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## COMMISSION OPINION

of **XXX**

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10 of Directive 2009/72/EC - Romania - Certification of Companiei Naționale de Transport al Energiei Electrice “Transelectrica” S.A.**

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**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10 of Directive 2009/72/EC - Romania - Certification of Companiei Naționale de Transport al Energiei Electrice “Transelectrica” S.A.**

### I. PROCEDURE

On 15 August 2015, 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 of 12 August 2015 on certification of Companiei Naționale de Transport al Energiei Electrice “Transelectrica” S.A. (hereafter, "Transelectrica") as Transmission System Operator ("TSO") for electricity.

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

#### 1. Background

Transelectrica operates the Romanian electricity transmission system.

Transelectrica is owned by the Romanian State via the Ministry of Economy, Commerce and Tourism (hereafter, "Ministry of Economy") (58.688%), S.I.F. Oltenia (5.667%) and other shareholders (35.645%). Transelectrica is listed on the Romanian stock exchange.

Further to Order No 90 of 11 December 2013, Transelectrica had been certified by ANRE as an Independent System Operator ("ISO") for the Romanian electricity system.

In its Opinion of 14 October 2013<sup>1</sup> on ANRE's preliminary decision on the certification, the Commission also expressed concerns as to Transelectrica's compliance with the requirements of the Electricity Directive with regard to several issues. The extent to which these deficiencies have been resolved is reviewed in Section III of this Opinion. In its opinion the Commission also considered that the choice of the ISO model was not appropriate in the case of Transelectrica and recommended *inter alia* the implementation of ownership unbundling via the application of Article 9(6) of the Electricity Directive enabling ownership unbundling within the State.

#### 2. The present notification

In the context of the present procedure, Transelectrica has re-applied for certification in accordance with the ownership unbundling model.

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<sup>1</sup> C(2013)6891, [https://ec.europa.eu/energy/sites/ener/files/documents/2013\\_082\\_ro\\_en.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/2013_082_ro_en.pdf)

In its draft decision, ANRE has reviewed whether Transelectrica complies with the requirements of the ownership unbundling model as laid down in the Romanian legislation implementing the Electricity Directive. ANRE concludes that Transelectrica can be certified on a preliminary basis as a transmission system operator for the transmission grid in accordance with the ownership unbundling model.

### **III. COMMENTS**

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

#### **1. Choice of the ownership unbundling model**

In the context of Transelectrica's afore-mentioned certification in 2013 under the ISO model, the Commission took the opinion that the ISO model was not the most appropriate model to be applied to Transelectrica. This conclusion was based in particular on the fact that, at the time, the Ministry of Economy as Transelectrica's sole controlling shareholder also held 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.<sup>2</sup>

Moreover, the Commission noted that the situation whereby Transelectrica owns approximately 45% of the electricity transmission assets, while the Romanian State owns approximately 55% of the electricity transmission network, did not represent the typical background for which the ISO model was established, i.e. the transmission grid being owned by a vertically integrated undertaking (VIU) and operated by the ISO.

Therefore, the Commission considered 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.

Against this background, the model chosen for unbundling in the present case is ownership unbundling, in particular, the option referred to in Article 9(6) Electricity Directive, where the transmission activities are legally unbundled from any production or supply activities in gas or electricity exercised by the State and both types of activities are under the responsibility and control of separate public bodies within the State.

Following legislative changes, the ownership unbundling model is available to Transelectrica under the Romanian Act No 123/2012 on electricity and natural gas transposing the Electricity Directive.

#### **2. Separation within the State**

Article 9(6) Electricity Directive opens up the possibility, within the ownership unbundling model, of the State controlling transmission activities, as well as generation, production and supply activities, provided however that the respective activities are exercised by separate public entities. For the purpose of the rules on ownership unbundling, two separate public bodies should therefore be seen as two distinct persons and should be able to control generation and 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

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<sup>2</sup> The ownership rights of the Romanian state in these companies are exercised by the Department for Energy of the Ministry of Economy.

public entity in violation of the rules on ownership unbundling. The public bodies concerned must be truly separate. In these cases, it must be demonstrated that the requirements of ownership unbundling of Article 9 Electricity and Gas Directives are enshrined in national law and are duly complied with. This has to be assessed on a case-by-case basis.

Article 9(1)(b)(i) Electricity Directive prohibits the same person or persons from directly or 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 transmission system operator or over a transmission system. Article 9(1)(b)(ii) Electricity Directive prohibits the same person or persons from directly or indirectly exercising control over a transmission system operator or over a transmission system, and directly or indirectly exercising control or exercising any right over an undertaking performing any of the functions of production or supply. Article 9(3) Electricity Directive includes a cross reference to transmission system operators and undertakings performing any of the functions of generation and supply within the meaning of the Gas Directive 2009/73/EC.

In its draft decision, ANRE notes that as a result of the legislative changes brought about by the entry into force of Emergency Government Ordinance No 86/17.12.2014, the Ministry of Economy exercises all rights and fulfils all duties resulting from its status as shareholder of Transelectrica on behalf of the State, and furthermore, the same ministry is the contracting authority concerning the concession of the assets of the electricity transmission network and of the lands on which it is located.

ANRE also states that according to Government Decision No 47/2013 on the organisation and functioning of the Ministry of Economy, this ministry does not have undertakings having as business activity the production or supply of electricity or natural gas under its subordination or coordination, nor does it have shares in them.

However, the draft decision notified by ANRE does not provide any information on the ownership and management of the Romanian State's interests in the supply and generation of electricity, which had been previously held by the Department of Energy subordinated to the Ministry of Economy.

Consequently, the preliminary decision does not assess whether the requirements of Article 9(1)(b) Electricity Directive are fulfilled, nor does it provide sufficient information for such an assessment.

Whereas the Commission is aware that, further to a restructuring of the Romanian administration, a separate Ministry of Energy has been created which *inter alia* holds and manages the Romanian State's participations in undertakings active in the generation and supply of energy, the Commission deems it necessary for ANRE to include an assessment of the ownership structure of these participations in the final certification decision.

In view of the above, the Commission invites ANRE to review and describe in its final decision the Romanian State's participations in undertakings active in the generation and supply of energy and to carry out an assessment as to whether the requirements of Article 9(1)(b) Electricity Directive are met in the present case, taking into account the required measures outlined by ANRE in its final decision of 12 December 2013 for the purpose of ensuring the separation within the State.

In this context, the Commission also recalls the comments made in its Opinion of 14 October 2013 regarding the need to establish, when assessing whether sufficient degree of separation of two ministries exists, that the Prime Minister is unable to give instructions or interfere by any other means with the respective ministries representing, on the one hand, the Romanian State's interests in Transelectrica, and the participations in undertakings active in the generation and supply of energy on the other hand and that these ministries are truly separate from one another. ANRE should include such an assessment in its final decision.

### **3. Ownership of the transmission assets**

Article 9(1)(a) of the Electricity and Gas Directives provides that in the ownership unbundling model each undertaking which owns a transmission system acts as a transmission system operator.

In its draft decision, ANRE states that Transelectrica owns parts of the assets used for the transmission of electricity to the value of approximately 4.3 billion RON, whereas further transmission assets of approximately 6 billion RON are owned by the Romanian state via the Ministry of Economy. Transelectrica has been granted the rights to use the latter assets via a concession agreement concluded with the Ministry of Economy. Further to this agreement, Transelectrica has the right to use and develop a portion of the electricity transmission network, and the entire responsibility for the performance of the activities of the transmission system operator.

The Commission considers that in order to establish whether Transelectrica can be considered to be the owner of the network it operates, an in-depth assessment into the rights and obligations under the concession agreement needs to be carried out. In order to comply with the requirement of Article 9(1)(a) of the Electricity and Gas Directives it must be established that the rights of use and disposal of the concessionaire with regard to the network assets can be regarded as equivalent to those of an owner.<sup>3</sup>

In its draft decision, ANRE analyses certain aspects of the concession agreement. It notes in this context that the base of the regulated assets taken into consideration during the approval by ANRE of the tariffs applied by the TSO for the transmission of electricity includes the assets being the subject matter of the concession agreement and that investments made by Transelectrica into the said assets are capitalised by the TSO. On this basis ANRE finds that Transelectrica fulfils the condition set out in Article 9(1)(a) Electricity Directive.

However, the Commission is of the opinion that ANRE's analysis of the rights of use and disposal of the network assets emanating from the concession agreement does not establish to a sufficient degree whether these rights can be regarded as equivalent to those of an owner.

The Commission therefore invites ANRE, prior to adopting its final certification decisions, to expand its analysis, taking into account, in particular, the ability of the concessionaire to use the assets covered by the concession agreement as a guarantee in acquiring financing on the capital markets and the right to compensation for investments made by the TSO into the said assets in the event of a termination of the concession agreement.

If on the basis of its analysis ANRE concludes that the rights of the concessionaires with regard to the network assets can be considered as equivalent to those of an owner, the

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<sup>3</sup> Commission's Opinion C(2014)3255 on ERSE's draft certification decision for REN and RENGasodutos, [https://ec.europa.eu/energy/sites/ener/files/documents/2014\\_094\\_095\\_pt\\_en.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/2014_094_095_pt_en.pdf).

Commission takes the view that the operation of the networks on the basis of a concession is not an obstacle for the certification of the applicant under the ownership unbundling provisions. Otherwise, the Commission considers that ANRE should render the certification of Transelectrica conditional on the implementation of any further changes to the concession agreement needed to ensure compliance with Article 9(1)(a) Electricity Directive.

#### **4. Commission comments in its Opinion C(2013)6891 of 14 October 2013**

In addition to the comments regarding the choice of unbundling model and the separation within the State, the Commission Opinion of 14 October 2013 on the certification of Transelectrica as ISO identified several instances of non-compliance with the unbundling requirements set out in Article 9(1)(b) and (c) Electricity Directive. These requirements are applicable both the in ownership unbundling and in the ISO context (see Article 13(2)(a) of the Directive). Given that at present certification under the ownership unbundling model is sought, it is necessary to assess to what extent the deficiencies have been remedied.

Firstly, in its opinion of 14 October 2013 the Commission concluded that two minority shareholders in Transelectrica, S.C. Fondul Proprietatea and S.I.F. Oltenia, also held interests in gas and electricity production and supply companies. Whereas these minority shareholders did not exert control over Transelectrica, they could vote on and propose the election of board members to the companies in which they hold shares. Consequently, the Commission concluded that these minority shareholders hold interests and can exercise rights that are incompatible with the provisions of Article 9(1)(b) and (c) Electricity Directive. According to the draft decision of 12 August 2015 ANRE, S.I.F. Oltenia currently holds 5.667% of Transelectrica's shares.

Further to ANRE's final decision on the certification of Transelectrica as ISO, the Memorandum of Association and internal procedures of Transelectrica were amended to provide that shareholders owning 5% or more of the share capital of Transelectrica who exercise control or rights over an undertaking having as business activity either the production of provision of electricity would be disabled from exercising voting rights, including the competence to appoint members in the Supervisory board, Directorate or other representative bodies of Transelectrica.

Secondly, in its 2013 opinion the Commission took the view that ANRE had been unable to ascertain in its draft decision of 2 August 2013 that none of the board members of Transelectrica hold interests or have other board positions incompatible with Article 9(1)d Electricity Directive, noting that ANRE would have to be equipped with the appropriate investigative powers.<sup>4</sup>

In its draft decision of 12 August 2015, ANRE outlines the investigative steps undertaken to assess the independence of Transelectrica's board members, the findings resulting from this investigation, including potential conflicts of interests due to participations in undertakings active in the generation or supply of energy, and the measures taken to ensure compliance with the requirements of the Electricity Directive.

In view of the measures outlined above, the Commission takes the view that the concerns raised in its Opinion of 14 October 2013 with regard to the interests of minority shareholders in Transelectrica have been removed. The Commission has also taken note of the

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<sup>4</sup> 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.

investigations carried out by ANRE regarding the independence of the members of Transelectrica's Directorate and Supervisory Board. However, in view of the fact that a number of Transelectrica's senior officers were appointed before the abovementioned modifications to the rights of minority shareholders, the Commission considers that ANRE should re-assess the independence of board members, including any potential conflict of interest in relation to the minority shareholders in question.

Thirdly, in its 2013 opinion the Commission considered that the powers of the Department for Energy conferred by law over dispatching were incompatible with the requirements of the Electricity Directive, pursuant to which dispatching is a core function of transmission system operation. Therefore, the Commission took the view that the Department for Energy should give up the methodological and operational coordination of the national dispatcher. In its final decision on the certification of Transelectrica as ISO, ANRE set out the legislative changes required to remedy this grievance.

However, in view of the restructuring of the Romanian administration, the Commission takes the view that ANRE should reassess in its final decision whether the measures aimed at achieving compliance with the Electricity Directive by assigning the sole responsibility for dispatching to Transelectrica have been fully implemented. Moreover, the Commission considers that ANRE should render the certification of Transelectrica conditional on the full implementation of these measures.

#### **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*