

## Opinion 2/24

### **pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Articles 10(6) and 11(6) of Directive 2009/73/EC – Moldova – Certification of Vestmoldtransgaz**

On 23 February 2024, the National Agency for Energy Regulation of the Republic of Moldova (hereinafter “ANRE”) notified the Energy Community Secretariat (hereinafter “the Secretariat”) of a preliminary decision (hereinafter “the Preliminary Decision”) on the certification of the transmission system operator (hereinafter “TSO”) *Vestmoldtransgaz LLC* (hereinafter “*VMTG*”) as an independent system operator (hereinafter “ISO”). The Preliminary Decision had been adopted on 16 February 2024, based on ANRE Decision No 434 of 7 July 2023 on the provisional designation of *VMTG* as natural gas transmission system operator (hereinafter “ANRE Decision 434/2023”) and Article VI(33) of Law No 249 of 2022 on the amendment of certain normative acts, including provisions from the Moldovan legislation on natural gas (hereinafter “Law 249/2022”)¹.

Pursuant to Articles 10 and 11 of Directive 2009/73/EC (hereinafter “the Gas Directive”) and Article 3 of Regulation (EC) No. 715/20092 (hereinafter “the Gas Regulation”), the Secretariat is required to examine the notified Preliminary Decision and deliver its opinion to ANRE as to the compatibility of such a decision with Articles 9(8), 11, 14 and 15 of the Gas Directive (hereinafter “the Opinion”).

#### **I. Background and framework for unbundling**

##### **1. Unbundling of the TSOs for gas in Moldova**

Based on the Gas Directive and the Gas Regulation, as adapted and adopted by the Ministerial Council of the Energy Community,² the deadline for unbundling of the gas TSOs in Moldova was 1 January 2020. The Gas Directive was transposed in Moldova by Law No 108 on Natural Gas (hereinafter: “the Gas Law”).³ The Gas Law transposes the requirements for unbundling and certification of TSOs in Articles 23 to 35. The Gas Law requires unbundling of gas TSOs according to one of the three models envisaged also by the Gas Directive: ownership unbundling (Article 25), independent system operator (Articles 26-28) or independent transmission operator (Articles 29-35).

Until ANRE Decision 434/2023 from 7 July 2023, by which *VMTG* was provisionally designated as TSO in Moldova, the function of TSO was exercised by *Moldovatransgaz* (except for the Iasi-Ungheni pipeline, see below).

A Plan of Measures Regarding the Unbundling of *Moldovatransgaz*, developed by *Moldovatransgaz*, approved by ANRE on 25 February 2020⁴ envisaged that *Moldovatransgaz* would submit a request for certification by 1 October 2020. After being granted additional time to implement the Plan of Measures, on 30 April 2021 *Moldovatransgaz* submitted a request for certification to ANRE under the independent transmission system operator (ITO) model. Within four months from receipt of the certification request, ANRE was required to either adopt a decision provisionally certifying *Moldovatransgaz* or refuse certification by way of a written

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¹ Law 249/2022 was published in the Moldovan Official Gazette no. 251-256/511 of 10 August 2022 and entered into force on 10 September 2022, and was subsequently amended.

² Ministerial Council Decision 2012/05/MC-EnC of 5 December 2012.

³ Law No 108 dated 27 May 2016, published in the Official Journal of the Republic of Moldova No 193-103/art 415 of 8 July 2016, as subsequently amended.

⁴ ANRE Decision No 48/2020 of 25 February 2020.

communication.<sup>5</sup> ANRE concluded that unbundling was not completed, and several essential measures necessary to comply with the ITO model had not been implemented. On 26 August 2021, ANRE informed *Moldovatransgaz* that its request for certification was denied.<sup>6</sup>

Subsequently, the Secretariat came to the preliminary conclusion that, by failing to implement the requirements of unbundling and certification of the TSO *Moldovatransgaz* as established by the Gas Directive, the Republic of Moldova failed to comply with its obligations under the Energy Community Treaty, and thus initiated dispute settlement proceedings by an Opening Letter on 24 January 2022, followed by a Reasoned Opinion on 31 May 2023.<sup>7</sup> In its Reasoned Opinion, the Secretariat concluded that *Moldovatransgaz* could not be certified under any of the unbundling models under the Gas Directive.

On 29 July 2022, a series of new provisions were introduced in the Gas Law by Law 249/2022, enabling ANRE to initiate the unbundling and certification of gas TSOs under the ISO model, in case no certification request is submitted by an uncertified TSO within 9 months from entry into force of Law 249/2022 (i.e. by 10 June 2023). In line with Article 36(2<sup>1</sup>) of the Gas Law, in this case, ANRE, *ex officio* or at the request of the Secretariat, designates an independent system operator and initiates the certification procedure. According to Article VI(3) of Law 249/2023, if the uncertified TSO fails to fulfil the unbundling and certification requirements by 18 September 2023 (the date when 3 months expired from the initiation of the certification procedure according to Art. 36(2<sup>1</sup>) of the Gas Law), the license of the uncertified TSO was to be withdrawn and ANRE must designate provisionally a new TSO.

On 20 July 2023,<sup>8</sup> a new obligation for the designated TSO and of the owners of the natural gas transmission networks was introduced in Moldovan legislation, namely to submit to ANRE for approval, at least 10 working days before the expiration of the certification term, the contracts of lease of the natural gas transmission networks signed by the parties. The purpose of this addition to the TSO certification legal framework was to ensure a smooth takeover of operations by the designated ISO and to prevent any interruptions of natural gas supply.

At the end of 2023, Parliament passed Law No 429/2023 on the amendment of several legal acts (hereinafter, "Law 249/2023")<sup>9</sup> by which it introduced another series of unbundling-related provisions to the Gas Law, for example by giving ANRE the authority to issue decisions stipulating the provisions of lease agreements, in case the owners and the candidate ISO would fail to sign lease agreements on their own motion on time.

On 16 June 2023, since no certification request had been submitted within the deadline imposed by law (10 June 2023), ANRE initiated the certification procedure and requested *Moldovatransgaz* to fulfil, within 3 months, all the necessary requirements of one of the three unbundling models provided for by the Gas Law.<sup>10</sup>

ANRE's subsequent Decision No 434/2023 dated 7 July 2023 (hereinafter, "ANRE Decision 434/2023") imposed several measures on the gas market stakeholders to ensure the smooth

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<sup>5</sup> In case ANRE had neither issued a decision on the provisional certification or informed about the refusal to certify, certification would have been considered tacitly agreed, to be confirmed by a provisional decision in this regard within five days from the expiry of the four-months deadline.

<sup>6</sup> Written notice on refusal to certify No 07-01/2946 dated 26 August 2021.

<sup>7</sup> Case ECS-31/21.

<sup>8</sup> Law No 201 of 20 July 2023 for the amendment of certain normative acts (including those applicable to unbundling and certification of gas TSOs), published in the Official Journal of the Republic of Moldova No 267-270 of 26 July 2023.

<sup>9</sup> Law No 429 of 28 December 2023, published in the Official Journal of the Republic of Moldova No 510-513 of 29 December 2023.

<sup>10</sup> Letter No 01-01/2436 dated 16 June 2023.

unbundling and certification process without any disruptions to the Moldovan security of gas supply, namely:

- a. ANRE provisionally designated *VMTG*, effective as of 19 September 2023, as the gas TSO of the Republic of Moldova, following the ISO model of unbundling. As of 19 September 2023, *VMTG* would also become the successor of rights and obligations of *Moldovatransgaz* regarding contracts with system users and interoperability agreements.
- b. ANRE ordered *Moldovatransgaz* not to obstruct in any way the activity of *VMTG*, and to provide *VMTG* unconditional access to the natural gas networks previously operated by *Moldovatransgaz*, to all the information and documents necessary for the gas transmission activity, including to the dispatch service.
- c. ANRE ordered both companies, *VMTG* and *Moldovatransgaz*, to make all preparations and take all measures to ensure the continuous and reliable operation of the gas transmission system, *inter alia* by: carrying out a technical, legal and commercial evaluation of the infrastructure and activity of gas transmission previously carried out by *Moldovatransgaz*, entering into lease agreements valid for at least 5 years, at least 10 working days before the expiration of the certification term provided for in the Gas Law (i.e., by 9 September 2023); to determine the needs of the qualified staff to perform the functions and obligations of a gas TSO; to submit to ANRE, within one month, proposals regarding the completion of the list of services and works that can be outsourced by *VMTG*.

On 4 September 2023, *Moldovatransgaz* submitted to ANRE a contract for the lease of the gas transmission networks concluded with *Vestmoldtransgaz*, effective as of 19 September 2023 (hereinafter, the “Lease Agreement”).<sup>11</sup> On 18 September 2023, following *Moldovatransgaz*’ failure to submit a certification request as a TSO and thus breach of the unbundling and certification provisions, ANRE withdrew the licence of *Moldovatransgaz*,<sup>12</sup> and provisionally designated *VMTG* as an ISO as from the next day. Also on 18 September 2023, two additional agreements were signed: a maintenance agreement for the gas transmission network between *Moldovatransgaz* and *VMTG* (hereinafter, the “Maintenance Agreement”),<sup>13</sup> and a technical operation agreement, also between *Moldovatransgaz* and *VMTG* (hereinafter, the “Technical Operation Agreement”).<sup>14</sup>

*VMTG* started operating the gas transmission network previously operated by *Moldovatransgaz* on 19 September 2023.

## 2. The gas network on the left bank of the Dniester River

Formally, the operator of the Moldovan gas transmission system on the left bank of the Dniester River (*Pridnestrovie/Transnistria*) is *Tiraspoltransgaz S.R.L.* (hereinafter “*Tiraspoltransgaz*”).<sup>15</sup> *Tiraspoltransgaz-Pridnestrovie de facto* operates the portion of the Moldovan gas transmission system situated on the left bank of the Dniester River, based on an arrangement with *Tiraspoltransgaz*, a *de jure* subsidiary of *Moldovagaz*.<sup>16</sup>

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<sup>11</sup> Contract No 70-SJ of 4 September 2023 for lease of the gas transmission network by *Moldovatransgaz* to *VMTG*.

<sup>12</sup> ANRE Decision No 572 dated 18 September 2023.

<sup>13</sup> Contract No 25/23 of 18 September 2023 for the maintenance of the gas transmission network, signed between *Moldovatransgaz* and *VMTG*.

<sup>14</sup> Contract No 26/23 of 18 September 2023 for the technical operation of the gas transmission network, signed between *Moldovatransgaz* and *VMTG*.

<sup>15</sup> <https://www.moldovagaz.md/rus/o-kompanii>.

<sup>16</sup> “Moldovagaz debt audit: final report” prepared by Wikborg Rein Advokatfirma AS and Forensic Risk Alliance LLC for The Public Property Agency of the Government of the Republic of Moldova, 2 June 2023, p 61.

On 6 April 2022, *Moldovatransgaz* and *Tiraspoltransgaz* concluded a lease agreement based on which *Tiraspoltransgaz* transferred to *Moldovatransgaz* the right of use of the natural gas pipelines from the interconnection point Grebeniki up to the balance demarcation boundary between *Tiraspoltransgaz* and *Moldovatransgaz*.<sup>17</sup>

### 3. The applicant *VMTG*

As described in the Preliminary Decision, *VMTG* was created by Government Decision No 501 of 1 July 2014.<sup>18</sup> The founder of the state enterprise *VMTG* was the then Ministry of Economy and Infrastructure. *VMTG* was established to manage and operate the Iasi-Ungheni pipeline and to perform the functions of a transmission service operator on the territory of Moldova.

On 6 January 2015, *VMTG* was licensed as a transmission system operator<sup>19</sup> on the territory of Moldova. The ownership of the transmission assets on the Iasi-Ungheni pipeline remained with the Moldovan Public Property Agency. On 28 March 2018, *VMTG* was sold by Ministry of Energy and Infrastructure (for the shares) and the Public Property Agency of Moldova (for the transmission assets) to *Eurotransgaz LLC* (hereinafter "*ETG*").<sup>20</sup> *ETG* has only been active as the sole shareholder of *VMTG* and has had no other activities. The sole shareholder of *ETG* is *Transgaz JSC* (hereinafter "*Transgaz*"), the Romanian TSO.<sup>21</sup> *Transgaz* was certified by the Romanian regulatory authority as an independent system operator on 6 August 2014.<sup>22</sup> Under the sale agreement between the Ministry of Economy and Infrastructure, the Public Property Agency and *ETG*, *ETG* received full control over *VMTG*, including all movable and immovable assets, contracts and licenses.<sup>23</sup>

*VMTG* applied for certification under the ownership unbundling model on 5 November 2020. ANRE issued its preliminary decision on 10 March 2021. On 9 July 2021, the Secretariat issued Opinion 2/2021, in which largely supported the certification of *VMTG* in line with ANRE's preliminary decision. ANRE's final decision on the certification of *VMTG* as TSO was issued on 3 September 2021.

On 25 August 2021, the European Bank for Reconstruction and Development (hereinafter, "EBRD"), purchased 25% of the shares in *VMTG*, which left *ETG* with 75% of the shares.

Before being designated as independent system operator for the network previously operated by *Moldovatransgaz*, *VMTG* operated, and continues to operate under the ownership unbundling model, the transmission network for the Iasi-Ungheni section (10,6 km) and the transmission network for the Ungheni-Chisinau section (109,2 km), which amount to 7.29% of the gas transmission network in Moldova. These networks are not subject of the present Opinion.

## II. The Preliminary Decision

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<sup>17</sup> Lease Agreement no 10-SJ dated 6 April 2022 between *Tiraspoltransgaz* and *Moldovatransgaz*.

<sup>18</sup> Official Gazette of the Republic of Moldova, No 174-177, 4 July 2014. On 16 July 2014, *VMTG* was registered in the Moldovan State Registry for legal persons.

<sup>19</sup> License AA no 087187, issued by ANRE on 6 January 2015, valid for 25 years.

<sup>20</sup> Agreement between the Ministry of Economy and Infrastructure, Public Property Agency and *ETG* dated 28 March 2018.

<sup>21</sup> Excerpt from the Moldovan Company Registry no 446687 dated 21 August 2020.

<sup>22</sup> ANRE Order dated 6 August 2014, published in the Official Gazette of Romania no. 613 from 19 August 2014.

<sup>23</sup> Agreement between the Ministry of Economy and Infrastructure, Public Property Agency and *ETG* dated 28 March 2018, section 2.2.

On 18 October 2023, VMTG submitted to ANRE a request for certification<sup>24</sup> based on ANRE Decision 434/2023 and Art. VI(33) of Law 249/2022. On 16 February 2024, ANRE adopted its Preliminary Decision on the certification of VMTG subject to the Opinion of the Secretariat. The Secretariat was notified of the Preliminary Decision on 23 February 2024.

In the Preliminary Decision, ANRE concluded that VMTG largely complies with the requirements of the provisions regarding the independent system operator. However, when assessing the independence of the transmission system owner in relation to the vertically integrated undertaking, it found that persons responsible for the management of the transmission system owner *Moldovatransgaz LLC* participate in company structures of the integrated natural gas undertaking responsible, directly or indirectly, for the day-to-day operation of the supply of natural gas *Moldovagaz JSC*, which is not in line with Article 15(2)(a) of the Gas Directive.

As a remedy, ANRE conditioned its certification of VMTG on the performance, by the owners of the natural gas transmission networks *Moldovagaz JSC* and *Moldovatransgaz LLC* of the actions necessary for its unbundling in accordance with Art 28 of the Gas Law (which transposes in Moldovan legislation Article 15 of the Gas Directive regarding the unbundling of the transmission system owners) as follows:

- for *Moldovatransgaz* to appoint a Board of Directors in accordance with its statute, so that the decision-making is no longer the *de facto* attribution of the shareholders assembly (with the sole shareholder *Moldovagaz*, the undertaking responsible for the supply of natural gas), and
- for *Moldovatransgaz* to make the needed amendments to its statute, so that the sole shareholder *Moldovagaz* no longer has the right to make decisions about any and all activities of *Moldovatransgaz*.

### III. Assessment of the Preliminary Decision

#### 1. The ISO model of unbundling

At the outset, the Secretariat recalls that the unbundling provisions were designed to separate, in vertically integrated undertakings (hereinafter “VIU”),<sup>25</sup> control over transmission system operation as a natural monopoly, on the one hand, and over production and supply activities as competitive activities, on the other hand, to eliminate potential conflicts of interest between transmission and other activities performed by vertically integrated undertakings. The rules on unbundling thus aim to prevent vertically integrated undertakings from using their privileged position as operators of a transmission network by obstructing access of network users other than their affiliated companies to their network or by other behaviour affecting fair and undistorted competition, market integration or infrastructure development. More broadly speaking, unbundling aims to eliminate potential conflicts of interest between transmission and other activities performed within the vertically integrated undertaking.<sup>26</sup>

By contrast, the ISO model enshrined in Article 14 of the Gas Directive envisages that the transmission network is not managed by a vertically integrated undertaking, including any of its subsidiaries, but by an operator which is fully independent from supply and production

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<sup>24</sup> Request for certification of VMTG No 02-410 dated 18 October 2023.

<sup>25</sup> A vertically integrated undertaking is defined in Article 2(20) of the Gas Directive as “a natural gas undertaking or a group of natural gas undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission, distribution, LNG or storage, and at least one of the functions of production or supply of natural gas”.

<sup>26</sup> Secretariat's Opinion 2/17 of 22 April 2017 on certification of *Yugorosgaz Transport*.

interests in the VIU, and at the same time effectively performs all TSO functions required by the Gas Directive and the Gas Regulation, most notably operation, development and maintenance of the system. As a precondition, it must be ensured that the ISO has the necessary powers and resources to operate the system independently from the VIU.

Under the Gas Directive, *VMTG* is eligible for unbundling under the ISO model. The transmission system belonged to a vertically integrated undertaking, *Moldovagaz*, on 6 October 2011, the cut-off date set by Article 14(1) of the Gas Directive.

The purpose of the certification procedure in these circumstances is to make sure the requirements by the Directive are being complied with. In the conditions in the present case, that does not only apply to relations between the ISO and the vertically integrated undertaking but also with the various system owners and undertakings performing the activities normally attributed to a TSO.

## **2. Independence of the transmission system operator**

According to Article 14(2)(a) of the Gas Directive, an ISO may be designated only where it complies with Articles 9(1) (b), (c) and (d) of the Gas Directive. These provisions aim at establishing the independence of the system operator by separating the exercise of control over or any rights in production and supply activities, on the one hand, and transmission activities on the other hand. The term 'control' is defined in Article 2(36) of the Gas Directive as "*any rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by: (a) ownership or the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.*"<sup>27</sup> The rights include in particular the power to exercise voting rights, the holding of a majority share and the right to act as, and the power to appoint members of the TSO's corporate bodies and those legally representing the TSO (Article 9(2) of the Gas Directive).

The cornerstone of the ISO model is the fact that the operator is not the owner of the transmission system, which is the property of other entities. In the Secretariat's practice, it has been often employed in cases where the transmission system was owned by the state and when, due to overriding legal provisions, it could not belong to a private or even state-owned company.<sup>28</sup>

An ISO may only be certified by a national regulatory authority if it fulfils all requirements listed in Article 14(2) of the Gas Directive namely:

- The candidate ISO has demonstrated that it complies with the requirements of Article 9(1)(b), (c), and (d) of the Gas Directive (Article 14(2)(a)) (see section a. below);
- The candidate ISO has demonstrated that it has at its disposal the required financial, technical, physical and human resources to carry out the tasks of a TSO under Article 13 of the Gas Directive (Article 14(2)(b)) (see section b. below);
- The candidate ISO has undertaken to comply with a ten-year network development plan monitored by the regulatory authority (Article 14(2)(c)) (see section c. below);
- The candidate ISO has demonstrated its ability to comply with its obligations under the Gas Regulation (Article 14(2)(e)) (see section b. below).

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<sup>27</sup> This definition is part of the Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings and should be interpreted accordingly (recital 10 of the Gas Directive).

<sup>28</sup> See the case of the Moldovan electricity TSO *Moldelectrica*.

### **a. Independence of the TSO**

Article 14(2)(a) of the Gas Directive determines that an ISO may be designated only where it complies with Articles 9(1)(b), (c) and (d) of the Gas Directive. These provisions aim at establishing the independence of the system operator by separating the exercise of control over or any rights in production and supply activities, on the one hand, and transmission activities on the other hand. Article 9(2) of the Gas Directive clarifies that the exercise of “any right” includes the exercise of voting rights, the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, or the holding of a majority share.

It is evident from the Preliminary Decision that *VMTG* itself is not engaged in any activities related to the production or supply of network energy. *VMTG* has two shareholders: *ETG*, holding a share representing 75% of the share capital of *VMTG* and EBRD, holding a share representing 25% of the share capital of *VMTG*.

The founder and the sole shareholder of *ETG* is *Transgaz*, the Romanian TSO.<sup>29</sup> *Transgaz* has been certified by the Romanian regulatory authority as an independent system operator on 6 August 2014.<sup>30</sup> The Secretariat will not analyse compliance of *Transgaz* with Article 14(2)(a) of the Gas Directive.

With regard to the share owned by EBRD, the Secretariat recalls that in similar cases, the European Commission has taken the view that even the participation of financial investors in generation, production and/or supply activities does not lead to a situation which the unbundling rules seek to prevent.<sup>31</sup> In addition, the statute of *VMTG* does not provide for any special privileges for minority shareholders that would grant it a level of influence greater than arising from the size of the share held. While some decisions of the shareholders assembly, such as amendments to the statute, additional contributions by the shareholders and the dissolution of the company,<sup>32</sup> require unanimity, they only concern matters meant to protect the rights of the minority shareholder. The 25% shareholding of EBRD does not permit it to have “decisive influence” within the sense of Article 2(36) of the Gas Directive.

In the Secretariat’s view, ANRE was correct to conclude that the candidate ISO *VMTG* complies with Article 14(2)(a) of the Gas Directive.

### **b. Disposal of the TSO of the required financial, technical, physical and human resources**

Article 14(2)(b) of the Gas Directive provides that an ISO may be designated only where it has demonstrated that it has at its disposal the required financial, technical, physical and human resources to carry out its tasks under Article 13 of the Gas Directive.

Article 13 of the Gas Directive requires a detailed division of tasks between the system owner, on the one hand, and the ISO, on the other. As regards its tasks, the ISO has to comply with all the obligations applicable to TSOs under the Gas Directive and the Gas Regulation. This follows from Article 14(4) of the Gas Directive, providing that “*the independent system operator shall act as a transmission system operator.*” This means that each ISO shall be responsible for granting and managing third-party access, including the collection of access charges, congestion charges, for operating, maintaining, and developing the transmission system, as well as for ensuring the long-term ability of the system to meet reasonable demand through

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<sup>29</sup> Excerpt from the Moldovan Company Registry no 446687 dated 21 August 2020.

<sup>30</sup> ANRE Order dated 6 August 2014, published in the Official Gazette of Romania no. 613 from 19 August 2014.

<sup>31</sup> Commission Staff working document on Ownership Unbundling, “The Commission practice assessing the presence of a conflict of interest including in case of financial investors”, SWD(2013)177final, 8 May 2013.

<sup>32</sup> Statute of limited liability company *Vestmoldtransgaz* from 2018 (hereinafter, “*VMTG* Statute”), Article 6.10.

investment planning. This list of tasks is not exhaustive. The role of the system owner, on the other hand, is to enable the ISO to carry out its tasks by fulfilling the obligations laid down in Article 14(5) of the Gas Directive.

Furthermore, Article 14(2)(e) of the Gas Directive also requires the candidate ISO to demonstrate its ability to comply with its obligations under the Gas Regulation, according to which TSOs are responsible for the following:<sup>33</sup>

- Third-party access services: ensure that they offer services on a non-discriminatory basis to all network users (Article 14(1)(a)), provide both firm and interruptible third-party access services (Article 14(1)(b)), offer to network users both long and short-term services (Article 14(1)(c))

- Capacity allocation and congestion management: implement and publish non-discriminatory and transparent capacity-allocation mechanisms (Article 16(2)), implement and publish nondiscriminatory and transparent congestion management procedures which facilitate cross border exchanges in natural gas (Article 16(3)), regularly assess market demand for new investment and when planning investments, assess market demand and take into account security of supply (Article 16(5)),

- Transparency requirements: make public detailed information regarding the services it offers and the relevant conditions applied, together with the technical information necessary for network users to gain effective network access (Article 18(1)), publish reasonably and sufficiently detailed information on tariff derivation, methodology and structure (Article 18(2)), make public information on technical, contracted and available capacities on a numerical basis for all relevant points including entry and exit points on a regular and rolling basis and in a user-friendly and standardised manner (Article 18(3)), disclose this information in a meaningful, quantifiably clear and easily accessible manner and on a non-discriminatory basis (Article 18(5)), make public *ex-ante* and *ex-post* supply and demand information, based on nominations, forecasts and realised flows in and out of the system (Article 18(6)), make public measures taken as well as costs incurred and revenue generated to balance the system (Article 18(6));

- Balancing: provide sufficient, well-timed and reliable on-line based information on the balancing status of network users (Article 21(2));

- Trading of capacity rights: take reasonable steps to allow capacity rights to be freely tradable and facilitate such trade in a transparent and non-discriminatory manner (Article 22).

i. As regards the commercial aspects of a TSO's activities, and based on the fact that *VMTG* is the only licensed TSO in Moldova and the conclusions reached by ANRE in the Preliminary Decision,<sup>34</sup> the Secretariat is satisfied that *VMTG* complies with the Gas Directive and the Gas Regulation and grants third-party access, collects tariffs, complies with the transparency requirements, is solely responsible for the dispatch service and the management of flows, as well as for nominations, trading of capacity rights and system balancing and is responsible for interoperability and interconnection with the adjacent TSOs, under the caveats of the Technical Operation Agreement.

ii. With respect to the technical aspects of transmission system operation, Article 13 of the Gas Directive specifically provides that maintenance of the transmission network is the ISO's responsibility. In the Preliminary Decision, ANRE relies on the Maintenance Agreement, under which *Moldovatransgaz* undertakes to ensure the proper technical and industrial safety

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<sup>33</sup> Articles 14-22 of the Gas Regulation.

<sup>34</sup> Section 4.7.1 of the Preliminary Decision.



operation of the natural gas transmission networks.<sup>35</sup> *VMTG*, the counterparty to the Maintenance Agreement, undertakes to pay for the services provided by *Moldovatrangaz*. However, *VMTG* lacks the prerogative to verify or refuse the works performed by *Moldovatrangaz*. Instead, *Moldovatrangaz*, an owner of the transmission system and the wholly owned subsidiary of another transmission system owner, *Moldovagaz*, is fully responsible for the maintenance of the network, described in detail in Annex 1 of the Maintenance Agreement.

It is not compatible with the ISO model for the ISO to outsource essential tasks of the system operation to the system owner to such an extent that the owner is *de facto* exercising the core tasks of a system operator,<sup>36</sup> It follows that, as long as *Moldovatrangaz* continues to own a part of the transmission system, it cannot be a sub-contractor of *VMTG* for the tasks listed in the Maintenance Agreement. In similar cases, the European Commission supported conditions imposed by national regulators that, while accepting temporarily that maintenance services be performed by a system owner, were imposing upon the ISO a deadline within which to acquire the capacity to perform maintenance works itself.<sup>37</sup> The Secretariat notes and is satisfied by the fact that the current Maintenance Agreement expires on 31 December 2024.

With regard to a new procurement for maintenance services, the Secretariat recalls that operation, maintenance and development of the network belong to the core tasks of a TSO they are to be carried out by the TSO itself.<sup>38</sup> The European Commission has previously stated that, even in cases in which the network operator outsourced part of its tasks, it should always be able to effectively monitor and control whether these tasks are being carried out in a proper manner, and it must employ enough qualified personnel.<sup>39</sup> In order to ensure compliance with Article 13 of the Gas Directive, the Secretariat requests ANRE to monitor the future procurement for maintenance services by *VMTG*, and to ensure that, under the new agreement, *VMTG* has the undisputed right to monitor, control and verify the works performed by the sub-contractor, including the prerogative to sanction the sub-contractor in case of lack of or faulty performance.

Moreover, *VMTG* currently employs 61 people, and it plans to employ 40 more.<sup>40</sup> Under the Maintenance Agreement, *Moldovatrangaz* delegated 518 employees to perform works and services for *VMTG*. The Secretariat recommends that ANRE, in its final certification decision, assesses whether the current interplay of allocated tasks and division of personnel allows *VMTG* to effectively fulfill its role of monitoring and controlling of the maintenance works performed by *Moldovatrangaz*, and to request amendments of the Maintenance Agreement to ensure that *VMTG* has the undisputed right to monitor, control and verify the works performed by *Moldovatrangaz*, including the prerogative to sanction *Moldovatrangaz* in case of lack of or faulty performance.

iii. Regarding financial resources needed to fulfill the tasks of a TSO, the Preliminary Decision analyzed an independent auditor report by BDO Audit & Consulting LLC, as well as *VMTG*'s financial statements for the financial year 2022. At the same time, the new role of ISO will ensure *VMTG* benefits from increased liquidity from regulated revenue. ANRE concluded that *VMTG* has the necessary financial resources to fulfil its tasks, and the Secretariat has no reason to not adhere to this conclusion.

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<sup>35</sup> Maintenance Agreement, Section 3.1.

<sup>36</sup> Commission's Opinion on certification of *Trans Austria Gasleitung GmbH*, C(2013) 649, 04.02.2013.

<sup>37</sup> Commission's Opinion on certification of *Augstsprieguma tikls*, C(2012) 9108 final of 3.12.2012.

<sup>38</sup> Commission's Opinion on certification of *Trans Austria Gasleitung GmbH*, C(2013) 649, 04.02.2013.

<sup>39</sup> Commission's Opinion on Certification of *jordgas Transport GmbH* C(2012), 3 March 2012.

Based on the above, the Secretariat requests that ANRE, in its final certification decision, imposes upon *VMTG* the following conditions:

- That any following maintenance agreement, as well as any agreement whose costs will be passed through to the consumers, will be the result of a transparent and competitive procurement procedure;
- That under the new maintenance agreement, *VMTG* has the undisputed right to monitor, control and verify the works performed by the sub-contractor, including the prerogative to sanction the sub-contractor in case of lack of or faulty performance.
- That owners of the transmission network are not eligible to participate in the procurement procedure for maintenance services and works; and
- That, until the new maintenance agreement is signed, amendments of the Maintenance Agreement to ensure that *VMTG* has the undisputed right to monitor, control and verify the works performed by *Moldovatrangsgaz*, including the prerogative to sanction *Moldovatrangsgaz* in case of lack of or faulty performance.

iv. As a precondition for *VMTG*'s capacity to effectively and reliably operate the transmission system, the ISO needs to be able to rely on the right to operate the network. This right is usually bestowed upon the ISO by law or by agreements with the owner of the infrastructure, such as economic management rights agreements, lease or concession.<sup>41</sup>

The two main owners of the transmission system operated by *VMTG* are *Moldovatrangsgaz* and *Moldovagaz*, together owning approximately 78% of the gas transmission system. The Moldovan gas transportation system (apart from the gas transmission networks located on the left bank of the Dniester River and the part operated by *VMTG* under the ownership unbundling model) is owned by several entities, as follows:

- The Moldovan Government through the Ministry of Infrastructure (46,58 km or 2.77%)
- Local public administration authorities (177,65 km or 10.56%)
- Economic operators, out of which:
  - o *Moldovagaz* (1011,271 km or 60.11%)
  - o *Moldovatrangsgaz* (288,099 km or 17.12%)
  - o *JV Rotalin Trading LLC* (25,57 km or 1.52%)
  - o *Garma Group LLC* (0,055 km or 0.003%) and
  - o *UMG Pricarpattrangsgaz Ukraine* (10,56 km or 0.627%).

The Lease Agreement between *VMTG* and *Moldovatrangsgaz* was concluded based on section 5 of ANRE Decision 434/2023, according to which a lease agreement had to be signed between the two parties and presented to ANRE for approval before 9 September 2023. The object of the Lease Agreement is the lease, from *Moldovatrangsgaz* to *VMTG*, of the entire gas transportation network as in the Annex 1 to the Lease Agreement, which constitutes the entire transportation network on the territory of the Republic of Moldova, i.e., the one previously managed by *Moldovatrangsgaz* as TSO (with the exception of the one on the left bank of the Dniester River). Under the Lease Agreement, *VMTG* is to use the network in accordance with the TSO license issued by ANRE.<sup>42</sup> The term of the Lease Agreement is five years and can be extended. The Lease Agreement includes the rights and duties of the parties.

As *Moldovatrangsgaz* owned, at the time the Lease Agreement was concluded, only 17.12% of the Moldovan transmission network, for the remaining part the Lease Agreement is a *de facto* sub-lease by *Moldovatrangsgaz* for the network owned by other entities.

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<sup>41</sup> See, for example, Secretariat's Opinion 4/19 on the certification of *GTSO* of Ukraine.

<sup>42</sup> ANRE Decision No 572 dated 18 September 2023.

A decision of the Committee for Emergency Situations from 4 September 2023 (hereinafter, “Decision 80 CSE” ),<sup>43</sup> initially obliged *Moldovatransgaz* to conclude with *VMTG* a single lease agreement for the whole transmission network in Moldova, to include the property owned by *Moldovatransgaz* and the property owned by *Moldovagaz*. According to section 2 of Decision 80 CSE, for the interpretation and execution of the provisions of the lease agreement, *Moldovatransgaz* was entitled to act as the sole owner of the entire natural gas transmission network leased out to *VMTG*. The state of emergency in Moldova ended at the end of December 2023, and as of that date all the decisions of the Committee for Emergency Situations, including Decision 80 CSE, ceased to be valid.<sup>44</sup> The subsequently adopted Law 429/2023 only introduces the obligation for the candidate ISO to enter into lease agreements with the owner/owners of the transmission network and does not require that one of these owners should be regarded to consent to the lease on behalf of all others.<sup>45</sup>

As Decision 80 CSE is no longer in force, it needs to be analysed whether *Moldovatransgaz* had the capacity to sign the Lease Agreement for the transmission network owned by *Moldovagaz*.

*Moldovagaz*'s assets had been previously leased to *Moldovatransgaz* on basis of a lease agreement dated 30 September 1999 (hereinafter, the “1999 lease agreement”),<sup>46</sup> by virtue of which *Moldovatransgaz* was entitled to use the transmission network owned by *Moldovagaz* for its activity as TSO. Notably, section 3.3 of the 1999 lease agreement provides that *Moldovatransgaz* cannot “sell, donate, exchange, pledge, lend, write off, dissemble, lease or otherwise dispose of the property subject to the agreement without the consent of *Moldovagaz*.” The 1999 lease agreement was amended by an additional act dated 4 September 2023, which modified section 3.3 quoted above by permitting *Moldovatransgaz* to sub-lease the transmission assets owned by *Moldovagaz*.<sup>47</sup> It is based on this 2023 amendment of the 1999 lease agreement that *Moldovatransgaz* entered into the Lease Agreement with *VMTG* for the transmission network owned by *Moldovagaz*.

The 2023 amendment of the 1999 lease agreement was executed by the president of the management board of *Moldovagaz*. According to *Moldovagaz* regulation on the management board,<sup>48</sup> the president of the management board can solely decide and conclude transactions in relation to *Moldovagaz* assets, only if the value of the respective assets does not exceed 0.1% of *Moldovagaz* assets as per the last financial report.<sup>49</sup> Under Moldovan law, the concept of “transaction” encompasses a wide range of contracts, such as sale, assignment, donation, lease, loan or license.

For assets worth more than 0.1% the agreement of additional members of the management board is required, as follows:

- assets worth between 0.1% and 1%: at least seven members
- assets worth between 1% and 10%: at least eight members
- assets worth between 10% and 25%: at least nine members (unanimity);

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<sup>43</sup> Decision no 80 of the Committee for Emergency Situations in the Republic of Moldova dated 4 September 2023.

<sup>44</sup> Law no 212-XV dated 24 June 2004 on the state of emergency, state of siege and state of war, published in the Official Journal of the Republic of Moldova no 132-137 Art 696 from 6 August 2004, Article 4.

<sup>45</sup> Law 249/2023, Article 10.

<sup>46</sup> Lease agreement dated 30 September 1999 between *Moldovagaz* and *Moldovatransgaz*.

<sup>47</sup> Additional act dated 4 September 2023 amending the lease agreement dated 30 September 1999 between *Moldovagaz* and *Moldovatransgaz*, section 4.

<sup>48</sup> *Moldovagaz* regulation on the functioning of the management board dated 3 September 2003, as subsequently amended.

<sup>49</sup> *Moldovagaz* regulation on the functioning of the management board dated 3 September 2003, as subsequently amended, section 2.4.

- assets worth higher than 25% of the entirety of *Moldovagaz* assets: decision by the shareholders' meeting of *Moldovagaz*.<sup>50</sup>

The Secretariat considers it unlikely that the assets leased to *VMTG* represent less than 0.1% of entire pool of assets owned by *Moldovagaz*. In consequence, the Secretariat sees a risk that the 2023 amendment of the 1999 lease agreement was signed by the president of the management board of *Moldovagaz* without a due power of representation, which would then render it and the Lease Agreement for the part referring to *Moldovagaz* assets void.<sup>51</sup> The Secretariat hence requests ANRE to analyse the validity of the 2023 amendment of the 1999 lease agreement and its effect on the Lease Agreement. Should ANRE find that the 2023 amendment of the 1999 lease agreement is void, a new agreement should be concluded between *Moldovatransgaz* and *Moldovagaz* to ensure the consent of *Moldovagaz* for the sub-lease of its transmission assets to *VMTG* or regulatory measures to that effect should be taken based on Article 7(1)(f) of the Gas Law. The new agreement or the decision of ANRE should enter into force within three months after the final decision on certification.

The gas transportation network owned by the Moldovan Government, local public administration authorities, as well as economic operators other than *Moldovagaz* (approximately 260 km or approximately 15%) was operated until 19 September 2023 by the previous TSO *Moldovatransgaz* on the basis of a series of contracts for delivery and acceptance for technical service of natural gas networks.<sup>52</sup> As in the case of the transportation network owned by *Moldovagaz* or *Moldovatransgaz*, the obligation in Article 26(3) of the Gas Law applies, namely that the candidate ISO (*VMTG*) had to enter into lease agreements with these network owners as well. To the Secretariat's knowledge, this is yet to happen.

ANRE argues in the Preliminary Decision that the contracts of delivery and acceptance had been "taken over" by virtue of the law, more specifically Article 26(2)(d) of the Gas Law and point no 4 of ANRE Decision 434/2023. Article 26(2)(d) of the Gas Law is the mere transposition of Article 14(2)(d) of the Gas Directive (obliging the system owner to demonstrate its ability to comply with its obligations and to provide all the contractual arrangements in this regard), whereas point no 4 of ANRE Decision 434/2023 states that, as of 19 September 2023, *VMTG* would be the legal successor of *Moldovatransgaz* regarding contracts with system users and interoperability agreements. The quality of a system owner, however, is different from that of a system user, as it is based on the right to property rather than a commercial contract. Also, it is unclear whether the contracts for delivery and acceptance for technical service of natural gas networks may qualify as interoperability agreements, as such agreements usually have neighbouring TSOs as counterparties.

Against this background, the Secretariat requests ANRE to oblige *VMTG* to present lease agreements with the Moldovan Government, local public administration authorities, as well as economic operators other than *Moldovagaz* for their part of the transportation network, or regulatory measures to that effect be taken based on Article 7(1)(f) of the Gas Law, within three months from the date of the Final Decision.

On 28 May 2024, the Ministry of Energy notified the Secretariat on the existence of the Tocuz-Căinari-Mereni pipeline which is also in state ownership under the Ministry of Infrastructure,<sup>53</sup>

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<sup>50</sup> Statute of JSC *Moldovagaz* dated 30 July 2021, section 29. The Founding Agreement / Shareholders' Agreement of *Moldovagaz* was signed on 23 October 1998 by the Department of Privatisation and Administration of the State Property at the Ministry of Economy and Reforms of Moldova, the so-called Committee for Property Administration of Transnistria and *Gazprom*.

<sup>51</sup> Article 370 of the Moldovan civil code.

<sup>52</sup> Preliminary Decision, section 4.1.2.

<sup>53</sup> Letter No. 09-1440 of 28 May 2024 from the Minister of Energy to the Director of the Energy Community Secretariat.

and asked the Secretariat which public authority should exercise the right of property on behalf of the state over that pipeline, so that compliance with the ISO model is respected. The Secretariat is not in a position to answer that question. However, based on the Secretariat's experience in the certification of the electricity TSO *Moldelectrica*,<sup>54</sup> ownership in gas transmission networks cannot be exercised by the Public Property Agency, which acts as a sole shareholder in supply and generation companies. Furthermore, as in the case of *Moldelectrica*, ownership of the transmission network by the Ministry of Energy, which is in charge of energy policy, would have to rely on the separation measures put in place in place by the Ministry.

v. As regards the gas network on the left bank of the Dniester River (Pridnestrovie/Transnistria), the operator of the gas transmission system is *Tiraspoltransgaz S.R.L.* (hereinafter "*Tiraspoltransgaz*").<sup>55</sup> *Tiraspoltransgaz-Pridnestrovie de facto* operates the portion of the Moldovan gas transmission system situated on the left bank of the Dniester River, based on an arrangement with *Tiraspoltransgaz*, a *de jure* subsidiary of *Moldovagaz*.<sup>56</sup>

On 6 April 2022, *Moldovatransgaz* and *Tiraspoltransgaz* concluded a lease agreement based on which *Tiraspoltransgaz* transferred to *Moldovatransgaz* the right of use of the natural gas pipelines from the interconnection point Grebeniki up to the balance demarcation boundary between *Tiraspoltransgaz* and *Moldovatransgaz*.<sup>57</sup>

On 18 September 2023, *VMTG* and *Moldovatransgaz* concluded the Technical Operation Agreement, whose aim is to ensure the interconnection and interoperability of the transmission network managed by *VMTG* and the transmission network on the left bank of the Dniester River managed by *Moldovatransgaz*, and that the consumers on the left bank of the Dniester River continue to benefit from uninterrupted supply with natural gas. According to the Technical Operation Agreement, *VMTG* agreed to take over the commercial operation on the interconnection points Ananiev, Grebeniki and Limanskoe and to implement the provisions of the interconnection agreement with the Ukrainian TSO<sup>58</sup> and, to the extent the volumes of natural gas are intended for consumption on the left bank of the Dniester River, to provide commercial operation services free of charge. On the other hand, *Moldovatransgaz* committed to ensure the transportation of gas volumes from the interconnection points Ananiev, Grebeniki and Limanskoe until the interconnection points managed by *Tiraspoltransgaz*.<sup>59</sup> The Technical Operation Agreement is valid until 24 December 2024.

According to Law 429/2023,<sup>60</sup> *Moldovatransgaz* remains responsible for the use of natural gas transmission networks technically managed and maintained by *Tiraspoltransgaz*, which will not perform the function of a TSO on the left bank of the Dniester River but will enter into a separate agreement with *Moldovatransgaz*.<sup>61</sup> That Law also included a novel competence for ANRE to designate the entity to manage gas transmission networks which are the property of undertakings situated on the left bank of the Dniester River.

The Secretariat is aware that Moldovan authorities, including ANRE, do not effectively control the natural gas market on the left bank of the Dniester River. The Secretariat also understands

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<sup>54</sup> Secretariat's Opinion 2/23 on the certification of *Moldelectrica*, 12 May 2023.

<sup>55</sup> <https://www.moldovagaz.md/rus/o-kompanii>.

<sup>56</sup> "Moldovagaz debt audit: final report" prepared by Wikborg Rein Advokatfirma AS and Forensic Risk Alliance LLC for The Public Property Agency of the Government of the Republic of Moldova, 2 June 2023, p 61.

<sup>57</sup> Lease Agreement no 10-SJ dated 6 April 2022 between *Tiraspoltransgaz* and *Moldovatransgaz*.

<sup>58</sup> See Additional Agreement No 2 to the Interconnection Agreement of 30 December 2019 between the Gas TSO of Ukraine, *Moldovagaz*, *Moldovatransgaz* and *VMTG* dated 15 September 2023.

<sup>59</sup> See ANRE Decision no 262 dated 24 July 2020 approving the list of entry/exit points of the natural gas networks.

<sup>60</sup> Law 429/2023, Article 10.

<sup>61</sup> Law 429/2023, Article 4; previously CSE Decision No 80, sections 1.1 and 1.2.

that the designation of *VMTG* as a TSO in Moldova has not affected the flow and supply of natural gas to that region and agrees that this *status quo* does not affect the gas market on the right bank.

### **c. Compliance with Article 14(2)(c) of the Gas Directive**

According to Article 14(2)(c) of the Gas Directive, a candidate ISO can only be certified if it has undertaken to comply with a ten-year network development plan monitored by the regulatory authority. A TSO needs to submit such a ten-year network development plan based on existing and forecast supply and demand to the regulatory authority. It shall contain efficient measures to guarantee the adequacy of the system and the security of supply (Article 22 of the Gas Directive). This obligation is transposed in Article 26(2)(c) of the Gas Law.

*VMTG* submitted, and ANRE approved, the Development Plan for the years 2023-2032, based on the infrastructure leased from *Moldovatransgaz*.<sup>62</sup> The Secretariat agrees with ANRE that *VMTG* complies with Article 14(2)(c) of the Gas Directive.

## **3. Unbundling and tasks of the gas transmission system owners**

### **a. Unbundling of the gas transmission system owners**

Article 15 of the Gas Directive requires legal and functional unbundling of the transmission system owner.

Legal unbundling requires that the network is owned by a company separate from the other activities not related to transmission, distribution and storage and must be responsible for all the decisions assigned to the transmission system owner under the Gas Directive.

Functional unbundling requires that this company is independent in terms of its organisation and decision making from other activities not related to transmission. Article 15(2) of the Gas Directive sets the following minimum criteria:

- Persons responsible for the management of the transmission system owner shall not participate in company structures of the integrated natural gas undertaking responsible, directly or indirectly, for the day-to-day operation of the production and supply of natural gas;
- Appropriate measures shall be taken to ensure that the professional interests of persons responsible for the management of the transmission system owner are taken into account in a manner that ensures that they are capable of acting independently;
- The transmission system owner shall establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded and ensure that observance of it is adequately monitored.

Article 15(1) and (2) of the Gas Directive apply to transmission system owners which are part of a vertically integrated undertaking. According to Article 2(20) of the Gas Directive, a "*vertically integrated undertaking*" (*VIU*) means "*a natural gas undertaking or a group of natural gas undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission, distribution, LNG or storage, and at least one of the functions of production or supply of natural gas*".

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<sup>62</sup> ANRE Decision no 820 dated 22 December 2023 for the approval of the development plan of *Vestmoldtransgaz* for 2023-2032.

The main owner of the gas transmission network in Moldova, *Moldovagaz*<sup>63</sup> acts as supplier of last resort<sup>64</sup> and universal service supplier at regulated prices<sup>65</sup> for all final gas consumers.<sup>66</sup> At the same time, *Moldovagaz* is a sole shareholder in twelve distribution system operators,<sup>67</sup> and the sole shareholder of *Moldovatrangaz*.<sup>68</sup> In addition, *Moldovagaz* is the sole shareholder of *SRL "Flacăra Albastră"* which in turn owns *SRL "Transautogaz"*, a natural gas supplier, as well as supplier of petrol products. Both *Moldovagaz* (the owner of 60.11% of the transmission networks on which *VMTG* was designated as the TSO) and *Moldovatrangaz* (the owner of 17.12% of the transmission networks on which *VMTG* was designated as the TSO) are therefore parts of a VIU.

In particular, the supply of natural gas by *Moldovagaz*, which at the same time is an owner of the transmission system, does not comply with the requirement of legal unbundling in Article 15(1) of the Gas Directive. To ensure the fulfillment of the conditions set out in that provision, ownership of the natural gas transmission network should either be transferred from *Moldovagaz*, to another entity e.g., to *Moldovatrangaz*, which would then have to comply with the requirements of functional unbundling under Article 15(2) of the Gas Directive. This would require fundamental changes to the corporate documents of both companies. Such changes were requested by ANRE in its Preliminary Decision, in which it imposed two conditions: that amendments are made to *Moldovatrangaz*' statute so that the decision-making process is not fully controlled by its sole shareholder, and that a board of directors is appointed in *Moldovatrangaz* to ensure an additional layer of separation between the sole shareholder and the actual decision-making. Whereas the Secretariat agrees in principle that *Moldovatrangaz* can act as a system owner for the assets currently owned by *Moldovagaz* as well as its own, mere amendments to the statute of *Moldovatrangaz* may not suffice. In order to exclude *Moldovatrangaz* from the VIU, the statute of *Moldovagaz* must be as well amended to exclude influence over the decision-making process in *Moldovatrangaz* by *Moldovagaz*. Furthermore, simply appointing a board of directors to make decisions, while having the sole shareholder appoint the respective board of directors is again not sufficient to comply with the requirements of functional and legal unbundling. Any corporate changes must ensure that *Moldovagaz* cannot control decision making processes within *Moldovatrangaz* and must be compliant with Moldovan legislation on companies.

In the alternative, should *Moldovagaz* and *Moldovatrangaz* remain the owners of the gas transmission system in Moldova, in order to ensure compliance with Articles 15(1) and (2) of the Gas Directive, *Moldovagaz* cannot continue its activity as gas supplier. To this end, the Secretariat requests that ANRE, in its final decision on certification, provides that the ownership of the natural gas transmission network should be transferred from *Moldovagaz* to another entity which does not conduct any other activities related to transmission, distribution,

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<sup>63</sup> License AC001347 valid until 6 November 2043.

<sup>64</sup> ANRE Decision No 444 dated 12 October 2021.

<sup>65</sup> ANRE Decision No 487 dated 20 December 2021.

<sup>66</sup> Since December 2022, 100% of the natural gas for Moldovan suppliers of last resort is supplied by *Energocom* (which also has a gas supply license) based on a public service obligation.

<sup>67</sup> *SRL "Chişinău-gaz"*, *SRL "Edineţ-gaz"*, *SRL "Floreşti-gaz"*, *SRL "Ialoveni-gaz"*, *SRL "Ştefan vodă-gaz"*, *SRL "Ungheni-gaz"*, *SRL "Cahul-gaz"*, *SRL "Bălţi-gaz"*, *SRL "Orhei-gaz"*, *SRL "Cimişlia-gaz"*, *SRL "Găgăuz-gaz"*, *SRL "Taraclia-gaz"*.

<sup>68</sup> Statute of *Moldovatrangaz* approved by the supervisory board of *Moldovagaz* by Decision No 10 from 13 July 1999.

supply and storage, and which is legally and functionally unbundled from the VIU, all within a timeframe resulting from the analysis requested under section III.4 below. The Secretariat further requests that ANRE, in its final decision on certification, provides that, in case this condition has not been fulfilled within the indicated deadline, to withdraw the supply license of *Moldovagaz* within one month from that deadline.

The other private companies owning parts of the transmission network are:

- *JV Rotalin Gaz Trading*, holder of a natural gas supply license<sup>69</sup> and of a natural gas distribution license.<sup>70</sup> It owns 25,570 km or 1.52% of natural gas transmission network, which were transmitted for technical service to *Moldovatrangaz LLC*.<sup>71</sup>

- *LLC Garma-Grup* owns 0.055 km of natural gas transmission network, and it has an electricity supply license.<sup>72</sup> It also transferred the natural gas transmission network it owns to *Moldovatrangaz LLC* for technical service.<sup>73</sup>

- *UMG Pricarpatrangaz (Ukraine)* owns of 10.56 km of the natural gas transmission network. Whereas ANRE admitted that the status of these assets is uncertain and comes from a historical situation, this has not negatively impacted the gas transmission activity in Moldova so far.<sup>74</sup>

In its Preliminary Decision, ANRE concluded that these companies own negligible parts of the transmission system relative to the entirety of the Moldovan gas transmission system. While this may be true, the Secretariat requests ANRE to clarify the status of ownership of these transmission assets and the legal basis on which they are used by *VMTG*, to ensure that the holder of the ownership rights is not a VIU and that it is not compensated through the transmission tariff.

The rest of the Moldovan gas transmission network is owned by central and local public authorities (the Public Property Agency owns 2.77% and the rest of 10.55% is split between ten local councils). Again, while these percentages may be negligible, and the transmission networks were operated by *Moldovatrangaz* and now by *VMTG* without incidents, ANRE should make use of the certification procedure and clarify the status of these assets, the legal basis on which they are used by *VMTG*, as well as their reflection in the transmission tariffs.

#### **b. Tasks of the gas transmission system owners**

The system owner's activities must be limited to enabling the ISO to carry out its tasks. Besides, Article 14(2)(d) of the Gas Directive requires that the transmission system owner has demonstrated its ability to comply with its obligations under Article 14(5) of the Gas Directive, namely to

- provide all the relevant cooperation and support to the ISO for the fulfilment of its tasks, including in particular all relevant information (Article 14(5)(a));

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<sup>69</sup> Series AC 001686 of 24 August 2010.

<sup>70</sup> Series AC 001409 of 24 August 2010.

<sup>71</sup> Contract no. 2/10 of 03 May 2010 on delivery and acceptance for technical service.

<sup>72</sup> Series AC no. 001408 of 21 February 2017.

<sup>73</sup> Contract no. 56-SP of 05 November 2018 on delivery and acceptance for technical service.

<sup>74</sup> Preliminary Decision, Section 4.8.1.5).



- finance the investments decided by the ISO and approved by the regulatory authority or give its agreement to financing by any interested party including the ISO (Article 14(5)(b));
- provide for the coverage of liability relating to the network assets, excluding the liability relating to the tasks of the ISO (Article 14(5)(c)); and
- provide guarantees to facilitate financing any network expansions (Article 14(5)(d)).

The relation between the gas transmission system owners and *VMTG* is defined by the Gas Law and the Lease Agreement. Article 27(3) of the Gas Law fully transposes the system owner's obligations in Article 14(5)(d).

The Lease Agreement, defines the roles, obligations, and rights of *Moldovatransgaz*, as the entity signing the Lease Agreement, and *VMTG*, as the system operator.<sup>75</sup> Section 7 of the Lease Agreement includes most of the requirements under Article 14(5) of the Gas Directive:

- As per section 7.1.6. of the Lease Agreement, *Moldovatransgaz* is under an obligation to provide support and assistance to *VMTG*, upon request, for the reliable operation of the transmission network. Furthermore, ANRE Decision 434/2023 instructed *VMTG* to share all relevant documents and information and to provide the access needed by *VMTG* to prepare for taking over the role of the ISO.<sup>76</sup>
- According to section 7.1.7. of the Lease Agreement, *Moldovatransgaz* must finance the investments decided by the *VMTG* and approved by ANRE in an amount that cannot be lower than the value of the annual amortization approved by ANRE for purposes of setting the price of the Lease Agreement, and to finance or give its consent to financing from third parties, including *VMTG*, of any investments exceeding that value. The Gas Directive does not include a cap for financing investments in the way that the Lease Agreement does, however, in a similar way to the Gas Directive, the Lease Agreement obliges *Moldovatransgaz* to consent to third parties financing investments in the network which are more than the value of the annual amortization approved by ANRE. The development plan approved by ANRE provides that the costs of the investments will be covered by *VMTG* and *Moldovatransgaz*, without offering details as the cost allocation.<sup>77</sup>
- The Lease Agreement does not include a specific clause providing for the coverage of liability relating to the network assets by the system owners. This has been interpreted as meaning that the network owner must cover liability for the condition of the network, but not for the management of the network.<sup>78</sup> To this end, the Lease Agreement contains several provisions that can be interpreted as *Moldovatransgaz*' liability coverage: *Moldovatransgaz* guarantees that the transmission network is free of any pledges, encumbrances and flaws (including legal flaws),<sup>79</sup> it undertakes to repair damages related to the material and legal flaws of the transmission network in accordance with the applicable civil law standards,<sup>80</sup> and it has an obligation to carry out all capital repairs in order to maintain the transmission network fit for purpose.<sup>81</sup> *Moldovatransgaz* is obliged to coordinate with *VMTG* the works and capital repairs in

<sup>75</sup> Preliminary Decision, section 4.5.

<sup>76</sup> ANRE Decision 434/2023, Section 3.

<sup>77</sup> ANRE Decision no 820 dated 22 December 2023 for the approval of the development plan of *Vestmoldtransgaz* for 2023-2032, Chapter 7.

<sup>78</sup> Interpretative note on directive 2009/72/EC concerning common rules for the internal market in electricity and directive 2009/73/EC concerning common rules for the internal market in natural gas. The unbundling regime, 22 January 2010, p 14.

<sup>79</sup> Section 4.1.1 of the Lease Agreement.

<sup>80</sup> Section 4.1.3 of the Lease Agreement.

<sup>81</sup> Section 7.1.8 of the Lease Agreement.

order to plan the execution of the works". The Secretariat agrees with ANRE that these provisions of the Lease Agreement corroborated ensure compliance with Article 14(5)(c).

- The Lease Agreement does not include an obligation for the system owners to provide guarantees to facilitate financing of any network expansions. In the Preliminary Decision, ANRE considers, however, this requirement fulfilled by the fact that such obligation exists in the Gas Law which covers situations not covered by the Lease Agreement.<sup>82</sup>

That being said, the Secretariat remains concerned that the Lease Agreement is valid only for the network owned by *Moldovatransgaz* for the reasons explained in section III.2.b(iv) above. This means that the owners of more than 80% of the transmission system may not only have not validly consented to their property to be leased to *VMTG*, but also may not have committed to comply with their obligations under Articles 14(2)(d) and 14(5) of the Gas Directive.

Finally, Article 41 of the Gas Directive stipulates a set of additional powers and duties for the national regulatory authority related to the transmission system owner in case of the ISO model. They comprise:

- monitoring the transmission system owner's compliance with its obligations under Article 14 of the Gas Directive, and issuing penalties for noncompliance (Article 41(3)(a));
- monitoring the relations and communications between the transmission system owner and the ISO, and in particular approve contracts and act as a dispute settlement authority between the transmission system owner and the ISO (Article 41(3)(b));
- ensuring that network access tariffs collected by ISO include remuneration for the network owner or network owners, which provides for adequate remuneration of the network assets and of any new investments made therein, provided they are economically and efficiently incurred (Article 41(3)(d));
- having the powers to carry out inspections, including unannounced inspections, at the premises of the independent system operator (Article 41(3)(e)).

In this respect, the Secretariat notes that, according to the Gas Law, ANRE has the power to carry out inspections, including unannounced inspections, at the premises of the system operator,<sup>83</sup> it must monitor the transmission system owner's compliance with its obligations under Article 14 of the Gas Directive, can issue penalties for non-compliance,<sup>84</sup> and monitors the relations between the transmission owners and the ISO, approves contracts and acts as a dispute settlement authority.<sup>85</sup> If properly implemented, these requirements can be considered fulfilled.

With regard to the obligation of the ISO network tariffs to include the remuneration for the network owners, such a provision has not been transposed in the Gas Law, however the remuneration for the network owners is included in the Lease Agreement approved by ANRE, which can be interpreted as a recognition of those costs, under the caveat of the validity of the Lease Agreement for other owners than *Moldovatransgaz*. It is however unclear whether *Moldovatransgaz* indeed shares the payments under the Lease Agreement with the other system owners. The Secretariat requests ANRE to clarify this issue in the final decision on

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<sup>82</sup> Section 13.4 of the Lease Agreement.

<sup>83</sup> Article 7(1)(e<sup>1</sup>) of the Gas Law.

<sup>84</sup> Article 113(3)(b) of the Gas Law.

<sup>85</sup> Article 109(2<sup>^</sup>1) of the Gas Law.

certification, and to ensure that all system owners are compensated (either by appropriate regulatory decisions, or in the decision establishing the content of future lease agreements based on Article 7(1)(f) of the Gas Law.

#### **4. Assessment under Article 11 of the Gas Directive**

As set out above, *Moldovagaz* owns 60.11% of the transmission network and controls *Moldovatransgaz*, the owner of 17.12% of the network. The majority shareholder of *Moldovagaz* is the Russian state-owned company *Gazprom* (50%+1). The remaining shareholders are the Government of the Republic of Moldova, represented by the Public Property Agency (35,33%), the region on the left bank of the Dniester River (13,44%), as well as other minority shareholders (1,23%). Moreover, *Gazprom* appoints the majority of members in all corporate and administrative bodies of *Moldovagaz*,<sup>86</sup> and can block any decision. *Gazprom* is active in the exploration, production, transportation, storage, processing and sales of gas worldwide, and does not comply with the independence requirements laid down in Article 9 of the Gas Directive.

According to Article 11 of the Gas Directive, when certification is requested by a transmission system owner or transmission system operator that is controlled by a person or persons from a third country or third countries, the regulatory authority shall refuse certification if it has not been demonstrated that the entity concerned complies with the applicable unbundling requirements (Article 11(3)(a)), and/or that granting the certification would not put at risk the security of supply of the Contracting Party and the Energy Community (Article 11(3)(b)). In such a situation, the procedure under Article 10 of the Directive is replaced by the one in Article 11 concerning certification in relation to third countries.<sup>87</sup>

The purpose of Article 11 is twofold: first, it seeks to avoid that unbundling rules, whose main aim is to separate between production and supply on the one hand, and distribution and transmission, on the other, are circumvented by participations acquired through third countries. And second, given the geopolitical importance of gas supply, Article 11 seeks to protect the security of supply in the respective country and the region. The control of networks by foreign companies can potentially threaten security of supply in the Energy Community, for example if the owner(s) of the transmission system also act as major suppliers and could use their control over the network to prevent alternative sources of supply from entering the market.<sup>88</sup> Security of supply is an essential element of public security and is intrinsically linked to well-functioning and open gas markets. According to Recital 22 of the Gas Directive, “*the security of supply of energy to the Community requires, in particular, an assessment of the independence of the network operation, the level of the Community’s and individual Contracting Parties’ dependence on energy supply from third countries, and the treatment of both domestic and foreign trade and investment in energy in a particular third country.*”

Ownership of networks by foreign countries may represent a threat to the Energy Community security of supply. Companies from countries which provide a significant proportion of their gas supplies, especially in a certain country or region, and which also own the pipelines

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<sup>86</sup> <https://www.moldovagaz.md/rom/despre-companie/organele-de-conducere>.

<sup>87</sup> „Interpretative note on directive 2009/72/EC concerning common rules for the internal market in electricity and directive 2009/73/EC concerning common rules for the internal market in natural gas. The unbundling regime”, 22 January 2010, p 22.

<sup>88</sup> See *Cabeau* in *Jones*, EU Energy Law, Vol. I, 3rd edition, para. 4.96 et seq.

necessary for the gas supply, would create important energy security issues, as they could use their ownership of the network to prevent alternative sources of supply from emerging.<sup>89</sup> In Moldova's case, it is the VIU *Moldovagaz*, controlled by *Gazprom*, that acts as a wholesale and retail supplier, ultimately owns more than 80% of the transmission network and the majority of the DSOs in the country.

Security of supply is more relevant now than ever, especially after Russia's full-fledged invasion of Ukraine, when several EU countries experienced unilateral and unjustified supply cuts from Russia,<sup>90</sup> some of which already resulted in awards against *Gazprom*.<sup>91</sup> Moldova was one of the first countries to experience the Russian supplier's lack of reliability and weaponization of energy resources in the autumn of 2021, when *Gazprom* reduced the supplied volumes by 30%, which triggered a state of emergency in the country.<sup>92</sup> Moreover, phasing out the reliance of Russian gas has been one of the key missions of the European Union since February 2022.<sup>93</sup>

Whereas in most of its certification opinions, the European Commission performed an analysis under Article 11 of the Gas Directive when the system operator was controlled by persons from third countries, it also applied Article 11 in case where the system owner was controlled by foreign interests. Such was the case of the certification of the Polish gas network operator *Gas-System*:<sup>94</sup> the Russian company *Gazprom* had 48% interest in the system owner *Europolgaz*. In its Opinion, the European Commission concluded that the very fact that the governance of *Europolgaz* is designed based on a balance of power and that as a result of that *Gazprom* is able to block decisions, including decisions of a strategic character, and that *Gazprom's* veto possibilities go beyond the protection of its financial interests, translates into decisive control over the system owner *Europolgaz*. It requested the Polish national regulator to perform an in-depth analysis in this regard. In its 2015 opinion on the certification of *Gaz-System*, the European Commission agreed with the regulator that, in principle, the ISO-model, whereby the owner of the system and the TSO are separate, is better suited to address influence of the owner than for instance the ITO model whereby the TSO, as the owner of the transmission assets, can remain exposed to direct influence as regards system operation by the VIU.<sup>95</sup> However, the European Commission insisted that the Polish national regulator applies Article 11(3)(b), which requires a security of supply assessment, in order to ensure that the fact that a third country person exercises control over the network or its owner does not put at risk the security of supply of the country in which the network is situated or the EU as a whole.

The Secretariat notes that ANRE has not formally notified the Secretariat that the main two transmission system owners in Moldova are controlled by a company from a third country and has not itself conducted an analysis of compliance with Article 11 of the Gas Directive. Given

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<sup>89</sup> See *Cabeau* in *Jones*, EU Energy Law, Vol. I, 3rd edition, para. 4.97.

<sup>90</sup> [https://energy.ec.europa.eu/topics/energy-security/security-gas-supply\\_en](https://energy.ec.europa.eu/topics/energy-security/security-gas-supply_en).

<sup>91</sup> <https://www.uniper.energy/news/uniper-terminates-russian-gas-supply-contracts>

<sup>92</sup> Decision of the Commission for Emergency Situations dated 13 October 2021.

<sup>93</sup> [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/repowereu-affordable-secure-and-sustainable-energy-europe\\_en#diversifying-energy-supplies](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/repowereu-affordable-secure-and-sustainable-energy-europe_en#diversifying-energy-supplies)

<sup>94</sup> Commission Opinion on certification of *Gaz-System* as the operator of the Polish section of Yamal-Europe Pipeline, C(2014), 9 September 2014.

<sup>95</sup> Commission Opinion on certification of *Gaz-System* as the operator of the Polish section of Yamal-Europe Pipeline, C(2015), 19 March 2015.

the reasons stated above, the Secretariat requests that an analysis in line with Article 11 is carried out in the case of the certification of *VMTG*, considering that the majority of the system is owned by a company controlled by third country interests, and considering that this company may have not entered into a valid lease agreement with the ISO, which increases its room for disruption in the Moldovan gas market. It should also be considered that *Moldovagaz* is the dominant supplier of natural gas in Moldova. This analysis should be carried out in the final decision on certification. The results of this analysis should be duly reflected in the outcome of the decision.

#### **IV. Conclusions**

Against this background, the Secretariat supports certification of *VMTG* in line with ANRE's Preliminary Decision and requests that ANRE,

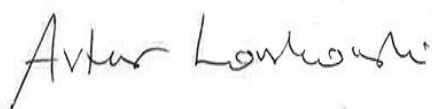
- (i) ensures that the final decision on certification includes an analysis under Article 11 of the Gas Directive regarding *Gazprom's* control over the owners of the gas transmission network, whether such control is compliant with Article 9 of the Gas Directive, and whether it may lead to a threat to the security of supply, including to the left bank of the Dniester River. Should ANRE find that indeed the third country interests pose a threat to Moldova's security of supply, or that unbundling rules are breached, the Secretariat requests that ANRE, in its final decision on certification, imposes adequate conditions to mitigate risks and remedy incompliances.
- (ii) before issuing its final decision on certification, assesses whether the current interplay of allocated tasks and division of personnel allows *VMTG* to effectively fulfill its role of monitoring and control of the maintenance works performed by *Moldovatransgaz*, and, depending on this analysis, to request amendments of the Maintenance Agreement to ensure that *VMTG* has the undisputed right to monitor, control and verify the works performed by *Moldovatransgaz*, including the prerogative to sanction *Moldovatransgaz* in case of lack of or faulty performance.
- (iii) to monitor the future procurement for maintenance services, and to insist that, under the new agreement, *VMTG* has the undisputed right to monitor, control and verify the works performed by any sub-contractor, including the prerogative to sanction sub-contractors in case of lack of or faulty performance. Any following maintenance agreement, as well as any agreement whose costs will be passed through to the consumers, must be the result of a transparent and competitive procurement procedure. Furthermore, the Secretariat requests ANRE to ensure that owners of the transmission network are not eligible to participate in the procurement procedure for maintenance services and works.
- (iv) to analyse, in its final decision on certification, the validity of the 2023 amendment of the 1999 lease agreement and its effect on the Lease Agreement. Should ANRE find that the 2023 amendment of the 1999 lease agreement is void, a new agreement should be concluded between *Moldovatransgaz* and *Moldovagaz* to ensure the consent of *Moldovagaz* for the sub-lease of its transmission assets to *VMTG* or regulatory measures to that effect should be taken based on Article 7(1)(f) of the Gas Law. The new agreement or the decision of ANRE should enter into force within three months after the final decision on certification.

- (v) in its final decision on certification, to oblige *VMTG* to present lease agreements with the Moldovan Government, local public administration authorities, as well as economic operators other than *Moldovagaz* for their part of the transportation network or to take regulatory measures to that effect based on Article 7(1)(f) of the Gas Law. The new agreements or the decision of ANRE should enter into force within three months after the final decision on certification.
- (vi) in its final decision on certification, provides that, within an appropriate timeframe resulting from the Article 11 analysis mentioned in condition (i) above, the ownership of the natural gas transmission network should be transferred from *Moldovagaz* and *Moldovatransgaz* to another entity which does not conduct any other activities related to transmission, distribution, supply, and storage, and which is legally and functionally unbundled from the VIU. The Secretariat further requests that ANRE, in its final decision on certification, provides that, in case this condition has not been fulfilled within the indicated deadline, to withdraw the supply license of *Moldovagaz* within one month from that deadline.
- (vii) to clarify, within a timeframe of up to eight months from the Final Decision, the status of the transmission assets owned by central and local public authorities, *JV Rotalin Gaz Trading, LLC Garma-Grup* and *UMG Pricarpatransgaz*, the legal basis on which they are used by *VMTG*, and to ensure that all system owners are compensated through appropriate regulatory decisions.

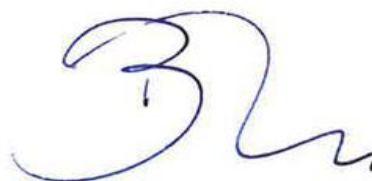
Pursuant to Article 3 of the Gas Regulation, ANRE shall take the utmost account of the above comments of the Secretariat when taking its final decision regarding the certification of *VMTG*. ANRE shall also communicate its final decision to the Secretariat and publish its decision together with the Secretariat's Opinion.

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

Vienna, 24 June 2024



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