

Opinion 1/24

pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC – Republic of North Macedonia – Certification of *NOMAGAS*

On 22 January 2024, the Energy and Water Services Regulatory Commission of the Republic of North Macedonia (hereinafter, “ERC”) notified the Energy Community Secretariat (hereinafter, “the Secretariat”) of a preliminary decision (hereinafter, “the Preliminary Decision”) on the certification of *NOMAGAS JSC Skopje*, “Акционерско друштво за вршење на енергетска дејност пренос на природен гас *НОМАГАС Скопје* во државна сопственост / Shoqëria Aksionare për ushtrimin e veprimtarisë energjetike përçimi i gazit natyror *NOMAGAS Shkup në pronësi shtetërore*” (hereinafter, “*NOMAGAS*”), the transmission system operator for gas in the Republic of North Macedonia (hereinafter, “TSO”). The Preliminary Decision was adopted on 22 January 2024 based on Article 113(4) of the Energy Law¹ and Article 5(3) of the Rulebook for Certification of the Electricity Transmission System Operator and of the Natural Gas Transmission System Operator.²

Pursuant to Article 10 of Directive 2009/73/EC³ (hereinafter, “the Gas Directive”) and Article 3 of Regulation (EC) No 715/2009⁴ (hereinafter, “the Gas Regulation”), the Secretariat shall examine the notified Preliminary Decision and deliver its Opinion to ERC as to the compatibility of such a decision with Article 9 of the Gas Directive.

I. Public energy undertakings in North Macedonia

1. The applicant *NOMAGAS*

Joint Stock Company *NOMAGAS* is the result of a merger between two companies, National Energy Resources AD Skopje (hereinafter, “NER”) and GA-MA AD Skopje (hereinafter, “GA-MA”) in 2022.

Unbundling and certification of the gas TSO in North Macedonia had been delayed due to a dispute between the Government of the Republic of North Macedonia and *Makpetrol AD Skopje* (hereinafter, “*Makpetrol*”) regarding the ownership rights over GA-MA, a company operating the transmission network between the North-Macedonian/Bulgarian border and Skopje. GA-MA was established in

¹ Official Gazette of the Republic of Macedonia no. 96/18 and Official Gazette of the Republic of North Macedonia 96/19 and 236/22.

² Official Gazette of the Republic of Macedonia No. 146/18.

³ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community on 6 October 2011.

⁴ Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community on 6 October 2011.

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June 2006 and was co-owned by the Government and by *Makpetrol*. *Makpetrol* is a natural gas supplier and trader. After 22 years of court proceedings, and as a result of a mediation conducted by the Secretariat's Dispute Resolution and Negotiation Centre,⁵ an dispute on the shares of ownership in *GA-MA* was resolved on 28 December 2020 with the adoption of the Law on the settlement of the dispute between the Government of the Republic of North Macedonia and *Makpetrol*.⁶ In July 2021, *Makpetrol* offered to the Government the purchase of its shares in *GA-MA*, and in August 2021, the Government of North Macedonia became the sole owner of *GA-MA*.

On 1 July 2022,⁷ *GA-MA* was merged with *NER*, a company fully owned by the Government, that developed a new gas transmission network in the country. The new and sole transmission system operator in the country is *NOMAGAS*, with a license for natural gas transmission until October 2040.⁸ The Ministry of Economy (hereinafter, "the Ministry") is the sole shareholder of *NOMAGAS*.

Article 109 of the Energy Law transposes the provisions of the Gas Directive on ownership unbundling. Article 110 of the Energy Law includes rules on ownership unbundling of public companies corresponding to Article 9(6) of the Gas Directive. This article stipulates that the Ministry of Economy is the owner of the gas transmission system operator. According to Article 110(2) of the Energy Law, the Ministry of Economy shall act independently when adopting decisions for appointment of the members of the supervisory board and may not accept directions and guidance from the Government or other state institutions.

As a joint-stock public company, *NOMAGAS* has the following governing bodies: the founder (i.), the shareholders' assembly (ii.) and the board of directors (iii.).

i. The founder is the Government of North Macedonia.⁹ According to the Law on Public Companies,¹⁰ the founder of a public company can only be the Government, the Council of Municipalities or the Council of the City of Skopje.¹¹ A founder establishes the public company, by deciding on its activity, headquarters, type of capital and form of organisation.¹² Whereas the founder is the initial owner of a public company, this does not prevent subsequent sales or transfers of a public company to other entities. On 1 August 2023, the Government transferred the shares in *NOMAGAS* to the Ministry.¹³

⁵ <https://www.energy-community.org/aboutus/disputeresolution/registry/closed/201903.html>

⁶ Official Gazette of the Republic of North Macedonia no. 317/2020.

⁷ Agreement for merger between *NER AD Skopje* and *GA-MA AD Skopje*, 1 July 2022.

⁸ Official Gazette of the Republic of North Macedonia, no 90/05, 135/06, 45/17 and 4/23), valid until 25 October 2040.

⁹ Statute of the JSC for performing energy activity – natural gas transmissions *NOMAGAS Skopje* in state ownership, consolidated text of 15 May 2023, no 01-02/2 of 15 May 2023 and the Decision on amending the Statute of the JSC for performing energy activity – natural gas transmissions *NOMAGAS Skopje* in state ownership no 15-3346/2 of 19 September 2023.

¹⁰ Official Gazette of the Republic of Moldova No. 38/96, as subsequently amended.

¹¹ Law on Public Companies, Art 9.

¹² Law on Public Companies, Art 10 ff.

¹³ Government Decision No. 41-5705/4 dated 1 August 2023. The Central Securities Depository recorded the transfer of the ownership from the Government to the Ministry on 10 August 2023 ([SEI Net V2](#)).

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ii. Pursuant to Article 110(1) of the Energy Law,¹⁴ the Ministry is the sole owner and shareholder of the gas transmission system operator. According to this provision, the Ministry is independent when electing the board of directors and must not accept instructions or directions from the Government or any other state authority.

The shareholders' assembly operates in accordance with the statute and the Company Law.¹⁵ It takes decisions in particular on approving the annual accounts, the financial statements and the annual report; deciding on the distribution of the profit; electing and dismissing the members of the board of directors; approving the remuneration for the members of the board of directors; increasing and decreasing the charter capital of the company; issuing shares and other securities; appointing an auditor; mergers and acquisitions; amendments of the statute; and approving of certain transactions. On the other hand, the shareholders' assembly cannot decide on operational issues that fall within the competence of the board of directors.

iii. The board of directors is composed of five members appointed by the shareholders' assembly for a period of six years. From those, the board appoints one executive member to represent the company. One of the non-executive members of the must be independent. A non-executive member also presides over the board. The board of directors takes decisions with a majority vote of the members present. According to Article 20 of the statute, the board of directors determines and manages the company's business policy; adopts all the acts that refer to the performance of the company's activity; adopts the plans and work programs of the company and gives guidelines for their implementation; decides on organizational changes; decides on the establishment and termination of a subsidiary; decides on the acquisition or alienation of immovable property and rights over them, which are not within the competence of the shareholders' assembly; prepares quarterly and annual reports for the sole shareholder and the shareholders' assembly; prepares a proposal for the distribution of the profit for the shareholders' assembly; decides on the conclusion of loan agreements; prepares a proposal for increasing and decreasing the charter capital of the company; makes all decisions worth more than 50,000 Euros, if the majority of the total number of non-executive members of the Board of Directors voted for their adoption.

In accordance with Article 238(5) of the Energy Law, the gas TSO also performs the function of natural gas market operator until the appointment of a company that will be granted a license for natural gas market operation. The functions of the gas market operator are listed in Article 126 of the Energy Law and include managing the organised natural gas market in the Republic of North Macedonia and/or joining with other organised natural gas markets; calculation of the quantities of the required balance energy for the purposes of determining the price of imbalance energy; financial settlement and control of the financial coverage of the recognised imbalances on the basis of quantitative settlement of imbalances; submission to the gas transmission system operator of all information necessary for the preparation of the final daily schedules for the purchase and sale of

¹⁴ Official Gazette of the Republic of Macedonia No. 96/18 and Official Gazette of the Republic of North Macedonia 96/19 and 236/22.

¹⁵ Official Gazette of the Republic of Macedonia, No. 28/2004, as subsequently amended.

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natural gas in the Republic of North Macedonia and beyond; keeping records of all contracts concluded with the participants in the natural gas market; preparation of a daily market plan and establishment and keeping a natural gas market participants registry.

2. Public activities in production and supply of electricity and gas

The State is not involved as shareholder or otherwise in gas production, distribution or supply. However, the Government owns 100% of the shares in *JSC ESM (Elektrani na Severna Makedonija)*, the country's biggest electricity producer which produces around 70% of the domestic electricity. Besides several subsidiaries active in electricity generation, *ESM* owns the supply company *ELEM Trade*. The Government also owns minority shares of 10% in the private utility *JSC EVN Macedonia* which operates in electricity generation, supply and distribution.

Pursuant to Article 3(1) of the Law on Use and Disposal of the State-Owned Property and Municipal Property,¹⁶ the State-ownership in *ESM* is exercised by the Government. *ESM* comprises a shareholders' assembly, a supervisory board, and a management board. The members of the supervisory board are appointed by decision of the sole shareholder, the Government (signed by the Prime Minister as President of the Government, or a Deputy Prime Minister presiding the respective session),¹⁷ while the members of the management board are appointed by the supervisory board.¹⁸

II. Description of the notified Preliminary Decision

On 2 October 2023, *NOMAGAS* submitted to ERC a request for certification¹⁹ based on Article 113(1) of the Energy Law and Article 6 of the Rulebook on Certification of Electricity TSO and Gas TSO.²⁰ On 22 January 2024, ERC adopted and notified to the Secretariat of its Preliminary Decision on the certification of *NOMAGAS* subject to the Opinion of the Secretariat.

In the Preliminary Decision, ERC concluded that *NOMAGAS* complies with the requirements of the provisions on ownership unbundling. ERC issued an unconditional certification of *NOMAGAS* as a gas transmission system operator. ERC imposed an obligation to *NOMAGAS* to be informed every half a year on the procedures initiated before the Real Estate Cadastre Agency of North Macedonia regarding the right of ownership over the transmission network.

IV. Assessment of the Preliminary Decision

¹⁶ Official Gazette of the Republic of Macedonia, No. 78/2015, as amended.

¹⁷ Article 11(3) of the Law on Government, Official Gazette, No. 59/2000 as amended.

¹⁸ Both Supervisory Board and Management Board members have been appointed in 2017. See appendixes submitted by ERC to ECS.

¹⁹ No. 11-2075/1 of 2 October 2023.

²⁰ Official Gazette of the Republic of North Macedonia No 146/18.

1. General

The unbundling provisions were designed to separate, in vertically integrated undertakings, control over transmission system operation, on the one hand, and production and supply activities, on the other hand, to eliminate a potential conflict of interest between transmission and other activities performed by vertically integrated undertakings.²¹ This objective is best fulfilled by implementation of the ownership unbundling model of Article 9 of the Gas Directive, which North Macedonia transposed in its Energy Law. In a market environment still prevailing in many Contracting Parties including North Macedonia, where energy activities are predominantly performed by undertakings with whole or majority ownership by the State and/or characterized by dominant positions on their respective markets, the separation of control and the prevention of conflicts of interest is of particular importance.

For cases, as in North Macedonia, where the State as owner engages in more than one energy-related activity and is thus to be considered a vertically integrated undertaking within the meaning of European energy law,²² Article 9(6) of the Gas Directive offers an ownership unbundling variant, an alternative to restructuring and privatization. Unlike in ownership unbundling cases under Article 9(1) of the Gas Directive, in situations covered by Article 9(6), the tie of control within the vertically integrated undertaking is not fully severed. The continued exercise of public ownership as well as constitutional and political links differentiate these situations from other cases of ownership unbundling, and matter for the present assessment. When relying on Article 9(6), full achievement of the objective of Article 9(1) of the Gas Directive needs to be ensured by the national regulatory authority proactively.

The Secretariat reviewed ERC's Preliminary Decision against this background.

2. Application of the ownership unbundling provisions to *NOMAGAS*

When assessing the compliance of the Preliminary Decision with the ownership unbundling model enshrined in the Gas Directive, the following aspects matter in particular:

- a) The undertaking to be certified needs to be the owner of the transmission assets as required by Article 9(1)(a) of the Gas Directive;
- b) The undertaking to be certified needs to perform the functions and tasks of a transmission system operator as required by Article 9(1)(a) of the Gas Directive;

²¹ Secretariat Opinion 1/16 of 3 February 2016 *TAP AG*; Secretariat Opinion 1/17 of 23 January 2017 *OST*; Secretariat Opinion 3/17 of 23 January 2017 *EMS*.

²² See, for instance, Commission's Opinions on certification of *Vorarlberger Übertragungsnetze (VÜN)* C(2012) 2244 final of 29.3.2012, at p. 4; on certification of *Augstsprieguma trīkls* C(2012) 9108 final of 3.12.2012, at p. 2.

- c) Control over and exercising rights in the undertaking to be certified need to be separated from control over and exercising rights in undertakings involved in production or supply of electricity and natural gas as required by Articles 9(1)-(3), (6), (7), (12) of the Gas Directive.

a. *Ownership of the gas transmission system*

Article 9(1)(a) of Directive 2009/73/EC requires that “each undertaking which owns a transmission system acts as a transmission system operator”. This means in principle that the undertaking applying for certification is the owner of the assets, i.e. the transmission system. In the case of North Macedonia, Article 109(1) of the Energy Law states that the transmission system operator for gas is the owner of the gas transmission network.

After the Ministry became the sole shareholder of *NOMAGAS* in 2023,²³ *NOMAGAS* started the process of registering its right of ownership over the gas transmission network before the Real Estate Cadastre Agency of North Macedonia. The process is ongoing, and the Preliminary Decision imposes a reporting obligation on *NOMAGAS* with regard to the registration process in the cadastre.

As already held in previous Opinions,²⁴ the Secretariat concludes that in a situation such as in the case at hand, where the legal framework of a Contracting Party provides a clear and unambiguous basis for ownership of the transmission system operator over transmission assets as a matter of principle (in casu Article 109(1) of the Energy Law), the requirement under Article 9(1)(a) of the Gas Directive may be deemed to be satisfied.

The Secretariat thus agrees with ERC that *NOMAGAS* is the owner of the gas transmission network, consisting of gas pipelines, metering stations, as well as other facilities and assets that are necessary for performing the function of a transmission system operator.

b. *The applicant undertaking performs core tasks as operator of the transmission system*

Article 9(1)(a) of the Gas Directive also requires that the undertaking in question “acts as a transmission system operator”. The notion of transmission system operator is defined by Article 2 No. 4 of the Gas Directive. It follows from this definition that the key elements for an undertaking to be considered a transmission system operator are the operation, the maintenance and the development of a transmission network.²⁵ A regulatory authority’s assessment in this respect needs to establish in particular whether a given undertaking is by law and fact actually performing the core

²³ Government Decision No. 41-5705/4 dated 1 August 2023. The Central Securities Depository recorded the transfer of the ownership from the Government to the Ministry on 10 August 2023.

²⁴ Secretariat Opinion 3/17 of 23 January 2017 *EMS*; Secretariat Opinion 2/19 of 1 February 2019 *KOSTT*; Secretariat Opinion 3/19 of 19 June 2019 *MEPSO*.

²⁵ Secretariat Opinion 1/16 of 3 February 2016 *TAP AG*.

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tasks of a transmission system operator, and whether it disposes of the necessary (human, technical, financial) resources for this.²⁶

Based on the information provided in the Preliminary Decision on the organisation, tasks and resources of *NOMAGAS*, and also on its own long-standing experience and cooperation with the company and its predecessors, the Secretariat agrees with ERC's findings that *NOMAGAS* satisfies the criteria of having available the necessary human, technical, physical and financial resources to effectively perform the tasks of a transmission system operator.

c. Separation of control over transmission from generation/supply

The Preliminary Decision assesses *NOMAGAS*' compliance with the ownership unbundling model against Article 109 of the Energy Law, the provision transposing Article 9 of the Gas Directive.

Article 9(6) of the Gas Directive provides that two separate public bodies may be seen as two distinct persons within the meaning of Articles 9(1) and 9(2) of the Gas Directive, and may control gas production and supply activities, on one hand, and gas transmission activities, on the other. The notion of control is further defined by the Merger Regulation²⁷ and includes the rights enumerated in Article 9(1)(b), (c) and (d) and Article (2) of the Gas Directive. Such rights include: the power to exercise voting rights, the holding of the majority share and the power to appoint persons legally representing the TSO and members of the TSO's corporate bodies. The designation of two separate public bodies constitutes the first and indispensable requirement for compliance with Article 9(6) of the Gas Directive.²⁸

The Secretariat agrees that the Ministry as the owner of *NOMAGAS* on the one hand, and the Government as the owner of *ESM* on the other, may in principle qualify as public bodies within the meaning of Article 9(6) of the Gas Directive.

The Preliminary Decision contains a comprehensive analysis of the prerogatives of the Government and of the Ministry, as well as of the interplay between the two institutions, based on the Constitution, the Law on Government,²⁹ and of the Law on the Organisation and Operation of State Administration Bodies.³⁰

ERC explains that, according to the Constitution of the Republic of North Macedonia, the Government, consisting of a president and ministers, is elected by the Parliament, and each of the ministers as well as the president is accountable before the Parliament for their work. The ministries are part of the state administration together with other administrative bodies.³¹ Ministries derive their

²⁶ Commission's Opinion on certification of *VŪN* C(2012) 2244 final of 29.3.2012.

²⁷ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Official Journal L 24, 29.01.2004, p 1-22.

²⁸ Secretariat Opinion 1/17 of 23 January *OST*; Secretariat Opinion 3/19 *MEPSO*; Secretariat Opinion 6/19 *Moldelectrica*.

²⁹ Law on Government, Official Gazette, No. 59/2000 as amended.

³⁰ Official Gazette of the Republic of North Macedonia, No. 58/2000, as subsequently amended.

³¹ Article 95 of the Constitution of the Republic of North Macedonia.

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rights and competences from the Law on Organization and Operation of the State Administration Bodies. These provisions show that a ministry is formally separated from the Government. What is decisive for the purpose of applying Article 9(6) of the Electricity Directive, however, is whether the Government and the Ministry are materially separated from each other.

The Secretariat reiterates in that context that in order to fully achieve the objective of Article 9 of the Gas Directive – the prevention of potential and actual conflicts of interest – and to ensure unbundling of undertakings controlled by public bodies on equal footing with private undertakings, Article 9(6) of the Gas Directive cannot be interpreted in a formalistic manner. The separation of control between the two public bodies in question must be effective in the sense that it ensures the full independence of the public body controlling the transmission system operator of any other entity controlling generation and supply activities.³²

In particular, the fact that the minister controlling the transmission system operator is at the same time a member of another collegial public body, the Government which controls the electricity generation and supply company *ESM*, remains critical against the objective of Article 9 of the Gas Directive, i.e. the avoidance of conflicts of interest, which may stem from the dependence of one public body on the other of which it forms part. To mitigate the risks of such conflicts of interest, additional safeguards need to be in place. The Secretariat will address these aspects below.

i. The transmission system operator is not engaged in generation/supply activities

The ownership unbundling provisions require that a transmission system operator (or the body exercising control over it) may not be engaged in the production of energy nor in its purchase and sale. This obligation has been transposed in Article 109(4) of the Energy Law. As *NOMAGAS* holds a license for the performance of the activity of a gas transmission system operator, and seemingly has no other interests in other companies or licenses to perform other activities, the Secretariat has no reason to doubt ERC's conclusion that *NOMAGAS* is indeed not involved in generation or supply activities.

As regards *NOMAGAS* performing the function of natural gas market operator, ERC considers this as just a temporary solution. The Secretariat agrees that market operation is not explicitly included in the scope of the prohibitions in Article 9(1)(b) of the Gas Directive. Both the European Commission³³ and the Secretariat³⁴ held that the holding of shares in companies engaged in facilitating trade of electricity and gas on exchanges does not create an obstacle to certification. In the case of the electricity TSO *MEPSO*, the Secretariat concluded that its shareholding in a power exchange will not represent an obstacle for ownership unbundling as long as such a company only facilitates trade and is not engaged in buying or selling electricity, and requested ERC to ensure and monitor that the activities of the respective power market operator do not raise any issues resulting

³² Secretariat Opinion 1/17 of 23 January 2017 *OST*, p.6, 12; Secretariat Opinion 4/17 of 2 October 2017 *Albgaz*, p.8.

³³ Commission's Opinion on certification of *Energinet (gas)* (C(2012) 88, 09.01.2013 p.3.

³⁴ Secretariat Opinion 3/19 *MEPSO*, p 11.

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in a potential conflict of interest in relation to supply of electricity or gas. In the case at hand, the Secretariat is satisfied that the activity of market operation does not involve the buying or selling of gas and is merely facilitating trade.

That said, there are compelling reasons for the transmission system operator and the market operator being two different entities. An additional layer of oversight is thus instituted in the market, the market operator cannot oversee the TSO when they are the same entity. As conflicts of interest may occur in this constellation, the Secretariat requests that ERC, in its Final Decision, requires NOMAGAS to separate the function of market operation from its other functions at least by establishing a subsidiary for market operation.

ii. Separation and independence of public bodies

To be considered not only formally but also materially independent of the Government controlling *ESM*, the Ministry needs to have exclusive competences, instruments and resources to exercise control over *NOMAGAS* in a legal and factually manner independent of the Government.

In the Preliminary Decision, ERC concluded that the fact that the Ministry is the owner of *NOMAGAS* as a matter of primary legislation prevents the Government from deciding over the state capital of *NOMAGAS* which remains entirely the competence of the Ministry.

According to the Constitution of the Republic of North Macedonia, the Government consist of a president (the prime minister) and individual ministers,³⁵ each of which are appointed and dismissed by the Parliament.³⁶ Article 91 of the Constitution lists the competences of the Government, which as executive power, consist in deciding on the policy for implementation of legislation, proposals for legislation, adoption of secondary legislation etc. The Government is bound by the legislation adopted by the Parliament, including the Energy Law conferring control over *NOMAGAS* exclusively to the Ministry, and the competence to independently adopt decisions related to exercising the ownership rights. Article 13 of the Law on Government stipulates that the “*minister shall independently manage the ministry they have been appointed for, shall monitor and shall be responsible for the implementation of the laws and other prescriptions.*” Based on Article 55 of the Law on Organisation and Operation of the State Administration Bodies, the minister is empowered to adopt secondary legal acts, including decisions when empowered to do so by law.

ERC also analysed in detail the relationship between the Ministry and the Government, addressing the accountability of the Ministry when implementing Government policies, the right of the Government to supervise the legality and efficiency of the Ministry’s operations, as well as the right of the Government to annul acts adopted by the Ministry. ERC concluded that the Ministry is not under an obligation to report to the Government about its actions as shareholder of *NOMAGAS*, as that reporting obligation applies only to actions done in a governmental, public capacity, and not in

³⁵ Article 89 of the Constitution of the Republic of North Macedonia.

³⁶ Article 90 of the Constitution of the Republic of North Macedonia.

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a private capacity as a shareholder governed by the Company Law.³⁷ Similarly, when supervising the performance of the Ministry, the Government follows whether a ministry's actions are legal and efficient, for example by checking compliance with deadlines and availability of financial means. It does not, however, assess performance of ministries under private law, like the role of the Ministry as a shareholder in *NOMAGAS*. Furthermore, the Government cannot annul decisions of the Ministry as shareholder of *NOMAGAS* in accordance with the Law on Organization and Work of State Administration Bodies. Annuling such decisions can be done only in accordance with the Company Law, and only the supervisory body and the management body, as well as any individual members, have the capacity to request an annulment in court.³⁸

Moreover, according to Article 11(1) of the Law on Government, the President of the Government (the Prime Minister) has no competence to give directions or guidance to the members of the Government for matters that relate to exercising rights of shareholder assembly and owner of the transmission system operator, which are adopted pursuant to the Company Law and do not relate to implementing governmental policy, and cannot dismiss individual ministers.³⁹

The Secretariat thus agrees with ERC that in the specific situation of North Macedonia, the ministries are responsible for the areas for which they are established, and independent of the Government and/or the Prime Minister.

The independence of the Ministry as shareholder of *NOMAGAS* is further confirmed by Article 110 of the Energy Law describes the Ministry's role as owner of the gas transmission system owner. In this capacity, the Ministry independently when appointing the board of directors of *NOMAGAS* and must not accept directions and guidelines from the Government or any other government body. The members of the board of directors must not request, nor accept directions or guidelines from the Government or any other government body.

- iii. The governance of the TSO and the public bodies involved in the energy sector allow for full independence in day-to-day decision making

Article 9 of the Gas Directive does not only require structural changes between the public bodies involved in the energy sector but also within the TSO itself and within individual public bodies to the extent this is required by the achievement of the objective of ownership unbundling, the prevention of potential and actual conflicts of interest. While a formal separation of competences on the level of government constitutes an important *sine qua non* for unbundling of state-owned TSO, full independence of network operation from supply and generation interests also requires measures related to, *inter alia*, the elimination of exchanges of any confidential information on a daily basis.⁴⁰

³⁷ Article 383 of the Company Law.

³⁸ Articles 408 to 415 of the Company Law.

³⁹ Article 94(2) and (3) of the Constitution of the Republic of North Macedonia.

⁴⁰ Recital 15 of the Gas Directive.

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Given that under Article 9(6) of the Gas Directive, the TSO continues to operate within the state as a vertically integrated undertaking, this is of particular importance.

Hence, the state must have effective measures in place to prevent undue coordination, discriminatory behaviour and undue dissemination of confidential information, including at the level of supporting staff and administration.⁴¹ To what extent this requires more detailed ring-fencing measures and an increased regulatory oversight is to be assessed on a case-by-case basis.

ERC assessed in its Preliminary Decision the measures currently in place to ensure the independent operation of *NOMAGAS* on a daily basis. These include rules, decisions and guidelines that it applies in order to prevent the disclosure of confidential and other commercially sensitive information as well as protection of personal data. Furthermore, although not compulsory under the ownership unbundling model, but following the Energy Community practice and past Opinions of the Secretariat,⁴² Article 112 of the Energy Law provides a legal basis for the appointment of a compliance officer and adoption of a compliance program. The purpose of the compliance programme is to ensure transparent, objective, and non-discriminatory behavior of *NOMAGAS* towards users of the natural gas transmission system, as well as avoiding any potential conflicts of interest. Indeed, in October 2023, *NOMAGAS* adopted a compliance programme⁴³ and appointed a compliance officer in December 2023.⁴⁴

Consequently, the Secretariat considers that sufficiently effective measures have been taken within *NOMAGAS* to ensure that no conflict of interest exists in relation to the independence of the TSO in its day-to-day activities.

V. Conclusions

Against this background, the Secretariat supports certification of *NOMAGAS* in line with ERC's Preliminary Decision and requests that ERC, in its Final Decision, requires *NOMAGAS* to separate the function of market operation from its other functions at least by establishing a subsidiary for market operation.

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

⁴¹ See, for comparison, Commission's Opinion on certification of *Energinet* (gas) (C(2012) 88, 9.01.2012; Commission's Opinions on certification of *Vorarlberger Übertragungsnetze (VÜN)* C(2012) 2244 final of 29.3.2012.

⁴² Secretariat Opinion 1/17 of 23 January 2017 *OST*; Secretariat Opinion 1/18 of 27 February 2018 *CGES*; Secretariat's Opinion 2/19 of 1 February 2019 *KOSTT*; Secretariat Opinion 6/19 *Moldelectrica*.

⁴³ Decision approving the Compliance Program of *NOMAGAS AD* Skopje in relation to the obligations arising from the ownership unbundling, no. 02-11-1855/3 of 9 October 2023.

⁴⁴ Decision No. 02-5629/17 of 28 December 2023.

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The Secretariat will publish this Opinion on its website. The Secretariat does not consider the information contained therein to be confidential. ERC 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, 21 May 2024

A handwritten signature in black ink that reads "Artur Lorkowski".

Artur Lorkowski

Director

A handwritten signature in black ink that reads "Dirk Buschle".

Dirk Buschle

Deputy Director/Legal Counsel