

Access to the EU Modernization Fund is a true opportunity for the Romanian Energy Sector

Opinion by Florian NITU, Managing Partner, Popovici Nitu Stoica & Asociatii

On September 14, 2021, the Romanian Ministry of Energy ("ME") has publicly announced¹ that it has submitted the first applications to the European Investment Bank for attracting financing from the EU Modernisation Fund.

Under EU Regulation no. 100/2020, by 30 November of each year, each beneficiary member state shall provide to the European Investment Bank (EIB) and the Investment Committee with an overview of investments in respect of which it intends to submit investment proposals in the next two calendar years. Although the beneficiary member states may submit investment proposals to the EIB and the Investment Committee at any time during a calendar year, the EIB and the Investment Committee assess the investment proposals submitted by the beneficiary member states only on a biannual basis.

With this in mind, one should however consider that the Modernization Fund is being set to operate under the responsibility of the beneficiary member states, as per article 10d paragraph 3 of the ETS Directive. As such, each jurisdiction is expected to prepare local regulations transposing the ETS Directive.

While in Romania there is currently a tremendous interest in both public and private sectors for getting access to the Modernization Fund, the ETS Directive is not yet transposed. In fact, there is not even a draft official regulation released for public consultation or available under the decisional transparency section of the Ministry of Economy. We found though one remote media reference of a draft in progress².

Certain Fundamental Options

It is now the time for the Romanian authorities to make a number of fundamental choices in connection to the use, scale and effect of access to the Modernization Fund for the Romanian Projects.

First, the Government shall establish a clear-cut line of allocation of projects to the Modernization Fund and to the National Recovery and Resilience Program (PNRR). While it is not yet decided, one should expect that given the PNRR statements

related to the energy storage and energy efficiency driven projects, projects eligible for the Modernization Fund shall rather consist in renewables, cogeneration or extension and rehabilitation of network investment.

This likely allocation should however remain informed of the rather poor status of the grid facilities and network, and a synergy between projects with PNRR vocation and projects with Modernisation Fund vocation shall be maintained. That is why we do think that the Romanian Government shall assume the effort to create the secondary legislation, rules and regulations, for both instruments – Modernisation Fund and the PNRR – in the same time, potentially using the same team of experts or at least ensuring that there is project integration in place.

There is a certain experience at the Ministry of Energy level in multiple projects that require integration and the Government's previous effort in relation to the Program of Large Infrastructure Projects should be of course fructified. Alternatively, secondary legislation for the two programs could be prepared independently and successively, with the transposal of the ETS Directive first, as the deadline is actually reached, and integration to be achieved with the PNRR related guidelines.

Secondly, there will be of course public procurement kind of rules applicable to projects under both umbrellas of the PNRR and the Modernization Fund. However, given the specifics of the Modernization Fund framework, one could expect that an alternative set of rules, other than the standard Romanian legal public procurement provisions, shall apply. This critical point shall also be assessed by reference to the nature of projects, hybrid, serial or stand alone, independent ones. It is common for the EIB funded or only managed projects to be submitted to the EIB specific procurement and award procedures, but that rule of thumb is not necessarily the most efficient one when projects are viewed in a larger context.

The key challenge in matters of parameterization of the project procurement and award procedures relies in making sure that by means of secondary local

regulations the framework remains flexible so that constraints, requests, conditions are not added to those already applying by effect of the EU regulations.

Thirdly, dealing with the state aid related difficulties, in both programs, is critical. There is of course a solid experience achieved in Romania during the past 15 years since accession and one should expect that all state aid guidelines relevant for the Modernization Fund and the PNRR will be prepared based on the existing state aid regulations and known system of assessment and review.

However, our strong view here is that certain objective higher clearing thresholds shall be set, based not only per project value, where figures of €25 million for example shall be deemed cleared, but also by reference to special situations or conditions, such as the former disadvantaged zones, or regions, etc. Geography and industrialization level could also be considered as key factors.

Next Steps

Time is of the essence.

Romania's action for transposing legislation for the Modernisation Fund is already late. Adoption of the project application guidelines should be done during November, latest by year end 2021; same applies to the project procurement and award regulations. In what regards the state aid component, time pressure is even higher since knowing the parameters for state aid clearance affects any strategic decision in project planning, projects proposal and submission for assessment to the EIB. Add here that the EIB assesses projects only twice a year.

The situation in relation to the PNRR is no different, there is possibly a couple of months more to use for preparative, but not more, since at the latest by mid of 2022 most of the projects should already be called for. Against the current background of political instability and institutional weakness, there is no other better option to get these very high objectives achieved in due time than to call for support, out of social responsibility, but equally for proper consideration, the private sector, the professional consultants.

¹ <http://energie.gov.ro/sute-de-milioane-de-euro-din-fondul-de-modernizare-pentru-finantarea-unor-proiecte-strategice-in-sectorul-energetic-din-romania/>.

² <https://e-negia.ro/fondul-de-modernizare-va-avea-10-miliarde-de-euro-pentru-romania-secretar-de-stat/>.