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COMMISSION

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## 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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### **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**

#### **I. PROCEDURE**

On 9 July 2014 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').

Pursuant to Articles 10 and 11 Directive 2009/73/EC<sup>1</sup> (hereafter "Gas Directive") and Article 3 Regulation (EC) No 715/2009<sup>2</sup> (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 is in the process of being appointed as the ownership unbundled transmission system operator (hereafter, 'TSO') 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 certification of Gaz-System as a TSO of the Polish transmission network on 28 July 2014.<sup>3</sup> The present certification concerns the appointment of Gaz-System as an ISO for the Polish section of the Yamal pipeline and therefore constitutes a separate procedure which does not affect the ongoing 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 Russian Gazprom (each holding 48% of shares), and Polish Gas-Trading S.A.<sup>4</sup>, which owns the remaining 4% of the shares.

The Yamal pipeline is a 4,196 kilometres long pipeline connecting natural gas fields in Western Siberia, crossing Belarusian territory, with the European Union. The Polish section

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<sup>1</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, OJ L 211/94 of 14.8.2009.

<sup>2</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, OJ L 211/36 of 14.8.2009.

<sup>3</sup> C(2014) 5457 final, {provide the link when published}. The final certification decision of ERO is pending.

<sup>4</sup> 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; Wegelokoks S.A. – 2.27% of shares; and Wintershall Erdgas Handelshaus GmbH – 2.27% of shares.

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)<sup>5</sup>.

On 25 October 2010, Europolgaz and Gaz-System concluded an entrusting agreement<sup>6</sup> (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.

ERO has 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 preliminary decision, ERO concludes that Gaz-System complies with the ISO-requirements and that Europolgaz is not controlled by a person from a third country. ERO thus reaches 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. On 14 August 2014, the Commission services met with ERO and with Gaz-System.

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<sup>5</sup> 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.

<sup>6</sup> Agreement on entrusting operator's responsibilities on the Polish section of Yamal-Western Europe Transit Gas Pipeline System.

### III. COMMENTS

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

#### 1. The availability and application of the ISO-model

According to Article 9(8)(a) Gas Directive, the ISO-model may be applied in cases where, on 3 September 2009, the transmission system belonged to a Vertically Integrated Undertaking (hereafter, "VIU"). The Commission agrees with ERO in the present case that the choice of the ISO-model is legitimate, considering that the Polish section of the Yamal pipeline was owned and operated by Europolgaz on the relevant date and thus part of a VIU.

Under the ISO-model, the VIU owning the network transfers the transmission function related to that network to an independent system operator.

In November 2010, Gaz-System was appointed by the President of ERO as the system operator of the Yamal pipeline. The notification of the draft certification decision as well as the additional information provided by ERO indicate that since November 2010 several steps have been taken to ensure that Gaz-System carries out the tasks of an independent system operator on the Yamal pipeline. The Commission considers the following developments of particular relevance:

– *Gaz-System allocates the capacity*

Article 14(4) Gas Directive determines that the ISO shall be responsible for granting and managing third party access to the network. This is a key requirement as it ensures non-discriminatory access by third party competitors to the infrastructure owned by the VIU.

Gaz-System is responsible for the allocation of capacities by way of auctions. This includes the forward capacities not locked up in the existing contracts as well as the reverse flow capacities. Moreover, Gaz-System actively applies congestion management mechanisms in order to ensure that unused capacity, both resulting from the underuse of historical contracts and of the remaining capacity, is offered anew to the market on at least a daily and monthly basis. Gaz-System performs this task on the basis of the Yamal Network Code.<sup>7</sup> The Commission encourages ERO to continue to monitor actively the applicability of the Yamal Network Code to the reverse and forward capacities of the Yamal pipeline including those that are released due to the applicability of the use-it-or-lose-it principle to the existing contracts.

As regards the calculation of available capacity, [REDACTED]

[REDACTED]. While this appears not to be in line with Article 14(4) Gas Directive, it should be noted that the Yamal Network Code foresees in its Article 8(4)(11) that Gaz-System shall determine the available transmission capacity taking into consideration the criteria set out therein. In this regard, the Commission considers that ERO should clarify in its certification decision - and continue to ensure - that, based on the Yamal Network Code, Gaz-System is responsible for calculating the available capacity.

<sup>7</sup> In February 2014, ERO approved a specific network code for the Yamal pipeline to ensure third party access to the network (hereinafter 'Yamal Network Code'). The Yamal Network Code ensures the applicability of the Capacity Allocation Mechanism network code and the Congestion Management Procedures guideline.

– ***Gaz-System is a member of ENTSOG***

As determined by Article 14(2)(e) Gas Directive the ISO needs to demonstrate its ability to comply with its obligations under the Gas Regulation, including in the cooperation of transmission system operators at European and regional level. Gaz-System does so by being an active member of ENTSOG. Europolgaz is not a member of ENTSOG.

– ***Gaz-System develops the ten-year network development plan***

In accordance with Article 14(2)(c) Gas Directive, Gaz-System is responsible for preparing a ten-year nationwide network development plan (hereinafter 'TYNDP') which must comply with the TYNDP prepared by ENTSOG. The ten year network development plan is updated each year and subject to scrutiny of the President of ERO as regards the compatibility of Gaz-System's TYNDP with ENTSOG's.

ERO points out that Gaz-System conducts market tests that assess market demand for providing additional transmission capacity. ERO also indicates that Gaz-System initiates investment processes and in this regard, according to ERO Gaz-System initiated, financed and concluded two important investments, namely the launching of the physical reverse flow on the Mallnow Interconnection Point<sup>8</sup> and the upgrade of the Włocławek entry point. In the draft certification decision, ERO also indicates that Gaz-System has further plans as regards the connection of the new entry/exit point to/from the Yamal pipeline at Wydartowo and the further extension of the Mallnow Interconnection Point. ERO therefore concludes that Gaz-System is able and committed to comply with the TYNDP requirement.

– ***Gaz-System controls the flows***

Article 14(2)(b) Gas Directive provides that the candidate operator, in this case Gaz-System, should have demonstrated that it has at its disposal the required financial, technical, physical and human resources to carry out its tasks under Article 13 Gas Directive. One of the core tasks under Article 13 Gas Directive is the operation and maintenance of the network. Gaz-System operates the Yamal pipeline from its integrated control centre which it uses as operator of the Polish national gas transmission system to operate that system. It thus has all the necessary equipment, know-how and resources to carry out this task for the Yamal pipeline.

Moreover, the additional information submitted by ERO demonstrates that the maintenance of the Yamal pipeline is entrusted by Europolgaz to Gaz-System on the basis of a separate technical agreement from 30 January 2012. Based on the information provided by ERO, this agreement requires Gaz-System to perform all necessary functions as regards the maintenance of the pipeline.

On that basis, the Commission concludes that Gaz-System controls the flows on the Yamal pipeline and performs all necessary functions as regards the maintenance of the pipeline. The Commission encourages ERO to monitor regularly that both functions continue to be performed by Gaz-System.

– ***Tariffs are set by the NRA***

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<sup>8</sup> The Mallnow compressor station is a border interconnection point between Poland and Germany. It is located on the Yamal pipeline in Germany and it is owned by the German TSO Gascade.

According to the arrangements applicable to the Yamal pipeline, the President of ERO is responsible for setting all tariffs in a non-discriminatory way, for all capacity on the pipeline, *i.e.* including the capacity under the two historical contracts. Gaz-System collects access charges for the capacity that it allocates, while the access charges under the historical contracts are temporarily collected directly by Europolgaz. In this regard, the Commission notes that Article 14(4) Gas Directive stipulates that under the ISO-model, the operator shall be responsible for collecting access charges and congestion rents.

In the draft certification decision, ERO argues that the current arrangement is only temporary given that Europolgaz is the party to the historical contracts for the remaining duration of those contracts (*i.e.* respectively till 2020 and 2022, depending on the contract – please see footnote 5). Furthermore under provisions of the amended Energy Law, Europolgaz has no legal right to extend these contracts or replace them by new transit contracts benefitting from the same framework. In this regard, the Commission notes that the main aim of regulatory tariff setting (and allocating of costs) is to ensure that all capacity of the pipeline is offered in a non-discriminatory manner and to ensure that the capacity is offered at a fair and reasonable price. This appears to be ensured with the President of ERO being responsible for setting all tariffs. The Commission underlines that on the basis of the Gas Directive, ERO has the powers to verify whether Europolgaz effectively charges the shippers (which are also its shareholders) the transmission tariffs as set by ERO in order to avoid undue advantages or cross-subsidies to those shippers. The Commission agrees with ERO's assessment that as long as the collection of some of the charges directly by Europolgaz is of a temporary nature and does not have negative impact on the principle of non-discriminatory access and the independent operation of the pipeline, this could be accepted as a workable solution in a short term, until the expiry of the historical contracts.

In order to ensure the non-discriminatory access to the pipeline the Commission encourages ERO to actively implement its powers and regularly monitor the applicable tariffs.

Notwithstanding the above, the Commission considers that certain elements of the division of tasks between Gaz-System and Europolgaz are not fully in line with the requirements of the ISO-model yet.

The Commission requests ERO to address these points in its final decision:

– ***Obligation on Europolgaz to establish a network development plan***

On the basis of the information provided by ERO, Gaz-System is required to establish a national TYNDP in accordance with Article 14(2)(c) Gas Directive by 11 September 2015. However, ERO points out in the notification and in the additional information provided that Article 16(1) of the Polish Energy Law requires the licenced energy company, Europolgaz, also to prepare a network development plan, for a period not shorter than three years. In addition,

On the basis of the information provided by ERO, the President of ERO examines the plan and its compatibility with the ENTSOG TYNDP and the national TYNDP.

Nevertheless, the mere fact that under Article 16(1) of the Polish Energy Law Europolgaz is required to prepare a network development plan and that

[REDACTED] appears in contradiction with Article 14(4) Gas Directive which provides that the owner shall not be responsible for investment planning. The Commission hence reserves the right to examine the compatibility of the provision further in the context of its ongoing assessment of the compatibility of Polish Energy Law with European Union Law. In any event, it requests ERO to give full effect to Article 14(4) Gas Directive. ERO is in this regard requested to specify in its final certification decision that any plan on network development which Europolgaz provides shall not in any manner bind or constrain Gaz-System in the establishment of the TYNDP pursuant to Article 14(2)(c) of the Directive. This competence of Gaz-System should not be impaired by the application of Articles 22 and 23 of the Amending Act . ERO is requested to specify that Gaz-System should be the sole entity in charge of planning, constructing and commissioning new infrastructure, including the eventual expansion of the Yamal pipeline.

– *Operation of compressor and metering stations*

From ERO's preliminary decision and the additional information provided on 11 August 2014, it can be deduced that Europolgaz employs around 150 staff to operate five compressor stations, two of which are also metering stations, along the Yamal pipeline.

In its Opinions related to the ISO-certifications of the Latvian electricity TSO Augstsprieguma tīkls,<sup>9</sup> as well as the Austrian gas TSO TAG<sup>10</sup>, the Commission underlined the importance of the need for the ISO to carry out the TSO-tasks without interference of the system owner, requesting the transfer of such tasks from the system owner to the ISO. In the present case, the Commission considers that the operation of compressor and metering stations is one of the core tasks of a TSO. Having this task performed by the system owner, which is owned by two of the main shippers on the Yamal pipeline, raises the risk of discriminatory behaviour on the part of Europolgaz and gives Europolgaz undue access to confidential information to a level that distorts the level-playing field between the owners of Europolgaz and third party shippers.

With regard to the access to confidential information, the Commission moreover notes that Europolgaz holds the license for the SCADA IT-system which is elementary for the physical operation of the Yamal pipeline and also employs twelve people that manage the IT-system. Measurement data from the metering stations is collected by the SCADA-system. Europolgaz puts the SCADA-system (including the data fed into the system at the metering stations) at the disposal of Gaz-System. Gaz-System employees, operating the dispatching centre then instruct the Europolgaz employees that operate the compressor stations on actions to take in order to control the flow.

From ERO's draft certification decision and the underlying documentation it appears that this situation has grown historically and that there are no particular circumstances that justify why in this particular case the compressor and metering stations on the Yamal pipeline need to be operated by the owner nor why the SCADA-system cannot be owned and operated by Gaz-System without interference by Europolgaz.

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<sup>9</sup> Commission's Opinion on PUC's draft certification decision for Augstsprieguma tīkls (AST), C(2012)9108, 044-2012-LV

[http://ec.europa.eu/energy/gas\\_electricity/interpretative\\_notes/doc/certification/2012\\_044\\_lv\\_en.pdf](http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/certification/2012_044_lv_en.pdf)

<sup>10</sup> Commission's Opinion on e-Control's draft certification decision for TAG, C(2013)649, 049-2012-AT

[http://ec.europa.eu/energy/gas\\_electricity/interpretative\\_notes/doc/certification/2012\\_049\\_at\\_en.pdf](http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/certification/2012_049_at_en.pdf)

On this basis, the Commission considers 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 (licenses of) IT systems related to these activities.

The Commission notes that this transfer will imply a transfer of costs from Europolgaz to Gaz-System and considers that this should be reflected in the remuneration that Gaz-System receives for carrying out the operation of the Yamal pipeline. The Commission considers that ERO should exercise strict control over the financial arrangements between Gaz-System and Europolgaz, in the context of approving the tariffs.

– *Access to confidential information*

It is part of the principle of non-discriminatory access to the transmission system that all shippers receive equal information, e.g. on available capacity, and that confidential information with regard to one shipper is not passed on to another shipper. The Commission is concerned about a disparity in the access to (confidential) information that appears to exist between third party shippers and Europolgaz, not only on the basis of the aforementioned facts related to the operation of the compressor and metering stations and the IT-system, but also in view of the agreed practice of certain data exchange processes between Gaz-System and Europolgaz.

On the basis of the information provided in ERO's notification, the Commission is of the view that the governance of the data exchange processes between Gaz-System and Europolgaz needs to be reviewed and tightened. 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). For these purposes, it is not necessary, as it seems to be current practice<sup>11</sup>, to share with Europolgaz the same nomination, re-nominations, measurements and allocations data as Gaz-System shares with the operators of interconnected systems. The Commission also does not consider it necessary, as it seems to be current practice<sup>12</sup>, that Europolgaz gets access to data from individual new transmission contracts signed with shippers and encourages ERO to ensure that only aggregated data is provided for settlement purposes only. All other data, including data regarding new contracts signed by Gaz-System, with regard to the use of the pipeline should be made available, in accordance with the EU transparency rules, for all shippers alike.

In conclusion, the Commission considers that, as far as compliance with ISO requirements is concerned, the certification of Gaz-System as an ISO for the Yamal pipeline should be made conditional upon:

- 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 (licenses of) IT-systems;

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<sup>11</sup> Points 5.4 and 5.5 of the Yamal Network code.

<sup>12</sup> Point 7.1.4 of the Yamal Network code



- Gaz-System not transferring or sharing with Europolgaz any information other than the data needed to allow Europolgaz to invoice the shippers under the historical contracts (e.g. nomination data of only 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).

Moreover, the Commission requests ERO to clarify in its final certification decision, and to ensure thereafter, that any plan on network development which Europolgaz provides shall not in any manner bind or constrain Gaz-System in the establishment of the TYNDP pursuant to Article 14(2)(c) Gas Directive. Furthermore, the Commission requests ERO to specify that Gaz-System's competence for the TYNDP is not impaired by Articles 22 and 23 of the Amending Act and that Gaz-System should be the sole entity in charge of planning, constructing and commissioning new infrastructure, including the eventual expansion of the Yamal pipeline.

## **2. The application of Article 11 –Certification in relation to third countries**

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 case, ERO has assessed whether the Russian company Gazprom, with its direct shareholding in the system owner Europolgaz of 48%, controls Europolgaz. In its preliminary decision, ERO concludes that this is not the case and that therefore the assessment of a possible risk to the security of supply of Poland or the EU in accordance with Article 11(3)(b) does not have to be carried out.

ERO's assessment of the question of control is based on the legal division of powers of the shareholders in Europolgaz. The basic principle underlying this division of power is the creation of a balance of power between the two main shareholders: PGNiG and Gazprom, which both hold 48% of the shares in Europolgaz. ERO concludes that this balance ensures that none of these shareholders can take decisions without the other. The balance of power is reflected in the composition and voting arrangements of the General Meeting of Shareholders, the Management Board and the Supervisory Board of Europolgaz. For instance, Gazprom has the right to appoint four members out of a total of six to nine members in the Supervisory Board, including its chair person, but with the condition that it can never have a majority in the Board. For a resolution to be adopted by the Supervisory Board, six members need to be present in the meeting representing an absolute majority of votes. Resolutions in the Management Board are adopted by unanimity. If unanimity is not reached the matter is referred to the Supervisory Board. In view of these elements and relying on a number of academic sources, ERO concludes that Gazprom does not exercise control over the system owner Europolgaz as it does not have the sole power to exercise decisive influence over that company.

The Commission has analyzed ERO's assessment and on the basis of the facts as provided by ERO comes to a different conclusion. The very fact that the governance of Europolgaz is designed on the basis of a balance of power and that as a result of that Gazprom is able to block decisions, including decisions of a strategic character, is a clear indication that there is a situation of joint control exercised by both Gazprom and PGNiG. In the Electricity and Gas

Directives<sup>13</sup> and in its interpretative note on the unbundling regime of the Third Energy Package<sup>14</sup> the Commission has underlined that the concept of control should be understood and assessed in accordance with the Merger Regulation and in particular of the Jurisdictional Notice<sup>15</sup>, which indicate that in cases like the one described above, there is joint control. Joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking. Decisive influence in this sense normally means the power to block actions which determine the strategic commercial behavior of an undertaking. Joint control is characterized by the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions. Parties are required to cooperate to reach a common understanding in determining the commercial policy of their joint venture.<sup>16</sup>

In its draft certification decision, ERO assesses the concept of negative control noting that it should go beyond a mere veto right normally conferred to minority shareholders to protect their financial interests. It translates this requirement into the question whether or not there are other shareholders that hold an equal share. The Commission cannot follow this argumentation. For the question of joint control it suffices that the parties can jointly exercise decisive influence over the joint venture, which is the case for Europolgaz. Moreover, there are clear indications that Gazprom's veto possibilities go beyond the protection of its financial interests. For instance, in case Gazprom is absent in the General Meeting, in the Supervisory Board or in the Management Board no decision at all can be taken by these bodies. ERO itself concludes that *"it should be noted that all **significant** decisions related to the company's operation as well as its current activity rules shall be, in fact, agreed upon with the company's partners, including Gazprom"* (emphasis added).

ERO's conclusion that Europolgaz is not controlled by a person from a third country leads it to conclude that the security of supply assessment under Article 11 Gas Directive does not have to be carried out by ERO. In view of the above facts, the Commission takes the view that a comprehensive assessment under Article 11 has to be carried out by ERO before granting certification. The revised draft decision including such assessment under Article 11 shall be notified to the Commission in accordance with Article 10(6) Gas Directive.

#### 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.

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<sup>13</sup> As regards the concept of "control", the Electricity and Gas Directives refer (see recital 13 Electricity Directive and recital 10 Gas Directive) to Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 24/1, 29.1.2004 (hereinafter, "Merger Regulation"). This concept should therefore be interpreted accordingly.

<sup>14</sup> [http://ec.europa.eu/energy/gas\\_electricity/interpretative\\_notes/doc/sec\\_2011\\_1095.pdf](http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/sec_2011_1095.pdf), see also Article 2 (36) Gas Directive.

<sup>15</sup> Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).

<sup>16</sup> *Id.*, paragraph 62.

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*