

Energy Community Secretariat

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Opinion 6/19

pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC – Republic of Moldova – Certification of *Moldelectrica*

On 5 June 2019, 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 State Enterprise *Moldelectrica* (hereinafter, “*Moldelectrica*”), the transmission system operator for electricity in the Republic of Moldova (hereinafter, “TSO”). The Preliminary Decision was adopted on 5 June 2019 based on Article 27 of Law no. 107 of 27 May 2016 on Electricity (hereinafter, “Law 107/2016”)¹.

Pursuant to Article 10 of Directive 2009/72/EC² (hereinafter, “the Electricity Directive”) and Article 3 of Regulation (EC) No 714/2009³ (hereinafter, “the Electricity Regulation”) the Secretariat shall examine the notified Preliminary Decision and deliver its Opinion to ANRE as to the compatibility of such a decision with Article 10(2) and Article 9 of the Electricity Directive.

I. The applicant *Moldelectrica*

The state enterprise *Moldelectrica* was created by Government Decision No. 1000 of 5 October 2000 on the establishment of state enterprises in the energy sector (hereinafter, “GD 1000/2000”).⁴

The Moldovan transmission system was part of the so-called *Moldovan Power Station (Combinatul energetic moldovenesc)* since 1955. After several reorganisations the system was reorganised into *State Enterprise Moldtranselectro* in 1997.⁵ By Government Decision no 1000/2000, *Moldtranselectro* was separated into three state enterprises: *Moldelectrica*, *Nodul Hidroenergetic Costesti* and *Autoelectrotrans*.⁶ As a result, *Moldelectrica* became the operator of the high voltage electricity network in Moldova, of the Central Dispatch Service and of a Training Centre. *Nodul Hidroenergetic Costesti* became an electricity producer whose main objects of activity are production

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

² Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011.

³ Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, as incorporated and adapted by Decision 2011/02/MC-EnC of the Ministerial Council of the Energy Community of 6 October 2011.

⁴ Official Gazette of the Republic of Moldova, No. 124-126, 5 October 2000.

⁵ Preliminary Decision, section III.1.

⁶ Government Decision no 1000/2000, Article 1.

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of electricity from hydropower. *Autoelectrotrans* was tasked with provision of technical and maintenance services for vehicles owned by companies active in the electricity sector.

This Government Decision⁷ is still in force and governs *Moldelectrica*'s main fields of activity.⁸ *Moldelectrica*'s current license for transmission of electricity was issued on 10 June 2008 and is valid until 20 April 2026.⁹ Government Decision no 1000/2000 was implemented on 2 May 2001, when the assets of *Moldtranselectro* were transferred into the administration of *Moldelectrica*.¹⁰

1. *Moldelectrica* as a State enterprise under Moldovan law

State enterprises such as *Moldelectrica* are governed by Law 246/2017 on the State Enterprise and on the Municipal Enterprise (hereinafter, "Law 246/2017").¹¹ According to Law 246/2017, a state enterprise has the following bodies: the Founder, the Board of Directors, the Administrator and the Board of Censors.¹²

The functions of the governing bodies of *Moldelectrica* are further explained in its Statute.¹³

The Founder of the state enterprise is the entity performing the functions and attributions for the State as an owner. The state, through the Founder, controls the activities of the state enterprise. The Founder approves the statute of the state enterprise and the rules of functioning of the Board of Directors; appoints and revokes the members of the Board of Directors, the Administrator and the

⁷ Government Decision no 1000/2000, Article 4.

⁸ Those activities relate to:

- the centralized operational management of the Moldovan power system through the Central Dispatch Service level (with the caveat that, in the future, an independent system operator would be created);
- the transmission of electricity through the high-voltage electrical network;
- exploitation and development of the transmission system for electricity, telecommunications and information technology, in correlation with the generation and distribution systems;
- ensuring the functioning of the national electricity transmission system in terms of quality, safety, economic efficiency and environmental protection;
- operation of interconnections and international transit of electricity;
- ensuring interconnections and optimum operating conditions in parallel with other countries' power systems;
- running specialized programs to determine the parameters of optimal operation of the national power system;
- performing electricity exchanges with external interconnection partners on the local electricity balancing market to avoid production-consumption imbalances;
- training and improvement of the power sector personnel.

⁹ License AA No 064574.

¹⁰ Handover Report dated 2 May 2001, Annex 8 of the Preliminary Decision.

¹¹ Official Gazette of the Republic of Moldova no 441-450, 23 July 2017.

¹² Article 6 of Law 246/2017.

¹³ Statute of State Enterprise "Moldelectrica" dated 7 November 2007, as subsequently amended *inter alia* by Additional Act dated 8 February 2017 and Decision dated 1 July 2011 (Annex 20 to the Preliminary Decision) (hereinafter, "the Statute").

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Board of Censors; approves acquisition and sale of assets of the state enterprise; assesses the activity of the Board of Directors, the Administrator and of the Board of Censors.¹⁴ The Founder of *Moldelectrica* is the Ministry of Economy and Infrastructure (hereinafter, “the Ministry”).¹⁵ According to the statute of *Moldelectrica*, the Ministry has the following additional competences: establishes the economic indicators; promotes a single technical policy; decides on the monthly allowances for the members of the Board of Directors; upon proposal from the Board of Directors, supervises the economic and financial activity of the enterprise, without intervening directly; decides on any loans contracted by the enterprise.¹⁶

The Board of Directors is a collegial body consisting of an odd number of directors (at least three) which represents the interests of the State.¹⁷ The directors have a two-year, renewable mandate and are appointed by the Founder. The Board of Directors approves the activities plan of the state enterprise, decides on the performance indicators, reports regularly to the Founder of the enterprise, examines the reports of the Administrators, and makes concrete proposals to the Founder regarding budgetary issues. The Board of Directors of *Moldelectrica* was appointed by the Ministry by Order no 278 dated 15 November 2017 (amended by Order 246 of 16 May 2018) and currently consists of seven members.¹⁸ According to the Statute,¹⁹ it has the following additional competences: takes measures ensuring the integrity and the efficient use of the assets; solves, in agreement with the Founder, the entry and exit of the enterprise in/from associations and unions; approves the yearly expenses, the financial reports and profit of the enterprise; controls the economic and financial activity of the enterprise; selects the Administrator of the enterprise and proposes a candidate for appointment by the Founder.

The Administrator of the state enterprise is its executive manager, appointed by the Founder. The Administrator has the following attributions: executes the decisions of the Founder and of the Board of Directors, represents the state enterprise in relation with third parties, contracts auditors, reports regularly to the Board of Directors and ensures the execution of the plan of activities.²⁰ The Administrator of *Moldelectrica* was appointed by the Ministry.²¹ According to the Statute, the

¹⁴ Article 7 of Law 246/2017.

¹⁵ Section 4 of the Statute of State Enterprise “Moldelectrica” dated 7 November 2007, as subsequently amended *inter alia* by Additional Act dated 8 February 2017 and Decision dated 1 July 2011 (Annex 20 to the Preliminary Decision) (hereinafter, “the Statute”). See, also, Annex 3¹ to Government Decision 690 dated 30 August 2017 (Official Gazette of the Republic of Moldova no 322-328, 1 September 2018) on the organisation and functioning of the Ministry of Economy and Infrastructure).

¹⁶ Section 25 of the Statute, Annex 20 to the Preliminary Decision.

¹⁷ Article 8 of Law 246/2017.

¹⁸ Annex 6 to the Preliminary Decision; see also http://moldelectrica.md/ro/about/admin_council.

¹⁹ Section 33 of the Statute, Annex 20 to the Preliminary Decision.

²⁰ Article 9 of Law 246/2017.

²¹ Annex 6 to the Preliminary Decision.

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Administrator has the following additional competences: oversees the activity of the enterprise and ensures its efficient operation; executes the decisions of the Board of Directors and of the Founder.²²

The Board of Censors is the body whose aim is to supervise the economic and financial activities of the state enterprise.²³ The rules of procedure of the Board of Censors are approved by the Founder of the state enterprise. The Founder of the enterprise also appoints and revokes the members of the Board of Censors. *Moldelectrica* has never had a Board of Censors and, despite being a state enterprise under Law 246/2017, its Statute does not mention a Board of Censors.

2. State activities in generation and supply of electricity and natural gas

a. Generation of electricity

The electricity sector in Moldova is dependent on a limited number of power plants. State-owned sources consist of two combined heat and power (CHP) plants (“Termoelectrica S.A.” and “S.A. CET-Nord”), as well as a hydropower plant (“Nodul hidroenergetic Costesti I.S.”).²⁴ The rest of demand is met by electricity procured either from the Cuciurgani-Moldavskaya GRES gas-fired power plant, owned by the Russian joint-stock company “Inter RAO UES”, or from imports from Ukraine.²⁵

“Termoelectrica S.A.”²⁶ is an electricity producer in cogeneration system. It is also producer, distributor and supplier of heat energy in Chisinau. “Termoelectrica S.A.” is a joint-stock company.²⁷ The Public Property Agency is the only shareholder of “Termoelectrica S.A.”²⁸ As a sole shareholder in the company, the Public Property Agency has the right to take any and all decisions regarding the company.²⁹ The governing bodies of “Termoelectrica S.A.” are the Board of Directors and the General Director. The current Board of Directors of “Termoelectrica S.A.” was appointed by the Public Property Agency as a sole shareholder on 29 May 2019.³⁰ The General Director of “Termoelectrica S.A.” was appointed by the Public Property Agency as a sole shareholder on 4 August 2015.³¹

²² Article 38 of the Statute, Annex 20 to the Preliminary Decision.

²³ Article 10 of Law 246/2017.

²⁴ See <http://www.anre.md/registrul-de-licentiere-3-134>.

²⁵ See the Energy Community Secretariat 2016 Annual Implementation Report, p 101.

²⁶ License AC 000653 valid until 4 June 2023.

²⁷ Statute of joint-stock company “Centrala electrica cu termoficare nr. 2” Chisinau, 22 October 2014.

²⁸ See Minutes of the General Meeting of Shareholders dated 30 May 2018, Annex 40 to the Preliminary Decision.

²⁹ Article 4.2 of the Statute of joint-stock company “Centrala electrica cu termoficare nr. 2” Chisinau, 22 October 2014.

³⁰ See Minutes of the General Meeting of Shareholders dated 29 May 2019, available at <https://www.termoelectrica.md/wp-content/uploads/2019/06/Decizia-Adun%C4%83rii-Generale-Ordinare-Anuale-a-Ac%C8%9Bionarilor-Societ%C4%83%C8%9Bii.pdf>.

³¹ See Minutes of the General Meeting of Shareholders dated 4 August 2015, Annex 40 to the Preliminary Decision.

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“S.A. CET-Nord”³² is an electricity producer in cogeneration system in the municipality of Balti. It is also the main producer of heat energy in the area. It operates as a joint-stock company.³³ The Public Property Agency is the only shareholder of “S.A. CET-Nord”.³⁴ The governing bodies of “S.A. CET-Nord” are the Company Council and the Administrator. The current Company Council of “S.A. CET-Nord” was appointed on 18 May 2018³⁵ by the Public Property Agency as a sole shareholder. The Administrator was appointed by the Company Council on 3 March 2018 by the Company Council.³⁶

“Nodul hidroenergetic Costesti I.S.”³⁷ is an electricity producer whose main objects of activity are production of electricity for the irrigation systems and exploitation of the hydropower resources.³⁸ It is a state enterprise and its Founder is the Public Property Agency.³⁹ The governing bodies of “Nodul hidroenergetic Costesti I.S.” are the Board of Directors and the Administrator. The current Board of Directors of “Nodul hidroenergetic Costesti I.S.” was appointed on 12 December 2018 by the Public Property Agency.⁴⁰ The Administrator was appointed by the Public Property Agency on 7 May 2018.⁴¹

b. Supply of electricity

There is one state-owned supplier at regulated prices in Moldova, “Furnizare Energie Electrica Nord”⁴², servicing approximately 30% of the market: the municipality of Balti and 15 other administrative units. It operates as a joint-stock company⁴³ and its only shareholder is the Public Property Agency.⁴⁴ The governing bodies are the Company Council and the Administrator. The current Company Council of “Furnizare Energie Electrica Nord” was appointed by the Public Property

³² License AA 064573 valid until 31 March 2024.

³³ See the Statute of “Societatea pe Actiuni CET-Nord”, published on 6 November 2017, available at <http://cet-nord.md/ro/station>.

³⁴ See List of shareholders dated 10 April 2019, Annex 37 to the Preliminary Decision. See also Annex 4¹ to Government Decision no 902 dated 6 November 2017, Official Gazette of the Republic of Moldova 390-396, 10 November 2017.

³⁵ See excerpt of the Minutes of the General Meeting of Shareholders dated 18 May 2018, Annex 37 to the Preliminary Decision.

³⁶ See Minutes of the General Meeting of Shareholders dated 3 March 2018, Annex 37 to the Preliminary Decision.

³⁷ License AA 064588 valid until 20 December 2025.

³⁸ Article 6 of Government Decision no 1000/2000.

³⁹ Letter from the Administrator of “Nodul hidroenergetic Costesti I.S.”, Mr Vitali Goncariuc, to ANRE, dated 17 April 2019, Annex 35 to the Preliminary Decision. See, also, the list of companies in which the Public Property Agency is the founding entity: <https://app.gov.md/ro/advanced-page-type/intreprindere-de-stat?page=3>. See also Annex 4 to Government Decision no 902 dated 6 November 2017, Official Gazette of the Republic of Moldova 390-396, 10 November 2017.

⁴⁰ Decision by the Public Property Agency dated 12 December 2018, Annex 35 to the Preliminary Decision.

⁴¹ Decision by the Public Property Agency dated 7 May 2018, Annex 35 to the Preliminary Decision.

⁴² License AC 000528 valid until 31 July 2040.

⁴³ See <http://fee-nord.md/dispozitii-generale/>.

⁴⁴ See Minutes of the General Meeting of Shareholders dated 25 May 2018, Annex 39 to the Preliminary Decision. See also Annex 4¹ to Government Decision no 902 dated 6 November 2017, Official Gazette of the Republic of Moldova 390-396, 10 November 2017.

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Agency as sole shareholder on 25 May 2018.⁴⁵ The Administrator was appointed by the Company Council on 20 June 2017.⁴⁶

The other supplier of electricity at regulated prices is the private company “ICS Gaz Natural Fenosa Furnizare Energie SRL”, servicing approximately 70% of the Moldovan market. In addition, there are twenty-six private suppliers at unregulated prices.⁴⁷

There is also one state-owned supplier at unregulated prices, “Energocom S.A.”⁴⁸ It is a joint-stock company in which the Public Property Agency is the only shareholder.⁴⁹ The governing bodies are the Company Council and the Director General. The current Company Council was appointed on 4 May 2018 by the Public Property Agency as sole shareholder.⁵⁰ The acting Director General was appointed by Order of the Minister of 21 August 2008.⁵¹

c. Supply of natural gas

“S.A. Moldovagaz” is a joint-stock company, whose main activity is the supply of natural gas in the Republic of Moldova.⁵² It is also the founding entity of companies which operate as TSOs and DSOs in the gas sector.⁵³ The shareholders of “S.A. Moldovagaz” are: SAP Gazprom (50%), the Public Property Agency (35,3%), the Committee for the administration of the Transnistria territorial unit (13,44%), and other natural and legal persons (1,26%).⁵⁴ The Public Property agency has 35.3% ownership. Moldovagaz has the following governing bodies: the Board of Directors and the Observers Council. The Observers Council was appointed on 25 May 2019 by the shareholders of “S.A. Moldovagaz”.⁵⁵ The current Board of Directors of “S.A. Moldovagaz” was appointed on 9 February 2017 by the Observers Council.⁵⁶

⁴⁵ See Minutes of the General Meeting of Shareholders dated 25 May 2018, Annex 39 to the Preliminary Decision.

⁴⁶ See Minutes of the Company Council Meeting dated 20 June 2018, Annex 39 to the Preliminary Decision.

⁴⁷ See <http://www.anre.md/registrul-de-licentiere-3-134>.

⁴⁸ License 001293 valid until 16 January 2028.

⁴⁹ See List of shareholders dated 12 April 2019, Annex 36 to the Preliminary Decision. See also Annex 4¹ to Government Decision no 902 dated 6 November 2017, Official Gazette of the Republic of Moldova, 390-396, 10 November 2017.

⁵⁰ See Minutes of the General Meeting of Shareholders dated 4 May 2018, Annex 36 to the Preliminary Decision.

⁵¹ Order of the Minister of Economy and Infrastructure, 21 August 2008.

⁵² License AC001347 valid until 6 November 2043.

⁵³ See <https://www.moldovagaz.md/rom/despre-companie>.

⁵⁴ Letter from the acting President of the “S.A. Moldovagaz” Board of Directors to ANRE dated 8 May 2019, Annex 38 to the Preliminary Decision.

⁵⁵ Minutes of the General Meeting of Shareholders, 31 May 2019, mentioned in Annex 38 to the Preliminary Decision.

⁵⁶ Decision by the Committee of Observers of “S.A. Moldovagaz” dated 9 February 2017, mentioned in Annex 38 of the Preliminary Decision.

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II. Description of the Preliminary Decision

On 16 October 2018, *Moldelectrica* submitted a request for certification as an electricity transmission operator to ANRE⁵⁷ based on Article 27(2) of Law 107/2016.

On 5 June 2019, ANRE issued a Preliminary Decision on the certification of *Moldelectrica*. On 11 June 2019, ANRE notified the Secretariat of its Preliminary Decision. In the Preliminary Decision, ANRE concluded that *Moldelectrica* complies with the requirements of the provisions on ownership unbundling. ANRE issued a provisional unconditional certification of *Moldelectrica* as an electricity transmission system operator.

III. Developments after the notification of the Preliminary Decision

On 12 July 2019, Law 78/2019 on the amendment of several legal instruments was adopted by the Parliament (hereinafter, "Law 78/2019").⁵⁸ One of the laws amended by Law 78/2019 is Law 121/2007 on the administration of public property.⁵⁹ According to the previous version of Law 121/2007, the Public Property Agency was directly subordinated to the Government of Moldova.⁶⁰ Following the adoption of Law 78/2019, the Public Property Agency is directly subordinated to the Ministry.⁶¹

The Secretariat has invited ANRE to provide an updated structure of the relevant decision makers on hierarchical line, and inform whether it intends to amend or revoke its Preliminary Decision as a result of the entry into force of Law 78/2019.⁶² In its response,⁶³ ANRE stated that the transfer of the Public Property Agency under the subordination of the Ministry does not represent an indirect control, by the Ministry, of the state-owned enterprises in which the Public Property is the founder. The Preliminary decision was thus neither amended nor revoked.

1. The current role of the Public Property Agency

According to Law 121/2007, as amended by Law 78/2019, the Public Property Agency is the state body which is in charge of administering the public property of the State and it is directly subordinated to the Ministry. Among other functions, the Public Property Agency represents the interests of the State as owner of public property (i) as a Founder in state enterprises or (ii) as a shareholder in joint-

⁵⁷ Request no 46-39/1613 dated 16 October 2018, Annex 1 to the Preliminary Decision.

⁵⁸ Official Gazette of the Republic of Moldova, 239-240, 23 July 2019.

⁵⁹ Official Gazette of the Republic of Moldova, 90-93, 26 June 2007.

⁶⁰ Article 7(2) of Law 121/2007.

⁶¹ Article II(2) of Law 78/2019.

⁶² Letter from Energy Community Secretariat to ANRE dated 19 August 2019.

⁶³ Letter from ANRE to Energy Community Secretariat dated 12 September 2019.

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stock state companies.⁶⁴ On behalf of the Ministry, the Public Property Agency has the following tasks: it acts as owner in state enterprises, it founds, restructures and dissolves state enterprises, it adopts decisions with regard to the founding, restructuring or dissolving of joint-stock state companies, it promotes the State policy in various fields (out of which energy is one) on behalf of the Ministry, it adopts any other decisions regarding state enterprises and in state enterprises as established by the Ministry.⁶⁵ The Ministry is also the body approving the statute of the Public Property Agency. The Public Property Agency is managed by one director-general and three deputy directors, all of them appointed by the Ministry.⁶⁶

As a result of this important amendment, the ownership and control scheme in the Moldovan state companies involved in electricity transmission, supply and generation looks as follows: the TSO is owned by and directly subordinated to the Ministry, while the state companies active in supply and generation are directly subordinated to the Public Property Agency, which in turn is subordinated to the Ministry.

IV. Assessment of the Preliminary Decision

1. General

The unbundling provisions were designed to separate, in vertically integrated undertakings, control over transmission system operation, on the one hand, and production and supply activities, on the other hand, and to eliminate a potential conflict of interest between transmission and other activities performed by vertically integrated undertakings.⁶⁷

The Republic of Moldova transposed the ownership unbundling model of Article 9 of the Electricity Directive by Law 107/2016.⁶⁸ In a market environment still prevailing in many Contracting Parties including the Republic of Moldova, where energy activities are predominantly performed by undertakings with whole or majority ownership by the State and/or characterized by dominant positions on their respective markets, the separation of control and the prevention of conflicts of interest is of particular importance.

For cases, as in the Republic of Moldova, where the State as owner engages in more than one energy-related activity and is thus to be considered a vertically integrated undertaking within the meaning of European energy law,⁶⁹ Article 9(6) of the Electricity Directive offers an ownership unbundling variant, an alternative to restructuring and privatization. Unlike in ownership unbundling

⁶⁴ Article 7(2) of Law 121/2007.

⁶⁵ Article 7(3) of Law 121/2007.

⁶⁶ Articles 11, 12 of Government Decision 902/2017.

⁶⁷ Secretariat Opinion 1/16 of 3 February 2016 *TAP AG*; Secretariat Opinion 1/17 of 23 January 2017 *OST*; Secretariat Opinion 3/17 of 23 January 2017 *EMS*.

⁶⁸ Article 26 of Law 27/2016.

⁶⁹ See, for instance, Commission's Opinions on certification of *Vorarlberger Übertragungsnetze (VÜN)* C(2012) 2244 final of 29.3.2012, at p. 4; on certification of *Augstsprieguma tr̃kls* C(2012) 9108 final of 3.12.2012, at p. 2.

cases under Article 9(1) of the Electricity Directive, in situations covered by Article 9(6), the tie of control within the vertically integrated undertaking is not fully severed. The continued exercise of public ownership as well as the constitutional, institutional and political linkage between the different public bodies and companies differentiate these situations from cases of ownership unbundling in the private sphere, and matter for the present assessment.

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

2. Application of the ownership unbundling provisions to *Moldelectrica*

When assessing the compliance of the Preliminary Decision with the ownership unbundling model enshrined in the Electricity Directive, the following aspects matter in particular:

- a) The undertaking to be certified needs to be the owner of the transmission assets as required by Article 9(1)(a) of the Electricity Directive;
- b) The undertaking to be certified needs to perform the functions and tasks of a transmission system operator as required by Article 9(1)(a) of the Electricity Directive;
- c) Control over and exercising rights in the undertaking to be certified need to be separated from control over and exercising rights in undertakings involved in production or supply of electricity and natural gas as required by Article 9(1)-(3),(6),(7) and (12) of the Electricity Directive.

a. Ownership of the electricity transmission system

Article 9(1)(a) of Directive 2009/72/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. Moreover, ownership of the transmission system by the TSO reduces legal and economic complexity caused by the need to establish potentially ambiguous and non-transparent contractual relations between the TSO and the owner of the assets.

The Preliminary Decision states that *Moldelectrica* is the owner of the transmission assets.⁷⁰ However, upon review of the annexes to the Preliminary Decision and of the publicly available Moldovan legislation, the Secretariat comes to the conclusion that this is actually not the case. This has been confirmed during informal consultations at technical level with ANRE.

⁷⁰ Preliminary Decision, Conclusion (1).

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The legal instrument by which the assets of *Moldtranselectro* were transferred into the administration of *Moldelectrica* is Government Decision 1000/2000.⁷¹ This is further confirmed by a handover report dated 2 May 2001.⁷²

The constitutive documents of *Moldelectrica* confirm that the company is not the owner of the assets. The statute of the TSO and the applicable legislation show that *Moldelectrica* is only managing the assets (including the transmission network system) while the state remains the owner of the assets (*“the enterprise is performing its activities on the basis of the property which has been transferred into its administration”* and *“the Founder and the Administrator will enter into a contract for the transfer of the state property into administration”*⁷³). The statute of *Moldelectrica* establishes unequivocally that the assets of the enterprise are fully owned by the Moldovan state.⁷⁴

Article 3 of Law 246/2017 states that *“the state enterprise does not own the assets belonging to the state and which are administered by the state enterprise.”* Furthermore, the same article provides that *“such assets cannot be used for enforcing debts of the state enterprise, cannot be transferred or subject to foreclosure, not even in the case of bankruptcy, and cannot be pledged [...]”*. This is the case of *Moldelectrica*, which has the status of a state enterprise under Moldovan law.⁷⁵ Also, according to Annex 5 to the Preliminary Decision, *“Moldelectrica is not the owner of any asset of the transmission system; the owner of the assets is the Moldovan state which transferred the transmission system to Moldelectrica to be administered by it.”*⁷⁶

Exceptionally, the European Commission has accepted that the ownership requirement is fulfilled in cases in which, though the TSO was not the actual owner of the assets under the applicable national law, the rights of use and disposal of the TSO with regard to the network assets could be regarded as equivalent to those of an owner (*“quasi-ownership”*).⁷⁷ However, in such cases provisions of relevant agreements were required to ensure that, in its capacity as lessee or concessionaire, the TSO's rights of use and disposal over the transmission system assets can be regarded as equivalent to those of an owner. In particular, as regards use and disposal of the transmission system assets, the Commission requires that the following three-prong test is complied with:

- (i) transmission system assets feature on the balance sheets of the TSO and they can be therefore used by the TSO as a guarantee (collateral) in acquiring financing on the capital market;

⁷¹ Handover Report dated 2 May 2001, Annex 8 of the Preliminary Decision.

⁷² Handover Report dated 2 May 2001, Annex 8 of the Preliminary Decision.

⁷³ Article 25 of the Statute, Annex 20 to the Preliminary Decision.

⁷⁴ Article 9 of the Statute, Annex 20 to the Preliminary Decision.

⁷⁵ Section 1 of the Statute, Annex 20 to the Preliminary Decision.

⁷⁶ Annex 5 to the Preliminary Decision (*“Description of the transmission system”*).

⁷⁷ See Commission's Opinion on certification of *REN Rede Electrica Nacional S.A.* and *REN Gasodutos S.A.*, C(2014) 3255 final, 12.05.2014, section III(1); Commission's Opinion on certification of *Transelectrica D.A.*, C(2015) 7053 final, 12.10.2015, section III(3).

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- (ii) the concessionaire is responsible for exercising all of the TSO's tasks, which include the planning, construction, operation and maintenance of the entire infrastructure and the financing thereof; and
- (iii) upon the expiry of the concession, the State compensates the TSO with an amount equivalent to the corresponding value of the concession assets.⁷⁸

In order to establish whether *Moldelectrica* has rights equivalent to an owner of the network it operates, an in-depth assessment into the rights and obligations related to the assets needs to be carried out. The Preliminary Decision fails to analyse this. While it is for ANRE to carry out such assessment in its Final Decision, the Secretariat, based on the documentation submitted to it, harbours strong doubts that *Moldelectrica* passes that three-prong test above.⁷⁹

Already the first condition, namely that *Moldelectrica* should be able to use the assets as a guarantee for acquiring financing on the capital market, is not fulfilled. According to the documents submitted together with the Preliminary Decision, it seems that the assets are on the balance sheet of *Moldelectrica*.⁸⁰ However, according to *Moldelectrica*'s statute, the TSO may not perform any of the following activities: rent out or pledge its assets, sell the assets it no longer uses, dispose of/discard its assets, preserve the assets for which there is no planned activity, hand over any of its movable or immovable assets.⁸¹ This is also expressly regulated in Law no 246/2017⁸²: the assets of the state enterprise are part of the public domain of the state and the state enterprise has no property rights over them.⁸³ Whereas these assets are part of the balance sheet of the state enterprise, the state enterprise cannot pledge them, sell them and they cannot be subject to enforcement or tax execution.⁸⁴ The Secretariat concludes that *Moldelectrica* does not have rights equivalent to an owner.

Consequently, and unless ANRE has other information, the documentation submitted to the Secretariat suggests that the requirement of ownership of electricity transmission assets is not fulfilled, as *Moldelectrica* neither owns the transmission assets nor has rights equivalent to an owner of the transmission assets.

⁷⁸ Commission's Opinion on URE's draft certification decision for *PSE S.A.* of 9 April 2014 (C(2014) 2471; 093-2014-PL); Commission's Opinion on ERSE's draft certification decision for *REN* and *RENGasodutos* of 12 May 2014 (C(2014) 3255; 094-2014-PT, 095-2014-PT); Commission's Opinion on ANRE's draft certification decision for *Transelectrica* of 12 October 2015 (C(2015) 7053; 117-2015-RO).

⁷⁹ Commission's Opinion on URE's draft certification decision for *PSE S.A.* of 9 April 2014 (C(2014) 2471; 093-2014-PL); Commission's Opinion on ERSE's draft certification decision for *REN* and *RENGasodutos* of 12 May 2014 (C(2014) 3255; 094-2014-PT, 095-2014-PT); Commission's Opinion on ANRE's draft certification decision for *Transelectrica* of 12 October 2015 (C(2015) 7053; 117-2015-RO).

⁸⁰ List of assets of "Moldelectrica" on 31 December 2018, Annex 18 to the Preliminary Decision.

⁸¹ Section 22 of the Statute, Annex 20 to the Preliminary Decision.

⁸² Official Gazette of the Republic of Moldova no 441-450, 22 December 2017.

⁸³ Law 246/2017, Article 3(1)-(2).

⁸⁴ Law 246/2017, Article 3(2).

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b. The applicant undertaking performs core tasks as operator of the transmission system

Article 9(1)(a) of the Electricity 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 Electricity Directive. 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.⁸⁵ 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.⁸⁶

Moldelectrica’s license confirms that the enterprise’s object of activity is indeed transmission of electricity.⁸⁷ So does Law 107/2016 on electricity which lists the tasks of the electricity system operator in its Article 30.

Based on the information provided in the Preliminary Decision on the organisation, tasks and resources of *Moldelectrica*,⁸⁸ and also on its long-standing experience and cooperation with *Moldelectrica*, the Secretariat agrees with ANRE’s findings that *Moldelectrica* satisfies the criteria of having available the necessary human, technical, physical and financial resources to effectively perform the tasks of a transmission system operator.⁸⁹

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

Article 9(6) of the Electricity Directive provides that two separate public bodies may be seen as two distinct persons within the meaning of Articles 9(1) and 9(2) of the Electricity Directive, and may control electricity production and supply activities, on one hand, and electricity transmission activities, on the other. The notion of control is further defined by the Merger Regulation⁹⁰ and includes the rights enumerated in Article 9(1)(b), (c) and (d) and Article (2) of the Electricity Directive. Such rights include: the power to exercise voting rights, the holding of the majority share and the power to appoint persons legally representing the TSO and members of the TSO’s corporate bodies.

⁸⁵ Secretariat’s Opinion1/16 of 3 February 2016 *TAP AG*.

⁸⁶ Commission’s Opinion on certification of *VÜN C(2012) 2244* final of 29.3.2012.

⁸⁷ License AA 064574 valid until 20 April 2026.

⁸⁸ Preliminary Decision, section III.2.

⁸⁹ According to an excerpt from the State Registry, submitted by ANRE as Annex 3 to the Preliminary Decision, *Moldelectrica* may perform further activities such as maintenance of personal vehicles, operation of bars, retail trade with food, beverages and tobacco, road freight transportation, public transport of passengers. It may also perform activities of “distribution of electricity through the grid”. Taking into account the applicable national legislation, the statute and the license of *Moldelectrica*, the Secretariat sees this more as a linguistic error and not as an obstacle to the fulfilment of the requirement enshrined in Article 9(1)(a) of the Electricity Directive.

⁹⁰ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Official Journal L 24, 29.01.2004, p 1-22.

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In its Opinions delivered on cases under Article 9(6) of the Electricity Directive,⁹¹ the Secretariat applies a test for assessments of compliance with that provision, focusing on its objective, namely to ensure an effective separation of control between the two public bodies in question capable of potential and actual conflicts of interest within the State structures controlling different energy activities. The designation of two separate constitutes the first and indispensable requirement for compliance with Article 9(6) of the Electricity Directive. As the Secretariat stated in the *OST* Opinion, “*the public or private body controlling it [the transmission system operator] may in principle not be engaged in electricity generation and supply activities.*”⁹² This requirement has not been complied with in the context of the present proceedings.

The applicant, *Moldelectrica*, is a state enterprise. The Founder of the state enterprise is the Ministry, which also directly exercises the rights of an owner of the company and fully controls it by appointing the Board of Directors and the Administrator.

The Public Property Agency, on the other hand, exercises direct control over the state companies involved in generation and supply activities of electricity and gas on behalf of the Ministry as shareholder of “S.A. Moldovagaz”, sole shareholder of “Termoelectrica S.A.”, “S.A. CET-Nord”, “Furnizare Energie Electrica Nord” and “Energocom S.A.”, as well as founder of the state enterprise “Nodul hidroenergetic Costesti I.S.” Whether as founder or sole shareholder, the Public Property Agency appoints, directly (and sometimes indirectly when it comes to mere administrative bodies), all the governing bodies of the state companies involved in generation and supply activities. According to Article 7(2) of Law 121/2007 on the administration of public property, as modified by Law 78/2019, the Public Property Agency is directly subordinated to the Ministry and it is the body through which the Ministry exercises its rights as owner of public property.

As a result, the Ministry directly and fully controls *Moldelectrica*, and, through the Public Property Agency, indirectly controls the state enterprises active in supply and generation of electricity (with maybe the exception of “S.A. Moldovagaz”, in which the Public Property Agency is neither the sole nor the majority shareholder). Hence, for all state-owned enterprises active in the electricity sector, the Ministry is the public body fully and effectively controlling them, appointing members of the management, as well as adopting legally binding decisions in relation to their activities. This is not in line with the notion of separation of control as required by Article 9 of the Electricity Directive.

In such a situation, it is even doubtful whether the introduction of the Public Property Agency as an “intermediary” between the Ministry and supply and generation enterprises, can even be considered as a designation of a different body than the Ministry, when the Ministry fully and directly controls the Agency. One does not need to pierce the corporate veil too deeply in order to observe that the Ministry and the Public Property Agency are, as a matter of fact, part of the same public body. With the Ministry fully, effectively and directly controlling the Public Property Agency, the Agency acts for

⁹¹ Secretariat Opinion 1/17 of 23 January *OST*.

⁹² See: Commission’s Opinion on certification of *National Grid*, C(2012)2735, 19.04.2012, p.4 or Italy and Spain, see: Commission’s Opinion, certification of *Societa Gasdotti Italia S.p.A.*, C(2013) 380 final, 23.01.2013, p.2) Commission’s Opinion on certification of *REN Rede Electrica Nacional S.A.* and *REN Gasodutos S.A.*, C(2014) 3255 final, 12.05.2014).

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and on behalf of the Ministry when fulfilling its tasks, including when acting as a founder or shareholder in electricity supply and generation state companies. The management bodies of the Public Property Agency, which in turn appoint the management bodies of the electricity supply and generation state companies, are appointed by the same person which appoints the management bodies of the TSO – the Minister of Economy and Infrastructure. It is therefore the Minister who *de jure* and *de facto* controls electricity transmission, supply and generation by state enterprises in the Republic of Moldova.

Thus, separation of control within the state in line with Article 9(6) read in conjunction with Article 9(1)(b) and (c) of the Electricity Directive has not even taken place in its most basic requirement, the designation of two public bodies, as the Public Property Agency is merely acting as an *alter ego* of the Ministry. Even if one were to consider them distinct public bodies, the full and unfettered control exercised by the Ministry over the Public Property Agency fails to ensure an effective separation of control between the two public bodies in question capable of potential and actual conflicts of interest within the State structures controlling different energy activities, as required by Article 9 of the Electricity Directive.

In the Secretariat's view, *Moldelectrica* cannot be certified as compliant with the Electricity Directive's provisions on ownership unbundling for this reason alone.

V. Conclusions

Based on the information displayed in the Preliminary Decision and all other information obtained in the course of the present proceeding, the Secretariat concludes that *Moldelectrica* is currently not unbundled in line with the ownership unbundling model as required by Article 9 of the Electricity Directive. Most notably, *Moldelectrica* is still directly and indirectly controlled by persons active in production and/or supply of natural gas or electricity (the Ministry as representative of State ownership in state enterprises active in supply and generation of electricity). It also seems not to own the transmission assets or exercise rights equivalent to an owner over the transmission assets. ANRE, in its Final Decision, should reject the application for certification in the current situation.

Pursuant to Article 3 of the Electricity Regulation, ANRE shall take the utmost account of the above comments of the Secretariat when taking its final decision regarding the certification of *Moldelectrica*.

The Secretariat invites ANRE, when preparing the final decision, to analyse the currently applicable legal framework. 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.

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