

Opinion 2/21

pursuant to Article 3 of Regulation (EC) No 715/2009 and Article 10 of Directive 2009/73/EC – Republic of Moldova – Certification of *Vestmoldtransgaz*

On 10 March 2021, 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 Limited Liability Company *Vestmoldtransgaz* (hereinafter “VMTG”), a transmission system operator (hereinafter “TSO”) for gas in the Republic of Moldova. The Preliminary Decision was adopted on 2 March 2021 based on Article 36 of Law No 108 of 27 May 2016 on Natural Gas (hereinafter, “Law 108/2016”)¹. ANRE also provided written responses to the Secretariat’s factual questions on 18 June and 2 July 2021.

Pursuant to Article 10 of Directive 2009/73/EC² (hereinafter “the Gas Directive”) and Article 3 of Regulation (EC) No 715/2009³ (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 Article 9 of the Gas Directive.

I. The interconnection between the Romanian and Moldovan gas transmission systems

The interconnection between the Moldovan and Romanian gas transmission systems has been on the agenda of the two countries since 2010, when a Declaration on a Strategic Partnership between Romania and Moldova was signed in Bucharest. This was followed by a subsequent Action Plan in 2012.

According to Moldova’s Energy Strategy,⁴ the operation of the Iasi-Ungheni-Chisinau pipeline will enhance Moldova’s energy security by diversifying its gas supply sources. The pipeline links Chisinau, a major area of gas consumption in the country, to the interconnector between the eastern Romanian city of Iasi and Ungheni, a Moldovan town on the Romanian border. The entry-exit interconnection points with the other Moldovan transmission system operator, *Moldovatransgaz*, are

¹ Official Gazette of the Republic Moldova, No. 193-203, 8 July 2016.

² 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.

³ 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.

⁴ Government Decision no 102/2013 on the Energy Strategy of Moldova until 2030, published in the Official Gazette of the Republic of Moldova no 27-30, 8 February 2013.

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Todiresti⁵ and Tohatin;⁶ the exit interconnection points with the Moldovan distribution network (distribution system operator Chisinau-Gaz) are Tohatin (two lines)⁷ and Ghidirici.⁸

The first part of the project, the upgrade of the Iasi-Ungheni section, was finalized in December 2014. The second part of the project, the construction of a pipeline connecting Ungheni and Chisinau, commenced in 2014 and saw repeated delays. As the information stands today, its estimated finalization date is 30 September 2021. The estimated commercial operation date is 1 October 2021.

II. The applicant VMTG

VMTG was created by Government Decision No.501 of 1 July 2014 on the establishment of the state enterprise VMTG (hereinafter "GD 501/2014").⁹ The founder of the state enterprise VMTG was the then Ministry of Economy (currently, the Ministry of Economy and Infrastructure, hereinafter "MEI"). According to the GD 501/2014, VMTG was established in order to manage and operate the Iasi-Ungheni pipeline and to perform the functions of a transmission service operator on the territory of Moldova. On 16 July 2014, VMTG was registered in the Moldovan State Registry for legal persons.

On 29 December 2014, the Iasi-Ungheni gas pipeline was transferred for the purpose of maintenance and other technical services to VMTG,¹⁰ while the ownership of the transmission assets remained with the Moldovan Public Property Agency. By a contract for technical services between MEI and VMTG, VMTG was obliged to carry out the maintenance works for the Iasi-Ungheni pipeline.¹¹ On 6 January 2015, VMTG also was licensed as a transmission system operator¹² on the territory of Moldova.

On 28 March 2018, VMTG was sold by MEI (for the shares) and the Public Property Agency of Moldova (for the transmission assets) to Eurotransgaz LLC (hereinafter "ETG"), a company which had been established in December 2017.¹³ According to an excerpt from the Moldovan Company Registry, ETG's scope of activity is the production, transmission, distribution, storage and supply of natural gas. In practice, ETG has only been active as the sole shareholder of VMTG and had no other activities. The founder and the sole shareholder of ETG is Transgaz JSC (hereinafter

⁵ 68ZTOD-MTG-VMTG3.

⁶ 68ZTOH-MTG-VMTGX.

⁷ 68ZTLO-MTG-VMTGT and 68ZTLC-MTG-VMTGD.

⁸ 68ZGDG-MTG-VMTGC.

⁹ Official Gazette of the Republic of Moldova, No. 174-177, 4 July 2014.

¹⁰ Order of MEI no 211/2014. See, also, Technical Service Agreement between the Ministry of Economy and VMTG dated 29 December 2014.

¹¹ Contract between MEI and VMTG dated 29 December 2014, section 2.

¹² License AA no 087187, issued by ANRE on 6 January 2015, valid for 25 years.

¹³ Agreement between MEI, APP and ETG dated 28 March 2018.

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“*Transgaz*”), the Romanian TSO.¹⁴ *Transgaz* has been certified by the Romanian regulatory authority as an independent system operator since 6 August 2014.¹⁵

Under the sale agreement between MEI, the Public Property Agency and *ETG*, *ETG* received full control over *VMTG*, including all movable and immovable assets, contracts and licenses.¹⁶ After the signature of the sale agreement, *VMTG* was restructured into a limited liability company.¹⁷ Its registered capital is MDL 1,162,779,547.¹⁸

As of the date of the present Opinion, *VMTG* is finalising works related to the automatisisation and securing of the pipeline, which are expected to be completed by 4 November 2021. In order for the Ungheni-Chisinau pipeline to function at its full capacity, 2 compressor stations at Onesti and Gheraiesti, as well as the DN 700 mm pipeline between Onesti and Letcani still need to be finalised. The dispatch centre CCAOMG Ghidirici will become functional in the fourth trimester of 2021.

Until the ongoing works are finalised, the Ungheni-Chisinau pipeline can already operate, albeit at limited capacity. However, there have been no market tests performed by *VMTG*, no requests for capacity booking, and consequently no gas transmission contracts signed. As a consequence, the company has no commercial activity ongoing, and it is financed by *ETG*, its sole shareholder.

VMTG currently has 28 employees (25% of the required personnel), but is in the process of employing more staff. Its existing personnel is being trained by *Transgaz* and *FGSZ* (the Hungarian gas TSO) experts. Furthermore, *VMTG* has commenced the procurement procedure for a capacity booking platform. According to previous agreements, *VMTG* will procure services from *FGSZ* (Hungary) for the use of the platform BRP.

1. *VMTG*'s corporate governance

Under Law 135/2007 on limited liability companies,¹⁹ the main body of *VMTG* as a limited liability company is the shareholder assembly, with *ETG* being the sole shareholder. The shareholder assembly has the following main functions: it adopts and amends the statutes, modifies the share capital, appoints and dismisses the board of directors, approves internal regulations and reports,

¹⁴ Excerpt from the Moldovan Company Registry no 446687 dated 21 August 2020.

¹⁵ ANRE Order dated 6 August 2014, published in the Official Gazette of Romania no. 613 from 19 August 2014.

¹⁶ Agreement between MEI, APP and *ETG* dated 28 March 2018, section 2.2.

¹⁷ Decision by the Moldovan Agency for Public Services dated 10 September 2018. Following the restructuring and registration of *VMTG* as a limited liability company, ANRE also recorded this change in its license registry on 13 September 2018, ANRE Decision no 253/2018 on updating the license of *VMTG*; License AC no 01338, issued by ANRE on 6 January 2015, valid for 25 years

¹⁸ Excerpt from the Moldovan Company Registry no 446687 dated 21 August 2020.

¹⁹ Official Gazette of the Republic of Moldova no 127-130, 17 August 2007.

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approves the annual balance sheet and the distribution of profit, establishes branches and subsidiaries.²⁰

The board of directors prepares business plans for approval of the shareholder assembly, elaborates and approves the strategy of the company, approves internal regulations of the company, and appoints and dismisses the administrator.²¹ The board consists of a maximum five members, one of which is designated as president of the board by the shareholder assembly.²² The administrator manages the day-to-day operations of the company, and implements the strategy defined by the board.²³ According to the statute, the shareholder assembly of *VMTG* may also appoint an internal auditor, which has not happened. The company is audited by *BDO Audit&Consulting LLC*.²⁴

II. Description of the Preliminary Decision

On 5 November 2020, *VMTG* submitted a request for certification as a natural gas transmission operator to ANRE²⁵ based on Articles 25 and 36 of Law 108/2016. On 2 March 2021, ANRE issued the Preliminary Decision. On 10 March 2021, ANRE notified the Secretariat of its Preliminary Decision. In the Preliminary Decision, ANRE concluded that *VMTG* complies with the requirements of the provisions on ownership unbundling, namely that:

1. At the date of submission of the application for certification by „Vestmoldtransgaz” LLC does not carry out activities of production, distribution, storage, or supply of natural gas or electricity and is independent of other natural gas and power companies;
2. „Vestmoldtransgaz” LLC is not part of a vertically integrated undertaking and is not directly or indirectly controlled by an undertaking or group of undertakings which may exercise control over each other, which carries out at least one of the activities of transmission, distribution, storage, production or supply of natural gas;
3. „Vestmoldtransgaz” LLC does not hold any shares in undertakings engaged in the production, distribution, storage or supply of natural gas or electricity and does not have control over such undertakings;
4. According to the information in the Register of Legal Entities at the date of submission of the application for certification, the sole founder of „Vestmoldtransgaz” LLC is "Eurotransgaz" LLC, which in turn does not have control over natural or legal persons carrying out activities for the production or supply of natural gas or electricity;
5. According to the information from the Register of legal entities (03.12.2020) the only founder of „Eurotransgaz” LLC is the “National Gas Transmission Company TRANSGAZ” which was subject to

²⁰ Law 135/2007, Art 49.

²¹ Statute, section 7.

²² At the time when *VMTG* applied for certification, the members of the Board were Irina Dragoman, Elisabeta Ghidiu, Marius Stoica and Marius Stroia. Cristina Iancu served as president, see Decision of the Board of Directors of *VMTG* no 64 dated 16 July 2020 and Decision of the Sole Shareholder of *VMTG* no 9 dated 26 April 2021.

²³ At the time when *VMTG* applied for certification, its administrator was Liviu-Valentin Duminica, see excerpt from the Moldovan Company Registry no 448539 dated 2 September 2020.

²⁴ Service Contract no 03A/2021 dated 21 April 2021.

²⁵ Request 9562 dated 5 November 2020.

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certification as an “independent system operator” according to ANRE Order no. 3 of 22.01.2014, published in the Official Gazette of Romania no. 60 / 23.01.2014, which confirms the observance of all the conditions of its separation and independence.

6. The indirect control of „Vestmoldtransgaz” LLC is owned by the “independent system operator” the “National Gas Transmission Company TRANSGAZ”;
7. „Vestmoldtransgaz” LLC is the owner of natural gas transmission networks;
8. „Vestmoldtransgaz” LLC is the holder of the license for the natural gas transmission;
9. „Vestmoldtransgaz” LLC does not carry out operational activity, its basic activity being focused on making investments related to the Iasi-Ungheni-Chisinau gas pipeline in order to ensure the natural gas transmission in the future.”

III. Assessment of the Preliminary Decision

According to the Secretariat’s well-established practice,²⁶ the following aspects matter in particular when assessing the compliance of the Preliminary Decision with the unbundling model enshrined in Article 9 of the Gas Directive:

- 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 TSO as required by Article 9(1)(a) of the Gas Directive; and
- c. control over and exercising any rights in the undertaking to be certified need to be separated from control over and exercising any rights in undertakings involved in production or supply of natural gas and electricity as required by Article 9(1)(b)-(d), (2) and (3) of the Gas Directive.

The Secretariat reviewed ANRE’s Preliminary Decision against that background.

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. This is one of the key elements of the ownership unbundling model as it ensures the uncompromised independence of the TSO in making decisions with regard to the management and investments into the system and eliminates potential conflicts of interest with any third-party owner of the assets.

²⁶ Secretariat’s Opinion 6/19 on certification of *Moldelectrica*, section IV.2; Secretariat’s Opinion 1/17 on certification of *OST*, section II.2; Secretariat’s Opinion 3/17 on certification of *EMS*, section III.2; Secretariat’s Opinion 1/16 of 3 February 2016 *TAP AG*.

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The Secretariat has no reason to call into question the Preliminary Decision's findings that VMTG is the owner of the transmission assets.²⁷ They include the transmission network for the Iasi-Ungheni section (10,6 km) and the transmission network for the Ungheni-Chisinau section (109,2 km).

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(4) of the Gas Directive. This provision follows a functional rather than a formal approach in determining that “*transmission system operator*” means a natural or legal person who carries out the function of transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transport of gas.” 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.²⁸ 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 tasks of a transmission system operator, and whether it disposes of the necessary (human, technical, financial) resources for this.²⁹

The Preliminary Decision does not analyse in detail the extent to which VMTG already now performs the tasks of a TSO. ANRE seems to consider this condition fulfilled by the existence of a license for transmission of gas. VMTG's license states that the enterprise's object of activity is transmission of gas.³⁰ ANRE also refers to the statute of VMTG³¹ and to information presented by VMTG regarding its personnel and their qualifications and tasks.³²

In this respect, the Secretariat observes that operation, maintenance and development are activities normally associated with an existing transmission network. In its Opinion on the certification of TAP AG as an Independent Transmission Operator,³³ the Secretariat found that the scope of the commercial operations of the company (mainly capacity allocation and related activities) at the time when certification was requested was too limited to be considered fully-fledged transmission system operation. However, in the end, the lack of commercial activity was not, in itself, a hindrance to certification, provided that certain conditions were fulfilled. The Secretariat agreed that the certification of TAP AG was timely, albeit with a condition: that the national regulator performed another assessment, three months before the commercial operation date, to make sure that, once operational, TAP AG complied with the ITO provisions (including the performance of the tasks of a

²⁷ Preliminary Decision, conclusion 7.

²⁸ Secretariat's Opinion 1/16 of 3 February 2016 TAP AG.

²⁹ Commission's Opinion on certification of VŮN C(2012) 2244 final of 29.3.2012.

³⁰ License AC no 01338, issued by ANRE on 6 January 2015, valid for 25 years.

³¹ Statute, section II.

³² Preliminary Decision, section 3.7 and Annex 2.

³³ Secretariat's Opinion 1/16 of 3 February 2016 TAP AG, sections II.3.a and II.3.c.

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transmission system operator). In the TAP certification, the national regulator itself had requested compliance with a list of commitments by TAP AG to be fulfilled before commercial operation date.

In the case of VMTG, the Iasi-Ungheni-Chisinau pipeline is also not yet operational. As ANRE concedes, VMTG's main activity is currently the development of the Iasi-Ungheni-Chisinau pipeline in its final phases, in order to prepare the future transmission of gas.³⁴ VMTG is currently not performing actual transmission services.,

In the case of TAP AG, the factual and legal background, as well as the corporate structure of the company, were more complex than in the case of VMTG, and this had direct consequences with regard to certification. For example, performance of the tasks of a transmission system operator was intertwined, under the ITO rules, with the prevention of conflicts of interest. That is why, in its Opinion 1/16, the Secretariat requested that TAP AG notifies the national regulator of all the circumstances of relevance for its full compliance with the ITO model at least three months before commercial operation date, and that the national regulator re-opens the certification procedure at that stage.³⁵ By contrast VMTG's current activities go beyond those of a mere project company. It already performs activities related to the supervision and maintenance of the gas transmission infrastructure, is negotiating interconnection agreements with neighbouring TSOs, and prepares for capacity allocation.³⁶ Such activities fall under the tasks of transmission system operators, as defined by Article 2(4) of the Gas Directive. The Secretariat has also no reasons to question that VMTG is about to engage in discharging the remaining functions of a TSO in the imminent future, on time before commercial operation on 1 October 2021. The company is training its existing employees, has plans of employing additional staff, acquiring the necessary capacity booking platforms and softwares, and having the dispatch centre operational.

The Secretariat suggests that ANRE, its Final Decision, demands that VMTG presents ANRE a detailed roadmap with key milestones required before full commercial operation, and that all the respective milestones are completed at least one month before commercial operation date.

c. Separation of control over transmission from gas generation/supply

The Preliminary Decision assesses the compliance of VMTG with the ownership unbundling model under Article 9 of the Gas Directive, as transposed in Moldovan legislation by Article 24 and 25 of the Law 108/2016. In order to fully achieve the objective of Article 9 of the Gas Directive – the prevention of potential and actual conflicts of interest – the provisions of Article 9 cannot be interpreted in a formalistic manner. The separation of control must be effective in the sense that it ensures the full independence of the public body controlling a TSO from any other entity controlling generation and supply activities.

³⁴ Preliminary Decision, Conclusion no 9.

³⁵ Secretariat's Opinion 1/16 of 3 February 2016 TAP AG, section II.3.c.

³⁶ ANRE's response to the Secretariat's questions on 2 July 2021.

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i. Exercise of control and rights in VMTG

Article 9(1)(b)(i) of the Gas Directive prohibits the same person or persons from directly and indirectly exercising control over an undertaking performing any of the functions of production or supply, and directly or indirectly exercising control or exercising any right over a TSO or transmission system. "Control" means "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."³⁷ Such rights generally are the power to exercise 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.³⁸

The sole shareholder of VMTG is ETG. The management of ETG is appointed by the board of Transgaz, which is also the sole shareholder of ETG. Transgaz, in turn is owned by the Romanian State (58,50%) and free float (natural and legal persons, 41,5%)³⁹. The Romanian State, through its Ministry of Economy, Entrepreneurship and Tourism, holds thus the majority shareholding in Transgaz, which in turn ultimately controls VMTG. Transgaz is certified as an independent system operator by the Romanian regulator,⁴⁰ which shows its compliance with the provisions in Article 9(1)(b), (c), and (d).⁴¹ The European Commission had issued a positive conditional decision on the certification of Transgaz, and requested that a series of measures be implemented to ensure separation between the state and independence of board members.⁴² The Romanian authorities made the needed legislative changes by Law 117/2014 and certified Transgaz on 6 August 2014.

The Secretariat thus agrees with ANRE that the current shareholding of Transgaz poses no risk to compliance with Article 9(1)(b)(i) of the Gas Directive.

ii. Participation in production and supply activities

Neither VMTG, nor ETG, its sole shareholder, participate in production / generation or supply activities.

iii. Independence of board members

³⁷ Gas Directive, Article 2(36).

³⁸ Gas Directive, Article 9(2).

³⁹ [Shareholding | Transgaz](#).

⁴⁰ Order No 72/2014 by Romanian energy regulator on approving the certification of Transgaz as transmission system operator for natural gas, Official Gazette of Romania no 613, 19 August 2014.

⁴¹ Gas Directive, Article 14(2)(a).

⁴² Commission Opinion of 25 November 2013 on the certification of Transgaz, sections III.3, III.4 and III.5.

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Articles 9(1)(c) and (d) of the Gas Directive require that the members of the management of a TSO and persons that have the right to appoint them must fulfil certain requirements of independence. In particular, the same person or persons are not entitled to control or exercise any right over an undertaking performing any of the functions of production or supply and at the same time be or appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking. Moreover, the same person is not entitled to be a member of the supervisory board, the administrative board or bodies legally representing an undertaking, of both an undertaking performing functions of production and supply, and a TSO or a transmission system.

The Preliminary Decision was accompanied by a series of statements of board members of *VMTG* and *ETG*, that they are not members of the supervisory board, the administrative board or bodies legally representing an undertaking, of both an undertaking performing functions of production and supply. The Secretariat considers this sufficient for the purposes of the present certification.

IV. Conclusions

Against this background, the Secretariat supports the certification of *VMTG* as a transmission system operator. As explained above, the Secretariat suggests that ANRE, in its Final Decision, demands that *VMTG* presents ANRE a detailed roadmap with the remaining milestones leading to full commercial operation on 1 October 2021, and that all milestones are completed at least one month before commercial operation date.

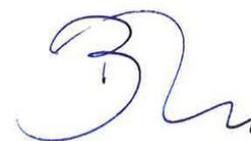
Pursuant to Article 3(2) of the Gas Regulation, ANRE shall take utmost consideration of the comments of the Secretariat when taking its final decision regarding the certification of *VMTG*. ANRE shall also communicate its final decision to the Secretariat and publish its decision together with the Secretariat's 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, 9 July 2021

A handwritten signature in blue ink, appearing to read "Janez Kopač".

Janez Kopač
Director

A handwritten signature in blue ink, appearing to read "Dirk Buschle".

Dirk Buschle
Deputy Director/Legal Counsel