TO THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY
represented by the Presidency and the Vice-Presidency of the Energy Community

In case ECS-13/17, the Secretariat of the Energy Community against the Republic of Serbia, the

ADVISORY COMMITTEE,

composed of
Rajko Pirnat, Alan Riley, Helmut Schmitt von Sydow, Verica Trstenjak, and Wolfgang Urbantschitsch

pursuant to Article 90 of the Treaty establishing the Energy Community ('the Treaty') and Article 11(3) of Procedural Act No 2008/1/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty as amended by Procedural Act No 2015/04/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 ('Dispute Settlement Rules 2015'),

acting unanimously,

gives the following

OPINION

I. Procedure

By e-mail dated 16 September 2019 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in case ECS-13/17 against the Republic of Serbia. The members of the Advisory Committee received the Reasoned Request and its annexes.

In its Reasoned Request the Secretariat seeks a Decision from the Ministerial Council declaring that the Republic of Serbia due to the unjustified exclusion by *Srbijagas* of the Horgoš entry point from unrestricted and non-discriminatory third party access and from open capacity allocation procedures, violated Article 32 of Directive 2009/73/EC[1] and Article 16 of Regulation (EC) 715/2009[2] and, therefore failed to fulfil its obligations under Articles 6, 10 and 11 of the Treaty.

The Republic of Serbia submitted a reply to the Reasoned Request on 12 September 2019.

On June 21, 2020 the Advisory Committee held a public hearing in order to establish the facts, the applicable law and to perform the legal assessment.

[1] Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas, as adopted by Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011.
[2] Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks, as amended by Commission Decision 2010/685/EU of 10 November 2010, as adopted by Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011.

II. Provisions allegedly violated by the Contracting Party concerned

Article 6 of the Treaty reads:

> *The Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty. The Parties shall facilitate the achievement of the Energy Community's tasks. The Parties shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.*

Article 10 of the Treaty reads:

> *Each Contracting Party shall implement the* acquis communautaire *on energy in compliance with the timetable for the implementation of those measures set out in Annex I.*

Article 11 of the Treaty reads:

> *The "*acquis communautaire *on energy", for the purpose of this Treaty, shall mean the acts listed in Annex I of this Treaty.*

Annex I of the Treaty reads:

> *(1) […]*
> *(2) Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas, as adopted by Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011.*
> *(3) […]*
> *(4) Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks, as amended by Commission Decision 2010/685/EU of 10 November 2010, as adopted by Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011.*
> *(5) – (7) […]*

Article 32 of Directive 2009/73/EC reads:

> *1. Contracting Parties shall ensure the implementation of a system of third party access to the transmission and distribution system, and LNG facilities based on published tariffs, applicable to all eligible customers, including supply undertakings, and applied objectively and without discrimination between system users. Contracting Parties shall ensure that those tariffs, or the methodologies underlying their calculation are approved prior to their entry into force in accordance with Article 41 by a regulatory authority referred to in Article 39(1) and that those tariffs - and the methodologies, where only methodologies are approved - are published prior to their entry into force.*
> *2. Transmission system operators shall, if necessary for the purpose of carrying out their functions including in relation to cross-border transmission, have access to the network of other transmission system operators.*
> *3. The provisions of this Directive shall not prevent the conclusion of long-term contracts in so far as they comply with Energy Community competition rules.*

Article 16 of Regulation (EC) 715/2009 reads:

> *1. The maximum capacity at all relevant points referred to in Article 18(3) shall be made available to market participants, taking into account system integrity and efficient network operation.*

2. The transmission system operator shall implement and publish non-discriminatory and transparent capacity-allocation mechanisms, which shall:
(a) provide appropriate economic signals for the efficient and maximum use of technical capacity, facilitate investment in new infrastructure and facilitate cross-border exchanges in natural gas;
(b) be compatible with the market mechanisms including spot markets and trading hubs, while being flexible and capable of adapting to evolving market circumstances; and
(c) be compatible with the network access systems of the Contracting Parties.
3. The transmission system operator shall implement and publish non-discriminatory and transparent congestion-management procedures which facilitate cross-border exchanges in natural gas on a non-discriminatory basis and which shall be based on the following principles:
(a) in the event of contractual congestion, the transmission system operator shall offer unused capacity on the primary market at least on a day-ahead and interruptible basis; and
(b) network users who wish to re-sell or sublet their unused contracted capacity on the secondary market shall be entitled to do so.
In regard to point (b) of the first subparagraph, a Contracting Party may require notification or information of the transmission system operator by network users.
4. In the event that physical congestion exists, non-discriminatory, transparent capacity-allocation mechanisms shall be applied by the transmission system operator or, as appropriate, by the regulatory authorities.
5. Transmission system operators shall regularly assess market demand for new investment. When planning new investments, transmission system operators shall assess market demand and take into account security of supply.

III. Facts

According to Article 32 (4) of Dispute Settlement Rules 2015, the Advisory Committee gives its Opinion on the Reasoned Request, based on the reasoned request and taking into account a reply by the Party concerned as well as the written observations received and after having conducted a public hearing.

On the basis of these principles, the Advisory Committee find the following facts to be established.

JP Srbijagas, a public undertaking wholly owned by Republic of Serbia, is the dominant undertaking in the downstream gas market in Serbia. It is active in transmission, distribution and supply and these activities are not unbundled according to the Directive 2009/73/EC. The license for the transmission system operator has expired in 2016, but it continues to perform transmission system operation based on Article 421 of the Serbian Energy Law, which authorises such activity before certification of the designated TSO, *Transportgas Srbija d.o.o.*, a wholly owned subsidiary of *JP Srbijagas.* This entity remains inoperative and unbundled according to the Third Energy Package. This remains to be in breach of Ministerial Council decision in case ECS-9/13[3] and later Decision of Ministerial Council establishing serious and persistent breaches under Article 92 of the Treaty[4].

Natural gas is imported into Serbia by the vertically integrated undertaking *Yugorosgaz a.d.,* which acts as intermediary with *Gazprom Export LLC*. All volumes of gas provided by *Yugorosgaz* are taken over by JP *Srbijagas* at *Kiskundorozsma/Horgoš IP* on Hungarian-Serbian border ("Horgoš entry point"). This entry point is the only entry point into Serbian gas

[3] Decision of the Ministerial Council 2014/03/MC-EnC, dated 23 September 2014.
[4] Decision of the Ministerial Council 2016/17/MC-EnC, dated 14 October 2016.

transmission system, which also has one exit point, *Zvornik IP* between Serbia and Bosnia and Herzegovina.

According to the Reasoned Request, *JP Srbijagas* has published three invitations for booking of annual firm capacities at entry and exit points of the Serbian gas transmission system, namely on 1 April 2017, 31 March 2018 and 31 March 2019. At the public hearing, it was established that on 6 June 2020 another invitation for booking firm annual capacity had been published, again excluding the Horgoš entry point. In all of these invitations the capacity of the Horgoš entry point was excluded by a statement in the invitation that this capacity "will not be available for booking until further notice". The result is that only *JP Srbijagas*, and entities transiting gas to Bosnia and Herzegovina through the Serbian gas transmission system, have access to this entry point.

The Republic of Serbia presented three responses to the submissions of the Secretariat: its reply to the Opening Letter of 28 September 2018, its reply to the Reasoned Opinion of 17 June 2019 and its reply to the Reasoned Request of 12 September 2019.

In its responses, the Republic of Serbia states, that this was due to the "technical inadequacy of metering system", namely that not all exit points from the gas transmission system are equipped with meters that would allow daily transfer of metering data to the dispatch centre ("daily metering"). Also, the Republic of Serbia claims that third party access to the Horgoš entry point would jeopardise system integrity. In addition, in the response sent by *JP Srbijagas* the view is presented that Article 16 of Regulation (EC) 715/2009 requires full opening to third party access only insofar as system integrity and efficient operation thereof would allow it.

In the responses, he Republic of Serbia also mentioned that the Energy Agency of the Republic of Serbia ("AERS") asked the Commission for Protection of Competition of the Republic of Serbia ("the Competition Commission") to investigate and remedy this situation. In its response, the Competition Commission endorsed *JP Srbijagas* explanations, which were essentially the same as the Ministry's response to the Secretariat. Still, it suggested to AERS that gradual opening of third party access to Horgoš entry point could be achieved by allowing access to those suppliers that supply the exit points equipped with daily metering. However, AERS did not agree with this since it would discriminate between system users. It pointed out that the Rules on Operation of the Natural Gas Transmission System in Serbia (essentially Network Code) in point 13.2. include a solution how to set daily quantities of delivered gas on exit points without daily metering. But, finding this, AERS stated that daily capacity allocation can be done only after unbundling of Srbijagas has been achieved. Therefore, AERS will assess the possibility of opening after certification and licencing of *Transportgas Srbija d.o.o.*, Novi Sad, which is presumably intended to be transmission system operator. Therefore, no immediate action was taken by AERS.

IV. Legal Assessment

The Reasoned Request of the Secretariat alleges that the Republic of Serbia due to the unjustified exclusion by *Srbijagas* of the Horgoš entry point from unrestricted and non-discriminatory third party access and from open capacity allocation procedures, violated Article 32 of Directive 2009/73/EC and Article 16 of Regulation (EC) 715/2009 and, therefore, failed to fulfil its obligations under Articles 6, 10 and 11 of the Treaty.

First, it must be noted that the Republic of Serbia failed to show how inadequate metering in the transmission system prevents *JP Srbijagas* to implement third party access to the Horgoš entry point. The Republic of Serbia is arguing that this inadequate metering would jeopardise the transmission system integrity. However, inadequate metering in this case means that not all of the exit points of the transmission system are equipped with meters that allow daily

metering. Still, about 70% are equipped with such meters. The inadequate metering therefore results in somewhat imprecise data. It must be considered that the Rules on Operation of the Natural Gas Transmission System in Serbia do provide a temporary regulatory solution to determine the respective daily delivered natural gas quantities, based on the total volume delivered during the timeframe and in accordance with the real or assumed daily temperature. As the Reasoned Request points out, these provisions are not intended only for exceptional cases, e.g. when the meters are not functional, but provide a solution for the functioning of the system in regular operational mode. Also, *JP Srbijagas* has no problem allocating cross-border transmission capacity at the Horgoš entry point for its own natural gas import needs and to selected system users on the basis of bilateral contracts. This allocation does not cause any technical disturbances in the system.

Therefore, the argument that inadequate metering may, in case of third party access, jeopardise transmission system integrity and efficient operation, lacks consistency. Inadequate metering may result in somewhat less precise data but could not endanger system integrity.

Second, technical inadequacy of the metering is not a legally valid argument to refuse third party access to the system. Article 35(1) of Directive 2009/73/EC provides the sole reasons for refusal of third party access to the system. They are:

- lack of capacity,
- access to the system would prevent transmission system operator from carrying out the public service obligations;
- serious economic and financial difficulties with take-or-pay contracts according to Article 48 of the directive.

None of these grounds for refusal of access are claimed by the Republic of Serbia. Even if not invoked, there is clearly no lack of capacity, since the highest daily quantity of natural gas withdrawn into the Serbian natural gas transmission system on the Serbian-Hungarian border amounted to 11.26 mcm/day out of available 13 mcm/day. Also, *Srbijagas* has not provided any justification invoking possible prevention from carrying out public service obligations or potential economic and financial difficulties with take-or-pay contracts in case unrestricted third party access to the Horgoš entry point and open allocation of cross-border transmission capacities were introduced.

Instead, the Republic of Serbia claims that jeopardising system integrity presents grounds for refusal according to Article 16 of the Regulation (EC) 715/2009. However, this provision states that in defining maximum capacity offered for third party access, the TSO should take “into account system integrity and efficient network operation”. Therefore, the question of efficient system operation is a factor to be taken into account in defining the amount of capacity offered but does not represent grounds for refusal of third-party access.

The actions resulting in complete refusal of access were *Srbijagas* actions. So, and this is the last point, it should be established whether these actions are attributable to Republic of Serbia as Contracting Party. It should be remembered that according to Article 3(2) of the Rules of Procedure of Dispute Settlement under the Treaty (“Dispute Settlement Rules”), failure by a Party to comply with Energy Community law may consist of any measure by the public authorities of the Party or of the public undertakings and undertakings to which special or exclusive rights have been granted to which the measure is attributable.

As seen from above, neither AERS nor the Competition Commission have acted in any decisive manner to achieve third party access at Horgoš entry point, although both have within their jurisdiction the power to order *Srbijagas* to grant third party access. Both also represent public authorities within the meaning of Article 3(2) of the Dispute Settlement Rules, so their failure is attributable to the Republic of Serbia. Furthermore, *JP Srbijagas* is fully owned by

Republic of Serbia and even has special legal status of public enterprise under Serbian law[5]. Thus *JP Srbijagas* falls within the meaning of public undertaking under Article 19 of the Dispute Settlement Rules, so its measures are attributable to the Republic of Serbia.

V. Conclusions

The Advisory Committee considers that the Republic of Serbia

> due to the unjustified exclusion by *JP Srbijagas* of the Horgoš entry point from unrestricted and non-discriminatory third party access and from open capacity allocation procedures violates Article 32 of Directive 2009/73/EC and Article 16 of Regulation (EC) 715/2009 and, therefore, fails to fulfil its obligations under Articles 6, 10 and 11 of the Treaty.

The Advisory Committee therefore upholds the Reasoned Request entirely.

Done in Vienna on 25 January 2021

On behalf of the Advisory Committee

Wolfgang Urbantschitsch, President

[5] JP stands for »Javno preduzeće« - public enterprise or undertaking.