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Page: 1/5

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## EUROPEAN UNION AND ITS MEMBER STATES – CERTAIN MEASURES RELATING TO THE ENERGY SECTOR

### REQUEST FOR CONSULTATIONS BY THE RUSSIAN FEDERATION

The following communication, dated 30 April 2014, from the delegation of the Russian Federation to the delegations of the European Union and its member States and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the European Union ("EU") and its Member States, pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXIII of the General Agreement on Trade in Services ("GATS"), Article XXIII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), Article 4.1, Article 7.1 and Article 30 of the Agreement On Subsidies And Countervailing Measures and Article 8 of the Agreement on Trade-Related Investment Measures with respect to certain restrictions and requirements maintained by the EU and implemented within its territory by the EU and its Member States, including Croatia, Hungary and Lithuania, through the so-called "Third Energy Package" Directives and Regulations, implementing legislation and decisions of the EU and its Member States and the measures resulting from participation in the Treaty establishing the Energy Community (hereinafter referred to as "Third Energy Package"), and pertaining to, in particular, the unbundling of vertically-integrated undertakings involved in the production, supply, and transmission of natural gas or electricity, the discriminatory certification requirements in relation to third countries, and the requirements in respect of granting of access to natural gas and electricity network capacity by transmission service operators.

In the view of the Russian Federation the provisions of "Third Energy Package" are inconsistent with a number of obligations and specific commitments of the EU and its Member States under the WTO Agreement. In particular, though not exclusively, the following measures, in the view of the Russian Federation, constitute an infringement of the said obligations and specific commitments.

The same person or persons cannot simultaneously act as producer or supplier of gas/electricity and execute its transportation/transmission. The same person or persons cannot be entitled directly or indirectly to simultaneously exercise control over an undertaking performing any of the functions of production or supply and directly or indirectly exercise control or exercise any right over a transmission system operator or over a transmission system. The opposite is true as well. This prohibition is applied even when a foreign person engaged in production of gas domestically intends to gain or exercise control only over transmission system or transmission system operator. The requirements of "Third Energy Package" exempts different types of pipeline networks as the "transmission" of gas means "transport of natural gas through a network, which mainly contains high-pressure pipelines, other than an upstream pipeline network and other than the part of high-pressure pipelines primarily used in the context of local distribution of natural gas, with a view to its delivery to customers".

This prohibition is to be achieved through the implementation of either of three regimes of unbundling: ownership unbundling, establishment of independent system operator or independent transmission operator. These regimes are of different degree of restrictiveness. Thus different regimes apply in different parts of the territory of the EU. In addition to varying regimes of different degree of restrictiveness throughout the territory of the EU "Third Energy Package" also

provides for the possibility to apply different unbundling regime depending on the date when the control over a transmission system within the EU is obtained.

In addition to that, a number of exemptions, exceptions and derogations from the unbundling requirements are provided for in the EU legislation. In particular, exemptions are contemplated in respect of certain types of infrastructure. For example, new major infrastructure may, at the discretionary basis through the consent of the EU, be fully or partially exempted from the unbundling requirement. Decisions to grant exemptions are taken on a case-by-case basis.

The unbundling requirements are not applied in case of emergent and isolated markets, as well as in case of small natural gas undertakings.

In all cases the most restrictive unbundling requirement – ownership unbundling – is not applied to persons who carry out the function of transport of natural gas through local or regional pipeline network with the view to its delivery to customers.

In case of certification of transmission system owners or operator, additional requirements for certification are provided for with respect to those controlled by a foreign person or persons. Such operators may be denied certification if such certification is deemed to lead to threat to the security of energy supplies in the EU Member States and the Community as a whole. Procedure for certification of transmission system owners and operators controlled by a foreign person or persons is different from that of transmission system owners and operators controlled by an EU person or persons being, in particular, more burdensome.

“Third Energy Package” requires, *inter alia*, that transmission system owners or operators offer their services on a non-discriminatory basis to all network users based on regulated tariffs, as well as that transmission system owners or operators provide both firm and interruptible third-party access to services. However, in respect of these and other requirements regulating access to the transmission and distribution systems, “Third Energy Package” provides for exemptions, exceptions and derogations, including exemptions, exceptions and derogations similar to those provided for in respect of unbundling requirements.

“Third Energy Package” is applied in the same manner in respect of producers or suppliers of electricity and transportation/transmission of electricity and has the same consequences in these sectors.

“Third Energy Package” requirements related to third-party access lower the volumes of transportation capacities available to the importers and impairs the implementation of long-term contracts for the supply of gas already concluded. At the same time there are exceptions, exemptions and derogations from the rules of the third-party access under “Third Energy Package” that are afforded to certain infrastructure and that puts the gas transported thereby in more favourable position than the gas imported through the infrastructure subjected to third-party access requirements.

The imported gas is also subjected to the additional requirements affecting its internal sale, offering for sale, purchase, transportation, distribution or use within the territory of the EU. However, the gas produced domestically, including the biogas, is not subject to the same requirements. Moreover, biogas produced domestically is afforded additional privileges that result in, as intended, substitution of the imported gas.

The instruments through which the EU and its Member States maintain the above measures include, but are not limited to:

- 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;<sup>1</sup>

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<sup>1</sup> OJ L 211, 14.8.2009, pp. 94-136.

- Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC;<sup>2</sup>
- Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC;<sup>3</sup>
- Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators;<sup>4</sup>
- Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003;<sup>5</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;<sup>6</sup>
- Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC;<sup>7</sup>
- Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009;<sup>8</sup>
- Opinion of the European Commission of 12 June 2011, pursuant to Regulation (EC) No 715/2009;
- Treaty establishing the Energy Community of 25 October 2005;
- Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC;
- Law on the Amendment of the Law on Natural Gas of the Republic of Lithuania, No. XI-1564, 30 June 2011;
- Law on Implementation of the Law on the Amendment of the Law on Natural Gas of the Republic of Lithuania, No. XI-1565, 30 June 2011;
- Government of the Republic of Lithuania, Resolution No. 1239 of 28 October 2011, on Approval of the Plan for Performing the Unbundling of Activities and Control of Natural Gas Undertakings That Do Not Conform to the Requirements of the Law on Natural Gas of the Republic of Lithuania;
- Plan for Performing the Unbundling of Activities and Control of Natural Gas Undertakings That Do Not Conform to the Requirements of the Law on Natural Gas of the Republic of Lithuania, Approved by Resolution No. 1239 of 28 October 2011 (Official Gazette, 2011, No. 130-6170);
- Act No. XXIX of 2011 amending the Gas Supply Act of the Government of Hungary;
- Act No. XL of 2008 on Natural Gas Supply of the Government of Hungary;

<sup>2</sup> OJ L 176, 15.7.2003, pp. 57-78.

<sup>3</sup> OJ L 211, 14.8.2009, pp. 55-93.

<sup>4</sup> OJ L 211, 14.8.2009, pp. 1-14.

<sup>5</sup> OJ L 211, 14.8.2009 pp. 15-35.

<sup>6</sup> OJ L 211, 14.8.2009, pp. 36-54.

<sup>7</sup> OJ L 295, 12.11.2010, pp. 1-22.

<sup>8</sup> OJ L 115, 25.4.2013, pp. 39-75.

- Government of Estonia, Natural Gas Act, Maagaasiseaduse muutmise seadus, seaduse parandus, RT I, 28.06.2012, 2; Elektrooniline Riigi Teataja (MNE(2012) 52911);
- Government of Croatia, Energy Act (Official Gazette 120/12);
- Government of Croatia, the Act on the Regulation of Energy Activities of 11 November 2012;
- Government of Croatia, Gas Market Act of 14 March 2013;
- Government of Belgium (Federal), Act of 8 January 2012, amending the federal Gas Act of 12 April 1965;
- Government of Belgium (Flanders), Decree of 8 July 2011, amending the Energy Decree of 8 May 2009;
- Government of Belgium (Brussels Capital Region), Edict of 20 July 2011, amending the Gas Edict of 1 April 2004;
- Government of Belgium (Wallonia), various amending decrees and governmental orders implementing the Gas Directive;
- Government of the United Kingdom, Electricity and Gas (Internal Markets) Regulations 2011;
- Government of Germany, Energiewirtschaftsgesetz (Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz – EnWG) i.d.F. von Artikel 2 des Gesetzes vom 16.1.2012, BGBl I S. 74.);
- Gas Grid Access Order of Germany (Verordnung über den Zugang zu Gasversorgungsnetzen) of 3 September 2010;
- The certification decisions under the Gas Directive by the EU Member States and the Opinions of the European Commission regarding these decisions;
- Commission Decision of 16 May 2013 on the exemption of the Trans Adriatic Pipeline from the requirements on third party access, tariff regulation and ownership unbundling laid down in Articles 9, 32, 41(6), 41(8) and 41(10) of Directive 2009/73/EC;<sup>9</sup>
- Final Joint Opinion of the Energy Regulators on TAP AG's Exemption Application of 6 June 2013;
- Commission Decision on the exemption of the "Gazelle" interconnector according to Article 36 of Directive 2009/73/EC;<sup>10</sup>
- Commission Decision on the exemption of the "Gazelle" interconnector from ownership unbundling within the meaning of Article 9 of Directive 2009/73/EC;<sup>11</sup>
- Commission's decisions on the exemption decisions by the authorities of Austria, Romania, Hungary, and Bulgaria related to the Nabucco pipeline;
- Commission's decisions on the exemption decisions by the authorities of Germany and/or Czech Republic related to the OPAL pipeline;
- Commission's decisions on the exemption decisions by national authorities related to, inter alia, LNG Grain (UK), South Hook (UK), Rovigo (IT), Dragon (UK), LNG Brindisi (IT), Gate Terminal (NL), LionGas (NL), LNG Eemshaven (NL), LNG Livorno (IT), LNG Shannon (IE), LNG Dunkerque (FR), LNG Porto Empedocle (IT) and National Grid Grain LNG (UK);

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<sup>9</sup> C(2013) 2949 final.

<sup>10</sup> C(2011) 3424.

<sup>11</sup> C(2011) 8777.

and any amendments, supplements, extensions, replacement measures, renewal measures, related measures, or implementing measures; as well as all other implementing measures of or decisions taken under "Third Energy Package" and adopted by the EU Member States that have not been identified in the present request and for the identification of which the Russian Federation requests the assistance of the European Commission during the consultations, or any such measures referred to by either party during the course of the consultations.

The EU and its Member States, therefore, appear to be acting inconsistently with the EU's obligations under Articles II, VI, XVI and XVII of the GATS and their Specific Commitments under the GATS, Articles I, III, X, and XI of the GATT 1994, Article 3 of the Agreement on Subsidies and Countervailing Measures, and Article 2 of the Agreement on Trade-Related Investment Measures, Article XVI:4 of the Agreement Establishing the World Trade Organization.

The measures cited in this request for consultations also appear to nullify or impair the benefits accruing to the Russian Federation directly or indirectly under the cited agreements.

The Russian Federation reserves the right to address additional measures and claims under other provisions of the covered agreements regarding the above matters.

We look forward to receiving your reply to the present request and to fixing a mutually convenient date for consultations.

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