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COMMISSION OPINION

of **XXX**

pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10 of Directive 2009/73/EC - Romania - Certification of Companiei Naționale de Transport al Energiei Electrice “Transelectrica” S.A.

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I. PROCEDURE

On 15 August 2013, the Commission received a notification from the Romanian National Regulatory Authority, Autoritatea Nationala de Reglementare in Domeniul Energiei (hereafter, "ANRE"), in accordance with Article 10(6) of Directive 2009/72/EC (hereafter, "Electricity Directive"), of a draft decision on certification of Companiei Naționale de Transport al Energiei Electrice “Transelectrica” S.A. (hereafter, "Transelectrica") as Independent System Operator ("ISO") for the Romanian electricity transmission system.

Pursuant to Article 3(1) Regulation (EC) No 714/2009 (hereafter, "Electricity Regulation"), the Commission is required to examine the notified draft decision and deliver an opinion to the relevant national regulatory authority as to its compatibility with Article 10(2) and Article 9 of the Electricity Directive.

II. DESCRIPTION OF THE NOTIFIED DECISION

Transelectrica operates the Romanian electricity transmission system.

Transelectrica is currently owned by the Romanian State (58,688%), S.C. Fondul Proprietatea (13,499%), S.I.F. Oltenia (7,040%) and other shareholders (20.8%), none of the latter owning more than 3% of Transelectrica's shares¹. Transelectrica is listed on the Romanian stock exchange. It seeks certification by means of the application of the Independent System Operator-model (hereafter, "ISO-model") as referred to in Article 9(8) Electricity Directive.

In its draft decision, ANRE reviews whether the requirements for certifying Transelectrica as an ISO are met in the light of the provisions of the Romanian legislation implementing the Electricity Directive. ANRE considers that Transelectrica can be certified on a preliminary basis as a transmission system operator for the transmission grid provided that Transelectrica:

"shall fully comply within six months with the conditions laid down by Article 34(1)(a), (b) and (c) and Article 34(2) and (3) of Law No 123/2012², including by eliminating any possibility of exercising decisive/determining influence over the company, its activities or those of the owner of the electricity transmission network, through any coordination, subordination or other means, by a person who controls or has rights over an economic operator engaged in any production or supply activities in the area of electricity and natural gas".³

¹ According to documentation provided by ANRE with its notification.

² Article 34(1), (2) and (3) of Law No 123/2012 transpose into Romanian law Article 9(1)(b), (c) (d) and 9(2) of the Electricity Directive.

³ Article 2 of the notified draft certification decision.

III. COMMENTS

On the basis of the present notification the Commission has the following comments on the draft decision.

1. The Choice of the ISO-model

According to Article 9(8)(a) Electricity Directive, the ISO model may be applied in cases where, on 3 September 2009, the transmission system belonged to a Vertically Integrated Undertaking (hereafter, "VIU").

In order to establish whether the ISO-model may be applied by Transelectrica, it is necessary to assess in the first place whether Transelectrica was part of a VIU on 3 September 2009. On 3 September 2009, Transelectrica's sole controlling shareholder was the Romanian State, which held at the same time and by the same Ministry (at the time the Ministry for Economy and Commerce, now the Ministry of Economy), major, including controlling, shareholdings in a number of important companies active in the production, distribution and supply of electricity as well as gas in Romania. In its preliminary decision ANRE notes that the Ministry can thus be considered a vertically integrated undertaking of which Transelectrica was a part. At that time the Ministry of Economy and Commerce was also attributed the power to manage the state property in the area of electricity, including the transport of electricity.

The Commission agrees that the choice for the ISO model is in principle legitimate, considering that the transmission system concerned did belong to a VIU on 3 September 2009. However, in view of the following facts, the Commission considers the choice for the ISO-model nonetheless not appropriate in the present case as the degree of separation between public authorities which is required to be in place in cases of application of the ISO model has not been achieved.

The management of the ownership rights of the Romanian State in Transelectrica has since 3 September 2009 been transferred to the Ministry of Public Finance which exercises all rights and assumes all obligations of the Romanian State as a shareholder in Transelectrica, holding the majority of the voting rights represented. The Ministry exercises these rights via the appointment of representatives in Transelectrica's general assembly, which by simple majority *inter alia* appoints and removes members of Transelectrica's supervisory board, sets its budget and approves the management plan and its company strategy.⁴ The Romanian state also holds important interests, including controlling interests, in the main Romanian electricity generation, supply and distribution companies as well as the main gas production, supply and distribution companies. The ownership rights of the Romanian state in these companies are exercised by the Department for Energy.

The Commission recalls that following the rules of the ISO-model, the ownership of the transmission system is by definition held by another person than the ISO. This person, the system owner, is strictly confined in exercising its rights as an owner. Moreover, it is subject to specific obligations aimed at enabling the ISO to carry out its transmission tasks independently from the system owner.

⁴ In view of the required quorum for the general assembly to adopt a decision, the Romanian State has always to be represented.

In the present case however, the transmission grid operated by Transelectrica is partly owned by Transelectrica itself, directly, and, partly, by the Romanian State. Indeed, the Romanian State holds approximately 55%, in value terms, of the electricity transmission network. Transelectrica directly holds a share of approximately 45%. Transelectrica's share of the ownership is bound to increase as newly acquired assets can accrue to Transelectrica only. Moreover, as explained in more detail below, direct and indirect links exist between Transelectrica and the Department of Energy which exercises the State's ownership rights in a number of undertakings in the supply and generation of electricity.

The Commission notes that in the present case, in view of the fact that Transelectrica owns 45% of the electricity transmission assets, the ISO is to a large degree the same person as the system owner. This does not represent the typical background for which the ISO model was established, namely a situation whereby a vertically integrated energy company that was reluctant to sell its transmission assets could place their operation in the hands of a completely separate operator, thus preventing any conflicts of interests with regard to the network operation. This separation is absent in the present case as Transelectrica owns a significant and progressively increasing share of the electricity transmission assets.

The Commission therefore takes the opinion that the ISO model is not the most appropriate model to be applied to Transelectrica. Instead, the Commission considers that ownership unbundling within the state would constitute a more appropriate option to ensure effective separation of the transmission activities from the State's interests in the supply and generation of electricity.

Under both the ISO-model and the ownership unbundling model, effective separation within the state must be ensured in cases where the unbundling takes place between public authorities. Article 9(6) Electricity Directive opens up the possibility, in the context of the ownership unbundling model and for the purpose of complying with the requirements of Article 9(1)(b), (c) and (d), for the State controlling transmission activities as well as generation, production and/or supply activities. However, the respective activities shall be exercised by separate public entities. This provision applies to the ISO-model as well.⁵ In this context, two separate public bodies should therefore be seen as two distinct persons and should be able to control generation and/or supply activities, on the one hand, and transmission activities, on the other, provided that it can be demonstrated that they are not under the common influence of another public entity in violation of the unbundling rules. The public bodies concerned must be truly separate. In these cases, it must be demonstrated that the requirements of Article 9(1)(b), (c) and (d) Electricity Directive are duly complied with.

According to Romanian law, the Prime Minister leads the Government and coordinates the activities of its members, subject to their respective legal duties⁶. The legal duties of the ministries are different and are established by different laws, in their respective fields of activity. The ministries are distinct legal entities without any subordination between them. According to Article 93(19) of Law 123/2013, any action against the independence of the TSO is considered a breach of the law. Whereas the Department for Energy is a legally separate department, it is subordinated to coordination by the Minister of Economy.

The Commission considers that the Department for Energy cannot be considered a public body separate from the Ministry of Economy within the meaning of Article 9(6) of the

⁵ See Article 13(2)(a) Electricity Directive, which requires the candidate ISO to demonstrate that it complies with the requirements of Article 9(1)(b), (c) and (d) of the Electricity Directive.

⁶ Article 13 from Law 90/2001

Electricity Directive. The Commission could agree that the Ministry of Public Finance on the one hand and the Ministry of Economics and the Department of Energy on the other hand may be regarded as independent public bodies within the meaning of Article 9(6) of the Electricity Directive. However, the Commission considers that it has not been sufficiently demonstrated that the Prime Minister is unable to interfere with the Minister of Public Finance on the one hand, and the Ministry of Economy and the Department of Energy on the other hand. It has for example not been demonstrated that the Prime Minister does not have the power of giving instructions to these public bodies.

The Commission moreover notes that the separation between the Ministry of Public Finance on the one hand, and the Ministry of Economy and the Department for Energy on the other hand, appears insufficient because of the existence of the concession agreement which appears to grant the Ministry of Economy rights vis-à-vis Transelectrica. The Department for Energy, that is subordinated to the Minister of Economy, is also attributed the responsibility to manage Romanian state property with regard to the transport of electricity. Moreover, the Department for Energy is in charge of the methodological and operational coordination of the national dispatcher, a part of Transelectrica, as described under point 4 of this Chapter. In that way, the Department for Energy exercises influence over Transelectrica in a way that is neither reconcilable with the separation within the State nor with its role as a system owner.

The Commission also took note of Article 3(4) of Government Emergency Ordinance no. 18/2013⁷ providing that even if the Ministry of Public Finance will appoint and revoke the board members in the Transelectrica, these board members must act in accordance with the policies and strategy in the field of energy and gas as drawn up by the relevant ministry i.e. the Department for Energy. Whereas it is appropriate that board members appointed by the Romanian State can be required to act within the confines of general policies and strategies set by the Romanian State, including those formulated by the Department for Energy, the Commission takes the view that such requirements should exclude explicitly the possibility that such measures interfere with the independence and day-to-day operation of Transelectrica.

Against this background, the Commission considers that in the present situation there is insufficient ground to conclude that the degree of separation required by Article 9(6) Electricity Directive in the context of an ISO model is met.

2. Interests of minority shareholders

Article 13(2)(a) Electricity Directive *inter alia* determines that the ISO needs to comply with the requirements of Article 9(1)(b) and (c) Electricity Directive, aimed at ensuring the independence of the transmission system operator from generation or supply interests.

In the present case, there are two minority shareholders in Transelectrica, i.e. S.C. Fondul Proprietatea (13,499%) and S.I.F. Oltenia (7,040%), each also holding interests in gas and electricity production and supply companies. S.C. Fondul Proprietatea and S.I.F. Oltenia do not exert control over Transelectrica, but they can vote on and propose the election of board members to the companies in which they hold shares. Romanian law also facilitates the appointment of board members by minority shareholders in state-owned companies via so-

⁷ Government Emergency Ordinance no 18/2013 providing for the transfer of the shares owned by the State in CNTEE Transelectrica SA and SNTGN Transgaz SA

called "cumulative voting rights".⁸ Consequently, the Commission concludes that these minority shareholders hold interests and can exercise rights that are incompatible with the provisions of Article 9(1)(b) and (c)⁹ Electricity Directive.

The Commission notes that it is necessary to ensure compliance with Article 9(1)(b) and (c) Electricity Directive irrespective of whether the ISO-model or the ownership unbundling model is applied. This could be achieved by establishing, for instance in the bylaws of Transelectrica, that significant¹⁰ shareholders cannot exercise their ownership rights in Transelectrica unless ANRE has received the appropriate reassurance that these shareholders do not possess interests in other companies incompatible with the requirements of the Electricity Directive.

3. Independence of Transelectrica's board members

Article 9(1)(d) Electricity Directive determines that it is not possible for a board member, or a member of a body legally representing a TSO, to be, at the same time, a board member of an undertaking active in electricity supply or generation as well. For several board members of Transelectrica, ANRE has been unable to ascertain whether they hold interests or have other board positions incompatible with Article 9(1)(d) Electricity Directive. In addition, for one board member appointed by the government, ANRE demonstrated that it is also a board member of Hidroelectrica, an important Romanian electricity generator.

The Commission notes that it is necessary for ANRE to assess the activities of all the board members before compliance with Article 9(1) (d) Electricity Directive can be ensured. It is necessary to ensure compliance with Article 9(1)(d) Electricity Directive irrespective of whether the ISO-model or the ownership unbundling model is applied.

The Commission further notes that is necessary that ANRE¹¹ must be equipped with the appropriate powers to establish that prospective board members comply with all relevant requirements of the Electricity Directive, prior to assuming their position.

4. Powers of the Department for Energy conferred by law over dispatching

Article 13(4) and (5) Electricity Directive strictly confines the powers of the system owner over the ISO. Article 13(2) determines that the ISO is to be responsible to carry out the tasks as listed in Article 12. Dispatching is a core function of the transmission system operation.

⁸ Government Ordinance no. 109/2011 regarding the corporate governance of public enterprises. This Ordinance provides that a shareholder holding, either individually or jointly with others, at least 10% of the shares in a state owned enterprises may ask for cumulative voting procedure be applied for the selection of members of the Board of Directors or the Supervisory Board. Whereas this facilitates the appointments of board members by minority shareholders, the rules are not such that they can acquire control. Fondul Proprietatea holds minority interests in state-owned electricity transmission as well as electricity generation companies.

⁹ In addition to the rights that can be derived from Government Ordinance 109/2011, it appears that S.C. Fondul Proprietatea benefits from certain minority rights allowing it to appoint board members in certain specific electricity generating companies and rights with regard to certain types of decisions.

¹⁰ Such as a entities that hold a share in the voting rights of 5% or higher within the meaning of Article 228 of Romanian Law no. 227 Capital Market - Capital Market Law or to entities that benefit from Government Ordinance 109/2011.

¹¹ That these duty is upon the NRA and the requirement for appropriate powers flows from Article 37(1)(b) and 37(4) of the Electricity Directive.

From the preliminary decision of ANRE, it appears that Transelectrica acts as the national power dispatcher in Romania, within the meaning of the Romanian electricity grid code¹² i.e. it manages the operation of the Romanian transmission grid and its interconnections with neighbouring countries. In brief, this entails the management of the grid after day-ahead schedules have been submitted including ensuring grid stability, balancing and congestion management.

However, Romanian law stipulates that the national power dispatcher¹³ shall remain under the methodological and operational coordination of the Minister Delegate for Energy.¹⁴

The Commission considers that such a provision is incompatible with the provisions of Electricity Directive. The Commission takes the view that operational coordination over the national power dispatcher is a core task of the TSO and has to be exercised independently and by the TSO itself.

Retaining the methodological and operational coordination over the national power dispatcher by the Romanian Department for Energy is all the more questionable in view of the fact that this Department also manages the Romanian interests in electricity generation, supply and distribution assets, rendering it unlikely that the TSO can perform this core task independently.

The Commission notes that it remains possible for the Department for Energy to set general policy with regard to the electricity sector, including the adoption of legislation which - within the limits set by Article 15 of the Electricity Directive - can affect dispatching.

Based on the above comments, the Commission is of the opinion that there is insufficient ground for certification under the ISO-model. The Commission recommends ANRE to strive, in cooperation with the relevant bodies in the Romanian State, for a situation in which ownership unbundling of Transelectrica is realized through application of Article 9(6) of the Electricity Directive enabling separation within the state, which by necessity also implies that Romanian law must, as a matter of urgency, be amended in a way such as to contain this unbundling model.

In such a situation, the exercise of the ownership rights of the Romanian State in Transelectrica can remain with the Ministry of Public Finance. The Ministry of Economy and the Department for Energy could hold on to their respective participations in generation and or supply undertakings and to their respective tasks with regard to national energy policy. However, the Ministry of Public Finance should become the contracting authority of the concession agreement (which, as a general remark, should be based on fair conditions) and obtain the responsibility to manage Romanian state property with regard to the transport of electricity that are now, respectively, with the Ministry of Economy and the Department for Energy. Article 3(4) of Emergency order 18/2013 should be amended in line with the above. Finally, the Department for Energy should give up the methodological and operational coordination of the national dispatcher, which is to be considered a core task to be carried out by Transelectrica independently.

¹² Codul Tehnic Al Rețelei Electrice de Transport, Revizia I. Aprobat prin Ordinul ANRE nr. 20/27.08.2004.

¹³ As well as the National Gas Dispatcher, i.e. Transgas, the Romanian gas TSO.

¹⁴ Article 5(2) Emergency Ordinance no.18/2013.

IV. CONCLUSION

Pursuant to Article 3(2) Electricity Regulation, ANRE shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of Transelectrica, and when it does so, shall communicate this decision to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take vis-à-vis national regulatory authorities on any other notified draft measures concerning certification, or vis-à-vis national authorities responsible for the transposition of EU legislation as regards the compatibility of any national implementing measure with EU law.

The Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. ANRE is invited to inform the Commission within five working days following receipt whether it considers that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which it wishes to have deleted prior to such publication. Reasons should be given for any such request.

Done at Brussels,

For the Commission

Member of the Commission