

Regulation for investigation procedure on the wholesale energy sector under public debate

The Romanian Energy Regulatory Authority ("**ANRE**") published a draft Regulation on the organization and conduct of investigations in the wholesale energy sector (the "**Draft Regulation**") enforcing specific provisions of Law no. 123/2012 on electricity and natural gas (the "**Energy Law**") and Regulation (EU) No. 1227/2011 on wholesale energy market integrity and transparency ("**REMIT**").

The Draft Regulation, which is currently published on ANRE website for public debate, provides for the regulatory framework for the conduct of investigations in relation to the functioning of the wholesale energy market.

Scope and field of application

The investigation is defined as an analysis that aims to identify any breaches of national or European legislation which should be performed following a complaint concerning such breaches or when there are solid grounds to suspect any distortions of the market.

The Draft Regulation applies to individuals and legal entities holding energy related licenses.

The investigations conducted by ANRE refers to:

- the use or the attempt to use privileged information for the acquisition or disposal of energy products, including financial instruments;
- market manipulation or attempted market manipulation.

Exclusions from application

The Draft Regulation does **not** apply in certain cases, such as:

- disputes between the transport or the system operator and the owner of the transport network;
- pre-contractual or contractual disagreements;

- disputes regarding network access;
- complaints against licence holders, whose obligations are measured by quality indicators set through activity performance standards;
- cases which are pending or settled in front of courts of law.

New investigation department

The investigations will be performed by a specific entity within ANRE, under the direct supervision of the President or of one of the Vice-Presidents.

Investigation decision

An investigation is performed (i) following a complaint from a person affected by a potential breach of the wholesale energy market framework, (ii) upon request of the Agency for the Cooperation of Energy Regulators (ACER), the European Commission or other regulatory authority from a member state, or (iii) *ex-officio*.

Any complaints submitted to ANRE can be investigated, on a case-by-case basis, in several stages: preliminary analysis, the performance of the actual investigation, taking a final decision and following-up the implementation of the measures taken.

Following the preliminary analysis, ANRE President has the powers to decide the performance of the investigation if it is established that there are factual grounds to evidence a

potential disruption of the functioning of the wholesale energy market.

Rights of the investigated entities

- to receive a certified copy of the judicial authorization issued by the President of the Bucharest Court of Appeal or by the delegated judge;
- to have access to the file and to copy any relevant investigation documents, provided that it does not breach any confidentiality obligations;
- to be assisted by a lawyer;
- to copy any files which were submitted to the investigation team;
- to receive a written evidence in case any documents are collected;
- to request the inspectors to identify themselves.

Obligations of the investigated entities

- to allow the access to any premises;
- to make available all the requested documents and to provide explanations, without being able to oppose by reason of confidentiality obligations;
- to be present for the investigation, as requested by the investigation team;
- to make available suitable premises for the proper conduct of the investigation;
- to cooperate with the inspectors in clarifying any aspects related to the scope of the investigation.

Final investigation report

When the investigation is complete, the final report is approved by ANRE President. The report shall contain a detailed description of the investigation, the legal and factual reasons, as well as any measures taken.

ANRE may publish the report on its website, provided that any sensitive commercial information is redacted.

Measures and Sanctions

ANRE can impose the sanctions provided by the Energy Law and can take the following measures:

- to order the suspension of any practice that is contrary to REMIT or to any other REMIT secondary legislation;
- to request a court to seize assets of the investigated entity;
- to request a court or any competent authority to impose a temporary prohibition of the professional activity;
- to promote amendments to secondary legislation if the market malfunctions are caused by the legislation in force;
- to take any measures it considers necessary during the investigation;
- to notify the competent criminal investigation bodies.

Conclusion

In case the Draft Regulation will be approved, ANRE will have fairly similar powers to those of the Romanian Competition Council. However, by comparison, the competition authority is an authority that has a considerable experience in dealing with investigations and dawn raids on the Romanian market and considers in its practice the extensive EU case law, including the protection of the legal privilege. All these points are important for the ANRE as well, in order to protect the rights of the investigated companies. It is yet unclear if a breach of the specific energy and competition legislation could enforce in the same time separate sanctions imposed by ANRE and the Romanian Competition Council.

Furthermore, the Draft Regulation does not provide yet for sufficient details with respect to the protection of the legal privilege nor with respect to the information that an investigation decision and/or an inspection order should include (e.g. the object and scope of the investigation and of the dawn raid, duration of the dawn raid, the sanctions and the ways of challenging the orders).

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