

Societatea Energetică Electrica S.A.
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 Fiscal Registration Certificate RO 13267221
 J40/7425/2000
 Share capital: 3.459.399.290 RON
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Endorsed
 CEO
 Georgeta Corina
 POPESCU

NOTĂ			
AUTHOR	Number	No. 9900/9001/23.09.2019	
	Entity	Legal Department, Legal and Holding Management Division	
1. Referring to	Attracting the liability of the directors and respectively, of the executive managers, under art. 155, par. (1) of Companies Law no. 31/1990, republished		
2. For	Information	Endorsment	Approval
	BoD	x	
	GMS		x
3. Proposed resolution	<p>Regarding the measures ordered by the Romanian Court of Accounts ("RCA") to remedy the deviations found in items 1-5 of the RCA Decision no. 12 / 27.12.2016 ("The Decision"):</p> <p>1. The Board of Directors endorses, in order to be submitted for the approval of the Ordinary General Meeting of Shareholders, filing a civil action in court for attracting the liability of the persons who have held the positions of director and respectively, executive managers of the Company for the obligations not fulfilled and/or improperly fulfilled, according to art. 155 of Law no. 31/1990, which determined the damages retained by the Romanian Court of Accounts, in order to implement the measures ordered by the Romanian Court of Accounts for remedying the deviations found according to items 1-5 of the RCA Decision no. 12 / 27.12. 2016 issued as a result of carrying out the control on the management of the patrimony of Societatea Energetica Electrica SA for the period 01.01.2013-30.06.2014 and the empowerment of the Chief Executive Officer of Electrica for the representation of the Company (with the possibility of sub-delegating the representation in court to persons with legal training), signing and promoting the legal action, according to the Note made available to the shareholders, according to the law.</p>		

4. Legal background	<ul style="list-style-type: none"> - Art. 33 par. 3, art. 64 par. 1 of Law 94/1992 regarding the organization and functioning of the Court of Accounts; - Art. 117 par. 1, art. 155 of Companies Law no. 31/1990, with subsequent amendments and completions; - Art. 220 of the Civil Code.
5. Content	
I. <u>General aspects</u>	
<p>Following the Court of Accounts control regarding “the management of the patrimony for the energy distribution and supply activities of Societatea Energetica Electrica S.A.” (“ELSA”) for the period 01.01.2013-30.06.2014, a series of measures were ordered to ELSA by the Decision no. 12/27.12.2016 (“The Decision”).</p>	
<p>As a general title, applicable to all the points mentioned below, we mention the following details:</p>	
<p>a. ELSA challenged both administratively, at the Romanian Court of Accounts, as well as in the court, the deviations and measures, detailed in the contents of this note, ordered by the Romanian Court of Accounts. The case is the subject of the file no. 2229/2/2017 of the Bucharest Court of Appeal, the next court term being established on October 30, 2019, in order to carry out the judicial technical expertise the energy specialty, evidence requested by ELSA.</p>	
<p>b. At the same time, on the role of the National Anticorruption Directorate ("NAD"), is registered the criminal file no. 208 / P / 2017, which was constituted following the communication of the control report by the Romanian Court of Accounts to NAD. In this case were requested by DNA a series of information and documents, which were transmitted by ELSA. At the same time, on March 28, 2018, between the NAD commissioners and ELSA, a report on the physical identification and photographing of the AMR equipment at the company headquarters was concluded. ELSA constituted a civil part in the criminal file no. 208 / P / 2017 on June 13, 2019. By the Ordinance dated 06.09.2019, communicated to ELSA on 13.09.2019, the NAD prosecutor ordered the classification of the case in terms of committing the offense of abuse in service, in relation to the facts presented in the notification of the RCA, this Ordinance being appealable in within 20 days from the date of its communication.</p>	
<p>c. Since the request to suspend the Decision 12 / 27.12.2016 was rejected, ELSA has the obligation to implement the measures ordered by the RCA. According to the Follow-up Report dated 16.07.2019, the RCA noted that the measures related to points 1-5 were partially fulfilled.</p>	
<p>d. At the same time, we mention that deadlines have been set for the implementation of the RCA measures, deadlines that have expired and the RCA did not agree with their extension, so that at the present date ELSA has the obligation to carry out the measures ordered by the RCA, ELSA ‘s management being responsible for establishing the measures required to recover the damages found by the RCA.</p>	
<p><u>Item 1 of the Decision:</u></p>	
<p>The commitment of money funds in an estimated amount of lei 224,622,940 (excluding VAT), for the execution of works related to the objective "AMR system necessary for the measurement activity and dispatcher of consumption at SC Electrica SA", for which the goods purchased although they were registered in accounting, they are not physically found in the patrimony nor were they used for the activities carried out according to the activity object, being necessary to carry out the activity of other legal persons (the subsidiaries of the company).</p>	
<p>Regarding the extension of the verifications, the commission constituted in Electrica, by Decision no. 21/13.02.2017, following the verifications undertaken, did not find the existence of any other procurement contract related to the objective of the AMR System.</p>	

The estimated value of the deviation retained by the RCA is in the amount of lei 214,276,649, and the value of the damage, estimated by Electrica is in the amount of lei 232,451,693.

Item 2 of the Decision:

Unjustified increase of the expenses with technical assistance services in an estimated amount of lei 2,337,657.50 (excluding VAT), destined for the activity of other legal entities (distribution subsidiaries).

From the analysis carried out by the commission constituted in ELSA, it turned out that there are no other cases of contracts for technical assistance services related to the communication infrastructure to the subsidiaries of the nature of those identified in the Decision. The estimated value of the deviation found by the RCA is in the amount of lei 2,337,657.50 (excluding VAT), and the value of the damage, estimated by Electrica, is in the amount of lei 2,711,682 .

Item 3 of the Decision:

Unjustified increase of operating expenses with the amount of lei 74,667 (excluding VAT), representing maintenance services equipment located in the communications infrastructure of subsidiaries, different legal entities.

The estimated value of the deviations, held by the Court of Accounts, is lei 74,667 lei (excluding VAT), representing expenses incurred by **Electrica SA** in order to carry out the activities of the subsidiaries.

The amount of the damage, estimated by Electrica, is lei 86,614.

Following the extension of the verifications, the Commission constituted in ELSA, found that there are no other contracts for maintenance services equipment in the communication infrastructure between January 2013 and June 2014, of the nature of those mentioned by the RCA for the measures in question.

Item 4 of the Decision:

Unjustified increase of the operating expenses with services in an estimated amount of lei 273,500 lei (excluding VAT), for which there was no proof of their provision for the exclusive needs of the company, respectively with the value of 4 technical studies purchased for activities that are not found in the object of activity of the verified entity, being related to activities belonging to other legal persons (Electricity Distribution Subsidiaries), without being reinvoiced to them and recovering their value, being technically endorsed for the electricity distribution activity carried out by the Electricity Distribution Branches (Transilvania Sud, Muntenia Nord si Transilvania Nord), organized as distinct legal entities, domain in which the entity is not licensed by ANRE to carry out activities and neither owns such distribution systems.

The estimated value of the deviations, held by the Court of Accounts, is lei 339,140, representing expenses with the 4 studies designed to carry out the activity of other legal persons (distribution subsidiaries), registered in the expenses accounts of Electrica SA (operating expenses in the amount of lei 273,500, to which was added a tax on profit in the amount of 43,760 lei). The amount of the damage, estimated by Electrica, amounts to lei 317,260. The Commission constituted in Electrica extended the checks and identified a further 9 studies in addition to the 4 already identified by the RCA. From the analysis of the internal commission it turns out that the value of the contracts that had as object the carrying out of studies was of lei 647,728.20 (without VAT), in 2013, and of lei 224,840

(without VAT), in 2014. Also, the internal commission found that through SLA type contracts, the distribution subsidiaries were re-invoiced for the study part, the amount of lei 1,064,808 (excluding VAT) in 2013, and the amount of lei 266,202, for 2014.

Item 5 of the Decision:

Making payments, between July 2013 - June 2014, in an estimated amount of lei 36,385, for expenses without legal basis, respectively for expenses with the rent of a building housed in service homes, benefited by the general manager, under the conditions in which granting the house was not carried out under the law.

The estimated value of the deviations, held by the Court of Accounts, is of lei 36,385, representing the value of the rents paid for the period 08.07.2013-30.06.2014 in order to rent a space having the destination of service housing, made available to the general manager mr. Ioan Roșca. The amount of the damage, estimated by Electrica, is lei 42,206. As a result of the verifications carried out, no other case was identified, during the period subject to the control, in which Electrica provided service housing by entering into contracts for this purpose. **The actions** taken by the commission constituted in Electrica, in order to quantify and recover the damage, consisted of:

- notification of the directors who approved the contract under which the general manager benefited from a service residence, regarding the RCA findings expressed through the Decision;
- issuing an address to the insurance company Omniaisig Vienna Insurance Group S.A., under the insurance contract no. 107/2013 regarding "Insurance Services of professional liability for the members of the Board of Directors", in order to compensate Electrica with the amount representing the deviation found by the RCA;
- the insurer opening several damages files.

From the correspondence with the insurance company, results that the insurance company has suspended the settlement of the damage files until the final settlement of the appeal filed by ELSA against the RCA Decision.

By address 9900/13538/20.12.2018, Electrica returned to Omniaisig requesting the insurance company to proceed with the instrumentation of the damages files independent of the settlement of the court file.

By address DD050 / 04.01.2019, Omniaisig has maintained its position in the sense that it will proceed with the instrumentation of the files after the final settlement of the litigation of the Court of Appeal.

- also, on 29.11.2018, Electrica returned with notifications to the directors of the company who approved the contract concluded with the general manager, in order to pay the damage.
- by the agreement no. 9900/1350 / 06.02.2019, Mr. Rosca Ioan waived the benefit of invoking the extinguishing prescription of the ELSA right to request the recovery of the amounts appreciated by the Court of Accounts as representing damage, the parties agreeing that the new prescription period that will run as an effect of the express renunciation that is the subject of the agreement will be for 10 years, calculated from the date of its conclusion, and in the situation in which it will be found that this limitation period is not in accordance with the provisions of art. 2515 paragraph (3) of the Civil Code, the new prescription period will be considered established by the parties, for a period of 10 years from the date of registration with ELSA of the RCA Report, respectively from 29.11.2016. At the same time, it was agreed that the agreement does not represent an act of acknowledgment by Mr. Rosca Ioan of any prejudice brought by ELSA nor of any possible payment obligation to it.

II. Obligation to implement the RCA Decision

ELSA has the obligation to order the measures to recover the damage, in Law no. 94/1992 regarding the organization and functioning of the Court of Accounts being provided sanctions for non-observance of the measures established by the RCA. Thus, in accordance with the provisions of art. 33 paragraph 3 of Law no. 94/1992, *in the situations in which the existence of deviations from legality and regularity is stated, which have determined the occurrence of damages, is notified to the management of the audited public entity this state of fact. Establishing the extent of the damage and arranging the measures for its recovery become an obligation of the management of the audited entity.* **The non-recovery of the damages, as a result of the failure to act and the failure of the management of the entity to submit the measures transmitted by the Court of Accounts, constitutes an offense and is punished by imprisonment from 3 months to one year or with a fine, according to art. 64 paragraph 1 of Law no. 94/1992.**

III. Competence

According to art. 155 para. 1 of the Companies Law no. 31/1990, *"the action against the founders, the administrators, the directors, respectively the members of the board of directors and the supervisory board, as well as the financial censors or auditors, for damages caused to their company by breaching their duties towards the company, belongs to the general meeting, which will decide with the majority provided in art. 112 "*, and according to par. 2, *"The General Assembly designates with the same majority the person in charge to file the legal action."* At the same time, **art. 220 Civil Code** provides in par. (1) that *"The action against the administrators, censors, directors and other persons who acted as members of the bodies of the legal person, for the damages caused to the legal person by them, in breach of the duties established in their task, belongs, on behalf of to the legal person, to the competent management body, which will decide with the majority required by law, and in the absence, with the majority required by the statutory provisions. "*

IV. Liability of the responsible persons

Regarding the persons with attributions in the field for which the deviations were found, the Court of Accounts identified as responsible for the damages caused to ELSA both persons who held management positions, in this case directors, general managers, department directors and heads of service, as well as employees of ELSA (both current and former) who held positions of execution.

a) Regarding the deviations that are subject to item 1 of the RCA Decision:

The Court of Accounts held that the persons who signed the service contracts identified by the Court of Accounts (so they took on the responsibility of the company), those who approved the inclusion in Electrica's investment program of these works, may be held liable for the damages caused, respectively those who signed the pass-through sheets to the fixed assets of the *AMR System investment for the activities of the measuring operator and consumer dispatcher in Electrica.*

Apart from the persons detained by the Court of Accounts, with attributions in the field for which the deviations were ascertained, based on the legal analysis carried out by ELSA with external support, it turns out that one can proceed to attract the responsibility of all those persons who have signed the

contracts identified by to the Court of Accounts, thus committing the responsibility of the company, of those who endorsed/approved the inclusion in the investment program of Electrica of these works, of those who signed the pass-through sheets to the fixed assets of the investment, of those who signed and approved the notes to substantiate the public acquisition, the necessary reports and the inclusion in the Investment Program, without a real need for the acquiring company (ELSA), signed and approved the notes regarding the estimation of the value or other documents that were the basis for the Notes regarding the estimated value, signed and approved the Notes regarding the choice of the procedure / the corresponding supporting notes.

b) Regarding the deviations that are subject to item 2-4 of the RCA Decision:

The persons indicated in the Court of Auditors' report, to which the liability for the recovery of the damage may be drawn, are:

- the managers of the specialized compartment that initiated the purchase of specialized technical assistance services on the communications infrastructure of Electrica, of the maintenance services of communications equipment and of the services of elaboration of studies, which led to the conclusion of the contracts, persons to whom the responsibility for the certification the reality, regularity and legality of the operations whose supporting documents have certified them;
- the managers of the specialized compartment, which granted the visa of preventive financial control proper to the operation of the acquisition of the specialized technical assistance services on the communication infrastructure, of the maintenance services of the communication equipment and of the studies development services;
- the general manager, who represented the company at the conclusion of the contracts indicated by the RCA.

c) Regarding the deviations that are subject to item 5 of the RCA Decision:

The persons indicated in the Court of Accounts' report, to which the liability for the recovery of the damage may be drawn, are:

- the Chairman of the Board of Directors, who signed the Mandate Agreement concluded with the Director General, as authorized person / principal;
- The General Director of ELSA, who, in this capacity, has approved the payment of the rent for the space for service housing.

Apart from the persons detained by the Court of Accounts, with attributions in the field for which the deviations were ascertained, based on the legal analysis carried out by ELSA with external support, it follows that one can proceed to attract the responsibility of all BoD members, who have approved the form of the mandate contract that was to be concluded with the general manager, under which was concluded the Contract for the rental of the working house.

Based on the findings of the Romanian Court of Accounts, according to which the persons with attributions in the area of activity in which the deviations were found did not fulfill, respectively they did not fulfill properly their obligations according to the contracts concluded between them and ELSA or not have complied with the legal provisions and, as a result, have caused the respective damages to the company, **ELSA will initiate actions to recover the damages under:**

- **contractual liability**, in case of existence, between ELSA and those persons, of civil law relationships (based on mandate contracts).

Following the above, the persons against whom it is necessary to **formulate a civil action in court in order to attract liability** are those who have held the functions of:

- Directors: Olteanu Cristian, Nicușor Mihai, Șaptefrați Mihai, Dumitrașcu Gabriel,

Coșeriu Sorin, Untescu Marius Eugen, Folescu Ioan, Țurlea Marian, Toader Ioan Bacu, Mârza Florin, Brădean Magdalena, Patriche Cezar Flavian, Ioan Roșca, Dorin Cătălin Spătaru, Nicolae Pleșa, Constantin Dinescu, Ionuț Sebastian Iavor, Marius Marin Petrescu,

- Executive Managers: Folescu Ioan – general manager, Dumitru Federenciuc – manager of the Technical Direction, Maria Spandonide – manager of Finance Patrimony Direction, Ioan Silvaș – manager of Energy Supply Direction, Corneliu Stan – general manager, Ioan Roșca – general manager,

for the obligations not fulfilled and/or improperly fulfilled, according to art. 155 of Law no. 31/1990 which determined the damages retained by the Romanian Court of Accounts, in order to implement the measures ordered by the Romanian Court of Accounts for remedying the deviations found according to items 1-5 of the RCA Decision no. 12 / 27.12. 2016 issued as a result of carrying out the control on the management of the patrimony of Societatea Energetica Electrica SA for the period 01.01.2013-30.06.2014.

Regarding the **prescription period**, the general limitation period of **3 years** is applicable, which, at first interpretation, it can be appreciated that it starts to run from the **date of registration by Electrica of the Court of Accounts report (29.11.2016)**, by which it is found the violation of the applicable legal provisions indicated in the Report and the Decision of the Court of Accounts and causing damage to the company as a result of the obligations assumed by it, through its representatives, with the non-observance of the legal provisions, **the deadline to be fulfilled on 28.11. 2019.**

However, **there is also the major risk of a misinterpretation by the courts, in the sense that it arises from the date of the damage**, and not from the date on which the company knew or had to know both the damage and the one who he is responsible for **what would entail the prescription of the right to action; thus, if it were considered that the prescription period would have started to run from the date of payment, taking into account the payment dates retained in items 1-5 of the RCA report, the limitation period would have been fulfilled between December 4, 2012 - April 30, 2018.** In this last interpretation, at the date of the registration of the report of the RCA (29.11.2016), about 85% of the amount estimated as damage would have already been prescribed.

We mention that, by **Decision no. 19 of 03.06.2019**, the supreme court has established that the beginning of the term of prescription of the action for committing the patrimonial liability of the employee does not start from the date of the control act performed by the Court of Accounts or by another body with control powers (through which established for the employer the obligation to act for the recovery of an injury caused by an employee or resulted from the payment to him of an undue amount of money), but must be taken into account:

- the provisions of art. 268 para. (1) letter c) of Law no. 53/2003 regarding the Labor Code - 3 years from the date of the birth of the right to action,
- the provisions of art. 211 letter c) of the Law on social dialogue no. 62 / 2011- 3 years from the date of the damage,
- the provisions of art. 8 of the Decree no. 167/1958 - the date when the damaged party knew or should have known, both the damage and the person responsible for it and
- the provisions of art. 2526 of the Civil Code - the date on which each benefit becomes chargeable / the date on which the last benefit becomes chargeable.

As such, *on the date of communication of the Control Report by the RCA, respectively on 29.11.2016*, referring also to the period that was the subject of the control (January 1, 2013 - June 30, 2014), *the period for which, in the interpretation given by the decision of the HCCJ, was not prescribed the right of Electrica to carry out the actions to recover the damages found by the Court of Accounts, is the period 01.12.2013-30.06.2014.* Regarding *the damages* found by the RCA as being caused by the

deviations committed during the period 01.01.2013-30.11.2013, the right Electrica SA to act for the recovery of the damages was prescribed at the date of the communication of the control report, in the interpretation given by the HCCJ decision previously mentioned.



V. Conclusions/ proposals:

1. Considering the above, for the recovery of the damage in a total amount of lei 235,609,455, to which will be added the legal interest calculated until the date of the recovery of the damage, we submit to the endorsement Board of Directors in order to be submitted for the approval of the Ordinary General Meeting of Shareholders, filing a civil action in court to attract the liability of the persons who held the positions of:

- director and executive managers of the company,

for the obligations not fulfilled / improperly fulfilled, according to art. 155 of Law no. 31/1990, which determined the damages retained by the Romanian Court of Accounts, in order to implement the measures ordered by the Romanian Court of Accounts for remedying the deviations found according to items 1-5 of the RCA Decision no. 12/27.12. 2016 issued as a result of carrying out the control on the management of the patrimony of Societatea Energetica Electrica SA for the period 01.01.2013-30.06.2014 and the empowerment of the Chief Executive Officer of Electrica for the representation of the Company (with the possibility of sub-delegating the representation in court to persons with legal training), signing and promoting the legal action.

The judicial stamp fee corresponding to the action rises to the estimated amount of lei 2,832,452 (related to the value of the damage – lei 235,609,455 lei and the legal interest of lei 47,275,221, calculated until November 14, 2019, the estimated date around which we consider that the action will be filed - after the GMS meeting, but not later than 28.11.2019).

CFO Mihai DARIE	Signature 
Head of Legal Department Ştefania ANDRUHOVICI	Signature 
Author Legal Counsler Vasile IFTIMIA	Signature 