



THE ARTICLE 10C APPLICATION BY ROMANIA

COMMENTS REGARDING THE APPLICATION OF ROMANIA FOR TRANSITIONAL ALLOCATION FREE OF CHARGE TO INSTALLATIONS FOR ELECTRICITY PRODUCTION

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1. INTRODUCTION

This report, for submission to the European Commission, analyses the application of Romania for transitional free allocation of emission allowances to electricity generation between 2013 and 2019 under Article 10c of EU ETS Directive 2003/87/EC.

The aim of this report is to provide independent analysis of the application, prepared by experts of CEE Bankwatch and Greenpeace in Romania.

We invite the Commission to take into account this information in its assessment, in accordance to paragraphs 25 and 60 of the Communication from the Commission 2011/C 99/03 — Guidance document on the optional application of Article 10c of Directive 2003/87/EC.

1.1 Policy Context

The European Union considers combating climate change a priority. According to the Roadmap for moving to a competitive low carbon economy in 2050¹, “Europe is working hard to cut its greenhouse gas emissions substantially while encouraging other nations and regions to do likewise.” In this regard, the EU Emissions Trading Scheme (EU ETS) established by Directive 2003/87/EC², (the “EU ETS Directive”) represents the fundamental base of the EU's strategy for fighting climate change.

¹ European Commission Climate Action website: website: available at http://ec.europa.eu/clima/policies/roadmap/index_en.htm, [last accessed January 27, 2012]

² DIRECTIVE 2003/87/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

Directive 2009/29/EC³ amending the EU ETS Directive brought substantial changes to the EU ETS, introducing a harmonised EU-wide approach to the allocation of greenhouse gas emission allowances to installations covered by the system.

As a rule, allowances can no longer be granted for free to power plants after 2012, which would instead have to buy all their allowances through auctions (or on the secondary market). However, under certain conditions, a Member State may ask for permission for continuing to allocate a limited number of emission allowances to eligible power plants for free, until 2019. The EU ETS Directive contains under Article 10c the possibility to apply for a derogation from the main allocation instrument (auctioning) with the purpose of helping the power sector in new Member States to cope more easily with potential costs of making the transition to less carbon-intensive electricity generation.

1.2 Romania's Application for the transitional free allocation of emission allowances

According to paragraph 1(c), Article 10c of the amended EU ETS Directive, if in 2006, more than 30% of electricity was produced from a single fossil fuel, and the GDP per capita at market price did not exceed 50 % of the average GDP per capita at market price of the Community, a Member State may continue to allocate a limited number of emission allowances to eligible power plants for free, until 2019.

The Romanian government applied by 30 September 2011 for allocation of approximately 75 million tonnes of allowances free of charge in the period 2013-2019. Romania intends to allocate these allowances to 36 installations (operated by 31 companies).

³ DIRECTIVE 2009/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community

2. REVIEW OF THE PREPARATORY PROCESS OF THE ROMANIAN APPLICATION

2.1 Insufficient publication of the application and incomplete materials released for public consultation

According to the Communication from the Commission 2011/C 99/03 — Guidance document on the optional application of Article 10c of Directive 2003/87/EC⁴ (the “Commission Guidance”), Member States should, as outlined in point E of Annex VII, summarise the process by which the application for transitional free allocation of emission allowances and the national plan for investments have been prepared and how the public has been informed and involved.

Furthermore, paragraph 60 of the Commission Guidance states that Member States “should publish an application before submitting it to the Commission to enable the Commission to consider information and views from other sources”⁵. The paragraph also states that applications submitted by Member States should be considered environmental information and would be subject to the requirements set out in Directive 2003/4/EC.

However, in Romania the process was as follows:

The application and its annexes available to the public online were different from those submitted to the European Commission. In its public consultation version, Annex IX (C1) of the application referring to investments failed to mention five investments. One of them was a new

⁴ Communication from the Commission 2011/C 99/03 — Guidance document on the optional application of Article 10c of Directive 2003/87/EC, OJ C 99/9, 31.3.2011

⁵ Communication from the Commission - Guidance Document on the optional application of Article 10c of Directive 2003/87/EC, OJ C 99/9, 31.3.2011

800 MW coal power plant (Braila Power)⁶. Also, the final version of Annex V (B1 c), referring to eligible installations, includes one extra installation which was not part of the list available for the public consultation. Public access to information considered environmental information was consequently restricted, thus breaching the provisions of Article 7.2. (b) of Directive 2003/4/EC⁷ regarding the dissemination of environmental information.

Another factor that restricted the public participation was the use of very abstract encoding and abbreviation of information such as the information presented in Annex VI (B.2) " *Total Quantity*".

In our opinion, the public consultation is an important part of the application process; however, Romania did not publish their application in accordance to paragraph 60 and Annex VII of the Commission Guidance.

2.2 Failure to verify whether an environmental assessment of the national plan is required, resulting in a breach of the SEA Directive

According to the Commission Guidance, on the basis of the provisions of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment ⁸("SEA Directive"), Member States should verify whether a strategic environmental assessment of the "national plan" is required.

⁶ Investment number RO-S-023, Annex IX (C.1) Pag. 1/2

⁷ DIRECTIVE 2003/4/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>

⁸ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment Europa website, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0042:EN:HTML> [last accessed February 7, 2012]

The Romanian application simply states that “[f]or the national plan a Strategic Environmental Assessment is not required”, without providing any information regarding why and what exactly was done in order to verify whether a strategic environmental assessment is required. Moreover, the Romanian application mentions that after the approval of the national plan by the European Commission, the government will issue decisions for each investment and an environmental impact assessment will be conducted for each investment. However, conducting environmental assessments for each investment after the Commission’s approval should not replace a proper evaluation under the SEA Directive of the national plan as a whole.

Summing up, the application does provide any indication that Romanian authorities verified whether an environmental assessment was required, as called for by the Commission Guidance.

An environmental assessment under the SEA Directive should be carried out for the plans and programmes which are likely to have significant environmental effects and which are prepared (among other sectors), for the energy sector. For the purposes of the SEA Directive, pursuant to Article 2⁹ *“plans and programmes” shall mean plans and programmes, as well as any modifications to them that are: subject to preparation and/or adoption by an authority at national, regional or local level, or which are prepared by an authority for adoption, through a legislative procedure by parliament or government, and; required by legislative, regulatory or administrative provisions.*

The Romanian application, in particular the national plan for the modernisation of the infrastructure and cleaner technology in energy

⁹ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment Europa website, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0042:EN:HTML> [last accessed February 7, 2012]

production, fulfils all criteria for the “plans and programmes” as defined by the EU legislation. In this regard, the adoption of the national plan will “set out a framework” for implementation of projects that may have a significant impact on the environment.

Additionally, the Romanian legislation transposing the SEA Directive¹⁰ reconfirms the cases in which an environmental impact assessment is required. In accordance to Article 5(2) of this document, the environmental assessment shall be required for: all plans or programmes in the sectors of industry and energy setting out a framework for the subsequent implementation of projects likely to have a significant impact on the environment.

The Romanian national plan clearly constitutes a plan in the field of energy, setting out a framework for subsequent investment projects with a likely significant environmental impact (for instance, new coal power plants). While in the case of the Romanian Energy Strategy for 2007-2020 updated for 2011-2020¹¹ (also a plan in the field of energy, setting out a framework for subsequent investment projects with a likely significant environmental impact), the Romanian authorities complied with their legal obligations conducting an assessment under the SEA Directive. Due to the abovementioned, a similar assessment should have been conducted in the case of the proposed national plan.

This failure to carry out an environmental assessment has resulted in a breach of the provisions of the SEA Directive (Article 3, Article 4 para. 1, Article 6 paras. 1 and 2, Article 8 and Article 9).

¹⁰ Government Decision No. 1076 of July 8, 2004 regarding the establishment of the procedure for environmental impact assessment for plans and programmes published in Official Journal, Part I No. 707 from August 5, 2004

¹¹ Raport de Mediu available at: http://www.minind.ro/dezbateri_publice/2011/Raport_de_mediu_Strategia_Energetica2011_2020_Rev03_27102011.pdf [last accessed January 31, 2012]

The European Commission is the institution tasked with safeguarding that the EU law is properly applied throughout all Member States. Therefore, the Commission should not approve documents that were adopted in breach of EU law, and the application should thus be rejected in its entirety.

3. COMMENTS ON THE CONTENT OF THE ROMANIAN APPLICATION AND THE NATIONAL PLAN

3.1 Eligibility of selected installations in Romania for free allowances under the EU ETS Directive

3.1.1 Requirement of “physically initiated investment process”

According to Article 10c(1) of the revised EU ETS Directive, for proposed electricity production installations which were not already in operation by 31 December 2008, eligibility for free allowances will be determined by whether the investment process of the proposed installation was physically initiated by 31 December 2008.

According to the Commission Guidance¹²: *“an investment process should be considered physically initiated no later than 31 December 2008 if it can be demonstrated that the investment decision was not influenced by the option of receiving free allocation of emission allowances. To this end, Member States could provide substantiated evidence that:*

-Construction work has physically started on-site and was visible by 31 December 2008; or

¹² Communication from the Commission – Guidance document on the optional application of Article 10c of Directive 2003/87/EC, OJ C 99/9, 31.3.2011, paras. 13-15

-a contract for the construction of the power plant in question was signed before 31 December 2008 between an investor (often the operator of the plant) and a company that is in charge of the construction work.”

In summary, to consider a proposed installation as eligible for an exemption under Article 10c, there is a need for proof of either the paperwork which authorised the construction of a power station, or the physical works carried out on the site initiating the investment before 31 December 2008.

3.1.2 Potential Ineligible Installations

In Annex V (B.1.c) of the Romanian application, “Installations”, we have identified one installation for which the permit was issued after 31 December 2008: on 26.01.2010 as showed in the following excerpt:

Numar instalatie	Nume instalatie	Numar permis	Operator	Grup companie
RO-036	Centrala de cogenerare Zimnicea (fosta SC Bio Fuel Energy SRL)	47/26.01.2010	Energy Cogen - Zimnicea	Energy Cogen

According to the information provided in Annex V (B.1.c), it is not clear whether the investment process was physically initiated before 31 December 2008. Moreover, the government did not provide concrete evidence. We therefore call for a review of the eligibility of this installation.

Additionally, we underline that the information provided in Annex V (B.1.c) is not complete, as it does not clarify whether the installations proposed are electricity generators.

3.2 Insufficient monitoring and enforcement provisions with respect to the investments proposed in the National Plan

Article 10c(5)(d) of the EU ETS Directive requires that the application should contain monitoring and enforcement provisions with respect to the intended investments listed in the national plan. With the aim of ensuring proper execution of the identified investments, and of assessing progress and compatibility of investments with the requirements laid down in Directive 2003/87/EC and the Commission Guidance, clear and effective monitoring and enforcement provisions should be set out in a detailed manner in the application. According to paragraph (62) of the Commission Guidance, “[...] *Member States should ensure that they have in force the laws, regulations and administrative provisions that are necessary to subject investments to scrutiny through the competent national authorities clearly identified in the application*”.

The Government Decision no.780/2009¹³ transposed the EU ETS Directive 2003/87/EC in its initial form; however, Romania has yet to transpose the amendments to this Directive as formally adopted in 2009. As previously mentioned, this Directive was substantially amended through Directive 2009/29/EC which introduces among other provisions Article 10c, representing the legal ground for the Romanian application.

Under section D.1. of its application - “*The legal basis of the effective provisions for monitoring and enforcement in Romania*” - the Romanian government mentioned that the monitoring and enforcement process will be realised on the basis of the “current legislation” (without indicating the exact provisions) as well as on the basis of the completion of the existent legislation with specific provisions that should come into force by 31 December 2012. Consequently, it can be stated that at this stage, there is

¹³ H.G. nr. 780/2006 privind stabilirea schemei de comercializare a certificatelor de emisii de gaze cu efect de seră, (published in the Official Bulletin no. 554/27.06.2006) - transposing Directive nr. 2003/87/CE

no proper legal framework in place for monitoring and enforcement. In the absence of legal provisions properly transposing Directive 2009/29/EC as well as in the absence of additional legislation “in force” necessary to enable the competent national authorities to scrutinise the investments, it is not possible to assess how the effective monitoring and enforcement of the Romanian investments will be secured.

Therefore, we call on the Commission to ask the Romanian authorities to present detailed and legally binding provisions that will ensure the monitoring and enforcement. Moreover, the Commission should require a clear and detailed explanation as to how the monitoring and enforcement are covered by existing legislation. If these requirements are not fulfilled or if the legal provisions are insufficient, then the Commission should reject the Romanian application on the basis of Article 10c (6) of the revised EU ETS Directive.

3.3 Investments proposed in the national plan

With two exceptions (a biomass cogeneration plant at CET Govora¹⁴, and the rehabilitation of the coal power plant at Turceni¹⁵) the investments proposed in the Romanian National Plan represent new fossil fuel energy production (lignite, hard coal, both local and imported, and natural gas).

The basic principles for the assessment of the eligibility of the intended investments listed in the National Plan are set forth in Article 10c, para.1 of Directive 2009/29/EC and the Guidance document. The investments should aim to provide for “*retrofitting and upgrading of the infrastructure and clean technologies*” and “*diversification of their energy mix and sources of supply*”. Further, these investments should contribute to emission reduction in a cost effective manner, they should contribute in the future

¹⁴ Investment number RO-\$-012, Annex IX (C.1) Pag.1/2

¹⁵ Investment number RO-\$-004, Annex IX (C.1) Pag. 1/2

to the elimination of the situation that permitted member states to apply for free allocations under Article 10c and they should contribute to decreasing the share of coal in the electricity mix and to diversify the sources of electricity production in the Member States in question. Moreover, the listed investments should be undertaken after 25 June 2009.

Investments that do not follow the aim and motivation behind the derogation under the provisions of EU ETS Directive, and that do not fulfil the criteria and requirements set forth in the Directive and the Commission Guidance, should not be considered eligible for the national plan, and thus should be rejected by the Commission.

3.3.1 Insufficient or missing information about intended investments

Article 4.1 para. 23 of the Commission Guidance sets up six principles under which the Commission has to assess the eligibility of the investments. Pursuant to para. 25 *“[w]hen assessing the application submitted pursuant to Article 10c (5) of Directive 2003/87/EC, the Commission will analyse to which extent the investments identified comply with these principles. If the information provided by Member States in their application pursuant to Article 10c (5) of Directive 2003/87/EC is not sufficiently detailed for the Commission to carry out a comprehensive assessment allowing for a well founded conclusion, the Commission may request additional information. If this additional information cannot be provided in due time, the Commission will reject the corresponding parts of the national plan. The Commission may also consider information and views from other sources to inform its assessment of the application”*.

One important issue with respect to the list of investments in Annex IX (C.1) is the fact that the description of the investments provides only very limited information. For example, one investment is described as “waste to

energy” at CET Timisoara Sud¹⁶ while another one is described as “new high-tech units with gas turbines” at Elcen¹⁷. Moreover, in Annex XII pag. 6/8 “*The Situation of capacities in the National Plan*” under “*Comments*” the government does not provide any information with regard to the capacities to be replaced by the new investments, or the type of fuel used by the existent facilities. For example, according to the Romanian government’s statement,¹⁸ the new coal power plant at Braila (Braila Power) with a capacity of 800MW using imported hard coal will “partially replace existing capacity”. According to our information, there is no coal power plant in Braila (the existing units have been operating only on gas and crude oil). For a proper evaluation, it is necessary to understand what exact capacities are planned to be replaced by this new coal power plant, the fuel used in the existing generation capacity and its agreed closure. In the absence of this important information, the national plan should be considered incomplete and thus rejected.

Furthermore, the national plan does not provide specific information regarding the evaluation methodology of the proposed investments which was used as the basis for the selection (24 investments out of a total of 61 applications received) presented in Annex IX (C.1). For instance, under Section C.1. of the application, the government mentions that the investments included in the national plan were analysed based on selection and hierarchical criteria which were approved within the Governmental working group.

With regard to the principles laid down in Article 4.1. para. 23 of the Commission Guidance, the Romanian authorities do not provide sufficient information regarding how these principles were applied in the evaluation

¹⁶ Investment number RO-\$-018, Annex IX (C.1) Pag. ½

¹⁷ Investment number RO-\$-011, Annex IX (C.1) Pag. ½

¹⁸ Annex XII “The Situation of capacities in the National Plan”, last position “JV EON-ENEL Termoelectrica”

process. On the basis of such fragmentary information provided, it is impossible to assess whether the intended investments are in compliance with these principles as well as whether there is any connection with the objectives of investments established by Article 10c and consequently the entire Directive 2009/29/EC, as follows:

Principle 1 of the Commission Guidance

The national plan does not provide sufficient information for evaluating whether Principle 1 (referring to a fundamental principle of EU ETS Directive 2003/87/EC) is fulfilled. Principle 1 requires that the national plan identifies investments that, directly or indirectly contribute to decreasing greenhouse gas emissions in a cost effective manner. Furthermore, despite the statement included in the application according to which all investments proposed fulfil this condition, the national plan does not contain any information about the way in which the intended investments contribute to reducing greenhouse gas emissions and to what extent. In this sense, the national plan does not contain any information regarding the approach of evaluating the emission reductions for the proposed investments. Hence, two questions arise:

- whether the government in its evaluation of the emission reduction ignored comparisons with a 'no project' scenario;
- whether the government took into consideration the emission reduction which would occur regardless of the investments proposed, due to the business as usual closure of ageing power plants.

Without complete information regarding the evaluation approach, it is not possible and feasible to assess either the cost-effectiveness of the intended investments or their contribution to the reduction of emissions.

Principle 2 of the Commission Guidance

In its application, the Romanian government stated that in order to fulfil this principle, it has evaluated the way in which the investments contribute to the elimination in the future of the situation referred to in Article 10c (1)(c) – in which more than 30% of the electricity is produced from a single fossil fuel (in Romania, the fossil fuel in discussion is coal). According to the Romanian national plan, all investments proposed fulfil this principle. We do not see how this is possible given that from the total number of 24 investment projects, 5 projects are coal-fired power plants. Of these five projects, one project aims to modernise existing capacity (CE Turceni¹⁹) while the other four investments entail the construction of new coal-fired power plants with a total capacity of 2,000 MW (CE Rovinari²⁰, SE Islanita²¹, SE Paroseni²² and Braila Power²³). Upgrading and building new coal-fired installations does not contribute to the reduction of the share of coal in electricity production. On the contrary, support for the investments contained in the national plan will lead to maintaining the high share of coal in electricity production, this being in direct contradiction with the purpose of Article 10c of the EU ETS Directive and Principle 2 of the Commission Guidance.

Principle 3 of the Commission Guidance

Article 10c (5)(e), of the EU ETS Directive establishes that those Member States that intend to allocate free allowances on the basis of this Article shall submit to the Commission an application containing information showing that the allocations do not create undue distortions of

¹⁹ Investment number RO-\$-004, Annex IX (C.1) Pag. ½

²⁰ Investment number RO-\$-005, Annex IX (C.1) Pag. ½

²¹ Investment number RO-\$-009, Annex IX (C.1) Pag. ½

²² Investment number RO-\$-014, Annex IX (C.1) Pag. ½

²³ Investment number RO-\$-023, Annex IX (C.1) Pag. ½

competition. Further, Principle 3 from the Commission Guidance states that investments must neither reinforce dominant positions nor unduly distort competition and trade in the internal market and, where possible, should strengthen competition on the internal market for electricity.

However, the application will undoubtedly favor *Rovinari CEN*, *CEN Craiova* and *Termoelectrica*, the companies ranking the 4th, 5th and 6th among Romania's energy producers. Taking into consideration that these three big companies are state-owned, the national energy market may be distorted by the derogation. Moreover, investments benefiting these companies will reinforce dominant positions in the internal market which represents a breach of principle 3 of the Commission Guidance.

Principle 4 of the Commission Guidance

One criterion of evaluation under this principle requires Member States **not to** introduce in their national plans those investments “*which would be required to match increasing electricity supply and demand*”.

A number of 23 intended investments out of the total of 24 investments described in Annex IX (C.1) Pag.1/2 represent new units that will produce electricity. Taking into consideration that the Romanian application does not mention closing dates for any of the already existing power plants producing electricity, the national plan would lead to a substantial growth of the national electricity production capacity. This indicates that the national plan was designed to prepare the national electricity sector to match increasing electricity demand, thus in breach with the above noted criterion under principle 4 of the Commission Guidance.

Principle 5 of the Commission Guidance

According to this principle, “[i]nvestments identified in the national plan should contribute to diversification, and reduction in carbon intensity, of the electricity mix and the sources of energy supply for electricity production”.

The Romanian national plan indicates that all proposed investments contribute to this goal; however, it does not indicate how this aim is achieved. On the contrary, in our opinion it is clear that the diversification and reduction in carbon intensity of the electricity mix cannot be achieved through a national plan promoting almost exclusively fossil fuels (except one biomass facility with a capacity of 10 MW representing approximately 0.18% of the total installed capacity), and particularly coal investments reaching around 36% of the total new capacity (2,000 MW).

The only diversification strategy included in the national plan relates to increasing the share of natural gas in the energy mix.

Romania misses the opportunity for developing more sustainable alternatives. The 24 investments presented in the Investment Plan (Annex IX C.1) do not include a single wind farm, nor any hydroelectric, solar or geothermal power plants. The list includes predominantly power plants which will burn lignite, coal, and gas. One major obstacle in the development of new private power plants in Romania is the currently very poor state of the electricity grid²⁴. Investments in grid modernization - including smart grids - are of utmost importance in Romania in order for new energy capacities to be granted access to the market. However, the Investment Plan (Annex IX C1) does not include any grid investments at all.

We therefore would like to stress that, in this light, a revision of the proposed investments should be required by the Commission.

²⁴The Romanian Energy Strategy for 2007-2020 updated for 2011-2020, page 18
http://www.minind.ro/dezbateri_publice/2011/Strategie_2007_actualizata_2011_01092011.pdf

Principle 6 of the Commission Guidance

According to this principle, *“investments should be economically viable in absence of the free allocation of emission allowances under Article 10c of Directive 2003/87/EC, once transitional allocation of such allowances comes to an end”*.

The Romanian application and national plan do not provide information regarding the economic feasibility of the proposed investments. It is unclear whether the investments proposed include the necessary feasibility studies that account for emission allowance costs and whether a plan on the structure of the Romanian energy sector indicates the relevance of these investments.

In conclusion, we consider it necessary to ask for additional information required for a proper assessment of the fulfilment of the principles of the Commission Guidance and Article 10c and the EU ETS Directive. Should Romania not provide adequate and timely information, the Commission should exclude investments from its national plan due to their ineligibility.

3.3.2 Ineligible investments that started the investment process before 25 June 2009

Article 10c of the EU ETS Directive sets out in para. 1 *“Investment undertaken from 25 June 2009 may be counted for this purpose”*. This is the date of entry into force of the Directive. Further on, the Commission Guidance states in Article 4.2. para. 28 *“in view of the title and overall context of Article 10c of Directive 2003/87/EC, investments eligible under this provision should concern the electricity sector and are to be undertaken from 25 June 2009”*. Therefore, it seems evident, that Article 10c of Directive is intended to encourage investments in new projects that are planned with the knowledge of the existence of Article 10c. A member state's decision to apply Article 10c should actually be an incentive to

invest in upgrading infrastructure and clean technologies. A different interpretation would lead to financial support for investments that would be undertaken regardless of the existence of Article 10c and the member state's derogation. Such a procedure would actually be a mere reimbursement for planned projects without any additional value for the reduction of emissions and pursuing the aim of the EU ETS Directive.

In the Romanian national plan, more exactly in Annex IX (C.1) Pag. 1/2, it is specified that all investments proposed are “*from 25 June 2009*”; however, we show below, using publicly available information, that some of the investments were undertaken before the cut-off date:

Braila Power²⁵

In the case of the investment “Braila Power”, in June 2008, S.C. Termoelectrica S.A. and a Joint Venture formed by E.ON and Enel signed a Memorandum agreeing to establish a new company as an Independent Power Producer with the purpose of realising a new capacity of 800 MW using imported hard coal. This agreement of investment, officially mentioned on Termoelectrica’s website²⁶ represents evidence that the investment at “Braila Power” was undertaken in June 2008 regardless of the existence of Article 10c provisions and Romania’s eligibility for derogation.

CCCC Brazi- Petrom²⁷

Petrom, the largest oil and gas producer in South-Eastern Europe, began the actual construction of the Brazi gas fired power plant after having started preparatory work already in 2008. According to an article

²⁵ Investment number RO-\$-023, Annex IX (C.1) Pag. ½

²⁶ ²⁶ Proiectul Braila, Termoelectrica website, available at: http://www.termoelectrica.ro/newweb/termo/?page_id=432 [last accessed February 9, 2012]

²⁷ Investment number RO-\$-022, Annex IX (C.1) Pag. ½

published on Petrom's website within the Press Archive on June 3, 2009, the actual decision of investment was taken by Petrom in 2007²⁸. Again, it is more than clear that this investment was undertaken before 25 June 2009 regardless of the existence of Article 10c provisions and Romania's eligibility for derogation and consequently it is not eligible.

If these investments are approved, the derogation would serve as a subsidy for a planned project without any additional value for the reduction of greenhouse gas emissions, nor towards the aim of the EU ETS Directive 2003/87/EC. As a consequence, we ask the Commission to reject the "Braila Power" and "CCCC Brazi-Petrom" investments due to their ineligibility. We also ask for a review of the remaining investments included in the national plan because they may similarly fail to meet the eligibility criteria of the Article 10c of the EU ETS Directive.

3.3.3 Investments directed towards the heating sector

The Commission Guidance in Article 4.2. para. 28 states: "*In view of the title and overall context of Article 10c of Directive 2003/87/EC, investments eligible under this provision should concern the electricity sector. However, as a matter of principle, investments in other energy sectors are not excluded, on condition that they benefit from strong justification on the basis of Article 10c of Directive 2003/87/EC.*"

In the Romanian National plan, some investments are planned for power plants designed to produce both electricity and heating such as CE Rovinari²⁹, SE Isalnita³⁰ or SE Paroseni³¹. The information whether the

²⁸ "Petrom began the construction of the Brazi power plant", June 3, 2009, available at: http://www.petrom.com/portal/01/petromcom!/ut/p/c5/04_SB8K8xLLM9MSSzPy8xBz9CP0os3hzA0sTI2MDI0t3S0s3A0_nUBMDF-9QYyNPE6B8pFm8r4Gh5tnqFGoo4mnl4Gbm7ulhwEEENAdXJSv7-eRn5uqX5AbUQ4AKCLyWQ!!/dl3/d3/L0lJsklLVUpJSkpnIS9JSGpBQUF4QUFFUWtKb0FLcXU2Zy80Qm40UkiBLUIKYXNCYIhwQ0VBIS82X00wOUhGSVUyVUE0SUowRkY2N0kwMDAwMDAwLzdfTTA5SEZJVTJVQTRJSjBGRklDSzEwMDAwMDAvbm9ybWFsL1J2MHBWNUZzNTAwMjQ!/?usp_query=Brazi&Submit.x=0&Submit.y=0#7_M09HFIU2UA4IJOFFICK1000000

²⁹ Investment number RO-\$-005, Annex IX (C.1) Pag. ½

investments concern exclusively electricity production is not provided in the National plan. Moreover, for those investments also focused on other sectors (such as heating production) the Romanian government should have justified its request in a sufficient manner.

4. CONCLUSIONS

As the European Commission's decision regarding the Romanian application and the national plan will have a crucial impact on the Romanian energy sector, we respectfully ask for a thorough assessment of the Romanian application, national plan and accompanying documents. As shown in this report, in many aspects the Romanian application does not comply with the legal requirements:

- Romania did not publish the application in accordance to paragraph (60) and Annex VII of the Commission Guidance.
- The Romanian government failed to verify whether an environmental assessment of their national plan is required, on the basis of the provisions of SEA Directive 2001/42/EC and therefore, the process of preparation and adoption of the Romanian application is in breach of this Directive.

³⁰ Investment number RO-\$-009, Annex IX (C.1) Pag. ½

³¹ Investment number RO-\$-014, Annex IX (C.1) Pag. ½

- To ensure compliance with the provisions under EU ETS Directive 2003/87/EC, the eligibility of installation RO-036 “Centrala de Cogenerare Zimnicea”³² should be reviewed.
- In their current form, the obligatory monitoring and enforcement provisions do not meet the relevant criteria as specified in paragraph (60) to (64) of the Commission Guidance.
- Publicly accessible information shows that “Braila Power” and “CCCC Brazi” investments were undertaken before the cut-off date of 25 June 2009 and are in violation of Article 10c of the EU ETS Directive paragraph 1 and paragraph (28) of the Commission Guidance.
- Romania did not provide an examination regarding the cost effectiveness of the emission reductions by the intended investments in the national plan. The national plan is therefore in breach of principle 1 of the Commission Guidance and the aim of EU ETS Directive 2003/87/EC to reduce emission in a cost-effective manner.
- The allocations of free allowances to *Rovinari CEN*, *CEN Craiova* and *Termoelectrica* will create undue distortions of competition, therefore the application is in breach of Article 10c (5), letter (e), of the EU ETS Directive; moreover, investments benefiting these companies will reinforce dominant positions in the internal market. The national plan is therefore in breach with principle 3 of the Commission Guidance.
- The implementation of the national plan would lead to a substantial growth of the national electricity production capacity. The application is therefore in breach of principle 4 of the Commission Guidance.

³² Annex V (B.1.c) Pag. 1/2, “Installations” position RO-036

- The investments outlined in the national plan maintain the dominant role of coal-fired power generation in the electricity mix. The national plan is therefore in breach of principle 2 and 5 for the investments in the national plan as stated in the Commission Guidance.
- The Romanian government did not justify why a significant number of investments are aimed at the heating sector.

The European Commission should only authorise the application and the national plan of Romania if all legal requirements are fulfilled. We therefore call on the European Commission to reject the entire application or at least those elements of the application of Romania which do not comply with EU ETS Directive 2003/87/EC and other relevant EU legislation.