

## Opinion 2/23

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 9 December 2022, 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 Initial 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 9 December 2022 based on Article 27 of Law No 107 of 27 May 2016 on Electricity (hereinafter, “the Electricity Law”).<sup>1</sup>

On 31 March 2023, ANRE notified the Secretariat of its adoption of Decision No 180/2023 (hereinafter, “the Preliminary Decision”) amending the Initial Preliminary Decision due to changes in the national legislation, namely the recent creation of a Ministry of Energy in the Republic of Moldova (hereinafter “the Ministry”), and the legislative amendments that followed.

Pursuant to Article 10 of Directive 2009/72/EC<sup>2</sup> (hereinafter, “the Electricity Directive”) and Article 3 of Regulation (EC) No 714/2009<sup>3</sup> (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 Articles 9(8), 13 and 14 of the Electricity Directive.

### I. Background

On 16 October 2018, *Moldelectrica* had already submitted a request for certification as an electricity TSO to ANRE under the ownership unbundling (hereinafter, “OU”) model. The OU model was the only unbundling model envisaged by Moldovan law at that time. On 5 June 2019, ANRE issued a Preliminary Decision on the certification of *Moldelectrica*,<sup>4</sup> and notified the Secretariat on 11 June 2019.<sup>5</sup> On 11 October 2019, the Secretariat issued an Opinion on that Preliminary Decision

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

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> Request No 46-39/1613 dated 16 October 2018.

<sup>5</sup> ANRE Decision No.177/2019 of 5 June 2019 on preliminary certification of *Moldelectrica*.

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concluding that *Moldelectrica* could not be certified according to the OU model, since the conditions on separation of control and ownership over transmission were not fulfilled. Namely, *Moldelectrica* did not own the transmission assets, which is one of the conditions for certification under the OU model. In addition, both *Moldelectrica* and the Public Property Agency (which was exercising direct control over the state companies involved in generation and supply activities of electricity and gas) were directly subordinated to the same public body, the Ministry of Economy at the time, which, in the Secretariat's view, was not compliant with Article 9(1)(b) of the Electricity Directive. In line with the Secretariat's Opinion, ANRE did not adopt a certification decision as required by Article 10 of the Electricity Directive.

In February 2022, Law 20/2022 amending Law 107/2016<sup>6</sup> was adopted. This Law introduced a new Article 26<sup>1</sup>, which transposed the independent system operator (hereinafter, "ISO") model of unbundling from Articles 13 and 14 of the Electricity Directive.

On 7 September 2022, *Moldelectrica* submitted a request for certification as an electricity TSO to ANRE under the ISO model (hereinafter, "the Certification Request"). On 9 December 2022, ANRE issued the Initial Preliminary Decision and notified the Secretariat thereof.<sup>7</sup> In the Initial Preliminary Decision, ANRE concluded that *Moldelectrica* complies with the requirements of the ISO model of unbundling and endorsed the unconditional certification of *Moldelectrica* as an ISO.

On 29 March 2023, *Moldelectrica* submitted additional documents to ANRE. The submission was prompted by the creation of a Ministry of Energy in the context of the restructuring of the Government of Moldova. A spin-off from the Ministry of Infrastructure and Regional Development, the Ministry of Energy became the legal successor of the Ministry of Infrastructure and Regional Development in the field of energy policy.<sup>8</sup> The Ministry of Energy was also designated to exercise the state's ownership rights in *Moldelectrica*, thus replacing the Ministry of Infrastructure and Regional Development as its founder.<sup>9</sup> On 31 March 2023, the Ministry of Energy informed ANRE of the changes and submitted a series of recently-adopted legal acts relevant for the certification process.

On 31 March 2023, based on the newly applicable legal framework, ANRE adopted the Preliminary Decision and notified the Secretariat on the same day.

<sup>6</sup> Official Gazette of the Republic of Moldovan No. 39, 5 February 2022.

<sup>7</sup> ANRE Decision 921 of 9 December 2022 on the preliminary certification of *Moldelectrica*.

<sup>8</sup> Government Decision No 117/2023 regarding the restructuring of certain specialised bodies of the public administration.

<sup>9</sup> Government Decision No 118/2023 regarding the organisation and operation of the Ministry of Energy.

## 1. The applicant *Moldelectrica*

The Moldovan transmission system was historically part of the integrated *Combinatul Energetic Moldovenesc*, which became the *State Enterprise Moldtranselectro* in 1997. By Government Decision No 1000 of 5 October 2000 on the establishment of state enterprises in the energy sector,<sup>10</sup> (hereinafter, “GD 1000/2000”) *Moldtranselectro* was split into three state enterprises: *Moldelectrica*, *Nodul Hidroenergetic Costesti* and *Autoelectrotrans*.<sup>11</sup> The founder and sole shareholder of the enterprise is the Ministry of Energy. *Moldelectrica*’s license for transmission of electricity is valid until 20 April 2026,<sup>12</sup> its license for centralised management of the power systems is valid until 29 June 2046.<sup>13</sup>

### a) Corporate governance

State enterprises such as *Moldelectrica* are governed by Law No 246/2017 on State and Municipal Enterprises (hereinafter, “the State Enterprise Law”)<sup>14</sup> According to this Law, a state enterprise has the following bodies: the founder, the board of directors, the administrator and the audit committee.<sup>15</sup> In the case of *Moldelectrica*, the administrator goes by the title of Director General.<sup>16</sup> The functions of the governing bodies of *Moldelectrica* are further explained its statute<sup>17</sup> and in the Regulation on the Board of Directors of *Moldelectrica* (hereinafter, “the BoD Regulation”).<sup>18</sup>

i. The founder of *Moldelectrica*, the Ministry, is the sole shareholder of the company. It exercises the functions and attributions of the State as an owner. The founder adopts the statutes upon proposal by the board of directors as well the regulation on the functioning of the board of directors and the audit committee, decides on the change of the share capital of the enterprise, consents to the establishment of subsidiaries, consents to the procurement of goods whose market value is over 25% of the value of the company’s net assets (or over 4,000,000 MDL), approves dividends, consents to the selling and decommissioning of unused fixed assets, appoints and dismisses the members of the board of directors (the number of which is also determined by the founder) and the audit committee, confirms the audit company chosen by the board of directors and determines the fee for its services, and establishes consultations to determine the fees for services rendered, with

<sup>10</sup> Official Gazette of the Republic of Moldova, No 124-126, 5 October 2000.

<sup>11</sup> Government Decision No 1000/2000, Article 1.

<sup>12</sup> License AA No 064574.

<sup>13</sup> License AC No 001549.

<sup>14</sup> Official Gazette of the Republic of Moldova no 441-450, 23 July 2017.

<sup>15</sup> Article 6 of Law 246/2017.

<sup>16</sup> Order No 4 of the Ministry of Energy dated 29 March 2023.

<sup>17</sup> Statute of State Enterprise *Moldelectrica* dated 26 August 2022 and amended by Order of the Ministry of Energy dated 29 March 2023.

<sup>18</sup> Regulation on the Board of Directors of *Moldelectrica*, approved by the Ministry of Infrastructure and Regional Development on 24 September 2022.

the exception of those determined by regulatory acts.

ii. The board of directors functions as the company's supervisory board. It is a collegial administrative body consisting of an odd number of directors (at least three, currently seven). The board of directors approves the development plan of the enterprise before it is sent to ANRE for its approval and monitors the implementation of the development plan, establishes performance indicators and evaluation criteria of the enterprise, approves the annual estimate of income and expenses, submits an annual activity report to the founder and proposes measures for the improvement of the efficiency of the enterprise, submits proposals to the founder regarding the improvement of the management of the enterprise and for the streamlining of the enterprise's activities. The board of directors also selects – through a competitive procedure – the candidate for Director General based on a regulation approved by the Government, and proposes him/her for appointment, examines the annual report of the Director General on the economic and financial activity of the enterprise, and submits proposals to the founder on sanctioning or rewarding the Director General. It also selects the external audit company.

The members of the board of directors, as well as the chairperson of the board, have a two-year, renewable mandate and are appointed by the founder. According to the BoD Regulation, the members can be dismissed based on one of the following grounds: three consecutive unjustified absences from the meetings of the board, breaches of the statute of *Moldelectrica* and breaches of the BoD Regulation.<sup>19</sup>

The current board of directors of *Moldelectrica* was appointed by Order of the Ministry dated 29 March 2023<sup>20</sup> and comprises two State Secretaries and the Secretary General in the Ministry of Infrastructure and Regional Development (now separated from the Ministry of Energy),<sup>21</sup> the Head of the Directorate of Energy Policies and the Head of the Natural Gas and Petroleum Products Department in the Ministry of Energy, as well as the Head of the Legal Department at the Ministry of Economy, and the Head of the Public Debt Directorate at the Ministry of Finance.

iii. The Director General, *Moldelectrica's* executive manager, is appointed by the founder upon a proposal from the board of directors. He/she manages the activity and ensures the efficient operation of the enterprise, is the legal representative of the enterprise, ensures the execution of the decisions of the founder and of the board of directors, initiates the audit of the financial statements and submits to the board of directors information about the results of controls performed and an action plan to

<sup>19</sup> BoD Regulation, item 17.

<sup>20</sup> Order No 3 of 29 March 2023 of the Ministry of Energy on the appointment of the Board of Directors of *Moldelectrica*.

<sup>21</sup> Ministry of Energy letter to ANRE dated 31 March 2023.

remedy deficiencies.<sup>22</sup> The (current) interim Director General of *Moldelectrica* was appointed in accordance with the procedure described above by Order of the Ministry on 29 March 2023.<sup>23</sup>

iv. The audit committee supervises internally the economic and financial activities of a state enterprise.<sup>24</sup> The rules of procedure of the audit committee are approved by the founder which also appoints and dismisses its members. Currently, *Moldelectrica* does not have an audit committee.

*b) Ownership and usage of transmission assets*

Under Moldovan law on public property, high-voltage electricity transmission lines, substations and the land plots on which they are located, as well as other technical and building infrastructure facilities and land plots related to them, which do not belong to administrative and territorial units or legal persons of private law, are in the public domain of the state and cannot be alienated.<sup>25</sup>

The State Enterprise Law stipulates that the function of exercising the ownership on behalf of the state) is performed by the Public Property Agency on behalf of the Government.<sup>26</sup> However, Government Decision No 118/2023 on the organisation and operation of the Ministry of Energy (hereinafter, "Government Decision 118/2023")<sup>27</sup> set out one exemption from this rule for *Moldelectrica*, in whose case the Ministry was designated as a founder and exercises the right of property on behalf the state.

Article 3 of the State Enterprise Law states that "*the state enterprise does not own the assets belonging to the state and 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 applies also to the case of the state enterprise *Moldelectrica*. Consequently, the statute of *Moldelectrica* provides that "*the enterprise is performing its activities on the basis of the property which has been transferred into its administration.*"<sup>28</sup>

Based on GD 1000/2000, the assets of its predecessor *Moldtranselectro* were transferred into the administration of *Moldelectrica* by a handover report of the then Ministry of Economy and Reforms on 2 May 2001. According to the handover report, the transmission assets of *Moldtranselectro* were transferred to *Moldelectrica* free of charge for discharging with its obligations as operator of the

<sup>22</sup> Article 9 of Law 246/2017.

<sup>23</sup> Order No 5 of 29 March 2023 of the Ministry of Energy on human resources.

<sup>24</sup> Article 10 of Law 246/2017.

<sup>25</sup> Law 29 dated 5 April 2018 on the delimitation of public property, Art 9(2)(i).

<sup>26</sup> Law 246/2017, Article 2(1).

<sup>27</sup> Government Decision No 118 dated 7 March 2023 on the organisation of the Ministry of Energy.

<sup>28</sup> Statute, Article 16.

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electricity transmission system.

On 6 September 2022, the Ministry of Infrastructure and Regional adopted Order No 155/2022 to ensure compliance of *Moldelectrica* with the ISO model. The Ministry of Energy's Order No 2/2023 on the provision of the preconditions necessary for the certification of *Moldelectrica* (hereinafter, "Ministry Order 2/2023"),<sup>29</sup> replaced Order No 155/2022 following the establishment of the Ministry of Energy.

Ministry Order 2/2023 confirms that the Ministry of Energy is the state authority exercising ownership rights over the transmission assets under the administration of *Moldelectrica*, as provided by the Moldovan Law on Public Property, the State Enterprise Law, GD 1000/2000 and the handover report dated 2 May 2001. Ministry Order 2/2023 also enclosed a list of the public property of the state which is under the administration of *Moldelectrica*, such as overhead power lines, substations, the central and territorial dispatch offices.

Ministry Order 2/2023 also lists the rights and obligations of the Ministry and *Moldelectrica* in their roles as transmission system owner and transmission system operator. Accordingly, the officials and the employees of the Ministry may not engage or give instruction interfering in the day-to-day activity and operation of the ISO, for example with regard to managing the network access, planning its investments and supplying any information that may confer a competitive advantage to third parties. At the same time, the Ministry is under an obligation to collaborate and support the ISO in fulfilling its tasks, to finance the investments as decided by the ISO and approved by ANRE, to approve the financing from external sources and to provide guarantees for obtaining such external financing, as the case may be. *Moldelectrica*, on the other hand, has the duty to use the transmission assets in order to fulfil its tasks as TSO and to plan new investments. It may obtain profit from these activities, manage third party access and collect tariffs, and obtain income from managing congestions and the inter-TSO compensation mechanism.

c) *The financial situation of Moldelectrica*

According to the external auditor's report for 2021,<sup>30</sup> tariffs charged for the provision of transmission services constitute the largest part of *Moldelectrica*'s budget.<sup>31</sup> The transmission tariffs are approved by ANRE. In addition to the regulated tariffs, *Moldelectrica* realises some small income for training sessions performed by its staff to stakeholders in the energy sector.

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<sup>29</sup> Order No 2 dated 29 March 2023 of the Ministry of Energy on the provision of the preconditions necessary for the certification of SE *Moldelectrica*.

<sup>30</sup> *Moldelectrica*'s financial statements for the year ending on 31 December 2021 and ICS Baker Tilly Klitou and Partners SRL's Audit Report dated 13 May 2022.

<sup>31</sup> See page 23 of the Auditor's Report.

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As of 31 December 2021, the value of the assets managed by *Moldelectrica* was MDL 2,065,574,400, and its equity (after deduction of liabilities) was MDL 1,137,094,889. *Moldelectrica*'s profit in 2021 was MDL 54,339,945. The external auditor concluded that *Moldelectrica* had the necessary financial means to perform its activity.

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

Under the State Enterprise Law, the Public Property Agency is in charge of administering the public property of the state. It is directly subordinated to the Government.<sup>32</sup> Among other functions, the Public Property Agency represents the interests of the state as owner of public property as founder in state enterprises or as shareholder in joint-stock state companies, including in the energy sector (with the notable exception of *Moldelectrica*).

### a) Generation of electricity

The *Cuciurgani-Moldavskaya GRES* gas-fired power plant owned by the Russian joint-stock company *Inter RAO UES* and located on the left side of the Dniester river, has been covering most of Moldova's electricity demand, and still does so, depending on the available gas supplies. State-owned enterprises generating electricity in Moldova are *Nodul Hidroenergetic Costesti*<sup>33</sup> managing one hydropower plant as well as two combined heat and power plants (*Termoelectrica S.A.* and *S.A. CET-Nord*). Joint-stock company *Termoelectrica*<sup>34</sup> operates in Chisinau, whereas joint-stock company *CET-Nord*<sup>35</sup> operates in the municipality of Balti. The Public Property Agency acts as sole shareholder in each of the three companies and has appointed members of the boards of directors for each of them. None of the members of the board of directors of the state-owned generation enterprises act as a member of the board of directors of *Moldelectrica*. However, there are two representatives of the Ministry of Energy on the board of directors of *Termoelectrica* (the head of the energy efficiency and renewable energy department, as well as the main consultant of heating and cogeneration), and one on the board of directors of *CET-Nord* (the head of the energy efficiency and renewable energy department).

### b) Supply of electricity

One state-owned supplier at regulated prices in Moldova, joint-stock company *Furnizare Energie Electrica Nord*<sup>36</sup>, services some 30% of the retail market in Moldova, namely in the municipality of

<sup>32</sup> Law 246/2017, Article 2(1).

<sup>33</sup> License AA 064588 valid until 20 December 2025.

<sup>34</sup> License AC 000653 valid until 4 June 2023.

<sup>35</sup> License AA 064573 valid until 31 March 2024.

<sup>36</sup> License AC 000528 valid until 31 July 2040.

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Balti and 15 other administrative units. Moreover, following a decision of the Moldovan Committee for Emergency Situations in April 2022,<sup>37</sup> state-owned joint-stock company *Energocom*<sup>38</sup> procures electricity for the universal service suppliers, suppliers of last resort and system operators for losses. Its sole shareholder is again the Public Property Agency. None of the members of the board of directors of *Furnizare Energie Electrica Nord* or *Energocom* act as a member of the board of directors of *Moldelectrica*. One state secretary from the Ministry of Energy sits currently on the board of directors of *Energocom*. Currently, there is no representative of the Ministry of Energy on the board of directors of *Furnizare Energie Electrica Nord*.

### c) Supply of natural gas

Since December 2022, 100% of the natural gas for Moldovan suppliers of last resort is supplied by *Energocom* (which also has a gas supply license) based on a public service obligation.<sup>39</sup> On the retail market, joint stock company *Moldovagaz*<sup>40</sup> is under a public service obligation for the supply of gas to all final consumers. Through a subsidiary, which is not unbundled in accordance with domestic and Energy Community law, *Moldovagaz* also operates as TSO in the gas sector. The shareholders of *Moldovagaz* are *SAP Gazprom* (50%+1), the Public Property Agency (35,33%), the Committee for the administration of the Transnistria territorial unit (13,44%), and other natural and legal persons (1,23%). None of the members of the board of directors of *Moldovagaz* acts as a member of the board of directors of *Moldelectrica*. However, one of the five members of the board of directors at *Moldovagaz* (referred to also as the observer's council) which appoints the company's management board, is a state secretary at the Ministry of Energy.

## II. The Preliminary Decision

The Preliminary Decision analyses compliance with the prerequisites of the ISO model of unbundling under the situation created by the Government restructuring<sup>41</sup> and the establishment of the Ministry as the founder of *Moldelectrica*,<sup>42</sup> and upholds the conclusions of the Initial Preliminary Decision. Namely, the Preliminary Decision confirms that *Moldelectrica* complies with the requirements of the provisions on unbundling in accordance with the independent system operator model, and is ready

<sup>37</sup> Decision of the Moldovan Committee for Emergency Situations dated 15 April 2022.

<sup>38</sup> License 001293 valid until 16 January 2028.

<sup>39</sup> Government Decision No 589 dated 10 August 2022.

<sup>40</sup> License AC001347 valid until 6 November 2043.

<sup>41</sup> Government Decision No 117/2023 regarding the restructuring of certain specialised bodies of the public administration.

<sup>42</sup> Government Decision No 118/2023 regarding the organisation and operation of the Ministry of Energy.



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to be certified as an independent system operator without any conditions.

### III. Assessment of the Preliminary Decision

#### a. The ISO model of unbundling

At the outset, the Secretariat recalls that the unbundling provisions were designed to separate, in vertically integrated undertakings,<sup>43</sup> control over transmission system operation as a natural monopoly, on the one hand, and over production and supply activities, on the other hand. The rules on unbundling were adopted to prevent vertically integrated undertakings from using their privileged position as operators of a transmission network by obstructing access of network users other than their affiliated companies to their network or by other conduct affecting fair and undistorted competition, market integration or infrastructure investment. More broadly speaking, unbundling aims to eliminate potential conflicts of interest between transmission and other activities performed within the vertically integrated undertaking.<sup>44</sup> The Secretariat has made it clear, for instance in the certification of the Ukrainian ISO *Ukrenergo*, that in conditions where different bodies within a government exercise the roles of shareholder, owner of the assets as well as control over energy generation and supply companies, it is the government itself which is to be considered the vertically integrated undertaking.<sup>45</sup> In such cases, Article 9(6) of the Electricity Directive offers a variant to the unbundling rules.

From the perspective of the Electricity Directive, *Moldelectrica* is eligible for unbundling under the ISO model. The transmission system belonged to the equivalent of a vertically integrated undertaking, the state,<sup>46</sup> on 6 October 2011, the cut-off date set by Article 13(1) of the Electricity Directive. In a situation such as the present one, where the ownership over transmission assets is and must remain with the state, ownership unbundling is ruled out because *Moldelectrica* cannot comply with Article 9(1)(a) of the Electricity Directive. This makes the ISO model, where ownership and operation are separated, the only available model of unbundling.

The ISO model is enshrined in Article 13 of the Electricity Directive and was transposed into Moldovan legislation by Article 26<sup>1</sup> of the Electricity Law. The ISO model accepts that the

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<sup>43</sup> A vertically integrated undertaking is defined in Article 2(21) of the Electricity Directive as “an electricity undertaking or a group of electricity undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission or distribution, and at least one of the functions of generation or supply of electricity”.

<sup>44</sup> Secretariat Opinion 2/17 of 22 April 2017 on the certification of *Yugorosgaz Transport*.

<sup>45</sup> Secretariat Opinions 1/20 of 5 February 2020 and 4/21 of 25 November 2021 on the certification of *Ukrenergo*.

<sup>46</sup> 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 tīkls* C(2012) 9108 final of 3.12.2012, at p. 2.

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transmission network remains the property of the vertically integrated undertaking. However, an entity which is fully independent from supply and production interests in the vertically integrated undertaking is to be entrusted with network operation.

In a situation such as the one of the unbundling of *Moldelectrica*, the unbundling rules thus also apply to the relations with and between the ISO and different bodies within the government of Moldova. Moreover, the ISO must also effectively perform all TSO functions required by the Electricity Directive and the Electricity Regulation, most notably operation, development and maintenance of the system. As a precondition, it must be ensured that the ISO has the necessary powers and resources to operate the system independently from the vertically integrated undertaking.<sup>47</sup>

**b. Independence of the transmission system operator**

According to Article 13(2)(a) of the Electricity Directive, an ISO may be designated only where it complies with Articles 9(1)(b), (c) and (d) of the Electricity Directive. These provisions aim at establishing the independence of the system operator by separating the exercise of control over or any rights in production and supply activities, on the one hand, and transmission activities on the other hand. Article 9(3) of the Electricity Directive stipulates that the independence requirements apply also across the natural gas and electricity markets, thereby prohibiting joint influence over an electricity generator or supplier and a natural gas TSO, or over a natural gas producer or supplier and an electricity TSO.

Under the conditions of Article 9(6) of the Electricity Directive, two separate public bodies exercising control over a transmission system operator on the one hand, and over an undertaking performing any of the functions of production or supply on the other hand, may be deemed to be independent from one another and exclude the exercise of joint control. The notion of control<sup>48</sup> includes in particular the power to exercise voting rights, the holding of a majority share and the right to act as, and the power to appoint members of the TSO's corporate bodies and those legally representing the TSO (Article 9(2) of the Electricity Directive). In its Opinions delivered on cases under Article 9(6) of the Electricity Directive, the Secretariat applies a test focusing on the objective of that provision,

<sup>47</sup> Secretariat Opinions 4/19 of 17 December 2019 on the certification of *GTSO* and 4/21 of 25 November 2021 on the certification of *Ukrenergo*.

<sup>48</sup> The term 'control' is defined in Article 2(34) of the Electricity Directive as "any rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by: (a) ownership or the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking." This definition is taken from the Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings and should be interpreted accordingly (recital 13 of the Electricity Directive).

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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.

*i. Separation of control between two public bodies*

It is evident from the Preliminary Decision that *Moldelectrica* itself does not control any activities related to the production or supply of electricity or gas. It is equally clear that the Ministry of Energy exercises full control over *Moldelectrica* within the meaning of Article 2(34) of the Electricity Directive, which is reinforced by the fact that the same Ministry also represents the state as the owner of the transmission assets, made available to *Moldelectrica* on the basis of the conditions set out in Ministry Order 2/2023. By contrast, control over state-owned energy generation or supply companies is exercised by the Public Property Agency, the state body in charge of administering the public property of the State, exercising the function as founder of these companies, and appointing their respective boards of directors and administrators.<sup>49</sup> It is directly subordinated to the Government, which approves the statute of the Public Property Agency and appoints the management.<sup>50</sup>

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 true separation of control and the prevention of conflicts of interest is of particular importance. The fact that the two public bodies in question, the Ministry and the Public Property Agency, remain part of the same vertically integrated undertaking, the state, may also require the introduction of additional safeguards to ensure the transmission system operator's full independence not only in a formal but also in the material sense. The regulatory authority tasked to certify the TSO needs to establish, *de iure* and *de facto* independence between the two public bodies tasked to exercise control over the state-owned undertakings in question.<sup>51</sup>

In this respect, the Secretariat is concerned that representatives of the Ministry are appointed by the Public Property Agency to hold positions on the boards of public generation and supply state-owned companies, namely *Termoelectrica*, *CET-Nord*, *Energocom* and *Moldovagaz*. This is not in line with a clear separation of control between two public bodies designated in accordance with Article 9(6) of the Electricity Directive. While the Ministry's members on those boards do not represent a majority

<sup>49</sup> Section II of Government Decision no 902/2017 on the organisation and functioning of the Public Property Agency, published in the Official Journal of the Republic of Moldova on 10 November 2017.

<sup>50</sup> Articles 11, 12 of Government Decision 902/2017.

<sup>51</sup> Commission Staff Working Paper – Interpretative Note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas – the Unbundling Regime, 22 January 2010.

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of votes, this does not eliminate the material risk of those members influencing the decision-making on the board. The Secretariat further recalls that conflicts of interest may arise also when it comes to access to confidential information.<sup>52</sup> The access the representatives of the Ministry may have to information related to the operations of *Moldelectrica* may place state-owned companies at an advantage over their competitors on the generation and supply markets. This is only partly mitigated by Ministry Order 2/2023 which designates a State Secretary in the Ministry to carry out all tasks related to the management of the shares in, as well as the management of the state property operated by *Moldelectrica*, independently from the Minister of Energy and other state secretaries in the Ministry. However, clear rules for and commitments by the Ministry's appointees acting on the boards of public generation and supply state-owned companies which would eliminate the risk of conflicts of interest, are missing.

The Secretariat is equally concerned that the current composition of the board of directors of *Moldelectrica* includes members representing other ministries, which form part of the Government of Moldova and hence participate in the decision-making of the public body controlling the Public Property Agency. Of the seven members of *Moldelectrica*'s board of directors, two are employees of the Ministry and the other five are representatives of ministries such as the Ministry of Economy, the Ministry of Infrastructure and Regional Development, and the Ministry of Finance. As in the case of the Ministry's appointees on the boards of directors of state-owned supply and generation companies, there is a material risk that these representatives influence the decision-making on the board, and that access of the directors to commercially sensitive and confidential information while acting on *Moldelectrica*'s board may be used to the advantage of the respective generation and supply companies. While the BoD Regulation includes standard provisions aimed at preventing conflicts of interest and the members of the board of directors, have submitted statements of independence and impartiality, this is not sufficient to empower them to act independently of the influence of their respective ministries.

*ii. The relationship between the Ministry and the Government*

To ensure the independence of the public body controlling the transmission system operator, the Ministry of Energy, that ministry must have clearly defined and delineated competences, must carry out the tasks assigned to it by Energy Community and national law in full autonomy and may not be subordinate to the public entity ultimately controlling energy generation or supply undertakings, namely the Government of Moldova.<sup>53</sup> In this respect, ANRE in its Final Decision needs to verify and

<sup>52</sup> Commission Staff Working Document, Ownership Unbundling – the Commission's practice in assessing the presence of a conflict of interest including in case of financial investors, Brussels, 8.5.2013 SWD (2013) 177 final, p 10.

<sup>53</sup> Secretariat's Opinion 1/17 on the certification of OST, 23 January 2017.

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ensure that the Government does not exercise control of the Ministry in its capacity as shareholder in *Moldelectrica*. The Secretariat recalls that a while a government and a ministry may be considered separate public bodies,<sup>54</sup> the relation of subordination between the government (and/or the prime minister) and a ministry may give rise to conflict of interests where the government controls generation and supply activities.<sup>55</sup> Such a potential conflicts of interest may arise through direct influence by the Government and/or the Prime Minister exercising control over the Ministry and hence indirectly over *Moldelectrica*. Article 9(6) of the Electricity Directive precludes a third body such as the Prime Minister from giving instructions to the two public bodies designated to control the TSO and generation/supply activities,<sup>56</sup> i.e. not only the Public Property Agency but also the Ministry.

The Constitution of Moldova establishes the Government as the highest body within the executive branch of the state. As a collegial body, it comprises the Prime Minister, First Deputy Prime Minister, Deputy Prime Ministers and Ministers. The Government also appoints and supervises the management of the Public Property Agency.<sup>57</sup>

The Constitution, in its Article 96, also tasks the Government with the general management of the public administration. While according to Article 37 of the Law on the Functioning of the Government, the Government may adopt (by a majority of its members), decisions in all its areas of competence (such as energy security), such decisions can only be issued other than on the basis of a law adopted by Parliament (Article 2 of the Law on the Functioning of the Government). This caveat extends also to the requirements of unbundling enshrined in Article 26<sup>1</sup> of the Electricity Law, which transposes Article 13 of the Electricity Directive. Any decision by the Government interfering in or bypassing the autonomy of the Ministry in controlling *Moldelectrica* would be in breach of Moldovan law.

Article 101 of the Constitution states that the Prime Minister directs the Government and coordinates the activity of its members, by respecting the specific tasks of each of them. This indicates that members of the Government (such as the Minister of Energy) enjoy a certain degree of independence in fulfilling their mandate. According to Article 22 of the Law on the Functioning of the Government, the Prime Minister monitors the activity of the members of the Government. These tasks of the Prime Minister are more organisational in scope and are primarily meant to ensure the good functioning of the Government. Under this provision, however, the Prime Minister can also order the performance of controls and apply disciplinary sanctions regarding the efficient and timely

<sup>54</sup> Secretariat Opinion 1/18 of 27.02.2018 *CGES*, Opinion 3/19 of 17.06.2019 *MEPSO*.

<sup>55</sup> Commission Staff Working Paper – Interpretative Note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas – the Unbundling Regime, 22 January 2010.

<sup>56</sup> European Commission Opinion of 25.07.2014 on certification of *GAZ-SYSTEM*.

<sup>57</sup> Articles 11, 12 of Government Decision 902/2017.

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implementation by ministries, central administrative authorities and organizational structures within their sphere of competence. He/she can also issue decrees regarding the organization of their activities<sup>58</sup> and may propose to the Government, in the cases provided by law, of candidates for positions in the corporate bodies of the organizational structures and central administrative authorities within the sphere of competence of the ministries. As a state enterprise, *Moldelectrica* is at least *de jure* sheltered from the influence of the Prime Minister and the Government, as it is neither an organisational structure nor a central administrative authority, and its role is defined on the Law on state enterprises and its statute.

The Secretariat nevertheless observes that the situation under Moldovan public law is not as straightforward as the one assessed in the certification of the Ukrainian TSO *Ukrenergo*. In Ukraine, the law corresponding to the Moldovan Law on the Functioning of the Government, explicitly excludes instructions by the Government and the Prime Minister “*in relation to decisions of ministers and other public bodies if such decisions are taken in exercising the management corporate rights in the electricity TSO.*” Government and Prime Minister are also explicitly prevented to “*coordinate and control*” transmission system operators and may “*not appoint members of management bodies of such economic entities*”.<sup>59</sup> Similar provisions explicitly prohibiting interference of the Government and the Prime Minister in the management of the TSO do not exist in Moldovan primary legislation. In this situation, the Secretariat considers that additional safeguards are required to shelter *Moldelectrica* from interference from the Government or the Prime Minister.

Finally, the Secretariat recalls that on 24 February 2022, the Parliament of Moldova declared that the country was in a state of emergency and established a Commission for Emergency Situations. The mandate of the Commission for Emergency Situations includes the adoption of swift decisions aiming to ensuring the security of supply of natural gas, electricity and other energy sources, including by exemptions from the applicable legal norms. The Commission for Emergency Situations is presided by the Prime Minister and has 25 members, out of which twelve are ministers in the Moldovan Government (including the Minister of Energy). In this composition and within its mandate, any separation of control between transmission activities on the one hand, and generation and supply activities on the other hand to both supply and generation companies on the one hand, is suspended. Given the exceptional and temporary nature of the state of emergency, the Secretariat considers that no additional behavioural and structural safeguards are required at this point in time, but requests ANRE monitors the situation constantly, and addresses appropriate measures to *Moldelectrica* and the Ministry in case of concerns for the independence.

<sup>58</sup> Article 39 of the Law on the Functioning of the Government.

<sup>59</sup> See Secretariat’s Opinion 4/2021, p 10.

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*iii. The Ministry of Energy as a shareholder and policy setter*

Potential conflicts of interest may also arise due to the fact that the Ministry does not only exercise control over *Moldelectrica* but is also involved in policy-making and implementation of these policies in the energy sector. The Ministry is explicitly mandated to develop and implement the energy policy of Moldova relevant for the production and supply of electricity.<sup>60</sup>

The potential for conflicts of interest with the exercise of the shareholding in *Moldelectrica* is exacerbated by the highly concentrated power market structure in Moldova and the high level of public ownership. In this context, the Secretariat recalls that the predecessor of the Ministry, the Ministry of Infrastructure and Regional Development, was closely involved in negotiating wholesale electricity supply contracts with the gas-fired power plant *MGRES* and negotiations with Romanian and Ukrainian energy producers.

To mitigate that potential conflict of interest, the Ministry adopted Ministry Order 2/2023, to which the Preliminary Decision refers. Ministry Order 2/2023 aims at strengthening *Moldelectrica*'s independence from the Ministry as founder and sole shareholder of *Moldelectrica*. The Minister of Energy will personally supervise its implementation. Ministry Order 2/2023 prohibits the Ministry's management and staff to intervene in the operation of *Moldelectrica*, to influence it any way with regard to granting third party access and investment planning, and to disseminate any information that would give certain market participants anti-competitive advantages compared to other market participants. However, Ministry Order 2/2023 cannot fully prevent interventions from the Minister of Energy in the activities of *Moldelectrica*. Most importantly, as an act emerging from the Minister of Energy, the instructions therein are addressed to employees that report to the Minister, and not the Minister himself. Even though the text of Ministry Order 2/2023 suggests that also the Minister will fulfill the tasks therein, and is personally responsible for its implementation, it is evident that such a self-commitment can be easily removed or even circumvented in the absence of an obligation legally binding on the Ministry.

Furthermore, Ministry Order 2/2023 appoints a State Secretary of the Ministry to carry out all tasks related to the management of the shares in, as well as the management of the state property operated by *Moldelectrica*, independently from the Minister of Energy and other state secretaries in the Ministry. The designated State Secretary is acting autonomously in his/her activities and is prohibited from taking part in any activities related to production and/or supply of electricity and natural gas. This is further enforced by a statement of independence submitted by the designated State Secretary on 30 March 2023.

In the Secretariat's view, the designation of the State Secretary in charge of managing the shares in

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<sup>60</sup> Regulation on the organisation and functioning of the Ministry of Energy, Annex 1 to Government Decision 118.

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*Moldelectrica*, is indeed an additional element limiting the possibility of the conflicting interests with the setting and implementing of energy policy measures, and to some extent also the possibility of interventions by the Government or Prime Minister. Yet, for the same reason as discussed above, a purely internal instruction by the Minister is of limited impact and should be reinforced by superior authority. In this respect, the Secretariat recalls that in the case of *Ukrenergo*, the designation of a deputy minister exclusively in charge of the TSO was done by a decision of the Government and not only by a ministerial order. This guaranteed both the commitment of the Government not to exert control over the TSO, and the deputy minister's independence towards the Minister of Energy.

In the case of *Moldelectrica*, there are additional circumstances which evidence that the influence of the Ministry over *Moldelectrica* has indeed not been curtailed in the way as the appointment of a State Secretary with exclusive competences may suggest. Firstly, it is the Ministry (and not the State Secretary) as founder that adopts and amends *Moldelectrica's* statute, as well as appoints and dismisses the members of the board of directors and the Director General.<sup>61</sup> Secondly, the Ministry (and not the State Secretary) appointed the current members of the board of directors of *Moldelectrica*, by the same Ministry Order 2/2023, and the current (interim) Director General by Ministry Order 5/2023. Based on the statute, the Ministry (and not the State Secretary) also adopts the BoD Regulation which determines the functions of this body. This confirms that control of *Moldelectrica*, at least in its current composition, is exercised by the Ministry as a public authority and ultimately the Minister responsible to lead that authority.

The Secretariat is aware that in August 2022, *Moldelectrica* adopted a compliance programme and engaged a compliance officer, approved by ANRE. The compliance programme contains provisions on the TSO's duty to grant third party access in a non-discriminatory way, transparency, cooperation with market participants and treatment of confidential information. Breaches of the compliance programme are sanctioned in accordance with *Moldelectrica's* internal rules in this regard. An external compliance officer is in charge of monitoring the implementation of the compliance programme and must draft an annual report. However, the compliance programme is only applicable to the employees of *Moldelectrica*, and it does not prevent external influence and interferences, for example, by the Ministry or representatives of other ministries sitting on the board of *Moldelectrica*.

*iv. Safeguards required to increase the independence of Moldelectrica*

Based on the applicable legislative framework assessed in the Preliminary Decision, the Secretariat considers and concludes that

- a) the separation of two public bodies controlling the transmission system operator, on the one hand, and controlling generation and supply activities, on the other hand, is at risk by the fact

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<sup>61</sup> Statute, Article 39.



that representatives of the Ministry may exercise influence over the latter by virtue of their membership in the board of directors of public generation and supply companies, and that vice versa, representatives of other ministries participate in the decision-making in *Moldelectrica* through their membership in the board of directors;

- b) the autonomy of the Ministry vis-à-vis the public bodies ultimately controlling public generation and supply companies, namely the Government and/or the Prime Minister requires reinforcement in the absence of an explicit legal commitment to non-intervention,
- c) the independence of *Moldelectrica* of interventions by the Minister of Energy and staff of the Ministry which is at the same time also involved in the setting and implementation of energy policy measures affecting the interest of generation and supply companies.

Against this background, the Secretariat requests ANRE, in its Final Decision, to condition certification of *Moldelectria* on a number of additional safeguards addressing the concerns raised above, namely

- *Moldelectrica*'s statute should be supplemented with a provision explicitly preventing the Ministry as a founder from interfering in the company's operational and commercial activities.
- The exclusive role of the State Secretary designated to exercise the role of the Ministry as founder of *Moldelectrica*, and the exclusion of that State Secretary from participation in energy policy setting and implementing, should be endorsed by a governmental act of higher legal value than Ministry Order 2/2023, for instance by an amendment of Government Decision No 118.
- This governmental act should also include a clear commitment by the Government and the Prime Minister to not interfere in the Ministry's exercise of control over *Moldelectrica*.
- An immediate obligation of the current representatives from public institutions in the board of directors in *Moldelectrica* and in the boards of directors of the other companies concerned (*Termoelectrica*, *CET-Nord*, *Energocom* and *Moldovagaz*) to sign legally binding and sanctioned declarations preventing conflicts of interest by those members as well as non-disclosure agreements to prevent the sharing of information obtained in the course of exercising their functions as board members.
- The exclusion of representatives of the Ministry of Energy on the board of directors of any public or private company engaged in the generation or supply of electricity and natural gas after the expiry of the current mandates.
- The introduction of selection procedures applicable to the positions of members of the board of directors of *Moldelectria* after the expiry of the current mandates, based on the principles

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of merit and transparency, with a majority of independent members to be selected from outside public administration and public enterprises, and the remaining state representatives not affiliated with production and supply companies.

- An amendment to *Moldelectrica*'s statute and the BoD Regulation to extend the role of an independent board of directors in appointing, supervising and dismissing the Director General of the company instead of the founder (the Ministry).

**c. Disposal by the transmission system operator of the required financial, technical, physical and human resources**

Article 13(2)(b) of the Electricity Directive provides that an ISO may be designated only where it has demonstrated that it has at its disposal the required financial, technical, physical and human resources to carry out its tasks listed under Article 12 of the Electricity Directive. This provision describes in more details the core functions of any TSO related to the operation, the maintenance and the development of a transmission network.<sup>62</sup> 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 TSO, and whether it disposes of the necessary (human, technical, financial) resources for this.<sup>63</sup>

Based on the information available to the Secretariat on the organisation, tasks and resources of *Moldelectrica*, on the detailed analysis provided by ANRE in the Preliminary Decision, and also on the Secretariat's long-standing experience with the company, the Secretariat agrees in principle with ANRE's findings that *Moldelectrica* satisfies the criteria of having the necessary human, technical and physical resources to effectively perform the tasks of a TSO.

**d. The role of the transmission system owner**

Under the ISO model, the system owner's activities must be limited to enabling the ISO to carry out its tasks by fulfilling the obligations laid down in Article 13(5) of the Electricity Directive.<sup>64</sup>

To that end, Article 14 of the Electricity Directive requires legal and functional unbundling of the transmission system owner. Legal unbundling requires that the network is owned by an entity separate from the other activities not related to transmission and must be responsible for all the decisions assigned to the transmission system owner under the Electricity Directive. Functional

<sup>62</sup> Secretariat Opinion 1/16 of 3 February 2016 on the certification of *TAP AG*.

<sup>63</sup> European Commission Opinion on certification of *VÜN C(2012) 2244* final of 29.03.2012.

<sup>64</sup> Secretariat Opinion 4/21 of 25 November 2021 on the certification of *Ukrenergo*; Commission's Opinion on certification of *Trans Austria Gasleitung GmbH*.

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unbundling requires that this entity is independent in terms of its organisation and decision making from other activities not related to transmission. In particular, Article 14(2) of the Electricity Directive sets the following minimum criteria, transposed in the Electricity Law in Article 26(2)(b)-(d):

- persons responsible for the management of the transmission system owner shall not participate in company structures of the integrated electricity undertaking responsible, directly or indirectly, for the day-to-day operation of the production and supply of electricity;
- appropriate measures shall be taken to ensure that the professional interests of persons responsible for the management of the transmission system owner are taken into account in a manner that ensures that they are capable of acting independently;
- the transmission system owner shall establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored.

In applying these criteria to the Ministry of Energy, the Secretariat agrees that a ministry, in principle, can be considered an equivalent to a separate legal entity, which is also functionally independent from other entities within the government performing or controlling energy production or supply activities.

The Secretariat recalls, however, that the Ministry acts in a dual function in the present set-up, namely as the body representing the state as owner of the transmission system as well as the body controlling the operator of that system, *Moldelectrica*, as its founder and sole shareholder.

As assessed above, a number of safeguards have been already introduced in order to limit this control to the precise tasks of a system owner and to prevent any interference by the Ministry in the day-to-day operation of *Moldelectrica*. By virtue of Ministry Order 2/2023, the officials and the employees of the Ministry may not engage or give instruction interfering in the day-to-day activity and operation of the ISO, for example with regard to managing network access, planning its investments and providing any information that may confer a competitive advantage to third parties. This commitment is reinforced by the assignment of the task of exercising the Ministry's role also as transmission system owner to a State Secretary. However, for the reasons given above, this does not exclude, with the required level of legal certainty, that persons responsible for the management of the transmission system owner also participate in the operation of the production and supply of electricity, and cannot be considered appropriate to ensure that the persons responsible for the management of the transmission system owner are capable of acting independently as required by Article 14(2) of the Electricity Directive. The additional safeguards requested by the Secretariat upon assessment of *Moldelectrica's* independence above are also necessary in order to improve the autonomy of the company not only vis-à-vis its shareholder, but also vis-à-vis the owner of the

transmission system it operates.

Article 13(2)(c) of the Electricity Directive (transposed in the Electricity Law in Article 26<sup>1</sup>(2)(c)) further requires that a candidate ISO has undertaken to comply with a ten-year network development plan monitored by the regulatory authority. The Preliminary Decision confirms that *Moldelectrica* submitted, and ANRE approved, a ten-year development plan for 2018-2027.<sup>65</sup> More generally speaking, Article 13(4) of the Electricity Directive prohibits the system owner from having any responsibility in investment planning. According to Ministry Order 2/2023,<sup>66</sup> the Ministry cannot be involved in any way in the planning of *Moldelectrica's* investments. However, according to *Moldelectrica's* statute, the board of directors appointed by the Ministry is in charge of approving the development plan before its submission to ANRE and overseeing its implementation. This should be remedied by additional safeguards to be reflected in conditions to be imposed by ANRE in its Final Decision.

Furthermore, Article 13(2)(d) of the Electricity Directive (transposed in the Electricity Law in Article 26<sup>1</sup>(2)(d)) requires that the transmission system owner has demonstrated its ability to comply with its obligations under Article 13(5) of the Electricity Directive, namely to

- provide all the relevant cooperation and support to the ISO for the fulfillment of its tasks (Article 13(5)(a));
- finance the investments decided by the ISO and approved by the regulatory authority or give its agreement to financing by any interested party including the ISO (Article 13(5)(b));
- provide for the coverage of liability relating to the network assets (Article 13(5)(c)); and
- provide guarantees to facilitate financing any network expansions (Article 13(5)(d)).

In this respect, the Secretariat recalls that the relation between the transmission system owner – the state represented by the Ministry – and the ISO – *Moldelectrica* – is defined by the Electricity Law transposing the ISO model of unbundling and by Ministry Order 2/2023. Ministry Order 2/2023 defines the roles, obligations and rights of both parties and explicitly includes the system owner's duties under Article 13(5) of the Electricity Directive. It also stipulates an obligation on the Ministry to facilitate performance by *Moldelectrica* of its tasks as a transmission system operator. Ministry Order 2/2023 further commits the Ministry to collaborate and support the ISO in fulfilling its tasks.

As regards the coverage of liability, Article 13(5)(c) of the Electricity Directive requires the network owner to cover liability resulting from the technical condition of the network, but not from the

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<sup>65</sup> Annex 26 to *Moldelectrica's* Certification Request.

<sup>66</sup> Article 1(c) of the 2023 Order.

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management of the network.<sup>67</sup> This requirement is transposed in Article 26<sup>1</sup>(5)(c) of the Electricity Law and implemented by Article 1(h) of Ministry Order 2/2023.

As regards financing of the investments to be decided by *Moldelectrica* and approved by ANRE, Article 13(5) of the Electricity Directive envisages two options; either financing by the transmission system owner – the state represented by the Ministry – or the latter’s agreement to financing by any interested party including *Moldelectrica* itself. The Electricity Law allows both options in Articles 26<sup>1</sup>(5)(b) and (d). Ministry Order 2/2023 also commits the Ministry to finance the investments as decided upon by the ISO and approved by ANRE, and to approve the financing from external sources and to provide guarantees for obtaining such external financing, as the case may be.

Moreover, Article 37(3) of the Electricity Directive stipulates a set of additional powers and duties for the national regulatory authority related to the transmission system owner in case of the ISO model. Those powers and duties have been properly transposed in the Electricity Law in Articles 7(2)(l)-(o).

Finally, Government Decision No 118/2023 stipulates that by 1 May 2023 the Ministry must finalise a compliance programme meant to prevent discriminatory behaviour, uncompetitive practices, as well as interference of Ministry’s representatives into the daily operation of *Moldelectrica*. A compliance officer is expected to be employed to monitor the implementation of the compliance programme. A compliance programme for the system owner in case of an ISO is required under Article 14(2)(c) of the Electricity Directive. At the time of rendering the present Opinion, neither has the compliance programme been adopted nor the compliance officer appointed.

Against this background, the Secretariat requests ANRE, in its Final Decision, to condition certification of *Moldelectrica* on a number of additional safeguards beyond the ones identified under point b. above, namely

- The compliance programme of the Ministry is finalised and consulted with the Secretariat before adoption, and the compliance officer is appointed.
- *Moldelectrica*’s statute should be supplemented with a provision preventing the board of directors, in its current set-up, from being involved in the adoption of the company’s development and investment plans, to be approved solely by ANRE.

#### IV. Conditions requested

Based on the assessment above, the Secretariat requests that ANRE, before issuing its Final Decision, ensures that

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<sup>67</sup> European Commission Staff Working Paper of 22 January 2010 – The Unbundling Regime.

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- i. The compliance programme of the Ministry is adopted upon consultation with the Secretariat, and the compliance officer is appointed.
- ii. *Moldelectrica*'s statute is supplemented with a provision explicitly preventing the Ministry as a founder from interfering in the company's operational and commercial activities.
- iii. *Moldelectrica*'s statute is supplemented with a provision preventing the board of directors, in its current set-up, from being involved in the adoption of the company's development and investment plans, to be approved solely by ANRE.
- iv. The current representatives from public institutions on the board of directors in *Moldelectrica* and on the board of directors of the other companies concerned (*Termoelectrica*, *CET-Nord*, *Energocom* and *Moldovagaz*) sign legally binding and sanctioned declarations preventing conflicts of interest by those members as well as non-disclosure agreements to prevent the sharing of information obtained in the course of exercising their functions as board members.

The Secretariat further requests that ANRE, in its Final Decision, provides that within a timeframe of up to nine months,

- i. The exclusive role of the State Secretary designated to exercise the role of the Ministry as founder of *Moldelectrica*, and the exclusion of that State Secretary from participation in energy policy setting and implementing, is endorsed by a governmental act of higher legal value than Ministry Order 2/2023, and that this governmental act includes a clear commitment by the Government and the Prime Minister to not interfere in the Ministry's exercise of control over *Moldelectrica*.
- ii. The introduction of a rule in that governmental act stipulating that representatives of the Ministry of Energy are excluded from participating on the board of directors of any public or private company engaged in the generation or supply of electricity and natural gas after the expiry of the current mandates.
- iii. Selection procedures applicable to the positions of members of the board of directors of *Moldelectrica* after the expiry of the current mandates, based on the principles of merit and transparency, with a majority of members to be selected from outside public administration and public enterprises and the remaining state representatives not affiliated with production and supply companies, are introduced in Ministry Order 2/2023, the statute and the BoD Regulation.
- iv. The statute and the BoD Regulation are amended to make the board of directors in

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charge of appointing, supervising and dismissing the Director General of *Moldelectrica*.

## V. Conclusions

Based on the information displayed in the Preliminary Decision and all other information obtained in the course of the present procedure, the Secretariat concludes that *Moldelectrica* can be certified as envisaged by the Preliminary Decision, subject to the conditions mentioned above.

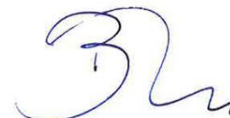
Pursuant to Article 3 of the Electricity Regulation, ANRE shall take the utmost account of the above comments of the Secretariat when taking its final decision regarding the certification of *Moldelectrica*. According to the same provision, ANRE must issue a Final Decision within two months upon receiving the Secretariat's Opinion.

The Secretariat will publish this Opinion on its website. The Secretariat does not consider the information contained therein to be confidential. ANRE is invited to inform the Secretariat within five working days following receipt whether and why it considers that this document contains confidential information, which it wishes to have deleted prior to such publication.

Vienna, 12 May 2023



Artur Lorkowski  
Director



Dirk Buschle  
Deputy Director/Legal Counsel