
MEMO

To: Naftogaz
From: WR
Date: Oslo, 2 June 2015
Partner in charge: Dag Mjaaland

Facilitating Reverse Flow Capacity from West to East

1 INTRODUCTION AND SUMMARY

Eustream, the transmission system operator ("TSO") of the Slovak gas transmission system ("GTS"), has declined to enter into an interconnection agreement with Ukrtransgaz, the TSO of the Ukrainian GTS. Eustream has, at a meeting of Slovak, Hungarian, Polish, Romanian and Ukrainian TSOs, chaired by the European Commission, explained that they cannot sign an interconnection agreement with Ukrtransgaz for the following reasons:

- (1) Gazprom Export's exclusive rights under a legacy agreement between Eustream and Gazprom regulating the utilisation of the Uzhgorod/ Veľké Kapušany interconnection point (the "interconnection legacy contract"). Under the interconnection legacy contract, Gazprom Export is given the right to control the pipelines between the Uzhgorod and Veľké Kapušany gas metering stations on the Ukrainian/Slovak border. Also, the interconnection legacy contract allows Gazprom Export to exchange shipping code pairs with Eustream, effectively making Gazprom Export the matching partner of Eustream.
- (2) Ukrtransgaz cannot perform all necessary functions of a TSO because Ukrtransgaz cannot provide shipping code pairs for Gazprom's gas flow.

There are five pipelines connecting the Ukrainian and Slovak gas transmission systems. Four of these pipelines, with a combined capacity of 92.6 bcm/year are treated as one interconnection point. Under a legacy booking contract separate from the interconnection legacy contract, Gazprom has booked approximately 74 bcm/year of East to West capacity in these pipelines, effectively reserving the entire 92.6 bcm/year for East to West flows. A fifth pipeline with a capacity of 14.5 bcm/year very close to the first four and connected to the same compressor station is treated as a separate interconnection point. Treating all five pipelines as one interconnection point and allocating flows more efficiently between them may increase West to East capacity between Slovakia and Ukraine from 14.5 bcm/year to approximately 24 bcm/year without affecting Gazprom's legacy booking.

The relevant facts are described in further detail in Section 2 below.

On this background, we have been asked to consider the following four questions:

- (1) Is the interconnection legacy contract between Eustream and Gazprom compliant with the EU *acquis communautaire* on energy and competition law?

- (2) If the interconnection legacy contract is not compliant with EU *acquis*, which legal actions are available to terminate the interconnection legacy contract or to make Eustream sign the interconnection agreement with Ukrtransgaz?
- (3) Is Gazprom's refusal to provide Ukrtransgaz with shipping code pairs a breach of EU energy or competition law?
- (4) Whether there is a legal basis to require Eustream to rearrange physical flows on different pipelines (provided it is technically feasible) in order to maximise the capacity available for physical reverse flows from West to East? This is essentially a question of whether the pipelines between the Uzhgorod/ Veľké Kapušany gas metering stations and the pipeline between Uzhgorod/Budince gas metering stations can be better utilised.

It should be noted that the booking legacy contract between Eustream and Gazprom also contributes to block the possibility for eastward physical reverse flow at the Ukrainian/Slovak border. The question of access to booked, but unutilised, capacity is dealt with in a separate Memo of 20 March 2015, and is not further discussed in this memo.

The applicable legal framework, EU energy and competition law, is addressed in Section 3 below.

With regard to the first question, the interconnection legacy contract is directly in violation of the unbundling requirements of the Third Gas Directive and in breach of the principle that interconnection agreements shall be entered into between TSOs. Legacy contracts are not protected by EU legislation if they are not in compliance with the requirements of the Third Energy Package. As such, Eustream is not bound by the interconnection legacy contract and cannot refuse to enter into an interconnection agreement with Ukrtransgaz on this basis, cf. Section 4.2 below.

As to the second question of which legal actions are available to ensure that Eustream and Ukrtransgaz enter into an interconnection agreement, it should be noted that Eustream is obliged to do so under EU energy legislation. Pursuant to Article 24 of Regulation 715/2009, the responsibility to enforce the provisions of the Regulation is allocated to the national level. If Eustream continues to refuse to enter into an interconnection agreement with Ukrtransgaz, this should be brought to the attention of the Slovak regulator, URSO, as a possible breach of Eustream's obligations under Article 12(2) of the Regulation and for possible enforcement procedures under national legislation, cf. Section 4.2 below.

Gazprom Export's role based on the legacy agreement between Eustream and Gazprom Export should also be brought to the attention of the Slovak competition authorities, the Antimonopoly Office of the Slovak Republic, and in particular the European Commission, both DG Energy and DG Competition. The interconnection legacy contract obstructs the establishment of an internal energy market. As such, the interconnection legacy contract should be seen in connection with other anti-competitive and abusive practices on the part of Gazprom currently under investigation by DG Competition, cf. Section 4.3 below.

The third question of whether Gazprom's refusal to provide Ukrtransgaz with shipping code pairs is in breach of EU energy or competition law, can be answered in the affirmative, cf. Section 5 below. Gazprom and its affiliate Gazprom Export's refusal to submit shipper code pairs to Ukrtransgaz, the designated TSO of the Ukrainian gas transmission system, clearly undermines the organisational requirements under and violates EU energy law. It is also clearly an abuse of Gazprom's position in the Ukrainian and Slovak gas markets, cf. Article 102 TFEU. If Gazprom or Eustream continue to refuse to

provide Ukrtransgaz with the Shipper Code Pairs necessary to identify Gazprom and its Counterparties, the issue should first and foremost be brought to the attention of the Slovak regulator, URSO, with a request that both Gazprom and Eustream are compelled to submit the shipper codes to Ukrtransgaz.

In respect of the fourth question, the TSO's obligation to optimise the management of the system, cf. Article 12(2) of Regulation 715/2009, and to make maximum capacity at entry and exit point available to market participant, cf. Article 16(1) of Regulation 75/2009, arguably implies an obligation to rearrange the physical flows between the existing pipelines in order to free up physical reverse flow capacity. In other words, the EU secondary energy legislation obliges the TSOs to an overall systemic approach in their utilisation of the transmission system. We show below that the physical reverse flow capacity can be increased by 9.5 bcm/year simply by rearranging flows between existing pipelines at the Ukrainian/Slovak border without affecting the capacity bookings for the shippers. Provided that it is technically feasible to operate the gas metering stations Veľké Kapušany and Budince as one interconnection point, it may be argued that the Slovak TSO fails to comply with its obligation to provide maximum capacity and to optimise the management of the network by not ensuring better overall utilisation of the pipelines at Veľké Kapušany and Budince, cf. Section 6 below.

2 THE RELEVANT FACTS

The gas metering station Uzhgorod on the Ukrainian side and the gas metering stations Veľké Kapušany and Budince on the Slovak side, are connected by 5 parallel pipelines with a total capacity of 107.1 bcm/year.

Uzhgorod and Veľké Kapušany are connected by four parallel pipelines having a total capacity of 92.6 bcm/year, of which two have a capacity of 22.8 bcm/year, one has a capacity of 23 bcm/year, and the fourth has a capacity of 24 bcm/year. According to ENTSOG's map over the European Gas Network 2014, the Veľké Kapušany interconnection point is bidirectional, i.e. flow can be offered in both directions (both East-to-West and West-to-East). However, firm capacity is only offered in one direction, from East to West.

In order to allow for physical reverse flow from West to East, Ukraine built the fifth pipeline between Uzhgorod and Budince. The fifth pipeline, which opened in September 2014, has a capacity of 14.5 bcm/year. The pipeline is bidirectional, but firm capacity is offered in only one direction, i.e. from West to East.

Under the booking legacy contract, Gazprom has booked the majority of the capacity available in the four Uzhgorod- Veľké Kapušany pipelines, i.e. 74 bcm/year East-to-West transmission capacity. Through this capacity reservation, Gazprom is effectively blocking the possibility for physical reverse flow from West to East through these pipelines. As mentioned above, the pipelines are bidirectional. However, we understand that once a capacity reservation has been made in one direction in a bidirectional pipeline, gas flows cannot be sent in the opposite direction. Given the capacities in the individual pipelines, a westward capacity booking of 74 bcm/year therefore implies that all the pipelines will be utilised for westward gas flows. Thus, if we assume that the full capacity of each pipeline is utilised before the remaining flow is sent through another pipeline, a capacity booking of 74 bcm/year will fill up the pipeline with a capacity of 23 bcm/year as well as both the pipelines with a capacity of 22.8 bcm/year, leaving an effective westward capacity reservation of 5.4 bcm/year in the last pipeline which has a capacity of 24 bcm/year. In other words, an effective westward capacity reservation of 5.4 bcm/year effectively locks a bidirectional pipeline with a total capacity of 24 bcm/year to westward flows and prevents physical reverse flows eastward. The 5.4 bcm/year could be sent through the 14.5

bcm/year Uzhgorod-Budince pipeline, increasing available physical West-to-East transmission capacity between Slovakia and Ukraine to 24 bcm/year from the present 14.5 bcm/year.

The gas metering stations Veľké Kapušany and Budince are close to each other and connected to the same compressor station. Ukrtransgaz and Naftogaz are of the opinion that technically these gas metering stations can be combined into one interconnection point, in order to facilitate more efficient allocation of physical flows between the five pipes connecting Ukraine and Slovakia.

While Ukrtransgaz and Eustream have entered into a separate interconnection agreement concerning the utilisation of the fifth pipeline, Gazprom and its affiliates in effect control the four main pipelines and the major capacity at the Veľké Kapušany interconnection point. As mentioned in Section 1 above, a legacy contract between Gazprom and Eustream grants Gazprom Export exclusive rights to physically control the four main pipelines between Ukraine and Slovakia, with Gazprom Export providing shipper code pairs only to Eustream. This must be seen in connection with the fact that Gazprom Export acts as a "super-operator" of the Ukrainian natural gas transit capacities and flows, cf. the Energy Community Secretariat's report *Gas Transit in Ukraine – Preliminary EnC Compliance Report* of 3 December 2014 (the "Preliminary Compliance Report"). Gazprom Export's role as super-operator of the Ukrainian gas transit system is based on Contract No. TKGU dated 19 January 2009 on Volumes and Conditions for the Transit of Natural Gas through the Territory of Ukraine from 2009 to 2019 ("the Transit Contract") and the Technical Agreement and Addenda which forms an integral part of the Transit Contract. Together, this implies that Gazprom Export carries out the functions of a transmission system operator at the interconnection point on the Ukrainian/Slovak border.

The matching of gas flow at interconnection points between adjacent systems is based on the exchange of Shipper Codes. Shipper Codes are the unique identification for shippers issued in a transport system by the system operator, and are used in the nomination procedures of sellers and buyers under gas sales agreements to allow the system operators to balance the physical gas flows when sellers nominate their deliveries and buyers nominate their off-take. As the nominations contain the Shipper Codes, the system operator can identify the downstream shipper and verify that he has the necessary transportation capacity available. Matching is carried out by and between the TSOs of adjacent transmission systems. However, as Gazprom refuses to inform Ukrtransgaz of its Shipper Code and the Shipper Codes of its counterparties, Ukrtransgaz is effectively hindered from carrying out one of its central functions as a TSO, i.e. to function as a matching partner.

Gazprom applies the same strategy as described above for other interconnection points at the Ukrainian western border. However, the Uzhgorod/Veľké Kapušany interconnection point is of particular importance due to the very large technical capacity available. Also, the majority of the gas flows for supply of the major markets in Europe pass through the Uzhgorod/Veľké Kapušany interconnection point. The interconnection point between the gas transmission systems of Slovakia and Ukraine respectively is essential for the possibility of reverse flows from/via Slovakia to Ukraine. By controlling the interconnection point at the Ukrainian/Slovak border, viz. Uzhgorod/Veľké Kapušany, Gazprom is able to obstruct the development of a competitive and liquid market for natural gas, both for Slovakia and Ukraine and other countries affected by the lack of gas transit to and from Slovakia and Ukraine, notably Bulgaria, Hungary, Poland and Romania, who are prevented from receiving reverse flow supplies from Europe via Ukraine.

On 22 April 2015 the European Commission sent a Statement of Objections to Gazprom alleging that some of its business practices in Central and Eastern European gas markets constitute an abuse of its

dominant market position in breach of EU antitrust rules. According to the Commission's press release its preliminary view is that "*Gazprom is breaking EU antitrust rules by pursuing an overall strategy to partition Central and Eastern European gas markets, for example by reducing its customers' ability to resell the gas cross-border*". In particular, the Commission points out that the territorial restrictions may result in higher gas prices and allow Gazprom to pursue an unfair pricing policy in five Member States, i.e. Bulgaria, Estonia, Latvia, Lithuania and Poland.

Gazprom's hold on Veľké Kapušany is a prime example of such a market partition strategy. Removing Gazprom as super-operator/matching partner as well as freeing up unutilised capacity at Veľké Kapušany, will facilitate free flow of gas, and will e.g. allow a possibility for fairly priced gas to reach Poland and Bulgaria through Ukraine.

3 THE APPLICABLE LEGAL FRAMEWORK: EU ENERGY AND COMPETITION LAW

Slovakia is an EU Member State and thus bound by EU competition law and related energy law. In July 2012, Slovakia adopted legislation to transpose the Third Energy Package into its national law, cf. the Commission's Progress Report 2014. ACER has also deemed Slovakia to have fulfilled its obligation to implement the revised CMP Guidelines within the fixed deadline (i.e. by 1 October 2013), cf. CMP Implementation Report 2014.

Ukraine is bound by the *acquis communautaire* on energy and competition as a member of the Energy Community, including the Third Energy Package. The Energy Community Treaty extends the EU internal energy market and the EU *acquis communautaire* on energy and competition in the field of energy to the territories of its Contracting Parties.

The adaptations made to the Third Package by Decision No 2011/02/MC-EnC implementing the Third Energy Package in the Energy Community Treaty, caused interconnectors to be defined as transmission lines or pipelines crossing a border between *Contracting Parties*. Within the European Union, the corresponding definition covers interconnectors between Member States. Both the Ministerial Council of the Energy Community and the European Commission have considered the Treaty to apply between EU Member States and Contracting Parties regardless, cf. Policy Guidelines by the Energy Community Secretariat on the application of the Energy Community *acquis* between the Contracting Parties and the European Union. This understanding is in line with as well as a precondition for fulfilling the objective of the Treaty.

EU energy law does not protect legacy contracts. If the legacy contracts are not compliant with the requirements of EU energy law, they will have to be adapted. It follows from case law that the fact that the interconnection legacy contract and the booking legacy contract were entered into prior to the adoption of the Third Energy Package and its transposition into Slovak legislation, does not prevent the application of the Directive, the Regulation and delegated acts adopted on the basis of these, cf. Case-17/03 Vereining voor Energie, Milieu en Water, Amsterdam Power Exchange Spotmarket BV and Eneco NV v Directeur van de Dienst uitvoering en toezicht energie [2005] ECR I-5016.

In any case, the practices in question, affect competition within and between several EU Member States of the European Union. Thus, the practices clearly affects trade within the EU under both Article 101 and 102 TFEU regardless of the above.

4 GAZPROM EXPORT'S ROLE AS TRANSMISSION SYSTEM OPERATOR AT THE INTERCONNECTION POINT ON THE UKRAINIAN/SLOVAK BORDER BASED ON A LEGACY CONTRACT BETWEEN GAZPROM AND EUSTREAM

4.1 Introduction

Eustream is the designated TSO of the Slovak transmission system. Still, as mentioned in Section 2 above, Gazprom Export carries out the functions of a transmission system operator at the interconnection point on the Ukrainian/Slovak border based on the legacy contract between Eustream and Gazprom. Gazprom Export's role is clearly contrary to the organisational requirements in EU energy law, cf. Section 4.2 below, and in violation of EU competition law, cf. Section 4.3 below.

4.2 Gazprom Export's rights under the legacy contract is in breach of organisational requirements under EU energy law

The first question listed in Section 1 above, is whether the interconnection legacy contract between Eustream and Gazprom is compliant with the EU *acquis communautaire* on energy and competition law. The answer is no. Gazprom Export's role at the Ukrainian/Slovak interconnection point is in clear violation of the organisational requirements under EU energy legislation.

The rights granted to Gazprom Export under the interconnection legacy agreement between Eustream and Gazprom are contrary to the unbundling requirements of Directive 2009/73/EC. According to Article 9(1)(b)(i) of the Directive, the same person cannot "control" generation, *production and/or supply activities*, and at the same time "control" or exercise "any right" over a TSO or *a transmission system*.

In this particular case, Gazprom Export, which is a supplier, exercises the management of the relevant interconnection point between the Ukrainian and Slovak grids on a contractual basis. While the Directive mainly focuses on the possibility of exercising decisive influence through corporate measures in its definitions of control, cf. Article 2(36), and "any rights", cf. Article 9(2), the definition is clearly not exhaustive, cf. "in particular", and decisive influence on a contractual basis is obviously just as problematic. If not, the aim of ensuring that network management is separated from energy generation or supply activities will not be fulfilled. In practice, this means that gas producers and suppliers like Gazprom and Gazprom Export are not allowed to operate a transmission network.

The rights granted to Gazprom Export under the interconnection legacy contract between Eustream and Gazprom are in breach of the principle that interconnection agreements must be entered into between adjacent TSOs. This principle follows directly from the TSOs operational responsibility of the transmission network, but can also be said to follow from the principle of unbundling, i.e. separating network management from energy generation or supply activities.

As mentioned in Section 3 above, legacy contracts are not protected by EU legislation provided that they are not in compliance with the requirements of the Third Energy Package. In this case, the interconnection legacy contract is directly in violation of the unbundling requirements of the Third Gas Directive and in breach of the principle that interconnection agreements shall be entered into between TSOs. As such, Eustream is not bound by the interconnection legacy contract and cannot refuse to enter into an interconnection agreement with Ukrtransgaz on this basis.

The fact that Gazprom Export functions as a TSO at Veľké Kapušany, essentially means that Eustream does not fulfil its obligations as TSO of the Slovak GTS. Moreover, and of particular importance in this context, is that Eustream also fails to fulfil its obligation to cooperate with the TSO of an adjacent system by entering into an interconnection agreement.

The transmission system operator ("*TSO*") has the operational responsibility for the transmission system, cf. Articles 2(4) and 13(1)(a) of Directive 2009/73/EC (the "Third Gas Directive"), and is tasked with facilitating the system's interoperability with adjacent transmission systems. Article 12 of Regulation 715/2009 regulates the regional cooperation between TSOs. Under Article 12(2) of Regulation (EC) No 715/2009 ("*Regulation 715/2009*") TSOs are, on a general basis, obliged to promote operational arrangements in order to ensure the optimum management of the network.

The obligation to promote operational arrangements to ensure the optimum management of the network pursuant to Article 12(2) is quite general in nature. In order to determine if and to what extent a TSO is bound by this provision to enter into an interconnection agreement, important factors to consider are both the objective of the provision itself, the purpose of the interconnection agreement in light of this objective, and whether the general obligation has been specified and/or clarified in this regard by subsequent (delegated) legislation, case law and/or administrative practices.

Article 12(2) of Regulation 715/2009 must be understood in light of the objective to provide for the creation of interconnection capacities to achieve the objective of a well-functioning, efficient and open internal market. In order to achieve this objective, increased cooperation and coordination amongst TSOs is required.

Similarly, interconnection agreements are normally established by two adjacent TSOs and describe how to facilitate interoperability of the grids. In other words, the main purpose of such agreements is precisely to establish operational arrangements to ensure the optimum management of the network.

In order to facilitate cross-border transport through the application of harmonised principles, ACER on 26 July 2012 adopted Framework Guidelines on Interoperability and Data Exchange Rules for European Gas Transmission Networks (the "*Framework Guidelines*"). Based on the principles on the establishment and/or amendment of interconnection agreements established by the Framework Guidelines, the Commission on 30 April 2015 adopted a network code, cf. Commission Regulation (EU) 2015/703 of 30 April 2015 establishing a network code on interoperability and data exchange rules (the "*Network Code*"). The Network Code entered into force on 21 May 2015 and will apply from 1 May 2016.

When interpreting the general obligations of TSOs to promote operational arrangements to ensure the optimum management of the network, Article 12(2) of Regulation 715/2009 must be read in conjunction with the Framework Guidelines and the Network Code. From a formal legal standpoint, the Framework Guidelines only establish the regulatory policies on which the Network Codes developed by ENTSOG and adopted by the European Commission shall be based. Commission Regulation 703/2015 will only apply from 1 May 2016. Still, ACER's Framework Guidelines and Commission Regulation 703/2015 are important factors of interpretation. The Framework Guidelines and the Network Code are developed by EU institutions tasked with developing and adopting delegated legislation with an aim to establish a harmonised approach at the regional level by requiring TSOs to set up a regional structure within the overall cooperation structure. They are developed and adopted in accordance with Article 12(1), cf. Articles 6 and 8, and are intended to specify and clarify the general obligation pursuant to Article 12(2).

While ACER's Framework Guidelines expressly state that individual interconnection agreements shall be established on a mandatory basis by all concerned TSOs at all interconnection points, Article 3 of Commission Regulation 703/2015 requires adjacent transmission system operators to enter into an interconnection agreement in respect of each interconnection point and stipulates the minimum terms and conditions to be covered by such an agreement.

Based on the above, TSOs of adjacent systems are obliged to enter into an interconnection agreement. That such agreements are entered into by TSOs is, as explained above, a direct consequence of the unbundling requirements of Article 9 of Directive 2009/73/EC.

Eustream is obliged to enter into an interconnection agreement with Ukrtransgaz. If Eustream continues to refuse to enter into an interconnection agreement with Ukrtransgaz, this should be brought to the attention of the Slovak regulator, URSO, as a possible breach of Eustream's obligations under Article 12(2) of the Regulation and for possible enforcement procedures under national legislation.

4.3 Gazprom obstructs the development of competitive and liquid markets on both sides of the interconnection point in violation of EU competition law

The interconnection legacy contract between Eustream and Gazprom is also in breach of Articles 101 and 102 TFEU.

As mentioned in Section 2 above, the Commission recently sent Gazprom a Statement of Objection because it suspects that Gazprom is abusing its dominant market position in upstream gas supply markets in Central and Eastern European Member States. The anticompetitive and abusive behaviour Gazprom is suspected of, is *inter alia* to have divided gas markets by hindering the free flow of gas across borders and to have prevented the diversification of supply of gas. In our view, the interconnection legacy contract between Eustream and Gazprom has such anticompetitive effects based on the following:

Gazprom, through Gazprom Export, controls the gas flows into and out of the Ukrainian GTS. Under the Transit Contract between Naftogaz and Gazprom, the exact same volumes of natural gas that enter into the Ukrainian GTS at the entry-exit point at the Russian/Ukrainian border shall be taken out at the entry-exit points at the western border of Ukraine - and it is specified which gas volumes are to be delivered at the entry-exit point at the Ukrainian/Slovak border and which at the other entry-exit points.

In other words, the Ukrainian TSO has no control over the transit of natural gas volumes through Ukrainian territory. Based on this fact, the Energy Community Secretariat, in its Preliminary Compliance Report, page 14, found that the Gazprom Export acts in the capacity of a so-called "super-operator" of the Ukrainian natural gas transit capacities and flows, and stated that this may be considered as non-compliant with the EU requirements for operational responsibilities, decision-making powers and independence of transmission system operators, cf. page 1.

In addition, Gazprom, through Gazprom Export, functions as a TSO at the entry-exit point at the Ukrainian/Slovak border through the interconnection legacy contract with Eustream. In its Preliminary Compliance Report, page 11, the Energy Community Secretariat reports that the implementation of the Transit Contract between Naftogaz and Gazprom has been associated with a practice where Gazprom Export has entered into interconnection agreements with operators of transmission systems neighbouring the Ukrainian GTS and, *inter alia*, is acting as the matching partner in respect of gas flows

from Ukraine. As such, Gazprom Export in effect controls the capacity utilisation of and the allocation of gas flows at the interconnection point at the Ukrainian/Slovak border.

According to ACER's Framework Guidelines, it is an explicit requirement that the Network Code ensures that an interconnection agreement imposes no restriction on cross-border trade and that it promotes the development of competitive and liquid markets on both sides of the interconnection points. This requirement may be said to operationalize Articles 101 and 102 TFEU.

By acting as a "super-operator" of the Ukrainian gas transit capacities and flows, including as an operator of the interconnection point at the Ukrainian/Slovak border, Gazprom Export has a position which is both restrictive of competition and abusive. This position is only possible as a result of Gazprom's dominant position within gas sales.

The arrangement between Eustream and Gazprom is in violation of both Article 101 and Article 102 TFEU, as it obstructs the development of competitive and liquid markets on both sides of the interconnection point by its mere existence.

Furthermore, the agreement between Eustream and Gazprom also facilitates restrictive and abusive practices on the part of Gazprom. An important example of restrictive and abusive practices which can be seen in the context of the agreement between Eustream and Gazprom Export, is lack of access to West-to-East capacity between Slovakia and Ukraine. As mentioned in Section 2 above and as discussed in Section 6 below, the interconnection point between the gas transmission systems of Slovakia and Ukraine is essential for the possibility of reverse flows from/via Slovakia to Ukraine.

Article 101 TFEU applies to the interconnection legacy contract between Eustream and Gazprom Export as such, because of its anti-competitive effects. Article 102 TFEU applies as the agreement is clearly a consequence of, and only possible because of, Gazprom's dominant position in the Ukrainian and Slovak gas markets.

5 THE OBLIGATION TO PROVIDE SHIPPER CODE PAIRS

The third question, cf. Section 1 above, is whether Gazprom's refusal to provide Ukrtransgaz with shipper code pairs is a breach of EU energy and/or competition law.

As explained in Section 2 above, the matching of gas flow at interconnection points between adjacent systems is based on the exchange of shipper code pairs. In order to allow the system operators to balance the physical gas flows when sellers nominate their deliveries and buyers nominate their off-take, sellers and buyers under gas sales agreements use the shipper code pairs in the nomination procedures.

Access to shipper code pairs is also an important prerequisite for the provision of virtual reverse flow. Virtual reverse flow essentially means that the gas transmission system operators are netting the natural gas quantities contracted for transmission in the two opposite directions. Without access to shipper code pairs identifying the sellers and buyers of the gas flow, such netting is not possible in practice.

In Section 4 above, it was established that under EU energy legislation the operational responsibility for the transmission system is placed with the transmission system operator. Matching and balancing are important functions of the TSOs operation of the transmission system. As such, Gazprom and its affiliate's refusal to submit shipper code pairs to Ukrtransgaz, the designated TSO of the Ukrainian gas

transmission system, clearly undermines the organisational requirements under and violates EU energy law. It is also clearly an abuse of Gazprom's position in the Ukrainian and Slovak gas markets.

Gazprom Export should be compelled to provide relevant shipper code pairs to Ukrtransgaz. In this respect, it should be noted that Gazprom Export's dispatching centre for Central Europe is in Berlin, i.e. under EU jurisdiction.

In any case, Eustream has the necessary information and can easily provide Ukrtransgaz with the shipper codes. Provided Gazprom Export does not provide Ukrtransgaz with its shipper code(s) and the shipper codes of its counterparties, Eustream or Gazprom Export's customers should be required to provide such shipper codes to Ukrtransgaz.

As previously mentioned, the responsibility to enforce the provisions of Regulation 715/2009 is allocated to the national level, cf. Article 24. If Gazprom or Eustream continue to refuse to provide Ukrtransgaz with the shipper code pairs necessary to identify Gazprom and its Counterparties, the issue should be brought to the attention of the Slovak regulator, URSO, as a possible breach of EU energy and competition legislation and for possible enforcement procedures under national legislation.

6 THE REARRANGEMENT OF GAS FLOWS BETWEEN PIPELINES IN ORDER TO MAXIMISE PHYSICAL REVERSE FLOW CAPACITY

In this Section, we discuss the fourth question presented in Section 1, i.e. whether there is a legal basis to require Eustream to rearrange physical flows on different pipelines (provided it is technically feasible) in order to maximise the capacity available for physical reverse flows from West to East.

As explained in Section 2 above, Gazprom has booked most of the capacity at the Ukrainian/Slovak border, but only parts are actually utilised. The effects of Gazprom's capacity reservation are limited third party access and that physical reverse flow from West to East is blocked.

Physical reverse flow from West to East is not only essential in order to diversify Ukraine's gas supply and reduce the country's dependency on Russian gas, but also to facilitate a functioning internal EU energy market. As explained in Section 2 above, the Uzhgorod/Veľké Kapušany interconnection point is of particular importance. By controlling the interconnection point at the Ukrainian/Slovak border, viz. Uzhgorod/Veľké Kapušany, Gazprom is able to obstruct the development of a competitive and liquid market for natural gas, both for Slovakia and Ukraine and for other countries affected by the lack of gas transit to and from Slovakia and Ukraine, notably Bulgaria, Hungary, Poland and Romania, who are prevented from receiving reverse flow supplies from Europe via Ukraine.

As previously mentioned, physical reverse flow from Slovakia to Ukraine can only pass through the fifth pipeline with a capacity of 14.5 bcm/year. Although the four pipelines connecting the Uzhgorod/Veľké Kapušany gas metering systems are bidirectional, i.e. it is technically possible to send flows in both directions, the physical flow in these four pipelines is in an westward direction from Ukraine to Slovakia. Once a capacity reservation has been made in one direction in a bidirectional pipeline, gas flows cannot be sent in the opposite direction. In Section 2 above, it was explained how an effective westward capacity reservation of 5.4 bcm/year blocks a pipeline with a capacity of 24 bcm/year and prevents physical reverse flows eastward through this pipeline. Without affecting the existing capacity bookings, the only way to increase eastward physical reverse flow capacity in the existing gas transmission system, is to reallocate the physical flows between the different pipelines in order to

maximise their utilisation. The gas flow of 5.4 bcm/year could be sent through the Uzhgorod-Budince pipeline, increasing the available physical West-to-East transmission capacity to 24 bcm/year from the present 14.5 bcm/year.

In Section 4.2 above, it was mentioned that TSOs are, on a general basis, obliged to promote operational arrangements in order to ensure the optimum management of the network, cf. Article 12(2) of Regulation 715/2009. In essence this is a question of the optimal utilisation of the technical capacity available in the system.

Also, pursuant to Article 16(1), cf. Article 2(b), of Regulation 715/2009, TSOs shall make the maximum capacity at all relevant points, including entry and exit points, available to market participants, taking into account system integrity and efficient network operation. The capacity shall be made available on a non-discriminatory basis, cf. Article 14(1). It may be argued that this obligation of transmission system operators to provide maximum capacity to all market participants on a non-discriminatory basis, includes a broader obligation to make reverse flow capacity available.

The issue of whether Article 16(1) imposes an obligation to provide reverse flow capacity was before the European Court of justice in Case C-198/12 (the "Bulgartransgaz case"), which establishes the principle that Article 16(1) relates to physical, not virtual, flow. While the ECJ did not expressly conclude on the matter, the Bulgartransgaz case may be considered to support the interpretation that the term "maximum capacity" must be understood to imply an obligation on the TSO to provide physical reverse flow in order to maximise capacity utilisation. However, the obligation to provide maximum capacity is balanced by the obligation to take into account system integrity and efficient network operation respectively.

In other words, the EU secondary energy legislation obliges the TSOs to an overall systemic approach in their utilisation of the transmission system.

The obligation to optimise the management of the system and to make maximum capacity available could arguably imply an obligation to reallocate the physical flows between the existing pipelines in order to free up physical reverse flow capacity. As shown above, the physical reverse flow capacity can be increased by 9.5 bcm/year by simply by reallocating flows between existing pipelines at the Ukrainian/Slovak border. In other words, physical reverse flow capabilities can be increased by shifting gas flows between Veľké Kapušany and Budince. In principle, the gas flows can be rearranged without affecting the capacity bookings of the shippers.

The rearrangement of gas flows between Veľké Kapušany and Budince requires the Uzhgorod/Veľké Kapušany interconnection point and the Uzhgorod/Budince interconnection point to be utilised as one interconnection point. Under the Third Energy Package, shippers book capacity separately at entry and exit points (entry-exit system). Currently, Veľké Kapušany and Budince are operated as separate interconnection points in the Slovak GTS. However, as explained in Section 2 above, the gas metering stations Veľké Kapušany and Budince are close to each other and connected to the same compressor station. Provided that it is technically feasible to operate the gas metering stations Veľké Kapušany and Budince as one interconnection point, it may be argued that the Slovak TSO fails to comply with its obligation to provide maximum capacity and to optimise the management of the network by not ensuring better overall utilisation of the pipelines at Veľké Kapušany and Budince.