

**DECISION No 12/2019
OF THE EUROPEAN UNION AGENCY
FOR THE COOPERATION OF ENERGY REGULATORS**

of 16 October 2019

on the compliance programme proposed by Balansys S.A.

THE EUROPEAN UNION AGENCY FOR THE COOPERATION OF ENERGY REGULATORS,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators¹, and, in particular, Article 6(1) thereof,

Having regard 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/EC², and, in particular, Article 7(4) thereof,

Having regard to the outcome of the public consultation organised between 7 June and 1 July 2019,

Having regard to the consultation with the Agency Gas Working Group of 4 September 2019,

Having regard to the favourable opinion of the Board of Regulators of 24 September 2019, delivered pursuant to Article 22(5) of Regulation (EU) 2019/942,

Whereas:

1. INTRODUCTION

- (1) Commission Regulation (EU) No 312/2014 of 26 March 2014 establishing a network code on gas balancing of transmission networks lays down balancing obligations that need to be complied with by transmission system operators (“TSOs”). Article 4(4) of Commission Regulation (EU) No 312/2014 states that, in case the responsibility of

¹ OJ L158, 14.6.2019, p. 22.

² OJ L211, 15.8.2009, p. 94.

keeping the transmission networks in balance has been transferred to an entity (other than a TSO), the Regulation applies to that entity to the extent defined under the applicable national rules.

- (2) According to Article 7(4) of Directive 2009/73/EC, vertically integrated TSOs may set up a joint undertaking for implementing regional cooperation between the TSOs. In such case, the joint undertaking has to establish and implement a compliance programme which needs to be approved by the Agency.
- (3) The present Decision follows from the request for approval of the compliance programme submitted by Balansys S.A., pursuant to Article 7(4) of Directive 2009/73/EC. Balansys S.A. is a joint undertaking owned by the TSOs Fluxys Belgium NV/SA and Creos Luxembourg S.A., which would act as gas balancing operator for balancing in the BeLux area in line with Article 4(4) of Commission Regulation (EU) No 312/2014.

2. PROCEDURE

2.1 Proceedings before regulatory authorities

- (4) On 7 May 2015, Balansys S.A. was established by notarial deed as a public limited liability company under Luxembourgian law.
- (5) On 2 October 2015, Balansys S.A. submitted its compliance programme for opinion to the Belgian national regulatory authority, the Commissie voor de regulering van de elektriciteit en het gas/Commission de régulation de l'électricité et du gaz ("CREG"), and complemented the request with supplementary documents on 9 November 2015.
- (6) On 23 October 2015, Balansys S.A. submitted to CREG a request for approval of the appointment and the conditions governing the mandate and the employment conditions of the compliance officer.
- (7) On 19 July 2016, CREG adopted its decision on the proposed appointment and the approval of the conditions governing the mandate and the employment conditions of the compliance officer³.
- (8) On 31 January 2017, Balansys S.A. submitted a revised compliance programme for opinion to CREG and withdrew the initial submission.
- (9) On 17 July 2017, CREG adopted its opinion regarding the submitted draft compliance programme⁴.

³ Eindbeslissing (B)160719-CDC-1509 van 19 juli 2016 over de aanvraag tot benoeming van mevrouw Valérie Vandegaart als nalevingsfunctionaris van de N.V. Balansys en de goedkeuring van de voorwaarden betreffende het mandaat of de arbeidsvoorwaarden, met inbegrip van de duur van het mandaat van de nalevingsfunctionaris.

⁴ Eindadvies (A)1618 van 17 juli 2017 over het nalevingsprogramma van de N.V. Balansys

2.2 Proceedings before the Agency

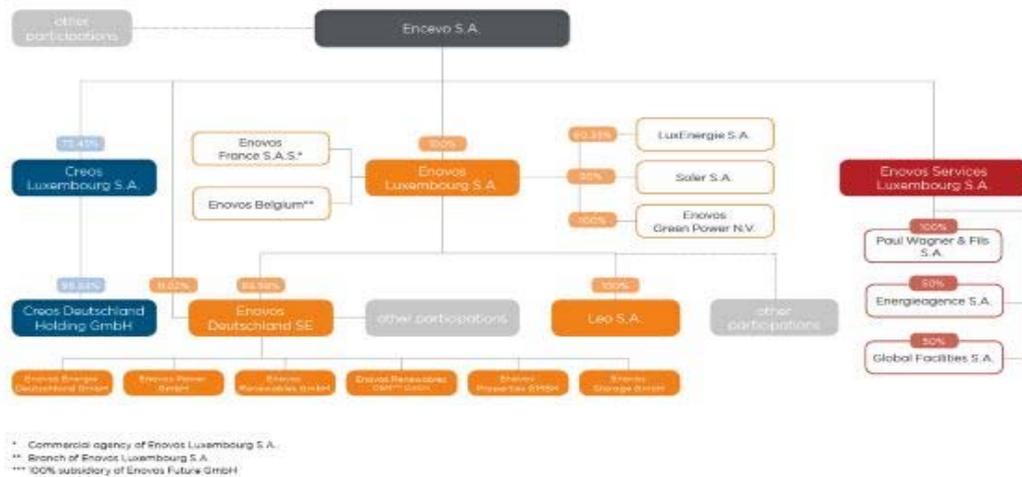
- (10) On 16 January 2018, Balansys S.A. submitted its compliance programme for approval to the Agency. Compared to the submission to CREG, the proposed compliance programme was revised by Balansys S.A. to take into account comments made by CREG in its opinion of 17 July 2017.
- (11) On 26 July 2018, the Agency requested further information from Balansys S.A. regarding the delineation of the allocation of responsibilities between Balansys S.A. and the parents of the joint undertaking, Fluxys Belgium NV/SA and Creos Luxembourg S.A..
- (12) On 11 September 2018, Balansys S.A. replied to the Agency's letter of 26 July 2018.
- (13) On 8 October 2018, the Agency requested further clarifications regarding Balansys S.A.'s proposed structure.
- (14) On 22 October 2018, Balansys S.A. replied to the Agency's letter of 8 October 2018.
- (15) On 31 October 2018, the Agency requested clarifications from CREG and the Institut Luxembourgeois de régulation ("ILR"), the regulatory authorities of Belgium and Luxembourg.
- (16) On 15 November 2018, ILR replied to the Agency's letter of 31 October 2018.
- (17) On 16 November 2018, CREG replied to the Agency's letter of 31 October 2018.
- (18) On 11 March 2019, the Agency requested further clarification regarding the amendment of the Agreement for the integration of the Belgian and Luxemburg gas markets ("Belux Integration Agreement") as proposed by Balansys S.A. in its letter of 22 October 2018.
- (19) On 13 March 2019, the Agency requested further clarification from ILR and CREG regarding their letters of 15 and 16 November 2018 in light of the applicable legal framework at Union and at national level.
- (20) On 1 April 2019, Balansys S.A. replied to the Agency's letter of 11 March 2019.
- (21) On 4 April 2019, CREG replied to the Agency's letter of 13 March 2019.
- (22) On 8 April 2019, ILR replied to the Agency's letter of 13 March 2019.
- (23) On 7 June 2019, the Agency published a notice to third parties inviting them to send observations, by 1 July 2019, concerning the draft compliance programme of Balansys S.A.. The Agency received 3 observations, which have been made available on the Agency's website and are summarised and considered in Sections 3, 5 and 6 below.

- (24) On 12 August 2019, Balansys S.A. provided its comments to the Agency on the draft Decision.

3. THE AGENCY'S COMPETENCE TO DECIDE ON THE PROPOSAL

- (25) Pursuant to Article 7(4) of Directive 2009/73/EC, the Agency needs to decide on the compliance programme proposed by vertically integrated TSOs that wish to cooperate at a regional level and for this purpose establish a joint undertaking.
- (26) According to the proposal, Balansys S.A. will act as gas balancing operator for balancing in the BeLux area, covering the integrated H-gas market of Luxembourg and Belgium and the L-gas market in Belgium. The geographical area in which the balancing services will be provided will cover more than one Member State. This is in line with the objective, set out in Article 7 of Directive 2009/73/EC, of transitioning the erstwhile national markets towards a fully competitive internal market in natural gas.
- (27) Balansys S.A. is a joint undertaking owned in equal shares by Fluxys Belgium NV/SA and Creos Luxembourg S.A.. Both parent companies are TSOs in the Member State where they have been established. Whilst Fluxys Belgium NV/SA is an ownership-unbundled TSO in Belgium, Creos Luxembourg S.A. is an exempted vertically integrated TSO in Luxembourg.
- (28) The majority shareholder of Creos Luxembourg S.A. is Encevo S.A.⁵, which, as shown in the table below, is a holding company and the sole owner of Enovos Luxembourg S.A., which, in its turn, has controlling rights over *inter alia* Enovos France S.A.S., Enovos Belgium, Enovos Deutschland SE and LEO S.A. (Luxembourg Energy Office S.A.), all of the afore-mentioned being gas suppliers.

⁵ Encevo S.A. is holder of 75.43% of the shares, the rest owned by the Administration Communale de la Ville de Luxembourg (20%), the Etat du Grand-Duché de Luxembourg (2.28%), the Fédération des Installateurs en Equipements Sanitaires et Climatiques (0.10%), 42 Administrations communales luxembourgeoises (2.13%) and Creos Luxembourg S.A. (0.05%).



- (29) According to the proposal, Fluxys Belgium NV/SA and Creos Luxembourg S.A. will delegate their balancing responsibilities to Balansys S.A., which will henceforth act in its own name and on its own behalf.
- (30) The fact that the parents of Balansys S.A. are an ownership-unbundled TSO and an exempted vertically integrated TSO, and the choice of the parent TSOs to delegate their balancing responsibilities to the joint undertaking, raises two admissibility issues with respect to the proposed legal basis. They are discussed in Section 3.1 and 3.2 of this Decision.

3.1 A joint undertaking between vertically integrated transmission system operators

- (31) Article 7(4) of Directive 2009/73/EC only foresees the case of joint undertakings established by vertically integrated TSOs. Yet, one of the parent TSOs involved in the proposed structure is not a vertically integrated TSO. Also, the question arises of whether the vertically integrated TSO referred to in this Article needs to be certified, since the other parent TSO is not.
- (32) Given the wording and objective of Article 7(1) of Directive 2009/73/EC, the Agency does not consider there to be any valid reason why this article, and the compliance programme requirement, would not be applicable if only one of the parents is a vertically integrated TSO. If this were not the case, it could prevent further regional market integration between TSOs, and thus go counter to the objectives set by the article itself in situations where there would actually be less risk for the joint undertaking to engage in discriminatory and anticompetitive conduct, since the other parent TSO would be ownership-unbundled and thus not have any direct or indirect link with any undertaking performing any of the functions of production or supply.

- (33) Similarly, the fact that one parent is not certified should also not prevent the application of Article 7(4) of Directive 2009/73/EC⁶. Pursuant to Article 49(6) of Directive 2009/73/EC, Luxembourg is exempted from the ownership unbundling and certification requirements. However, as it is the very aim of Article 7 of Directive 2009/73/EC that TSO regional cooperation should facilitate the integration of gas markets, the fact that a TSO is exempted should not be held against it⁷. Also, Article 7(4) of Directive 2009/73/EC only refers to “vertically integrated transmission system operators” (and thus without reference to a certification), and is situated in Chapter II, which is separate from and precedes the chapter dealing with unbundling and certification. Requiring a certification prior to engaging into further cooperation would slow down, rather than facilitate, regional TSO cooperation.
- (34) However, the fact that one of the parent TSOs is ownership-unbundled and the other not certified may have an impact on the content of the proposed compliance programme. The lack of certification increases the regulatory risk for discriminatory conduct, which needs to be addressed accordingly in the compliance programme. By contrast, Article 7(4) of Directive 2009/73/EC does not require a compliance programme in case both parent TSOs seeking regional cooperation are ownership unbundled, as they already inherently provide the necessary guarantees. The structures and measures which the compliance programme must foresee should therefore take the particular characteristics and (absence of) regulatory risks emanating from each parent TSO into account. The manner in which Balansys S.A. proposes to address the regulatory risks present in the current case will be discussed below in more detail in Sections 4 and 6 of this Decision.

3.2 A joint undertaking established for implementing regional cooperation between TSOs

- (35) The main objective of Article 7 of Directive 2009/73/EC is to facilitate regional cooperation between TSOs, meanwhile ensuring that such cooperation does not create any risk for discriminatory or anticompetitive conduct.
- (36) An important element regarding these cooperation projects is that the cooperation mechanisms remain driven and controlled by the TSOs seeking the further integration of their markets. With respect to Article 7(4) of Directive 2009/73/EC, such cooperation would typically involve the parent TSOs mandating the joint venture to carry out the tasks on their behalf, the parents at all times remaining legally accountable for the task at hand.

⁶ The participation of an exempted vertically integrated TSO in a joint venture performing regulated balancing activities on a regional level was questioned by FEBEG during the public consultation (cf. letter of FEBEG to the Agency of 1 July 2019).

⁷ The fact that Article 7(1) of Directive 2009/73/EC explicitly highlights the integration of isolated systems forming gas islands (which are typically exempted under 49 of Directive 2009/73/EC) as one of the key objectives of the regional cooperation reinforces the argument that the certification should not be considered as a criterion under Article 7(4) of Directive 2009/73/EC.

- (37) In the current case, Balansys S.A. would carry out two types of activities previously undertaken by its parents. On the one hand, it would perform the market-based balancing of the BeLux area, i.e. (a) aggregate the balancing positions of the shippers on the respective grids of Creos Luxembourg S.A. and Fluxys Belgium NV/SA and on the Zeebrugge Trading Point (ZTP) and communicate such balancing positions, as well as the aggregated balancing positions of the overall market area, to the shippers, (b) purchase and sell gas for balancing purposes, and (c) invoice balancing charges to the shippers.
- (38) On the other hand, Balansys S.A. would undertake the regulatory tasks of drafting, designing and submitting the Balancing Agreement, Balancing Code, Balancing Programme and Balancing Tariff to ILR and CREG, within their scope of competence, and conclude a Balancing Agreement with each shipper in the BeLux area.
- (39) According to the clarifications provided by Balansys S.A., the parent TSOs would not mandate, but delegate the above-mentioned tasks to the joint undertaking, relying in this respect on the possibility given by Belgian law to the Belgian TSO to delegate the management of the (commercial) balancing tasks to a joint venture established with one or more TSOs of other Member States, which are certified in accordance with Articles 9 and 10 of the Third Gas Directive, or which are exempted from certification by Article 49(6) of the Third Gas Directive⁸.
- (40) However, as Article 7(4) of Directive 2009/73/EC is to be understood as facilitating and setting conditions for the cooperation between TSOs, it is important that the parent TSOs still bear responsibility for the delegated TSO activities in the construct. In the following sub-sections, the Agency will therefore explore the nature of the delegated balancing services (Section 3.2.1) and the precise modalities of the delegation and related responsibilities of the parent TSOs and Balansys S.A. (Sections 3.2.2 to 3.2.4).

3.2.1 The provision of balancing services is a TSO activity

- (41) From the wording of Regulation (EC) No 715/2009, Directive 2009/73/EC and Commission Regulation (EU) No 312/2014, it is clear that the legislator meant that the services which are provided to support the shippers' commercial balancing activities must be performed by TSOs and are accordingly to be considered as TSO activities.
- (42) Indeed, all regulatory balancing obligations in these acts are explicitly and consistently assigned to the TSOs, which are expected to carry them out. The most relevant ones are listed in the table below.

⁸ Cf Article 15/2bis, §1 of the Belgian Gas Act (« Loi du 12 avril 1965 relative au transport de produits gazeux et autres par canalisations »).

Gas Regulation	
TSO task	Article
Provide network users with sufficient, well-timed and reliable on-line based information on the balancing status of network users	21(2)
Harmonise balancing regimes and streamline structures and levels of balancing charges in order to facilitate gas trade	21(4)
Gas Directive	
TSO task	Article
Rules for balancing the gas transmission network shall be objective, transparent and non-discriminatory, including rules for the charging of system users of their networks for energy imbalance. Terms and conditions, including rules and tariffs, for the provision of such services shall be established pursuant to a methodology in a non-discriminatory and cost-reflective way and shall be published.	13(3)
NRA approval of at least the methodologies for the provision of balancing services	41(6)(b), 41(8)
NC Gas Balancing	
TSO task	Article
General principles and objectives	3(2), 4(1), 6, recitals 9+11
Trade notifications with shippers	3(5), 4(3), 5
Communicating information	
Communicating information to the shippers	19(2), 21(5), 21(6), 24(2), 32, 33, 34, 35, 36(4), 37(1)(a)+(c), 37(3), 38
Communicating to trading platforms loss of right of network users to make trade notifications	10(7)
Aggregating the balancing position of the shippers	21(1)
Information provision between TSO, DSO, forecasting party	39(5), 40, 41, 42
Offering linepack flexibility service (optional provision by the Code)	43(1)
Purchasing and selling gas for balancing purposes	3(4), 6(1)+(3), 9
Invoicing balancing charges to the shippers (draft, send and collect charges)	19(2), 23, 29(2)
Establishing rules and submitting for NRA approval	

Incentives	11(2)
Daily imbalance charge calculation methodology	20(1), 21(1)
Within-day obligations	26(1)+(3)+(6), 28
Contributing to build methodology for neutrality charge	3(3), 29, 30

- (43) The above table include services which would be provided by Balansys S.A., which are thus to be considered as TSO activities⁹.

3.2.2 The scope of Article 4(4) of Commission Regulation (EU) No 312/2014

- (44) The Agency notes that, in case the responsibility of keeping the transmission network in balance has been transferred to an entity, Article 4(4) of Commission Regulation (EU) No 312/2014 clarifies that the obligations in the network code apply also to that entity “to the extent defined under the applicable national rules”.
- (45) Whilst it is clear that the delegated entity needs to respect the obligations laid down in the network code to the extent that this has been made obligatory under national law, the wording of Article 4(4) of Commission Regulation (EU) No 312/2014 does not imply that the delegated obligations therefore cease to be TSO tasks.
- (46) Article 4(4) of Commission Regulation (EU) No 312/2014 does not permit that national legislation allows a delegation of balancing responsibilities without the TSO continuing to be ultimately accountable over the delegated balancing responsibilities. If such interpretation were to be upheld, Member States would be in a position to limit the scope and nature of regulatory TSO duties, despite the provisions of the Third Package requiring the contrary, and set up various national and possibly conflicting regulatory balancing regimes. Such interpretation has to be rejected for a number of reasons.
- (47) First, as stated above, the provision of balancing services is a TSO duty firmly laid down in the Third Package, and only further developed in the network code. A network code cannot change any essential elements of the Regulation or the Directive. Following the principle of the rule of law, the hierarchy of norms and the principle of legitimate expectations, the regulatory constraints under which the TSO operates remain applicable also when the latter delegates its responsibilities to another entity. The rights and safeguards provided by the Third Package to the network users and the regulatory authorities should remain protected. Article 4(4) of Commission Regulation (EU) No 312/2014 can therefore not be interpreted in a manner according

⁹ The fact that the delegated services are commonly referred to as “commercial balancing” as opposed to ensuring the system integrity of the gas network does not imply that they would therefore not be regulated. Cf the letter of FEBEG to the Agency of 1 July 2019, as submitted during the public consultation.

to which the full scope of rights and safeguards related to the TSO balancing duties would no longer be provided to the network users or to regulatory authorities.

- (48) Moreover, such an interpretation would also significantly undermine legal certainty and risk to treat the operators differently, depending on where they provide their services in the Union. The risk of having various, possibly contradicting sets of national regulatory balancing frameworks would also go counter to the Network Code's own objective, as set out in its recital 9, to "harmonise the balancing rules laid down in Article 21 of Regulation (EC) No 715/2009 in order to facilitate gas trade".

3.2.3 The assignment of TSO duties to another TSO

- (49) The delegating TSO can only be relieved of his TSO balancing duties in case a Member State foresees in its national legislation the possibility to entrust these duties onto another entity. Article 1, last paragraph, of Regulation (EC) No 715/2009 foresees this possibility explicitly¹⁰, and allows a Member State to assign the TSO balancing obligations e.g. to a specific 'balancing operator' instead of the TSO. In such a case, network users and the regulatory authority can no longer address themselves to the TSO, but only to this 'balancing operator', who would need to be certified and designated accordingly, following the provisions of Article 9 *et seq.* of Directive 2009/73/EC¹¹. During the market consultation, one market participant alluded to this scenario, by questioning why TSO certification of Balansys S.A. was not required¹².
- (50) However, a Member State is not obliged to pursue this option. Article 1, last paragraph, of Regulation (EC) No 715/2009 forms an exception to the principle underlying Directive 2009/73/EC that a (single) TSO has to perform all the functions linked to its transmission system.

¹⁰ Read strictly, the article only allows a partial assignment of TSO tasks to entities that are state owned, as also put forward by Balansys S.A. in its submission. The corollary of such reading is that no TSO obligations could be assigned to privately owned TSOs, even if national legislation would allow it so, as the latter would otherwise infringe EU law.

However, there does not seem to be any objective justification for such strict interpretation. Both private and public undertakings are subject to the same regulatory framework and requirements in order to become a TSO. Furthermore, a similar general possibility for the Member State to assign TSO tasks to another entity on condition of certification can be found in the electricity sector, but without the requirement that the latter is also state owned (cf. Article 40(2) of Directive (EU) 2019/944).

In order to ensure a consistent and coherent regulatory framework, both within the gas legislation and as compared to the recently adopted recast electricity legislation, the Agency interprets the wording "to establish an entity or body" in Article 1 of Regulation (EC) No 715/2009 therefore as covering also privately owned TSOs.

¹¹ One exception to this principle can be found in the electricity sector, where Article 13(4) of Commission Regulation (EU) 2017/2195 does not strictly require certification and designation when the assignment of TSO tasks and obligations does not require direct cooperation, joint decision-making or entering into a contractual relationship with TSOs from other Member States. Recital 10 of Regulation (EU) 2019/943 cites imbalance settlement as such task or obligation which could be carried out at national level only. However, the Agency notes that the TSOs remain responsible for the tasks as entrusted to them under Article 40 of Directive (EU) 2019/944.

¹² Cf. the letter of FEBEG of 1 July 2019, as submitted in the public consultation.

- (51) In the present case, neither the Belgian legislator nor the Luxembourgian one foresaw such an assignment¹³. The absence of a certification requirement for Balansys S.A. was a deliberate choice of the Belgian legislator¹⁴. The modification in the respective national legislation allowing the operation of the balancing services by Balansys S.A. is instead based on the delegation of responsibilities under Article 4(4) of Commission Regulation (EU) No 312/2014¹⁵.
- (52) If the present submission had been the result of an assignment of TSO duties to Balansys S.A., the approval of the compliance programme would have not been necessary nor appropriate, but it would have rather been a matter of certification and designation of the operator. Based on the information available to the Agency, the current case is however not one of assignment, but of delegation of balancing activities by the TSOs to Balansys S.A.¹⁶.

3.2.4 Concurrent responsibility of the delegating TSO and the delegated entity

- (53) Balansys S.A. would sign the balancing agreement with the shippers on its own behalf, as well as meet the regulatory obligations vis-à-vis the national regulatory authorities, referred to in paragraph 38 above. Yet, Balansys S.A. put forward to the Agency that the “responsibility for the performance of those acts (signing the balancing agreement with the shippers) and regulatory obligations vis-à-vis the regulators lays with both Balansys SA and its parent companies, which retain the ultimate legal responsibility for the balancing, and its financial and operational risk”¹⁷.
- (54) The legal construct as proposed by Balansys S.A. thus implies a concurrent responsibility of the delegating TSOs and the delegated entity, Balansys S.A., which for each party is based on different legal grounds.
- (55) With respect to Balansys S.A., it is clear that its duties and responsibility as balancing operator are regulated according to the latest changes in Belgian and Luxembourgian law¹⁸. It is on the basis of these amendments under national law that the national regulators and network users could eventually rely to act against Balansys S.A. in the

¹³ In Belgium, the unbundling requirements and certification thereof as laid down in the Act of 12 April 1965 on the transport of gaseous and other products via pipelines, as amended in particular by the Act of 8 January 2012, only apply to TSOs, but the relevant provisions were not amended to include also the balancing operator following the amendment of the Belgian gas act of 8 July 2015. Similarly, there is no certification obligation for Balansys S.A. in the modified law of 1 August 2007 relating to the organisation of the market of natural gas in Luxembourg.

¹⁴ See the confirmation of the absence of any certification duty for Balansys S.A. in Opinion number 57.224/3 of 7 April 2015 of the Legislative Section of the Belgian Council of State on the draft Belgian law modifying the Belgian gas act (<http://www.lachambre.be/FLWB/PDF/54/1127/54K1127001.pdf>, pages 30-33).

¹⁵ In its submission, Balansys also explicitly refers to the Belgian legislation, and argues that it is not subject to unbundling and certification since it does not qualify as a TSO.

¹⁶ In the letter of Balansys S.A. to the Agency of 11 September 2018, Balansys S.A. emphasises that it concerns a “delegation for a limited part and on a revocable basis to another entity (but in no case *transfer* or *hand-off* to that other entity)”.

¹⁷ Letter of Balansys S.A. to the Agency of 22 October 2018.

¹⁸ Cf. the Act of 8 July 2015 amending the Act of 12 April 1965 on the transport of gaseous and other products via pipelines (Belgium), and the modified law of 1 August 2007 relating to the organisation of the market of natural gas (Luxembourg).

event of non-compliance¹⁹. In addition, network users will have entered into a contractual relationship with Balansys S.A., which also provides a basis for the former to act upon in case of non-compliance of the contractual obligations by Balansys S.A..

- (56) The delegation of balancing responsibilities does however not take away the responsibility which the parent TSOs carry as TSOs. The delegation is a contractual relationship between the TSOs and their daughter company Balansys S.A. to manage the balancing in the BeLux area, as allowed by national law. However, this contractual relationship does not affect the parents' ultimate responsibility for the balancing and its financial and operational risks, which must remain with the TSOs. As the Belgian and Luxembourgian legislator cannot relieve the parent TSOs of their duties unless there were an assignment of responsibilities to another TSO (cf. Sections 3.2.2 and 3.2.3 above), this responsibility is still retained by the national TSO under EU law, even if this were not clearly foreseen or possibly even denied under national law.
- (57) The principle that a delegating TSO remains ultimately responsible for the balancing activities, even in case of non-compliance by the delegated entity, is exemplified in Commission Regulation (EU) 2017/2195 establishing a guideline on electricity balancing. Article 13(1) of this Commission Regulation clearly states that "a delegating TSO shall remain responsible for ensuring compliance with the obligations under this Regulation", even if the delegated operator carries out the activities in practice.
- (58) Where possible, the Agency should interpret the responsibilities of the TSO in the gas market in the same manner as a TSO operating in the electricity sector, unless objective justifications exist to the contrary. As correctly pointed out by one market participant in the public consultation²⁰, the principles underlying the management of the gas and electricity networks (i.e., safeguarding competition, confidentiality or integrity) are the same. A similar approach towards these principles would not only reduce legal uncertainty and inefficiency, but would also further streamline the sector-specific regulation and facilitate an efficient sector coupling.
- (59) In addition, the approach is coherent with assuring the compliance of the balancing obligations. As Commission Regulation (EU) No 312/2014 only applied to Balansys S.A. to the extent foreseen under national law, a risk would exist that the national regulatory framework be less effective or contain legal lacunas as compared to the situation under EU law. However, the fact that the TSO remains ultimately responsible entails that the NRA always has the default option of ensuring compliance via the TSO, as its enforcement powers towards the TSO are in any event established in Directive 2009/73/EC.

¹⁹ According to the letter of CREG to the Agency of 13 March 2019, several actions could thus be undertaken against Balansys S.A. on the basis of Articles 15/16, 15/18, 15/18*bis*, 15/20, 15/20*bis*, 15/21, 15/22, 18, 19, 19*bis*, 20/1, 20/1*bis*, 20/2 and 23 of the Belgian Gas Act.

²⁰ See the joint position paper of AGCS Gas Clearing and Settlement AG, Croatian Energy Market Operator Ltd, and OTE a.s. of 1 July 2019, as submitted in the public consultation.

- (60) In the present case, CREG and ILR informed the Agency that their national legislation no longer gives them enforcement powers towards their TSO for the delegated activities, and that they can only address possible events of non-compliance to the balancing operator²¹. However, even if so, NRAs would still always have the possibility to rely directly on EU law, should the situation so require and other enforcement actions proved inadequate. In any event, the possible absence or inadequacy of enforcement powers of a NRA towards its TSO under national law cannot be held against Balansys S.A. for evaluating the admissibility of its request under Article 7(4) of Directive 2009/73/EC.
- (61) Finally, also Balansys S.A. and its parent TSOs have confirmed in various instances that, whilst Balansys S.A. manages the (commercial) balancing of the BeLux area, this does not imply that the TSOs would no longer be legally responsible. Thus, they affirmed *inter alia* that “Fluxys Belgium SA and Creos Luxembourg SA do not relinquish any liability or responsibility for the commercial balancing of the integrated market: actually they retain a final responsibility in this matter, which is concurrent to the one of Balansys SA that stems from it performing the task”²². As regards the scope of NRA’s enforcement powers, Balansys S.A. confirmed that the delegation of balancing activities to Balansys S.A. “has no impact on the power of the respective NRA to monitor directly Fluxys Belgium SA and Creos Luxembourg SA and to address them directly in case of an alleged non-compliance by Balansys SA of any of the relevant balancing services delegated by the TSOs to Balansys SA. However, nothing prevents the NRAs to first address Balansys SA to obtain the necessary information”²³.
- (62) The parent TSOs of Balansys S.A. expressed their willingness to adapt their shareholder’s agreement (the Belux Integration Agreement) to recognise the concurrent responsibility of the TSOs and Balansys S.A. for the commercial balancing obligations. According to their proposal, a clause would be added confirming that “Balansys and the Parties (in their capacity of designated transmission system operators) are concurrently liable and responsible for the good performance of the tasks delegated to Balansys”²⁴. Whilst such amended shareholder agreement may not provide a direct legal basis for NRAs and network users to initiate legal action against the TSOs, it does demonstrate the TSOs’ recognition that they remain responsible for ensuring compliance with the delegated balancing obligations under EU law, which can be invoked against the TSOs by NRAs and network users.

3.3 Conclusion on the Agency’s competence to decide on the proposal

- (63) For the reasons set out in Section 3.1, the Agency interprets the condition of vertically integrated transmission system operators participating in a joint undertaking

²¹ In letters of 15 and 16 November 2018 and 8 April 2019, both CREG and ILR assert that they are not entitled to impose sanctions on the TSO in the event of a non-compliance by Balansys S.A. of its legal obligations.

²² See letter of Balansys S.A. to the Agency of 22 October 2018.

²³ See letter of Balansys S.A. to the Agency of 11 September 2018.

²⁴ See letter of Balansys S.A. to the Agency of 1 April 2019.

established for implementing such cooperation in light of the general objectives of Article 7 of Directive 2009/73/EC to stimulate initiatives for further market integration. The Agency therefore considers that Article 7(4) of Directive 2009/73/EC also applies to cooperation agreements between Fluxys Belgium NV/SA, as the ownership unbundled TSO in Belgium, and Creos Luxembourg S.A., as the exempted vertically integrated TSO in Luxembourg.

- (64) For the reasons set out in Section 3.2, and with the understanding that the proposed draft amendment to the Belux Integration Agreement as communicated in the letter of Balansys S.A. to the Agency of 1 April 2019 will also be implemented following the adoption of this Decision, the Agency considers that the proposed legal construct, whereby Fluxys Belgium NV/SA and Creos Luxembourg S.A. delegate their balancing responsibilities to Balansys S.A. to be in compliance with the requirements of cooperation under Article 7(4) of Directive 2009/73/EC, as the proposal implies a concurrent responsibility of the parent TSOs and Balansys S.A. for the compliance with the TSO balancing obligations.
- (65) For the above reasons, the Agency considers the request of Balansys S.A. to decide upon its proposed compliance programme admissible, and that the Agency can thus act pursuant to Article 7(4) of Directive 2009/73/EC.

4. SUMMARY OF THE PROPOSAL

4.1 The organisation and management of Balansys S.A.

- (66) According to the explanatory note attached to its request, Balansys S.A. is a joint undertaking founded by Creos Luxembourg S.A. (50%) and Fluxys Belgium NV/SA (50%). The company is limited by shares (“société anonyme”) under the laws of the Grand-Duchy of Luxembourg. Once approved, Balansys S.A. intends to act as balancing operator in the BeLux area.
- (67) In order to carry out its mission, as it will only have a highly limited amount of staff, Balansys S.A. would rely heavily on its parent TSOs, with whom it has concluded service agreements. Both service agreements contain confidentiality clauses, in which the parent TSOs ensure, *inter alia*, that their staff would comply with the compliance programme of Balansys S.A..
- (68) In addition to the service agreements with the parent TSOs, the compliance programme takes into account that Balansys S.A. may also conclude subcontracts with other entities. In such event, the compliance programme lists particular contractual requirements that need to be included in such subcontracts.
- (69) Balansys S.A. also contracted a compliance officer, who needs, *inter alia*, to monitor the implementation of the compliance programme. Where appropriate, Balansys’ compliance officer can take further investigatory steps and, when necessary, propose

corrective measures and sanctions. The compliance officer also assists to all relevant Balansys meetings, and provides his/her reports to the regulatory authorities.

4.2 The compliance programme of Balansys S.A.

- (70) The compliance programme, attached to this Decision, is divided into 9 chapters, which touch upon the following topics: the introduction (chapter 1), definitions (chapter 2), general principles (chapter 3), commitments (chapter 4), conformity measures (chapter 5), provisions related to the prohibition of collusion or fraud and the policy regarding gifts and invitations (chapter 6), the compliance officer (chapter 7), violations of the compliance programme (chapter 8), and the compliance officer's annual report (chapter 9).
- (71) A more detailed assessment of the remaining critical elements in the compliance programme is given in Section 6.2 of this Decision.

5 SUMMARY OF THE OBSERVATIONS RECEIVED BY THE AGENCY

- (72) Following the public consultation, which the Agency held between 7 June 2019 and 1 July 2019, three market participants submitted their comments to the Agency.
- (73) The joint position paper of AGCS Gas Clearing and Settlement AG, Croatian Energy Market Operator Ltd. and OTE a.s. endorsed the Agency's consultation document, and argued that the arrangements of delegation and assignment should be interpreted in a similar manner in both the EU electricity and gas legislation in order to avoid legal uncertainty and inefficiency between these two sectors.
- (74) The submissions of FEBEG and Febeliec were more critical. FEBEG questioned the admissibility of the proposal and the compliance of the proposed construct with Directive 2009/73/EC. In addition, both FEBEG and Febeliec pointed to particular issues regarding the Balansys compliance programme and Balansys S.A.'s decision making process.
- (75) The observations of the market participants have been addressed in Sections 3 and 6 of this Decision.

6 ASSESSMENT OF THE PROPOSAL

6.1 Legal framework

- (76) Article 7 of Directive 2009/73/EC aims to foster regional cooperation amongst TSOs "at one or more regional levels, as a first step towards the creation of a fully liberalised market". For this purpose, NRAs or Member States should facilitate such cooperation.
- (77) The Article lists in particular three underlying regulatory objectives: (i) the creation of a competitive internal market in natural gas, (ii) increasing the consistency of the legal, regulatory and technical framework, and (iii) integrating the isolated systems forming gas islands.

- (78) Article 7(4) of Directive 2009/73/EC indicates that, in case vertically integrated TSOs enter into a joint undertaking established for implementing such cooperation, a compliance programme should be established by this joint undertaking setting out the measures to be taken to ensure that *discriminatory* and *anticompetitive* conduct is excluded.
- (79) Neither Article 7(4) nor the recitals of Directive 2009/73/EC provide any further guidance as to the precise content of the compliance programme.
- (80) However, in this respect, it should be noted that the joint undertaking was understood to be a joint undertaking of vertically integrated undertakings. When the latter are organised as ITOs, Article 21 of Directive 2009/73/EC requires them to establish and implement a compliance programme to ensure the exclusion of any discriminatory conduct, and enumerates various conditions relating thereto. It seems therefore reasonable to assess the compliance programme in line with the criteria set out in this Article²⁵.
- (81) Yet, the compliance programme of the joint undertaking may differ from those of the parent TSOs. The compliance programmes of the vertically integrated TSOs aim to address the activities as performed by the parent itself, and apply within a specific (national) context. They are therefore not necessarily suited for the regional context in which the joint undertaking will operate, and in which other discriminatory or anticompetitive conduct issues may arise, for which the parent's compliance programme may not be appropriate.
- (82) Given that the compliance programme has to address the risks faced by the joint undertaking, it is instrumental to also assess the context in which the compliance programme applies. The manner how the joint undertaking is set up and operates therefore forms an essential element in the evaluation as to whether the compliance programme is effective in ensuring that the conduct of the joint undertaking will meet the criteria and objectives of Article 7(4) of Directive 2009/73/EC.

6.2 Critical elements in the compliance programme

- (83) In general, the proposed compliance programme contains the key elements required in a compliance programme. Thus, the proposed compliance programme includes, *inter alia*, the obligation of non-discriminatory treatment of grid users, transparency principles, measures to ensure impartial and independent conduct by the personnel, conflict of interest requirements and anti-fraud measures (i.e., a presents and invitations policy) and the development of a compliance training programme. The compliance programme also specifies that Balansys S.A. is bound to protect the confidential nature of commercially sensitive information which it obtains as if it were a TSO, and foresees various measures to comply with this obligation (e.g., by establishing a detailed list of commercially sensitive information and a list of the

²⁵ Also the ISO model contains a compliance programme requirement for the transmission system owner (cf Article 15(2)(d) of Directive 2009/73/EC), but this article remains general in terms of content.

persons having access to this information, which can also be obtained by the compliance officer). Finally, the compliance programme contains rules for receiving and investigating possible complaints or infringements of the compliance programme, and the adoption of possible sanctions.

- (84) On 17 July 2017, the Belgian regulator CREG provided a detailed opinion on the compliance programme of Balansys S.A., which had already been previously revised following an earlier opinion of CREG of 19 July 2016. The compliance programme as submitted by Balansys S.A. to the Agency took CREG's comments of both opinions into account and addressed their points directly in the document.
- (85) The assessment below thus focuses on the remaining critical elements meriting further attention. They concern the relationship of Balansys S.A. with its parent TSOs, the internal decision-making process and the independence criteria of Balansys' staff and its compliance officer.

6.2.1 The degree of reliance on the parent TSOs by Balansys S.A.

- (86) As Balansys S.A. entirely outsources the daily execution of the delegated balancing activities back to its parent TSOs via service agreements, the approach contains a risk that Balansys S.A. may not be in control of the day-to-day management of the balancing activities performed by its subcontractors. Balansys S.A. does not enjoy a direct employer/employee relationship with the staff from the parent TSOs and cannot issue any direct instructions towards this staff. The degree of reliance on its parent TSOs could therefore endanger the capacity of Balansys S.A. to remain impartial and ensure that anticompetitive and discriminatory conduct is excluded.
- (87) The Agency notes that, in order to counter this risk, several measures were taken or relied upon by Balansys S.A., which are discussed in further detail below in Sections 6.2.1.1 to 6.2.1.4.

6.2.1.1 *Application of the compliance programme to the subcontractors*

- (88) Article 4.4 of the compliance programme requires that the staff of the subcontractors of Balansys S.A. (including the parent TSOs acting as subcontractors) need to respect the provisions of the compliance programme, including the duty to act in an impartial, independent and professional manner, and the duty to avoid any discriminatory and anticompetitive conduct that aims or could have as effect to favour one or more network users as compared to other network users²⁶.
- (89) In order to implement this requirement, Article 4.4, second subparagraph, of the compliance programme states that the subcontractors have to undertake the necessary measures to assure that their staff is informed and acts according to it.

²⁶ Cf. Article 5.1.1 of the compliance programme.

- (90) In line with the above obligation, Article 12(4) of the service agreements concluded between Balansys S.A. and Fluxys Belgium S.A. and Creos Luxembourg NV/SA requires the parent TSOs to inform their personnel of the compliance programme and to undertake the measures ensuring that they comply therewith.
- (91) However, the service agreement of Creos Luxembourg NV/SA does not contain the requirement that Creos Luxembourg NV/SA will also seek to obtain explicit acknowledgements of receipt from its staff, as prescribed by Article 4.4 of the compliance programme. As such, this is not so much a lacuna in the compliance programme as it is a matter of implementing it following the conclusion of the service agreement. The compliance of this particular requirement will need to be continuously monitored by the compliance programme officer (see in this respect also Section 6.2.1.3 below).
- (92) More importantly, Article 4.4, second subparagraph, of the compliance programme also requires that the subcontractors have to express their agreement with the compliance programme in the subcontract.
- (93) The Agency notes that in the service agreements, Fluxys Belgium S.A. and Creos Luxembourg NV/SA do not explicitly express their agreement with the compliance programme and only acknowledge its receipt, despite the requirement of Article 4.4. of the compliance programme to the contrary. The fact that the two parent TSOs agreed to make sure that their personnel will comply with the compliance programme could arguably be seen as an implicit agreement of the parent TSOs with the compliance programme.
- (94) Nonetheless, in order fully to comply with the terms of the compliance programme, the Agency recommends to make this agreement more explicit. A possible infringement of the compliance programme would then constitute a contractual breach, which would provide Balansys SA. with a clear basis to request corrective measures, or else to reduce or recover its payments, or even to terminate the agreement²⁷. Obtaining the explicit agreement would thus provide Balansys S.A. with more reassurances that the compliance programme be duly complied with by its subcontractors.

6.2.1.2 Nature of tasks subcontracted to the parent TSOs

- (95) Although Balansys S.A. fully relies on the service agreements with the parent TSOs for carrying out its tasks, the activities that are subcontracted back to the TSOs take

²⁷ Cf Article 8.6 of both service agreements. The Agency acknowledges that Article 4.10 of the Belux Integration Agreement (the 'Balansys liability') also contains measures that provides to an extent inherent incentives to the parent TSOs to comply with the obligations under the Belux Integration Agreement, as it obliges the parent TSO to indemnify Balansys S.A. under certain conditions set out in this article. In addition, a material or protracted breach of the agreement may lead to the termination of the agreement by the other party, alongside the obligation to pay indemnity sanctions (cf. Article 8.4 and 10.3 of the Belux Integration Agreement). However, for obvious reasons, Balansys S.A. is not a part of this shareholders agreement.

into account whether or not they involve receipt and processing of commercially sensitive information of the shippers.

- (96) Thus, the ownership-unbundled TSO Fluxys Belgium NV/SA is subcontracted for the most commercially sensitive tasks, relating directly to the individual balancing operations. Fluxys Belgium NV/SA is thus responsible for providing the dispatching²⁸, back-office²⁹ and invoicing services³⁰. The fact that the commercially sensitive information is treated by a certified ownership-unbundled TSO provides inherent guarantees that discriminatory and anticompetitive conduct in this area is excluded.
- (97) Creos Luxembourg NV/SA is subcontracted for those activities of Balansys S.A. which do not provide access to commercially sensitive information of the shipper. More in particular, Creos Luxembourg NV/SA is entrusted with the administration and legal management³¹, invoicing³², accounting³³, and the design and management of the capacity solution³⁴.
- (98) Annex 7 and 7bis of the submission of Balansys S.A., attached to this Decision, contain the preliminary report of the compliance officer, which discusses *inter alia* Balansys' handling of commercially sensitive information and the division of tasks between the parent TSOs. The annex shows the various measures taken to secure that,

²⁸ The dispatching activities include the operational set-up, market balancing operations (follow-up, purchase/sale of gas, etc), capacity solution operations, 24/7 interactions with grid users, or a 24/7 nomination service. The operational management of the delegated balancing activities take place in the offices of Fluxys Belgium NV/SA. The personalised access of shippers to the Balansys platform (containing the daily balancing information) are not visible to nor accessible by the staff of Creos Luxembourg SA working for Balansys S.A..

²⁹ The back-office service includes (non-operational) interactions with grid users, including commercial support (front/back office), contracting and ICT set-up; interactions with TSO's, platform operators and other service providers, electronic data platform management, and contract accounting. The data of shippers having signed the balancing agreement (eg, address, TV number, choice of solvability reassurance (rating/bank/caution) are all stored on the IT systems of Fluxys Belgium NV/SA. The latter systems follow and benefit from the IT security measures as applicable to the activities of Fluxys Belgium NV/SA.

³⁰ The invoicing services include managing of invoice contact details, creation and export of invoicing details, e-billing management, and approval of the invoice received by Balansys S.A. from the platform operators (quantities/price).

³¹ The administrative and legal management services include secretarial works, corporate works, administrative formalities, drafting of legal documents, website management and insurance. When invoices are contested by shippers, the staff of Creos Luxembourg NV/SA only deals with cases where the modality of the invoice is contested (customer or bank reference, material errors in the invoice, etc). Disputes relating directly to balancing data (information related to the balance settlement, possible penalties or the neutrality charge) are handled by the managing director or general director of Balansys S.A..

³² The invoicing services include the administration of invoicing based on relevant data provided by Balansys S.A. (aggregate monthly amount of settlements, neutrality charge, and administrative fees), the invoice payment follow-up and the administration and payment of invoices received (from Creos, Fluxys Belgium, Powernext, etc). In line with Article 5.2.2 of the compliance programme, the managing director or general director of Balansys S.A. has a list of staff members of Creos Luxembourg NV/SA that have access to this information (as well as of those staff members working for Balansys S.A., Fluxys Belgium NV/SA or other subcontractors dealing with commercially sensitive information of Balansys S.A.).

³³ The accounting services include the accounting and tax management, treasury and cash management, creditworthiness follow-up and risk management, the neutrality fee calculation and controlling.

³⁴ This task covers the capacity forecast, as well as the processing of Prisma, NCG and ITC infrastructure costs.

with respect to the calculation, follow-up and communication of the individual and overall balancing positions in the BeLux area, the purchase/sales on the Pegas platform, and the invoicing, Creos Luxembourg NV/SA does not have access to the commercially sensitive data of the shippers handled by Balansys S.A..

- (99) In line with the above division of tasks, the only persons having access to the commercially sensitive information obtained by Balansys S.A. are staff of Fluxys Belgium NV/SA, the compliance officer and the managing director or general director of Balansys S.A.. Apart from the balancing metering data of the TSO network of Creos Luxembourg NV/SA, the staff of Creos Luxembourg NV/SA only has access to the aggregated monthly invoicing data.

6.2.1.3 Monitoring of compliance and sanctions

- (100) The compliance officer's monitoring of the correct implementation of the compliance programme relates to the conduct of all personnel, including those of the subcontractors of Balansys S.A.. In this respect, Article 7 of the compliance programme allows the compliance officer of Balansys S.A. to have access to all information necessary to carry out his/her monitoring duties. The compliance officer could thus at any moment request access to data held by staff of the parent TSOs or of other subcontractors of Balansys S.A..
- (101) The Agency understands that Balansys S.A. cannot give any direct instructions to the employees of Fluxys Belgium NV/SA and Creos Luxembourg SA, given the absence of any contractual relationship between them. In such case, Article 7 of the compliance programme foresees that the compliance officer should work together with the compliance officers of the TSO concerned. This duty of mutual cooperation between the compliance officers is also restated in Article 12.4 of the service agreements which Balansys S.A. concluded with both TSOs.
- (102) In case the compliance officer has established an infringement of the compliance programme following his/her investigation, and the adoption of a sanction on the staff member of the TSO or other subcontractor would be appropriate, Article 8.1 of the compliance programme acknowledges that, due to the contractual relationship, only the TSO or other subcontractor would be entitled to sanction the person concerned. In such case, the managing director or the general director or the compliance officer of Balansys S.A. would be informed of the possible sanction that was imposed.

6.2.1.4 Concurrent responsibility of the parent TSOs

- (103) Finally, the subcontractors on which Balansys S.A. heavily relies for the execution of its tasks are the parent TSOs, Fluxys Belgium NV/SA and Creos Luxembourg S.A., which share responsibility for the correct application of the delegated balancing obligations, as discussed in Section 3.2.4 of this Decision.
- (104) Furthermore, the two parent TSOs have adopted and follow compliance programmes themselves, as also mentioned in Article 1.4 of the compliance programme.

- (105) The regulated framework under which the parent TSOs operate thus constitutes a further mitigating factor for the risk of possible misconduct by the staff of the parent TSOs acting as subcontractor of Balansys S.A.

6.2.1.5 Conclusion on the use of service agreements

- (106) As discussed, the proposal of Balansys S.A. entails that all the balancing obligations that are delegated by the parent TSOs to Balansys S.A. are subcontracted back to the same parent TSOs. As such, this construct does not appear in violation with EU law. Neither Directive 2009/73/EC nor Commission Regulation (EU) No 312/2014 contain any provisions regarding the extent to which the delegated entity (in this case Balansys S.A.) can rely on the delegating TSO for carrying out its obligations as balancing operator. Pursuant to Article 4(4) of Commission Regulation (EU) No 312/2014, it is left to the national legislator to decide to which extent the balancing obligations apply to the delegated entity. In this respect, the Agency notes that neither Belgian nor Luxembourgian law seem to oppose the proposed degree of subcontracting³⁵.
- (107) Further, the Agency notes that the proposed degree of subcontracting might affect the costs of this service. Balansys S.A. will likely include a reasonable margin in its tariff proposal for the provision of its services. However, as the services provided by Balansys' subcontractors may equally foresee such reasonable margin in the subcontracts, the risk cannot be excluded that, in theory, the shippers might have to pay twice such margin for the same service. However, this issue is not directly a point that can be covered by the compliance programme. Both the cost of the TSO and of Balansys are under scrutiny by the competent NRA, which needs to approve the proposed balancing tariffs. It is thus rather a point which needs to be examined and possibly addressed at national level by the NRAs at the time of submission of the tariff proposal.
- (108) Given the above, and for the reasons mentioned in Sections 6.2.1.1 to 6.2.1.4, the possible risk arising from the extent to which Balansys S.A. subcontracts its delegated activities back to its parent TSOs seem sufficiently addressed.

³⁵ The proposed degree of subcontracting would likely not be in line with EU law if the joint undertaking would act as a TSO. The Commission has required on previous occasions, with respect to ownership unbundling certification decisions, that a TSO must have enough resources at its disposal to carry out its tasks independently. Whilst subcontracting core TSO functions has been permitted in certain limited circumstances, the Commission has underlined that it remains important that the TSO outsourcing its tasks has sufficient resources to oversee, control and provide instructions to either the subcontractor or the party on which it is relying. See e.g., Commission opinion on the certification of Vorarlberger Übertragungsnetze GmbH, p.4, Commission opinion of 23.5.2013, Certification of Premier Transmission Limited and Belfast Gas Transmission Limited, p.5, or Commission opinion of 8.7.2013, certification of Moyle Interconnector Limited, p.4.

6.2.2 The decision making process of Balansys S.A.

- (109) Apart from the subcontracting of services to Fluxys Belgium NV/SA and Creos Luxembourg S.A., also the internal decision-making process of Balansys S.A. needs to be analysed.
- (110) Pursuant to Article 4.3 of the Belux Integration Agreement, aside the shareholders' meeting, Balansys S.A. has a Board of Directors and one managing director or general director who is in charge of the day-to-day management.
- (111) The Board of Directors is composed of five members, of which three are appointed on proposal of Fluxys Belgium NV/SA and two on proposal of Creos Luxembourg S.A.. The Board takes decisions by simple majority. If for important, so-called "Material Decisions"³⁶, no consensus can initially be found, the decision on the issue is postponed for a period of three months, during which the matter is further discussed between Balansys' shareholders, Fluxys Belgium NV/SA and Creos Luxembourg S.A.. If no agreement is found after this period, the Board of Directors takes the decision by simple majority.
- (112) The Agency does not consider this decision-making process as highly problematic. Whilst it shows that there are limitations to the degree of independence in its decision-making, Balansys S.A. is not a TSO but acts as balancing operator, for whom the balancing obligations only apply to the extent defined under national law. The corollary of the latter is that the TSO's responsibility on the matter has not ceased³⁷. When there is disagreement in adopting key decisions of the joint undertaking, it seems therefore reasonable that a degree of interaction with the parent TSOs takes place. However, Article 4.3.3 of the Belux Integration Agreement makes clear that the final decisions on the issue concerned are ultimately taken by Balansys' Board of Directors, whose meeting the compliance officer attends³⁸.

6.2.3 The independence criteria of the members of the Board of Directors, the managing director or general director, and the compliance officer

- (113) All staff, the so-called 'responsible parties' (representatives of the Balansys shareholders, Board members, and the managing director or general director) and the compliance officer of Balansys S.A. have to meet a series of independence criteria³⁹. They include the prohibition to have any direct or indirect links with any producer or

³⁶ Examples of 'Material Decisions' are the appointment and dismissal of the managing director or general director, approval of the documents and tariffs to be submitted to the NRAs, agreeing to or adopting key financial commitments or decisions, or decisions regarding further partnerships or agreements regarding agreements between Balansys S.A. and a parent TSO or any of its affiliates.

³⁷ Cf. sections 3.2.2 and 3.2.4 of this Decision.

³⁸ Cf Article 7 of the compliance programme.

³⁹ Cf. Article 5.1.1 of the compliance programme, Article 4.6.1 of the Belux Integration Agreement, and Article 10.4 and 13.2 of the Articles of Association of Balansys S.A..

supplier, and a “cooling on” and “cooling off” obligation. Both of these two conditions were commented upon during the public consultation.

6.2.3.1 The obligation to have no professional position or responsibility, interest or business relationship, directly or indirectly, with a producer or supplier

- (114) Pursuant to Article 5.1.1(2) of the compliance programme, the Board members and the managing director or general director should not have any other “professional position or responsibility, interest or business relationship, directly or indirectly, with the Producer/Supplier”.
- (115) During the market consultation, one market participant criticised⁴⁰ the fact that executive staff members of Creos Luxembourg S.A. are allowed to take part in meetings of Encevo S.A., the parent of Creos Luxembourg S.A.⁴¹. It was argued that such a participation would not be permitted under the Belgian rules on ownership unbundling.
- (116) However, the Agency notes that Creos Luxembourg S.A. is a vertically integrated TSO which is exempted from the ownership unbundling requirements. Whether the participation in the Executive Committee and Board of Directors of Encevo S.A. complies with the independence criteria of the executive staff members of Creos Luxembourg S.A. is a matter that needs to be decided under Luxembourgian law⁴². As this compliance issue is not a subject matter of this Decision, the Agency does not have the powers to pronounce itself on this particular aspect.
- (117) None of the Balansys Board members appointed by Creos Luxembourg S.A. have any position or responsibility in Encevo S.A.. Interpreting the proposal for appointment of the Balansys Board members by Creos Luxembourg S.A. as a possible indirect link of these Board members to an interest or business relation with a producer/supplier would be unreasonably far reaching and needs to be rejected. Moreover, such far-reaching interpretation would have implied that the Agency be deciding upon the parent TSO’s independence criteria rather than upon those of the joint undertaking⁴³, which would exceed the Agency’s powers. As mentioned in Section 6.1 of this Decision, the Agency can only pronounce itself on whether the proposed compliance programme is effective in ensuring that the conduct of the joint undertaking will meet the criteria and objectives of Article 7(4) of Directive 2009/73/EC. The risk for any

⁴⁰ Cf letter of Febeliec to the Agency of 1 July 2019.

⁴¹ The CEO of Creos Luxembourg S.A. is a member of the Executive Committee of Encevo S.A.. In addition, the Vice-Chairman of the Board of Directors of Creos Luxembourg S.A. is also the 1st Vice-Chairman of the Board of Directors of Encevo S.A..

⁴² Cf. Article 37(2) of the Act of 1 August 2007 related to the organisation of the natural gas market. The Agency notes that no compliance concern was observed by the compliance officer of Creos Luxembourg S.A or by ILR (see in this respect the 2019 compliance programme of Creos Luxembourg S.A. and the preliminary report of the compliance officer of Balansys S.A.).

⁴³ If the argument would be accepted, it would effectively mean that Creos Luxembourg S.A. would no longer be entitled to appoint any staff members to the executive committee or Board of Directors of Encevo S.A., lest it would be unable to seek regional cooperation with other TSOs under Article 7(4) of Directive 2009/73/EC.

possible adverse effect due to the relationship of Balansys S.A. with its parent TSOs is in this respect discussed in further detail in section 6.2.1 of this Decision.

- (118) The Agency notes that the participation in the executive committee or Board of Directors of Encevo S.A. could be problematic if it concerned a Balansys Board member, but, as mentioned above, this is not the case here. The criteria listed in Article 5.1.1 of the compliance programme of Balansys S.A. also provide sufficient tools to act upon and address such eventual situation.

6.2.3.2 The duration of the “cooling on” and “cooling off” obligation

- (119) As part of the independence criteria, Article 5.1.1 of the compliance programme contains a “cooling on” and “cooling off” obligation, aimed at limiting the risk or impact of revolving doors. The “cooling on” obligation consists in an overall one year waiting period that applies to all staff, ‘responsible parties’ and their compliance officer prior to working for Balansys S.A., during which they cannot have held, directly or indirectly, any position or have had any responsibility, business relation or interest with a producer or supplier. The “cooling off” obligation contains a similar restriction when leaving Balansys S.A.. In this case, the term is 6 months for all staff and ‘responsible parties’, and 1.5 year for the compliance officer.
- (120) During the public consultation, one market participant questioned⁴⁴ the duration of the “cooling on” and “cooling off” obligations, which were considered too short for the managers and the compliance officer. Instead, an extension of the periods was proposed for the managers (1.5 years “cooling on” obligation, 1 year “cooling off” obligation) and the compliance officer (2 years “cooling off” obligation), due to their position and nature of responsibility within Balansys S.A..
- (121) Directive 2009/73/EC adopts a dual approach for vertically integrated TSOs, depending on whether the national legislator opts for the ISO or ITO model. Whereas the ISO model does not directly prescribe any cooling on/off obligations, the ITO model does: Article 19(3) and (7) contain cooling on/ off obligations whose duration considerably exceed those that are currently proposed for Balansys S.A.⁴⁵.
- (122) However, in the current case, the joint undertaking is between an ownership-unbundled TSO and an exempted vertically integrated TSO. Whilst the Agency accepted the application of Article 7(4) of Directive 2009/73/EC also for such types of TSO cooperation⁴⁶, it cannot be known whether the Luxembourgian legislator will opt for an ISO or ITO model, whenever the exemption be lifted. In any event, the Luxembourgian legislation does not require cooling on/off obligations at this point in time.

⁴⁴ Cf letter of FEBEG to the Agency of 1 July 2019.

⁴⁵ The “cooling on” obligation in Article 19(3) of Directive 2009/73/EC refers to a period of three years, whereas the “cooling off” obligation in Article 19(7) of Directive 2009/73/EC may not be less than four years. Particular limitations to the application of the obligation are laid down in Article 19(8) of Directive 2009/73/EC.

⁴⁶ Cf. section 3.1 of this Decision.

- (123) However, the Belgian legislator did adopt legislation for Fluxys Belgium NV/SA in light of this specific form of TSO cooperation, and considered the risk of revolving doors sufficiently covered by imposing cooling on/off obligations on the compliance officer⁴⁷ which Balansys S.A. has taken over in its compliance programme in its entirety.
- (124) As mentioned in Section 6.1 of this Decision, the compliance programme of the joint undertaking needs to address the risks on a case-by-case basis within the context in which it operates. Imposing the stringent cooling on/off obligations of Article 19 of Directive 2009/73/EC across the board would likely be disproportionate, for instance in case the joint undertaking applies to two ISOs, given that such restrictions may not even be applicable to any of the two parent TSOs.
- (125) As the proposed terms for the cooling on/off obligations seem reasonable and as they are in compliance with the national legislation in both Member States, the Agency considers the risk adequately covered and the duration of the obligation proportionate.

7 CONCLUSION

- (126) For the reasons laid down in Section 6.2 of this Decision, and taking into account the particular contractual context in which Balansys S.A. will operate, the Agency considers that the measures taken and foreseen in the compliance programme contain sufficient guarantees to exclude possible discriminatory and anticompetitive conduct on the part of Balansys S.A.,

HAS ADOPTED THIS DECISION:

Article 1

The Agency approves the compliance programme of Balansys S.A. as attached to this Decision.

Article 2

This Decision is addressed to Balansys S.A.

Done at Ljubljana on 16 October 2019.

- SIGNED -

For the Agency
Director ad interim
Alberto POTOTSCHNIG

⁴⁷ Cf. Article 12/2^{ter} of the Belgian gas act.

Annexes:

Annex I – Compliance Programme Balansys S.A.

Annex II – Preliminary report of the Compliance Officer of Balansys S.A.

In accordance with Article 28 of Regulation (EU) 2019/942, the addressee may appeal against this Decision by filing an appeal, together with the statement of grounds, in writing at the Board of Appeal of the Agency within two months of the day of notification of this Decision.