

Opinion 1/23

pursuant to Article 3a of Regulation (EC) 715/2009 as amended by Regulation (EU) 2022/1032 with regard to gas storage – Ukraine – Certification of *Ukrtransgaz* as gas storage system operator

On 3 March 2022, the National Energy and Utilities Regulatory Commission (hereinafter “NEURC”) notified the Energy Community Secretariat (hereinafter “the Secretariat”) of a preliminary decision (hereinafter “the Preliminary Decision”) on the certification of *JSC Ukrtransgaz* (hereinafter “*Ukrtransgaz*”) as gas storage system operator (hereinafter “SSO”). The Preliminary Decision was adopted on 1 March 2023,¹ based on Article 17 of the Law of Ukraine on the National Energy and Utilities Regulatory Commission² and Article 47¹ of the Law of Ukraine on the Natural Gas Market.³

Pursuant to Article 3a of Regulation (EC) 715/2009 as amended by Regulation of the European Parliament and of the Council (EU) 2022/1032 with regard to gas storage (hereinafter “the Gas Regulation”),⁴ the Secretariat is required to examine the notified Preliminary Decision and to deliver a binding opinion within 25 working days to NEURC as to its compatibility with Article 3a of the Gas Regulation (hereinafter “the Opinion”).

I. *Ukrtransgaz*

SE Ukrtransgaz was established on the basis of Resolution of the Cabinet of Ministers of Ukraine No 1173, dated 24 July 1998, as a subsidiary of *NJSC Naftogaz of Ukraine* (hereinafter “*Naftogaz*”). By Resolution of the Cabinet of Ministers of Ukraine No 360-p on reorganisation of subsidiaries of the *NJSC Naftogaz of Ukraine*, dated 13 June 2012, and Order of the Ministry of Energy and Coal Industry of Ukraine No 530 on reorganisation of *Ukrtransgaz*, dated 18 July 2012, *Ukrtransgaz* was reorganised as public joint stock company, and on 6 June 2018 as joint stock company *SE Ukrtransgaz*.⁵ Since 1 January 2020, *Ukrtransgaz* is only licensed to perform the activity of

¹ NEURC Resolution No 393, adopted on 1 March 2023, available at <https://www.nerc.gov.ua/acts/pro-prijnyattya-poperednogo-rishennya-pro-sertifikaciyu-operatora-gazoshovishcha>

² Law of Ukraine “On National Energy and Utilities Regulatory Commission” № 1540-VIII of 22.09.2016, available at <https://zakon.rada.gov.ua/laws/show/1540-19#Text>

³ Law of Ukraine “On the Natural gas market”, № 329-VIII of 09.04.2015, available at <https://zakon.rada.gov.ua/laws/show/329-19#Text>

⁴ Incorporated and adapted by Permanent High Level Group Decision 2018/01/PHLG-EnC of 12 January 2018 and by Ministerial Council Decision 2011/02/MC-EnC of 6 October 2011 on the implementation of Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) 714/2009 and Regulation (EC) 715/2009 and amending Articles 11 and 59 of the Energy Community Treaty and by the Ministerial Council Decision 2022/01/MC-EnC adapting and implementing Regulation (EU) 2022/1032 with regards to gas storage.

⁵ Decision of shareholder No 186 dated 21 May 2018, available at <https://utg.ua/img/menu/company/docs/2018/186.pdf>

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operation, maintenance and development of the underground natural gas storage system, as well as the provision of all services related to the storage of natural gas.

The 12 underground storages operated by *Ukrtransgaz* are located across Ukraine and have a total capacity of 31 bcm.⁶ All gas storage facilities are located on the territory controlled by Ukraine, with the exception of one with 0,4 bcm capacity located on the territory illegally occupied by the Russian Federation since 2014 and not used by *Ukrtransgaz*.

The storage capacity operated by *Ukrtransgaz* can satisfy more than Ukraine's annual demand for natural gas (estimated for the last five years before 2022, at 28,9 bcm);⁷ the average demand in the last 5 years has always been at a level or below the total storage capacity. Also, the withdrawal rates of the Ukrainian storages are in most cases large enough to cover the total demand on a typical or cold winter day.

The percentage of capacity of *Ukrtransgaz*' facilities filled before the heating season has been typically between █████ (2022) and █████ (2020) of the total designed active volume. Storage facilities have always been filled up at the beginning of the heating season above the target level set for Ukraine in Regulation (EU) 2017/1938 as amended by Regulation of the European Parliament and of the Council (EU) 2022/1032 with regard to gas storage,⁸ i.e. 35% of its average annual consumption in the previous 5 years.

Besides the operation of storage facilities, *Ukrtransgaz* is also engaged in the following economic activities:

- Provision of chemical laboratory services;⁹
- Customs broker services;¹⁰
- Production of electricity from renewable sources;¹¹
- Construction of gas pipelines;¹²

⁶ <https://utg.ua/en/utg/company/ukrtransgaz-today.html>

⁷ Available at <https://www.statista.com/statistics/703686/natural-gas-consumption-ukraine/#:~:text=Natural%20gas%20consumption%20in%20Ukraine%20amounted%20to%2026.1%20billion%20cubic,meters%20in%20the%20previous%20year.>

⁸ Incorporated and adapted by the Ministerial Council Decision 2021/15/MC-EnC of 30 November 2021 on Annex I to the Treaty establishing the Energy Community and adapting and implementing Regulation (EU) 2017/1938 concerning measures to safeguard the security of gas supply and by the Ministerial Council Decision 2022/01/MC-EnC adapting and implementing the Regulation (EU) 2022/1032 with regards to gas storage.

⁹ Certificate of conformity of the measurement management system dated 05/26/2019 No. 038/19 and dated 08/07/2019 No. 061/19.

¹⁰ Extract from the register of customs brokers, record of the series dated 03.07.2018 serial No. AA 002066.

¹¹ NEURC Resolution issuing a license NO 1353, dated 05.07.2019.

¹² Division "Construction and assembly firm "Ukrgazprombud".

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- Repair and maintenance of machines and industrial equipment;¹³
- Wired telecommunications.¹⁴

Ukrtransgaz is fully owned by *Naftogaz*, a vertically integrated undertaking, which in turn is fully state-owned. The corporate rights in *Naftogaz* are managed by the Cabinet of Ministers of Ukraine.

On the basis of Resolution of the Cabinet of Ministers of Ukraine No 747, dated 25 May 1998, and the Agreement No 76, dated 4 February 1999, between the State Property Fund of Ukraine and *Naftogaz*, the former granted *Naftogaz* the right to use the property for natural gas storage. According to the agreement, the assets remain on the balance sheet of the State Property Fund of Ukraine and *Naftogaz* may transfer the assets for use to companies within its structures. Accordingly, *Naftogaz* and *Ukrtransgaz* concluded an agreement¹⁵ whereby *Ukrtransgaz* is entitled to independently take decisions on all issues related to the use of the assets.

Naftogaz performs the following activities directly or indirectly through its subsidiaries:

- *Naftohazenerhoservis*: electricity production;
- *Ukravtohoz*: supply of natural gas (operation of automobile gas filling compressor stations);
- *Naftohaz teplo LLC*: electricity production, distribution of electricity, supply of natural gas, production of thermal energy at TPPs, nuclear power plants and CHPs;
- *JSC Chornomornaftogaz*: transportation of natural gas, oil gas and gas (methane) of coal deposits through pipelines, storage of natural gas, gas (methane) of coal deposits, production of gas and gas condensate;
- *JSC Ukgazvydobuvannya*: electricity production, supply of natural gas and gas condensate
- *JSC Ukrtransnafta*: transport of oil through main pipelines, transportation of petroleum products through main pipelines;
- *Gas supply company Naftogaz of Ukraine LLC*: supply of natural gas, electricity production;
- *OJSC for gas supply and gasification Kirovogradgaz*: distribution of natural gas;
- *PJSC Ukrnafta*: production (industrial development of deposits) of hydrocarbons.

Ukrtransgaz itself owns 38% of the authorised capital in *LLC Koheneratsiini Tekhnologii UTG* and 0.12% of the shares of *PJSC Enzym*, none of them active on any natural gas market.

¹³ Division "Production repair and technical enterprise "Ukrigasenergoservice".

¹⁴ Division "Ukgaztekhzvyazok".

¹⁵ Agreement No 19/275, dated 17 June 1999.

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II. The Preliminary Decision

Article 47¹ of the Law of Ukraine on the Natural Gas Market transposes Article 3a of the Gas Regulation and stipulates the obligation of NEURC in the framework of the SSO certification to assess compliance with the requirements for avoiding risks to the security of natural gas supply in Ukraine or within the Energy Community as well as any mitigation of such risks. Further details are laid down in the Procedure for Certification of the Gas Storage Operator, adopted by NEUR Resolution No 110, dated 24 January 2023.

On 27 January 2023, *Ukrtransgaz* submitted its application for certification as SSO to NEURC. On 3 March 2023, NEURC submitted to the Secretariat its Preliminary Decision on the certification of *Ukrtransgaz* as SSO, dated 1 March 2023.

In its operative part, the Preliminary Decision certifies *Ukrtransgaz* as SSO and imposes the obligations on *Ukrtransgaz* to:

“1) implement measures to conclude respective Agreement on the use of state property, necessary for the economic activity of gas storage, conducted by JSC “UKRTRANSRAZ”, with the Ministry of Energy or another state body determined by the Cabinet of Ministers of Ukraine;

2) Immediately notify NEURC and the Ministry of Energy if the status of such business relations changes or upon receipt of requests to inject (withdraw) natural gas in/out of the gas storage facilities or declaration of the natural gas transferred through customs border of Ukraine from business entities, the final beneficiaries of which are citizens or residents of a state recognized by the Verkhovna Rada of Ukraine as an aggressor-state or an occupier-state (including Moldovagaz JSC).”

III. Assessment of the Preliminary Decision

Security of energy supply is an essential element of public security and is therefore inherently connected to the efficient functioning of the internal market in gas.¹⁶ Article 3a(3) of the Gas Regulation therefore requires the certifying authority to take into account any security of gas supply risk at national, or Energy Community level as well as any mitigation of such risk, resulting, inter alia, from:

- ownership, supply or other commercial relationships that could negatively affect the incentives and the ability of the SSO to fill the underground gas storage facility;
- the rights and obligations of the Energy Community with respect to a third country arising under international law;

¹⁶ Recital 22 Gas Directive.

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- the rights and obligations of the Contracting Parties concerned with respect to a third country arising under agreements concluded by the Contracting Parties concerned with one or more third countries, in so far as those agreements comply with Energy Community law; or
- any other specific facts and circumstances of the case.

Certification is to be refused if a person directly or indirectly controls, or exercises any right over, the SSO could endanger the security of energy supply or the essential security interests of the Energy Community or of any Contracting Party. In the following, the Secretariat will assess whether there are any elements that could negatively affect the incentives and the ability of the SSO *Ukrtransgaz* to fill the gas storage facility.

1. Ownership

In its Preliminary Decision, NEURC finds that based on the ownership structure and the composition of the bodies of *Ukrtransgaz* and *Naftogaz*, no relations of ownership and/or control which may pose a risk to the security of natural gas supply exist.

The Gas Regulation tasks the certifying authority to assess whether ownership relations raise any security of gas supply risk at national or Energy Community level. This requires an analysis of whether due to the activities of the parent company of the SSO including its shareholder(s), as well as of the activities of the shareholdings of the SSO itself, the shareholders' interests pose a risk to security of supply. Security of supply is understood as the uninterrupted physical availability of energy products on the market, at a price which is affordable for all consumers.¹⁷ No such risk results from ownership if the SSO as well as entities and structures directly and indirectly controlling it do not have any commercial, strategic or political interests running counter to securing Ukraine's and the Energy Community's energy supply.

The term 'control' is defined in Article 2(36) of the Gas Directive as "*any rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by: (a) ownership or the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.*"¹⁸ The rights include in particular the power to exercise voting rights, the holding of a majority share and the right to act as, as well as the power to appoint members of the company's corporate bodies and those legally representing the company.¹⁹

¹⁷ EU Green Paper - Towards a European strategy for the security of energy supply, 19.11.2000, COM(2000) 769 final.

¹⁸ This definition is taken from the Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings and should be interpreted accordingly (recital 10 of the Gas Directive).

¹⁹ Article 9 of the Gas Directive.

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Ukrtransgaz' sole shareholder *Naftogaz* is fully owned by the Ukrainian State. According to the charter of *Ukrtransgaz*²⁰, its general meeting (consisting of its sole shareholder *Naftogaz* elects the director general as executive body.²¹ According to the charter of *Naftogaz*²², its general meeting (comprising its sole shareholder, the Cabinet of Ministers of Ukraine) selects the members of the supervisory board competent to elect and dismiss the members of the executive board.²³ It follows that the State exclusively and directly exercises control over *Naftogaz* and ultimately *Ukrtransgaz*. There are no indications that the state of Ukraine, besides maximizing the profits of its public companies, has other interests than securing the country's energy supply.

As far as the shareholdings of *Ukrtransgaz* itself are concerned, they are limited to minority shareholding in two companies not active on any natural gas market. The shareholding of *Ukrtransgaz* itself does not pose a risk to security of gas supply in Ukraine and the Energy Community.

Based on the above, the Secretariat considers that the ownership structure of *Ukrtransgaz* and its own shareholding in two subsidiaries does not give rise to security of supply risks.

2. Supply or other commercial relationships

Assessing possible security of supply risks at national or Energy Community level resulting from supply or other commercial relationships that could negatively affect the incentives and the ability of *Ukrtransgaz* to fill the underground gas storage facility, NEURC elaborates on the regulatory framework under which *Ukrtransgaz* performs its activity (regulated access²⁴) and the level of utilisation and sources of the volumes stored in *Ukrtransgaz*' facilities. NEURC explains that [REDACTED] of the total natural gas volume stored in its facilities and [REDACTED] of the total designed active volume belong to business entities owned or controlled by the Ukrainian State, and concludes that no such relations posing risks to security of supply exist.

The Gas Regulation tasks the certifying authority to assess whether any security of gas supply risks exists at national or Energy Community level due to supply or other commercial relationships that could negatively affect the incentives and the ability of the SSO to fill its underground gas storage facilities. Regulation (EU) 2017/1938 as amended by Regulation of the European Parliament and of the Council (EU) 2022/1032 with regard to gas storage²⁵ requires Contracting Parties to both achieve

²⁰ No 431, dated 16 December 2020.

²¹ Decision of *NJSC Naftogaz of Ukraine* No 569, dated 6 January 2023.

²² Resolution of Cabinet of Ministers of Ukraine No 1044, dated 14 December 2016, amended by Resolution of Cabinet of Ministers No 1233, dated 3 November 2022.

²³ Order of the Cabinet of Ministers of Ukraine No 55-p, dated 24 September 2023; Resolution of Cabinet of Ministers of Ukraine No 983-p, dated 3 November 2022; Resolution of Cabinet of Ministers of Ukraine No 983-p, dated 3 November 2022; Resolution of Cabinet of Ministers of Ukraine NO 1155-p, dated 28 September 2021 and 6 January 2023.

²⁴ NEURC Resolution No 2495, dated 30 September 2015.

²⁵ Incorporated and adapted by the Ministerial Council Decision 2021/15/MC-EnC of 30 November 2021 on Annex I to the Treaty establishing the Energy Community and adapting and implementing Regulation (EU) 2017/1938 concerning

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concur with NEURC's view that due to inactive status of this user, its very limited volumes and the solid regulatory framework enforced by NEURC, this commercial relationship does not pose a relevant risk to security of energy supply at national or regional level.

b. As regards the regulatory framework in place and its ability to ensure security of gas supply or to mitigate any risks thereto, the Gas Regulation requires the SSO to have capacity allocation procedures in place which effectively make the maximum storage capacities available to market participants, and to include measures aimed at preventing capacity-hoarding. The Ukrainian regulatory framework transposes these principles most notably via the Storage Code, which inter alia requires effective use of gas storage capacities, congestion management rules and other third-party related services, and via the Standard Storage Contract, which operationalises these requirements. The Storage Code stipulates in particular that in case no free storage capacity is available, and an allocated annual capacity is used less than 80%, the user is required to release the unused capacity.²⁶ The Secretariat has no reason to doubt that these measures present an additional safeguard against capacity hoarding, and that they are applied in practice.

c. Based on the above, the Secretariat agrees with the NEURC's conclusion that supply and other commercial relationships do not pose a risk to security of supply by negatively affecting *Ukrtransgaz*' ability and incentives to fill the gas storage facilities.

3. Rights and obligations of the Energy Community with respect to a third country arising under international law

The Preliminary Decision does not assess any security of supply risks at national or Energy Community level resulting from rights and obligations of the Energy Community with respect to a third country arising under international law.

Although the Energy Community as an international organisation is subject to public international law, it does currently not have any obligations or commitments towards third countries. Therefore, the Secretariat confirms that there is no security of gas supply risk resulting from any rights and obligations of the Energy Community with respect to a third country.

²⁶ NEURC Resolution No 2495 dated 30 September 2015, available at <https://zakon.rada.gov.ua/laws/show/z1380-15#Text>

4. Rights and obligations of Ukraine with respect to a third country arising under an agreement

In its Preliminary Decision, NEURC refers to the

In the absence of any valid or active obligation or commitment of Ukraine and its public companies towards third countries which could directly or indirectly affect *Ukrtransgaz*' capacities to store gas, the Secretariat concurs that there is no security of gas supply risk in this respect.

5. Any other specific facts and circumstances

NEURC's Preliminary Decision correctly emphasizes that in spite of the illegal occupation of parts of the Ukrainian territory by Russian troops, the gas storage facilities of *Ukrtransgaz* are located on the territory controlled by Ukraine.

That said, the Secretariat recalls that after the full-scale Russian invasion, the Ministry of Energy has introduced a prohibition of any gas exports from Ukraine, save for gas transiting Ukraine.²⁷ This order was later amended by the Cabinet of Ministers to limit the gas export ban to gas of Ukrainian origin.²⁸ The current resolution essentially bans only domestically produced gas. Gas stored in storage facilities under the special customs warehouse regime has not been cleared under Ukrainian customs and is thus considered as foreign gas.

Without prejudice to the question of its compliance with the Energy Community Treaty, an export ban may negatively affect security of supply in the Energy Community since it inhibits gas producers to sell their gas volumes beyond the borders of Ukraine. Historically, *Naftogaz* produces around three quarters of the national gas output and has been selling this gas to satisfy domestic district heating and household customers under public service obligations. Domestic private producers, whose output has been approximately one quarter of the total domestic natural gas production, sold their quantities exclusively to industrial customers on the national market. However, since the full-scale invasion, industry demand drastically dropped, leaving the local producers with excessive gas which they could offer abroad, most notably to Moldova, which has diversified from Russian supplies

²⁷ <https://zakon.rada.gov.ua/rada/show/v0099922-22#Text>

²⁸ <https://zakon.rada.gov.ua/rada/show/666-2022-%D0%BF#n2>

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in 2022. Exports of Ukrainian gas in storage to Moldova and other Energy Community countries could be beneficial for their security of supply.

The Secretariat considers that the current situation, with the gas stored by foreign customers under the customs warehouse regime excluded from the export prohibition's scope, does not raise serious concerns with regard to the risk for security of supply in the respective countries of origin of those customers. The Secretariat reserves the right to review its Opinion in case the situation changes.

IV. Conclusion

Based on the above, the Secretariat concludes that *Ukrtransgaz* currently complies with the provisions laid down in Article 3a(3) of the Gas Regulation and that a risk to gas security of supply at national or Energy Community level that would arise from ownership, supply or other commercial relationships of *Ukrtransgaz* as well as other facts and circumstances currently does not exist.

According to Article 3a(6) of the Gas Regulation, NEURC shall comply with the Secretariat's Opinion and issue a certification decision within 25 working days of receipt of the Opinion.

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

Vienna, 31 March 2023



Artur Lorkowski
Director



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