



9.9.2024

NOTICE TO MEMBERS

Subject: Petition No 0124/2024 by Catalin Mihai (Romanian) on alleged breach of Directive (EU) 2019/944 on common rules for the internal market for electricity in Romania

1. Summary of petition

The petitioner explains that, in his opinion, Directive (EU) 2019/944 of the European Parliament and of the Council on common rules for the internal market for electricity has been breached in Romania by the adoption of Order no. 90/05 of October 2023, published in the Official Journal of Romania no. 899 of 5 October 2023. He explains that the respective order modifies the Regulation on the establishment of the compliance program and the designation of the compliance agent by the electricity/natural gas distribution operators and by the natural gas storage operators that are part of a vertically integrated economic operator. He states that, according to the Electricity and Natural Gas Law no. 123/2012, electricity/natural gas distribution operators, as well as natural gas storage operators are obliged to adopt a compliance program (a series of measures that should be respected in order to guarantee the exclusion of discriminatory practices) and to designate a compliance agent, to ensure adequate monitoring of the application of the compliance program, who should be completely independent and should have access to all information on the respective operator or on any other related economic operator. In the petitioner's opinion, the changes that the Order 90/2023 introduced are likely to restrict the compliance officer in his efforts to monitor how his employer complies with the compliance program. He adds that it allegedly shows the intention to circumvent the rules intended to guarantee the exclusion of discriminatory practices and on the other hand, it was adopted allegedly in violation of the regulations related to decisional transparency and to the hierarchy of normative acts. He stresses that due to all modifications the Order 90/05 of October 2023 introduced he was fired and his compliance agent certificate was revoked. The petitioner points out that he initiated a judicial procedure and asks for a clarification from the European Parliament on whether the above mentioned order breaches Directive (EU) 2019/944.

2. Admissibility

Declared admissible on 30 April 2024. Information requested from Commission under Rule 227(5) (New Rule 233(5)).

3. Commission reply, received on 9 September 2024

The petition

The petitioner indicates that the amendments made to the Regulation by Order No 90/2023 circumvent the rules intended to ensure the exclusion of discriminatory practices or the attainment of the objective of independence of a distribution system operator part of a vertically integrated company. In particular, the petitioner claims that:

a) the Regulation amended by Order No 90/2023 defines the compliance officer as the natural or legal person designated by the distribution system operator or storage system operator (hereafter referred to as DSO/IB), and the petitioner indicates that the new amendments to the Regulation fail to define the independent manner in which the compliance officer should act.

b) Article 14 (1) of the Regulation amended by Order No 90/2023 lays down a rule that the appointment of the compliance officer is made by the DSO/IB for a minimum of two calendar years and a maximum of four calendar years, which, according to the petitioner, significantly diminishes the independence of the compliance officer.

c) Article 14 (2) of the Regulation amended by Order No 90/2023 sets out that the compliance officer of the DSO/IB is fully independent and has access to the information of the DSO/IB or any related economic operator that is necessary for the performance of its tasks. The petitioner claims that the wording allowing the compliance officer access ‘to all information of the vertically integrated operator or any affiliated entity’ has been deleted.

d) In accordance with Article 14 (6) of the Regulation amended by Order No 90/2023, the compliance officer shall be provided by the DSO/IB with the resources necessary for the performance of his or her duties and his remuneration shall not depend on the activities or results of the vertically integrated undertaking, with the exception of those of the DSO/IB. The petitioner notes that the references to the type of resources (e.g. ‘financial, technical, physical and human resources’) provided to the staff member for the performance of his duties have been deleted.

e) The petitioner also reports that the text of the Regulation amended by Order No 90/2023 does not include explicit provisions of Directive 2019/944 as those contained in Article 50 (10) and (11).

The petitioner also claims that Order 90/2023 was adopted in breach of the rules on transparency in decision-making as laid down in the Romanian national legislation Law No 52/2003 on transparency in decision-making in the public administration.

The Commission’s observations

Article 35 (2) (d) of Directive 2019/944¹ sets out the rules with regards the compliance programme and the compliance officer to ensure independence of a distribution system operator part of a vertically integrated company, in terms of its organisation and decision-making from the other activities not related to distribution.

The compliance officer is a ‘person or body’ responsible for monitoring the proper implementation of the compliance programme. Directive 2019/944 further clarifies that the compliance officer of the distribution system operator must be fully independent and have access to all the necessary information of the distribution system operator and any affiliated undertaking to fulfil his task. The compliance officer must submit on a yearly basis a report to the national regulatory authority, setting out all the measures taken. This report must be published.

Article 35 (2) (d) of Directive 2019/944 sets out a clear obligation of result for the compliance officer to ensure that the observance of the compliance programme is adequately and regularly monitored. As indicated by the petitioner, while Article 14 (2) of the Regulation amended by Order No 90/2023 sets out that the compliance officer of the DSO/IB is fully independent and has access to the information of the DSO/IB or any related economic operator that is necessary for the performance of its tasks, the wording allowing the compliance officer access ‘*to all information of the vertically integrated operator or any affiliated entity*’ has been deleted. Prima facie, such deletion seems to limit the access to the information for the monitoring activity of the compliance officer and might affect the adequate and regular monitoring of the compliance programme.

It should be underlined that, in the absence of any express provision to this effect, the specific more stringent and more detailed rules concerning the compliance officer of the independent transmission operators (hereafter referred as ITO) laid down in Article 50 of Directive 2019/944 cannot be deemed to strictly apply to the compliance officer of the DSO, although it could provide some guidance as to the interpretation of the rules applicable to DSOs. In particular, when shaping the specific rules and guarantees for independence of the compliance officer of the DSO, the rules on the compliance officer of the ITO as laid down in Article 50 (2) of Directive 2019/944 may serve as a point of reference, where appropriate.

With regards to the allegation on the breach of the rules on transparency in decision-making, according to the information provided by the petitioner, these rules do raise issues of compliance under national law, and not of EU law stemming from sectoral legislation.

Conclusion

The Commission takes note of the petition with regards to Order No 90/05 October 2023 published in the Official Gazette of Romania No 899 of 5 October 2023 amending the Regulation on the establishment of the compliance programme and the designation of the compliance officer by electricity/natural gas distribution system operators (DSOs) and natural gas storage operators (natural gas storage operators) which are part of a vertically integrated economic operator, approved by Order No 97/2021 of the President of the National Energy Regulatory Authority, published in Official Gazette of Romania Part I No 874 of 13 September 2021.

¹ OJ L 158, 14.6.2019, p. 125–199.

The pleas raised in the petition with regards to the circumvention of the rules intended to ensure the exclusion of discriminatory practices or the attainment of the objective of independence of the compliance officer do not raise an issue of wider principle to be assessed in the general interest of the EU. As indeed clarified above, Article 35 (2) (d) of Directive 2019/944 only provides general requirements for DSO compliance officers, while the more detailed rules of ITO compliance officers set out in Article 50 of Directive 2019/944 are not directly applicable to DSO compliance officers. Given the broader nature of Article 35 (2) (d) of Directive 2019/944, Member States have wide discretion to implement the principles concerning DSO compliance programme and compliance officer. With regards to the limited access to information to perform the monitoring tasks stemming from the changes of Article 14 (2) of the Regulation by Order No 90/2023, the Commission suggests that evidence is provided to prove that the amended provision *de facto* prevents the compliance officer to access to all the necessary information of the distribution system operator and any affiliated undertaking to fulfil his task, as prescribed by Article 35 (2) (d) of Directive 2019/944.

The petitioner's grievance concerning incompliance with the rules on transparency in decision-making mostly relates to an issue with national law. This does not concern a requirement stemming from Directive 2019/944 because no such transparency requirements are laid down therein. The petitioner is kindly invited to contact the competent national administrative court, as it is better placed to assist.