LEGALITY OF THE ACTIVITIES OF THE ENERGY MONOPOLIES: LEGAL REGULATION AND COURT PRACTICE

Dr. Agnė Tikniūtė
Vice-Dean of the Faculty of Law, Mykolas Romeris University (Vilnius, Lithuania)
Dr. Saulė Milčiuvienė
Faculty of Law, Mykolas Romeris University (Vilnius, Lithuania)

ENERGETIKOS MONOPOLIJŲ VEIKLOS TEISĖTUMAS: TEISINIS REGULIAVIMAS IR TEISMŲ PRAKTIKA

Dr. Agnė Tikniūtė
Teisės fakulteto prodekanė, Mykolo Romerio universitetas (Vilnius, Lietuva)
Dr. Saulė Milčiuvienė
Viešojo saugumo fakultetas, Mykolo Romerio universitetas (Vilnius, Lietuva)

THE SUMMARY (THESES)

The single market concept was not implemented in the energy sector a long time after the Treaty establishing the European Community had come in force. Member States were unwilling to delegate their powers in energy sector to the European Commission for two reasons: firstly, the energy sector was considered by the Member States as being related to national sovereignty and national survival, and secondly, the Member States used fundamentally different methods to manage national energy sectors. However, the emerging new technologies and increasing global competition forced the Member States to create a more competitive European energy market.

Therefore, this presentation aims to analyze the legal regulation and the landmark cases regarding energy monopolies in the European Union and Lithuania.

The main issue from the lawyer's perspective is the ambiguity of the Treaty language – Treaty establishing the European Community declares the economic freedom, but at the same time recognizes the legitimate

existence of monopolies: article 86(1) obliges the Member States not to regulate monopolies in a way that would make monopolies breach the rules of the Treaty, however, Article 86(2) provides derogation from these rules for state monopolies in order to maintain core public service function. The key provision of Article[47] 86(2) allows derogation not only from competition rules but, as seems sometimes assumed, from all rules of the Treaty. All conduct or existence of monopolies (or special enterprises entrusted with the public services by the state) need to be examined under Article 86(2).

The relevance of the examination under Article[48] 86(2) is discussed in energy cases—both trade and monopoly regulation. Analysis proceeds, firstly, by determining the compliance of applicable rule with free trade and competition, secondly, by stating the existence of legitimate public service function and the necessity to maintain the exclusivity—i.e. non-compliance with the Treaty's rules to deliver such services.

Lithuanian electricity sector was and still remains a monopoly in many aspects. Before 2002 the Lithuanian electricity sector could be described as a single vertically integrated monopoly Lietuvos Energija AB and the State Enterprise Ignalina Nuclear Power Plant as the largest electricity producer, both owned by the state. On the 1st of January 2002 vertically integrated monopoly Lietuvos Energija AB was divided into several companies: two companies producing electricity Lietuvos Elektrine AB and Mažeikiai Thermal Power Plant AB, one transmission system operator also acting as a market operator Lietuvos Energija AB and two distribution network companies Rytu Skirstomieji Tinklai AB and VST AB. On the 20th of May 2008 national investor LEO LT AB was established. The Republic of Lithuania remains the owner of 61.7 percent of shares in the national investor, the rest of LEO LT AB shares is owned by the private company NDX Energija UAB. LEO LT AB is a parent company of Lietuvos Energija AB, VST AB, Rytu Skirstomieji Tinklai AB, Visagino Atomine Elektrine UAB, InterLinks UAB.

The relation of monopolistic operator and the free market requirement is discussed in the decisions of Constitutional Court of the Republic of Lithuania. These decisions are also represented in this presentation.

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[47] Consolidated Version of the Treaty Establishing the European Community.

[48] *Ibid*.