EUROPEAN COMMISSION
DG Competition

CASE AT.39984
Romanian Power Exchange / OPCOM

(Only the Romanian text is authentic)

ANTITRUST PROCEDURE

Council Regulation (EC) 1 / 2003 and Commission Regulation (EC) 773 / 2004

Article 7 Regulation (EC) 1 / 2003

Date: 05/03/2014

EUROPEAN
COMMISSION

Brussels, 5.3.2014
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COMMISSION DECISION

of 5.3.2014

addressed to
S.C. OPCOM S.A. and C.N.T.E.E. Transelectrica S.A.
relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) *
(AT.39984 - Romanian Power Exchange/OPCOM)

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(AT.39984 - Romanian Power Exchange/OPCOM)

(Only the Romanian text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union[1],

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[2], and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission Decision of 6 December 2012 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty[3],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the hearing officer in this case,

Whereas:

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1 OJ, C 115, 9.5.2008, p. 47.

2 OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ('TFEU'). The two sets of provisions are, in substance, identical. For the purposes of this Decision, where appropriate, references to Articles 81 and 82 of the EC Treaty should be understood as references to Articles 101 and 102, respectively, of the TFEU. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and 'common market' by 'internal market'. Where the meaning remains unchanged, the terminology of the TFEU will be used throughout this Decision.

3 OJ L 123, 27.4.2004, p. 18.

1. INTRODUCTION

(1) This Decision concerns an abuse of dominance by the operator of the only power exchange in Romania, S.C. OPCOM S.A., registered as *Operatorul Pieței de Energie Electrică și de Gaze Naturale "OPCOM" S.A.* ('OPCOM') on the market for services facilitating short-term electricity trading in Romania. OPCOM discriminated against companies on the basis of their nationality/place of establishment, thereby restricting competition on the wholesale electricity market in Romania.

(2) By the present Decision, the Commission will establish that OPCOM abused its dominant position by requiring all participants on the Day-Ahead and Intraday Markets of the power exchange to have a Romanian VAT registration and consequently to establish business premises in Romania, even though foreign traders already have a VAT registration in their home country.

(3) This requirement constitutes a discrimination against traders established in an EU Member State other than Romania ('EU traders') in violation of Article 102 of the Treaty.

2. THE ADDRESSEES OF THE DECISION

(4) The present Decision is addressed to the legal entities OPCOM and its parent company C.N.T.E.E. Transelectrica S.A., registered as *Compania Națională de Transport al Energiei Electrice "Transelectrica" S.A.* ('Transelectrica') that form part of the same undertaking.

2.1. Transelectrica

(5) Transelectrica was set up in 2000 pursuant to Government Decision no. 627/2000, as a joint stock company under Romanian law. It is the only company that performs the function of Transmission System Operator ('TSO') in Romania. Transelectrica does not operate in other countries.

(6) Transelectrica provides together with its subsidiaries: (i) electricity transmission services; (ii) system services (operational management of the power system); (iii) electricity trading services (through its subsidiary OPCOM). These activities are performed by virtue of the Electricity and Natural Gas Law no. 123/2012 ('Energy Act') under a licence issued by the Romanian Energy Regulator, the *Autoritatea Națională de Reglementare în Domeniul Energiei* ('Energy Regulator'), which is valid until 2025.[4]

(7) Previously wholly owned and currently majority owned by the Romanian State, Transelectrica has, since August 2006, been listed on the Bucharest Stock Exchange.[5] In 2012, the Transelectrica group's[6] reported turnover was EUR 610 million, with a net profit of EUR 10.7 million.[7]

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4 Transelectrica, *Annual Report 2011*, p. 107.

5 Transelectrica's shares are held by the Romanian State (58.68 %), legal persons (20.3 %), the Property Fund (13.5 %) and natural persons (7.7 %).

(8) Transelectrica owns 100 % of the shares of OPCOM.

2.2. OPCOM

(9) OPCOM was set up in 2001 pursuant to Government Decision no. 627/2000, as a joint stock company and 100 % owned subsidiary of Transelectrica.

(10) The Energy Regulator granted OPCOM a licence to operate a power exchange in Romania in December 2001. By virtue of this licence OPCOM facilitates electricity trading on the wholesale electricity market in Romania.

(11) OPCOM started operations on the Day-Ahead Market in June 2005 and on the Centralized Market for Bilateral Contracts in December 2005. As of July 2011, OPCOM also operates an Intraday Market. Furthermore, OPCOM administers the Green Certificates Market (as of 2005) and the Greenhouse Gas Emission Certificates Market (as of 2010).

(12) OPCOM's reported turnover in 2011 was EUR 3.9 million, with a net profit of EUR 436 000.[8] In 2012, OPCOM's turnover was EUR 3.65 million with a net profit of EUR 137 000.[9]

3. PROCEDURE

(13) On 6 December 2012 the Commission decided to initiate proceedings within the meaning of Article 2(1) of Commission Regulation No 773/2004 and Article 11(6) of Council Regulation (EC) No 1/2003 in the present case ('Regulation 773/2004' and 'Regulation 1/2003' respectively).

(14) During the investigation, the Commission sent several requests for information ('RFIs') pursuant to Article 18 of Regulation 1/2003 to OPCOM, to parties that could offer substitutable services (i.e. brokers), as well as to market participants that either purchased or were interested in purchasing electricity with delivery within Romania.

(15) Two state of play meetings were held with OPCOM and Transelectrica, the first on 14 May 2013 and the second on 29 November 2013.

(16) On 29 May 2013, the Commission notified a Statement of Objections ('SO') to OPCOM and its parent company Transelectrica. The Commission took the preliminary view that OPCOM held a dominant position on the market for services facilitating electricity trading at wholesale level in Romania and was abusing its dominant position by imposing discriminatory requirements on EU traders for participation on its Day-Ahead and Intraday markets.

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6 OPCOM is not included in the consolidated financial statements of Transelectrica.
7 Transelectrica, *Annual Directorate's Report - 2012 Consolidated Report*, p. 10.
8 OPCOM, *Annual Report 2011*, p. 38.
9 OPCOM, *Annual Report 2012*, p. 15.

(17) Following the SO, access to the Commission's file was granted to OPCOM on 5 June 2013 and to Transelectrica on 7 June 2013.

(18) The Commission originally set a six-week deadline for Transelectrica and OPCOM to submit their reply to the SO. By letters dated 5 July 2013 and 9 July 2013 both parties asked for an extension of this deadline to 30 September 2013.

(19) On 12 July 2013, the Commission granted Transelectrica and OPCOM a two-week extension of the deadline to reply to the SO, until 5 August 2013.

(20) On 19 July 2013, OPCOM wrote to the Hearing Officer and asked to be granted a further extension of the deadline to reply to the SO until 30 September 2013. The Hearing Officer rejected this request by letter of 24 July 2013.

(21) By letter dated 2 August 2013, OPCOM requested to the Hearing Officer to reconsider his decision. The Hearing Officer did not modify his decision and informed OPCOM that it could further develop its arguments in response to the SO at the Oral Hearing.

(22) On 2 August 2013, Transelectrica also requested to the Hearing Officer an extension of the time limit to respond to the SO. The Hearing Officer extended the time limit by two days, i.e. until 7 August 2013.

(23) OPCOM and Transelectrica submitted their reply to the SO within the time limits set.

(24) In its written reply to the SO dated 5 August 2013, OPCOM claimed that it had been prevented from duly exercising its rights of defence. According to OPCOM, this was because the Commission had refused to grant it a further extension of the time limit to reply to the SO.

(25) The Commission rejects OPCOM's claim. As a general point, the overall time period of two months granted to OPCOM by the Commission to submit its written reply to the SO is reasonable and in line with its general policy and normal practice. Such duration is also longer than the minimum period of four weeks provided for by Article 17(2) of Regulation 773/2004 and was set in accordance with the Best Practices.[10] In addition, there were various contacts between OPCOM and Commission services before the adoption of the SO, by which OPCOM was informed of the Commission's competition concerns. Finally, the Commission notes that OPCOM has replied extensively to the SO, thereby exercising its rights of defence.

(26) An Oral Hearing took place on 19 September 2013 during which both Transelectrica and OPCOM made known their views.

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[10] Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU ('Best Practices'), OJ C 308, 20.10.2011, p. 6, at paragraph 100, which provides that a longer than the minimum period is granted taking into account *inter alia* the size and complexity of the file, prior access to information and any other objective obstacle faced by the addressee of the SO.

(27) The Commission invited the European Federation of Energy Traders ('EFET')[11] to express its views at the Oral Hearing as a third party pursuant to Article 13(3) of Regulation 773/2004.

(28) On 28 November 2013, the Commission sent to Transelectrica and OPCOM a letter drawing the parties' attention to a number of specific items of evidence relating to the Commission's existing objections ('Letter of Facts'). The Commission indicated that it might use the specific items of evidence in a potential final Decision. In addition, Transelectrica and OPCOM received access to all new documents in the case file.[12]

(29) Transelectrica and OPCOM submitted their written reply to the letter of facts on 13 December 2013 and 6 January 2014, respectively.

4. THE SERVICES CONCERNED BY THE DECISION

(30) The services concerned by the present Decision are services facilitating the trading of electricity on the Romanian wholesale market. This section describes the functioning of the Romanian wholesale electricity market and the factual circumstances of OPCOM's anti-competitive business practices.

4.1. The Romanian wholesale electricity market

(31) On the wholesale market, large amounts of electricity are exchanged. The Romanian wholesale electricity market is the organised framework for the trading of electricity and related services[13] to which the electricity producers[14], the transmission and system operator[15], the distribution operators[16], the electricity market operator[17] and the wholesale customers[18] participate.

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11 EFET is the European association of wholesale energy market participants. It was founded in 1999 and currently has more than 100 energy trading companies as members. Its members are engaged in the production, trading, portfolio management, risk management and supply of energy. Its aim is to improve the operation of European wholesale energy markets, in particular the electricity and gas sector, and to promote the development of a sustainable and liquid European wholesale market.

12 Judgment of 20 March 2002 in Case T-23/99 *LR AF 1998* v *Commission* (ECR 2002, p. 11-1705, paragraph 190 and the case-law cited). See also Joined Cases T-236/01, T-239/01, T-244/01-T-246/01, T-251/01 and T-252/01 *Tokai Carbon* v *Commission* [2004] ECR 11-1181, paragraph 45.

13 Electricity and Natural Gas Law no. 123/2012 ('Energy Act'), Article 3, point 47.

14 The electricity generators in Romania are mainly controlled by the State; together the State-controlled electricity generators have a market share of more than 90 %. Total net electricity generation in Romania amounted to 53.7 TWh in 2012.

15 Transmission is ensured by Transelectrica. Transelectrica may only participate on the wholesale market to cover own consumption and network losses, and to maintain balance between generation/consumption, by transactions on the balancing market.

16 Distribution is carried out by eight distributors; five of them have been fully or partially privatised and are owned by major European energy companies (E.ON, ENEL and CEZ). The distributors may participate on the wholesale market only to cover own consumption and networks losses.

17 OPCOM administers the Romanian wholesale electricity market since 2001.

18 There are more than 130 electricity suppliers in Romania. Electricity suppliers and traders purchase electricity from generators or other suppliers/traders.

(32) The wholesale electricity market in Romania consists of a regulated and a competitive segment.

4.1.1. Regulated wholesale market

(33) The regulated wholesale electricity market consists of wholesale transactions for the supply of customers with electricity at **regulated prices**. The transactions are concluded bilaterally between certain designated generators and 'suppliers of last resort'[19] under the regulated regime set by the Energy Regulator.

(34) In accordance with the Energy Act, prices for commercial customers (starting on 1 September 2012) and for households (starting on 1 July 2013) are being progressively deregulated.[20] The deregulation was completed on 31 December 2013 for commercial consumers and will be completed on 31 December 2017 for households.

4.1.2. Competitive wholesale market

(35) On the competitive wholesale market electricity is traded at **freely agreed prices**. Electricity on this part of the wholesale market is ultimately used by customers who are not eligible for regulated tariffs. More than 50 % of the Romanian total electricity production is sold on the competitive wholesale market.[21]

(36) Electricity on the competitive wholesale market originates from domestic generation or from imports. Market integration with neighbouring countries is at an early stage.[22]

4.2. Trading on the competitive wholesale market

(37) Electricity is generally traded in three ways: (i) bilaterally, (ii) brokered, or (iii) via a power exchange. The first two trading channels are referred to as 'Over-The-Counter' trading ('OTC').

(38) Bilateral transactions are concluded through direct contact between a seller and a buyer. Brokers (voice brokers or electronic brokerage platforms) match a potential buyer with a potential seller, a service for which they charge a commission. Power exchanges, unlike brokers, bring together multiple potential buyers and sellers.

(39) Electricity trading can be subdivided into short-term and longer term trading. Short-term trading covers contracts which foresee delivery of electricity on the same day or the next day, whereas longer-term contracts foresee delivery later than the next day and have a longer duration, typically one month to one year.

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19 'Suppliers of last resort' are suppliers that are entrusted with procuring electricity for the needs of those customers who receive electricity at regulated prices. See, to that effect Article 22(2)(a) of the Energy Act.

20 Energy Act, Article 22(8).]

21 Energy Regulator, *2011 Annual Report*, p. 32.

22 Commission Staff Working Document of 15 November 2012, *Energy Markets in the European Union in 2011*, p. 133.

(40) The main purpose of short-term trading is to enable market participants to refine their contract positions close to real time in the light of current information (e.g. concerning the weather or other factors affecting supply/demand). On the basis of short-term forecasts, generators can adjust their planned output and suppliers can increase or decrease the amount of electricity procured.

(41) Given that electricity consumption varies significantly throughout the day, an effective short-term market requires the ability to trade electricity for single hours or parts of the day (blocks of hours). The period with the highest consumption is referred to as peak hours and the period with the lowest consumption as off-peak hours.

(42) Longer-term markets serve mainly as a means of hedging price risks. Buyers and sellers fix the price for electricity in order to secure a certain price for the future, thus reducing price risks.

(43) Until July 2012 electricity trading on the competitive wholesale market in Romania took place simultaneously on the power exchange and OTC. During 2008-2012, some OTC transactions were facilitated by a few international brokers. Brokered contracts included short-term and longer-term transactions. However, the overwhelming majority of brokered electricity was for delivery in the longer-term. Electricity for delivery on the next day made up less than 1 % of the overall brokered electricity (see section 6.4).

(44) Since 2009, by virtue of a Ministerial Order,[23] state-controlled producers (accounting for roughly 90 % of the Romanian electricity output) have an obligation to sell their output on the power exchange.

(45) Further, since 16 July 2012[24], all domestic electricity trading on the competitive wholesale market has to take place on the power exchange. This means that as of this date OTC trading (negotiated directly by counterparties or through a broker's platform), other than for exports and imports[25] can no longer be legally concluded on the Romanian electricity wholesale market.

4.3. The Romanian power exchange

4.3.1. Trading on the power exchange

(46) The Romanian power exchange is administered by OPCOM on the basis of a licence granted by the Energy Regulator in December 2001.[26]

(47) The power exchange consists of trading platforms for electricity and environmental certificates (Green Certificates and Greenhouse Gas Emission Certificates). Transactions on the electricity platforms are part of the competitive wholesale

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23 Ministerial Order No. 445/2009 issued by Ministry of Economy, Trade and Business Environment on 10 March 2009.

24 Energy Act, Article 23(1).

25 Energy Regulator's position paper on the import/exports of electricity of 9 January 2013.

26 Licence no. 407 issued by Energy Regulator on 20 December 2001, as amended.

electricity market. This Decision does not concern the trading platforms for environmental certificates.

(48) There are two types of electricity markets on the Romanian power exchange:

(a) *Spot markets* consisting of the Day-Ahead Market and the Intraday Market. On the spot markets, electricity is traded for delivery on the next day. Offers on the Day-Ahead Market are accepted until 11:15 am.[27] The Intraday Market starts after completion of the Day-Ahead Market and finishes just before the TSO establishes the physical electricity flows for the next day.[28] On the spot markets electricity is traded for each hour of the next day. OPCOM is a central counterparty for all sell/buy trades concluded on the spot markets.

(b) *Centralised bilateral markets*, consisting of the Centralised Market for Bilateral Contracts through public auction ('CMBC') and the Centralised Market for Bilateral Contracts through Continuous Negotiation ('CMBC-CN'). On the centralised bilateral markets, electricity is traded for delivery in at least one week and generally for periods of up to one year.

(49) The number of participants and volumes of electricity traded on the power exchange are shown in the table below.

Table 1: Electricity trading on the power exchange (2011)

Facilitation of electricity trading on:	Number of participants	Volumes traded of the overall Romanian electricity production (%)	Amount traded 2011 (GWh)	Average price 2011 (EUR/MWh)
Day-Ahead Market	96 active (123 registered)	16.5 %	8 870	52
Intraday Market	16 active (44 registered)	0.0 %	5	66
CMBC	49 active (94 registered)	8.6 %	4 660	38
CMBC-CN	27 active (93 registered)	0.84 %	626	48

Source: OPCOM's reply to Commission's RFI (2012/049522)

(50) In 2011, electricity trading on the power exchange accounted for 14.2 TWh or around 25 % of the net electricity production in Romania. The most important in terms of traded volumes was the Day-Ahead Market, where almost 17 % of the overall Romanian production was exchanged in 2011. The value of the electricity exchanged on that market amounted to EUR 573 million.[29]

(51) In 2012, trading on the Day-Ahead Market increased by 20 % compared to the previous year. The total volume traded on the Day-Ahead Market accounted for more

[27] Article 2, Order of the Energy Regulator no. 53/2011 establishing the deadline for submission of offers on the Day Ahead Market.

[28] On other power exchanges intraday trading allows for delivery on the same day.

[29] OPCOM, *Annual Report 2011*, p. 28.

than 10.7 TWh.[30] The volume of electricity traded on the Intraday Market in the first year of its existence (the period from July 2011 to July 2012) accounted for 10.8 GWh.[31] Overall trading on the electricity markets operated by OPCOM accounted for 26.7 TWh, i.e. around 50 % of the net electricity production in Romania for 2012.

(52) During January – September 2013, trading on the Day-Ahead Market increased by 70 % compared with the same period of the previous year. The total volume traded on the Day-Ahead Market accounted for more than 11 TWh. Overall trading on the electricity markets operated by OPCOM accounted for 31.8 TWh.[32]

(53) In the medium term, traded volumes are expected to increase significantly for the following main reasons:

(a) Large amounts of electricity are sold on the basis of long-term bilateral contracts concluded prior to the adoption in 2009 of the Ministerial Order requiring state-controlled producers to sell their output on the power exchange. When these contracts expire, new contracts (on the competitive market) will have to be concluded on OPCOM's markets.

(b) Following removal of regulated prices for commercial consumers (end of 2013) state-owned producers are required to sell this output on OPCOM's markets, as laid down by the Energy Act of July 2012.

(c) The Energy Act extends the obligation to sell on OPCOM's markets to privately owned producers and resellers as from July 2012.

(54) Until December 2013, OPCOM received a regulated fee for the services it provided as operator of the power exchange (i.e. administration of trading platforms, management of the markets and settlement services). The fee was based on OPCOM's annual costs and provided for a reasonable profit. The level of the fee was proposed by OPCOM and approved by the Energy Regulator.[33] The fee was paid by all suppliers in proportion to the electricity they delivered to customers in Romania and the electricity they export. As of 1 January 2014, OPCOM receives individual fees for each of the services provided to market participants (i.e. entry fee, annual administration fee and transaction fee).[34]

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30 OPCOM, *Synthesis Annual Report 2012 on the results of the organised markets operated by OPCOM*, p. 1.

31 OPCOM's Press release of 23 August 2012 – *Market results in the first seven months of 2012* and the Energy Regulator's *Electricity Market Monitoring Reports* – January - July 2012 (available at: http://anre ro/documente.php?id=1173).

32 OPCOM's monthly reports, January-September 2013, (available at: http://www.opcom ro/tranzactii_rezultate/tranzactii_rezultate.php?lang=ro&id=22)

33 Energy Regulator Order no.17/2010, *Methodology on setting the regulated fees for centralised energy market operators.*

34 Energy Regulator Order No.67/2013, *Methodology on setting the regulated fee applied by the electricity market operator;*

4.3.2. Conditions for trading on the power exchange

(55) Electricity trading on the OPCOM power exchange is restricted to members of the exchange. According to OPCOM's rules applicants for membership are required to:[35]

(a) obtain a license to supply electricity from the Energy Regulator.[36] Under Romanian law[37], a foreign legal person must set up a secondary establishment (e.g. branch, agency, representative office or other establishment)[38] or a subsidiary in Romania in order to obtain such license.[39]

(b) register as a balancing party[40] with the TSO or join an existing balancing party. Applicants, as future transmission system users, need to enter into a balancing agreement with the TSO for the settlement of electricity imbalances.

(c) provide sufficient collateral by appointing a clearing bank. Applicants must also submit an unconditional and irrevocable bank guarantee issued in favour of OPCOM.

(d) enter into a standardised membership agreement with OPCOM. The membership agreement sets out the rights and responsibilities of traders. It also describes the rights and responsibilities of OPCOM as operator/administrator of the power exchange. There is a standardised membership agreement for each market. Applications to a specific market are accepted only if the corresponding membership agreement is signed with OPCOM without any changes to the standard text. The membership agreements with OPCOM for the Day-Ahead and the Intraday Markets are respectively called 'Convention on Participation in the Day-Ahead Market' and 'Convention on Participation in the Intraday Market'.

5. THE PRACTICES WHICH ARE THE SUBJECT OF THE DECISION

5.1. The VAT registration requirement

The VAT requirement for EU traders was established by OPCOM

(56) OPCOM requires all participants in the spot markets to hold a Romanian VAT registration. There is no such requirement for the centralised bilateral markets. On

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35 EFET, Submission to DG Competition on 3 February 2012, Annex 4, *How to become Participant in the DAM*.

36 Energy Act, Article 8(3).

37 Until 23 September 2013, the conditions for obtaining the electricity supply license were set out in the *Regulation for granting licences and authorisations in the electricity sector* approved by Government Decision no. 540/2004. As of 24 September 2013 the conditions to obtain the licence are set out in the secondary legislation issued by Energy Regulator, namely Order no. 48/2013, in accordance with the Energy Act.

38 As defined by the national Company Law no. 31/1990 as subsequently amended.

39 Article 9(2) of the Regulation for granting licences and authorisations in the electricity sector approved by Government Decision No. 540/2004 and subsequent amendments.

40 A balancing party is responsible for ensuring that supply corresponds to consumption of electricity in its balancing area during a given time period. In case of imbalance it is obliged to pay a fee to the TSO.

the former OPCOM acts as a central counterparty[41], on the latter it does not assume this role.

(57) For the Day-Ahead Market the requirement to hold a Romanian VAT registration is laid down in the addendum[42] to OPCOM's *'Convention on Participation in the Day-Ahead Market'.*[43] For the Intraday Market the VAT registration requirement is set forth in OPCOM's *'Convention on Participation in the Intraday Market'*[44] and in the *'Procedure on the functioning of the Intraday Electricity Market'.*[45] The Energy Regulator issued positive opinions regarding the two Conventions.[46]

The VAT registration for EU traders is not required under Romanian law

(58) Under Romanian law, an EU trader who has its business established outside Romania, but who is established in Romania by a fixed establishment, is required to register for VAT. Conversely, an EU trader not established in Romania and who carries out in Romania only operations for which the beneficiary is liable for payment of VAT has no obligation to be registered in Romania for VAT purposes.

(59) More specifically, in application of the Council Directive (EU) 2006/112/EC of 28 November 2006 on the common system of value added tax[47] (the 'EU VAT

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41 A central counterparty acts as the buyer to every seller and as the seller to every buyer thereby reducing the counterparty risk associated with the transactions.

42 An EU License holder can conclude an agreement with OPCOM for participation on the Day-Ahead Electricity Market only if '*[…] in order to ensure compliance with the Romanian law on VAT and invoicing, the activity of the foreign legal person, which is a holder of an electricity supply licence, on the Day-Ahead Market, must be carried out through its branch – a branch established in Romania.'*

43 OPCOM further requests that foreign legal persons, i.e. EU traders, must carry out all the operations on the spot markets through a Romanian establishment which in turn would require a VAT registration. See, to that effect, OPCOM's reply of 12 June 2012 to the RFI of 11 May 2012, Annex 36, *Letter addressed by SC OPCOM SA to E.ON ENERGY TRADING SE,* registered under No. 16170 of 17 November 2011: '*We hereby inform you that a legal foreign person ('FLP') can register on the Day-Ahead Market only if it has established a subsidiary in Romania, i.e.* ***FLP – subsidiary/branch in Romania****, from which it carries out all operations relating to participation on the Day-Ahead Market. In these conditions, the FLP must submit the following documents to OPCOM: […] a copy of the Tax Registration Certificate for VAT purposes issued by the National Tax Administration Agency of the FLP - subsidiary/branch.*' For the intraday market this requirement is explicitly indicated in OPCOM's Convention on Participating on the Intraday Market (see footnote 44).

44 An EU License holder can conclude an agreement with OPCOM for participation on the Intraday Electricity Market only if it has *'provided proof that it established and registered for VAT purposes [its] subsidiary in Romania […], from which it intends to participate on the Intraday Electricity Market.'*

45 Section 6.1.1 reads*: 'The License holder wishing to register on IDM* [intraday market] *shall send the following documents to OPCOM:* [...] 'the *official document on the registration of the undertaking for tax purposes, namely a copy of the registration certificate for tax purposes issued by the Romanian authorities, i.e. the Registration Certificate for VAT purposes issued by the National Tax Administration Agency of the undertaking or of the subsidiary through which it intends to operate on the IDM*.'

46 The positive opinion on the 'Convention on participation in the Day-Ahead Market' was issued by Endorsement No 15 of 22 May 2008 of the President of the Energy Regulator. The positive opinion on the 'Convention on Participation in the Intraday Market' was issued by Endorsement No 24 of 30 June 2011 by the President of the Energy Regulator.

47 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and successive amendments and Council Implementing Regulation No 282/2011, Articles 38 and 39 (OJ L 347, 11.12.2006).

Directive'), Romanian VAT legislation[48] expressly provides that an EU company with a secondary establishment in Romania whose sole purpose is the holding of an energy supply license, does not need to obtain a Romanian VAT registration in order to trade electricity. The Romanian Ministry of Public Finance has also confirmed that pursuant to national legislation '[traders] *not established in Romania are not required to register for VAT purposes in Romania for the sole purpose of carrying out electricity trades*'.[49]

(60) Furthermore, the Ministry of Public Finance recently again confirmed that EU traders are not subject to Romanian VAT obligations. In a letter addressed to the regional tax authorities concerning a consistent application of the VAT regime, the Ministry of Public Finance stated the following: '*in case the beneficiary of electricity supply is not established in Romania, even if it is registered for VAT purposes in Romania under Article 153 of the Fiscal Code, the provisions of Article 160 of the Fiscal Code are not applicable, given that the place of supply of electricity from the VAT perspective is not considered in Romania according to Article 132 (1) (e) and (f) of the Fiscal Code. In this case the transaction is not taxable in Romania, but in the State where the beneficiary is established or, where appropriate, in the State where the beneficiary uses and actually consumes the electricity.*'[50]

(61) Indeed, as opposed to the situation of purely domestic transactions, special rules apply in order to define the relevant national tax authority which is entitled to collect VAT in the case of cross-border supply of goods and services. According to the EU VAT Directive and Romanian Fiscal Code, electricity is treated as a good for VAT purposes.[51]

(a) *Domestic transactions*: In a purely domestic transaction, the buyer of a good pays a price including VAT to the seller who in turn transfers the VAT to the domestic tax authority. Companies buying products in order to use them as inputs or as trading goods pay VAT ('input VAT') for such products, but also receive VAT from the final customer via their sales ('output VAT'). These companies can deduct the input VAT they paid for their purchases from the output VAT they received from their sales and transfer only the net VAT to the domestic tax authority. It is therefore ensured that VAT is always paid by the final customer.

(b) *Intra-EU transactions*: In an acquisition of goods where the buyer and the seller reside in two different Member States, the transaction is generally taxable at the place of supply. More specifically, concerning electricity traders, Article 38 of the EU VAT Directive stipulates that '*in the case of … the supply of electricity … to a taxable dealer, the place of supply shall be deemed to be the place where the taxable dealer has established his business or has a fixed*

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48 Law No.571/2003 on the Fiscal Code and subsequent amendments, Article 132 (1) (e) and (f).

49 EFET, Submission to DG Competition on 3 February 2012, Annex 10, *Letter from the Ministry of Finance to EFET* dated 04.03.2011.

50 Letter no. 408436/02.09.2013 of Ministry of Public Finance addressed to the Regional tax authorities for the uniform application of the VAT tax provisions introduced by GEO no. 16/2013 on amending Law no. 571/2003 on the Fiscal Code.

51 Electricity, gas, heat or cooling energy and the like shall be treated as tangible property. See EU VAT Directive, recital 19 and Article 15, and Law No.571/2003 on the Fiscal Code, Article 125^1(1)(6).

establishment for which the goods are supplied or, in the absence of such a place of business or fixed establishment, the place where the dealer has his permanent address or usually resides.' The Romanian Fiscal Code also specifies that the place of supply for electricity is '*the place where the trader acting as a taxable person has established his business*'.[52] A buyer having its place of establishment in a Member State other than Romania therefore pays a price without VAT when acquiring electricity directly from a Romanian supplier. If the buyer re-sells the electricity in the country where he has his place of establishment, it pays the received VAT directly to the tax authority in this country.

(62) On the spot markets, OPCOM, as central counterparty, acts as buyer to every seller and as seller to every buyer. Under EU and Romanian tax rules, the sale of electricity by OPCOM to an EU trader (i.e. a trader located outside Romania but in another EU Member State) would be considered as a supply of goods in the country where the EU trader is established. The EU trader would therefore not be subject to VAT in Romania, while a Romanian trader is subject to VAT in Romania and this VAT is collected by OPCOM. On the other hand, the purchase of electricity by OPCOM from an EU trader assumes supply of goods at the place where OPCOM is established, i.e. Romania. OPCOM is, therefore, not required to pay out VAT on its purchases of electricity from EU traders, while it is required to do so in relation to purchases from Romanian traders.

(63) OPCOM's requirement by which every trader wishing to trade electricity in Romania needs to be registered for VAT purposes in Romania effectively turns all EU transactions into domestic transactions. As explained above, such VAT registration requirement does not derive from Romanian law but is the result of measures taken by OPCOM.

5.2. Implications of the VAT registration requirement

(64) EU traders trading electricity with delivery in Romania need to establish a secondary establishment, i.e. a local presence in order to obtain a licence to supply electricity (see recital (55)(a)). This requirement may, for instance, be fulfilled by setting up a Romanian branch. However, this does not imply that the secondary establishment needs to obtain a Romanian VAT registration because a secondary establishment for the purpose of a supply license does not have to be an operating subsidiary which would represent a fixed establishment. Absent OPCOM's VAT registration requirement, EU traders would therefore be able to carry out their trading activities from their main place of establishment outside Romania. The Romanian branch could remain a non-operating or brass-plate company[53] that works under the identity of the parent company.

(65) According to Romanian VAT legislation, a company needs to carry out an economic activity in Romania in order to obtain a Romanian VAT registration. To that end, an EU trader needs to set up a permanent establishment in Romania that has sufficient

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[52] Law No.571/2003 and subsequent amendments of the Fiscal Code, Article 132 (1)(e).

[53] Non-operating subsidiaries or brass-plate companies do not have an operational presence within the country where they are formally registered, but merely have an address there.

technical (offices, computer systems, etc.) and human resources (employees) in Romania to perform supplies of electricity on a regular basis.[54]

(66) Hence OPCOM's VAT registration requirement effectively obliges EU traders to create a permanent establishment in Romania with such resources, which they would not otherwise be required to do under Romanian VAT legislation, in order to participate in the spot markets on the Romanian power exchange.

(67) The VAT registration requirement also has implications for OPCOM's cash flow. Absent the VAT registration requirement, a potential VAT (cash flow) mismatch would arise in case of transactions involving EU traders due to the mismatch of VAT applied to cross-border sale and purchase transactions invoiced by OPCOM. Such potential cash-flow mismatch results from the fact that OPCOM acts as central counterparty on the spot market. OPCOM thereby acts as an intermediate trader buying the electricity from every seller and selling it subsequently to every buyer on the spot market.

(68) VAT is generally charged at each step of the value chain as goods are sold successively. The current collection model of VAT is based on the following process: (i) the purchaser pays VAT to the supplier, mostly together with payment for the goods; (ii) the supplier collects the VAT on behalf of the tax authority; (iii) the supplier makes a balance between VAT collected and VAT deductible, and files a VAT return, if it is in a VAT receivable position or pays the balance to the tax authority, if it is in a VAT payable position.

(69) Special rules exist as to the allocation of VAT in intra-EU transactions involving traders of electricity: under Article 38 of the EU VAT Directive and Article 132(1) of the Romanian Fiscal Code, if a trader (or 'taxable dealer') buying electricity is located in a different EU Member State than the vendor, this buyer or 'taxable dealer' does not pay VAT to the vendor.[55] Instead, the buyer is responsible for paying VAT to the relevant tax authorities. This mechanism allows the allocation of VAT to the different affected Member States in case of cross-border transactions. It is called 'reverse charge mechanism' since it effectively reverses the tax liability from the seller to the buyer. While normally the seller collects VAT from the buyers by adding VAT to the invoice in order to later pass on this tax to the tax authorities in his country of establishment, under the reverse charge mechanism it is the buyer who has to pay VAT to the tax authorities in its own country after having paid a price excluding VAT to the seller.

(70) Therefore, in the situation where a domestic sale transaction by OPCOM leads to a collection of VAT by OPCOM, whereas OPCOM does not have to pay VAT in case of an EU purchase transaction (i.e. the VAT reverse charge mechanism applies), a net VAT payable position arises for OPCOM towards the national tax authorities as

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[54] Chapter 1, point 4 Title VI of the Government Decision no. 44/2004 and subsequent amendments regarding Methodological Norms to the Fiscal Code (Law no. 571/2003).

[55] Article 195 of the EU VAT Directive: 'VAT shall be payable by any person who is identified for VAT purposes in the Member State in which the tax is due and to whom goods are supplied in the circumstances specified in Articles 38 or 39, if the supplies are carried out by a taxable person not established within that Member State.'

OPCOM would have to pass the collected VAT to the Romanian tax authorities. In the case of an opposite flow (e.g. an intra-EU sale by OPCOM where it collects no VAT combined with a domestic purchase by OPCOM where OPCOM has to pay VAT to the seller), a temporary pre-financing would occur resulting in a VAT receivable position for OPCOM from the national tax authorities. (see section 7.3.2, in particular recital (199) and following).

6. LEGAL AND ECONOMIC ASSESSMENT

(71) Power exchanges such as OPCOM are subject to the provisions of Article 102 of the Treaty, since they are undertakings carrying out an economic activity, namely the provision of services for electricity trading which is typically provided against payment. The following section finds that an entity such as OPCOM which carries out an economic activity can be regarded as an undertaking within the meaning of the competition rules, irrespective of the way in which it is organised, and regardless of whether it is governed by public or private law.[56]

(72) The following section also assesses the relevant market and the existence of a dominant position by OPCOM within the meaning of Article 102 of the Treaty.

6.1. The relevant product market

(73) The relevant product market can be defined as comprising '*all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use*'.[57]

(74) OPCOM provides services facilitating the trading of electricity for delivery on the Romanian grid. Such facilitation services consist in the provision of a trading platform and related services such as clearing facilities.

(75) Services facilitating electricity trading are intrinsically linked to the demand and supply of the underlying product, namely electricity for delivery on the Romanian grid.

(76) There are three main characteristics of electricity contracts which influence facilitation services.

(a) *Time and duration of delivery of electricity*: Short term contracts (spot) concern delivery for a short duration (typically 24 hours) and in the immediate future (same or next day). Longer term contracts (forward and futures) typically have a duration of one month to one year and the start of delivery is some time after the conclusion of the contract.

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[56] Judgment of 23 April 1991 in Case C-41/90 *Höfner and Elser* v *Macrotron* (ECR 1991, p. I-01979, paragraphs 21-22).

[57] Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJEC [1997] C 372/5, paragraph 7.

(b) *Location of delivery of electricity*: Wholesale supply of electricity is based on the existence of electricity transmission grids which are managed on a nation-wide basis, and from and to which electricity cannot flow freely.[58]

(c) *Settlement method*: Contracts can be settled either by physical delivery (physical settlement) or by financial compensation (financial settlement).

(77) Services facilitating the trading of electricity are offered by power exchanges and brokers. Each power exchange sets the institutional rules that govern trading and information flows regarding trading over the exchange. These services may include clearing facilities by which post-trade activities are completed on the exchange. On OTC markets electricity supply contracts are traded bilaterally. Brokers offer services facilitating bilateral contracts but such contracts can also be concluded directly without facilitation by brokers. OTC markets are less transparent and less regulated than exchanges.

(78) The Commission has previously considered that the market for services facilitating electricity trading is a separate product market, encompassing facilitation services offered by power exchanges and brokers. The question whether a distinction should be made between the facilitation of wholesale electricity trading in short-term and longer term products has been left open.[59]

(79) On the basis of its market investigation, the Commission's assessment is that facilitation services for short-term trading ('short-term facilitation') cannot be substituted by facilitation services for longer term trading ('longer term facilitation'). This results from the fact that short and longer-term electricity trading exhibit significant differences, both when assessed from a demand-side and from a supply-side perspective.

6.1.1. Demand side substitutability

(80) The primary interest in electricity trading lies with exchanging specific amounts of electricity, at a specific place and at a specific time. Market participants first decide what electricity product (i.e. the quantity of electricity, the location of delivery and the timing of delivery) they need and only afterwards consider how to acquire it.

(81) There is a clear demand by certain market participants to trade electricity close to the time of actual delivery because supply and demand conditions can change very quickly on the electricity markets.

(82) Regarding production of electricity, the technical availability of power plants can change. For example, power plants might encounter technical problems resulting in unforeseen non-availability (i.e. outage) or reduced availability of production capacity. When the output of the affected power plant has been sold in advance, the producer has to procure the 'missing' electricity in order to fulfil its supply

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[58] Concerning the wholesale supply of electricity in Germany and the Netherlands, case COMP/M.5467 *RWE/Essent* (2009); in Belgium, case COMP/M.5549 *EDF/Segebel* (2009); in Portugal and Belgium, case COMP/M.5978 *GDF Suez/International Power* (2011).

[59] Case COMP/M.5911 –*TenneT/Elia/Gasunie/APX-ENDEX* (2010), recital 37.

obligations. In such situations the producer will specifically demand services facilitating short-term trading.

(83) Regarding consumption, suppliers attempt to forecast aggregate consumption of their customers in order to avoid having too much or, alternatively, not enough electricity. These forecasts become more precise the closer they are to the time of consumption. Changes in forecasts induce suppliers to adjust their portfolio through short-term electricity trading. The demand for electricity to be delivered on the next day inherently translates into a specific demand for services facilitating short-term trading.

(84) In the present case the investigation has shown that spot contracts are not substitutable with longer-term contracts, namely forward and futures contracts. (see recitals (75) - (79)). In line with market participants, the Commission considers that the longer term contracts are often used to hedge price risks and revenues/costs over a longer time period. In turn, short term contracts are used as adjustment mechanism to cover differences between contracted amounts of electricity. In the case of short term contracts, customers generally require immediate physical settlement or close to immediate delivery.

(85) Based on the above, it can be concluded that from a demand-side perspective facilitation services for short-term and long-term electricity trading are insufficient substitutes and are thus to be considered as separate products.

6.1.2. Supply side substitutability

(86) The market investigation in this case showed that short-term trading took place almost exclusively on the power exchange and, while brokers were present, they facilitated only negligible numbers and amounts of short-term trading.[60] Market participants indicated that brokers did not attract sufficient quantity of electricity for sale in order to have a significant offer of short-term facilitation services.[61]

(87) In addition, brokers concluded short-term contracts which offered no flexibility within the day (i.e. flat/constant delivery) or only partial flexibility (i.e. peak or off-peak delivery). Flexibility allows market participants to make finely granulated adjustments to their portfolio in order to reduce/avoid costly physical imbalances on the next day. In Romania, no brokered transaction had such flexibility.

(88) In Romania, facilitation of electricity trading via brokers was prohibited by the Energy Act of July 2012. Even before that date, brokers had only a negligible share in facilitating short-term trading.

6.1.3. Assessment of OPCOM's arguments concerning product market definition

(89) OPCOM does not contest the distinction between short- and long-term facilitation services. However, OPCOM submits that, apart from facilitation services provided by exchanges, one-day transactions concluded through brokerage platforms or

60 Minutes of the conference call with TFS of 7 March 2013 and with GFI of 11 and 14 March 2013.

61 Minutes of the conference call with TFS of 7 March 2013 and with GFI of 11 and 14 March 2013.

bilaterally between traders would also form part of the market for short-term facilitation services.[62] OPCOM claims that bilateral transactions without any facilitation services are substitutable with transactions concluded on the spot market or via brokers. In addition, OPCOM indicates that imports and exports represent a substitute to transactions on the spot market.[63]

(90) As indicated above, the Commission takes the view that brokers' activities in short-term facilitation services could potentially be included into the relevant product market. However, bilateral trading without any involvement of brokers or exchanges cannot form part of the relevant market since no facilitation services are involved.

(91) The underlying product, namely the wholesale supply of electricity for delivery in Romania, includes imports. Electricity imports can be facilitated by short-term facilitation services. The Commission therefore includes in the product market definition services which facilitate transactions relating to electricity imported into Romania. Electricity that is exported from a given market is typically regarded as part of the wholesale market to which it is delivered. Consequently the facilitation of export transactions should not be regarded as part of the relevant market.

6.1.4. Conclusion on the relevant product market

(92) In conclusion, for the purpose of this case, the relevant product market is considered to be the market for services facilitating short-term electricity trading.

(93) The question of whether the relevant product market includes both facilitation services for short-term electricity trading offered by a power exchange and such services offered by brokers can be left open. The Commission's analysis of the market share held by OPCOM on the relevant market includes an analysis of the share accounted for by brokers.

6.2. The relevant geographic market

(94) According to established case-law and Commission practice, the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different.[64]

(95) The Commission has previously considered the market for facilitating electricity trading to be national in scope.[65] OPCOM submits that the geographic market is wider than national due to the activities of foreign brokers in Romania during the

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62 OPCOM's reply of 5 August 2013 to the SO, paragraph 64.

63 Presentation by OPCOM at the Oral Hearing on 19 September 2013: *'Introduction to OPCOM'*, slide 16.

64 Commission Decisions in case COMP/37451, *Deutsche Telekom AG*, recitals 92-93; and case COMP/38.233, *Wanadoo Interactive*, recital 205. See also judgment in Case C-27/76 *United Brands vs. Commission*, paragraph 44; judgment in Case 322/81 *Michelin v Commission*, paragraph 26, judgement in case 247/86 *Alsatel v Novasam*, paragraph 15.

65 Case COMP/M.5911 – *TenneT/Elia/Gasunie/APX-ENDEX,* recital 43 and 44.

time period before OPCOM was granted a legal monopoly in July 2012. According to OPCOM, the geographic market should at least cover Romania and the United Kingdom since most of these foreign brokers had their place of establishment in the United Kingdom.[66]

(96) The geographic market for facilitating electricity trading may only be larger than national if supply and demand-side substitutability is '*easy*'.[67]

(97) From a supply-side perspective, it needs to be assessed whether companies outside Romania were or are able to offer services facilitating short-term trading for electricity to be delivered in Romania which is the relevant product.

(98) Prior to 2012, both OPCOM and, although only to a very limited extent, brokers based in other EU Member States, offered services facilitating short term trading for electricity to be delivered in Romania. Due to the necessity to have sufficient volumes of electricity for short-term trading so as to achieve sufficient liquidity (see section 6.4), the importance of brokers has been marginal in this market. As for services facilitating exchange-based trading in electricity to be delivered in Romania, OPCOM has had a monopoly since 2001.[68]

(99) Since 2012, the Energy Act obliges all public and private market participants trading electricity for delivery in Romania to trade on the power exchange. Before that date, state-owned generators, which represent the vast majority of the traded electricity in terms of volume, were already required to trade on the power exchange (see also recital (119)).

(100) From a demand-side perspective, power exchanges cannot easily expand their geographic radius of activity into other countries due to the differing national regulatory requirements. In Romania, a specific license is needed in order to operate as a power exchange. Before July 2012, it was in principle possible for a foreign power exchange to obtain a license in Romania. However, no other power exchange has entered the market. The only company which expressed interest was the Romanian Commodities Exchange, which, however, never obtained a license.

(101) Accordingly, from a demand-side perspective, traders wishing to trade electricity with delivery in Romania could not switch to short-term facilitation services from other exchanges. Due to the need for liquidity they could switch to brokers regardless of the brokers' place of establishment only to a limited extent.

(102) The conditions for competition on the market for the supply of facilitation services for the short-term trading in electricity are largely influenced by the presence of OPCOM and the Romanian regulatory framework. Romania is therefore the area in which the conditions of competition for the supply of facilitation services for short-term electricity trading for delivery in Romania are sufficiently homogeneous and

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66 OPCOM's reply of 5 August 2013 to the SO, paragraph 72, and OPCOM's reply of 6 January 2014 to the Letter of Facts, paragraphs 21-24.

67 Case COMP/M.5911 – *TenneT/Elia/Gasunie/APX-ENDEX,* recital 43.

68 OPCOM holds the only licence to operate an organised electricity market in Romania. The licence was issued by Energy Regulator on 20 December 2001 with reference number 407.

Romania can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas, already since before July 2012.[69]

(103) The fact that a very limited number of transactions were facilitated by foreign, mainly British, brokers does not change this analysis since the brokers' activities were not of such importance as to allow concluding that the conditions of competition for short-term facilitation services in Romania and the United Kingdom (or even in a wider region) were sufficiently homogeneous. In any event, the Commission takes into account foreign brokers in the market share analysis.

(104) It follows from the above that for the purpose of this case, the market for services facilitating short term electricity trading for delivery in Romania should be regarded as national in scope.

6.3. Undertaking

(105) According to established case-law, an entity engaged in economic activities is considered to be an undertaking within the meaning of Articles 101 and 102 of the Treaty regardless of its legal status and of the way in which it is financed.[70] Moreover, the Court of Justice confirmed that an activity can in particular be considered as an economic activity where it has in the past has not only been exercised by public authorities, but also by private undertakings.[71]

(106) In its reply to the SO and during the Oral Hearing OPCOM claimed that it cannot be qualified as undertaking under competition rules based on two main arguments:

(a) Its activity would represent an essential function of the State, and

(b) Its activity would not involve commercial risk.

(107) In support of its first argument, OPCOM states that based on settled case-law, services linked to the exercise of state functions fall outside the scope of competition rules. By virtue of Law 318/2007, it would be an essential function of the State in the field of electricity supply to '*ensure transparent and non-discriminatory access to electricity*'. According to the Energy Act, OPCOM has a legal responsibility to ensure that the '*electricity is traded in a transparent, public, centralised and non-discriminatory manner*'. OPCOM would therefore perform State-like functions. Its services on the spot markets would serve to ensure a safe and transparent environment for electricity trading, and would not be profit oriented. In this regard, the fact that OPCOM has been institutionally set up as a company would be irrelevant.[72]

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69 Commission notice on the definition of relevant market for the purposes of Community competition law [OJ C 372 of 9.12.1997 pp. 5-13], paragraph 8.

70 Judgment of 23 April 1991in Case C-41/90 *Höfner and Elser* v *Macrotron* (ECR 1991, p. I-01979, paragraph 21); Judgment of 11 December 2007 in Case C-280/06 *ETI and Others*, (ECR 2007, p. I-10893, paragraph 38); Judgment of 5 March 2009 in Case C-350/07 *Kattner Stahlbau* (ECR 2007, p. I-01513, paragraph 34).

71 Judgment of 23 April 1991 in Case C-41/90 *Höfner and Elser* v *Macrotron* (ECR 1991, p. I-01979, paragraphs 21-22).

72 OPCOM's reply to the SO, 5 August 2013, paragraph 58.

(108) The Commission notes that OPCOM is a subsidiary of Transelectrica which is in turn controlled by the Romanian State. It provides facilitating services for electricity trading on the market. OPCOM's status under national law is not decisive in determining wheher its activity has an economic character. Even in a case where an entity was not structurally separated from the State the Court ruled that such entity was an undertaking since its activity, consisting in offering goods or services to the market, was economic.[73] The only relevant criterion in this respect is whether an entity carries out an economic activity.

(109) Further, the Commission notes that power exchanges in the EU are operated by either (i) private entities whose income derives from charges based on traded volumes and registration fees for users, or (ii) regulated companies whose income derives from fees approved by the regulator or ministry (e.g. OPCOM). Examples of power exchanges operated by private for profit companies are: EPEX, APX, and BELPEX. In addition, the Romanian Commodities Exchange - a private undertaking – applied for a license to operate a power spot market in Romania; until 2012, private operators were active in the provision of facilitation services in Romania, namely as brokers in the area of OTC trading. The Commission therefore considers that private undertakings may and do offer services for the facilitation of electricity trading (including facilitation services via a power exchange) to the market. The activity of a power exchange therefore does not constitute a typical essential function of the State comparable to public functions such as the police or the judiciary. [74]

(110) OPCOM has also submitted that its activity is financed via a fee imposed on electricity suppliers in Romania when selling electricity domestically or abroad. The fee is set by the national regulator and is not directly linked to the volume of transactions carried out via OPCOM's platforms. This fact alone would, according to OPCOM, suffice to prove that OPCOM does not carry out an economic activity.[75]

(111) The Commission considers that the fact that OPCOM is paid by means of a fee which is not directly linked to the volume of transactions carried out on the exchange is not sufficient for the activity carried out to be classified as non-economic. In *Höfner/Elser* the Federal Office for Employment did not charge a fee for its services to its clients, but it was allowed to collect contributions from employers and workers. The Court nonetheless considered the Federal Office for Employment to be an undertaking.[76]

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73 Judgment of 16 June 1987 in Case 118/85 *Commission* v *Italy* (ECR 1987, p. 2599, paragraphs 3-7). Amministrazione Autonoma dei Monopoli di Stato (AAMS) carried out the manufacture and sale of tobacco. However, under Italian law, AAMS had no status separate from that of the state. Italy argued that AAMS did not have to comply with the directive: rather than an undertaking to which the directive was addressed, AAMS was part of the state (a public authority).

74 In Case C-264/01 *AOK Bundesverband* (ECR 2004 p. I-2493, paragraph 27), Advocate General Jacobs reported that: '*In assessing whether an activity is economic in character, the basic test appears ... to be whether it could, at least in principle, be carried on by a private undertaking in order to make profits. If there were no possibility of a private undertaking carrying on a given activity, there would be no purpose in applying the competition rules to it. ... It is not necessary actually to make profit, nor is it necessary to have a profit-making motive. All that is required is that the potential exists to make profit from the activity*.'

75 OPCOM's reply of 5 August 2013 to the SO, paragraph 59.

76 Judgment of 23 April 1991in Case C-41/90 *Höfner and Elser* v *Macrotron* (ECR 1991, p. I-01979)

(112) As regards OPCOM's argument concerning commercial risk, OPCOM submitted that the fee it receives does not depend on income generated on spot markets and is therefore not affected by any upward or downward variation of traded volumes. Settlement of transactions is secured by an unconditional and irrevocable bank guarantee of participants issued in favour of OPCOM, as well as through direct debit. OPCOM would thus carry out risk free activities.[77]

(113) The Commission cannot accept OPCOM's argument. One of the main arguments of OPCOM's defence is that it would not be able to cover the potential VAT mismatch which would occur in the absence of the VAT registration requirement, and OPCOM has also argued that given its poor financial condition, it would be impossible to draw credit lines to cover the respective amounts. The Commission therefore considers that OPCOM carries commercial risk.

6.4. OPCOM's dominant position on the relevant market

(114) According to settled case law, dominance is '*a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers*.'[78]

(115) OPCOM has never faced any significant competition on the relevant market. It has been the only company holding a license for operating a power exchange in Romania since 2001. Also, it has been the only company offering electricity contracts with hourly flexibility.

(116) On the basis of the data provided by OPCOM and by brokers who have been active in Romania, the market share of OPCOM on the relevant market (market for the facilitation of short-term trading of electricity for delivery in Romania) has consistently been above 99 % every year since 2008.

(117) OPCOM submits that the Commission did not cover in its investigation all market participants and therefore underestimated the market shares of its competitors.[79] In a request for information, the Commission had asked OPCOM to name its competitors.[80] OPCOM did not list any companies active in the provision of facilitation services in Romania and also did not do so in its reply to the SO. The Commission included into its investigation all brokers which were identified by the Energy Regulator in 2011,[81] namely GFI Brokers, ICAP Energy, Tradition Financial Services and Tullet Prebon as being active in Romania.[82] This list of names coincided with the names which were given to the Commission by a representative of

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77 OPCOM's reply of 5 August 2013 to the SO, paragraph 60.

78 Judgment of 14 February 1978 in Case 27/76 *United Brands* v *Commission* (ECR, 1978, p. 207, paragraph 65).

79 OPCOM's reply of 5 August 2013 to the SO, paragraph 71.

80 Commission's RFI to OPCOM of 22 February 2013, question 10.

81 Energy Regulator, *Annual Report 2011*, p.36. Energy Regulator's reply of 15 February 2013 and 3 April 2013 to questions raised by DG Competition.

82 The Romanian Commodities Exchange is only active on the retail level. See BRM's reply of 15 October 2013 to the Commission's request for clarification of 14 October 2013.

the Association of Electricity Suppliers in Romania, AFEER, in 2013.[83] Also OPCOM confirmed at the Oral Hearing that these four brokers have been the most important ones for trading in Romania. Following the Oral Hearing, the Commission carried out further fact-finding and included into its investigation other two brokers, namely Marex Spectron and OTCex Group.

(118) The Commission asked all these brokers as well as OPCOM to submit their volumes of electricity traded for each of the years 2008 to 2012 and to distinguish between spot and longer-term trading.[84] The analysis of this data showed a market share of OPCOM in the market for short-term facilitation services of over 99%. The fact that these brokers had an aggregated market share of approximately 1% during the relevant period shows that this result can be considered as robust. Even if additional brokers had been active in the years 2008-2012 in Romania (and it is worth noting that they include the four brokers identified by OPCOM as being the most important), it is highly unlikely that their activity could reduce OPCOM's market share to a significant extent. On this basis, the Commission considers that its investigation correctly reflects the market structure in Romania.

(119) It is worth noting that since March 2009 state-controlled generators have had to sell their output on the power exchange.[85] State-controlled companies produce about 90 % of the Romanian electricity output.[86] This gave the power exchange a privileged position and resulted in high market shares.

(120) In addition to its *de facto* monopoly, since 19 July 2012 OPCOM also enjoys a *de jure* monopoly. The Energy Act restricts all trading of electricity to the power exchange operated by OPCOM. In particular, Article 10(2)(f) therein states that '*one license is granted for the electricity market operator and one for the balancing market operator*'. Article 23(1) thereafter states that '*electricity trades take place on the competitive market, in a transparent, public, centralized and non-discriminatory way*'. Similarly, Article 28(c) lays down that generators should '*offer all electricity available on the competitive market, in a public and non-discriminatory way*'. Hence, as of the entry into force of the Energy Act all electricity in Romania has to be traded via a centralised electricity market, and the sole licence to operate that market is held by OPCOM.

(121) In light of the above, OPCOM can be deemed to hold a dominant position within the meaning of Article 102 of the Treaty on the relevant market at least since June 2008.

6.5. Dominance in a substantial part of the internal market

(122) For the purpose of Article 102 of the Treaty, it is necessary to determine whether the specific territory on which an abuse occurs is large enough to amount to a substantial part of the internal market. In this context, the Court has ruled that '*the pattern and*

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83 See e-mail from a representative of CEZ Trade and AFEER, the Association of Electricity Suppliers in Romania of 8 March 2013.

84 A further distinction between physical and financial settlement was required. All reported trading was based on physical delivery.

85 Ministerial Order No. 445/2009 issued by the Ministry of Economy, Trade and Business Environment.

86 Energy Regulator, *Annual Report 2010*, p. 12, and List of state-owned companies in the energy sector (Office for State Participation and Privatization in Industry).

volume of production and consumption of the said product as well as the habits and economic opportunities of vendors and purchasers must be considered'.[87] The General Court has further ruled that if the relevant geographic market corresponds to the territory of a Member State, it can be regarded as constituting a substantial part of the internal market.[88]

(123) In this case, the relevant geographic market for services facilitating electricity trading is in this case the territory of Romania. Furthermore, national legislation restricts selling and purchasing of electricity on the Romanian wholesale markets to the power exchange. Given that the territory of an entire Member State is affected, the dominant position is held in a substantial part of the internal market.

(124) It follows that the Romanian electricity market constitutes a substantial part of the internal market as required by Article 102 of the Treaty.

7. THE ABUSIVE BEHAVIOUR

(125) The fact that an undertaking holds a dominant position is not in itself contrary to the competition rules. However, an undertaking enjoying a dominant position is under a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the internal market.[89]

(126) Article 102 of the Treaty prohibits as incompatible with the internal market any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it, insofar as it may affect trade between Member States.

(127) The Court of Justice defined the concept of abuse under Article 102 of the Treaty in the following terms: '*The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition*'.[90]

(128) It follows from the nature of the obligations imposed by Article 102 of the Treaty that, in specific circumstances, undertakings in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in

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87 Judgment of 16 December 1975 in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73 *Suiker Unie and Others* v *Commission* (ECR 1975, p. 1663, paragraph 371).

88 Judgment of 7 October 1999 in Case T-228/97 *Irish Sugar* v *Commission* (ECR 1999, p. II-2969, paragraph 99).

89 Judgment 9 November 1983 in Case 322/81 *Michelin* v *Commission* (ECR 1983, p. 3461, paragraph 57); Judgment of 9 September 2009 in Case T-301/04 *Clearstream* v *Commission* (ECR 2009, p. II-03155, paragraph 132).

90 Judgment of 13 February 1979 in Case 85/76 *Hoffmann-La Roche* (ECR 1979, p. 461, paragraph 91).

themselves abuses and which would even be unobjectionable if adopted or taken by non-dominant undertakings.[91]

7.1. OPCOM's VAT requirement

(129) The requirement imposed by OPCOM that participants on the Day-Ahead Market and the Intraday Market must obtain a Romanian VAT registration constitutes an abuse of its dominant position. OPCOM's VAT requirement discriminates against EU traders who are already established and registered for VAT in another EU Member State because – contrary to domestic traders who only need one VAT registration – EU traders are required to obtain a second VAT registration for Romania.

(130) The Commission and the EU courts have qualified discrimination on grounds of nationality by a dominant company as an abuse of dominance in violation of Article 102 of the Treaty. For example, the judgment of the Court in the Sacchi case[92] states that if a dominant undertaking imposes unfair conditions or discriminates between domestic companies and companies from other Member States, such undertaking abuses its dominant position in violation of Article 102 of the Treaty.

(131) In the *GVL* case,[93] the Court confirmed a Commission decision finding an abuse of dominance by a German collecting society that was found to have infringed Article 82 EC [now 102 TFEU] by refusing to conclude rights management agreements with artists residing in other Member States. In particular, the Court held that '*a refusal by an undertaking having a de facto monopoly to provide its services for all those who may be in need of them but who do not come within a certain category of persons defined by the undertaking on the basis of nationality or residence must be regarded as an abuse of a dominant position within the meaning of the first paragraph of Article 86 EEC Treaty [102 TFEU].*'[94]

(132) OPCOM argues that the GVL case is not relevant since it concerns discrimination against natural persons, rather than undertakings, and that the burden resulting from changing residence is greater for a natural person than for an undertaking. The Commission notes that the Court in GVL did not find discrimination on the part of GVL because its behaviour imposes an undue burden on a natural person, but rather because it refused to conclude management agreements with such persons while they were established in another EU Member State.[95]

(133) In the *AAMS* case[96], a state-owned distributor of cigarettes was found to have violated Article 82 EC [now 102 TFEU] by taking measures which favoured the sale of domestic cigarettes. AAMS incorporated unfair clauses into its standard, non-

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91 Judgments in Case 322/81 *Michelin* v *Commission* (ECR 1983, p. 3461, paragraph 57), and Case T-111/96 *ITT Promedia* v *Commission* (ECR 1998, p. II-2937, paragraph 139); Judgment of 9 September 2009 in Case T-301/04 *Clearstream* v *Commission* (ECR 2009, p. II-03155, paragraph 133).

92 Judgment of 30 April 1974 in Case 155/73 *Sacchi* (ECR 1974, p. 411, paragraph 17).

93 Judgment of 2 March 1983 in Case 7/82 *GVL* v *Commission* (ECR 1983, p. 483).

94 Judgment of 2 March 1983 in Case *GVL* v *Commission* (ECR 1983, p. 483, paragraph 56).

95 Judgment of 2 March 1983 in Case *GVL* v *Commission* (ECR 1983, p. 483, paragraphs 54-55).

96 Judgment of 22 November 2001 in Case T-139/98 *AAMS* v *Commission* (ECR 2001, p. II-03413, paragraph 80).

negotiable distribution agreements and left its customers no choice but to comply with the agreements or to stop using its services.

(134) Similarly, in its 1998 Football World Cup Decision[97], the Commission stated that the French committee in charge of organising the 1998 World Cup '*was, as a de facto monopolist, under a prima facie obligation to ensure that entry tickets sold in 1996 and 1997 for finals matches were made available to the general public under non-discriminatory arrangements throughout the EEA*'.[98] The Commission concluded that the committee '*abused its dominant position on the relevant markets because its behaviour had the effect of imposing unfair trading conditions on residents outside France which resulted in a limitation of the market to the prejudice of these consumers*'.[99] The unfair trading conditions in question included the requirement that the customers had to have an address for the delivery of tickets in France.

(135) For the reasons set out below, OPCOM's conduct requiring EU traders wishing to participate in the Day-Ahead and Intraday Markets to hold a VAT registration in Romania amounts to discrimination on grounds of nationality.

(136) OPCOM does not conclude membership agreements with traders which do not hold a Romanian VAT registration. Thus EU traders are precluded from trading on the spot markets of the power exchange unless they register for VAT in Romania (even though they have no legal obligations to do so as described above); and, since EU traders are effectively dependent on access to the power exchange for conducting business on the competitive wholesale electricity market in Romania, they are also effectively prevented from the competitive wholesale electricity market in Romania if they do not register for VAT in Romania.

OPCOM's arguments

(137) In its reply to the SO, OPCOM raised a number of arguments with a view to showing that the VAT requirement would not constitute an abuse on the grounds that (i) it is laid down by or results from the Romanian legal framework and was approved by the Energy Regulator, (ii) it is not discriminatory, (iii) it does not entail significant costs for EU traders, and (iv) it does not put EU traders at a competitive disadvantage, rather the contrary.

(138) ***Regulatory framework***: OPCOM argues that its activity is closely regulated and supervised by the Energy Regulator. In particular, OPCOM claims that it organises and administers the Day-Ahead Market on the basis of rules approved by the Energy Regulator. OPCOM also argues that the 'Convention on participation in the Day-Ahead Market' containing the VAT registration requirement was approved by Endorsement No 15 of 22 May 2008 of the President of the Energy Regulator.

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97 Commission Decision of 20 July 1999 in Case IV/36.888 *1998 Football World Cup*, OJEC [2000] L 5/55.

98 See *1998 Football World Cup* Decision, paragraph 87.

99 See *1998 Football World Cup* Decision, paragraph 88.

(139) Regarding the Intraday Market, OPCOM argues that its rules of organisation and functioning are approved by the Energy Regulator[100] and that the 'Convention on participation in the Intraday Market' containing the VAT registration requirement was also approved by the Energy Regulator.[101]

(140) OPCOM also argues that the requirement to register for VAT purposes in Romania stems from the Romanian regulatory framework. OPCOM also points to its obligation under Romanian law to effectively apply VAT to electricity transactions, in particular the amount invoiced by OPCOM to market participants must comprise the total value of electricity to which VAT has to be added.[102] OPCOM further claims that it cannot deviate from the Conventions which set forth the VAT registration requirement, once these have been approved by the Energy Regulator.

(141) Moreover, OPCOM claims that the VAT registration requirement *de facto* results from the electricity supply licence and the conditions attached to the licence. More specifically, OPCOM states that the supply licence is focused on retail activities whereas wholesale activities are only presented as ancillary. OPCOM argues that retail activities *de facto* necessitate a permanent establishment in Romania, within the meaning of the VAT rules, and that a license holder with retail activities would likely be viewed as holding sufficient human and technical resources in Romania to make it subject to VAT.[103]

(142) ***Equal treatment***: OPCOM submits that a Romanian VAT registration is required from all companies regardless of whether they are Romanian or EU traders. Therefore, according to OPCOM there is no discrimination against EU traders since they have to fulfil exactly the same requirements as domestic traders.[104]

(143) ***Costs***: OPCOM argues that a trading office could be set up in Romania for as little as EUR 50 000. OPCOM also argues that the costs involved would, irrespective of the VAT requirement, be incurred as a result of the conditions imposed by the Energy Regulator to obtain an energy supply license.[105]

(144) ***Competitive advantage***: OPCOM argues that EU traders would not be at a competitive disadvantage. On the contrary, they would have a competitive advantage if they were able to participate in the Romanian spot market without a Romanian VAT registration. According to OPCOM, this results from the fact that Romanian purchasers of electricity have to pay VAT on purchases immediately (i.e. VAT must be paid within two days, at the same time as the transaction is settled) unlike EU traders, who would not have to pay VAT to OPCOM. Romanian traders have to finance this VAT until they receive a price including VAT when reselling the

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100 Order No 32 of 30 June 2011 by President of the Energy Regulator.

101 Endorsement No 24 of 30 June 2011 by the President of the Energy Regulator.

102 Energy Regulator Order no. 32/2011 for the approval of the *Regulation for the organization and operation of the intraday electricity market* and Energy Regulator Order no 25/2004 for the approval of the *Wholesale Electricity Commercial Code*, in respect to the day-ahead market.

103 OPCOM's reply of 5 August 2013 to the SO, paragraph 95 et seq.

104 OPCOM's reply to the SO, paragraph 113 et seq.

105 OPCOM's reply of 5 August 2013 to the SO, paragraph 137 et seq.

purchased electricity. OPCOM argues that this gives EU traders an unfair competitive advantage.[106]

The Commission's assessment

(145) ***Regulatory framework:*** The Commission notes that the Court of Justice has ruled that regulatory provisions cannot have an 'exculpatory' effect if companies still enjoy discretion as to how to comply with these provisions.[107] The Court has for example clarified that anticompetitive pricing behaviour which had been approved by a national regulator did not remove the undertaking's liability under EU competition rules.[108]

(146) The fact that an undertaking is subject to regulatory supervision or that a given conduct was approved by a regulator does not impact the applicability of Article 102 of the Treaty as long as the undertaking could still act independently (i.e. as long as the behaviour in question was not imposed by the legislation).

(147) The evidence in the Commission's file described below shows that the VAT registration requirement does not derive from any legal obligation. Nor does the favourable opinion on OPCOM's Day-ahead and Intraday Conventions given by the Energy Regulator entail an obligation on OPCOM to impose the VAT requirement.

(148) The Commission notes that prior to the adoption in 2008 of the documents concerning OPCOM's function as counterparty to transactions on the Day-Ahead Market, the President of the Energy Regulator stated publicly: '*We have issued a favourable opinion to these* [procedures for the day-ahead market] *requests* [by OPCOM]. *This, however, does not mean that we have implicitly approved the proposals.'*[109]

(149) Recently, the Energy Regulator stated concerning a request by OPCOM for amendment of the Conventions: *'... the Energy Regulator shall deliver an opinion on the procedures (including participation Conventions) developed by the electricity market operator* [OPCOM], *thus confirming that they are compliant with primary and secondary legislation in the electricity sector. ... the opinion refers only to compliance with the law in the electricity sector.'*[110] This statement shows that the favourable opinion by the Energy Regulator does not constitute a formal approval of the Conventions producing legal effects and certainly cannot be viewed as an 'order' by the Energy Regulator to introduce the VAT requirement. The fact that a

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106 OPCOM's reply of 5 August 2013 to the SO, paragraph 146.

107 Judgment of 10 April 2008 in Case T-271/03 *Deutsche Telekom* v *Commission* (ECR 2008, p. II-477), confirmed on appeal by Judgment of 14 October 2010 in Case C-280/08 (ECR 2010, p. I-09555).

108 Judgment of 30 January 1985 in Case 123/83 *BNIC* v *Clair* (ECR 1985, p. 391, paragraphs 21-23); Judgment of 10 April 2008 in Case T-271/03 *Deutsche Telekom* v *Commission* (ECR 2008, p. II-00477, paragraph 107), confirmed on appeal in Case-280/08, paragraph 85.

109 Statement of the President of the Energy Regulator delivered on 2 February 2007.

110 Letter no. 46211/16.09.2013 of the Energy Regulator addressed to OPCOM concerning OPCOM's request to amend the Conventions on participation in the day-ahead market and intraday market not requiring any longer proof that the EU trader is established and registered for VAT purpose in Romania.

favourable opinion does not constitute an approval has been confirmed by the Romanian High Court.[111]

(150) The Commission also notes that OPCOM has at no time claimed that it would be precluded from submitting to the Energy Regulator an amendment to its Conventions removing the VAT requirement. Similarly, OPCOM has neither submitted that the Energy Regulator would not have issued a favourable opinion on the Conventions had they not included the VAT registration requirement.

(151) The Commission concludes that the VAT requirement was not imposed on OPCOM on the basis of any regulatory requirement. Nor does the Energy Regulator's favourable opinion on OPCOM's standard membership agreement containing the VAT registration requirement prevent the application of Article 102 of the Treaty, all the more so as the opinion did not even constitute a formal approval of the requirement (see recital (149)). Rather, the VAT requirement was imposed by OPCOM at its own discretion.

(152) The Commission therefore takes the view that OPCOM enjoyed a margin of discretion as to whether or not to impose a VAT registration requirement on participants to its Day-Ahead and Intraday markets, and that the subsequent approval of the requirement by the Energy Regulator cannot remove the VAT registration requirement from the scope of Article 102 of the Treaty.

(153) As regards OPCOM's argument that it is obliged to charge VAT under Romanian law, the Commission does not contest the fact that the amount invoiced by OPCOM to market participants must comprise the total value of electricity to which in principle VAT must be added. However, according to the Energy Regulator the '*content* [of invoices] *shall be in accordance with the legislation in force*'.[112] The relevant legislation in force is the Fiscal Code, under which invoices issued must include all items referred to in Article 155(19) therein, including VAT. The Fiscal Code also states that the charging of VAT depends on the place where the taxable dealer has established its business, i.e. if the taxable dealer has established its business in Romania VAT is payable in Romania, if the taxable dealer has established its business in a country outside Romania, VAT is payable in such other country but not in Romania.[113]

(154) Under the Fiscal Code OPCOM should therefore only issue an invoice with VAT if the customer has its place of business in Romania. In case of delivery of electricity by OPCOM to an EU trader the invoice shall be issued without applying VAT since

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111 Judgment of the Romanian High Court of Cassation and Justice No. 1923/2012: 'The opinion, irrespective of whether it is binding, consultative or optional, is not an administrative act, but rather a procedural operation, preceding the issuance of the act. It does not produce legal effects by its own.'

112 Energy Regulator Order no. 32/2011, Article 34 (1).

113 Transactions are subject to VAT in Romania where the place of supply is Romania according to the applicable rules (Article 2.1 (a) of the EU VAT Directive 2006/112/EC, as implemented by Article 126 (1) of Fiscal Code). For supplies of electricity to a 'taxable dealer', i.e. in this context a taxable person whose principal activity in respect of purchases of electricity is reselling those products and whose own consumption of those products is negligible, the place of supply is the place where that taxable dealer has established his business, by virtue of Article 38 of the EU VAT Directive 2006/211/EC implemented by Article 132 (1) (e) of the Fiscal Code.

the transaction is non-taxable in Romania pursuant to Article 132(1) (e) of the Fiscal Code.

(155) Finally, OPCOM's argument that the VAT requirement is a result of the electricity supply licence must also be rejected. The supply of electricity may be carried out in Romania by a foreign legal person on the basis of a licence granted by the Energy Regulator[114] or on the basis of a licence granted by the Energy Regulator of the Member State where it has its place of business, provided a mutual recognition of the licence exists between the two Member States.[115]

(156) In the absence of such mutual recognition, in order to obtain a licence from the Energy Regulator, a foreign applicant must submit the required documents indicated by the Regulation governing the award of licences (the 'Licensing Regulation').[116] The Licensing Regulation requires the applicant to have a Romanian address and to carry out its activities by means of appropriate staff and equipment, but it does not specify the location of this staff and equipment.[117] Consequently, it is clear that no permanent establishment in Romania is required by national law in order to obtain the license and, also, that is not necessary to show that the required resources of the applicant are located in Romania. In at least two cases, EU companies have obtained a supply license without having a permanent establishment in Romania and without Romanian VAT registration.[118] At the same time, OPCOM provided no evidence that any company was required to have a Romanian VAT registration or a permanent establishment in Romania in order to obtain an electricity supply licence.

(157) The Commission’s investigation has further shown that by virtue of the electricity licence and associated conditions, a holder of an electricity supply licence can act either as a wholesale supplier and/or a retail supplier.[119] That is to say that under the licence conditions, a foreign licence holder would not necessarily have to participate in Romanian electricity markets as a retailer, but could simply act as wholesale participant. For example CEZ a.s. obtained an electricity supply licence even though it had explicitly indicated to the Energy Regulator in its application that it envisaged exclusively wholesale activities.[120] The Commission's investigation has shown that an entity can obtain an electricity supply license without Romanian VAT registration.

(158) If a foreign license holder intended to act as a retailer it would be obliged to establish a permanent presence in Romania, in order to comply with the conditions imposed

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114 Article 9(1) of the Regulation for granting licences and authorisations in the electricity sector approved by Government Decision No. 540/2004 and subsequent amendments.

115 Article 8 (5) of the Regulation for granting licences and authorisations in the electricity sector approved by Government Decision No. 540/2004 and subsequent amendments.

116 *Regulation for granting licences and authorisations in the electricity sector* approved by Government Decision No. 540/2004 and subsequent amendments.

117 Article 15 (1) and Article 22 of the Regulation for granting licences and authorisations in the electricity sector approved by Government Decision No. 540/2004 and subsequent amendments.

118 For example see: CEZ a.s.' Power Supply Licence no.855/11.12.2008 and E.ON Global Commodities' Power Supply Licence no. 712/21.12.2005, as amended.

119 Minutes of conference call with E.ON Global Commodities' representatives on 21 August 2013 and 1 October 2013 and AFEER and CEZ Trade Romania' representatives on 1 October 2013.

120 The Energy Regulator's Assessment Report of CEZ a.s. application no.32125/7.11.2008 to obtain the electricity supply licence.

by the regulatory framework governing electricity retail activities, namely the Supply Regulation,[121] and consequently to register for VAT purposes in Romania. However, a foreign license-holder that only carries out wholesale activities is not subject to the Supply Regulation, which only governs electricity retail activities.[122]

(159) Electricity transactions on the Day-Ahead and Intraday markets which are concerned by this Decision are wholesale transactions and therefore are not subject to the Supply Regulation and hence are not subject to a VAT registration requirement.

(160) The VAT requirement is consequently not based on any regulatory measure but represents a decision which OPCOM took independently as an undertaking.

(161) ***Equal treatment***: As noted above, the fact that OPCOM's rules prevent access for EU traders to OPCOM's spot markets amounts to discrimination on grounds of nationality, which is prohibited under Article 102 of the Treaty. The Commission notes that discrimination may consist not only in treating similar situations differently, but also in treating different situations identically.[123] In this case EU traders are in a different situation to domestic traders, since EU traders necessarily already have an establishment registered for VAT in another EU Member State (their 'home' VAT registration). The fact that in order to access OPCOM's spot markets EU traders have to register for VAT and hence set up an additional establishment constitutes an additional burden and cost for EU traders in Romania, as compared to domestic traders and makes access to the Romanian market more difficult and costly for EU traders than for domestic traders.

(162) ***Costs***: Third, the Commission considers that this additional cost of setting up and operating an additional establishment may be substantial, in particular for smaller traders. According to EFET's estimate, the annual costs of having to trade from an establishment registered for VAT in Romania are between EUR 400 000 and 500 000.[124]

(163) The Commission notes that the exact amount of setting up and operating an electricity trading establishment in Romania is debatable but it is indisputable that it entails additional costs compared to a trader already registered in Romania.

(164) Furthermore, for large EU traders, the most important negative effect of having to comply with the VAT registration requirement (and hence of having to set up an establishment in Romania) results from the inefficiencies created by the need to separate trading activity and centralised support functions which constitutes a significant competitive disadvantage. Energy trading companies normally operate on the basis of a central trading desk and do not deploy traders to individual markets. Trading companies are generally reluctant to set up new trading centres and thus to

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121 Regulation for electricity supply to consumers approved by Romanian Government Decision No 1007/2004

122 Article 3 of the Supply Regulation reads: '*This Regulation shall not apply to transactions on the wholesale electricity market.*'

123 Judgment of 17 July 1963 in Case 13/63 *Italy* v *Commission* (ECR 1963, paragraph III.4.a)

124 EFET's reply of 26 March 2012 to questions raised by DG Competition on 15 February 2012, Annex 3, *Calculation potential Romanian subsidiary*; see also p. 6 of EFET's reply dated 9 October 2013 to the Commission's RFI of 1 October 2013; CEZ note of telephone conversation of 1 October 2013.

separate the trading activity from centralised support functions (e.g. finance, legal, IT). Such separation creates inefficiencies in the form of increased coordination and administration requirements resulting in higher costs. As a matter of fact, E.ON has indicated that the optimisation of its trading portfolios on a European-wide basis is only possible via centralised trading, and that it regards the centralised trading model as a more appropriate model in terms of risk-management and management of contractual relations.[125]

(165) In a complaint addressed to OPCOM, E.ON explained that '*structures would have to be established for accounting purposes, payment of taxes, audit, crediting risks would have to be taken into account …. In short, the requirement to set up a decentralized structure entails the loss of synergy effects and, at the same time, a time consuming coordination process.'*[126]

(166) With respect to OPCOM's argument that any company holding a supply license would in any event have to set up an office in Romania, the Commission notes that the Romanian Energy Regulator can and has awarded an electricity supply licence to a company based in another EU Member State that met, outside Romania, the resources and personnel requirements stipulated in the licence conditions (see recital (157) and footnote 120). It is therefore not necessary for the company in question to demonstrate that it has such resources in Romania (see section 5.1.).

(167) The VAT requirement, therefore, created significant costs and disadvantages for EU traders which they would not in any case have incurred as a result of obtaining the electricity supply license.

(168) ***Competitive advantage***: Finally, concerning the alleged competitive advantage that would be enjoyed by EU traders if they did not have to register for VAT in Romania, the Commission notes that as the electricity is purchased on the Day-Ahead and Intraday Markets, it will be delivered the following day, and has to be resold to other traders and ultimately to end-users quickly. The domestic purchaser on OPCOM will therefore only have to finance this VAT briefly when reselling on the domestic wholesale market. The competitive disadvantage that a domestic purchaser would suffer on that market as compared to an EU trader reselling on the same market (but that has not had to pay out VAT on its purchases) is therefore only limited. The domestic purchaser that resells on the retail market in Romania may take longer to recover the VAT due to the nature of the market, but in any event they do not compete on the retail market with EU traders. It is also worth noting that EU traders are not overall exempted from VAT when buying from a Romanian seller, but have to pay VAT to the tax authorities in their country of residence under the reverse charge mechanism (see recital (69)). In addition, if such competitive advantage for EU traders were to exist, Romanian traders would in any case benefit from the same advantage in countries other than Romania under similar circumstances. More importantly, any competitive disadvantage that may result from the fact that an EU trader would not need to pay VAT on purchases, would result from the tax laws in

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125 Minutes of the conference call with E.ON Global Commodities on 21 August 2013 and 1 October 2013.

126 OPCOM's reply of 12 June 2012 to the Commission's RFI of 11 May 2012, Annex 37, *Letter addressed by E.ON ENERGY TRADING SE to SC OPCOM SA* and registered by the latter under No 17545 of 14 December 2011.

force. It is not OPCOM's role to eliminate through private restrictions any alleged or perceived discrimination.

(169) OPCOM's argument that the VAT registration requirement does not represent a disadvantage for EU traders, but on the contrary, its absence would give them a competitive advantage as compared to Romanian traders, therefore, has to be rejected.

(170) Consequently, the Commission takes the view that OPCOM's conduct in requiring all participants of the Day-Ahead Market and the Intraday Market to obtain a Romanian VAT registration amounts to an abuse of its dominant position on the relevant market.

7.2. Impact on competition and consumers

(171) Article 102 of the Treaty prohibits practices which may cause prejudice to consumers directly and those which are detrimental to them through their impact on an effective structure of competition, as laid down in Article 3(1)(g) EC [now 3(1)(b) TFEU].[127] The Court has held that '*competition rules laid down in the Treaty … aim to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such*'.[128]

(172) In the context of assessing behaviour that tends to exclude competitors from the market, and consequently the structure of competition in the market, the Court of First Instance has ruled that, '*for the purposes of establishing an infringement of Article 82 EC* [now 102 TFEU]*, it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect.*'[129]

(173) Commission's practice in relation to abuses of dominance that exclude market players from the market is, in line with the case-law cited above, to show that the behaviour tends to distort competition on the relevant market, on an upstream or a downstream market, or that the behaviour is capable of having that effect. It is not necessary for the Commission to demonstrate the actual effects of the behaviour in question. Further, where behaviour raises barriers to trade between Member States and consequently to the internal market by discriminating against trading partners on

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127 Judgment of 15 March 2007 in Case C-95/04 P *British Airways* v *Commission* (ECR 2007, p. I-02331, paragraphs 106-107); Case 6/72 *Europemballage and Continental Can* v *Commission* (ECR 1973, p. 215, paragraph 26). Indeed Article 3 TFEU mentions now as one of the aims of the European Union only the achievement of the internal market, however the achievement of the latter according to the Protocol 27 includes the protection of undistorted competition.

128 Judgment of 6 October 2009 in Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C 519/06 P *GlaxoSmithKline Services and Others* v *Commission and Others* (ECR 2009, p. I-09291, paragraph 63). See also judgment of 4 June 2009 in Case C-8/08 *T-Mobile Netherlands and Others* (ECR 2009, p. I-04529, paragraphs 38-39).

129 Judgment of 17 December 2003 in Case T-219/99 *British Airways* v *Commission* (ECR 2003, p. II-05917, paragraph 293); and Judgment of 9 September 2009 in Case T-301/04 *Clearstream* v *Commission* (ECR 2009, p. II-03155, paragraph 144). See also: C-549/10 P - *Tomra and Others* v *Commission* (not yet published), paragraphs 68 – 79.

grounds of nationality, the Commission considers that the behaviour restricts competition within the internal market.

(174) In the current case, the VAT registration requirement imposed by OPCOM is capable of distorting competition on the market for the wholesale supply of electricity. It creates an artificial barrier to market entry for electricity traders and in turn reduces liquidity on the wholesale electricity market.

(175) For instance, the VAT registration requirement prevented the trader E.ON Energy Trading SE from joining the power exchange[130] as well as JAZ Budapest Zrt., Gazprom Marketing And Trading Limited, EDF Trading Limited.

(176) Liquid markets provide transparent and reliable price signals. Liquidity gives participants the confidence that they can purchase and sell electricity at prices that reflect underlying demand and supply conditions. This fosters competition and puts downward pressure on retail energy prices. Conversely, lack of liquidity may deter market entrance (at wholesale and downstream level) and inhibit the development of effective competition on the electricity markets in general.

(177) Liquidity and more generally the functioning of electricity markets benefit from a large number of participants at the wholesale level. Having more traders on the power exchange means that more bids and offers are made. This facilitates the conclusion of transactions and the determination of the equilibrium price for electricity.

(178) Exchange-based trading results, such as prices, volumes and number of contracts are systematically made available on public websites. Consequently, the electricity exchange is the primary (if not the only) source of reliable price signals for detecting potential security of supply or generation adequacy problems. It provides a public price index which can be used as reference price for most contracts traded on wholesale electricity market. In the long term, distorted electricity prices, resulting from unequal, discriminatory access of participants to the power exchange, provide the market with wrong signals and thereby lead to inefficient investment. Due to the increased risk of inefficient investment, electricity consumers are more likely to pay higher prices.

(179) In this case, removal of the discriminatory VAT registration requirement would abolish an entry barrier and therefore ease market entry. The number of potential entrants, the entry of which could materialise were OPCOM's participation requirements non-discriminatory, is significant. On power exchanges in comparable markets (e.g. Hungary, Czech Republic), over 50 % of the participants are foreign traders without local VAT registration.[131]

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130 OPCOM's reply of 12 June 2012 to the Commission's RFI of 11 May 2012, Annex 37, Letter addressed by E.ON ENERGY TRADING SE to SC OPCOM SA and registered by the latter under No 17545 of 14 December 2011.

131 According to EFET, HUPX in Hungary has 59 % foreign members (23 out of 39 market participants) and PXE in the Czech Republic has 55 % foreign members (18 market participants with Czech VAT domicile and 24 with foreign VAT domicile), EFET's reply of 26 March 2012 to Questions raised by DG Competition dated 15 February 2012. The fact that according to OPCOM only 4 applications /

OPCOM's position

(180) In its reply to the SO OPCOM argues that the E.ON Group, to which E.ON Energy Trading SE belongs, in fact does participate on the Romanian spot markets through its subsidiary E.ON Energie Romania SA.

(181) Further, OPCOM argues that the number of foreign-controlled companies that are registered on OPCOM's spot markets has increased significantly since the VAT registration requirement was introduced in 2008, so that there is no impact on competition resulting from the VAT registration requirement.

Commission's Assessment

(182) E.ON has confirmed that its strategy is normally to carry out wholesale trading activities through its centralised trading operation in Germany (see recitals (164) - (165)). E.ON stated that since it has not been able to register the centralised trading operation (i.e. E.ON Global Commodities) on OPCOM, it does not carry out wholesale trading activities in Romania. However, E.ON Energie Romania SA, which is a member of OPCOM's spot markets, purchases electricity for its retail business on the spot market in Romania. It does generally not carry out any wholesale trading.[132] As described above (paragraph 158), foreign license holders intending to act as a retailer are obliged to establish a permanent presence in Romania and consequently to register for VAT purposes in Romania.

(183) The Commission notes that the CEZ Group, contrary to the E.ON Group, has in fact incurred the costs of setting up a trading subsidiary in Romania and is present on the spot markets via that trading subsidiary. Its Romanian retail business, CEZ Vanzare SA is also a member of the spot markets, in order to meet the needs of its retail business.[133] Indeed all companies that are active in retail supply in Romania, and have obligations as supplier of last resort, are required by law to be present on the spot markets in order to balance their position.[134]

(184) Therefore, companies that are active in retail supply in Romania in any event have a Romanian VAT registration due to their retail business activities in Romania and are present on OPCOM's spot markets in their capacity as retailers. Such companies typically carry out wholesale trading through a separate trading entity. E.ON decided to stay out of spot trading in Romania altogether as a result of the VAT registration requirement, while CEZ decided to enter the market but had to incur the costs of setting up a permanent establishment in Romania.

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requests for changes of fiscal residence by EU-traders were received after OPCOM had informed traders about the recent changes of the law in relation to VAT in September 2013 (see OPCOM's reply to the Letter of Facts, para. 49) is no evidence to the contrary since market participants may e.g. wait for a formal change of OPCOM's Conventions for the sake of legal certainty or may need some time to consider or prepare their market entry.

132 Minutes of conference call with E.ON of 1 October 2013.

133 Minutes of conference call with CEZ of 1 October 2013.

134 Order of the Energy Regulator no.30/2012, Methodology for establishing prices and tariffs for electricity sold to consumers who do not exercise their eligibility rights, Article 5(1) (previously Order of the Energy Regulator no. 133/2008).

(185) In relation to OPCOM's argument that the number of foreign-controlled companies registered on OPCOM's spot markets has increased since 2008 the following should be noted: first, such increase does not contradict the fact that the VAT requirement was at least capable or likely to have had negative effects. Second, the Commission notes that this increase in the number of foreign-controlled traders registered on OPCOM's spot markets is likely to have been affected by the obligation (since 2009) imposed on all state-owned producers of electricity (which represent 90% of Romanian production), to sell their production exclusively on OPCOM, and the obligation (since end of July 2012) of all transactions in electricity for delivery in Romania to take place on OPCOM.

7.3. Objective justification and efficiencies

(186) For the assessment as to whether OPCOM's VAT registration requirement constitutes an abuse of dominance within the meaning of Article 102 of the Treaty, the Commission must consider the arguments put forward by OPCOM that its behaviour is justified.

(187) While the burden of proving the existence of an infringement lies with the Commission,[135] it is for the undertaking concerned to raise any objective justification or efficiencies arguments and to support these arguments with evidence.[136]

(188) For instance, in the *Aéroports de Paris* judgment, the Court held with regard to the policy of the airport manager ADP that '*the Commission was justified in inferring from the difference in rates of the fees demanded from the ground-handlers by ADP that ADP was imposing discriminatory fees, unless it justified that difference in treatment by objective reasons.*', and '*in the event of disparity, it is for ADP to justify the reasons for and correctness of the differences in the rates of fee applied to different groundhandlers operating at Orly and Roissy- CDG airports*.'[137]

(189) The Court has also held in Tetra Pak II as regards Tetra Pak's differential pricing of machines that '*in the absence of any argument by the applicant which might provide objective justification for its pricing policy, such disparities were unquestionably discriminatory*'.[138]

(190) The Commission's role is to assess the arguments put forward by OPCOM in order to verify whether they could amount to an objective justification for the behaviour in question. The Commission must consider whether OPCOM's behaviour was

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135 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Article 101 and 102 TFEU], OJ L 1, 4 January 2003, recital 5 and Article 2.

136 Judgment of 30 September 2003 in Case T-203/01 *Michelin* v *Commission* (ECR 2003, p. II-04071, paragraphs 107-109); judgment of 17 September 2007 in Case T-201/04 *Microsoft v Commission* (ECR 2007 p. II-3601, paragraph 688); judgment of 27 March 2012 in Case C-209/10 *Post Danmark A/S v Konkurrenceradet*, paragraph 41.

137 Judgment of 12 December 2000 in Case T-128/98 *Aéroports de Paris* v *Commission* (ECR 2000, p. II-3929, paragraphs 201-202).

138 Judgment of 6 October 1994 in Case T-83/91 *Tetra Pak International* v *Commission* (ECR 1994, p. II-755, paragraph 207)

necessary and proportionate, and in particular whether it restricts competition more than is necessary to achieve the objective sought by the undertaking.[139]

(191) OPCOM brought forward the following main arguments to justify the VAT registration requirement:

(a) that there is a risk of criminal charges against OPCOM in case it does not collect VAT;

(b) absent the VAT registration requirement, OPCOM would be faced with a cash-flow mismatch which it would not be able to finance.

(192) The Commission considers that none of those arguments are founded for the reasons below.

7.3.1. Risk of criminal charges against OPCOM if it does not collect VAT

OPCOM's position

(193) OPCOM submits that retailers of electricity are required by law to have a permanent establishment and a VAT registration in Romania. Since the electricity supply license does not differentiate between retail and wholesale electricity trading, OPCOM is in practice forced to ask all participants in the spot market for a VAT registration. OPCOM argues that it would be at risk of criminal charges in the event that it did not collect VAT from participants, e.g. on the assumption that participants are wholesalers whereas they in fact operate as retailers via a permanent establishment in Romania. OPCOM states that: '*In case OPCOM fails to apply the 24 % of VAT on the electricity sold to participants, it would risk being subject to control for tax evasion with potential financial and even criminal consequences*.'[140]

Commission's Assessment

(194) The Commission cannot accept this argument. In order to comply with its VAT obligations, OPCOM would not have to identify whether its participants are retailers or wholesalers, but it would only have to verify whether they have a permanent establishment in Romania or abroad. (see recital (155)).

(195) All traders have to submit to OPCOM, among other information, their name and address, their license and their VAT-number. In this way, OPCOM is provided with information by the trader as to whether the trader is liable to pay VAT in Romania or not.[141] OPCOM has not provided any evidence which would show that it would be liable for fraud committed by Romanian traders pretending not to have a permanent establishment in Romania and providing a wrong address, license and VAT number in order to avoid VAT payments to OPCOM. Insofar as OPCOM has an obligation to

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139 Opinion of Judge Kirschner acting as AG in Case T-51/89 *Tetra Pak Rausing SA v Commission* (ECR 1990, p.II-309, paragraph 68 et seq.)

140 OPCOM's reply to the SO, paragraphs 104, 105 and OPCOM's presentation at the Oral Hearing: *Application of Article 102 TFEU to OPCOM's conduct*, slide 17.

141 The VAT number issued by any Member State may be easily checked on the VIES website http://ec.europa.eu/taxation_customs/vies/?locale=en

verify the information provided by the traders, this obligation cannot justify a VAT registration requirement for foreign traders. At most it could justify stricter requirements regarding proof of permanent establishment to be submitted by traders who claim not to fall under Romanian VAT-rules.

7.3.2. Exposure of OPCOM to a potential cash-flow mismatch

OPCOM's position

(196) OPCOM argues that Romanian VAT registration is necessary and justified for the Day-Ahead Market and the Intraday Market given that on these markets OPCOM acts as a central counterparty, is responsible for the correct and timely settlement of all transactions and – without the VAT requirement - would be required to pre-finance large VAT amounts in case of transactions involving EU traders during a considerable period.

(197) According to OPCOM, traders controlled by entities established in other EU Member States, which are active on the Romanian power exchange, carry out more purchase than sale transactions on the spot markets, which means that if such traders were not subject to VAT in Romania, OPCOM would have to pay out more VAT on transactions than it collects, and would have to seek reimbursement of the difference from the Romanian authorities. According to information submitted by OPCOM, in Romania VAT reimbursement takes a minimum of 35 days and a maximum of 170 days. Absent the Romanian VAT registration requirement, OPCOM would therefore be required to finance the net difference between VAT received and paid during that period. OPCOM submitted that the difference amounted to EUR 30.2 million in 2011 and EUR 54 million in 2012. That amount is several times higher than its turnover, and OPCOM would be unable to finance this difference (the 'VAT mismatch') during the period of up to 170 days pending reimbursement of the VAT by the Romanian tax authority.[142]

Commission's Assessment

(198) The Commission assessed whether the VAT registration requirement imposed by OPCOM to resolve its alleged inability to finance a potential VAT mismatch (applied to sale and purchase transactions invoiced) was necessary and proportionate to achieve the objective sought. For the reasons set out below, the Commission does not consider that OPCOM has demonstrated that it was not possible to find an alternative way to deal with the potential VAT flow mismatch, which is less restrictive of competition. Further, OPCOM has not demonstrated that it is unable (together with Transelectrica) to finance a potential cash-flow mismatch.

The reasons for OPCOM's potential cash-flow mismatch

(199) The mismatch which could occur without OPCOM's VAT registration requirement results from the fact that OPCOM acts as central counterparty on the spot market. OPCOM thereby acts as an intermediate trader buying the electricity from every

[142] OPCOM's reply of 12 June 2012 to the Commission's RFI of 11 May 2012, p. 22-23.

seller and selling it subsequently to every buyer on the spot market. The transactions OPCOM undertakes have the following VAT implications:

(a) *OPCOM's purchase of electricity from a Romanian seller*: If OPCOM purchases electricity from a seller that has a VAT-registration in Romania, it must pay VAT to the seller. Both parties to the transaction have their place of establishment in Romania. The transaction would therefore be purely domestic and the VAT paid to the seller would ultimately have to be transferred to the Romanian tax authority by the seller.

(b) *OPCOM's purchase of electricity from a foreign seller*: If OPCOM purchases electricity from a seller established in another EU Member State it would not pay VAT to the seller, since OPCOM is not subject to VAT in the country where the seller has its fixed establishment. The Romanian tax authorities will receive VAT from OPCOM, unless OPCOM sells the purchased electricity to a buyer outside of Romania (see recitals (58) to (61) as well as (69)).

(c) *OPCOM's sale of electricity to a foreign buyer*: If OPCOM sells electricity to a buyer established in another Member State, the price which the buyer has to pay to OPCOM will not include VAT, since the foreign buyer is not subject to VAT in Romania but instead will pay VAT in its country of establishment (see recitals (58) to (61) as well as (69)).

(d) *OPCOM's sale of electricity to a Romanian buyer*: If OPCOM sells electricity to a buyer established in Romania the price the buyer has to pay to OPCOM will include VAT. OPCOM subsequently transfers this VAT to the Romanian State.

(200) A negative VAT mismatch for OPCOM may occur in particular if a third party buyer has its place of establishment in a Member State other than Romania. This would result in a (temporary) negative cash-flow mismatch for OPCOM, since while being obliged to pay VAT to the Romanian seller, OPCOM would not be able to collect VAT from the foreign buyer of electricity on the spot market, hence OPCOM would have to recover the VAT it paid from the Romanian tax authorities.

(201) If EU traders (with no establishment for VAT purpose in Romania) bought more electricity on the Romanian spot market from Romanian participants than they sell to Romanian participants, the net temporary negative mismatch would increase.

(202) OPCOM is not a final consumer, thus it is entitled to request a refund in case its input VAT exceeds its output VAT from the Romanian tax authority.[143] Such refund may be requested at the latest on the 25th day of the month following the one in which the transaction was carried out on the spot market. The period between the transaction and the application for refund may therefore take up to approximately 55 days. According to the Romanian Fiscal Code the refund should occur within 45

[143] European Commission, *VAT in the European Community – Romania*, October 2010, as published under http://ec.europa.eu/taxation_customs/resources/documents/ taxation/vat/traders/vat_refunds/2010/ vademecum-refund-romania_2010_en.pdf, paragraph 40.

days from the submission of the file to the tax authority by the applicant.[144] OPCOM reports that in practice the refund is delayed in many cases and claim that a refund may take up to 170 days from the day of the transaction.[145]

(203) For the sake of completeness, it should be noted that a positive cash-flow mismatch in favour of OPCOM would occur if EU traders sell more electricity on the Romanian spot market than they buy, since the price which OPCOM has to pay will not include VAT while OPCOM will receive VAT if it sells electricity to a buyer established in Romania.[146]

The level of the mismatch

(204) During the Oral Hearing, OPCOM estimated the potential mismatch at EUR 54 million on the basis of trading activities in 2012 and at approximately EUR 30 million for 2011. However, the Commission considers that these figures significantly overstate the level of the potential VAT mismatch.

(205) First, as subsequently confirmed by OPCOM these figures do not take into account the rolling refund that OPCOM would be receiving from the State.[147] The figures were calculated by simply aggregating the potential VAT mismatch on the basis of the transactions which have been concluded by all foreign-controlled participants on the spot market. The VAT refund by the Romanian State paid out to OPCOM was not deducted from this sum. A corrected calculation provided by OPCOM for 2011 shows a potential VAT mismatch of EUR 22 million under the assumption that the refund would occur nine months[148] after the month of the respective transaction and of EUR 12 million under the assumption that the refund would be made within the legal deadlines (after three months).[149]

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144 See Government Ordinance No 92/2003 and subsequent amendments regarding the Fiscal Procedure Code, article 70 and Public Finance Minister's Orders no.263/2010 and 2.017/2011 for the approval of the Procedure concerning the settlement of VAT refund applications claimed by taxable persons, Chapter I Letter B point 6.

145 Article 70 of the Fiscal Code; see submission by OPCOM of 25 March 2013, points 5.1 and 5.2.

146 This mismatch would, however, be as a tendency of shorter duration since it would only exist until the point in time when OPCOM has to transfer the collected VAT to the Romanian tax authority. In principle, the same date applies as for a request for a refund. The collected VAT has to be transferred on the 25th of the month after the one in which the transaction took place. The positive mismatch could therefore last only at maximum 55 days, whereas the negative mismatch should normally (in case of no delay of refunding) last no more than maximum 100 days in total.

147 Reply by OPCOM to the Commission's RFI of 2 October 2013, question 2a.

148 The legal deadline for a refund is 45 days after the claim for refund has been made. The claim can be made at the latest on the 25th day of the month following the transaction. OPCOM claims that in reality the State is late with refunds by up to 180 days or even more. The statistics provided by OPCOM (see presentation at the Oral Hearing 'Overview of the regulatory and Fiscal Framework', slide 29) show that the deadline of 45 days for refunds was exceeded in the past in a significant number of cases. However, in the years 2009-2012, the large majority of refunds took place within the 180 days. Only in the first half of 2013 the majority of refunds were made later than 180 days. OPCOM's assumption that all refunds take place only 9 months following the month of transaction is therefore a calculation which is very favourable for OPCOM since many refunds might in reality take place earlier, i.e. within the 180 days and hence less than 6 months).

149 Reply by OPCOM to the Commission's RFI of 2 October 2013, question 2a.

(206) Second, the potential mismatch figures submitted by OPCOM are based on a 'worst case scenario' which would only occur if – without OPCOM's VAT requirement - all current participants that are foreign-owned/controlled (and even including those who are Romanian companies, but have subsidiaries abroad[150]) would decide to give up their Romanian trading establishment and instead purchase electricity via their headquarters or a subsidiary located in another Member State. This is, however, not necessarily what would occur, in particular for those companies that are retailers in Romania and which would in any event retain their Romanian VAT registration due to their electricity retail activities in Romania (see the E.ON and CEZ examples at recital (182) and (183)).

(207) Indeed, foreign-controlled retailers would not be able to balance their position on the spot market via a trading company located abroad, even one belonging to the same corporate group. By law[151], retailers which act as suppliers of last resort are obliged to purchase themselves the electricity necessary to balance their position (i.e. to make short-term adjustments to their electricity portfolio) in order to supply the needs of end customers on the regulated segment of the market. This means that for this part of their business foreign-controlled retailers would in any case have to purchase electricity directly from the spot markets and could not shift this purchasing activity to a foreign trading branch. Such retailers can therefore not be counted into the potential VAT-mismatch since they are established in Romania and they could not use their trading subsidiary established abroad.

(208) In addition, since the creation of OPCOM's legal monopoly in July 2012 the risk and level of the potential mismatch has been reduced significantly. Since July 2012 all electricity trading has to go via OPCOM, including intra-group transactions. The only exception to the rule that all electricity transaction have to go via OPCOM relates to import and export transactions which – on the basis of a letter from the Energy Regulator – may be concluded bilaterally between two traders without the involvement of OPCOM.

(209) Since the changes implemented in July 2012, due to the short-term nature of transactions on the spot market and due to the fact that only one auction takes place per day (on each market), it is difficult for traders to buy and resell electricity on the spot market (although they can for instance buy on OPCOM's centralised bilateral markets and resell on the spot market). This means that the majority of purchases on the spot market are made by retailers (which necessarily have a VAT registration) which need the purchased electricity in order to supply end users. Since the volume of purchases by traders on the spot market is significantly reduced (broadly limited to wholesale transactions in electricity that is subsequently exported), the potential negative VAT mismatch is also significantly reduced.

(210) On this basis, OPCOM would in 2012 have been likely to arrive even at a cash-surplus due to the VAT refunds in the second half of 2012 (for the previous months)

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150 OPCOM included in its calculation of the potential VAT mismatch also TINDMAR S.A. which has its headquarters in Romania and subsidiaries abroad. OPCOM apparently assumes that also such a Romanian company would reorganise its trading on the Romanian spot market to a foreign subsidiary once the VAT requirement were to be dropped, which however seems unlikely.

151 Idem footnote 134

while not facing any significant monthly negative potential VAT mismatch as of July 2012.[152]

Inability of OPCOM to finance the potential VAT (cash flow) mismatch

(211) OPCOM submits that, considering its small revenues, it would not be able to obtain a loan of several million Euros to cover the costs of the mismatch. The ability of OPCOM to obtain such a loan would depend in particular on the readiness of the Energy Regulator to cover the financing costs when assessing the cost basis for OPCOM's regulated fee. Since OPCOM does not set or obtain fees for its facilitating services but instead receives a regulated fee and has its costs approved by the Energy Regulator, OPCOM's ability to obtain a loan should be assessed in combination with the Energy Regulator's ability to adapt OPCOM's cost basis.

(212) The Commission considers that a loan covering a 'worst case' mismatch of EUR 22 million (as submitted by OPCOM for 2011, and assuming a refund by the Romanian state delayed by nine months, (see recital (205)) would have given rise to interest payments of up to an estimated EUR 1.6 million for that specific year.[153] In case of a timely refund, a mismatch of EUR 12 million would have to be covered with a maximum estimated financing costs of EUR 0.8 million. The Commission also notes that OPCOM would be entitled to recover interest on the outstanding amount from the national tax authority, which would reduce its financing cost.[154]

(213) For the reasons set forth below, the Commission considers that OPCOM neither demonstrated that the VAT registration requirement was necessary nor proportionate to address the potential VAT mismatch; in particular, OPCOM did not demonstrate that no less restrictive options were available.

OPCOM did not contact the Energy Regulator to find alternative solutions

(214) First, OPCOM has not submitted any evidence showing that it contacted the Energy Regulator or made any formal request to the Energy Regulator to take account of these financing costs when determining OPCOM's revenue. The Commission considers that the Energy Regulator would in the normal course of events take account of a legitimate cost to be incurred by OPCOM. The fee revenues allocated by the Energy Regulator to OPCOM are currently covered by a fee paid by all energy suppliers in Romania. To date, the Energy Regulator has approved OPCOM's costs of up to approximately EUR 4 million.[155]

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152 In this scenario, OPCOM would only receive refunds for the last six months without having to pay out any VAT on the basis of a VAT-mismatch.

153 Assuming an interest rate of 7 %.

154 Article 124(1) of the Fiscal Procedure Code.

155 OPCOM had annual revenues in the recent years of between 3.7 and 4.2 million Euro and profits of approximately 0.5 million Euro. On that basis the Commission concludes that, the Energy Regulator approved costs of up to almost EUR 4 million. The Commission notes that an increase in OPCOM's costs need not necessarily be met by an increase in the fee paid by electricity suppliers. It would be possible to change to a system in which OPCOM charges fees to the traders for its facilitating services (e.g. per transaction) instead of covering its costs via fees payable by all electricity suppliers and ultimately by all electricity consumers in Romania.

OPCOM's parent Transelectrica could have financed the temporary mismatch

(215) Second, OPCOM is a fully owned subsidiary of Transelectrica, which is a company of significant size, with a turnover of EUR 610 million in 2012. The Commission considers that Transelectrica would have been in a position to finance the temporary negative cash-flow mismatch or to provide a guarantee in favour of OPCOM for a loan. The Commission does not consider that this would give rise to a conflict of interest for Transelectrica, as suggested but not further explained by OPCOM.[156]

OPCOM and Transelectrica could have created a fiscal group

(216) Third, the creation of a fiscal group between OPCOM and Transelectrica would in all likelihood have removed the problem of the potential negative VAT mismatch since OPCOM's VAT exposure would be subsumed into Transelectrica's. OPCOM submits that the creation of a fiscal group was suggested by OPCOM to Transelectrica by letter of 19 January 2012 but not accepted by Transelectrica on grounds that it was unwilling to incur any costs or risks and that it already uses own VAT refund claims to clear its own payment obligations (tax on profits) (letter of 17 July 2012).[157] The Commission does not consider that the grounds put forward by Transelectrica for not proceeding with the creation of a fiscal group are relevant. Transelectrica did not substantiate that a fiscal group would not be possible or create significant risks or costs for Transelectrica but only indicates that a fiscal group would not be desirable for Transelectrica. The Commission does not consider that in its letter of 2 August 2012 ANRE specifically endorsed the position taken by Transelectrica, as claimed by OPCOM.[158]

Other power exchanges are able to deal with the negative VAT mismatch

(217) Fourth, the Commission notes that no other power exchange in the EU imposes a local VAT registration requirement in order to avoid a potential negative VAT (cash flow) mismatch which further illustrates that less restrictive alternatives are available.[159]

(218) The Czech power exchange, operated by OTE, also registers a VAT mismatch whenever foreign traders buy electricity on the spot markets. Although the Czech Republic is a net exporter of electricity, OTE does not require foreign traders to register for VAT in the Czech Republic. In order to reduce the potential negative mismatch, OTE provides in its general business terms for the possibility that it would pay to Czech sellers of electricity the VAT component of the price only on the day when those sellers have to transfer the VAT to the tax authority (at the latest on the 25th of the month following the one in which the transaction took place). The price excluding VAT would be paid within the normal settlement period, i.e. within two days after the transaction. Normally, however, OTE covers through its own revenues

156 Reply by OPCOM to the Statement of Objections, 5 August 2013, paragraph 164.
157 Reply by OPCOM to the Letter of Facts, 6 January 2014, Annex 3.
158 Reply by OPCOM to the Letter of Facts, 6 January 2014, sub-Annex 3.5.
159 EFET, Submission to DG Competition on 1 February 2013, p.2.

the costs resulting from a negative VAT mismatch generated by EU traders buying electricity on its spot markets.[160]

(219) OPCOM argues that the Romanian regulatory framework precludes OPCOM from postponing VAT payment and using the Czech model. OPCOM claims that it must settle the net purchase price of the transaction, including VAT, within two working days of the day of transaction.

(220) The Commission notes that there is no indication in the Commission's file of the existence of such obligation on OPCOM, other than OPCOM's own submissions which did not make reference to any specific legal tax provision. Neither is the Commission aware of any legal provision to that effect in the national tax legislation. Commission notes that for the supply of goods, VAT is to be charged on the date when the invoice is issued, but no later than on the 15th day of the month following the month in which the supply took place. The same rule is valid for intra-community acquisitions. As concerns settlement on the day-ahead market, OPCOM refers to the Commercial Code of the Electricity Wholesale Market. The provisions thereof stipulate that the settlement administrator (i.e. OPCOM) credits or debits the value of a transaction by adding any applicable tax, including VAT. Payment is required within maximum seven banking days. Since EU traders are not subject to VAT in Romania, the Commission considers that OPCOM errs in arguing that it must settle the net purchase price of the transaction, including VAT, within two working days.

(221) The Hungarian power exchange HUPX outsources its central counterparty role to European Commodity Clearing AG, based in Leipzig, which provides clearing services for the power spot market transactions concluded on HUPX.[161] Under this system the negative VAT mismatch situation is less likely to arise due to the fact that most transactions become cross-border transactions for settlement purposes and the reverse charge mechanism (see recital (69)) applies both to purchase and sale transactions (with the only exception of those transactions conducted by traders with a fixed establishment in the country of the clearing house[162]).

(222) In its reply to the Letter of Facts, OPCOM argues that it cannot outsource its central counterparty role as most of the European power exchanges have done. It argues that this is because OPCOM has been entrusted by ANRE with the central counterparty role by secondary legislation.[163]

(223) The Commission considers that OPCOM has not shown that the options chosen by other power exchanges were unavailable to it. First of all, it is not clear that the provisions in the relevant secondary legislation which define OPCOM's role as central counterparty would also prohibit any outsourcing of the clearing function which would then be done by a clearing house on behalf of OPCOM. The Commission notes that, although it may appear that most of the power exchanges in the EU have outsourced clearing services to other Member States, in fact such

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160 Minutes of the conference call with OTE of 26 April 2013.

161 See the website of European Commodity Clearing AG: http://www.ecc.de/en/about-ecc

162 For this reason, clearing houses often choose a country in which not many traders active on the relevant exchange have their fixed establishment.

163 OPCOM's reply of 6 January 2014 to the Letter of Facts, paragraph 62.

services are provided in many cases by either a subsidiary established in the same Member State[164] or by the power exchanges themselves. In some cases, the central counterparty subsidiary is abroad. For example, European Commodity Clearing AG (ECC), fully owned by the European Energy Exchange AG (EEX), has set up a subsidiary based in Luxembourg for the purpose of eliminating the potential cash flow mismatch.[165] The above examples show that alternative and less restrictive options are available to address a VAT mismatch.

Conclusion on OPCOM's alleged inability to finance the potential VAT mismatch

(224) OPCOM has failed to demonstrate that the VAT registration requirement for EU traders was a necessary and proportionate solution to the potential negative VAT mismatch.

(225) OPCOM has not demonstrated that the cost of financing a loan or an overdraft facility to cover the potential VAT mismatch could not have been met by requesting the Energy Regulator to cover OPCOM's costs when determining the amount of its fee. Neither OPCOM nor Transelectrica have demonstrated why Transelectrica could not have financed a loan or created a fiscal group with OPCOM which would have removed or reduced the potential VAT mismatch.

(226) The fact that less restrictive alternatives are available is further evidenced by the fact that none of the other EU power exchanges applies a similar requirement but have dealt with the issue in other ways.

(227) It follows that OPCOM's alleged inability to finance the potential negative VAT mismatch cannot be regarded as an objective justification.

7.3.3. No efficiencies

(228) OPCOM has not demonstrated that the VAT registration requirement creates benefits to consumers which would outweigh its negative effects on competition.

7.3.4. Conclusion

(229) The Commission considers that OPCOM has failed to demonstrate that the introduction of a discriminatory VAT registration requirement for EU traders was objectively justified or resulted in any efficiencies.

7.4. Conclusion on the abusive behaviour

(230) For the reasons set out above, the Commission concludes that OPCOM violated Article 102 of the Treaty by requiring EU traders wishing to participate on the Day-Ahead Market and the Intraday Market in Romania to obtain a Romanian VAT registration. Such requirement is equivalent to discriminating against companies

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164 In general, the trades executed on exchanges are cleared through a designated clearing house. Most of the power exchanges use a vertically integrated clearing house (e.g. Belpex, APX Commodities LTD, APX Netherlands, PowerNext, EEX, Nord Pool, etc.).

165 See the website of European Commodity Clearing AG: http://cdn.ecc.de/document/5254/20090623_ECC_Tochtergesellschaft.pdf

active in wholesale electricity trading on the basis of their nationality/place of establishment. The Commission considers that OPCOM's VAT requirement was capable of having restrictive effects, i.e. of excluding EU traders or making it more difficult for them to participate on OPCOM. Only by setting up a fixed establishment in Romania, thereby incurring costs and organizational disadvantages, such traders could enter the Romanian wholesale electricity market.

7.5. Duration of the infringement

(231) The Commission considers that the infringement started on 30 June 2008, the date on which the 'Convention on Participation in the Day-Ahead Market', containing the VAT registration requirement, became applicable. The Commission considers that the infringement ended on 16 September 2013.

7.5.1. Date of commencement of the infringement

(232) For the Day-Ahead Market the requirement to hold a Romanian VAT registration is laid down in OPCOM's 'Convention on Participation in the Day-Ahead Market' which became applicable on 30 June 2008. For the Intraday Market the requirement is set forth in OPCOM's 'Convention on Participation in the Intraday Market' which became applicable on 14 July 2011. OPCOM's VAT registration requirements both on the Day-Ahead Market as well as on the Intraday Market form part of the same overall strategy by OPCOM, namely to discriminate EU traders vis à vis domestic traders in order to avoid a potential VAT mismatch. The means by which this objective is achieved by OPCOM is also identical for both the Day-Ahead and the Intraday Market, namely through VAT registration requirements in OPCOM's standard agreements. Both the Day-Ahead and the Intraday Market form part of the same relevant product market.

(233) In view of these considerations, the imposed VAT registration requirement in both Conventions constitutes one single infringement. The relevant date for the start of the infringement is 30 June 2008.

7.5.2. Date of termination of the infringement

(234) On 16 September 2013, OPCOM submitted for the opinion of the Energy Regulator amended draft Conventions for the Day-Ahead Market and Intraday Market without a Romanian VAT registration requirement.[166] The Convention regarding the Intraday Market received a favourable opinion of the Energy Regulator on 10 January 2014 and was published on 14 January 2014.[167] The Convention regarding the Day-Ahead Market has to date not yet received a favourable opinion from the Energy Regulator and has not yet been published but OPCOM in November 2013 started admitting EU traders on the Day-Ahead Market without VAT registration requirement.[168] The

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166 OPCOM's reply of 21 November 2013 to the Commission's RFI of 19 November 2013.

167 See: http://www.opcom ro/tranzactii_produse/tranzactii_produse.php?lang=ro&id=163.

168 OPCOM informed the Commission services in the State of play meeting of 29 November 2013 that two of the applicants (foreign traders) were admitted on 20 November 2013 and 28 November 2013, respectively. See, also: Addendum no. 1 of 20 November 2013to the Convention on Participation in the Day-Ahead Market concluded between CEZ a.s. and OPCOM.

Commission therefore considers that OPCOM has undertaken serious efforts to end the infringement.

(235) In view of the above, the Commission therefore takes 16 September 2013 as the end date for the infringement, i.e. the date when OPCOM submitted the two draft Conventions to the Energy Regulator's opinion without requirement of proof of registration for VAT purposes in Romania.

7.5.3. Conclusion on duration

(236) For the purpose of the fine calculation, the duration of the infringement corresponds to the period from the date of the Romanian VAT registration requirement (30 June 2008) until the date when OPCOM submitted a first draft without requirement for VAT purposes in Romania (16 September 2013).

8. EFFECT ON TRADE BETWEEN MEMBER STATES

(237) Article 102 of the Treaty prohibits any abuse of dominant position within the internal market or in a substantial part of it insofar as it may affect trade between Member States. An abuse of a dominant position affects trade between Member States when it is capable of influencing, either directly or indirectly, actually or potentially, the pattern of trade in goods and services between Member States.[169]

(238) The Court of Justice held that '*Article 82 [now 102 TFEU] does not require it to be proved that abusive conduct has in fact appreciably affected trade between Member States, but that it is capable of having that effect*'. The Court has also clarified that the interpretation and application of the condition relating to effects on trade between Member States contained in Articles 101 and 102 of the Treaty must be based on the purpose of that condition, which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by EU law and the law of the Member States.[170]

(239) Thus, EU competition rules apply to any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by sealing off domestic markets or by affecting the structure of competition within the internal market.[171]

(240) In the present case, OPCOM's abusive conduct prevents foreign traders from entering the Romanian wholesale electricity market, thereby having adverse impact on the competitive structure of the market. By definition, restricting the possibility

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169 Judgment of 21 January 1999 in Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* (ECR 1999, p. I-00135, paragraph 47).

170 Judgment of 9 November 1983 in Case 322/81 *Michelin v Commission* (ECR 1983, p. 3461, paragraph 104). See also Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v. Commission* (ECR 1975, p. I-743, paragraphs 69-70).

171 Judgment of 31 May 1979 in Case 22/78 *Hugin* v *Commission* (ECR 1979, p. 1869, paragraph 17); Case C-475/99 *Ambulanz Glöckner* (ECR 2001, P. I-8089, paragraph 47); Case C-407/04 P *Dalmine* v *Commission* (ECR 2007, p. I-00829, paragraph 89).

for companies active in other Member States to trade on the only power exchange in Romania affects trade between Member States. The abuse extends to the entire territory of Romania and that territory constitutes a substantial part of the common market. OPCOM's conduct restricts access to the Day-Ahead and Intraday trading platforms, an infrastructure which currently represents the only possibility to purchase/sell electricity on spot markets in Romania.

(241) OPCOM's conduct therefore is capable of affecting trade between Member States.

9. LIABILITY FOR THE INFRINGEMENT

(242) According to settled case law, the conduct of a subsidiary may be attributed to the parent company and the parent and subsidiary may thus be held jointly and severally liable if these companies form a single economic unit, i.e. one single undertaking. To be considered as a single economic unit a parent company must (i) be in the position to exercise decisive influence over the subsidiary's commercial conduct and (ii) have actually exercised this influence.[172]

(243) The Court considers that where a parent company has a 100 % shareholding in a subsidiary which has infringed the EU rules on competition, that parent company is able to exercise decisive influence over the conduct of its subsidiary, and there is a rebuttable presumption that the parent company does in fact exercise such influence. In these circumstances, '*it is sufficient for the Commission to prove that the entire capital of a subsidiary is held by its parent company in order for it to be presumed that the parent actually exercises decisive influence over the commercial policy of that subsidiary'*.[173]

(244) The Commission can then hold the parent company to be jointly and severally liable for payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market.[174]

(245) The Commission's finding is that Transelectrica has owned 100 % of the shares in OPCOM since 2001.[175] Prior to the adoption of the SO Transelectrica provided no evidence to the effect that OPCOM acts independently on the market.[176] Therefore,

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172 Judgment of 14 July 1972 in Case 48/69 *ICI* v *Commission* (ECR 1972, p. 619, paragraph 137. Also, see judgment of the Court of Justice in Case 107/82 AEG v Commission [1983] ECR 3151, paragraph 50.

173 Judgment of 16 November 2000 in Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* (ECR 2000, p. I-9945, paragraph 29; judgment of 29 March 2011 in Joined cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and others* (ECR 2011 p.I-2239, paragraph 97); judgment of 19 July 2012 in Joined cases C-628/10 P and C-14/11 P *Alliance One International Inc and others* v *Commission*, paragraph 46; judgment of 26 September 2013 in Case C-679/11P *Alliance One International Inc v Commission*, paragraph 38.

174 See, e.g, judgment of 10 September 2009 in Case C-97/08 P *Akzo Nobel and Others* v *Commission* (ECR 2009, p. I-8237, paragraph 61).

175 OPCOM, *Annual Report 2011*, p.24.

176 Transelectrica claimed at the state of play meeting with the Commission on 14 May 2013 that it does not have decisive influence over OPCOM. On 21 May 2013 Transelectrica made a written submission to this effect, however, the submission did not include any corroborating evidence.

in the SO the Commission relied, in line with case law, on the rebuttable presumption that Transelectrica has a decisive influence over its subsidiary, forms one single undertaking and is therefore liable for OPCOM's infringement. For the reasons set out in the following, the Commission does not consider that the presumption has been rebutted.

9.1. Transelectrica's arguments and the Commission's assessment

(246) In its reply to the SO, at the Oral Hearing and in its reply to the Letter of Facts Transelectrica argued that it has no decisive influence over OPCOM. Transelectrica submitted several documents as evidence to support its argumentation that OPCOM is structurally, operationally and financially independent from Transelectrica. Transelectrica's main arguments can be summarised as follows:

(a) OPCOM and Transelectrica act as separate entities (see section 9.1.1).

(b) OPCOM is a regulated entity which leaves no room for the exercise of decisive influence by Transelectrica (see section 9.1.2).

(c) The main strategic issues regarding OPCOM are decided by the Ministry of Economy, not by Transelectrica (see section 9.1.3).

9.1.1. Separate entities

Transelectrica's arguments

(247) Transelectrica submits that OPCOM was set up by administrative decision of the Romanian Government[177] and not by decision of Transelectrica. OPCOM's shares were also allocated to Transelectrica by Government Decision. OPCOM does not constitute an investment by Transelectrica.[178] It operates autonomously, under the Energy Regulator's rules, with its own resources, not only in financial terms but also regarding all other operational aspects of the business.[179] Transelectrica submits that also the Ministry of Economy expresses the view that Transelectrica has no control over OPCOM's operational decisions.[180]

(248) According to Transelectrica, this separation is documented by the fact that the accounts of Transelectrica and OPCOM are not consolidated. In case of control over its subsidiary, the International Accounting Standard 27 would require consolidation of the accounts.[181] The annual reports of Transelectrica state that OPCOM is not consolidated because Transelectrica does not control it. Transelectrica has other subsidiaries which are consolidated into its accounts.[182]

(249) Moreover, Transelectrica submits that the separation of Transelectrica and OPCOM is evidenced by the fact that they have frequently expressed diverging views about

177 Government Decision no. 627/2000
178 Transelectrica's Reply to the SO, paragraphs 35 seq.
179 Transelectrica's Reply to the SO, paragraphs 50 and 51.
180 Transelectrica's Reply to the SO, paragraph 25.
181 Transelectrica's Reply to the SO, paragraphs 52 seq.
182 Transelectrica's Reply to the SO, paragraph. 70.

issues that were debated in public and before the Energy Regulator.[183] They also have presented and continue to present themselves separately in the present proceedings.[184]

(250) Transelectrica finally argues that it also has had no involvement in the introduction of the VAT registration requirement.[185]

Commission's Assessment

The creation of OPCOM by the Government

(251) The fact that OPCOM was set up by Government Decision does not change the fact that it was set up as subsidiary of Transelectrica. The Commission further notes that the Government Decision does not limit Transelectrica's ownership rights over OPCOM.

(252) For the same reason it is also irrelevant whether OPCOM was created as an 'investment' by Transelectrica or whether OPCOM's shares were allocated by the government.[186]

(253) In addition, the investigation shows that Transelectrica made investments into OPCOM in the past, or even concluded and financed contracts for the direct benefit of OPCOM, for instance:

– Consultancy contract nr. P081406-O-C78 'Consultant Services Complex Time based Assignments: technical and institutional capacity building assistance for the development and commercial start-up of the OPCOM Power Exchange' concluded in 2004 between Kema International B.V. as service provider and, Transelectrica buyer and OPCOM final beneficiary.

– Consultancy contract nr. P081406-O-C125/2007 'Development and Implementation of The Regional Power Exchange – OPCOM' concluded in 2007 between NORD POOL ASA as service provider, Transelectrica as buyer and OPCOM as final beneficiary.[187]

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183 Transelectrica's Reply to the SO, paragraphs 71 and following. The issues related to public consultations on 'Operational procedure concerning the establishment, update and use of guarantees for balancing parties' and 'The suspension of the electricity wholesale market' as well as to discussions in the drafting procedure of 'The sharing of information between the transmission system operator and the settlement operator'.

184 Transelectrica's reply to the SO, paragraph 83.

185 Transelectrica's reply to the SO, paragraph 69.

186 Case T-399/09 - *HSE* v *Commission,* (not yet published), paragraphs 48 -49. In this case, the Court held that is irrelevant how or why a company acquired a shareholding in its subsidiary for the existence of an economic unit.

187 The two contracts are included under the C component of the investment project 'Electricity Market project', in accordance with the loan contract nr. 7181RO/17.07.2003 concluded by Transelectrica with IBRD. See *Memo concerning increase of the share capital of the subsidiary OPCOM by contribution in kind from Transelectrica for the intangible assets received after completion of phase IA and II of Contract no P081406-O-C78 and for the intangible assets received on Contract no P081406-C12 and P081406-C300* of Transelectrica's Management of 4 July 2011.

(254) Further, OPCOM relied on Transelectrica for capital injections. On 27 November 2007 Transelectrica's Shareholders Assembly voted a RON 1 047 000 capital injection into OPCOM.[188] On 11 May 2011 Transelectrica's Management Board decided (Decision nr. 9) to increase OPCOM's capital through a capital injection of RON 22 950 760. This decision was later approved by Transelectrica's Shareholders Assembly.[189]

(255) This shows that Transelectrica has undertaken investments into OPCOM and that OPCOM has relied on Transelectrica's financial resources. It is also worth noting that while OPCOM has its own operational departments it relies fully on Transelectrica for the collection of its fees.[190] Transelectrica collects the fees for OPCOM from the energy suppliers together with the transmission fee.

(256) In its reply to the Letter of Facts, Transelectrica submitted that the loan agreement referred to above was decided and guaranteed at government level. The fact that a small part of this loan benefitted OPCOM would be a result of this financial arrangement with the Government and not a decision of Transelectrica.[191] Transelectrica also argued that the decision concerning the capital injection was taken based on a mandate from the Ministry of Economy, which was enforced as such.[192]

(257) The fact that the loan contracted by Transelectrica partly benefitted OPCOM clearly shows that the latter relied on the financial resources of its parent company. This conclusion cannot be altered by the fact that the loan had been decided at government level. In addition, the fact that the State representatives in Transelectrica Shareholders Assembly decide under mandate from the State as Transelectrica's own majority shareholder does not suffice to rebut the presumption (see recital (284) below).

Consolidation of accounts

(258) According to established case law the fact that the accounts of a subsidiary are not consolidated with the parent company does not imply that the latter has no decisive influence over its subsidiary.[193]

(259) It is also worth noting that the (non-) consolidation of accounts is based on the specific definition of control within the meaning of accounting rules, which does not

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188 Decision of Transelectrica's Shareholders Assembly of 27 November 2007, point 5 and 5.1.

189 Point 5, Decision no. 6 of the Shareholders' general ordinary assembly of the National Power Grid Company Transelectrica SA of 14 October 2011.

190 Contract no.C1/2002, as amended, concluded by Transelectrica with OPCOM for the provision of services for the wholesale electricity market.

191 Transelectrica's reply of 13 December 2013 to the Letter of facts , paragraphs 40 – 42.

192 Transelectrica's reply of 13 December 2013 to the Letter of facts, paragraph 37.

193 Judgment of 26 April 2007 in the joined cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré* v *Commission* (ECR 2007, p. II-00947, paragraph 142): *'... the fact that in the present case Copigraph had, as Bolloré stated in its reply to the SO without challenge by the Commission, its own production installations and its own staff and that it entered its turnover into its own annual accounts does not in itself prove that Copigraph defined its conduct on the market entirely independently from its parent, Bolloré*.'

necessarily correspond to the definition of the notion of undertaking under competition rules.

Different views between Transelectrica and OPCOM and use of different law firms

(260) The fact that OPCOM and Transelectrica might have expressed different or diverging views during a public consultation or vis-à-vis the Energy Regulator does not show that OPCOM acted autonomously from Transelectrica. This is all the more so since the 'divergences' seem to be limited to a few procedural questions vis-à-vis the Energy Regulator and the question as to whether a submission by OPCOM in the framework of a public consultation was made within the deadline for comments or not.

(261) Nor can the use of different law firms in the present procedure rebut the presumption.[194] Any other conclusion would render parental liability dependant on the choice of one or several law firm(s).

Lack of involvement of Transelectrica in the infringement

(262) The fact that Transelectrica was not involved in the infringement is irrelevant. The established case-law lays down that since the parent company and its subsidiary form a single economic unit and therefore form a single undertaking the Commission may address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement.[195]

(263) In any event, it should also be noted that Transelectrica must have been aware of the VAT registration requirement and of its potentially problematic nature. In a letter dated 19 January 2012 from OPCOM to Transelectrica, OPCOM presented to Transelectrica a possible way to abolish the VAT requirement, namely to consolidate OPCOM's accounts into Transelectrica.[196] From the lack of reaction by Transelectrica to OPCOM's infringement, in spite of having been informed of it, the Commission could, moreover, infer that Transelectrica tacitly approved its subsidiary's unlawful conduct and constitutes further evidence of Transelectrica's decisive influence over the conduct of its subsidiary.[197] On this basis, Transelectrica's argument of lack of involvement is not sufficient to rebut the presumption.

9.1.2. Decisive influence

Transelectrica's arguments

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194 Case T-408/10 *Roca Sanitario* v *Commission*, judgment of 16 September 2013, paragraph 104. This was also the view taken by the Commission in its Decision COMP/37.980 *Souris Bleue/TOPPS*, (recital 165) where it stated: '*... nor is the presumption of liability rebutted by the fact that the European subsidiaries and Topps USA chose different legal counsel and sent in independent submissions during the proceedings before the Commission.*'

195 Case C-521/09 P *Elf Aquitaine* v *Commission* [2011] ECR I- 8947, paragraph 55.

196 Letters addressed by OPCOM to Transelectrica no. 943/19.01.2012, 5084/03.04.2012, 7227/21.05.2012 and 9182/05.07.2012

197 Case T-38/05, *Agroexpansion, SA* v *Commission*, [2011] II-7005, paragraph 157.

(264) Transelectrica argues that Transelectrica and OPCOM hold different licences granted by the Energy Regulator.[198] The Energy Act requires that integrated economic operators keep separate accounts for each licensed activity and proceed in the same way as if each licensed activity would be carried out by separate operators.[199]

(265) The conditions attached to Transelectrica's and OPCOM's licences foresee that their holders shall ensure the confidentiality of insider information obtained in the course of their work. Access to such information is granted only to persons authorised, and the confidentiality obligation is also applicable in respect of affiliated undertakings.

(266) Transelectrica and OPCOM have according to Transelectrica the legal obligation to carry out their activities as if they were separate companies, an obligation which both companies have fully respected.[200] Transelectrica submits that Transelectrica is treated by OPCOM in the same way as any other market participant.[201]

(267) Transelectrica argues, moreover, that it has no influence over the fees applied by OPCOM as they are set by the Energy Regulator.[202] It similarly indicates that the distribution of OPCOM's profit is decided by the government.

Commission's Assessment

Licences

(268) The fact that Transelectrica and OPCOM hold separate licences is merely evidence of the fact that they carry out different licensed activities. This has no bearing on Transelectrica's rights and powers as owner of OPCOM. [203] The same applies to the other elements resulting from the fact of holding separate licenses (e.g., separate accounts, confidentiality requirements etc.).

(269) The confidentiality obligation resulting from OPCOM's licence prevents Transelectrica from obtaining certain information from its subsidiary. However, the information covered by the confidentiality obligation is limited to electricity transactions[204] and therefore of such nature that it does not, or at least not significantly, impede Transelectrica's ability to request and receive information from OPCOM, of a nature to allow it to supervise its subsidiary.

(270) Finally, as a power exchange OPCOM is required by regulation to treat all market participants equally. Observing this legal obligation therefore does not imply that Transelectrica has no decisive influence over OPCOM.

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198 Transelectrica holds a licence as transmission system operator and OPCOM holds a licence as operator of the electricity market.

199 Transelectrica's reply to the SO, paragraph 31.

200 Transelectrica's reply to the SO, section 3.1.

201 Transelectrica's reply to the SO, paragraphs 81-82.

202 Transelectrica's reply to the SO, paragraphs 56 seq.

203 Case T-399/09 - *HSE* v *Commission,* (not yet published), paragraph 50. The Court held that the fact that the subsidiary was active in an entirely different sector than its parent company does not suffice to rebut the presumption in case of 100% ownership.

204 Energy Act, Article 43 (2) reads: '*the electricity market operator* [OPCOM] *is not allowed to disclose information related to electricity transactions in its possession, obtained in the course of its activity otherwise than in accordance with the law.*'

OPCOM's fees and profits

(271) The fact that OPCOM's fees are regulated does not show that Transelectrica has no decisive influence over OPCOM. As explained above (see recital (54)), OPCOM submits its costs in an annual planning procedure to the Energy Regulator which sets on this basis the fee to be paid by all energy suppliers to OPCOM. Such fees are supposed to allow OPCOM to cover its costs and earn a certain margin. Even if the fees of OPCOM would be calculated by the Energy Regulator and this particular element would therefore remain outside the control of Transelectrica, Transelectrica can and does exercise its influence over OPCOM in other areas except fees.

(272) Transelectrica argues that the distribution of OPCOM's profits is determined by the Romanian government. The government issued instructions, e.g. in form of an Emergency Government Ordinance or of Memoranda, specifying the percentage of profit to be distributed as dividends by companies whose capital is owned wholly or in majority by the State.[205] For the same reason as stated above, this general provision applicable to all state-owned companies does not exclude decisive influence of Transelectrica over OPCOM.

(273) According to the case-law Transelectrica cannot rebut the presumption merely by showing that it does not influence the setting of OPCOM's fees and profits.[206]

9.1.3. Strategic decisions taken or approved by the Ministry

Transelectrica's arguments

(274) Transelectrica submits that main decisions regarding the management of OPCOM are effectively taken by the Ministry of Economy, notably the appointment of representatives in OPCOM's Shareholders Assembly and the approval of the budget. Transelectrica refers particularly to OPCOM's Statute which stipulates in Article 9 that the Ministry of Economy represents the interests of the State in OPCOM: *'The rights and obligations related to the State shareholding through Transelectrica as sole shareholder are exercised by representatives of the Ministry of Economy and Finance, appointed by order of the Minister of Economy and Finance*.' Furthermore, according to Article 11 of OPCOM's Statute, the '*representatives in OPCOM's Shareholders Assembly are appointed by Order of the Minister of Economy and Finance*'.[207]

(275) Transelectrica explains that in practice the Minister of Economy grants to its representatives in Transelectrica's Shareholders Assembly a mandate to appoint the members of OPCOM's Shareholders Assembly and to nominate the candidates for OPCOM's Management Board for election. It thereby indicates precisely the individual persons to be appointed or nominated for election. A similar procedure

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205 Transelectrica's reply to the SO, paragraphs 64 - 66.

206 Case T-197/06 - *FMC* v *Commission*, [2011] ECR II-03179, paragraph 105.

207 Transelectrica's reply to the SO, paragraphs 40, 47-49. See, also Annex 4.1 – *OPCOM's Statute of 14 June 2013* and Annex 4.2 – *OPCOM's Statute of 23 April 2008*.

applies to OPCOM's budget[208] which in addition needs a subsequent approval by three different Ministries.

(276) The majority of members of OPCOM's Shareholders Assembly are representatives from a Ministry. According to Transelectrica, OPCOM's management has never included any members of Transelectrica's management.

Commission's assessment

Management overlaps

(277) According to established case law, the lack of overlap in the management of Transelectrica and OPCOM is not sufficient to show that no decisive influence was exerted.[209]

(278) In any event, even assuming that none of the members of Transelectrica's Management Board have been also members of OPCOM's Shareholders Assembly or Management Board, there nevertheless have been some personal overlaps between Transelectrica and OPCOM. The Shareholders Assembly - representing the 100% shareholder Transelectrica - is the main decision-making body of OPCOM, entitled to take decisions on its overall activity and commercial policy. [210] Members of the Shareholders Assembly of Transelectrica or of one of Transelectrica's consolidated subsidiaries have been also members of OPCOM's Shareholders Assembly and in one case also of OPCOM's Management Board. Some of these periods have overlapped. For instance, the same person had been simultaneously member of:

– the Shareholders Assembly of Transelectrica, OPCOM and SMART (subsidiary of Transelectrica);F[211]

– the Shareholders Assembly of Transelectrica and OPCOM;[212]

– the Shareholders Assembly of Teletrans (subsidiary of Transelectrica) and the Management Board of OPCOM;[213]

– the Shareholders Assembly of SMART (subsidiary of Transelectrica) and of OPCOM.[214]

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208 Transelectrica's reply to the SO, paragraph 59.

209 Judgment of 8 May 2013 in Case C-508/11 P (ECR 2013, not yet published, paragraphs 64-65): '*a company that coordinates, inter alia, financial investments within the group is in a position to regroup shareholdings in various companies and has the function of ensuring that they are run as one, including by means of such budgetary control. … That conclusion cannot be called into question by the fact that Eni had never operated directly in the chemical sector or that there had never been any management overlap between the parent company and the subsidiaries*.'

210 See: Article 12 of OPCOM's Statute, as amended. By way of example, OPCOM's Shareholders Assembly decides on overall strategy development, modernization, economic and financial restructuring; approves the budget; appoints and lays off the members of the Management Board; approves the rules of organization and functioning of the Management Board; determines the remuneration of the CEO and Management Board members; decides on capital increases, mergers or divisions of the company; and decides on long-term bank loans, commercial loans and guarantees.

211 Declaration of interests of one member of OPCOM's Shareholders Assembly of 27 October 2010.

212 Declaration of interests of one member of OPCOM's Shareholders Assembly of 15 February 2011.

213 Declaration of interests of the Chairman of OPCOM's Management Board of 30 May 2013.

(279) Further, by virtue of Shareholders Assembly Decision[215] the following persons are members of OPCOM's Audit Committee which has the tasks to supervise the management activity and review financial reporting:

– CFO of Transelectrica;

– Deputy CFO of Transelectrica;

– Representative of the Ministry of Public Finances.

(280) In its reply to the Letter of Facts, Transelectrica submitted that the abovementioned composition of OPCOM's Audit Committee would not in any way imply the exercise of control by Transelectrica over OPCOM's business operations. Members of the Audit Committee are according to Transelectrica by definition independent from the management of the company, in view of the fact that they are responsible for the verification of the company's accounts.[216]

(281) Whilst admitting that auditors normally act independently from the management of the company audited, the Commission notes that in OPCOM's case the Audit Committee is made up of two employees of Transelectrica, the sole shareholder of OPCOM, and one employee of the Transelectrica's main shareholder. This is a clear proof that some personal overlaps exist between Transelectrica and OPCOM.

Influence by the Ministry over OPCOM

(282) The Commission does not dispute that the Ministry – through Transelectrica – exercises influence over OPCOM. However, the fact that the Ministry influences OPCOM through its representatives in Transelectrica only shows that Transelectrica passes on the instructions it receives from its own 'parent' to its subsidiary and therefore acts like any 'normal' intermediate parent. This in fact reinforces the Commission's position that Transelectrica exercises decisive influence over OPCOM.[217]

(283) All main decisions taken by Transelectrica with respect to OPCOM are taken by Transelectrica's Shareholders Assembly. An examination of the voting records of Transelectrica's Shareholders Assembly shows that it regularly votes on matters concerning OPCOM.[218] Members of OPCOM's Shareholders Assembly are appointed and revoked by Transelectrica's Shareholders Assembly. The competent Ministry instructs its representatives in Transelectrica Shareholders Assembly to vote – in their function as representatives of Transelectrica - in a certain way regarding

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214 Declaration of interests of one member of OPCOM's Shareholders Assembly of 10 May 2011.

215 OPCOM's Shareholders Assembly Decision no. 14/27.10.2011.

216 Transelectrica's reply of 13 December 2013 to the Letter of facts, paragraph 10 and 13.

217 See Case C-280/06 ETI and Others, [2007] ECR I-10893, paragraphs 49-52. In this case the Court held that two entities controlled by the state were considered to be part of the same undertaking. See also Case C-90/09 P - *General Química and Others* v *Commission*, ECR 2011, p. I-00001, paragraphs 86-87. The Court held that an intermediate company through which the decisive influence is exercised forms a single undertaking with the subsidiary for the purposes of EU competition law.

218 For example, Decision no. 9 of the Shareholders' general ordinary assembly of the National Power Grid Company Transelectrica SA of 28 December 2012.

the appointment of members of OPCOM's Shareholders Assembly.[219] Similar instructions are given by Transelectrica to OPCOM (following instructions from the Ministry) with respect to the budget.

(284) The fact that the State representatives in Transelectrica Shareholders Assembly decide on the basis of instructions they receive from Transelectrica's own majority shareholder does not inhibit Transelectrica's decisive influence on OPCOM. It rather shows the underlying motivation of Transelectrica for deciding in a certain way and it is normal that this motivation is defined by its own majority shareholder. It is also worth noting that the Ministry of Economy issued similar mandates regarding the appointment of members of Shareholders Assemblies for other subsidiaries of Transelectrica, such as SC Teletrans SA ('Teletrans').[220] Teletrans is a 100% subsidiary of Transelectrica providing IT services and communication services for Transelectrica.

(285) The Commission also notes for the sake of completeness that according to the voting records of Transelectrica's Shareholders Assembly most decisions taken by Transelectrica regarding OPCOM were not based on instructions by the Ministry.[221]

(286) In its reply to the Letter of Facts, Transelectrica admitted that certain aspects of control which are exercised at ministerial level are common to all subsidiaries wholly or majority owned by the State. What distinguishes OPCOM from other subsidiaries would be that, in addition to control by the Ministry, as indicated above, OPCOM is regulated by ANRE. There is therefore no margin for Transelectrica to influence OPCOM's activity.[222]

(287) The fact that OPCOM's activity is regulated by ANRE does not change the fact that it is controlled by Transelectrica. The Commission considers that even if the level of OPCOM's fees is regulated by ANRE and therefore not subject to control of Transelectrica (see recital (271)). Transelectrica exercises its influence over OPCOM in other areas except fees.

(288) While it is of no legal relevance for the assessment of Transelectrica's liability in this case and therefore purely for the sake of completeness, the Commission provides below some examples that demonstrate that Transelectrica actually exercised its decisive influence over the commercial policy of OPCOM.

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219 Decisions of the Transelectrica Shareholders Assembly are taken with the simple majority of the votes of those present (Article 16 (1) of the Statute) and are valid if at least ½ of the total number of votes are present. This means that the competent ministry may effectively decide about the members of OPCOM's Shareholders Assembly who in most, but not all cases are representatives of the Ministry of Economy or another Ministry. See Transelectrica's reply to the SO, Annex 3.

220 For instance, Ministerial Order No. 1438/2012 issued by the Ministry of Economy, Trade and Business Environment, which mandates its own representatives in Transelectrica's Shareholders' Assembly to appoint the State representatives in Teletrans's Shareholders Assembly.

221 For example see: Transelectrica's Shareholders Assembly Decision no.9 of 28 December 2012, where Transelectrica decided on the approval of OPCOM's budget, the modification of OPCOM's Articles of Association or the approval of the Evaluation report of the supplies under the loan agreement between Transelectrica and IBRD, which amounted of Transelectrica's contribution in kind to increase the capital in OPCOM.

222 Transelectrica's reply of 13 December 2013 to the Letter of facts, paragraph 26 - 28.

(289) Such examples include the fact that Transelectrica's Shareholders Assembly mandates its representatives in the Shareholders Assembly of OPCOM for the purpose of approval of the annual financial statements. This is evidenced by a letter from OPCOM dated 13 March 2012 to Transelectrica's CEO which indicates: '*We are kindly asking for your support to include the attached document on the agenda of the next Shareholders Board of Transelectrica, in order to approve the mandate of Transelectrica's representatives in OPCOM's Shareholders Board for approval of the company's financial statements at 31.12.2011'*.[223] Based on OPCOM's Management Board report, the independent auditor's report and the auditors' report, Transelectrica's Shareholders Assembly mandated its representatives in the Shareholders Assembly of OPCOM by Decision no.4 of 26 April 2012, to approve OPCOM's financial statements at 31 December 2011 as well as the distribution of profit recorded at 31 December 2011.[224]

(290) Transelectrica also exercised its influence over its subsidiaries including OPCOM through its Management Board ('Transelectrica's Directorate'). Transelectrica's Directorate approves the mandate of its representatives in the meetings of the Shareholders Assembly of its subsidiaries and informs Transelectrica's Supervisory Board by quarterly reports on the mandates given to them.[225] Transelectrica's Directorate gives specific instructions to Transelectrica's representatives in OPCOM's Shareholders Assembly. One example of this influence relates to the current proceedings in which OPCOM requested an extension of the time period for its reply to the SO with the reasoning that it had to await Transelectrica's approval for hiring an external law firm.[226]

(291) In its reply to the Letter of Facts, Transelectrica underlined that its Directorate has been approving the mandate of its representatives in the meetings of the Shareholders Assembly of its subsidiaries only as of July 2012. Prior to this date, the by-laws laid down that the representatives of Transelectrica in the Shareholders Assembly of its subsidiaries could decide based on a special mandate from Transelectrica's Management Board. Each member of the Management Board had in turn to obtain a special mandate from the shareholder which appointed him.

(292) The Commission considers it is of no relevance to the assessment of Transelectrica's parental liability whether the mandate of Transelectrica's representatives in the meetings of the Shareholders Assembly of its subsidiaries are approved by Transelectrica's Directorate or rather by its Management Board.

(293) It is also worth noting that OPCOM in the beginning of the current proceedings turned towards Transelectrica proposing to solve the VAT mismatch problem by forming a fiscal entity in which any negative VAT mismatch could be easily netted

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223 OPCOM's reply of 15 October 2013 to the Commission's RFI of 2 October 2013, Annex 1, Section 1_1.3, *Letter of OPCOM addressed to Transelectrica dated 13 March 2012.*

224 Transelectrica's reply of 18 October 2013 to the Commission RFI of 2 October 2013, Annex 1.1, *Transelectrica's Shareholders Assembly Decision no.4 of 26 April 2012.*

225 Article 25(1)(h) of Transelectrica's Statute, as amended and Article 8(1)(j) of Annex to Transelectrica's Supervisory Board Decision no. 7/08.03.2013 - Regulation on the organisation and functioning of Transelectrica's Directorate.

226 OPCOM's reply of 15 October 2013 to the Commission's RFI of 2 October 2013, Annex 1, Section 7_7.4, *Transelectrica's Directorate decision no.25/17.06.2013*.

against Transelectrica's large VAT payments to the State. Transelectrica did not take up this proposal. This shows, however, that OPCOM reverted in this issue to its mother company – a strategy which would not make sense if Transelectrica did not have any decision making power with respect to matters relating to OPCOM.

9.2. Conclusion on liability

(294) The arguments put forward by Transelectrica do not rebut the presumption that as 100% shareholder Transelectrica was able and actually did exercise decisive influence over the commercial policy of OPCOM and hence forms one undertaking with OPCOM. Transelectrica is therefore jointly and severally liable with OPCOM for the abuse.

10. REMEDIES AND FINES

10.1. Remedies under Article 7 of Regulation 1/2003

(295) Where the Commission finds that there is an infringement of Article 102 of the Treaty, it may require by decision that the undertaking concerned brings such an infringement to an end in accordance with Article 7 of Regulation 1/2003.

(296) While OPCOM has undertaken serious efforts to end the infringement (see paragraph 231) and the Commission considers that the infringement ended on 16 September 2013, the amended Convention on the Day-Ahead Market has not yet been published and hence it cannot be entirely excluded that the VAT requirement still exists. The Commission therefore requires the addressees of the present Decision to bring the infringement to an end to the extent they have not already done so and to refrain from any conduct which may have the same or a similar object or effect.

10.2. Fines under Article 23(2) of Regulation 1/2003

(297) Under Article 23(2) of Regulation 1/2003, the Commission may by decision impose on undertakings fines where, either intentionally or negligently, they infringe Article 102 of the Treaty. For the undertaking participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year.

(298) In the present case the Commission considers that, based on the facts described in this Decision and the assessment contained above, the infringement has been committed intentionally. The infringement is an obvious infringement as it consists of the imposition by OPCOM of a VAT registration requirement that discriminates on the basis of a trader's place of establishment/nationality. In addition, in view of the fact that discrimination on the grounds of nationality has been condemned on several occasions by the European Courts and the Commission, OPCOM could not have been unaware that its practices violated Article 102 of the Treaty. In the alternative, the Commission considers that the infringement has at least been committed by negligence.

(299) In setting the amount of the fines, the Commission refers to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003[227] ('the Guidelines on fines').

10.3. Basic amount of the fine

(300) The basic amount of the fine to be imposed on the undertaking concerned is to be set by reference to the value of sales, that is, the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic market. Depending on the gravity of the infringement a proportion of the value of sales (up to 30% according to the Guidelines on fines) is to be established that is multiplied by the number of years over which the infringement was committed.

10.3.1. Calculation of the value of sales

(301) The Commission normally takes into account the sales made by an undertaking during the last full business year of its participation in the infringement.[228] There is no reason to deviate from this practice in the present case. The last full year of OPCOM's participation in the infringement was 2012.

(302) The relevant sales concern OPCOM's facilitation services as power exchange provided on the spot markets (i.e. Day-Ahead and Intraday). OPCOM does not have 'typical' sales as it does not charge a fee based on the transactions for which OPCOM provides a facilitation service. Rather, the fees OPCOM receives are based on an assessment of its total costs which OPCOM must provide each year to the Romanian Energy Regulator. The corresponding fee amount is then collected by Transelectrica from all electricity suppliers in Romania when the latter sell their electricity domestically or abroad. The fees are subsequently transferred by Transelectrica to OPCOM. These fees constitute the turnover of OPCOM which amounted to EUR 3 628 000 in 2012.[229]

(303) OPCOM provided a breakdown of its total estimated annual costs into costs per market for 2012.[230] According to these figures 48 % of its total costs may be attributed to the day-ahead market and 17 % to the intraday market. On this basis, the Commission allocated 48 % of OPCOM's total turnover of EUR 3 628 000 in 2012 to the Day-Ahead Market and 17 % to the Intraday Market and used these amounts as the value of sales to which the infringement relates.

(304) On this basis, the estimated value of sales to which the infringement relates is EUR 1 741 400 for the Day-Ahead market and EUR 616 700 for the Intraday market, i.e. 65 % of OPCOM's turnover.

(305) In its reply to the letter of facts, OPCOM claims that the Commission's intention to allocate 65 % of total costs to the spot markets has no objective rationale. The

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227 OJ C 210, 1.09.2006, p. 2-5.

228 Guidelines on fines, point 13.

229 Values in EUR on the basis of the European Central Bank reference average exchange rate for 2012, i.e. Romanian leu/EUR = 4.4593

230 OPCOM's reply of 05 November 2013 to the Commission's RFI (2013/107444).

breakdown of costs for 2012 would be a mere estimation. OPCOM considers this estimation to be unreliable because (i) the share of the Day Ahead Market in total transactions has increased significantly after adoption of the Energy Act in 2012, and (ii) whilst the ratio between the estimated costs on the Intraday Market and those on the Day-Ahead Market is 36 %, the ratio between the volumes traded on the two spot markets in 2012 is only 0.07 %.

(306) The Commission rejects OPCOM's arguments. Since OPCOM's turnover consists of the fees it receives from Transelectrica which in turn are based on OPCOM's cost estimate, an allocation of the value of sales based on OPCOM's costs relating to the Day Ahead and Intraday Markets is the most relevant breakdown to establish the value of sales. Since OPCOM does not charge a fee based on volumes traded since its turnover is not related to the amount of transactions, a breakdown based on volumes traded or transactions would not be meaningful as a proxy for OPCOM's value of sales. OPCOM was unable to provide the Commission with a breakdown of OPCOM's revenues by type of market for 2012.[231] The Commission therefore determined the value of sales to calculate the fine on the best available figures.[232]

10.3.2. Gravity

(307) In order to determine the proportion of the value of sales to be considered as basic amount, the Commission will have regard to a number of factors to assess the gravity of the infringement, such as the nature of the infringement, the market share, the geographic scope of the infringement and/or whether or not the infringement has been implemented.[233]

10.3.2.1. Nature of the infringement

(308) The infringement concerns an abuse of a dominant position in the form of discrimination on the basis of nationality/place of establishment. OPCOM's requirement that all participants on the spot markets on the power exchange hold a Romanian VAT registration, and must therefore be established in Romania prevented foreign based participants from entering the market. This requirement restricts access to the domestic electricity market. This type of abuse has already been the subject of several Commission decisions and judgments of the EU courts and constitutes a clear infringement of Article 102 of the Treaty.[234]

10.3.2.2. Market share

(309) On the relevant market OPCOM has never faced any significant competition. In addition to its *de facto* monopoly until 2012 (market share of 99 %), since end of

231 OPCOM's reply of 1 March 2013 to the Commission's RFI of 22 February 2013.

232 Guidelines on fines, point 15 and 16.

233 Guidelines on fines, point 20.

234 Judgment of 30 April 1974 in Case 155/73 *Sacchi* (ECR 1974, p. 409, paragraph 17); Judgment of 14 February 1978 in Case 27/76 *United Brands* v *Commission*, (ECR 1978, p. 207, paragraphs 232-233), Judgment of 2 March 1983 in Case 7/82 *GVL* v *Commission* (ECR 1983, p. 483), Judgment of 22 November 2001 in Case T-139/98 *AAMS* v *Commission* (ECR 2001, p. II-3413).

July 2012 OPCOM has a *de jure* monopoly for facilitating electricity trading on the spot markets.[235]

10.3.2.3. Geographic scope

(310) The infringement covers the whole territory of Romania.[236]

10.3.2.4. Conclusion on the gravity of the infringement

(311) In view of the above, in particular in view of the nature of the infringement and OPCOM's market shares, the proportion of the value of sales to be used to establish the basic amount of the fine to be imposed on OPCOM and Transelectrica should be 10 %.

10.3.3. Duration

(312) For the Day-Ahead Market the requirement to hold a Romanian VAT registration is laid down in OPCOM's 'Convention on Participation in the Day-Ahead Market' which became applicable on 30 June 2008. For the Intraday Market the requirement is stated in OPCOM's 'Convention on Participation in the Intraday Market' which became applicable on 14 July 2011. Since both the Day-Ahead Market as well as the Intraday Market form part of the same relevant product market and the imposed VAT registration requirement in both Conventions constitutes one single infringement, the relevant start date for the overall infringement is 30 June 2008. However, when calculating the fine the Commission will take into account that the infringement regarding the Intraday Market started only on 14 July 2011.

(313) As regards the end of the infringement, the Commission considers that OPCOM's ended the infringement on 16 September 2013, when OPCOM submitted for the opinion of the Energy Regulator amended draft Conventions on participation in the Day-Ahead Market and Intraday Market, presumably without a Romanian VAT registration requirement (see paragraph 231).

(314) Therefore, the overall duration of the infringement to be taken into account for the calculation of the fine amounts to 5 years, 2 months and 16 days for the day ahead market and 2 years, 2 months and 2 days for the intraday market, respectively. For the purposes of the calculation of the fine, the amount determined in recital (304) above should be multiplied by 5.16 for the day-ahead market and 2.16 for the intraday market to take account of the duration.

10.3.4. Conclusion on the basic amount of the fine

(315) On the basis of the above, the basic amount of the fine to be imposed should therefore be EUR 1 031 000.

10.4. Adjustments to the basic amount

(316) There are no aggravating or mitigating circumstances in this case.

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235 See section 6.4.

236 See section 6.2.

(317) The final amount of the fine does not exceed 10 % of the total turnover of the undertaking.[237]

(318) Therefore, no adjustment to the basic amount is applied.

10.5. Conclusion on the final amount of the fine

(319) In applying the foregoing, the final amount to be imposed pursuant to Article 23(2) of Regulation 1/2003 should be EUR 1 031 000.

11. CONCLUSION

(320) In light of the considerations set out in this Decision, the Commission:

(a) finds that Transelectrica and its subsidiary OPCOM have committed a single and continuous infringement of Article 102 of the Treaty from 30 June 2008 until at least 16 September 2013, by requiring EU traders wishing to participate on the Day-Ahead Market and the Intraday Market in Romania to obtain a Romanian VAT registration.

(b) requires Transelectrica and its subsidiary OPCOM to bring the infringement to an end and to refrain from taking measures having an equivalent effect to the conduct identified as abusive.

[237] Article 23(2) Regulation (EU) No 1/2003

HAS ADOPTED THIS DECISION:

Article 1

Compania Națională de Transport al Energiei Electrice "Transelectrica" S.A. (‘C.N.T.E.E. Transelectrica S.A.’) and its subsidiary *Operatorul Pieței de Energie Electrică și de Gaze Naturale "OPCOM" S.A.* ('SC OPCOM S.A.') have committed a single and continuous infringement of Article 102 of the Treaty from 30 June 2008 until at least 16 September 2013 in the form of discrimination, by requiring EU traders wishing to participate on the Day-Ahead Market and the Intraday Market in Romania to obtain a Romanian VAT registration.

Article 2

For the infringement referred to in Article 1, a fine of EUR 1 031 000 is imposed on C.N.T.E.E. Transelectrica S.A and S.C. OPCOM S.A., being jointly and severally liable for the payment of the entire fine.

The fine shall be paid in euro, within three months of the date of notification of this Decision, to the following account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT
1-2, Place de Metz
L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000
BIC: BCEELULL
Ref.: European Commission – BUFI / AT.39984

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where an undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fine by the due date by either providing an acceptable bank guarantee or making a provisional payment of the fine in accordance with Article 90 of Commission Delegated Regulation (EU) No 1268/2012.[238]

Article 3

C.N.T.E.E. Transelectrica S.A. and its subsidiary SC OPCOM S.A. shall immediately bring to an end the infringement referred to in Article 1 in so far as it has not already done so.

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238 Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ L362, 31.12.2012, p.1).

C.N.T.E.E. Transelectrica S.A. and its subsidiary SC OPCOM S.A. shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or equivalent object or effect.

Article 5

This Decision is addressed to

(a) C.N.T.E.E. Transelectrica S.A., 2-4 Olteni Street, sector 3, 030786 Bucharest, Romania, and

(b) S.C. OPCOM S.A., 16-18 Hristo Botev Blvd., sector 3, 030236 Bucharest, Romania.

This Decision shall be enforceable pursuant to Article 299 of the Treaty

Done at Brussels, 5.3.2014

For the Commission
Joaquín ALMUNIA
Vice-President