



FORMAL OPINION

On the Draft of EGO on the amendment and completion of the Law no. 220/2008 for the establishment of the system for promoting the production of energy from renewable energy resources, with the subsequent amendments and completions

By analyzing the Draft of Emergency Ordinance on the amendment and completion of the *Law no. 220/2008 for the establishment of the system for promoting the production of energy from renewable energy resources, republished, with the subsequent amendments and completions* and the related Funding Note, submitted by the Ministry of Economy, the Department for Energy, by the address no. 11201/29.04.2013, registered at the Competition Council with no. RG 6090/07.05.2013,

COMPETITION COUNCIL

Based on art. 20 recital (4) letter c) and of art. 26 recital (1) letter l) in Law no.21/1996 of competition, republished, with the subsequent amendments and completions, during the Plenum meeting held on 14.05.2013,

ISSUES FORMAL OPINION

On the Draft of Emergency Ordinance on the amendment and completion of the *Law no. 220/2008 for the establishment of the system for promoting the production of energy from renewable energy resources, republished, with the subsequent amendments and completions*, with the following recommendation:

By the Law no. 220/2008 for the establishment of the system for promoting the production of energy from renewable energy resources, republished, with the subsequent amendments and completions (hereby named the *Law 220/2008*) made compatible with the State aid legislation by the GEO no.88/2012, it is set up the system for promoting the production of energy from renewable energy resources (E-SRE) by granting green certificates, scheme authorized by the European Commission by the Decision no. 4938/13.07.2011.

After the Commission's Decision, the support scheme was amended and completed by the Law no. 134/2012, which introduced certain amendments which were not in line with the Community regulations. This was reported to the Romanian authorities by the European Commission through the letter from 9.10.2012. the Commission has asked the Romanian authorities to confirm that the amendments brought to the support scheme through the Law

no.134/2012 shall not be implemented before the adoption, by the European body, of a position on this topic¹.

From the assessment of the Draft it results that the scheme's main amendments are the following:

1. Limiting of the accreditation of the power-plants benefiting from the promoting system through green certificates up to the annual level of the capacities installed within power-plants producing E-SRE, as set-up by the National Action Plan in the field of Renewable Energy (NAPRE);
2. Temporary delaying, starting with 01.07.2013, the granting of a number of green certificates for each 1 MWh, as follows:

- 1 green certificate for new hydro-electrical power-plants with installed power lower or at most equal to 10MW
- 1 green certificate for wind power plants
- 2 green certificates for solar power-plants.

The recovery of green certificates shall be done starting with 01.01.2017 for new hydro-electrical power-plants and solar power-plants, respectively starting with 01.01.2018 for wind power-plants;

3. Monitoring the producers' costs and incomes shall be done biannual. This will make possible to apply the adjusting mechanism in case of over-compensations, starting with the year 2013;
4. Correspondingly, the application of the adjusting mechanism can be done before January the 1st 2014, respectively January the 1st 2015, dates presently provisioned for by the law in force;
5. Eliminating the exemptions allowing the granting of the un-diminished number of green certificates for the investments benefiting of the cumulation of investment State aid with green certificates;
6. Eliminating the provision which modified the manner on calculating the reduction of green certificates, in the case of cumulating green certificates with other State aids;
7. Introducing the possibility, for the network operators, to request the set-up of financial guarantees when wiring-up, in order to issue the technical wiring-up advice;
8. Introducing the possibility to sign bi-lateral contracts between small E-SRE producers owning electrical power-plants of at most 5 MW per power-plant and the suppliers of electricity;
9. Introducing the possibility to take-over E-SRE supported by the promoting system through green certificates, within the regulated energy market, based on the ANRE;

¹ During the bi-lateral meeting Ro-DG COMP on several State aid cases, held at Brussels, from February the 27th till the first of March c.y., in order to clear the functioning of the support scheme, the participator Romanian authorities have undertaken not to implement the modifications brought to the support scheme and introduced by the Law no. 134/2012 (regarding the modification of the cumulating rule of the green certificates with investment aids, of the mechanism for adjusting the number of green certificates in case of over-compensation and of the increase of green certificates granted for the energy produced from wood wastes). The Commission did not accepted the provision regarding the set-up of a fixed date till the application of the reduction of the number of green certificates (namely January the 1st 2014 for photovoltaic energy and January the 1st 2015 for the rest of technologies), as the results of the monitoring show an over-compensation on technologies.

10. Exempting the large electricity consumers (those with an annual consumption higher than 150.000 MWh) from the application of the provisions of the Law no.220/2008, for 50% of the electricity delivered to them, correlated with the adequate annulment of the obligation to acquire green certificates related to this quantity, by the suppliers, and with the obligation of the large consumers to submit programs on the increase of energetic efficiency, in order to justify the exemption.

By assessing the previously-presented measures, from the point of view of the legislation in the field of competition and State aid, we ascertain the following:

As far as the provisions mentioned at points 4-6 are concerned, points regarding the elimination of the time limit until which it is not possible to reduce the number of green certificates in case of over-compensations, the elimination of the exemptions which allow the granting of the un-diminished number of green certificates for the producers benefiting of cumulation of investment State aid and green certificates, and the elimination of the provision modifying the method to calculate the reduction of the number of green certificates agreed with the Commission, in the case of cumulating green certificates with other State aids, we consider that those are measures that re-harmonize the support measure with the State aid legislation and with the European Commission's Decision.

The measure on the delay of granting a number of green certificates until January the 1st 2017, respectively 2018, represent a temporary decrease of the support level granted to the producers of E-SRE.

The set-up of a level of the accredited installed capacities in correlation with the level provisioned for in the NAPRE introduces a limitation of the capacities supported through the promotion scheme.

The introduction of the biannual monitoring instead of the annual one creates the possibility to adopt the reduction of the number of green certificates, in case of over-compensations, much closer to the time of finding it.

Given the above, we mention that the State aid legislation does not prohibit to the authorities to adopt, at a certain moment, measures for the reduction of the initially provisioned support level. However, the reduction of the support level must be done within the limits necessary to maintain the sustainability of the investments and to ensure the achievement of the targets assumed by Romania in the field of renewable energies.

As far as the measure exempting the large consumers of electricity (with an annual consumption higher than 150.000 MWh) from the application of the Law no.220/2008 is concerned, we find-out that this measure is selective and may create an advantage to the undertakings large consumers of energy, compared to the rest of the undertakings which are not exempted from this obligation. Therefore, this measure is likely to represent State aid and needs to be approved by the European Commission, in order to be enforced, as the European Commission is the sole authority that can give legal certainty on the State aid character of a measure and on its compatibility. We recommend to keep in mind the Commission's decision 2011/528/UE, from 08.03.2011, on the State aid measure C 24/09 (ex N 446/08), adopted as a result of the official investigation procedure regarding the exemption mechanism set-up by Austria in favor of the undertakings large consumers of energy, annex to the present Formal Opinion.

From the point of view of the competition rules, the draft does not enclose any reason for setting-up that specific consumption threshold (with regard to the number of final consumers that would fall under this exemption and to their percentage within the total consumption of electricity on national level), nor an impact study to show the implications of this measure on the actors and the relevant markets. In this context, a possible distortion of the competition can be foreseen on the markets where the exempted final consumers activate, especially if a consumer like this activates on a market where also other small size industrial consumers are activating (consumers that do not fall within the stipulated consumption threshold).

By article II of the Draft it is set-up a waiver from article 23 recital (1) in the Law no. 123/2012 of electricity and natural gas (hereby named the *Law of energy and gas*). In accordance with article 23 recital (1) of the Law of energy and gas, “*the transactions with electricity are carried out on the competitive market, in a transparent, public, centralized and un-discriminatory manner*”. The reason based on this legal provision was precisely to exclude the possibility to sign bi-lateral contracts outside the centralized transactional platforms, such as those managed by OPCOM.

Under these circumstances, the amendment introduced by the Draft creates a differentially treatment for a certain category of E-SRE producers, as compared to other E-SRE producers, as well as to other producers of energy from other sources, which continue to be subject of the obligation to close transactions only on OPCOM.

By point 12 of article 1 of the Draft, the grant of the technical wiring-up advice is conditioned on the set-up of financial guarantees. The set-up of such guarantees may have as effect, under certain circumstances, the discouragement of the entrance on the market of new investors. Taking into account these aspects and the fact that the usage manner and the amount of the guarantees shall be set-up through ANRE regulations, it is of most importance for the mechanism established by the regulator to ensure a transparent and un-discriminatory environment for the investors willing to make such investments.

As far as the secondary legislation to be elaborated for the application of the amendments provisioned by the Draft is concerned, it is important to consult the competition authority, in order to avoid subsequent problems of competitive nature.