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[...] (2015) **XXX** draft

COMMISSION OPINION

of **XXX**

**pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) and 11(6) of
Directive 2009/73/EC - Poland - Certification of Gaz-System as the operator of the
Polish section of Yamal-Europe Pipeline**

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I. PROCEDURE

On 23 January 2015 the Commission received a notification from the Polish national regulatory authority (hereafter, 'ERO') of a draft decision on the certification of Gaz-System S.A. (hereafter, 'Gaz-System') as an independent system operator (hereafter, 'ISO') for the Polish section of the Yamal-Europe Pipeline (hereafter, 'Yamal pipeline'), which is owned by EuRoPol Gaz S.A. (hereinafter 'Europolgaz').

On 9 July 2014 the Commission had received an earlier draft decision by ERO for this TSO. The Commission adopted its opinion on that draft decision on 9 September 2014, indicating it expected ERO to carry out additional analysis and to re-notify the draft decision.

Pursuant to Articles 10 and 11 Directive 2009/73/EC¹ (hereafter "Gas Directive") and Article 3 Regulation (EC) No 715/2009² (hereafter "Gas Regulation") the Commission is required to examine the notified draft decision and deliver an opinion to the relevant national regulatory authority.

II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

Gaz-System was appointed as the independent system operator (hereafter, 'ISO') of the entire Polish high pressure gas transmission system, with the exception of the Yamal pipeline. The Commission adopted its opinion on ERO's draft decision for certification of Gaz-System as a TSO of the Polish transmission network on 28 July 2014. The present certification concerns only the appointment of Gaz-System as an ISO for the Polish section of the Yamal pipeline and therefore constitutes a separate procedure from the certification of Gaz-System as the ownership unbundled TSO on the gas transmission network owned by Gaz-System.

The Yamal pipeline is owned by Europolgaz, a joint venture of the Polish gas incumbent - PGNiG and Gazprom (each holding 48% of the shares), and Polish Gas-Trading S.A.³, which owns the remaining 4% of the shares.

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 and repealing Directive 2003/55/EC, OJ L 211/94 of 14.8.2009.

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 and repealing Regulation (EC) No 1775/2005, OJ L 211/36 of 14.8.2009.

³ Its shareholding is as follows: PGNiG S.A. – 43.41% of shares; Przedsiębiorstwo Handlu Zagranicznego Bartimpex S.A. – 36.17% of shares; OOO Gazprom Export – 15.88% of shares; Weglokoks S.A. – 2.27% of shares; and Wintershall Erdgas Handelshaus GmbH – 2.27% of shares.

The Yamal pipeline has over 2,000 kilometres and connects Russia, crossing Belarusian territory, with the European Union. The Polish section of the Yamal pipeline crosses Poland from east to west from Kondratki on the Belarusian border up to Mallnow at the border with Germany. The Yamal pipeline is connected with the Polish gas network at two physical points in Włocławek and Lwówek. The pipeline has a physical capacity of 33 bcm per year, and is used primarily to ship gas to the western parts of Europe (mainly Germany) and to a lesser extent to supply Poland. The planning of the Yamal pipeline started in 1992. The Polish section was completed in September 1999 and the pipeline reached its current annual capacity in 2005, after completion of all compressor stations.

The construction and the governance of the Yamal pipeline is underpinned by an intergovernmental agreement (hereinafter, "IGA") signed between Poland and Russia in 1993, followed by additional protocols from 1995 and 2003 respectively, and an amendment of the IGA and of the protocols in October 2010. The latter amendment was aimed at aligning the existing IGA with applicable European Union law, while respecting the pre-existing capacity reservations (*i.e.* the two transmission contracts concluded before 3 September 2009 and of which the longest runs until 31 December 2022)⁴.

On 25 October 2010, Europolgaz and Gaz-System concluded an entrusting agreement⁵ (hereinafter, "EA"), whereby they set out the division of tasks between Gaz-System and Europolgaz. In November 2010, the President of ERO appointed Gaz-System as the TSO for the Polish section of the Yamal pipeline. ERO's decision included, among other provisions, general requirements concerning third party access (hereinafter, "TPA") rules, transparency provisions and security of network requirements that should be performed by the operator.

In September 2013, an amendment of the Polish Energy Law (hereinafter, "Amending Act") entered into force that implemented the main provisions of the Third Energy Package. On that basis, Gaz-System applied for certification as an ISO for the Yamal pipeline.

In its draft decision of 9 July 2014 ERO analysed whether the arrangements for the operation of the Polish section of the Yamal pipeline comply with the unbundling rules of the ISO-model. ERO has also carried out a partial assessment of the question whether or not Europolgaz is controlled by a person or persons from a third country or third countries and of the question whether or not a security of supply assessment in the sense of Article 11(3)(b) Gas Directive needs to be carried out in the certification process. In its draft decision of 9 July 2014, ERO concluded that Gaz-System complied with the ISO-requirements and that Europolgaz is not controlled by a person from a third country. ERO thus reached the preliminary conclusion that certification can be granted. On this basis, ERO submitted its preliminary decision on 9 July 2014 to the Commission requesting an opinion. On 7 and 11 August 2014, ERO submitted additional information in response to an information request by the Commission.

⁴ This concerns two historical contracts: (i) the 25 year transmission contract signed by Europolgaz with Gazprom in 1995 (running until 2020) to secure deliveries through Poland to Germany; and (ii) PGNiG's contract with Europolgaz that was renewed in 2004 and remains valid until the end of 2022. It is to be noted that under provisions of the amended Polish Energy Law, Europolgaz has no legal right to extend these contracts or replace them by new transit contracts benefitting from the same framework as set out in the 2010 IGA.

⁵ Agreement on entrusting operator's responsibilities on the Polish section of Yamal-Western Europe Transit Gaz Pipeline System.

On 9 September 2014 the Commission adopted its Opinion with regard to ERO's draft decision. The Commission expressed serious concerns as regards the implementation and application of the ISO-model, in particular as regards the influence of Europolgaz as system owner over tasks that under the ISO-model are the exclusive terrain of the ISO, i.e. Gaz System. The Commission moreover concluded that ERO had failed to carry out a comprehensive Article 11 assessment which is necessary in the present case in view of the control of a third country entity over the system owner. The Commission requested re-notification of a draft decision that would include such a comprehensive assessment and would take into utmost account its comments. ERO re-notified a draft decision on 23 January 2015.

III. COMMENTS

On the basis of the notification and the additional information provided by ERO the Commission has the following comments on the new draft decision.

1. Operation of compressor and metering stations

In its Opinion of 9 September 2014, the Commission considered that ERO should make Gaz-System's certification conditional upon the transfer by Europolgaz to Gaz-System, within a period of 24 months from the date of certification, of the day-to-day operation of all compressor and metering stations in Poland. The transfer should include the transfer of staff and of IT licenses related to these activities.

In the present draft decision, ERO notes it is unable to react to the Commission's comment in this regard due to its 'complex nature'. It neither assesses nor concludes on this point and indicates that it plans to do so in the final certification decision.

The Commission reminds ERO that it is to take into utmost account the Commission's Opinion and considers that, given the absence of relevant assessment, it has insufficiently done so. The Commission recalls that this comment concerns one of the core provisions of the ISO model, namely the fact that not the vertically integrated system owner but the independent system operator carries out the TSO tasks. Operation of compressor and metering stations is a core task of a TSO. The Commission takes note of the explanations provided in a letter of 23 January 2015 from ERO, pointing at difficulties on this issue, and recognises that transferring the day-to-day operation of the compressor and metering stations, including the transfer of staff and of IT licences, may be a complicated matter, but for that reason it has suggested a transitory period of 24 months. The Commission regrets the absence of progress on this issue in the draft decision. The Commission reiterates that Gaz-System cannot be certified as an ISO for the Yamal pipeline without the transfer from Europolgaz to Gaz-System, within maximum 24 months from the date of certification, of the day-to-day operation of the compressor and metering stations, including the transfer of staff and the transfer of IT-systems. The Commission recalls that a decision by ERO that is not in line with this condition will not be in accordance with the unbundling rules of the Gas Directive.

2. Network Planning and Investments

In its Opinion of 9 September 2014, the Commission noted that a requirement that Europolgaz prepares a network development plan (next to that of Gaz-System) appears to be in contradiction with Article 14(4) Gas Directive, which determines that it must be the responsibility of the ISO to develop the transmission system and to ensure the long term ability of the system to meet reasonable demand through investment planning. It appears that such a requirement follows from Article 16(1) of the Polish Energy Law in connection with Articles 22 and 23 of the Amending Act. The Commission noted that the mere fact that

Europolgaz is required to prepare a network development plan and that [BUSINESS SECRET], appears in contradiction with Article 14(4) of the Gas Directive. The Commission requested ERO to give full effect to Article 14(4) Gas Directive and to specify that any plan on network development which Europolgaz provides shall not in any manner bind or constrain Gaz-System in the establishment of the ten-year network development plan (hereafter, 'TYNDP') pursuant to Article 14(2)(c) of the Directive. Also, the Commission noted in its Opinion that ERO should specify that Gaz-System is the sole entity in charge of planning, constructing and commissioning new infrastructure, including the possible expansion of the Yamal pipeline.

[BUSINESS SECRET]. Moreover, ERO submits that both plans are ultimately submitted to ERO which assesses whether they are in line with ENTSOG's TYNDP and whether the plans are consistent. It hence concludes that Europolgaz plan '*should be*' in line with the TYNDP and that it is correct to state that Gaz-System is responsible for planning, building and ordering new infrastructure, including eventual development of Yamal.

The Commission is of the view that the relevant criterion to be investigated by ERO is not whether the plans are consistent but whether or not the situation is compliant with Article 14(4) Gas Directive. The Commission reminds ERO that this is the case only where the system operator is fully and solely responsible for the development of the investment plan for the network and where the system owner does not retain any powers to block investments. Therefore, the Commission takes the view that ERO should ensure that the system owner does not have any prerogatives with regard to investments that go beyond its obligations laid down in Article 14(5) Gas Directive and that Gaz-System is legally and in practice able to independently decide on investments on the Yamal pipeline. ERO should not proceed to certify Gaz-System as an ISO for the Yamal pipeline if the above has not been ensured.

The Commission underlines that a decision by ERO that is not in line with the above will not be in accordance with the unbundling rules of the Gas Directive. In addition, the Commission reserves the right to examine the compatibility of Article 16(1) of the Polish Energy Law further in the context of its ongoing assessment of the compatibility of the Polish Energy Law with European Union Law.

3. Capacity Calculation

In its Opinion of 9 September 2014, the Commission underlined the need for ERO to clarify and ensure that Gaz-System and not Europolgaz is responsible for calculating the available capacities into and out of the Polish section of the Yamal pipeline. [BUSINESS SECRET].

The Commission notes that ERO's assessment in its newly notified draft decision remains very limited on this point and has not been extended to include an assessment of the practical situation with regard to capacity calculation. The Commission is therefore of the opinion that ERO has insufficiently taken into account the Commission's comments and has not succeeded in taking away the Commission's concerns on its point. [BUSINESS SECRET], nor how this influences Gaz-System's freedom to determine the capacities. The Commission underlines the importance of full discretion for the system operator to determine capacities in order to make sure the maximum amount of capacity is made available to the market. The Commission hence requests ERO to provide irrefutable evidence and state clearly that Gaz-System has full discretion in calculating and determining the capacities. The Commission recalls that a decision by ERO that is not in line with this condition will not be in accordance with the unbundling rules of the Gas Directive.

4. Access to confidential information

In its Opinion of 9 September 2014, the Commission expressed concerns about a disparity in the access to (confidential) information which appeared to exist between third party shippers and Europolgaz, not only on the basis of the facts laid out under point 1. above related to the operation of the compressor and metering stations and the IT-system, but also in view of the agreed practice of various data exchange processes between Gaz-System and Europolgaz. The Commission underlined that the only data that Gaz-System should be allowed to make accessible to Europolgaz are the data needed to allow Europolgaz to invoice the shippers under the historical contracts (e.g. nomination data of these shippers) or information which is needed to allow Europolgaz to assert its ownership rights (e.g. information demonstrating that Gaz-System fulfils its maintenance obligations).

In the present draft decision, ERO addresses the issue and refers to communications with Gaz-System from which it appears that the information sharing arrangements with Europolgaz have already been amended and limited to the information necessary for the billing related to the historical contracts only. Where these data concern more than just the historical contracts, it is shared in an aggregated way. Moreover, ERO has also set-up a monitoring regime whereby it also receives and oversees the shared data.

The Commission supports the approach taken by ERO. The Commission however also asks ERO to verify in its final decision that any information that is still provided in an aggregated way to Europolgaz and that concerns other contracts than the historical contracts, is necessary for invoicing purposes only.

5. The application of Article 11 –Certification in relation to third countries

In its Opinion of 9 September 2014, the Commission took the view that a comprehensive assessment under Article 11 had not been carried out by ERO and that it should proceed to do so before granting certification. Article 11 Gas Directive determines that where certification is requested by a transmission system owner or TSO that is controlled by a person or persons from a third country or third countries, the regulatory authority shall refuse certification if it has not been demonstrated that the entity concerned complies with the applicable unbundling requirements (Article 11(3)(a)), and/or that granting the certification would not put at risk the security of supply of the Member State and the EU (Article 11(3)(b)).

In the present draft decision, ERO has carried out an assessment into the effects of the joint control of Gazprom and PGNiG over Europolgaz, concluding that it does not translate into control over the network. ERO's core argument is the fact that the ISO-model is applied, which not only ensures the independent operation by Gaz-System, but which is also beneficial for security of supply as it opens up the Yamal pipeline for alternative sources and integrates it in the wider Polish and European network.

This argument is repeated in discussing all other elements of the Article 11. As regards existing international agreements, ERO makes reference to the IGA between Poland and Russia underlining again that the ISO-practice ensures that operation of the pipeline is in conformity with EU law.

In terms of the effects on security of supply of Poland and the EU of the third country entity controlling the system owner, ERO puts forward the arguments that the importance of Russia as a gas supplier to Poland and the EU is still high, but declining thanks to diversification investments ongoing. The Yamal pipeline itself is still important for security of supply, but thanks to the introduction of physical reverse flow it can also be used (to a limited extent) in the reverse direction. Additional arguments put forward by ERO concern the application of special 'critical infrastructure' legislation applicable to Gaz-System and some factual evidence supporting the claim that Gaz-System is truly independent in carrying out its task as operator

of Yamal. As such, the ISO-model ensures independent operation and development of the system.

The Commission agrees with ERO that the ISO-model, where it is applied correctly, should be an effective means to neutralize the risk of undue third country influence over the network.⁶ However, the Commission recalls that Article 11(3)(b) also requires a security of supply assessment, in order to ensure that the fact that a third country person exercises control over the network or its owner does not put at risk the security of supply of the country in which the network is situated or the EU as a whole.

The Commission is of the opinion that a true risk assessment under Article 11(3)b Gas Directive has not been carried out. In particular, it needs to be assessed by ERO whether the fact that Russia as a supplier and the Yamal pipeline are key to (i) European and (ii) Polish security of supply and whether the combination of Gazprom's joint control over Europolgaz and its important position as a supplier are such that they compromise that security of supply. Although certain investments on the Yamal pipeline have taken place in the past, this fact is as such insufficient as guarantee for the future that no impact on security of supply will ensue.⁷

While EU Member States are obliged to ensure full application and enforcement of EU law, including the Gas Directive, in view of their obligations under the EU Treaties, third countries are not bound by such obligations. Therefore, ERO should assess the risk that Europolgaz and/or its shareholders and/or any of their direct or indirect shareholders exercise their ownership rights in a manner that could result in making it difficult or impossible for Gaz-System or Europolgaz to comply with EU law or that would sanction such compliance.

The Commission thus requests ERO to extend its assessment. The assessment needs to be aimed at identifying risks to security of supply first and second assessing what additional remedies might be necessary to neutralize such risks. The Commission takes the view that in case ERO detects such risk ERO should be granted additional rights as a necessary safeguard, such as the power to suspend Gazprom's voting rights in Europolgaz.

IV. CONCLUSION

Pursuant to Article 3(2) Gas Regulation, ERO shall take utmost account of the above comments of the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take vis-à-vis national regulatory authorities on any other notified draft measures concerning certification, or vis-à-vis national authorities responsible for the transposition of EU legislation as regards the compatibility of any national implementing measure with EU law. The Commission's opinion is notably without prejudice to Commission procedures under European competition rules.

⁶ The ISO-model, whereby the owner of the system and the TSO are separate, is in principle better suited to address influence of the owner than for instance the ITO model whereby the TSO, which is the owner of the transmission assets, can remain exposed to direct influence as regards system operation by the Vertically Integrated Undertaking.

⁷ Guidance on such assessment is available in earlier opinions of the Commission concerning the application of Article 11, such as on TIGF (https://ec.europa.eu/energy/sites/ener/files/documents/2014_097_fr_en.pdf) and DESFA (https://ec.europa.eu/energy/sites/ener/files/documents/2014_101_gr_en.pdf)

The Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. ERO is invited to inform the Commission within five working days following receipt whether it considers that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which it wishes to have deleted prior to such publication. Reasons should be given for any such request.

Done at Brussels,

For the Commission

[...]

Member of the Commission