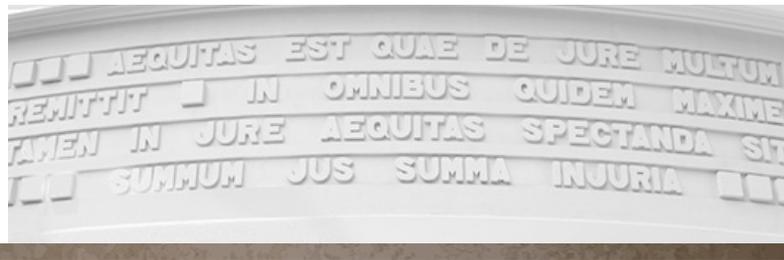




No. 2, February, 2016

## Newsletter



*Constitutional democracy plays, in a non-exhaustive description, the role of assuring the necessary framework in order to prevent conflicts of any nature whatsoever (cultural, social or economic) between citizens and judicial entities alike. In case conflicts do however arise, the political system binds authorities to intervene as a mediator or, as a last resort, as an umpire in conflict resolution, by means of sensible criteria, with a view to ensuring a fair balance between all interests involved, without sacrificing one side over the other.*

*Throughout its activity of over 20 years, STOICA & Asociații - Attorneys at Law, faithful to the defense of the legal interests of its clients has always put forth solutions compliant to this fundamental objective of constitutional democracy.*

*In recent years the legislative evolution in the energy sector has nevertheless prompted the authorities to stray away from their natural role. It is not too late however for all relevant public authorities to cooperate towards bridging the gap that arose, and towards precluding the risks to grow steeper between the various players in the sector.*

---

*Valeriu STOICA, Founding Partner*

## February: A scorching month on the energy market

1. This year has started off boisterously on the energy market. By a decision issued at the end of 2015, the Romanian Competition Council has taken the view, against the industrial European common practice and contrary to the position expressed by the European Parliament and the European Commission, that it is rightful to ban contracts for the sale of high volumes of energy concluded for a long period of time between industrial consumers and some of the producers.

2. The Decision of the Competition Council is yet to be accounted for, so that it remains unclear, at least at this juncture, what sorts of contracts of energy sale, with what type of producer, for what period of time and for what volume are large industrial consumers allowed to conclude. No distinction has been drawn between large industrial consumers and energy providers. Coupled with the lack of a functional OPCOM market, able to fully satisfy their individual needs, the Decision of the competition authority may jeopardize the predictability expected by large industrial consumers, which is also key to a business present on an ever turbulent global market.

3. Beyond this issue, the energy market is in turmoil due to the authorities' incoherent approach regarding the onus of purchasing green certificates.

15. During the very same year, Romanian authorities have adopted a Government Emergency Ordinance which amended the Law no. 220/2008 so that the annual compulsory quota of renewable energy to benefit from the support scheme of green certificates, as of 2014, was not going to be the one foreseen initially, but it was going to be fixed on a yearly basis through an Emergency Ordinance, at the ANRE's proposal. As a result, in 2014, the compulsory quota was fixed at a mere 11,1%, against the one provided for initially, of 15%, and 11,9% in 2015 against 16% as stated in the original version.

16. As support quotas for renewable energy diminished, the green certificates calculation scheme for 2014 and 2015 has been set, as previously mentioned, at 0,218 green certificates/MWh, respectively 0,274 green certificates/MWh.

17. Even under the circumstances of reduced quotas in comparison to the initial period, according to an estimation made by ANRE, in 2015, 6 million green certificates will find no purchaser, while another 3 million green certificates for 2014 will be added up to these figures.

18. Additionally, renewable energy producers are taxed for green certificates at the moment of issuance, and not

The annual renewable energy compulsory quota to benefit from the green certificates aid scheme, laid down for 2016 by the Romanian Government at the suggestion of ANRE, triggers forceful reactions by renewable energy producers. It also has a direct impact on the demand of green certificates on the OPCOM market. On the other hand, ANRE refuses to grant to the large industrial consumers the exemption from purchasing green certificates for the full year 2015, seeking clarification from the Government and thus complicating matters further for both large industrial consumers and energy providers.

4. What is it that got us here? It is hard to believe that within several pages only, one could fully answer this question, given its intricacy. We shall do our utmost nevertheless, to replicate, in the first part of this paper, the view taken by the producers of renewable energy, whilst in the second part we shall to briefly describe the setbacks that large consumers are currently facing. Finally, we shall refer to several judgements in which the highest European courts, the ECHR and the ECJ, have censored the incoherent approach on the part of the Romanian authorities.

l) The stance taken by the renewable energy producers: the green certificates scheme and some of its inconsistencies

#### A) A tortuous history

5. In the context of the EU energy policies, in 2009, the European authorities have issued the Directive 2009/28/CE, setting out a 20% share of energy from renewable sources in overall Community consumption to be reached by 2020. Romania has set itself a more ambitious threshold, of 24%. The Romanian legislator has transposed the aforementioned Directive through the amendments and the additions made to Law no. 220/2008 and thus setting up green certificates for the support of the renewable energy production.

6. On the basis of this scheme, each producer of renewable energy is awarded monthly a statutory number of green certificates, in direct proportion to the volume of renewable energy it delivered, and coupled with the type of source for renewable energy. In order to pay out their initial investment in production capabilities, renewable energy producers sell green certificates to energy suppliers, in exchange of a price set on a demand and supply basis, or to the consumers with whom they have established a direct contractual relationship; this price is nevertheless limited by law, with its margins being set at a minimum of Euro 27/MWh and a maximum of Euro 53/MWh. Hereafter, energy suppliers pass the value of green certificates on to the end consumers, depending on how much renewable energy they used. Consequently, the value of green certificates always falls on the end consumer. A green certificate is effective for one

at the moment of capitalization (at the moment of sale). Moreover, in January 2015, the Romanian Government has adopted a Memorandum regarding the opening up of a renewable energy production support scheme aimed at boosting imports of renewable energy from other Member States. As a result, once again, the supply of green certificates will increase.

19. Due to constant legal amendments, in 2015 Romania has dropped to 34th in a ranking of the most attractive markets in the world for investment in renewable energy, according to the last EY report, the Renewable energy country attractiveness index (RECAI). Moreover, according to some independent research carried out by POYRY and a major consultancy company in Romania, for the wind energy alone, in 2014, the total net loss (at a consolidated level) amounted to as much as RON 2.1 billion.

#### B) The current discontent

20. What happened in January 2016? The Government, based on ANRE's proposal, has fixed on 31.12.2015 a compulsory renewable energy quota of 12,15% to benefit from the support scheme. We recall that the initial version of the law proposed for 2016 a quota of 17%. The 12,15% share is very similar to the 2015 share (11,9%) or to that for 2014 (11,1%). In accordance with this renewable energy support quota of 12,15%, the ANRE has laid down a purchase quota of 0,317 GC/MWh. Consequently, green certificates will experience no seriously increasing demand.

21. In respect of the current quota of 12.15% proposed by ANRE for 2016, the associations of producers of renewable energy estimate that another 6 million unsold green certificates for 2016 will add up to the already 9 million left unsold in 2015 and 2014. All these certificates will expire (some already did) in one year following their issuance, thus generating no return at all. This is why fierce criticism was drawn from renewable energy producers who invested in the production of renewable energy with the initial version of the law in mind.

#### l) The large consumers' view: the exemption mirage

22. It remains unclear whether, at the time of setting up the support scheme for renewable energy producers, the Romanian legislator considered the impact this scheme will have upon large energy consumers. In 2008 it seemed that the marvelous economic growth was bound to last many years, and probably this led to unwarranted optimism on the part of authorities regarding the prospect of increased consumption or the capacity of both the industry and the Romanian society as a whole to bear a statutory support scheme generous towards green energy.

23. However, for aluminum, steel, iron, cement, chemicals producers, and generally, those operating in the heavy industry, the costs with electrical energy amount sometimes to even 50% of the total production cost. The international competitiveness of these large consumers may suffer, since producers in less

year from the moment of its issuance.

7. In order to create a demand, the state has laid down an obligation upon consumers to purchase green certificates. To that effect, within the state aid scheme, ANRE establishes on a yearly basis a compulsory annual quota of green certificates to be purchased by the suppliers of renewable energy. The evolution of the annual quota is shown in the following chart:

Year of reference	Compulsory quota of purchase of green certificates
2011	0,03747 green certificates/MMh
2012	0,1188 green certificates/MMh
2013	0,224 green certificates
2014	0,218 green certificates/MMh
2015	0,274 green certificates/MMh
2016	0,317 green certificates/MMh

8. Among other various criteria, the aforementioned quota is dependent, upon another quota – the annual compulsory renewable energy quota to benefit from the green certificates scheme: the higher this quota (that is, a larger percent of renewable energy benefiting from the subsidy), on the basis of a virtually constant consumption, the bigger the quota of green certificates purchased by consumers. When the green certificates aid scheme was put in place, the statutory annual compulsory quota of renewable energy, that was set to be granted green certificates for, looked as detailed in the chart below.

Year of reference	Compulsory quota of green certificates purchase benefiting from the aid scheme of green certificates
2011	10%
2012	12%
2013	14%
2014	15%
2015	16%
2016	17%

9. The aid scheme was extremely generous. Therefore, according to an EY report on the Renewable energy country attractiveness index (RECAI), in 2011, Romania was ranking 13th globally among the most attractive countries for such investment; the relatively large number of green certificates issued for each MWh of energy, together with a statutory purchase quota, coupled with a minimum price for certificates sale were, undoubtedly, key elements to increasing the attractiveness of the Romanian aid scheme.

10. Moreover, it was probably the computing and calculating on the part of authorities that lacked transparency and the rather complicated nature of the scheme that determined some investors to overlook that there was no direct and unambiguous connection between the number of issued certificates and the amount of money that could be

environment friendly areas of the world are not bound to bear the costs of renewable energy. Moreover, the global crisis has fully left its mark in 2010-2011 and this is what led to a drop in the energy consumption and also weakened the industry's capacity to bear the green certificates additional costs on their own.

24. Following amendments to the industrial strategy at an European level, lest to suffocate large energy consumers with an exaggerated energy price (including that paid for green certificates), the 2014 Government Resolution #495, put in place a system of exemption, so that large consumers be exempted by up to 85%, depending on their respective energy consumption, from the onus to purchase green certificates.

25. The aid scheme designed to protect large consumers (their being exempted from buying a percent of green certificates) was initially set to take effect as of August 2014. Its entry into force was postponed until December 1st 2014 in order for the consent of the European Commission to be granted; approval was issued in October 2014. Although the first claims for exemption (together with the relevant information) have already been submitted to the competent authority in December 2014, and the granting procedure for these claims was statutorily limited to a 30 days period of investigation, the competent authority has issued its first warrant in June 2015 only.

26. According to Article 3(1) of the 2014 Government Resolution no. 495/2014, "The exemption (i.e. – of large consumers) is to be granted in relation to the mandatory green certificates purchase quota applicable to energy suppliers, published by ANRE, as of the year in which the exemption approval was granted." On this basis, all large consumers that were granted the exemption in 2015 were expecting to benefit from the exemption for that whole year, namely since January 1<sup>st</sup> 2015.

27. By means of a public notice letter of January 5th 2016, the ANRE has pointed out that, in its view, the afore-mentioned exemption was to be applied to large consumers not as of January 1st 2015 but starting with the very moment the exemption was granted (that is June 2015 for most of the concerned consumers). The view adopted by ANRE in this regard is instrumental since, according to the relevant law, ANRE is to establish the green certificates final quota to be purchased in 2015 on March 1st 2016 at the latest. ANRE has officially requested from the Government an interpretation that clarifies when the exemption should entry into force.

28. By way of another public notice letter of February 2nd 2016, ANRE has requested the economic operators bound to purchase green certificates to forward the necessary information for determining the compulsory green certificates purchase quota for 2015, both in case the exemption takes effect at its date of issuance (as ANRE would hold) or in case the exemption takes effect as of 01.01.2015.

29. As a result of this approach by ANRE, energy suppliers are facing major hurdles due to the lack of

cash in by selling green certificates: from the very beginning, depending on new production capabilities and how energy consumption fared, the supply of green certificates could pose the danger of exceeding the demand by far, resulting in certificates being kept constantly at the minimum statutory price, thus causing a significant part of them to remain unsold.

11. Under these circumstances, many producers have shown interest in investing in the production of renewable energy in Romania, so that at present, investment in this sector rises to as much as around 8 billion euros. Due to the attractive green certificates aid scheme, in 2012 the installed production capabilities of renewable energy has increased by 190%, the installed power reaching, at the end of 2013, 2339 MWh, with ongoing investment for another 2627 MWh.

12. In 2013, according to a report drawn up by the European Union, 23.9% of the national consumption of energy stemmed from renewable sources, which was very close to the European objective that Romania has set itself for 2020, namely 24%. The Romanian Government was nearly reaching its target of 24% set for 2020, 7 years in advance.

13. The big success enjoyed by the green certificates aid scheme – attracting high volumes of investment, increasing the installed renewable energy capabilities – has led to an increase in the number of green certificates and, consequently, to a heavier financial burden on those constrained to purchase them – the final consumer. This increase, provided it followed the original trend, would have led to an unbearable charge, especially for large industrial consumers, the most affected by the onus of purchasing green certificates. As a result, a series of legislative amendments ensued, aimed at tempering the disparity between the producers' interests, namely that of receiving and selling as many green certificates as possible, and the interests of the consumers, compelled to bear the cost of green certificates in a direct proportion to their own energy consumption.

14. Hence, in 2013, the Romanian legislator postponed (up until 2017/2018) the trading of a number of green certificates received by some of the renewable energy producers. For instance, wind energy producers could sell only 0,5 out of 1,5 green certificates received for every MWh.

decisiveness on the part of the authorities, who do not know what is the amount of green certificates that they are to sell and exempt from selling to large consumers.

### III) Conclusions

30. The setting up by the Romanian authorities of an incoherent legislation, frequently amended, is well-known to the European forums. For instance, in over 100 cases, the ECHR has condemned the Romanian State for having incoherently legislated; in the *Viașu* case, the European court upheld, with surprise, that the Law no. 18/1991 was amended in 2008 for no less than 72 times (!) hence highly affecting the accuracy and the predictability of the legislative process; in the *Păduraru* case the same court has held that by contradictory successive amendments, the Romanian State has forged two groups of individuals with contrasting interests, both prejudiced by the rampant uncertainty, the result of an unclear, too frequently modified of a legal framework. As regards the European Union, it suffices to recall the car tax saga, "censured" in its initial and subsequent forms in several cases before the ECJ (the *Nádasdi* and *Németh, Tatu, Nisipeanu* or *Câmpean* and *Ciocoiu* cases etc.). On this occasion, we have briefly recalled judgments laid down only by the most prominent European courts, even though other authorities have taken the same stance in this regard (The European Council, the European Commission, etc.).

31. The history of the aid scheme for renewable energy seems to increasingly mirror these patterns; with the Government setting up a renewable energy quota of 12,5% to benefit from the green certificates aid scheme, in spite of the recent reactions, is yet another example of infringing the legitimate expectations of the relevant parties, which could find legal protection before the European courts.

32. On the other side, as far as large consumers are concerned, we cannot help but take account of the severity of the fact that, even though the European Commission has allowed for the exemption scheme to be applied to large consumers ever since December 1st 2014, the Romanian authorities are still trying to figure out in February 2016 whether the granting of the exemption on its own provisions as of January 1st 2015 is rightful or not.

33. Even more dangerous would be, relative to the "history" of the legislative process in Romania, for this behavior to be put up with uncomplainingly. In this field, as in any other field, it is never too late for the legal framework to fulfill two key criteria for the rule of law: predictability and legislative stability, so that the harmonization of interests, of different nature, of the main players on the energy market is becoming reality.



**Valeriu STOICA**  
Founding Partner

T: (+4021) 402.09.30

E: [vstoica@stoica-asociatii.ro](mailto:vstoica@stoica-asociatii.ro)

This Newsletter is strictly informative, does not represent advertisement and can not be deemed as an offer for legal services or as a legal opinion. In case you might have any suggestion/observation with regard to the present Newsletter please send it to the address: [newsletter@stoica-asociatii.ro](mailto:newsletter@stoica-asociatii.ro).



**Dragoș BOGDAN**  
Partner

T: (+4021) 402.09.30

E: [dbogdan@stoica-asociatii.ro](mailto:dbogdan@stoica-asociatii.ro)

SCA STOICA & Asociații

T: (+4021) 402.09.30

F: (+4021) 402.09.31

E: [sca@stoica-asociatii.ro](mailto:sca@stoica-asociatii.ro)

Opera Center II, 2 Dr. Nicolae Staicovici street,  
2<sup>nd</sup> floor, District 5, 050558, Bucharest,  
© STOICA & Asociații 2016