

# The EU energy law implementation within the Serbian sustainable development policy

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**Abstract.** The states implementing the European Union ("EU") law in the spheres of energy and sustainable development within the frameworks of the Energy Community ("EC") are faced with a crucial lack of time otherwise needed to harmonise their legislation. Issues surrounding the difficulties of interpreting the provisions of various directives, regulations and current implementation practice have proven to be notable barriers. Companies such as Serbian vertically integrated undertaking ("VIU") Yugorosgas ("YRG") and transmission system operator ("TSO") YugorosgasTransport ("YRGT") are obliged to make changes to local regulations and their organizational structure, from which they are experiencing great difficulties. There are often situations when companies, government agencies and institutions of international organizations hold very different attitudes and stances towards the application of a certain law. These legal deficiencies and inconsistencies in the positions of various parties can lead to disruptions in the activities of the largest energy companies engaged in gas supply and other important functions in the energy sector, as well as to significant economic expenses – Serbian (at least) national sustainable development becomes threatened. At the same time, we recognize the importance of the law implementation.

## 1 Introduction

The EC is an international organization: its parties (the EU and 9 non-EU states) form a unique single energy market. Its legal capacity is of a special nature, as it is limited by the goals and powers necessary to solve the tasks of the Treaty establishing the Energy Community ("the EC Treaty" — entered into force on July 1, 2006) keeping in mind the importance of sustainable development goals fulfillment. As for the activities of the organization, Article 2 of EC Treaty includes:

- 1) the EU law implementation by non-EU states in the energy, environment, competition and renewable energy spheres;
- 2) the establishment of a regulatory framework for good energy network market functioning in non-EU states (and a part of the EU territory);
- 3) the creation of the energy market network without internal borders.

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The organization is a carrier of common energy interests and is designed to protect them.

## **2 Materials and Methods**

### **2.1 Serbian Implementation Law Practice**

The Republic of Serbia is committed to promoting the implementation of the UN 2030 Agenda for Sustainable Development. As a state willing to become a part of the European Union, it achieves most of its sustainable development goals and targets in the energy sphere with the help of the Union itself and a specially designated organization – the Energy Community.

A leading role of the Energy Community as a mechanism that helps to form sustainable development and energy strategic decisions is mentioned in Serbian National reporting guidelines for sustainable development. The document headlines increase of overall sector efficiency, security of energy supply, introduction of competition and compliance with relevant stipulations of the EU *Acquis Communautaire* (specific EU law provisions and acts brought to and by the Energy Community for its further implementation by its contracting parties) while following principles of sustainable development.

The harmonisation in the spheres of energy and sustainable development of Serbia as a contracting party of the EC was carried out, first of all, by the new Energy Law adoption which, in turn, requires changes in a large number of other regulatory legal acts, including the Law on Pipeline Transportation of Gaseous and Liquid Hydrocarbons and Distribution of Gaseous Hydrocarbons dated April 1, 2009 and by-laws that mainly regulate certain areas of energy.

It is worth recognizing that most of the provisions of the relevant EU law were incorporated into the Serbian law without any changes. For example, an important Article 235 of the Energy Law concerning the requirements for members of management bodies of the ITO is similar to Article 19 of Directive 2009/73/EU 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/EU (“Gas directive”).

At the same time, we presume that the officials of Serbia have a right to modify provisions of the European Law when implementing it. For example under Article 17.1 of the Gas Directive, the provision of services to other parts of the VIU is possible if: 1) there is no discrimination against other users of transport systems; 2) the provision of these services is available to all users of transport systems on the same terms; 3) there are no competition restrictions in the areas of production and supply.

One further clause in the mentioned article states that the national energy regulatory authority has to confirm the provision of the declared services. However, Article 232 Para 4 of the Serbian Energy Law sets out slightly different conditions: “The provision of services to other parts of the VIU is possible if the provision of these services does not discriminate users of transport systems; the conditions for the provision of these services are indicated in the compliance program”.

However, occasionally situations arise whereby the provisions of the Serbian laws are even stricter. The issue is here that the Secretariat of the Energy Community (“EC Secretariat”) has an only binding opinion on performance or non-performance of contracting parties’ obligations. Within tough relations between the organization and the state, the institute tries in every way to complicate the process of implementation and practical realisation of the EU law by tightening the requirements for Serbia mostly because of Russian ambitions (disadvantageous in some aspects for the EU) in the Serbian energy

sector. Serbia as the EU membership candidate holds definite interest in due performance of implementation and practical realisation of the EU law, and will endeavour not to be charged with violation under Article 92 of the EC Treaty (the article states that in case of the existence of a serious and persistent Parties' breaches of their EC Treaty obligations their rights, including voting, meetings participation and activities under mechanism, may be suspended).

## **2.2 YRG and YRGT Case**

To show the example of tightening Serbia's law, we will consider the issue of difficult implementation, alongside with tough practical realisation of the EU law in the context of restructuring Serbian VIU YRG (Gazprom owns 50% of the company, Centrex — 25%, Srbijagaz — 25%) and unbundling TSO YRGT which as a part of the VIU as of 6 October 2011 has to use one of the separation models: independent transmission operator ("ITO") or independent system operator ("ISO") according to the Third Energy Package ("TEP"). YRG is a sole founder of YRGT, which rents the transport system from YRG and holds a licence for gas transport which is valid only for certification on the basis of TSO model.

Before analysing and comparing differences provisions of the Serbian Energy Law and the Gas directive, we should start with the fact that YRGT was certified by the Energy Agency of the Republic of Serbia ("EARS") on December 12, 2016 on an interim basis. On April 22, 2017 the EC Secretariat provided a negative opinion on the compliance of YRGT with the ISO model. In this regard, on June 20, 2017 the EARS made a decision on the temporary certification of YRGT under the ISO model which contains the requirements to be completed by June 20, 2018 — so a company can stay certified on a permanent basis. However, on July 3, 2018 the EC Secretariat initiated, ex officio, a preliminary procedure for resolving a dispute with the Republic of Serbia regarding the violation of unbundling requirements and the TEP rules.

YRGT initiated the certification process on the basis of the ISO model because of the existence of the intergovernmental agreements between Russia and Serbia ("IAs"). This is caused by the necessity to amend the IAs if the ITO certification is applied, as the ownership of the transport system would be transferred to YRGT.

In order to successfully certify YRGT on the basis of the ISO model, YRG and YRGT must be unbundled from the shareholders involved in the gas production or supply. Sale of shares in YRG and YRGT to a third party was not wanted and ultimately not carried out.

As for the ITO, on the basis of Article 18.3 of the Gas directive, if we consider YRG as a VIU, but not as a VIU subsidiary company, it can perform distribution and supply functions and own shares for making key decisions (those that are not directly connected with daily activities) in YRGT (the Gas directive also provides with independent decision-making rights to ITO and prohibits the VIU to determine ITO's competitive behaviour in daily activities and in relation to activities necessary for the ten-year network development plan preparation).

However, Article 232 Para 6 of the Serbian Energy Law uses a different wording providing: "Business entities of the VIU carrying out natural gas production or supply cannot either directly or indirectly own a share in ITO", and it turns out that the VIU, i.e. YRG falls under the scope of this article. By using such wording, Serbian legislation aimed to include also parental VIU companies when they perform natural gas production or supply function. It is impossible to say unequivocally why the Serbian Energy Law is even stricter than the EU law provisions, but it is undoubtedly a political subject surrounding the EU's desire to complicate development of projects in Serbia with participation of Gazprom. The question is if the EU could have somehow directly or indirectly (through the EC)

influenced the legislative process by lobbying the formulation of Article 232.6 of the Serbian Energy Law.

If there was no such modification of the Gas directive, there would be no problems regarding ITO certification, as YRG is the VIU due to several reasons: 1) YRG has several founders, 2) documents of the EC Secretariat and the EARS provide that YRG is a VIU, not Gazprom, Centrex or Srbijagas.

On a meeting held on 11 October 2018 between the representatives of YRG and the EARS, the first stated that Article 232 Para 6 of the Energy Law shall be applied to subsidiary companies but not to the VIU, and that YRG may perform not only distribution, but also supply function and as well own the share in YRGT. However, due to consultative opinion of the EARS, the VIU falls under the ban and cannot have a share in YRGT - if it performs the supply function. It is obvious that YRG founders are not intended to sell their shares in YRGT and the only way is to establish a subsidiary of YRG YugorosgasSupply ("YRGS"). Based on YRGT certification as ITO and the new structure, YRG could distribute gas, YRGT transport and YRGS supply it.

This requires multiple contracts, including at least a long-term contract for the supply of gas to the Republic of Serbia between Gazprom export and YRG, a long-term contract for the gas supply to the Republic of Serbia between YRG and Srbijagas, as well as contracts concluded in the VIU framework: contract for the supply for own needs between YRG and YRGT, for the distribution between YRGS and YRG, for the lease of capacities between YRGS and YRGT, for the supply between Srbijagas and YRGS. It is also important to conclude an agreement for the supply of terminal buyers – YRGS will be one of the parties.

In order to confirm such plans, it would be necessary to request an opinion of Serbian state bodies regarding interpretation of Article 232 Para 6 of the Energy Law and potential breach of the IAs between Russia and Serbia. Work is going on on different sides and the official position of the MFA of Russia regarding potential breach of the IAs is already requested and defined – being politically motivated, the Russian side supports the ITO model certification. After that, the tripartite negotiations with the EC Secretariat and the EARS should be held. Then YRGT could be certified as the ITO by the EARS if it meets the requirements – and we should not forget that the national regulator has to take the opinion of the EC Secretariat into consideration, but not follow it, if relevant lawful arguments appear to be.

Even though there are possible solutions to the issues that arise in the case of YRG and YRGT, it is right to say that political aspects and lack of transparency of the processes of implementation and practical realisation of the energy law that affects national sustainable development issues, excessive power of the Secretariat of the Energy Community, and at the same time its dependence on EU institutions make the situation increasingly difficult.

### **3 Results and Discussion**

#### **3.1 Difficulties and Possible Changes in the EC**

It should be outlined that the EC Treaty mechanisms do not always take into account the opinions of the EC members. Moreover, a large number of various institutes and platforms of the Energy Community complicate the work of the organization. For example, such EC platform as the Western Balkan 6 Initiative ("Berlin process") and does not function in the form in which it should. This is largely based on ideological contradictions arising due to the different cultural traditions of the Western Balkan states, therefore, it does not contribute to the promotion of the initiatives of its participants: while we have such

negative aspects of coordination we can forget about the global sustainable development goals.

As stated above, states regularly violate the implementation rules of the EC Treaty and do not always comply with the measures taken by the EC institutions. This often happens because of the inherent complexity of the system and regulatory processes. Some states are not able to implement measures properly in accordance with all the rules set out by the EU and the EC due to lack of high-quality specialists of the EU energy law, as well as the number of complex issues addressed to the state. To our mind, specialists from the EU institutions should interact more with representatives of states implementing the EU law. The EU may also promote the development of skills of lawyers and economists involved in the implementation and practical implementation process by opening up new opportunities for education and training.

Mr. Grujičić notes that the main (and not specified in the EC Treaty) actual sanction for the contracting parties in case of serious / systematic violations of the Treaty is the suspension of the EU accession process, which is the main point for the countries to implement the EU law. In addition, the European Union gives funds to non-EU states for national energy development, though it is not their responsibility. Contracting parties definitely intend to continue to receive financial support from the European Union. In such situations, it is easy to assume the probability of political influence and pressure of the EU and the EC on the states, in particular, willing to join the European Union.

Still, from the rational and legal point of view, we may conclude that the measures (for example, suspension of voting rights) taken as a result of violation of the EC Treaty (possible even in the YRG and YRGT case in the future) are not effective and it would be necessary to introduce financial accountability in case of breach. It is vital to mention that there are plans to introduce such accountability mechanism in the EC Treaty in 2020-2021 within the reforming process – relevant provisions would encourage countries to pay more attention to their obligations, but at the same time fines will not be big (they will only result in a double sum of organizational fees paid by the contracting parties to the Energy Community).

Among other possible changes of the EC reforms in 2020-2021, we would like to underline the preparation of the EU and the EC documents taking the principle of reciprocity into account — the EU members will be obliged to implement and realise modifications of the EU law (the EC Acquis) at the borders with the contracting parties of the Energy Community which is a positive step for the latter – it would help countries to work in a more coordinated way.

But the influence on the contacting parties may also increase in a certain way. The Agency for Cooperation of Energy Regulators (“ACER”) may become the authority in which cases related to tariffs, access to interconnection points, etc., between the contracting parties and the EU member states will be considered; such issues are currently being resolved by the Energy Community Regulatory Board, a similar to the ACER Board of Regulators body. The Energy Community has already received informal explanations from the European Union: The EC Treaty refers to agreements, according to which ACER may have certain powers in relation to third states, but this requires consolidating the will of such states in the relevant treaty. At the same time, it is assumed that cases between the contracting parties will continue to be resolved within the Community.

## **4 Conclusion**

The Energy Community is a unique international organization: contracting parties implement the EU law in their national legislation. However, this often proves to be a far

less successful process than it initially appears, as currently installed mechanisms do not allow to effectively implement the EU law.

The work of the EC may become more transparent in unifying the attitude towards all the EC contracting parties and participants. It is vital to take into account positions of various states and other subjects involved in the implementation process. The reviewed case of YRG and YRGT shows the possibility of complexity in the implementation and realisation of the EU law and the ambiguity of decisions made by national energy regulators (in particular, EARS) in interaction with the EU-influenced institutions of the Energy Community. Moreover, financial accountability for breach of obligations will ultimately be necessary for due performance of obligations and protection of different subjects' rights and in bigger amounts.

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