

## Opinion 2/20

pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Articles 10(6) and 11(6) of Directive 2009/73/EC – Bosnia and Herzegovina – Certification of *Gas Promet*

On 18 May 2020, the Regulatory Commission for Energy of Republika Srpska, an entity of Bosnia and Herzegovina, (hereinafter “RERS”) notified the Energy Community Secretariat (hereinafter “the Secretariat”) of a preliminary decision (hereinafter “the Preliminary Decision”) on the certification of the transmission system operator (hereinafter “TSO”) *Gas Promet* JSC (hereinafter “*Gas Promet*”). The Preliminary Decision was adopted on 28 April 2020<sup>1</sup> and based on Articles 21(1)(2) and 44(4) of the Gas Law of Republika Srpska of 2018, Article 17(1) of RERS’ Rulebook on Certification of the Natural Gas Transmission System Operator (hereinafter “RERS’ Rules on Certification”), and Article 33(1)(g) of RERS’ Procedural Rules.

Pursuant to Article 10 of Directive 2009/73/EC (hereinafter “the Gas Directive”)<sup>2</sup> and Article 3 of Regulation (EC) No 715/2009 (hereinafter “the Gas Regulation”),<sup>3</sup> the Secretariat is required to provide its Opinion as to the compatibility of a Preliminary Decision with Articles 9 and 10(2) of the Gas Directive. In this respect, the Secretariat recalls that Bosnia and Herzegovina has not transposed the Gas Directive and the Gas Regulation for the entirety of its territory. It has also not designated a single regulatory authority for gas at national level, as required by Article 39(1) of the Gas Directive. This constitutes a serious and persistent breach of Energy Community law.<sup>4</sup> While the obligations to establish a single national regulatory authority and to unbundle TSOs are equally important, they are functionally distinct of each other. The unbundling provisions were designed to separate control over TSO and production and supply activities with the aim to eliminate potential conflicts of interest, and hence to promote the opening of markets.<sup>5</sup> In an environment such as the one in Bosnia and Herzegovina, where energy activities are predominantly performed by public undertakings, characterized by dominant positions on their respective markets, and interlinked in ways rendering the development of markets all but impossible without unbundling, a clear separation of control and the prevention of conflicts of interest is of particular importance. For this reason, the Secretariat issues an Opinion on the certification of *Gas Promet* as the first TSO to be unbundled in the country. Not reviewing the Preliminary Decision because of Bosnia and Herzegovina’s failure to transpose the Third Energy Package would deprive the Secretariat of the possibility to request crucial amendments meant to bring RERS’ final certification within the scope of the unbundling rules in the Gas Directive. Once a single national energy regulatory authority has been designated (also) with competences for certifying gas TSO, the Secretariat may request the opening of the certification procedure for reassessment of compliance in line with Article 10 of the Gas Directive.

<sup>1</sup> RERS’s Decision No. 01-334-6/19/P-142-19 of 28 April 2020.

<sup>2</sup> 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 and repealing Directive 2003/55/EC, as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011.

<sup>3</sup> 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 and repealing Regulation (EC) No 1775/2005, as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011.

<sup>4</sup> Decision 2018/16/MC-EnC.

<sup>5</sup> Secretariat Opinion 1/16 of 3 February 2016 *TAP AG*; Opinion 1/17 of 23 January 2017 *OST*; Opinion 3/17 of 23 January 2017 *EMS*; Opinion 2/17 of 22 April 2017 *Yugorosgaz Transport*; Opinion 1/18 of 27 February 2018 *CGES*; Opinion 2/19 of 1 February 2019 *KOSTT*; Opinion 3/19 of 17 June 2019 *MEPSO*; Opinion 4/19 of 17 December 2019 *GTSO*.

The Energy Community Regulatory Board was requested by the Secretariat on 22 June 2020 to provide its opinion on the Preliminary Decision pursuant to Article 3(1) of the Gas Regulation. The Secretariat has not received any reply to date.

On 9 September 2020, a hearing on the certification of *Gas Promet* was held by the Secretariat with representatives of RERS and *Gas Promet*. The state-level regulatory authority for energy, SERC, was invited to the hearing but did not participate.

## I. Background

The applicant was established in 1998 by the Government of Republika Srpska and reorganized under its present corporate structure in May 2019. At the time of applying for certification, the company held licenses for natural gas transmission system management<sup>6</sup> and for natural gas transport, issued on 30 July 2015 and valid until 23 March 2020.<sup>7</sup> It was indeed common in former Yugoslavia to distinguish between system management (the commercial side of transmission, including investment, dispatching and capacity allocation) and transport (the technical side of transmission, including pipeline ownership, metering and maintenance as well as supporting the system manager in designing and executing investments).

*Gas Promet* is one of two TSOs operating in Republika Srpska, the other one being the non-unbundled *Sarajevo-gas Istočno Sarajevo*. In the other entity of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, the TSO *BH Gas* is also not unbundled as required by the Third Energy Package.

The transmission network in Republika Srpska is approximately 64 kilometres long. There is no compressor station on the network in Republika Srpska (or Bosnia and Herzegovina). Instead, the pressure is controlled by *Srbijagas*, *Gas Promet*'s largest shareholder, at Batajnica, close to Belgrade in the Republic of Serbia, where the compressor station is located. The pipeline system consists of following pipeline sections: Šepak-Karakaj, Karakaj-Zvornik and Karakaj-Entity border between Republika Srpska and Federation of Bosnia and Herzegovina. In line with the distinction explained above, *Gas Promet* commercially operates all three sections of the transmission network in Republika Srpska, including dispatching and capacity allocation under regulated tariffs. Ownership and maintenance (in domestic legal terminology: transport of gas) on the section Karakaj-Entity border between Republika Srpska and Federation of Bosnia and Herzegovina, however, rests with *Sarajevo-gas Istočno Sarajevo*. The transmission network owned and operated by *Gas Promet* has a capacity of around 710 mcm/a, of which some 250 mcm/a are being used based on annual capacity contracts. There are not more than three shippers on average, namely *Srbijagas*, *GAS-RES* and *BH Gas*.

*Gas Promet* is an open joint-stock company. Its two main corporate bodies are the Shareholder Assembly and the Board of Directors. The Shareholder Assembly appoints and dismisses the members of the Board of Directors and decides on matters of principal importance such as allocation of profits and coverage of losses. Its decisions are normally taken with simple majority of the present or represented votes, with the exception of decisions of a more fundamental nature (capital increase/decrease, changes of statutes etc.) requiring two-thirds majority. All current shares bear one vote. The Board of Directors consists of three members, of which two members may not be

<sup>6</sup> RERS Decision No. OL-238-LL/I4/P-88-222, dated 30.07.2014.

<sup>7</sup> RERS Decision No. 0I-488-7/18/P-102-13 dated 07.02.2019.

employees of *Gas Promet*. The current members are Mr Milan Djukic (elected by the Board of Directors as President), Mr Jovo Karan and Mr Igor Milanovic. Mr Djukic is also the CEO of *Novi Sad Gas*, a vertically integrated gas company in the Republic of Serbia and subsidiary of *Srbijagas*, *Gas Promet*'s largest shareholder. Moreover, Mr Djukic is executive director for legal affairs at *Srbijagas*. The Board of Directors, among other tasks, adopts transmission tariffs (to be approved by RERS), appoints and instructs a chief executive officer and two other executive managers, establishes the business plan and adopts investment decisions above 50.000,00 BAM (some 25.000 €).

*Gas Promet*'s shareholders are: *Srbijagas* (39,14%), the *Share Fund of Republika Srpska* (26,09 %), *DIUF Management Solutions* (17,97%), a subsidiary of the *Pension Reserve Fund of Republika Srpska* named *PREF* (10%), the *Restitution Fund of Republika Srpska* (5%), and natural persons hold less than 2% of the shares. Except the natural persons, all shareholders of *Gas Promet* are also involved in the generation of electricity and/or the supply of natural gas.

*Srbijagas*, the 100% state-owned natural gas incumbent in neighbouring Republic of Serbia, is engaged in gas transmission, storage distribution and supply activities and dominates the market both at wholesale and retail levels. As the Secretariat has assessed previously, *Srbijagas* holds a dominant position on the Serbian markets for wholesale supply, retail supply, transmission and distribution.<sup>8</sup> *Srbijagas* also acts as the public supplier and supplier of the last resort of final customers, which vests it with a legal monopoly with regard to these customers. Its lack of unbundling in line with (even) the Second Energy Package has already led to a Decision establishing a serious and persistent breach of Energy Community law by the Ministerial Council.<sup>9</sup> The company is also not unbundled in line with the Gas Directive under the Third Energy Package. On the market of Bosnia and Herzegovina, *Srbijagas* also owns 80% of the shares in *Bijeljina Gas*, a gas supply undertaking in Republika Srpska. *Bijeljina Gas* is currently building a distribution network of natural gas in the town of Bijeljina and is not yet performing supply activities.

The *Share Fund*, the *Restitution Fund* and the *Pension Reserve Fund* of Republika Srpska were established by laws. The former two are operated by the public *Investment-Development Bank of Republika Srpska (IRBRS)*, in which the Government represents Republika Srpska. Both Funds and *IRBRS* are managed by the same Director, appointed by the respective entity's Supervisory Board which in turn is appointed (or nominated for appointment to Parliament) by the Government of Republika Srpska. The management of *PREF*, the subsidiary of the *Pension Reserve Fund* of Republika Srpska is performed by a management company, which is also owned and controlled by the Government of Republika Srpska. The *Share Fund* of Republika Srpska holds 29.9% of the shares in *Sarajevo-gas Istočno Sarajevo*, a vertically integrated local gas supplier in Republika Srpska. The *Restitution Fund* owns 5%, and the *Pension Reserve Fund* of Republika Srpska (through *PREF*) owns 10% of the shares in several energy companies, namely the gas utility in the municipality of Zvornik, *Zvornik stan*, and in *Sarajevo-gas Istočno Sarajevo*, but also in generation, distribution and supply subsidiaries of *Elektroprivreda Republike Srpske*, a vertically integrated electricity company owned directly by Republika Srpska.<sup>10</sup>

<sup>8</sup> Opinion 1/2019 of 1 February 2019 on the exemption of the Gastrans natural gas pipeline project from certain requirements under Directive 2009/73/EC by the Energy Agency of the Republic of Serbia.

<sup>9</sup> Case ECS-9/13 <https://www.energy-community.org/legal/cases/2013/case0913RS.html> and ECS-9/13S <https://www.energy-community.org/legal/cases/2013/case0913SRS.html>

<sup>10</sup> Namely: *Elektrokrajina a.d. Banjaluka* (distribution of electricity and public supply with electricity), *Elektro Dobož a.d. Dobož* (distribution of electricity and public supply with electricity), *Elektrodistribucija a.d. Pale* (distribution of electricity and public supply with electricity), *Elektrohercegovina a.d. Trebinje* (distribution of electricity and public supply with electricity), *Elektro-Bijeljina a.d. Bijeljina* (distribution of electricity and public supply with electricity), *Hydro Power Plants on the Drina river a.d. Visegrad* (generation of electricity), *Hydro Power Plants on the Vrbas river a.d. Mrkonjic Grad* (generation of

Moreover, Republika Srpska owns 100% of the shares in *GAS-RES*, the company importing, trading and supplying gas for and in Republika Srpska. According to RERS,<sup>11</sup> *GAS-RES* held 87% of the retail market share in Republika Srpska in 2019. It also owns 100% of *Elektroprivreda Republike Srpske*. As sole shareholder, the Government of Republika Srpska appoints the members of the board of directors in those companies.

*DIUF Management Solutions* consists of two investments funds in private ownership. They own also shares in generation and supply companies, albeit all with 1% or less.

## II. The Preliminary Decision

The Gas Law of Republika Srpska, adopted in 2018, transposes in its Article 37 the provisions of the Gas Directive on ownership unbundling. On 16 September 2019, *Gas Promet* submitted to RERS an application for certification under the model of ownership unbundling under that provision. On 28 April 2020, RERS adopted the Preliminary Decision.

In its Preliminary Decision, RERS comes to the unconditional conclusion that *Gas Promet* complies fully with the requirements of the provisions on ownership unbundling in conformity with Article 37 of the Gas Law.

The Decision reads:

1. *Application of the joint-stock company for transport and natural gas transport system control "GAS PROMET" Pale is accepted for certification of the natural gas transport system operator number 01-688/19 dated 12th September 2019 applying the unbundling model - ownership unbundling.*
2. *Joint-stock company for transport and natural gas transport system control "GAS PROMET" Pale is certified as the natural gas transport system operator.*
3. *Decision becomes effective on the day it is made, and will be published, along with the opinion of the Energy Community Secretariat in the "Official Gazette of the Republic of Srpska" and at the website of the Regulatory Commission for Energy of the Republic of Srpska.*

## III. Assessment of the Preliminary Decision

According to the Secretariat's well-established practice, the following aspects matter in particular when assessing the compliance of the Preliminary Decision with the unbundling model enshrined in Article 9 of the Gas Directive:

- a) the undertaking to be certified needs to be the owner of the transmission assets as required by Article 9(1)(a) of the Gas Directive;
- b) the undertaking to be certified needs to perform the functions and tasks of a TSO as required by Article 9(1)(a) of the Gas Directive; and

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electricity), Hydro Power plants on the Trebisnjica river a.d. Trebinje (generation of electricity), RITE (Mine and Thermal Power Plant) Ugljevik, a.d. Ugljevik (Generation of electricity), RITE (Mine and Thermal Power Plant) Gacko a.d. Gacko (Generation of electricity).

<sup>11</sup> [https://reers.ba/wp-content/uploads/2020/09/Izvjestaj\\_RERS\\_2019\\_CIR\\_2\\_dio\\_FINAL-Z.pdf](https://reers.ba/wp-content/uploads/2020/09/Izvjestaj_RERS_2019_CIR_2_dio_FINAL-Z.pdf)

- c) control over and exercising any rights in the undertaking to be certified need to be separated from control over and exercising any rights in undertakings involved in production or supply of natural gas and electricity as required by Article 9(1)-(3) of the Gas Directive.

- a. *Ownership of the natural gas transmission system*

Article 9(1)(a) of the Gas Directive (as transposed by Article 37(1) of the Gas Law) requires that “*each undertaking which owns a transmission system acts as a transmission system operator*”. This means in principle that the undertaking applying for certification is the owner of the natural gas transmission assets, *i.e.* the natural gas transmission system. Ownership of the transmission assets is one of the key elements of the ownership unbundling model as it ensures the uncompromised independence of the TSO in taking decisions with regard to the management and investments into the system and eliminates potential conflicts of interest with any third-party owner of the assets.<sup>12</sup>

In the Preliminary Decision, RERS concluded that *Gas Promet* owns the transmission system it operates. Yet according to the information available, *Gas Promet* owns the pipeline sections Šepak-Karakaj and Karakaj-Zvornik (including the metering stations) but not the section Karakaj-Entity border between Republika Srpska and Federation of Bosnia and Herzegovina. Despite *Gas Promet*’s (expired) system management license having covered that latter section too, it is owned and operated by *Sarajevo-gas Istočno Sarajevo* under a transport license. *Gas Promet* is not, contractually or otherwise, involved in the management of this section of the transmission system, which is also subject to a separate transmission tariff for the benefit of *Sarajevo-gas Istočno Sarajevo*.

Hence, *Gas Promet* can only be certified and designated as a TSO under the ownership model for the former two sections. For the avoidance of any doubt, the Secretariat requests that RERS in its final decision explicitly specifies that certification of *Gas Promet* does only comprise transmission system operation of the pipeline sections Šepak-Karakaj and Karakaj-Zvornik.

- b. *The applicant undertaking performs core tasks of a TSO*

Article 9(1)(a) of the Gas Directive requires also that the undertaking in question “*acts as a transmission system operator*”. The notion of transmission system operator is defined by Article 2 No 4 of the Gas Directive. It follows from this definition that the key elements for an undertaking to be considered a TSO are the operation, the maintenance and the development of a transmission network.<sup>13</sup> A regulatory authority’s assessment in this respect needs to establish in particular whether a given undertaking is by law and factually performing the core tasks of a TSO, and whether it disposes of the necessary (human, technical, financial) resources for this.<sup>14</sup>

In its Preliminary Decision, RERS has not assessed the capability of *Gas Promet* to carry out the tasks of a TSO as described in Article 13 of the Gas Directive. In particular, it has not verified whether *Gas Promet* disposes of the human, technical and financial resources necessary to perform such tasks. By contrast, RERS opined that an assessment of the capacity to perform the tasks of a TSO should only be conducted after the certification, in the process of issuing a licence. The Secretariat

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<sup>12</sup> Secretariat’s Opinion 1/20 of 5 February 2020 *Ukrenergo*.

<sup>13</sup> Secretariat’s Opinion 1/16 of 3 February 2016 on certification *TAP AG*.

<sup>14</sup> Commission’s Opinion on certification of *VÚN*, C(2012) 2244 final, 29.3.2012.

does not agree with such an opinion. On the contrary, assessing the capacity is necessary for confirming compliance with Article 9(1)(a) of the Gas Directive. The Secretariat recalls in particular that outsourcing core services to be provided by a TSO is only possible under certain conditions established in past certification procedures.<sup>15</sup>

The Secretariat notes that in terms of human resources, the company has currently only 13 employees, which may be sufficient given the limited size of the transmission system. The Secretariat requests RERS to assess whether and how the staff covers all tasks referred to in Article 13 of the Gas Directive, whether and to which provider any services are being outsourced, whether in case of outsourcing *Gas Promet* effectively oversees, controls and provides instructions to the service provider, and whether any service provider meets the unbundling requirements.

In terms of financial resources, the Secretariat notes that *Gas Promet* disposes of a registered capital of BAM 4,690,620 (around EUR 2,400,000) and receives a regular income from regulated tariffs based on RERS' transmission tariff methodology. In this respect, the Secretariat has no reason to doubt that the tariffs are cost reflective for CAPEX and OPEX and ensure an appropriate profit.

Finally, in terms of technical resources, RERS is requested to verify if and to what extent *Gas Promet* is in a position to measure and control downstream gas flows towards the systems of *Sarajevo-gas* and the Federation of Bosnia and Herzegovina.

Moreover, it is to be recalled that *Gas Promet* cannot influence the pressure in its transmission system as the only compressor station is located on the territory of the Republic of Serbia, and operated by *Srbijagas*. For historical reasons, compressor stations do not exist on the territory of Bosnia and Herzegovina. As the compressor station located in neighbouring Serbia serves exclusively the needs of the gas transport systems in Bosnia and Herzegovina, *Srbijagas'* costs are transferred to system users on the Bosnian system through the exit tariff at the border with Bosnia and Herzegovina. *Gas Promet* is a beneficiary of this service as without it, it could not perform its main tasks, operation of the transmission network system it owns. This is recognized by a technical (interoperability) agreement signed between *Srbijagas* and *Gas Promet* in 2017.

In this respect, the Secretariat notes that it is for the TSO to ensure that for transport of natural gas through pipelines under high pressure, the pressure, among other parameters of the system, remains within required limits during normal mode of operation. If this function is outsourced to another entity, such outsourcing must be in line with the conditions established by the European Commission as quoted above. As a consequence, RERS in its final decision is to request *Gas Promet* that outsourcing gas pressure control as a technical service is based not only on a technical but on a commercial (service) contract against appropriate remuneration and vesting *Gas Promet* with appropriate control, decision-making and compensation rights. Moreover, the Secretariat recalls that such outsourcing is possible if the execution of the tasks in question is being sub-contracted to another TSO seeking certification / or certified as an ownership unbundled TSO.<sup>16</sup> This is not the case for *Srbijagas* nor for its transmission branch, which is still fully integrated in *Srbijagas*. Finally, RERS needs to establish that *Gas Promet* has sufficient resources to oversee, control and provide instructions to the operator of the compressor station.

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<sup>15</sup> Commission's Opinion on certifications of Vorarlberger Übertragungsnetze GmbH (2012 AT); Premier Transmission Limited (2013 UK); Gas Networks Ireland (2016).

<sup>16</sup> See footnote 16 above.

c. *Separation of control over transmission from production/supply*

According to the Preliminary Decision and the information available to the Secretariat, *Gas Promet* is not engaged in the production of energy nor in its purchase and sale. Yet the Gas Directive also insists that the same entity or entities do not control production and supply activities, on one hand, and transmission activities on the other hand. In particular, Article 9(1)(b)(i) and (ii) of the Gas Directive prohibits the person or persons to exercise control or any right over a TSO and an undertaking performing any of the functions of production or supply. Article 9(2) of the Gas Directive excludes certain rights in a non-exhaustive manner as non-compliant *per se*. Article 9(3) of the Gas Directive makes an explicit cross reference to the functions of production and supply under the Electricity Directive 2009/72/EC.

aa. *The exercise of control*

The Preliminary Decision does not elaborate in detail on the separation of control, despite its utmost importance or unbundling and certification in the light of the objective to prevent actual or potential conflicts of interest between gas transmission, on the one hand, and energy production and supply, on the other hand.

The Secretariat recalls that the notion of control is defined under Article 2(31) of the Gas Directive and under the Merger Regulation.<sup>17</sup> Accordingly, sole control essentially exists if one undertaking alone can exercise decisive influence on an undertaking. This is either the case if one shareholder can determine the strategic commercial decisions of the undertaking, typically by holding the absolute majority of voting rights in a company or any other special rights (positive sole control), or if it can veto strategic commercial decisions in an undertaking (negative sole control). Joint control exists where two or more shareholders have the possibility of exercising decisive influence over an undertaking, either by minority shareholders pooling their votes to control the company, or by creating deadlock situations to block strategic decisions. For joint control to occur, the shareholders typically cooperate and reach a common understanding in determining the commercial policy of their company, either on the basis of a legally binding agreement or on a *de facto* basis, including as a consequence of strong common interests, going beyond mere financial interests of the shareholders in question.

The Secretariat requests RERS to assess in detail the situation against this background in its final decision. For the purpose of this assessment, RERS is invited to focus primarily on the role, interests and behaviour of the three Funds owned by Republika Srpska (the *Share Fund*, the *Pension Reserve Fund's* subsidiary *PREF* and the *Restitution Fund*), and *Srbijagas*. According to the information available to the Secretariat, the three Funds are directly owned and effectively controlled by the Government of Republika Srpska, including through the voting rights corresponding to the shares and the right to appoint their management. For the purpose of this assessment, the shares held by the three funds can be attributed to their exclusive shareholder, Republika Srpska.<sup>18</sup> Both Republika Srpska and *Srbijagas* undoubtedly control energy production and supply activities. Republika Srpska fully owns *GAS-RES*, the main gas supplier on its territory, as well as *Elektroprivreda Republike*

<sup>17</sup> Council Regulation (EC) No 139/2004 of 20 January 2004, Official Journal L 24, 29.01.2004, p. 1-22.

<sup>18</sup> ECJ T-282/02, *Cementbouw Handel & Industrie v Commission*, ECLI:EU:T:2006:64, para 72; ; European Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, 2008/C 95/01, para. 13.

*Srpske*, the electricity generation and supply incumbent.<sup>19</sup> *Srbijagas*, which is not unbundled even in line with the Second Energy Package<sup>20</sup> let alone Article 9 of the Gas Directive, controls gas supply activities in the Republic of Serbia, and owns 80% of *Bijeljina Gas*, a gas trade and supply company licensed in Republika Srpska.

As set out above, Republika Srpska indirectly owns 41.19% of *Gas Promet*'s shares, *Srbijagas* directly owns 39.14%, whereas the other shareholders own 16% of the shares and less. In the absence of special share categories, the shareholding translates directly into voting rights with the result that no shareholder of *Gas Promet* has a majority vote in the TSO. While this may give rise to the *prima facie* conclusion that neither Republika Srpska nor *Srbijagas* exercise direct control over the transmission system operator in decisions requiring simple majority (such as the appointment of the board of directors) on the basis of their shares alone, the Secretariat, in line with the explanations on the notion of control under the Merger Regulation, requests RERS to assess in particular:

- whether either Republika Srpska (or the three Funds) or *Srbijagas* enjoy any rights, vested by statute, shareholders' agreement, contracts or other means, which individually give them the possibility of exercising decisive influence on the composition of or the decision-making in the corporate bodies of *Gas Promet* (positive sole control), or whether either of them can individually veto strategic commercial decisions in the Shareholder Assembly of *Gas Promet* especially if they require a 2/3 majority which cannot be obtained without either Republika Srpska or *Srbijagas* (negative sole control);
- whether there are any indications, based on common strategic interest or on past voting patterns, that representatives of Republika Srpska (or the three Funds) and *Srbijagas* cooperate, on a contractual or factual basis, to influence or to block decision-making in *Gas Promet*, e.g. by voting together systematically or by not being represented in Shareholder Assembly meetings etc.;
- whether there are any other circumstances relevant for the establishment of sole or joint control over *Gas Promet*. Such circumstances may include relations between institutions of Republika Srpska and the Republic of Serbia, the ultimate shareholder of *Srbijagas*, or contributions by either shareholder to the business of *Gas Promet* which are vital for its operation (e.g. specific technologies such as the compressor station controlled by *Srbijagas*, know-how, shipper relations e.g. between *Gas Promet* and its shareholder *Srbijagas*, service agreements, access to information etc.).

If following such assessment, RERS came to the result that Republika Srpska and/or *Srbijagas* exercise control over *Gas Promet* within the meaning of the Merger Regulation and Article 2(36) of the Gas Directive, the request for certification would have to be rejected based on Article 9(1)(b) and (c) read in conjunction with Article 9(2) of the Gas Directive, which prohibit direct or indirect control over gas transmission system operation and energy (electricity and natural gas) production or supply, unless Republika Srpska and/or *Srbijagas* were to abandon such dual control.

*bb. The exercise of any other right and the avoidance of conflict of interests*

Besides the prohibition of dual control as defined by the Merger Regulation, Article 9(1) of the Gas Directive prohibits the exercise of 'any other right' over the TSO if a shareholder controls a production

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<sup>19</sup> As explained above, it also holds minority shares in *Sarajevo-gas Istočno Sarajevo*, a local supplier of natural gas, and *Zvornik stan*.

<sup>20</sup> See: Cases ECS-9/13 and ECS-9/13S.

or supply company. Article 9(2) of the Directive clarifies that the concept of ‘any other right’ includes the power to exercise voting rights, the holding of a majority share or the power to appoint members of the corporate bodies and those legally representing the TSO. Article 9(2) of the Gas Directive, however, does not exclude the holding of purely passive financial rights related to a minority shareholding, *i.e.* the right to receive dividends, without any voting rights or appointment rights attached to them.

In its case law, the European Commission has found, for instance, that minority shareholders in a TSO (with 21% and 10% shares respectively) which at the same time control undertakings performing gas supply activities may not exercise rights in the TSO, including the right to vote in the Shareholder Assembly or the right to appoint members of the board of the TSO.<sup>21</sup> In a case where a gas supply company was a minority shareholder (with 34%) in the domestic TSO and controlled the supplier of 80% of the domestic market, the European Commission recalled that undertakings that control energy production or supply companies may retain participations in TSOs only if such participations do not amount to ‘any rights’ in the meaning of Article 9(2) of the Gas Directive. Such rights in the TSO could, however, be passive non-majority participations without voting rights or rights to appoint board members.<sup>22</sup> In a case involving a fund as shareholder of a gas TSO (owning 14,98% of the shares) which also held participations in gas and electricity production and supply companies, the European Commission also requested assurances that the fund only exercised appointment or voting rights in the TSO upon assurance that it does not possess interests in other companies incompatible with the requirements of the Gas Directive.<sup>23</sup>

Moreover, the European Commission has consistently expressed the view that certification can only be granted if any conflict of interests between generators/producers, suppliers and TSOs is clearly excluded.<sup>24</sup>

The Secretariat is indeed concerned that Republika Srpska and *Srbijagas* unduly hold ‘any other right’ over *Gas Promet* and that conflicts of interest may arise therefrom. Such conflicts of interest may materialise in the form of third party access to the network, information leakage between the network and supply companies and distortion of investment incentives etc.

With regard to Republika Srpska, the Secretariat’s concerns about the holding of rights and actual conflicts of interests relate in particular to the latter’s control over *GAS-RES*, the main gas supplier in Republika Srpska and constant shipper on the network of *Gas Promet*. The control over *GAS-RES* may actually or potentially affect the positions Republika Srpska’s representatives in the corporate bodies of the TSO. RERS is requested to assess and explain in the final decision whether and which safeguards are in place to ensure structural separation within the Government, and to avoid that an alignment of positions between the three Funds owned by Republika Srpska as well as with the management of *GAS-RES* takes place. Should there be no or insufficient safeguards in place, RERS is invited to require effective measures separating the management of the Funds and the management of *GAS-RES*. If this is not possible, the rights of the Funds holding shares in *Gas Promet* should be limited to passive financial rights. In comparison, Republika Srpska’s control over

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<sup>21</sup> Commission Opinion on certification of *Regasificadora del Noroeste*, S.A. (C(2013) 809 final), Commission’s Opinion on certification of *Regasificadora del Noroeste*, S.A. Spain, C(2013) 9689.

<sup>22</sup> Commission Opinion on certification of JSC *Conexus Baltic Grid*, C(2018) 5060, p.3.

<sup>23</sup> Commission Opinion on certification of *Societatea Națională de Transport Gaze Naturale Transgaz SA* (‘Transgaz’), C(2013) 8485.

<sup>24</sup> Commission’s Opinion on certification of *Regasificadora del Noroeste*, S.A. Spain, C(2018) 1021.

the electricity incumbent *Elektroprivreda Republike Srpske* may be mitigated, to some extent, that there is currently no generation of electricity from gas in Republika Srpska.

With regard to *Srbijagas*, the non-compliance with Article 9 of the Gas Directive and ensuing conflicts of interest are even more manifest. As explained above, *Srbijagas* is a vertically integrated undertaking dominating the gas supply markets in neighbouring Serbia, is a shipper on *Gas Promet*'s network and expands to Republika Srpska through its supply and distribution subsidiary *Bijeljina Gas*. RERS's argument that *Bijeljina Gas* currently still only constructs a distribution network is not convincing in view of the fact that *Bijeljina Gas* has a trade and supply license. The conflict of interest is exacerbated by the fact that the President of the Board of Directors of *Gas Promet*, Mr Djukic, is also the CEO of *Novi Sad Gas*, a subsidiary of *Srbijagas*, as well as executive director at *Srbijagas*. This is not in line with Article 9(1)(d) of the Gas Directive. Article 9(1)(d) of the Gas Directive explicitly prohibits the same persons to be members of the supervisory board, the administrative board, or bodies legally representing the undertaking, of a TSO, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply. To address the conflict with Article 9(1) and (2) of the Gas Directive, and any ensuing conflict of interest, the Secretariat requests RERS to require that *Srbijagas* limit its shareholding rights in *Gas Promet* to passive financial rights (i.e. right to receive only the dividends resulting from those shares without exercising any voting right at the Shareholder Assembly, and without the right to appoint, nominate or propose any member of the Board of Directors). To remedy the non-compliance with Article 9(1)(d) of the Gas Directive, RERS is requested to require the replacement of Mr Djukic on the Board of Directors of *Gas Promet*.

### III. Conclusions

Against this background, the Secretariat supports certification of *Gas Promet*, subject to the following conditions to be reflected by RERS in the final decision:

- explicitly specify that the certification of *Gas Promet* does only comprise transmission system operation of the pipeline sections Šepak-Karakaj and Karakaj-Zvornik;
- assess the capability of *Gas Promet* to carry out the tasks of a TSO as described in Article 13 of the Gas Directive and verification whether *Gas Promet* disposes of the human, technical and financial resources necessary to perform such tasks, and in particular whether and how the staff covers the tasks referred to in Article 13 of the Gas Directive, whether and to which provider any services are being outsourced to service providers, whether in case of outsourcing *Gas Promet* effectively oversees, controls and provides instructions to the service provider, and whether any service provider meets the unbundling requirements;
- request that outsourcing gas pressure control to another TSO seeking certification / or certified as ownership unbundled is based on a commercial (service) contract against appropriate remuneration and vesting *Gas Promet* with appropriate control, decision-making and compensation rights, and establish that *Gas Promet* has sufficient resources to oversee, control and provide instructions to the operator of the compressor station.
- assess whether Republika Srpska and/or *Srbijagas* exercise control over *Gas Promet* in line with the criteria set out by the Secretariat;
- assess whether and which safeguards are in place to ensure structural separation within the Government, and to avoid that an alignment of positions between the three Funds owned by Republika Srpska as well as with the management of *GAS-RES* takes place and, in the absence of sufficient safeguards, request appropriate measures;

- require that *Srbijagas* limit its shareholding rights in *Gas Promet* to passive financial rights (i.e. right to receive only the dividends resulting from those shares without exercising any voting right at the Shareholder Assembly, and without the right to appoint, nominate or propose any member of the Board of Directors);
- require the replacement of Mr Djukic on the Board of Directors of *Gas Promet*.

Pursuant to Article 3 of the Gas Regulation, RERS shall take the utmost account of the above comments of the Secretariat when taking its final decision regarding the certification of *Gas Promet*. RERS shall also communicate its final decision to the Secretariat and publish its decision together with the Secretariat's Opinion.

The Secretariat will publish this Opinion on its website. The Secretariat does not consider the information contained therein to be confidential. RERS is invited to inform the Secretariat within five working days following receipt whether and why it considers that this document contains confidential information which it wishes to have deleted prior to such publication.

Vienna, 18 September 2020



Janez Kopač



Dirk Buschle