

## Legal position, rights and obligations of transmission system operators – Energy law as compared to Directive 2009/73/EC

Under the Energy Community Treaty from 2005, to which the Republic of Serbia is a party, the contracting countries are obligated to harmonize with the necessary Directives of the EU in the field of energy. Serbia also has such an obligation as a candidate in the procedure of acceding to the EU and harmonizing its legislation with the *aquis communautaire*. For the very purpose of such harmonization, Serbia has successively harmonized its regulations in the field of energy, which resulted in the enactment of a new Energy Law passed by the Serbian National Assembly on December 29<sup>th</sup>, 2014.

In the domain of natural gas, the Energy Law is for the most part harmonized with Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC<sup>1</sup>. The main goal of both the Directive and the Energy Law is liberalization of the market, ensuring freedom of conducting business activities and free access to the system for all third parties, aimed at improving the quality of natural gas transmission activities, increasing competition in this field and lower prices for the end consumer.

The Energy Law, modeled on Directive 2009/73/EC, specifies that the activity of natural gas transmission shall be conducted by a company that owns a transmission system independent, both in terms of ownership and management, from natural gas production, supply and distribution undertakings. With regard to the base model of organizing the natural gas transmission activity by way of a transmission system operator, the Energy Law makes a conceptual difference as compared to the Directive. Namely, the Law requires that the same person or persons shall not be permitted to manage both a TSO and natural gas production, supply or distribution undertakings, while instead of the term "manage", the Directive uses the term "exercise control", which has a broader meaning.

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<sup>1</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, Official Journal of the EU L 211/94.

Recognizing that as at the date of its enactment many EU countries have already had integrated systems for various energy activities in the field of natural gas for quite a while, and that their unbundling would require a certain transition period, the Directive permits two additional models for organizing TSOs: (a) independent system operator, and (b) independent transmission operator. The Energy Law supports the strategy of unbundling energy activities and independent TSO organization, but the criteria for when the additional models may be applied are unclear. Thus, as opposed to the Directive which clearly references its effective date, the Energy Law references the moment "before the deadline determined in accordance with the obligations of the Republic of Serbia undertaken under ratified international treaties."

The basic characteristics of the additional models are as follows. An independent system operator does not own a transmission system, and is independent of the vertically integrated undertaking in terms of ownership and management. On the other hand, an independent transmission operator owns a transmission system, is connected in terms of ownership with the vertically integrated undertaking, and its independence in terms of management must be ensured. As opposed to the Directive, which clearly differentiates between these additional models with regard to the criterion of ownership of the transmission system, the Energy Law does not do so clearly enough, but specifies that an independent transmission operator has a transmission system, which can be construed as ownership over a transmission system, but also as holding a transmission system on the grounds of a lease agreement or some other appropriate grounds.

The Energy Law is additionally unclear as compared to the Directive with regard to the additional independent system operator model, in that the same article of the Energy Law first excludes application of the article requiring unbundling, and then requires that an independent system operator meet the conditions specifies in that same article.

Furthermore, as opposed to the Directive, which clearly states that the corporate organization of the independent transmission operator additional model shall be a two-tier system with a mandatory supervisory body, the Energy Law does not contain a provision to the effect that an independent transmission operator must be organized as a two-tier company, which leads to a number of ambiguities, including the fact that under the Energy Law the Shareholders Meeting of an independent transmission operator should consist of independent persons - completely contrary to the idea of this model, which in fact presumes non-independent ownership, which, inter alia, is exercised through the owner's participation in the work of the General Meeting.

Another obvious disharmony between the Law and the Directive can be seen in the various conditions that need to be met by the person in charge of monitoring non-discriminatory conduct, who must be appointed by the independent transmission operator. The Directive requires that this person meet the conditions that the members of the supervisory body and management of the independent transmission operator have to meet, which the Energy Law requires that this person meet the conditions under Article 225 of the Law relating to a transmission system operator and its independence from natural gas production, supply and distribution undertakings in terms of ownership and management.

Comparing the new Energy Law to Directive 2009/73/EC, we can conclude that the legislator largely followed the provisions of the Directive, directly or indirectly, in accordance with its intent and spirit. Although in enacting this Law the legislator certainly intended to essentially implement the provisions of the Directive, which it did succeed in to a degree, there are a number of provisions that are already the subject of polemics, both because of insufficient clarity and precision, and because of stricter conditions as compared to those specified by the Directive. The expediency of such regulating of ownership unbundling and the obstacles that could arise in implementing these provisions remain to be seen in practice.

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