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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 - Societatea Națională de Transport Gaze Naturale Transgaz SA ('Transgaz')

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I. PROCEDURE

On 25 September 2013, the Commission received a notification from the Romanian National Regulatory Authority, Autoritatea Națională de Reglementare în Domeniul Energiei ("ANRE"), in accordance with Article 10(6) of Directive 2009/73/EC (hereafter, "Gas Directive"), of a draft decision on certification of Companiei Naționale de Transport a Energiei Electrice "Transgaz" S.A. ("Transgaz") as Independent System Operator for the Romanian gas transmission system.

Pursuant to Article 3(1) Regulation (EC) No 715/2009 ("Gas Regulation 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 Gas Directive.

II. DESCRIPTION OF THE NOTIFIED DECISION

Transgaz operates the Romanian gas transmission system. Transgaz is currently owned by the Romanian State (58.509%), Fondul Proprietatea SA (14.987%) and other shareholders (26.502%), none of the latter apparently owning significant shares in Transgaz.¹ Transgaz is listed on the Romanian stock exchange. The transmission assets are to approximately 64% owned directly by Transgaz. The Romanian State holds approximately 34% of the assets.²

Transgaz seeks certification by means of the application of the Independent System Operator-model ("ISO-model") as referred to in Article 9(8) Gas Directive.

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

shall meet the conditions laid down by Article 128(1)(a), (b), (c) and (e) of Law No 123/2012³ on electricity and natural gas in full, including by eliminating any possibility of it, its activity, or the owner of the electricity⁴ transmission system being subjected, by any coordination, subordination or other means, to decisive/determining influence 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.⁵

¹ According to documentation provided by ANRE with its notification.

² Another third party also owns 2% of the gas transmission network.

³ Article 128 transposes into Romanian law Article 9 of the Gas Directive.

⁴ Note by the Commission: presumably "gas" was meant.

⁵ 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 possibility of applying the ISO-model

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

The Commission understands that on 3 September 2009, Transgaz's sole controlling shareholder was the Romanian State. The ownership rights of the Romanian State were exercised by, at the time, the Ministry for Economy and Commerce which is today the Ministry of Economy. This Ministry also holds major, including controlling, shareholdings in a number of companies active in the production, distribution and supply of gas, as well as electricity in Romania. At the time, the Ministry of Economy and Commerce was also attributed the powers to manage the state property in the area of gas (and electricity) supply, production and transportation.

The Ministry of Economy and Commerce may thus be considered to have been a vertically integrated undertaking in 2009 of which Transgaz was a part and therefore the choice for the ISO-model is in principle open to Transgaz. However, on the basis of a number of comments on the structural nature of the practical implementation of the ISO-Model in the present case, the Commission strongly recommends ANRE to, in cooperation with the relevant bodies in the Romanian State, consider the implementation of the ownership unbundling model on the basis of a separation between public bodies within the state.

2. The Choice of the ISO-model

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) Gas 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.⁶ In this context, two separate public bodies should therefore be seen as two distinct persons and should be able to control production 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) Gas Directive are duly complied with.

Ownership of the system

Transgaz uses the part of the transmission system it does not own on the basis of a concession agreement for which, on behalf of the Romanian State, the National Agency for Mineral Resources is the signatory authority. The National Agency for Mineral Resources is a public

⁶ See Article 14(2)(a) Gas Directive, which requires the candidate ISO to demonstrate that it complies with the requirements of Article 9(1)(b), (c) and (d) of the Gas Directive.

body that falls under the direct coordination of the Prime Minister. From ANRE's preliminary decision, it remains unclear to what extent the concession agreement confers powers over the transmission grid to the National Agency for Mineral Resources. The Commission invites ANRE to clarify, in its final decision, the rights the National Agency for Mineral Resources has over Transgaz through the concession agreement.

The Commission recalls that following the rules of the ISO-model, the ownership of the transmission system is by definition to be 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.

In the present case however, as explained above, the transmission system operated by Transgaz is partly owned by Transgaz itself and partly by the Romanian State. Indeed, the Romanian State holds approximately 34% of the assets, whereas Transgaz directly holds a share of approximately 64%⁷. Transgaz's share of the ownership is bound to increase as newly acquired assets can accrue to Transgaz only.⁸ Hence, the ISO is to a large degree the same person as the system owner. The Commission notes that 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 interest with regard to the network operation. This separation is absent in the present case as Transgaz owns a significant and progressively increasing share of the gas transmission assets.

Separation within the state

The Commission notes that after 3 September 2009 the management of the ownership rights of the Romanian State in Transgaz has been transferred to the Ministry of Public Finance which today exercises all rights and assumes all obligations of the Romanian State as a shareholder in Transgaz, holding the majority of the voting rights represented. The Ministry exercises these rights via Transgaz's general assembly, which by simple majority *inter alia* appoints and removes members of Transgaz's supervisory board, sets its budget and approves the management plan and its company strategy.⁹

The ownership rights of the Romanian State in the main Romanian gas production, supply and distribution companies, as well as the main electricity generation, supply and distribution companies, are exercised by the Department for Energy. The Department for Energy is a legally separate entity, but it is subordinated to coordination by the Minister of Economy.

According to Romanian law, the Prime Minister leads the Government and coordinates the activities of its members, subject to their respective legal duties.¹⁰ The legal duties of the

⁷ Another third party also owns 2% of the gas transmission network.

⁸ However, according of the Concession Agreement by which assets owned by the Romanian State are licenced to Transgaz, all Transgaz assets will be 'returned' to Romanian State when the Concession Agreement expires.

⁹ The rules on the quorum required for reconvened ordinary and extra ordinary shareholders meetings after the first meeting failed to reach the required quorum are such that it is possible for these reconvened meetings to take valid decisions without the Romanian State being present. (Its presence is required for the first called ordinary and extra-ordinary meeting to take valid decisions). In view of the current shares of minority shareholders, none of the latter would however be able to exercise control over Transgaz.

¹⁰ Article 13 from Law 90/2001

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.

The Commission could agree that the Ministry of Public Finance on the one hand and the Ministry of Economy and the Department for Energy on the other hand may be regarded as independent public bodies within the meaning of Article 9(6) of the Gas Directive. On the same grounds it may be accepted that the National Agency for Mineral Resources is a public body separate from the Ministry of Economy and the Department for Energy as well as, for that matter, the Ministry of Public Finance.

However, as explained under point 5 of this Opinion, the Department for Energy has certain powers over Transgaz, which are incompatible with the unbundling rules related to a separation between public bodies.

The Department for Energy, that is subordinated to the Minister of Economy, is attributed the responsibility to manage Romanian state property with regard to the transport of gas. Moreover, the Department for Energy is in charge of the methodological and operational coordination of the national dispatcher, a part of Transgaz, and is attributed the responsibility of coordinating¹¹ the activities of the national system of natural gas (as well as electricity) transmission (see also point 5 of this chapter). Consequently, the Department for Energy exercises influence over Transgaz 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. 18/2013¹² providing that even if the Ministry of Public Finance will appoint and revoke the board members in Transgaz, 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 Transgaz.

In addition, the Commission considers that it has not been sufficiently demonstrated that the Prime Minister is unable to interfere with the Minister of Public Finance and especially with the National Agency for Mineral Resources (which falls under its coordination) 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. It has also not been demonstrated sufficiently that the National Agency for Mineral Resources has no other interests related to the production and/or supply of gas and electricity within the ambit of its responsibilities.

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) Gas Directive in the context of an ISO model is met.

¹¹ Article (1) of Government Decision No 429/2013, point 3. This comment does not cover point 2 of the same Decision.

¹² 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

3. Interests of minority shareholders

Article 14(2)(a) Gas Directive *inter alia* determines that the ISO needs to comply with the requirements of Article 9(1)(b) and (c) Gas Directive, aimed at ensuring the independence of the transmission system operator from generation or supply interests.

One of the owners of Transgaz is Fondul Proprietatea which owns 14,987% of the shares. Fondul Proprietatea also holds participations in gas and electricity production and supply companies. The fund does not exert control over Transgaz, but it can vote on and propose the election of board members to the companies in which it holds shares. Moreover, Romanian law facilitates the appointment of board members by minority shareholders in state-owned companies via a so-called "cumulative voting rights" regime.¹³ The Commission concludes that this minority shareholder holds interests and can exercise rights that are incompatible with the provisions of Article 9(1)(b) and (c)¹⁴ Gas Directive.

The Commission notes that compliance with Article 9(1)(b) and (c) Gas Directive could be achieved by establishing, for instance in the bylaws of Transgaz, that shareholders cannot exercise their appointment or voting rights in Transgaz until ANRE has received the appropriate reassurance that these shareholders do not possess interests in other companies incompatible with the requirements of the Gas Directive.¹⁵

4. Independence of Transgaz's board members

Article 9(1)(d) Gas Directive determines that it is not possible for a board member of a TSO or a member of a body legally representing a TSO, to be, at the same time, a board member of an undertaking active in gas production or supply.

In its preliminary decision, ANRE does not assess in detail whether all Transgaz' current board members hold interests or have other board positions incompatible with Article 9(1)(d) Gas Directive. The Commission notes that it is necessary for ANRE to undertake such assessment for all the board members before issuing its final certification decision in order to ensure compliance with Article 9(1)(d) Gas Directive. As a general remark, the Commission notes that it is necessary that ANRE is equipped with the appropriate powers to establish that potential board members comply with all relevant requirements of the Gas Directive, prior to assuming their position.¹⁶

¹³ 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.

¹⁴ In addition to the rights that can be derived from Government Ordinance 109/2011, it appears that 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.

¹⁵ As a practical approach, the Commission could support the option put forward by ANRE to use the threshold as laid down in Article 228 of Romanian Law no. 227 Capital Market - Capital Market Law and waive their scrutiny powers for those entities that hold a share in the voting rights below 5% or to entities that benefit from Government Ordinance 109/2011.

¹⁶ Article 41(4) of the Gas Directive determines that NRAs shall be granted with such power.

5. Powers of the Department for Energy over Transgaz

Article 14(4) and (5) Gas Directive strictly confines the powers of the system owner over the ISO. Article 14(2) determines that the transmission system operator is to be responsible to carry out the tasks as listed in Article 13. Dispatching is a core function of the transmission system operation.

Transgaz acts as the gas dispatcher in Romania. According to Article 100 paragraph 40 of the Law no. 123/2012 dispatch represents the: *„specific activity of constant and operative balancing at the level of the systems of the quantities of natural gas injected and respectively taken out from those systems, at the parameters imposed by the respective delivery obligations, and take the necessary measures to limit the effects of emergency situations such as: very low temperatures, natural disasters, major accidents and others like those, using specific means”*. Dispatch therefore concerns day-to-day gas grid management operations including balancing.

Romanian law stipulates that the national gas dispatcher¹⁷ shall remain under the methodological and operational coordination of the Minister Delegate for Energy.¹⁸ The Commission considers that such a provision is incompatible with the provisions of Gas Directive. The Commission takes the view that operational coordination over the national gas dispatcher is a core task of the TSO and has to be exercised independently and by the TSO itself. In this context it should be noted that Article 13(3) Gas Directive that sets out the tasks of the gas transmission system operator explicitly refers to the balancing of the gas transmission system.

Retaining the methodological and operational coordination over the national gas 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 gas production, supply and distribution assets, rendering it unlikely that the TSO can perform this core task independently.

More generally, the Department of Energy is attributed by law the responsibility of coordinating¹⁹ the activities of the national system of natural gas (as well as electricity) transmission. The relevant provision clearly refers only to the activities of the national system of natural gas (as well as electricity). It therefore appears to refer to the activities of the transmission system operators as such and not the activities of the transmission system operators vis à vis other relevant entities in the gas and electricity sector, such as gas suppliers and producers whereas the transmission system operator should be able to exercise its functions independently from the Department of Energy.²⁰

Based on the above comments, the Commission is of the opinion that under the present circumstances there is insufficient ground for certification of Transgaz 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 Transgaz is realized through application of Article 9(6) of the Gas 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.

¹⁷ As well as the National Electricity Dispatcher, i.e. Transelectrica.

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

¹⁹ Article 3 (1) of Government Decision No429/2013, point 3.

²⁰ Such as meant in point 2 of the same Article.

In such a situation, the exercise of the ownership rights of the Romanian State in Transgaz 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 production and/or supply undertakings and to their respective tasks with regard to national energy policy. However, the responsibility to manage Romanian state property with regard to the transport of gas that is now with the Department for Energy must be transferred to a public body separate from the Department of Energy. Article 3(4) of Emergency Ordinance 18/2013 should be amended in line with the above. The Department for Energy should also give up the methodological and operational coordination of the national dispatcher, which is to be considered a core task to be carried out by Transgaz independently.

IV. CONCLUSION

Pursuant to Article 3(2) Gas Regulation, ANRE shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of Transgaz, 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