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**Subject: State Aid SA. 37177 (2015/NN) – Romania
Amendments to the green certificates support system for promoting
electricity from renewable sources**

Sir,

1. PROCEDURE:

- (1) Following pre-notification contacts, Romania notified on 20 March 2014 several amendments to the green certificates support scheme for promoting electricity from renewable energy sources. The Romanian green certificates support scheme for promoting electricity from renewable energy sources was approved by the Commission in 2011 by its decision in the case SA.33134 (2011/N) Green certificates for promoting electricity from renewable sources (hereinafter “the Commission’s decision”)
- (2) At the request of the Commission Romania provided additional information on 16 June 2014, 29 August 2014, 26 November 2014 and 28 January 2015. A video-conference with the Romanian authorities took place on 19 May 2014 and two meetings took place, on 8 October 2014 and 19 December 2014.
- (3) The Commission received several complaints and submissions from third parties concerning the respective amendments adopted by the Romanian authorities¹:
 - (a) A renewable energy project developer submitted a complaint on 28 February 2013 and additional information on 3 March 2013.

¹ Registered under the case number SA.36317 (2013/CP)

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- (b) A renewable energy consultant provided information to the Commission on the respective amendments on 17 May 2013;
 - (c) The Romanian Photovoltaic Industry Association submitted a complaint on 21 May 2013 and additional information on 13 June 2013, 27 June 2013, 28 June 2013, 2 July 2013, 10 July 2013, 30 September 2013, 9 January 2014;
 - (d) The Romanian Wind Energy Association submitted a complaint on 14 June 2013 and additional information on 9 July 2013, 2 September 2013, 16 October 2013, 29 October 2013, 31 October 2013, 28 February 2014, 26 March 2014, 29 April 2014 and 13 May 2014. Several meetings were also organised;
 - (e) A wind energy project developer submitted a complaint on 24 June 2013 and additional information on 3 July 2013 and 31 October 2013;
 - (f) Another wind energy project developer submitted information to the Commission on the respective amendments on 26 June 2013 and 27 June 2013;
 - (g) An investor in the Romanian renewable energy market submitted information to the Commission on the respective amendments on 28 June 2013 and 31 October 2013;
 - (h) Another wind energy developer submitted a complaint to the Commission on 16 August 2013 and additional information on 10 September 2013;
 - (i) Another renewable energy project developer submitted a complaint to the Commission on the respective amendments on 20 February 2014;
 - (j) A photovoltaic project developer submitted a complaint to the Commission on the respective amendments on 28 June 2014;
 - (k) The European Wind Energy Association submitted information to the Commission expressing their concerns on the respective amendments on 9 September 2014, 3 October 2014 and 7 November 2014; several meetings were also organised.
 - (l) Two investors in hydro energy submitted information to the Commission complaining about the respective amendments on 10 July 2014, 9 February 2015, 4 March 2015, 12 March 2015 and 12 April 2015.
- (4) The Commission has forwarded the first 4 complaints received to the Romanian authorities on 24 June 2013, 10 July 2013 and 11 July 2014. The Commission requested the observations of the Romanian authorities on the complaints, as well as additional clarifications. Romanian submitted its observations, as well as the additional information requested on 1 August 2013.
- (5) The subsequent complaints have not been forwarded to the Romanian authorities, as the Commission noted that most of the issues raised were already covered by the first complaints. To the extent a complaint or information submitted by third

parties raised any new issues, clarifications on it were requested from the Romanian authorities in the framework of the notification procedure.

- (6) As Romania already implemented some of the notified amendments, without waiting for the Commission's decision, the Commission has registered the case as a non-notified aid procedure (2015/NN).

2. DESCRIPTION OF THE MEASURE

2.1. Description of the approved green certificates scheme

- (7) The Romanian support system for renewable energy is based on green certificates that are granted by the State, free of charge, to renewable electricity producers and an obligation imposed on electricity suppliers to acquire a certain amount of green certificates.
- (8) The national legal basis is the Law 220/2008.
- (9) The number of green certificates granted to the renewable electricity producers is differentiated by technology. The amount of green certificates that the suppliers need to buy is calculated by the Energy regulator based on quotas established by the law.
- (10) The law sets a maximum and minimum price for green certificates (55€ and 27€ respectively, annually indexed). The State does not buy the unsold certificates. Normally the amount of certificates that the suppliers need to buy is correlated with the number of certificates issued, but there can be situations in which some certificates would remain unsold (in such cases the electricity producers are not compensated in any way).
- (11) If a supplier fails to meet its obligation, it must pay a penalty (double the maximum price established by the Law) for each missing certificate. The money collected in the penalty fund are not redistributed in the system, but used to provide grants to individuals installing very small scale renewable electricity installations, under *de minimis* rules.
- (12) Green certificates are traded on the green certificates market, independently of the electricity for which they were granted (i.e. electricity producers sell their electricity on the electricity market, at the price of grey electricity, and sell the certificates on the green certificates market). The operator of the green certificates market (OPCOM) establishes the equilibrium price and the quantity of green certificates that can be traded, based on the offers and demands received, but the financial flows remain direct between the sellers and buyers of green certificates (i.e. such financial flows do not pass through any clearing centre).
- (13) The functioning of the system is illustrated in figure 1 below.

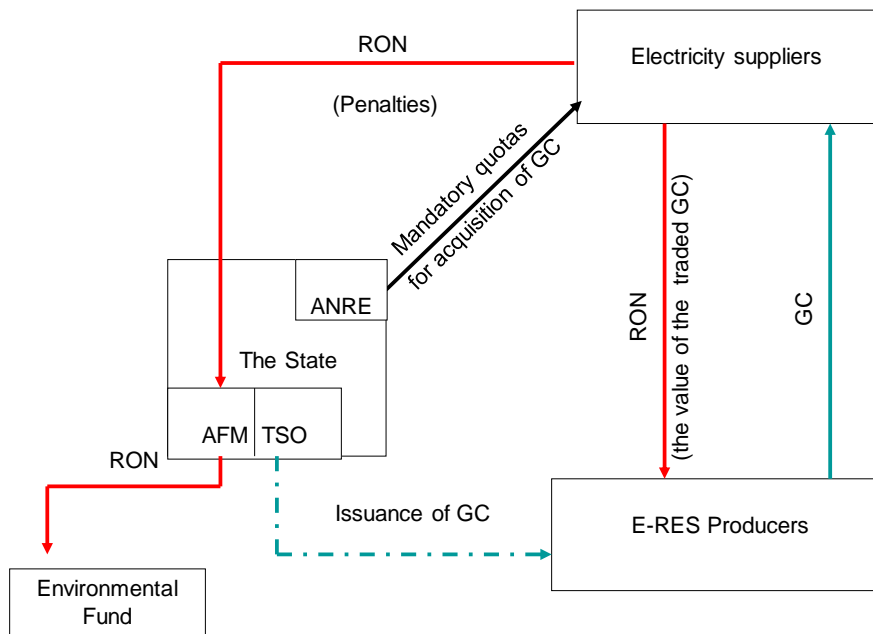


Figure 1: Functioning of green certificates system²

2.2. Notified amendments

- (14) The scheme was approved by the Commission decision in July 2011, and started to be implemented in October 2011.
- (15) Romania modified the legal basis for the scheme already in 2011, as the Ordinance OUG 88/2011 contains some changes as compared to the draft submitted to the Commission for assessment (namely, for large projects exceeding the thresholds for individual notification the beneficiaries were allowed to receive green certificates on a temporary basis for 24 months in the absence of a Commission decision on the project; this provision has been already applied in at least two cases).
- (16) The Ordinance OUG 88/2011 was approved with amendments by the Law 134/2012. On this occasion new amendments were introduced to the approved support scheme.
- (17) In June 2013 the Government adopted the Ordinance OUG 57/2013. This ordinance introduced new amendments to the approved support scheme, and entered into force on 1 July 2013. In fact, the ordinance cancelled many of the changes introduced in 2012 (in some instances bringing the national legal basis back in line with the Commission's decision approving the scheme). Also in June 2013 the Government adopted the Ordinance OUG 79/2013 restricting the use of agricultural land for photovoltaic power plants.

² ANRE (the National Authority of Regulation in the field of Energy) is the independent regulatory authority set up in pursuance to Article 23 of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ L 176, 15.7.2003, p. 37). AFM (the Administration of the Environmental Fund) is the entity collecting the penalties.

- (18) In 2014 the Parliament adopted the Law 23/2014, approving the Government ordinance OUG 57/2013 and introducing some new amendments (most of them annulling amendments previously introduced and bringing the national legal basis closer to the Commission decision approving the scheme).
- (19) By the Government Decision 994/2013 the number of green certificates was reduced for certain technologies (new hydro, wind and solar), for new beneficiaries. Romania informed the Commission about this decision during the pre-notification contacts. The Romanian authorities explained that 2012 was the first full year when the scheme was applied. ANRE published its monitoring report in 2013 proposing adjustments since a risk of overcompensation was identified for several technologies. The respective adjustments were accepted by the Government, included in the Government Decision 994/2013, and implemented as of 1 January 2014. Since the decision was merely implementing the adjustment mechanism approved by the Commission for the support scheme (see recitals 37, 69-70 and footnote 20 in the Commission decision), it is covered by the Commission's decision. It follows that it does not need to be notified and is not included in the scope of the current decision.
- (20) The Order no. 49/2014 of the ANRE President approved a new methodology for establishing the annual acquisition quota for green certificates. This methodology was changed again by the Order no.144/2014 of the ANRE.
- (21) The Government Decision 495/2014 established a support scheme for large energy users. This scheme has been notified separately and approved by the Commission in the case SA.39042 – RES support reduction for energy-intensive users. This amendment is therefore outside the scope of this decision.
- (22) Romania provided a table with all the amendments done to the law since 2011 and for each amendment their opinion on whether it affects the support scheme or not. In the view of the Romanian authorities some amendments can be clearly considered administrative changes. For the rest of the amendments introduced in 2013, Romania considered they needed to be notified, as tightening of criteria for granting the support. These changes concern:
- Temporary suspension from trading until 2017-2018 of a part of the green certificates granted for certain technologies (wind – one certificate out of two; solar – two certificate out of six; new hydro – one certificate out of three); this amendment concerns only the beneficiaries who entered into the system before 31 December 2013; for the beneficiaries for which the support is reduced due to the deduction of the investment aid received, the suspension does not apply if it would lead to reducing the support level to less than one certificate per MWh.
 - Limit the accreditation of electricity producers to the annual level established by the Government based on a national program aimed at reaching the 2020 targets; small producers with installed capacities up to 1MW or 2MW in the case of high-efficient biomass cogeneration are exempted and can close bilateral contracts with suppliers³;

³ This amendment was however cancelled by the Law 23/2014.

- Introducing the possibility for the grid operators to request financial guarantees in view of the connection to the network;
 - Transactions on the centralised market (OPCOM) allowed only for producers of electricity from renewable sources and suppliers obliged to acquire them (eliminating intermediaries, and bilateral transactions);
 - No support granted to photovoltaic installed on land that was used in agriculture at the end on 2013;
 - No support granted for electricity delivered to the network in addition to the hourly quantities indicated by the producers to the Transmission and System Operator (TSO) ;
 - The annual revision of the RES quotas (initially set out in the Law 220/2008); the annual quotas are established and approved by the Government at the proposal of the ANRE;
 - The validity of green certificates was reduced from 16 months to 12 months.
- (23) Other changes were introduced but cancelled afterwards, without being implemented. Such changes are:
- Changes concerning the adjustment mechanism (initially, in line with the Commission's decision, the national legislation established annual monitoring and, if necessary, adjustments as from 1 January of the following year; By Law 134/2012 Romania decided that the first adjustment cannot be done before 2014 for solar and 2015 for the other technologies; in 2013 Romania introduced monitoring of 6-months periods and adjustments within 90 days;
 - Creating a guarantee fund that would buy the certificates remained unsold on the market; in parallel a quarterly obligation was imposed on suppliers, with the view on ensuring constant revenues throughout the year to beneficiaries; the suppliers not complying with the quarterly obligation were supposed to pay the maximum price of the green certificates for the certificates missing to the guarantee fund;
 - The quantity of electricity that can benefit from support will be regulated based on firm contracts with each accredited producer;
- (24) Other changes were introduced but are outside the scope of this decision:
- Exemption for energy intensive users (approved on 15 October 2014 in the case SA.39042);
 - Electricity produced from renewables can also be traded by using regulated contracts;
 - Increased support for biomass from residues (this amendment is not applied).
- (25) The Romanian authorities confirmed that the functioning of the system remains as described in section 2.1. above and is not modified by the notified amendments. The amendments only modify the amount and intensity of the support for some beneficiaries.

2.3. The impact of the notified amendments on the approved scheme

- (26) The amendments brought to the approved support scheme mainly tighten the criteria for granting the support and their effect can be the reduction of the support for the producers of electricity from renewable energy sources. Part of the green certificates granted to beneficiaries for certain technologies (new hydro, wind and solar) are suspended and cannot be traded before April 2017 for new hydro and solar, and respectively until 2018 for wind. This might postpone certain income flows for the beneficiaries, affecting negatively their profitability. In addition, green certificates are no longer granted for electricity delivered to the network in addition to the hourly quantities indicated by the producers to the TSO. This also might reduce the revenues of the beneficiaries, in particular for intermittent technologies such as wind and solar. On the other hand, the acquisition quota for electricity suppliers was reduced (for 2014 from 15% to 11.1%; for 2015 the quota was set up at 11.9% instead of the initial quota of 16% established by the Law 220/2008). This creates a reduction of the demand for green certificates, which might have as a consequence the decrease of the price of green certificates and favouring a situation in which more green certificates will remain unsold due to insufficient demand.
- (27) The amendments do not introduce new categories of beneficiaries and do not eliminate any existing categories of beneficiaries.
- (28) The duration of the scheme remains unchanged – the scheme will expire on 31 December 2016. The development of electricity from renewable sources exceeded the forecasts of the Romanian authorities (reaching 3000 MW installed new capacities in the period 2011-2013) and led to higher amounts being granted in the first years and an increase by 400% of the budget for the respective period. However, the amendments introduced aim at reducing the support per MWh, and therefore at reducing the budget. The overall effect on the budget is a reduction from EUR 19.5 billion (initial estimation) to EUR 17.4 billion.
- (29) The amendments will have for most of types of technologies a negative impact on the internal rates of return of the beneficiaries, as illustrated in the table below.

Table 1 - Estimation of internal rates of return changes due to the amendments

Installed capacities by types of technologies	Initial IRR	Estimated IRR (notified in March 2014)	Updated IRR (November 2014)
Wind – new equipment (MW)	10.9 %	8.6 %	8.6 %
Wind – reused equipment (MW)	9.9 %	10.2 %	10.1 %
Hydro – new equipment (MW)	10.2 %	7.4 %	7.4 %
Hydro – upgraded equipment (MW)	10.3 %	7.6 %	7.5 %
Hydro – old equipment (MW)	2.1 %	2.1 %	2.1 %
Biomass Cogeneration (MW)	10.5 %	7.5 %	7.5 %
Biomass from technologies based on fermentation of waste and sludge resulting from wastewater (MW)	11.8 %	5.5 %	5.4 %

Biomass (MW)	10.6 %	7.2 %	7.2 %
Biomass resulting from energy crops (MW)	11.3 %	8.0 %	8.0 %
Solar (MW)	11.6 %	8.3 %	8.3 %

Source: Romanian authorities (information submitted in November 2014)

2.4. Commitments

- (30) The support scheme is financed by a de facto charge paid by the final consumers for the electricity consumed. Suppliers of electricity are obliged to buy green certificates. By law, they are then obliged to fully pass on the cost of green certificates to the end consumer. The national legislation establishes in detail how these costs must be passed on, including a formula based on which is calculated the charge that each final consumer must pay for each MWh of electricity consumed. This charge is highlighted as a separate amount on the electricity bill of final consumers.
- (31) In order to ensure compliance with Articles 30 and 110 of the Treaty on the Functioning of the European Union (TFEU), Romania provided a commitment to open the support scheme for producers of electricity from renewable energy sources from other Member States, and to provide support to such producers for the electricity imported and consumed in Romania.
- (32) In January 2015 the Romanian Government adopted the Memorandum on opening the green certificates support scheme to promote electricity from renewable energy sources to imported electricity from renewable sources from other Member States. By means of this Memorandum, the Romanian Government approved the submission of a government commitment to open the green certificates scheme to promote electricity from renewable energy sources to imported electricity from renewable sources from other EU Member States, and the adoption of measures to prohibit the granting of State aid in cases where electricity is sold at negative prices in order to ensure that the green certificates promotion system does not apply to electricity from renewable energy sources sold at negative prices.
- (33) The exact terms of the Romanian authorities' commitment on the above mentioned issues are the following:
- producers of electricity from renewable energy sources from other Member States shall have the right to be accredited by the ANRE, on request, as beneficiaries of the support scheme under the same terms as those provided under the national legislative framework to domestic producers and on the basis of prior reciprocal agreements concluded with the respective Member States. Consequently, such producers shall meet accreditation criteria and submit accreditation documentation in the same way as Romanian producers;
 - to avoid overcompensation, the rules on cumulation of aid shall be taken into account in determining the level of support during the accreditation process. Producers from other Member States shall be required to provide information in this regard; producers from other Member States accredited to benefit from the Romanian support system shall receive green certificates issued by the TSO (Transelectrica SA) for electricity from renewable sources exported and

consumed in Romania, on the basis of proof of its origin from renewable sources;

- producers from other Member States which receive green certificates in Romania shall have the right to trade these certificates on Romanian centralised markets under the same terms as those provided under the national legislative framework to domestic producers;
- the green certificates promotion system shall apply to an annual quantity of electricity from renewable sources imported, set at the level of the volume of total electricity imports to Romania in 2013.

- (34) By the same Memorandum, the Romanian Government approved the commitment to put in place the necessary measures to ensure that the green certificates promotion system does not apply to electricity from renewable sources sold at negative prices.
- (35) In order to comply with the commitments made in the Memorandum, the Government has mandated the Ministry of Energy, Small and Medium-Sized Enterprises and the Business Environment, in consultation with the ANRE, to initiate and promote draft legislation to ensure that the above commitments are met.

2.5. Information submitted by third parties

- (36) All third parties who submitted complaints and information to the Commission about the notified amendments to the Romanian green certificates support scheme are beneficiaries of the scheme or associations of beneficiaries of the scheme. The main concerns they have is that the Romanian authorities modified the support scheme approved by the Commission in a way that has a negative impact on them. They have made their investments based on the approved support scheme, and the amendments introduced recently by the Romanian authorities do not only change the rules based on which the aid is granted for new beneficiaries, but also for the existing beneficiaries.
- (37) Most of these third parties submitted to the Commission that Romania has modified the approved support scheme and is implementing the amendments in the absence of an approval from the Commission.
- (38) Most of the third parties have complained that Romania introduced and implemented amendments in a discriminatory way, affecting more severely some technologies (wind, solar and new hydro) or certain categories of beneficiaries (e.g. the ones who received also investment aid). They complained that Romania does not take into account the significant contribution these technologies had to reaching the intermediary renewables targets, nor the specific situation of the beneficiaries who received also investment aid. It was argued that by reducing/postponing a certain number of green certificates, in absolute terms, the impact would be much harder on those beneficiaries for which the level of support was already reduced based on the cumulation rules.

- (39) Many submissions referred to the negative effect of the reduction of the acquisition quota, on top of the postponement of certain certificates for trading. Many third parties estimate that due to these amendments many certificates will remain unsold. One of the complainants argued that as many as 4 million green certificates, representing 40% of the total green certificates issued in 2014, will remain unsold, and the situation will only get worst in the following years. This is estimated to have a strong negative impact on the profitability of the beneficiaries, leading to sharp decreases of the profits and rates of return. Many complainants submitted their estimations in terms of profit reductions. Some third parties submitted that they expect to incur losses and even to go bankrupt, although they invested in a project that was initially viable and able to generate a rate of return within the range mentioned in the Commission's decision.
- (40) Many submissions referred to the negative effect of the non-implementation and cancelling of the guarantee fund.
- (41) Some of the submissions question the sustainability of Romania's strategy to promote renewable energy sources and the ability of Romania to attain its 2020 targets in the field of renewables.
- (42) Some third parties argued that the Romanian authorities have infringed various Articles of the Treaty (Article 49 on the freedom of establishment, Article 63 on the free movement of capital), the Renewables Directive⁴, and various general principles of EU law (breach of legitimate expectations, breach of the principle of non-discrimination, breach of the right to property).

3. ASSESSMENT OF THE MEASURE

3.1. Existence of aid

- (43) State aid is defined in Article 107(1) TFEU as any aid granted by a Member State or through State resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far as it affects trade between Member States.
- (44) In its decision from 2011, as the case law of Union courts was not definitive on this point and as previous Commission case practice stood as regards certificates' support systems, the Commission did not conclude on the existence of State aid, but decided simply not to raise objections to the measure since it was found to be compatible with the internal market.
- (45) On the green certificates support system, as amended, the Commission notes the following: The State is granting green certificates for free to producers of electricity from renewable energy sources. At the same time the State creates a market for such producers to sell the certificates. The producers of electricity

⁴ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (RES Directive) (OJ L 140 of 5.6.2009)

from renewable energy sources receive an advantage, as they get green certificates for free and are able to sell them on the green certificates market obtaining additional revenues. The support is aimed to favour the production of electricity from renewable energy sources as compared to electricity produced from other sources, and, as such, could distort the competition between producers of electricity. Electricity is widely traded between Member States. The support is therefore likely to affect the trade between Member States.

- (46) Therefore, the only aspect that requires clarification is the presence of State resources. Given the evolution of the case law since the adoption of the Commission decision from 2011, the presence of State resources needs to be reassessed herein. In this context the Commission finds that the assessment of the existence of State resources in the Romanian green certificates system can take a dual dimension, i.e. the granting of the green certificates to the renewable energy producers and the financing of the support system or price the producers obtain for the green certificates once sold. Both elements could individually lead the Commission to the conclusion that State resources are involved.

3.1.1. The granting of green certificates

- (47) The Romanian green certificates support system functions on the principle that the State grants the certificates to the beneficiaries (producers of electricity from renewable sources) for free. The State has also created a market for these certificates by imposing an acquisition obligation (quota) on electricity suppliers. The State establishes in detail how the market is organised, who can participate on it and how the financial flows are organised. The State further imposes to suppliers the way in which the costs related to green certificates are to be passed on to the final consumers.
- (48) Firstly, by giving green certificates for free to producers of electricity from renewable sources, the State is actually providing them, for free, with intangible assets. Secondly, the green certificates can be traded on a specific market and by selling them the producers of electricity from renewable resources obtain revenues.
- (49) In a judgement⁵ from 8 September 2011, subsequent to the Commission decision from 2011, the Court of Justice observed that NOx emission allowances were tradable⁶, as (i) the State authorizes the sale of these allowances and (ii) it allows those undertakings which have emitted a surplus of NOx to acquire from other undertakings the missing emission allowances. This creates a market for the allowances. By making the allowances tradable, the State conferred on them a market value.
- (50) In the case of the green certificates scheme in Romania the market is created by the principles of the support system itself, i.e. the State imposes an obligation on electricity suppliers to submit at the end of the reporting period to ANRE (the national regulatory authority in the field of energy) a certain number of green certificates. Similar as in the NOx case, the system creates, without real

⁵ C-279/08 P - Commission v Netherlands, ECLI:EU:C:2011:551

⁶ C-279/08 P - Commission v Netherlands, ECLI:EU:C:2011:551, paragraph 88.

consideration supplied to the State, certificates, which, because of their tradable character, have an economic value.

- (51) The Court of Justice also found⁷ that the emission allowances had the character of intangible assets provided by the State free of charge to selected undertakings. By conferring on the emission allowances the character of tradable intangible assets and by making them available to the undertakings concerned free of charge the State forgoes public resources.
- (52) The Commission considers that the same reasoning can be applied to the Romanian green certificates system. The State has created tradable assets in form of green certificates and made them available to producers of electricity from renewable energy sources. Further the State has conferred an economic value on them by creating a genuine market of green certificates with a demand stemming from the quota imposed on electricity suppliers. Instead of selling the green certificates or putting them up for auction, the State allocates the green certificates for free and thus it forgoes public resources.
- (53) The Commission considers that the above element alone suffices to conclude that the Romanian green certificates system involves State aid.

3.1.2. The financing of the green certificates system

- (54) As regards the financing of the green certificates system and the revenue obtained by the renewable energy producers from the sale of the green certificates, the Commission notes that the financial flows on the green certificates market are constantly under the control of the State although they take place between private parties (RES electricity-producers – electricity suppliers – end consumers).
- (55) Indeed the concept of "intervention through State resources" is intended to cover not only advantages which are granted directly by the State but also "those granted through a public or private body appointed or established by that State to administer the aid"⁸. In this sense, Article 107(1) TFEU covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector⁹.
- (56) The green certificates and, thus, the revenues obtained by the producers of electricity from RES, are ultimately financed by end consumers. However, the mere fact that the advantage is not financed directly from the State budget is not sufficient to exclude that State resources are involved¹⁰. It results from the case-

⁷ C-279/08 P - Commission v Netherlands, ECLI:EU:C:2011:551, paragraph 107.

⁸ Judgement in *Steinike & Weinlig v Germany*, Case 76/78, EU:C:1977:52, paragraph 21; Judgement in *PreussenElektra*, C-379/98, EU:C:2001:160, paragraph 58; Judgement in *Doux Elevage and Cooperative agricole UKL-ARREE*, C-677/11, EU:C:2013:348, paragraph 26; Case *Vent de Colère*, C-262/12, EU:C:2013:851, paragraph 20; *Sloman Neptune*, joined cases C-72/91, C-73/91, EU:C:1993:97, paragraph 19.

⁹ Judgement in *Doux Elevage*, EU:C:2013:348, paragraph 34, Judgement of 27 September 2012, *France v Commission*, T-139/09, EU:T:2012:496, paragraph 36, *Vent de Colère*, C-262/12, EU:C:2013:851, paragraph 21.

¹⁰ Judgement of 12 December 1996, *Air France v Commission*, T-358/94, EU:T:1996:194, paragraphs 63 to 65.

law of the Court that it is not necessary to establish in every case that there has been a transfer of money from the budget or from a public entity¹¹.

- (57) The relevant criterion in order to assess whether the resources are public, whatever their initial origin, is that of the degree of intervention of the public authority in the definition of the measures in question and their methods of financing¹². Hence, the mere fact that a subsidy scheme benefiting certain economic operators in a given sector is wholly or partially financed by contributions imposed by the public authority and levied on certain undertakings is not sufficient to take away from that scheme its status of aid granted by the State¹³. Equally, the fact that the resources would at no moment be the property of the State does not prevent that the resources might constitute State resources, if they are under the control of the State¹⁴, in particular when aid is granted by public or private bodies designated or established by the State¹⁵. The Court found State resources in case of funds financed through compulsory contributions imposed by State legislation and they were managed and apportioned in accordance with the provisions of that legislation¹⁶.
- (58) This has been confirmed by the Court in the *Vent de Colère* case¹⁷ where the Court has also ruled that a mechanism for offsetting in full the additional costs imposed on undertakings because of an obligation to purchase wind-generated electricity at a price higher than the market price that is financed by all final consumers of electricity in the national territory, constitutes an intervention through State resources.
- (59) In the light of those principles, the Commission has examined whether the financing of green certificates and the revenues of the producers of electricity from renewable energy sources stemming from their sales, involves State resources.
- (60) The Commission observed that the State has established a special bill component in order to finance the mandatory acquisition quota of green certificates. In other words, this bill component serves to finance the support of electricity from renewable energy sources under Law 220/2008. In addition, the Commission observes that the State has entrusted the electricity suppliers with the task to, on the one side, purchase predefined quantity of green certificates from the producers and, on the other, to pass the respective cost on to customers.
- (61) Moreover, the State has established detailed rules for determining the green certificate quota and for the calculation of the bill component. The exact

¹¹ *Doux Elevage*, EU:C:2013:348, paragraph 34, *France v Commission*, EU:T:2012:496, paragraph 36; Judgement in *Bouygues Telecom v Commission*, C-399/10 P et C-401/10 P, EU:C:2013:175, paragraph 100; *Vent de Colère*, C-262/12, EU:C:2013:851, paragraph 19.

¹² *France v Commission*, EU:T:2012:496, point 63 and 64.

¹³ *France v Commission*, EU:T:2012:496, paragraph 61.

¹⁴ Judgment of 12 December 1996, *Compagnie nationale Air France v Commission*, T-358/94, EU:T:1996:194, paragraphs 65 to 67; *France v Commission*, C-482/99, EU:C:2002:294, paragraph 37; *Doux Elevage SNC*, EU:C:2013:348, paragraph 35.

¹⁵ *Sloman Neptun*, EU:C:1993:97, paragraph 19.

¹⁶ Judgement in *Italy v Commission*, 173/73, EU:C:1974:71, paragraph 16. Judgement in *Essent*, C-206/06, EU:C:2008:413, point 66.

¹⁷ *Vent de Colère*, EU:C:2013:851.

methodology of the calculation of the bill component is laid down in implementing provisions. The level of the bill component results automatically from the methodology established by the Law 134/2012 as amended by Law 23/2014 and its implementing provisions.

- (62) Given that the bill component in a certain year is calculated based on forecasts, Romania has also established a correction mechanism, whereby deficits or surpluses are corrected the following year. This ensures that electricity suppliers do not have to bear any financial burden for the purchase obligation but it ensures as well that they cannot raise funds through the bill component that would serve other purposes than the support of renewables as decided by the State.
- (63) The national legislation imposes to the electricity suppliers to include the cost of green certificates in the bills sent to the consumers, indicated distinctively from the cost of energy, indicating the legal basis, and calculating the respective cost as the annual quota imposed by the energy regulator, multiplied with the quantity of energy provided and the average price of the green certificates acquired. The Commission notes that all electricity consumers are under the obligation to pay the bill component to their respective electricity suppliers for each kWh of electricity consumed.
- (64) On the basis of the above elements, the Commission considers that the electricity suppliers are administering the cost of green certificates and that they have been entrusted with specific task and all related operations by the State. The Commission notes in addition that the State is monitoring the way the electricity suppliers are administrating the cost of the green certificates.
- (65) It follows from the above that the green certificates scheme and its financing involve State resources. The Commission observes in particular that the State can control, direct and influence the administration of green certificates and their financing. The State has defined to whom the advantage is to be granted, the eligibility criteria and the level of support, but it has also determined the financial resources to cover the costs of the support.
- (66) Taking into account the above, the Commission concludes that the Romanian green certificates support system constitutes aid within the meaning of Article 107 TFEU.

3.2. Legality of the aid

- (67) Romanian amended the green certificates support system for electricity from renewable energy sources. Some amendments affect the compatibility assessment of the support scheme, since they affect the aid amount and the intensity of the aid. Romania has implemented already some of these amendments.
- (68) The Commission regrets that Romania put the aid measure into effect, in breach of Article 108(3) TFEU.

3.3. Compatibility of the aid measure

- (69) The Commission notes that the notified scheme aims at promoting the generation of electricity from renewable sources. Consequently, the notified scheme falls within the scope of the Guidelines on State aid for environmental protection and energy 2014-2020 (EEAG). The Commission has therefore assessed the notified measures on the basis of the general compatibility provisions of the EEAG (set out in its section 3.2.) and the specific compatibility criteria for operating aid granted for electricity from renewable energy sources (section 3.3.2.1. of the EEAG).
- (70) In line with point 248 of the EEAG, unlawful environmental aid or energy aid will be assessed in accordance with the rules in force on the date on which the aid was granted. Therefore the Commission has assessed the compatibility of the aid granted until 1 July 2014 based on the provisions of the 2008 Community Guidelines on State Aid for Environmental Protection (EAG), and the compatibility of the aid granted after 1 July 2014 based on the provisions of the EEAG.
- (71) All the points relevant for the State aid assessment raised by the complainants and in the submissions received from various third parties are addressed in this section.

3.3.1. *Compatibility of the aid measure with EAG*

- (72) Given the fact that the notified measure concerns operating aid for electricity produced from renewable energy sources and considering its market based set up, the compatibility conditions laid down in point 110 (Option 2 for operating aid to renewable energy sources) of the EAG apply.
- (73) In its decision from 2011 the Commission concluded that the Romanian green certificates support system was compatible with the internal market. The amendments made to the scheme do not change this conclusion. In fact, the amendments can be considered tightening of the criteria for granting the aid. Their effect is a reduction of the aid amount and intensity of the aid. They lead to a lower rate of return for the beneficiaries. This further decreases the risk of overcompensation.
- (74) The Commission notes that it received numerous submissions concerning the notified amendments from numerous third parties, beneficiaries of the scheme. While most of them argued that Romania has granted aid illegally, none of them provided any evidence that the aid granted by Romania might be incompatible with the internal market.
- (75) Furthermore, some third parties were complaining about the removal of previous positive elements of the scheme, such as the guarantee fund. The Commission notes that the guarantee fund was not part of the approved support scheme. Many of the amendments introduced by Romania in 2013 and 2014 actually aimed at bringing the scheme back in line with the Commission's decision, removing amendments that were introduced in 2012. Therefore the removal of previously introduced amendments do not alter the approved support scheme, but are

actually bringing the aid scheme closer to the form in which it was approved, reducing the actual number of amendments to the scheme.

- (76) Some third parties argued that the recent amendments introduced by Romania in the support scheme led to the current situation in which the price of the green certificates is at its minimum level established by the law, and some green certificates will remain unsold. According to some third parties, this evolution was not expected and worsens very much their business perspectives.
- (77) The Commission agrees that the amendments introduced by the Romanian authorities are reducing the profitability of the projects developed by the beneficiaries of the scheme. This is also acknowledged by the Romanian authorities.
- (78) The Commission notes that under certain circumstances Member States are allowed to grant aid, and such aid can be found compatible with the internal market. However, Member States are under no obligation to provide State aid. Therefore they are also under no obligation to provide sufficient aid so as to ensure a minimum level of support to the beneficiaries. Under certain circumstances different forms of aid can be cumulated, as long as they do not lead to overcompensation. This shows that sometimes a certain aid measure implemented by a Member State may not be sufficient to achieve the desired effects.
- (79) Furthermore, the Commission notes that in the Commission's decision approving the Romanian green certificates scheme in 2011 it is recorded that the Romanian authorities expected the price of the green certificates to reach the minimum level established by the law in 2015 and 2016, and they also expected that some green certificates would remain unsold (see in particular recital 36 of the Commission's decision). Contrary to what is argued by some of the complainants and third parties, the Romanian green certificates support system, as approved by the Commission, did not provide guaranteed minimum revenues for the beneficiaries, or a buyer of last resort (see in particular recital 25 and footnote 12 in the Commission's decision).
- (80) Based on the above considerations, the Commission concludes that the amendments introduced by the Romanian authorities do not lead to overcompensation in the aggregate. On the contrary, as confirmed by the submissions received by the Commission from various complainants and third parties, the amendments have negatively impacted the profitability of the supported projects, possibly to an extent larger than the one estimated by the Romanian authorities.
- (81) Therefore the Commission considers that the Romanian green certificates support system, as amended, remains compatible with the internal market until 1 July 2014.

3.3.2. Compatibility of the aid measure with EEAG

- (82) The Commission has assessed the compatibility of the aid granted after 1 July 2014 based on the provisions of the EEAG, in particular section 3.2. – General

compatibility provision and 3.3.2.4 – Aid granted by way of certificates for energy from renewable energy sources.

- (83) Objective of common interest: The aim of the aid measure is to help Romania achieve the renewable energy targets set by the EU as part of its 2020 strategy. The Commission considers that the notified scheme is clearly aimed at an objective of common interest in accordance with Article 107(3) of the Treaty.
- (84) Need for state aid and appropriate instrument: In point 107 EEAG, the Commission acknowledges that "under certain conditions State aid can be an appropriate instrument to contribute to the achievement of the EU objectives and related national targets". For the notified scheme, Romania argues the support scheme is still necessary to incentivise investments into electricity from renewable energy sources. The submission received from third parties also indicate that aid for electricity from renewable sources is still necessary, some third parties arguing that Romania might not be able to reach its 2020 targets.
- (85) According to point 116 of the EEAG, in order to allow Member States to achieve their national energy and climate change targets, the Commission presumes aid to energy from renewable sources to be appropriate and have limited distortive effects provided all other compatibility conditions are met.
- (86) Consequently, the Commission considers that for the notified scheme the aid is necessary and that it is an appropriate instrument to address the objective of common interest.
- (87) Incentive effect: In line with point 49 of the EEAG, the incentive effect occurs if the aid induces the beneficiary to change his behaviour towards reaching the objective of common interest which it would not do without the aid. The Commission notes that in the absence of aid renewable energy technologies will probably not be deployed, as without the aid such projects would not be financially viable. Some third parties argued that even with the current level of support some projects would not be viable, but none of them argued that support is no longer necessary to trigger investments. The aid has therefore still an incentive effect, since it determines the beneficiaries to change their behaviour and invest in renewable energy projects.
- (88) In addition, the table provided by the Romanian authorities (see table 1 above) shows that the IRR for all installed capacities by types of technologies is still positive, only for biomass from technologies based on fermentation of waste and sludge resulting from wastewater the IRR would decrease by about 50%.
- (89) Romanian authorities confirmed that the beneficiaries have to fill in an application form to receive support and provided information on the content of the respective application form. The Commission considers that the aid scheme complies with the obligation to use an application form for obtaining aid, set out in point 51 of the EEAG.
- (90) Proportionality: According to point 69 of the EEAG, environmental aid is considered to be proportionate if the aid amount per beneficiary is limited to the minimum needed to achieve the environmental protection objective aimed for.

The Commission considered in 2011 that the support granted by way of green certificates was proportional. Romania monitored the evolution of the support system and made adjustments in line with the adjustment mechanism approved in the Commission's decision. Furthermore, Romania introduced several amendments into the scheme further reducing the level of support. This has reduced the expected IRR of the projects, as illustrated in table 1. The Commission notes that the expected IRR do not indicate any risk of overcompensation, and considers therefore that the aid is limited to the minimum necessary.

- (91) The green certificates support system is a state aid with market-based system elements. The beneficiaries sell their electricity on the market in the normal market way, subject to competitive pressures from other market participants. They receive green certificates that they can sell in order to obtain additional revenues. The price of the green certificates is capped by the law, which established a maximum price.
- (92) The Commission considers that the aid:
- is essential to ensure the viability of electricity produced from renewable energy sources,
 - does not, for the scheme in the aggregate, result in overcompensation over time and across technologies, or in overcompensation for any individual technology and
 - does not dissuade renewable energy producers from becoming more competitive.
- (93) Therefore the Commission considers the aid measure complies with point 136 of the EEAG.
- (94) Point 137 of the EEAG states that the Commission considers in particular that no differentiation in support levels through green certificates may be applied unless a Member States demonstrates the need for a differentiation on the basis of the justifications set out in point 126. As Romania explained, the green certificates are traded on the green certificates market based on clear competitive, transparent and non-discriminatory procedures, included in the corresponding trading platforms. In this manner, the level of aid, quantified on the basis of the price of green certificates and established at the closing of trading sessions, is determined based on the demand and supply.
- (95) Point 137 of the EEAG further states that for certificates aid systems the conditions set out in paragraphs (124) and (125) should apply when technically possible, and that any investment aid previously received must be deducted from the operating aid.
- (96) Under the Romania green certificates support system the cumulation rules ensure that any investment aid previously granted is deducted from the operating aid. The green certificates resemble to a premium, since they represent a source of additional income in addition to the electricity revenues obtained by the beneficiary on the electricity market. Romania confirmed that the beneficiaries have standard balancing responsibilities. This was also confirmed by the

submissions received from third parties. Already now the beneficiaries do not receive green certificates for the electricity delivered to the network in addition to the hourly quantities indicated by the producers to the TSO. Finally, Romania provided a commitment that the support system will be adjusted to ensure that no support is provided in case of negative prices.

- (97) Based on the considerations above, the Commission considers that the conditions set out in point 137 of the EEAG are complied with.
- (98) The EEAG requires individual notification subject to two cumulative conditions: absence of a competitive bidding selection process and installed capacity exceeding the threshold of 250 MW (section 2, paragraph 20 of the EEAG). The Commission considers that since green certificates are granted to all eligible producers of electricity from renewable energy sources, aid to installations exceeding the threshold of 250MW must be individually notified. Romania confirmed it will notify individually such projects.
- (99) Based on the above, the Commission considers that the aid granted is proportional.
- (100) Distortion of competition and balancing test: According to point 90 of the EEAG, the Commission considers that aid for environmental purposes will by its very nature tend to favour environmentally friendly products and technologies at the expense of other, more polluting ones. Moreover, the effect of the aid will in principle not be viewed as an undue distortion of competition since it is inherently linked to its very objective.
- (101) Romania confirmed that the Directive 2000/60/EC of the European Parliament and the Council of 23 October 2000 establishing a framework for Community action in the field of water policy is entirely respected, with regard to the support provided to hydro power plants under the notified scheme (in line with point 117 EEAG).
- (102) Furthermore, Romania confirmed that the waste hierarchy, as set out in the Directive 2008/98/EC of the European Parliament and of the Council 19 November 2008 on waste and repealing certain Directives (Waste Framework Directive) is respected, with regard to the support provided under the notified scheme to plants using waste (in line with point 118 EEAG).
- (103) According to point 116 of the EEAG, the Commission presumes aid to energy from renewable sources to have limited distortive effects provided all other compatibility conditions are met. The Commission considers that the aid to renewable energy under assessment does not have undue distortive effects on competition and trade because the applicable conditions laid out in Section 3.3.2.4 of the EEAG are fulfilled, as discussed above.
- (104) Consequently, the Commission concludes that the distortion of competition caused by the scheme under assessment is limited.
- (105) Transparency: According to point 104 of the EEAG, Member States have the obligation to ensure the transparency of the aid granted, by publishing certain information on a comprehensive State aid website. In line with point 106 of the

EEAG, Member States are requested to comply with this obligation as of 1 July 2016. Romania undertook to ensure the transparency of the aid granted and publish the relevant information. Moreover, the Romanian authorities informed the Commission that the information referred to in point 104 of the EEAG are available on the websites of the ANRE and of the TSO.

- (106) Compliance with Article 30 and 110 TFEU: As indicated in point 29 of the EEAG, if a State aid measure or the conditions attached to it (including its financing method when it forms an integral part of it) entail a non-severable violation of Union law, the aid cannot be declared compatible with the internal market. In the field of energy, any levy that has the aim of financing a State aid measure needs to comply in particular with Articles 30 and 110 TFEU. The Commission has therefore verified if the financing mechanism of the notified aid measures complies with Articles 30 and 110 TFEU.
- (107) In order to alleviate any concern regarding compliance with Article 30 and 110 TFEU, Romania provided a commitment that it will open its green certificates supports scheme to producers from other Member States upon the conclusion of cooperation agreements with these Member States. This condition is in line with point 122 of the EEAG which provides that Member States may want to have a cooperation mechanism in place before allowing cross border support of electricity from renewable energy sources.
- (108) The Commission considers that the conditions under which the scheme will be open to producers from other Member States (as described in recitals 31-33 above) are acceptable given that the scheme will end on 31 December 2016. However any prolongation of the scheme requires its full compliance with Article 30 and 110 TFEU.
- (109) Conclusion with regard to the compatibility of the measure with the EEAG: In light of the above assessment, the Commission considers that the aid measure pursues an objective of common interest in a necessary and proportionate way, the distortion of competition are limited, and therefore the aid is compatible with the internal market on the basis of the EEAG until the expiry of the scheme on 31 December 2016.

4. CONCLUSION

The Commission regrets that Romania put the amendments to the green certificates support system for promoting electricity from renewable sources into effect, in breach of Article 108(3) of the Treaty on the Functioning of the European Union.

However, it has decided, on the basis of the foregoing assessment, not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(3)(c) of the Treaty on the Functioning of the European Union.

If any parts of this letter are covered by the obligation of professional secrecy according to the Commission communication on professional secrecy and should not be published, please inform the Commission within fifteen working days of notification of this letter. If

the Commission does not receive a reasoned request by that deadline Romania will be deemed to agree to the publication of the full text of this letter. If Romania wishes certain information to be covered by the obligation of professional secrecy please indicate the parts and provide a justification in respect of each part for which non-disclosure is requested.

Your request should be sent electronically in accordance with Article 3(4) of Commission Regulation (EC) No 794/2004 to the following address:

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Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission