

## Opinion 3/24

### **pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC – Republic of Serbia – Certification of *Transportgas Srbija***

On 25 July 2024, the Energy Agency of the Republic of Serbia (hereinafter “AERS”) 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”) *Transportgas Srbija doo Novi Sad* (hereinafter “Transportgas”) as an independent system operator (hereinafter “ISO”). The Preliminary Decision was adopted on the same day, 25 July 2024,<sup>1</sup> based on Articles 39(1) and 49(3) in connection with Articles 240 and 241 of the Energy Law of Serbia (hereinafter “the Energy Law”)<sup>2</sup>, as well as Article 24 of the Rulebook on Energy Licence and Certification<sup>3</sup>, and Article 12 of the Statute of AERS<sup>4</sup>.

Pursuant to Articles 10 and 11 of Directive 2009/73/EC (hereinafter “the Gas Directive”)<sup>5</sup> and Article 3 of Regulation (EC) No. 715/2009 (hereinafter “the Gas Regulation”),<sup>6</sup> the Secretariat is required to examine the notified Preliminary Decision and deliver its opinion to AERS as to the compatibility of such a decision with Articles 9(8), 14 and 15 of the Gas Directive (hereinafter “the Opinion”).

#### **I. Background**

##### **a. *Transportgas Srbija***

*Transportgas* is a limited liability company, whose founder and sole shareholder (100%) is the Republic of Serbia. The control by the Republic of Serbia over *Transportgas* is exercised through the Republic Commission for Energy Networks (hereinafter “the Commission”). The main field of activity of *Transportgas* is transport of natural gas.<sup>7</sup>

According to AERS’ Annual Report for 2023, at the end of 2023, the length of the transmission system operated by *Transportgas* amounted to 2,604 km in north and central Serbia (83.2%

<sup>1</sup> AERS Decision No 311.01-1/2024-C-I, adopted on 25 July 2024.

<sup>2</sup> Energy Law, Official Gazette of the Republic of Serbia No. 145/14, as subsequently amended.

<sup>3</sup> Rulebook on Energy License and Certification, Official Gazette of RS No. 87/15.

<sup>4</sup> Statute of the Energy Agency of the Republic of Serbia, Official Gazette of the Republic of Serbia No 52/05.

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> Decision on amendments and addenda to the amendments and addenda of the Articles of Incorporation of Limited Liability Company *Transportgas Srbija Novi Sad*, consolidated text, issued by the acting Director General, 19 January 2024. See also Preliminary Decision, p 4.

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of the gas transport system). Two other gas TSOs were operating on the territory of Serbia, as follows: *Yugorosgaz Transport LLC* 125 km of gas pipeline in southeast Serbia (4.0% of the gas transport system) and *Gastrans LLC* 402 km of gas pipeline from the border with Bulgaria up to the border with Hungary (12.8% of the gas transport system).<sup>8</sup> *Yugorosgaz Transport LLC* is not certified, and *Gastrans LLC* was certified in disregard of the Secretariat's opinion.<sup>9</sup>

*Transportgas*' corporate bodies are the Assembly and the Director General:

The Assembly is formed by five representatives of the Republic of Serbia, appointed by the Commission for a term of four years. One of the representatives serves as president of the Assembly. The Assembly is vested with the power to adopt amendments to the Articles of Incorporation of *Transportgas*; adopts long-term and medium-term business strategy and development plans and oversees their implementation; adopts proposals for the general objectives submitted to the Commission, and key performance indicators; adopts annual or medium-term business plans; adopts periodic business reports; supervises the work of the Director General and adopts the Director General's reports; decides on status changes, establishment of other legal entities, and capital investment; concludes employment contracts with the Director General in accordance with applicable labour law provisions; adopts auditor's reports if financial reports have been subject to audit; decides on increases and decreases in the company's share capital; decides on profit distribution and manner of covering losses; appoints an auditor or audit commission; consents to the transfer of shares to third parties in cases provided by the Law regulating the legal status of economic entities;<sup>10</sup> approves legal transactions in which there is a personal interest, in accordance with the Law regulating the legal status of economic entities; consents to the acquisition, sale, lease, pledge, or other disposal of high-value assets, as defined in the Law regulating the legal status of economic entities; decides on establishing branches; decides on changing the activity of the company, the name and the registered office of the company.<sup>11</sup>

The Director General represents and acts on behalf of *Transportgas* in accordance with the law and the Articles of Incorporation; manages the company's operations; proposes long-term and medium-term business strategy and development plans and is responsible for their implementation; submits proposals to the Assembly for the formulation of general objectives and key performance indicators; proposes annual or medium-term business plans and is

<sup>8</sup> 2023 Energy Annual Report dated May 2024, available at [ГОДИШЊИ ИЗВЕШТАЈ АЕРС- НАСЛОВИ](#).

<sup>9</sup> Energy Community Annual Implementation Report 2023, p 114.

<sup>10</sup> Law regulating the status of economic entities, published in the Official Gazette of the Republic of Serbia No 36/2011, as subsequently amended.

<sup>11</sup> Preliminary Decision, p 4. See also Decision on amendments and addenda to the amendments and addenda of the Articles of Incorporation of Limited Liability Company *Transportgas Srbija Novi Sad*, consolidated text, issued by the acting Director General, 19 January 2024.

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responsible for their implementation; prepares and is responsible for the accuracy of financial reports; is responsible for the accuracy of *Transportgas* ' financial report; adopts procurement plans; executes decisions of the Assembly; informs the Assembly about the operations; submits business reports to the Assembly; and performs any other tasks specified by law and the Articles of Incorporation, which are not within the competence of the Assembly.<sup>12</sup>

### **b. State activities in generation and supply of electricity and natural gas**

In Serbia, the energy sector is heavily dominated by state-owned companies, in both the gas and electricity sectors. With the notable exception of the TSOs, it is the Ministry of Mining and Energy of the Republic of Serbia (hereinafter “the Ministry”) that exercises the State’s rights in the respective energy companies.

The supplier *Javno preduzeće “Srbijagas”* (hereinafter “Srbijagas”) is the dominant player on the wholesale and retail gas markets. It is also the only wholesale supplier for public service suppliers and the supplier of last resort.<sup>13</sup> The Republic of Serbia owns 100% of the shares in *Srbijagas*. *Srbijagas* is also the owner of the transmission system operated by *Transportgas*.<sup>14</sup>

Regarding distribution system operators, *Srbijagas* owns 100% of *Distribucijagas Srbija Novi Sad, Društvo sa ograničenom odgovornošću za distribuciju prirodnog gasa Gas Bečej*, as well as 61.38% of *Privredno društvo za distribuciju gasa Loznica-Gas doo u mešovitoj svojini Loznica*. *Srbijagas* is also the sole shareholder of a distribution system operator incorporated in Montenegro, *Energogas Podgorica*, through which it fully controls *Jednočlano društvo sa ograničenom odgovornošću za trgovinu na veliko Energigas TNG d.o.o. Beograd-Novi Beograd*, a Serbian company holding natural gas and wholesale electricity supply licenses. *Srbijagas* also holds 25% of the shares of *Preduzeće za izgradnju gasovodnih sistema za transport i promet prirodnog gasa, Jugorosgaz a.d. Beograd*, a company which has licenses for both supply and distribution of natural gas and performing transport of natural gas although not holding a license or being certified.<sup>15</sup> The rest of the shares are divided: 25% of its shares are owned by *Centrex Europe Energy & Gas AG* from Austria, and 50% by *Gazprom*.

In addition, *Srbijagas* holds 49% of the shares of the gas storage operator *Podzemno skladište gasa Banatski Dvor društvo za ograničecom odgovornošću Novi Sad*, the remaining 51% being owned by *Gazprom Export LLC*.

<sup>12</sup> Preliminary Decision, p 5. See also Decision on amendments and addenda to the amendments and addenda of the Articles of Incorporation of Limited Liability Company *Transportgas Srbija Novi Sad*, consolidated text, issued by the acting Director General, 19 January 2024.

<sup>13</sup> Energy Community Implementation Report 2023, p 115.

<sup>14</sup> See section III.2 below.

<sup>15</sup> AERS 2023 Annual Report, pp 8-9, available at <https://aers.rs/Files/Izvestaji/Godisnji/Eng/AERS%20Annual%20Report%202023.pdf>.

Srbijagas also holds approximately 39% of the shares in *Gas Promet Pale*, a TSO in Republika Srpska<sup>16</sup>, and 49% in *Gastrans*, which started operating as a TSO in January 2021.<sup>17</sup>

The electricity sector is dominated by the 100% state-owned producer and supplier *Elektroprivreda Srbije* (hereinafter “EPS”). EPS owns nine electricity generating companies: *HPPs Derdap*, *Drinsko-Limske HPPs*, *Nikola Tesla TPPs*, *MB Kolubara*, *TPPs-OCMs Kostolac*, *Panonske CHPs* and *EPS Obnovljivi izvori*, as well as *EPS Supply*.<sup>18</sup>

## II. The Preliminary Decision

On 10 May 2024, *Transportgas* submitted a request for certification<sup>19</sup> based on Articles 227-231 of the Energy Law. On 25 July 2024, AERS adopted its Preliminary Decision on the certification of *Transportgas* subject to the Opinion of the Secretariat. The Secretariat was notified of the Preliminary Decision on the same date.

In the Preliminary Decision, AERS concluded that *Transportgas* complies with the requirements of the ISO model of unbundling.

## III. Assessment of the Preliminary Decision

At the outset, the Secretariat recalls that the unbundling provisions were designed to separate, in vertically integrated undertakings (hereinafter “VIUs”),<sup>20</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 VIUs. The rules on unbundling thus aim to prevent VIUs 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 VIU.<sup>21</sup>

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

<sup>16</sup> <https://www.gaspromet.com/osnovni-podaci/>.

<sup>17</sup> <https://gastrans.rs/about-the-company/?lang=en>

<sup>18</sup> [Branches](#).

<sup>19</sup> Request for certification of *Transportgas* No 02-410 dated 10 May 2024.

<sup>20</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>21</sup> Secretariat's Opinion 2/17 of 22 April 2017 on the certification of *Yugorosgaz Transport*.

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. The ISO model is transposed in Serbian legislation by Articles 227-231 of the Energy Law.

The purpose of the certification procedure is to make sure that the TSO complies with the requirements of the Gas Directive. In the present case, that does not only apply to relations between the ISO and the VIU but also to the relation between the ISO and the system owner.

### **1. Unbundling and tasks of the transmission system operator**

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).

#### **a. 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>22</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).

<sup>22</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).

The cornerstone of the ISO model is the fact that the operator of the network does not own the transmission system, but the transmission system is the property of another entity (in this case, state-owned entities). In practice, Contracting Parties resorted to the ISO model 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>23</sup>

It is clear from the Preliminary Decision that *Transportgas* itself is not engaged in any activities related to the production or supply of electricity or natural gas.<sup>24</sup> It is also clear that the Commission exercises full control over *Transportgas* within the meaning of Article 2(36) of the Gas Directive. According to the Request for Certification, *Transportgas* does not perform any other activity in the Republic of Serbia or in other countries, for which is necessary to hold a licence, permission, or authorisation for conducting energy activities.<sup>25</sup>

Whereas in the past, the sole shareholder and the entity also exercising control over *Transportgas* was the Republic of Serbia, currently this role is exercised by the Commission, which was created by amendments to the Energy Law in 2023.<sup>26</sup> The Commission is an independent body subordinated to the Serbian Parliament. According to Article 64(b) of the Energy Law, the Commission has full control over electricity and gas TSOs. It develops their strategy, sets annual goals and targets, appoints the representative of the Republic of Serbia in the Assembly, has the authority to amend the Articles of Incorporation, approves acquisitions, sales, or any other type of property disposal. The Commission is formed by five members, one of which serves as chairman. They are appointed by the Serbian Parliament for a five-year term and can only be dismissed by the Parliament. Members of the Commission cannot perform any functions that can affect their independence.<sup>27</sup> The current five members of the Commission are Boris Dumnić, Dragan Veljić, Dejan Ilić, Goran Mandić and Nikola Šibulov.<sup>28</sup> On 26 March 2024, the Commission appointed the following representatives of the Republic of Serbia to the Assembly: Nikola Popović, Zoran Lakićević, Milan Djukić, Darko Jovanović, and Dalibor Šćekić.<sup>29</sup> In essence, the Commission was established to sever the chain of control between the Serbian Government, which controls energy supply and generation companies through the Ministry, and the TSOs.

The Acting Director General of *Transportgas* is Zoran Jovčić, who was appointed by a Government Resolution in November 2022.<sup>30</sup> The Secretariat notes that the current Acting

<sup>23</sup> See the case of the Moldovan electricity TSO *Moldelectrica* and of the Ukrainian gas TSO *GTSSOU*.

<sup>24</sup> Preliminary Decision, p 7.

<sup>25</sup> Schedule 6 to the Request for Certification, Statement of the Acting Director of *Transportgas*, 24 April 2024.

<sup>26</sup> Official Gazette of the Republic of Serbia No. 62/2023. See, also <https://www.energy-community.org/news/Energy-Community-News/2023/09/06.html>.

<sup>27</sup> Energy Law, Articles 64a ff.

<sup>28</sup> Schedule 13 to the Request for Certification.

<sup>29</sup> Decision of the Republic Commission for Energy Networks no 3/01/2024 dated 26 March 2024.

<sup>30</sup> Government Resolution on appointment of the acting director, no 119-9125/2022 dated 10 November 2022.

Director General was appointed by the Serbian Government, and not by *Transportgas*' Assembly, as required under the Energy Law and the Law regulating the status of economic entities.<sup>31</sup> Indeed, the Acting Director General was appointed in 2022, before the Commission was created and its role enshrined in the Energy Law. A Director General appointed by the Government defeats the purpose of the Commission which is the severance of the chain of control between the Serbian Government over the TSOs, and thus threatens the independence of the TSO in relation to the Government and the Ministry. It follows that in order to ensure *Transportgas*' compliance with Article 14(2)(a) of the Gas Directive, the Assembly must appoint the Director General of *Transportgas*.

Whereas state-owned *Transportgas* is controlled by the Commission subordinated to the Serbian Parliament, the main state-owned companies which quasi-monopolise the electricity and gas sectors, *EPS* and *Srbijagas* respectively, are controlled by the Ministry.<sup>32</sup>

The Secretariat reiterates in that context that to fully achieve the objective of Article 9(1)(b)-(d) of the Gas Directive – the prevention of potential and actual conflicts of interest, the separation of control between the public body controlling the TSO and any other public body controlling generation and supply activities must be ensured.<sup>33</sup> *De iure* and *de facto* independence between the two public bodies tasked to exercise control over the state-owned undertakings in question must be established.<sup>34</sup>

The separation of powers is enshrined in Article 4 of the Serbian Constitution. The relations between the judiciary, legislative and executive powers are based on strict separation, equilibrium of powers and mutual control.<sup>35</sup> While the European Commission and the Secretariat accepted that the body controlling transmission activities and the body controlling supply and generation activities can both be part of the executive, provided that certain safeguards are implemented,<sup>36</sup> in the case at hand, the Commission is controlled by the legislator, while the Ministry is part of the executive branch. This set-up not only ensures a deeper separation of control and the lack of interference between the two institutions, but it may also provide for a certain level of oversight between the two bodies, the Commission and

<sup>31</sup> Law regulating the status of economic entities, published in the Official Gazette of the Republic of Serbia No 36/2011, as subsequently amended, Article 200.

<sup>32</sup> To this end, the Law on ministries (as subsequently amended, published in the Official Gazette of the Republic of Serbia No 128 of 26 October 2020, Article 8) provides that the Ministry of Mining and Energy is controlling, on behalf of the state, the public companies engaged in the production, distribution and supply of electricity, natural gas, i.e. oil and petroleum products.

<sup>33</sup> See: Secretariat Opinion 1/17 of 23 January 2017 on the certification of *OST*, p.6, 12; Secretariat Opinion 4/17 of 2 October 2017 on the certification of *Albgaz*, p.8.

<sup>34</sup> Commission Staff Working Paper – 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.

<sup>35</sup> Constitution of the Republic of Serbia as adopted in the referendum of 8 November 2006.

<sup>36</sup> Secretariat's Opinion 2/23 of 12 May 2023 on the certification of *Moldelectrica*.

the Ministry, which will incentivise effectiveness.

Therefore, the fact that *Transportgas* is ultimately controlled by a legislative body, and the state interests in supply and generation of energy are controlled by an executive body, fulfils, in the Secretariat's view, the requirement of separation of control enshrined in Article 9(1)(b), (c), and (d) of the Gas Directive. However, in order to fully comply with the requirement of separation of control, it is necessary that the Assembly of *Transportgas* appoints the Director General in line with the Energy Law and the Law regulating the status of economic entities.

**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 among others 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 investment planning. 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, in particular Articles 14 to 22. The ISO is responsible among others to offer third-party access services, implement and publish non-discriminatory and transparent capacity-allocation mechanisms and congestion management procedures which facilitate cross border exchanges in natural gas, comply with comprehensive transparency requirements, provide sufficient, well-timed and reliable on-line based information on the balancing status of network users, and trade capacity rights.

As regards the commercial aspects of a TSO's activities, AERS, in the Preliminary Decision, concluded that *Transportgas* has the required financial, technical, physical, and human resources to perform the tasks of a TSO based on a statement in this regard by the Acting



Director General of *Transportgas*.<sup>37</sup>

AERS also provided the Secretariat with a document entitled “Specifications of energy facilities that make up the transport system” dated 23 November 2021, which outlines the network operated by *Transportgas* (metering stations, gas pipelines). It also made available to the Secretariat the business report for *Transportgas* for 2023 which includes information on the company's activities, volume of business and analysis of business results.<sup>38</sup>

However, the Secretariat is aware that *Transportgas* does not fulfil the whole array of tasks of a TSO. For example, whereas Serbia transposed the network codes (balancing, capacity allocation mechanisms, interoperability and data exchange rules, harmonised transmission tariff structures, congestion management procedures) already in 2022, *Transportgas* has not yet harmonised its rules with the network codes, nor has it implemented them. This is particularly evident by the restriction of third-party access to the Horgoš entry point, which has been the subject of a dispute settlement procedure since 2017.<sup>39</sup> Also, by not publishing and implementing non-discriminatory and transparent capacity-allocation mechanisms, *Transportgas* fails to comply with one of its core tasks, the allocation of capacity.

Tellingly, remedying these instances of noncompliance is listed as a priority in the Reform Agenda of the Republic of Serbia<sup>40</sup> in the context of the implementation of the Third Energy Package in the gas sector, an overdue milestone. The certification of the gas TSO *Transportgas* and ensuing implementing steps represent key policy commitments of Serbia under the Reform Agenda, to which tight deadlines are attached. Indeed, according to the Reform Agenda, the certification of the one gas TSO operating the whole gas transmission system in Serbia, together with availability of third-party access and the allocation of capacities at the Horgoš and IBS border points should all be accomplished by June 2025. The Secretariat is committed to supporting Serbia comply with this priority.

Regarding human resources, the Preliminary Decision mentions that *Transportgas* employs 217 people which AERS deems as sufficient for the fulfilment of the TSO's tasks. Additional documentation submitted by AERS to the Secretariat includes the names and positions of these employees, as well as the organigram of *Transportgas*. The Secretariat has no reason to disagree with AERS' conclusion in this regard.

<sup>37</sup> Schedule 23 to the Request for Certification.

<sup>38</sup> Business Report *Transportgas Srbija doo Novi Sad* for 2023, dated March 2024.

<sup>39</sup> Case ECS-13/17.

<sup>40</sup>

Available

at

[https://www.mei.gov.rs/upload/documents/nacionalna\\_dokumenta/adopted\\_reform\\_agenda\\_narrative\\_-\\_republic\\_of\\_serbia.pdf](https://www.mei.gov.rs/upload/documents/nacionalna_dokumenta/adopted_reform_agenda_narrative_-_republic_of_serbia.pdf), p 65 ff.

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Regarding the financial resources needed to fulfill the tasks of a TSO, the Preliminary Decision mentions the financial statements of 2023 and the corresponding audit report.<sup>41</sup> AERS also shared with the Secretariat the following documents: Notes to Separate Financial Statements as of 31 December 2023,<sup>42</sup> and a report on the implementation of the annual business program,<sup>43</sup> both adopted by the Assembly on 15 March 2024.<sup>44</sup> AERS concluded that *Transportgas* has the necessary financial resources to fulfil its tasks, and the Secretariat has no reason disagree with this conclusion.

As a precondition for the ability of an ISO to operate the transmission system effectively and reliably, the ISO needs to be able to rely on the right to operate the network as physical resources. 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>45</sup>

*Transportgas* is operating the gas transportation network based on an agreement on managing gas transport system, planning, financing and implementation of investments and transport system development, and lease signed on 9 February 2024 between *Transportgas* and *Srbijagas* (hereinafter “the Lease Agreement”).<sup>46</sup> The Lease Agreement is valid until 30 September 2029.

According to the Lease Agreement, *Srbijagas* is leasing to *Transportgas* the gas transmission network consisting of the network of gas pipelines with a pressure higher than 16 bar, compressor stations, block stations, metering and regulating stations, as well as the additional infrastructure necessary to perform the activity of gas transportation.<sup>47</sup> The Lease Agreement further contains provisions regarding the amount of the rent and the obligations of the two parties, including with regard to the investment plan. According to the Lease Agreement, *Transportgas* is already in the possession of the transport network it operates, and its employees are solely in charge of operating it.<sup>48</sup>

According to Article 417 of the Energy Law, *Srbijagas* acquired the ownership of the gas transport infrastructure by the date following of entry into force of the Energy Law, 30

<sup>41</sup> Schedule 4 to the Request for Certification.

<sup>42</sup> Notes to Separate Financial Statements of *Transportgas Srbija* as of 31 December 2023, dated March 2024.

<sup>43</sup> Report on the implementation of the annual business program of *Transportgas Srbija* for the period 1- 31 December 2023, dated March 2024.

<sup>44</sup> Decision of the Assembly of *Transportgas Srbija* No 01-02-1/36-2 dated 15 March 2024.

<sup>45</sup> See, for example, Secretariat’s Opinion 4/19 of 17 December 2019 on the certification of *GTSO*.

<sup>46</sup> Agreement on managing gas transport system, planning, financing and implementation of investments and transport system development between *PE Srbijagas Novi Sad* and *Transportgas Srbija* No 01-01-2/182 dated 9 February 2024.

<sup>47</sup> Article 2.1 of the Lease Agreement.

<sup>48</sup> Article 5 of the Lease Agreement.

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December 2014.<sup>49</sup> This provision constitutes a clear and unambiguous basis for ownership of the transmission system owner over transmission assets as a matter of principle. Article 418 of the Energy Law further requires the Serbian public registry to process the registration of the gas transport infrastructure at the request of the owner.<sup>50</sup> Yet, in the Lease Agreement, both parties acknowledge and agree that the lessor (*Srbijagas*) is not registered as owner of the natural gas transport system in the Serbian public registry (as required by the Energy Law), but that the registration process of its right of ownership over the assets is ongoing. The Secretariat is aware that the registration process is ongoing, and that several transport assets have already been included in the Serbian public registry as property of *Srbijagas*. Nevertheless, to ensure that the necessary physical resources are available to the TSO,<sup>51</sup> the registration process of all assets must be finalised.

While the Secretariat largely agrees with AERS that *Transportgas* disposes of the required financial, technical, physical and human resources to perform its tasks as a TSO, as required by Article 14(2)(b) of the Gas Directive, it also considers that in order to ensure full compliance, *Transportgas* must implement and publish non-discriminatory and transparent capacity-allocation mechanisms and ensure third-party access. Furthermore, the network owner must finalise the registration of all assets.

### c. Compliance with a ten-year network development plan

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, transposed in Article 228(3) of the Energy Law).

*Transportgas* submitted, and AERS approved, the Development Plan for the years 2022-2031.<sup>52</sup> The Secretariat agrees with ANRE that *Transportgas* complies with Article 14(2)(c) of the Gas Directive.

<sup>49</sup> Article 417(2) of the Energy Law states that „the operator of the natural gas transmission or distribution system shall acquire ownership of the network for the transmission or distribution of natural gas, which it has built or acquired by its own funds or acquired through a legal transaction by the date of entry into force of this Law.“

<sup>50</sup> Article 418(1) of the Energy Law states that „the authority responsible for keeping public records of immovable property and rights shall, at the request of the transmission operator [...] referred to in Article 417, paragraph 1 of this Law, register the ownership rights on the real estate – facilities of the natural gas transmission system [...]“.

<sup>51</sup> 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; Secretariat Opinion 1/24 of 21 May 2024 NOMAGAS.

<sup>52</sup> [The ten-year system development plan - Transportgas Srbija LLC.](#)

<b>Bank</b>	Raiffeisenlandesbank
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<b>BIC</b>	RLNWATWW

## 2. Unbundling and tasks of the gas transmission system owner

### a. Unbundling of the gas transmission system owner

Article 15 of the Gas Directive requires legal and functional unbundling of the transmission system owner. Legal and functional unbundling was discussed by the European Commission in a Staff Working Paper with regard to the unbundling of distribution system operators. By applying the same rationale for the system owner under the ISO model, 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.<sup>53</sup> This new company can remain part of the VIU, provided that it is functionally unbundled, i.e. independent in terms of its organisation and decision making from other activities not related to transmission.<sup>54</sup>

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 VIU, as defined in Article 2(20) of the Gas Directive.

The owner of the gas transmission network operated by *Transportgas, Srbijagas*, holds the monopoly on the Serbian gas wholesale market (also regarding wholesale supply for public service suppliers and suppliers of last resort) and is also the dominant player on the gas retail market, therefore it is a VIU in accordance with the definition enshrined in Article 2(20) of the Gas Directive.

The supply of natural gas by *Srbijagas*, which at the same time is an owner of the transmission system, does not comply with the requirement of legal unbundling required under Article 15(1) of the Gas Directive. To ensure the fulfillment of the conditions set out in that provision,

<sup>53</sup> Commission Staff Working Paper, „The Unbundling Regime“, Brussels, 22 January 2022, available at [https://energy.ec.europa.eu/system/files/2014-10/2010\\_01\\_21\\_the\\_unbundling\\_regime\\_0.pdf](https://energy.ec.europa.eu/system/files/2014-10/2010_01_21_the_unbundling_regime_0.pdf), p 23.

<sup>54</sup> Commission Staff Working Paper, „The Unbundling Regime“, Brussels, 22 January 2022, available at [https://energy.ec.europa.eu/system/files/2014-10/2010\\_01\\_21\\_the\\_unbundling\\_regime\\_0.pdf](https://energy.ec.europa.eu/system/files/2014-10/2010_01_21_the_unbundling_regime_0.pdf), p 24.

ownership of the natural gas transmission network would need to be transferred from *Srbijagas* to another legal entity, part of the same group of companies but functionally unbundled. This would require not only corporate but also legislative changes, as *Srbijagas'* ownership over the transmission network is enshrined in the Energy Law. Should *Srbijagas* remain the owner of the gas transmission system operated by *Transportgas*, *Srbijagas* would have to cease its activity as gas supplier to ensure compliance with Articles 15(1) and (2) of the Gas Directive.

In addition, the Secretariat is not aware whether *Srbijagas* has already developed a compliance programme which sets out measures taken to ensure that discriminatory conduct is excluded, or whether it has ensured its proper monitoring.

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

The system owner's activities must be limited to enabling the ISO to carry out its tasks.<sup>55</sup> 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 (transposed into Article 229 of the Energy Law), 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));
- 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 owner *Srbijagas* and *Transportgas* is defined by the Energy Law and the Lease Agreement. The Lease Agreement defines the roles, obligations and rights of *Srbijagas*, the system owner, and *Transportgas*, the system operator.<sup>56</sup> The Lease Agreement implements the requirements under Article 14(5) of the Gas Directive:

- As per section 5.3 of the Lease Agreement, *Srbijagas* must refrain from any action which would prevent *Transportgas* from properly operating the transmission system.
- According to section 6.5 of the Lease Agreement, *Srbijagas* must finance the investments stipulated in the ten-year development plan, in such a manner that ensures a minimal interference with *Transportgas'* operations.

<sup>55</sup> See Cabeau in *Jones*, EU Energy Law, Vol. I, 3rd edition, para. 4.183.

<sup>56</sup> Preliminary Decision, pp 9-10.

- According to Article 6.4 of the Lease Agreement, *Srbijagas* must insure the gas infrastructure against risks that are common to such types of immovable assets and equipment.

With regard to the provision of guarantee for financing the development of the transmission system, the Secretariat notes that they were provided by a previous lease agreement between *Srbijagas* and *Transportgas* dated 1 October 2021.<sup>57</sup> It is unclear whether this 2021 agreement was replaced by the 2024 Agreement, or whether certain provisions (including the one on guarantees) continue to apply.

The Lease Agreement does not include a specific clause providing for the coverage of liability relating to the network assets by the system owner. Under the ISO model, the system owner must cover liability for the condition of the network, however not for the management of the network.

### 3. Enhanced powers for the national regulatory authority

The Energy Community acquis contains additional powers for the national regulatory authority in case of an ISO designation due to the fact that, when a VIU (especially a state-owned one) is responsible for multiple levels in the field of energy, an additional level of specialised oversight is needed. Article 41(3) Gas Directive provides for several specific duties for regulatory authorities when an ISO is designated. These duties are additional to the duties regulatory authorities generally have in the context of the certification procedure.<sup>58</sup> 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));
- for the first ten-year network development plan, approve the investments planning and the multi-annual network development plan presented annually by the ISO (Article 41(3)(c));
- 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));

<sup>57</sup> Agreement on lease between *Srbijagas* and *Transportgas* dated 1 October 2021 No 01/12/552.

<sup>58</sup> Commission Staff Working Paper, „The Unbundling Regime“, Brussels, 22 January 2022, available at [https://energy.ec.europa.eu/system/files/2014-10/2010\\_01\\_21\\_the\\_unbundling\\_regime\\_0.pdf](https://energy.ec.europa.eu/system/files/2014-10/2010_01_21_the_unbundling_regime_0.pdf), pp 13-14.

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- having the powers to carry out inspections, including unannounced inspections, at the premises of the ISO (Article 41(3)(e)).

The Secretariat notes that the Serbian Energy Law does not include any enhanced supervisory powers for AERS in case an ISO had been designated and certified. Under Article 57(3) of the Energy Law, AERS must monitor compliance of all energy undertakings with their respective obligations under the law, which can be interpreted as compliance with Article 41(3)(a) of the Energy Law. When it comes to the authority to impose penalties for noncompliance, however, AERS can only issue a warning, impose a non-financial measure or bring the case in front of a national court.<sup>59</sup>

Though not the subject of this Opinion, the Secretariat urges the Republic of Serbia to transpose Article 41(3) of the Gas Directive in full. Until then, the Secretariat requests that AERS, in the final decision on certification, explain how it will ensure compliance with this provision.

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<sup>59</sup> Energy Law, Articles 58-60.

#### IV. Conclusions

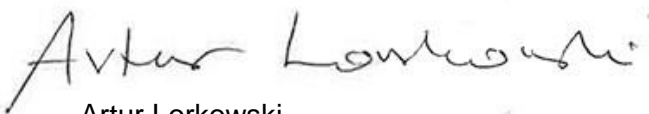
In order to fully comply with the requirements of the ISO model, the instances of non-compliance described above must be addressed by a number of actions, as described below:

- i. the Assembly of *Transportgas* must appoint the Director General in line with the Energy Law and the Law regulating the status of economic entities;
- ii. *Transportgas* must adopt and implement its transmission rules code, in particular by applying and publishing non-discriminatory transparent capacity-allocation mechanisms;
- iii. *Srbijagas* must finalise the registration of all its transmission assets;
- iv. *Srbijagas* must be legally and functionally unbundled by transferring ownership of the natural gas transmission network to another legal entity which is functionally unbundled within the *Srbijagas* group of companies;
- v. *Srbijagas* must develop and adopt a compliance programme as system owner;
- vi. *Srbijagas* must provide financial guarantees for the development of the transmission system;
- vii. the Lease Agreement must include a clause providing for the coverage of liability relating to the network assets by the system owner;
- viii. AERS, in the final decision on certification, should explain how it will ensure compliance with Article 41(3) of the Gas Directive.

Pursuant to Article 3 of the Gas Regulation, AERS shall take the utmost account of the above comments of the Secretariat when taking its final decision regarding the certification of *Transportgas*. AERS 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. AERS 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 November 2024

Handwritten signature of Artur Lorkowski in blue ink.

Artur Lorkowski

Director

Handwritten signature of Marie-Therese Richter-Kuhnert in blue ink.

Marie-Therese Richter-Kuhnert

Head of Legal Unit