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PROBLEMS AND TASKS OF LEGAL REGULATION OF INTERSTATE ELECTRIC ENERGY TRANSMISSION

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Abstract: *Interstate transmission of electric energy (capacity) (hereinafter referred to as the IST) is one of the fundamental elements for creation of the common electric power market of the Eurasian Economic Union. The concept of the IST in the form in which it is specified in the Treaty on the EAEU is not known to the legislation of foreign countries and is collective as in case of implementation of the IST in the form of substitution, interrelations of the parties complicated by a foreign element will be based on counter contracts for purchase and sale of electricity and capacity of the same volume at different supply points. At the same time, substitution is the only way to implement the IST in the Russian Federation due to a number of factors. First, it is the length of the Russian Federation and the UNPG (territorial distribution). Second, it is the structure of the UES of Russia, that is, although the UES of Russia generally operates in parallel with the electric power systems of foreign states (the Republics of Belarus and Kazakhstan), the electric power systems of these states are connected to specific integrated energy systems (hereinafter referred to as the IES), of which the UES of Russia consists, and in which, as a rule, electricity (capacity) is produced and consumed. Third, it is the discrepancy between the price areas established by the Wholesale Electricity and Capacity Market Rules approved by Resolution No. 1172 of the Government of the Russian Federation dd. December 27, 2010 upon implementation of the IST across the territory of the Russian Federation and, as a result, the mismatch of electricity prices in these price areas. Taking into account the above-mentioned factors, it is currently impossible to talk about the technical and economic possibility of movement (transit) across the territory of the Russian Federation of electricity (capacity) upon implementation of the IST within the EAEU.*

Keywords: *electric power system, common electric power market of the Eurasian Economic Union, interstate electricity (capacity) transmission.*

For the first time, the concept of "interstate transmission of electricity (capacity)" was specified in the Intergovernmental Agreement dd. November 19, 2010 "On Ensuring Access to Services of Natural Monopolies in the Electric Power Industry Including Fundamentals of the Pricing and Tariff Policy" concluded between the Government of the Republic of Belarus, the Government of the Republic of Kazakhstan, and the Government of the Russian Federation.

The above-mentioned Intergovernmental Agreement became null and void from the effective date of the Treaty on the EAEU — from January 1, 2015.

The protocol on ensuring access to services of natural monopoly entities in the electric power industry including the fundamentals of

the pricing and tariff policy which forms Annex No. 21 to the Treaty on the EAEU (hereinafter referred to as the Protocol on Ensuring Access to Services of the NME) currently defines "interstate transmission of electricity (capacity)", which is referred to the provision of services by authorized organizations of the member states for movement and/or substitution of electricity (capacity). Depending on the peculiarities of the national laws, the relevant relations are formalized by service contracts for transfer (transit) or other civil law contracts including contracts for purchase and sale of electricity (capacity).

3.1. In the Protocol on Ensuring Access to Services of the NME, the movement of electricity (capacity) is understood as ensuring flows of electricity (capacity) produced in the territory of the member state through the grids of another member state between supply points located on its border(s).

The flow of electricity (capacity) is understood as the transport of electricity (capacity) through one or several transmission lines in a controlled section (the Agreement on Ensuring Parallel Operation of Electric Power Systems of the Member States of the Commonwealth of Independent States dd. November 25, 1998).

Movement of electric energy as a variant of the IST needs to be distinguished from the contract for cross flow that existed in the Soviet era. Thus, B.M. Seynaroev noted that the legal form determining relations between electric power systems for transmission of electric energy from one energy system to another is a contract for cross flow of electricity. Under the contract for cross flow, one energy system undertakes to sell electricity to the other, and the latter undertakes to pay for the received amount of energy at a price provided for by the contract and approved in accordance with the established manner. The subject matter of the specified contract is electric energy [1]. In its turn, the IST in the form of movement may be qualified as a kind of onerous service contract, the subject matter of which is transmission of electricity across the territory of a neighboring state.

The Protocol on Ensuring Access to Services of the NME distinguishes the following types (routes) of the IST: (1) Transmission of electricity (capacity) from one part of the electric power system of the member state to its other part through the electric power system of a neighboring member state; (2) Movement of electricity (capacity) through the electric power system of the member state from the electric power system of one member state to the electric power system of another member state; (3) Movement of electricity (capacity) through the electric power system of the member state in order to fulfill obligations with respect to the subjects of the electric power industry of third countries.

The analysis of the provisions of the Protocol on Ensuring Access to Services of the NME and the Agreement on Transit of Electricity and Capacity of the CIS Member States shows that the concept of "movement of electricity (capacity)" is similar to the concept of "transit of electricity (capacity)" as provided for in the Agreement on Transit of Electricity and Capacity of the CIS Member States.

In the above Agreement, the transit of electricity and capacity means: (1) Transmission across the territory of the party through its power grids of electricity and capacity produced in the territory of another state and intended for the territory of a third state, provided that either the other or the third state is a party to the said agreement; (2) Transmission of electricity and capacity between two points of one party across the territory of the other party through its power grids.

According to Article 3 of the Agreement on Transit of Electricity and Capacity of the CIS Member States, electricity and capacity is transited on the basis of agreements (contracts) concluded by the business entities of the Parties, regardless of the form of ownership and departmental affiliation.

The Civil Code of the Russian Federation and the Federal Law "On the Electric Power Industry" do not contain the term "transit of electricity and capacity" and do not distinguish an independent agreement — the agreement on transit of electricity and capacity. However, absence of this term in the specified legislative acts does not mean that it refers to a contract not specified in the civil law, but not conflicting with it (paragraph 2, Article 421 of the Civil Code of the Russian Federation). According to the author,

the agreement on transit of electricity and capacity is a variant of the contract for provision of services for electricity and capacity transmission.

For example, A.Yu. Sinenko notes that contracts for provision of services for transit of electricity and capacity are an independent variant of the contract for electricity transmission providing for peculiarities related to movement of electricity as a specific product across the state border. [2]

In accordance with Article 3 of the Federal Law "On the Electric Power Industry", services for electricity transmission are defined as a complex of organizational and technologically related actions including actions on operational and technological control, which ensure transmission of electricity through technical devices of power grids in accordance with mandatory requirements. It may be concluded from analysis of the provisions contained in Articles 9, 26, and 37 of the Federal Law "On the Electric Power Industry" as well as in the Rules for Non-Discriminatory Access to Electricity Transmission Services and Provision of These Services approved by Resolution No. 861 of the Government of the Russian Federation dd. December 27, 2004, that the contract for provision of services for electricity transmission mediates the same relations as the agreement on transit of electricity and capacity as well as the contract for provision of the IST services in the form of movement — relations for transfer of electricity and capacity using electric power facilities (according to the terminology of the Federal Law "On the Electric Power Industry") and power transmission lines of all voltage classes (according to the terminology of the Agreement on Transit of Electricity and Capacity of the CIS Member States) or ensuring cross flows of electricity (capacity) produced in the territory of one member state through the grids of another member state between supply points located on its border(s) (according to the terminology of the Treaty on the EAEU).

In the arbitration practice of the Russian Federation, the contract for provision of services for electricity transmission is often referred to as the contract for transit of electricity and capacity. Herewith, analysis of judicial practice shows that the transit contract means an agreement pursuant to which electricity and capacity is supplied to the consumer through power grid facilities owned by several organizations that provide services for transfer. [3]

The concept of "transit of electricity and capacity" does not coincide with the concept of "transit" as defined in Articles 2 and 31 of Federal Law No. 164-ФЗ dd. December 8, 2003 "On the Fundamentals of State Regulation of Foreign Trade Activity". According to the above-mentioned federal law, transit means physical movement of goods/things across the territory of the Russian Federation performed on the basis of a contract for goods shipping. The contract for transit of electricity and capacity cannot be qualified as a contract for goods shipping (Article 785 of the Civil Code of the Russian Federation). Since electricity is matter in motion, its movement is covered by essential nature as a special kind of substance. Therefore, one can say that electricity actually moves itself when the conditions necessary for it are provided. The grid organization does not need to take any specific actions to ensure its transportation similar to the actions of the shipping organization in the contract for goods shipping [4].

The concept of "transit" in the form in which it is specified in the Agreement on Transit of Electricity and Capacity of the CIS Member States is one of the types of the IST provided for by the Protocol on Ensuring Access to Services of the NME, namely, movement of electricity and capacity. At the same time, the concept of "transit" contained in the above Agreement is narrower as compared to the concept of "movement of electricity and capacity" because transit for the CIS member states does not provide for movement of electricity and capacity through the electric power system of the CIS member state to fulfill the obligation with regard to the subjects of the electric power industry of third countries (not members of the CIS). Therefore, in addition to the "transit routes" specified in the Agreement on Transit of Electricity and Capacity of the CIS Member States, the Protocol on Ensuring Access to Services of the NME provides for possible transit of electricity through the electric power system of the member state in order to fulfill obligations to the subjects of the electric power industry of third countries.

In Europe, energy cooperation is simultaneously based on several international treaties including the Barcelona Convention on Freedom of Transit concluded by the League of Nations, and the Statute on Transit of 1921 (Annex to the Barcelona Convention) [5]; the Geneva Convention on Transit Transmission of Electricity of 1923 [6]; the General Agreement on Tariffs and Trade (GATT) of 1947 [7]; and the Energy Charter Treaty (signed in Lisbon on December 17, 1994). In particular, the international principles regulating relations for transit of electricity are formalized in the GATT and the European Energy Charter.

Article 7 of the Energy Charter Treaty dd. December 17, 1994, defines transit as movement across the territory of one state of products originating in the territory of the other state and intended for a third state, or in some cases, for this second state.

The Geneva Convention on Transit Transmission of Electricity of 1923 only obliges the states to commence negotiations on transit and gives a limited definition to transit: "Energy is deemed to be in transit across the territory of one of the contracting states when it crosses this territory by conductors installed solely for this purpose and not being fully or partially depleted, used or transformed within this territory". Therefore, as noted in the legal literature, if electricity needs to be transformed in the territory of a transit state, this "transportation" may no longer be considered transit. [8] It can be said that the Geneva Convention on Transit Transmission of Electricity of 1923 establishes a classical understanding of international transit — movement across the territory of the state of goods, vehicles, if this movement is only a part of the route beginning and ending outside this state.

In the territory of the EU, transit of electricity is governed by Regulation of the European Parliament and the Council of the European Union No. 714/2009 "On Conditions for Access to Grids for the Purposes of Cross-Border Electricity Exchange and on Cancellation of Regulation 1228/2003" included in the Third Energy Package of the EU. In accordance with the Regulation, transit is defined as a procedure that occurs in circumstances where the declared export route of electricity includes countries in which transmitted electric energy will not be used.

As can be seen from the above definitions, they are all similar to the concept of transit of electricity and capacity contained in the Agreement on Transit of Electricity and Capacity of the CIS Member States. At the same time, in the EU, transit is understood not as movement of electricity and capacity but a procedure, that is, the official procedure for actions to be taken by the parties to ensure transit.

3.2. In contrast to movement, substitution of electricity (capacity) means interconnected and simultaneous delivery of equal volumes of electricity (capacity) to and from the electric power system through different supply points located on the border(s) of the member state.

Substitution of electricity (capacity) is an alternative method of the IST as compared to the movement of electricity (capacity). This method of IST implementation is specified in Annex No. 21 to the Treaty on the EAEU in respect of the Russian Federation upon arrangements for the IST between the member states through the UES of Russia. Therefore, implementation of the IST by the business entities of the Republics of Belarus and Kazakhstan through the grids of the UES of Russia will be performed by substitution of electricity (capacity) through different supply points located on the borders of the Russian Federation. At the same time, to implement the IST in the form of electricity substitution in the territory of the Russian Federation, it will be necessary to conclude a number of contracts specified in paragraph 6.3 of the Methodology for Implementation of Interstate Transmission of Electricity (Capacity) between Member States. Moreover, volumes of electricity that are subject to the IST between the member states should be taken into account in the wholesale market upon submission of price bids, conducting a competitive selection of price bids for the day ahead, determining market prices and the share of system costs associated with the interconnected and simultaneous purchase and sale of equal volumes of electricity (capacity) at different points of supply on the border(s) of the Russian Federation.

In this case, it is possible to talk about the counter purchase and sale of electricity (capacity)

between the subjects of the electric power industry whose electric power systems, first, operate in a parallel mode, and second, the legal relations of which are mediated by contractual conditions. In these legal relations, the parties act both as the buyer (import) and as the seller (export) at different supply points, while the volumes of imported and exported electricity (capacity) at the different supply points are the same.

In a variant simplified for understanding, one can talk about the following legal relations upon implementation of the IST in the form of substitution:

1) Upon purchase and sale of electricity (capacity) from the electric power system of country A for the electric power system of the Russian Federation, a contract for purchase and sale of electricity (capacity) shall be concluded between the subjects of the electric power industry authorized by the state. As a rule, an organization involved in electricity (capacity) export and import operations, a commercial agent, acts on the part of the Russian Federation. According to the general rule, this organization is not the end consumer of this volume of electricity (capacity), but only "supplies" electricity (capacity) to the wholesale market. In the wholesale market, this volume of electricity (capacity) is acquired by the consumer (or energy supply organizations). In its turn, the end consumer of the Russian Federation shall have a number of contractual relations provided for by the rules of the wholesale or retail markets including the contract for provision of services for transmission of electricity.

2) In case of a counter purchase and sale, when electricity (capacity) is purchased and sold from the territory of the Russian Federation, the seller, a commercial agent, enters into a contract for purchase and sale of electricity (capacity) in the wholesale market (for the purpose of its subsequent export) and contracts related to these activities including the contract for provision of services for transmission of electricity. The purchase and sale itself is based on the contract for purchase and sale of electricity (capacity) concluded by the seller with the subject of the electric power industry of state A or B.

Pursuant to Article 30 of the Federal Law "On the Electric Power Industry", the regime of electricity export and import shall be established in accordance with the laws on state regulation of foreign trade activities. Let us stress once again that the above export and import contracts for purchase and sale of electricity (capacity) are interconnected, provide for the IST of one volume of electricity (capacity) at different supply points, and are directed to implementation of the IST in the Russian Federation by an alternative method — by substitution of electricity (capacity).

4. Peculiarities of Regulation of Interstate Electricity (Capacity) Transmission in the EAEU.

The legal regulation of the IST is based on four main principles for implementation of the IST, which are specified in the Protocol on Ensuring Access to Services of the NME. In particular, the following principles for implementation of the IST are established with respect to the EAEU member states:

1) IST of electricity (capacity) is performed within the limits of available technical ability given domestic needs for electricity (capacity) are met on a priority basis;

2) formalization of the priority of the "methods" for the IST of electricity (capacity) at the level of interstate treaties;

3) compensation for the cost of the IST of electricity (capacity) based on the legislation of the state in the territory of which IST is implemented;

4) the IST of electricity (capacity) is regulated on a bilateral basis with due account for the legislation of the state across the territory of which the IST is performed.

The first, the third and the fourth principles are basic and set the limits for possible implementation of the IST based on the technical capabilities of the electric power facilities, the procedure for determining the cost of the IST, and the procedure for determining the substantive law applicable to IST legal relations.

The second principle formalizes at the interstate level, first, the priority of domestic energy needs and, second, the priority of the "method" for implementation of the IST when there are limitations on the technical feasibility of the IST. The EAEU member states have established the following priority for implementation of the IST:

1) ensuring domestic needs for electricity (capacity) of the member state through the electric power system of which implementation of the IST is planned;

2) ensuring the IST of electricity (capacity) from one part of the electric power system of the member state to its other part through the electric power system of the neighboring member state;

3) ensuring the IST of electricity (capacity) through the electric power system of the member state from the electric power system of one member state to the electric power system of another member state;

4) ensuring the IST of electricity (capacity) through the electric power system of the member state in order to fulfill obligations to the subjects of the electric power industry of third countries.

Therefore, at the interstate level, there is an agreement between the EAEU member states on the priorities for implementation of the IST, and the priority of the IST, which should be taken into account upon settlement and fulfillment of transactions related to the need to move or substitute electricity (capacity) is set. Herewith, in accordance with paragraph 12 of the Protocol on Ensuring Access to Services of the NME, relating to the IST of electricity (capacity) are settled taking into account other existing international treaties.

I would like to emphasize once again that implementation of the IST is possible in the presence of parallel operation of the electric power systems of the EAEU member states and the technical capability with due account for the priorities and routes of the IST agreed upon by the member states.

Taking into account lack of parallel operation of the electric power system of this republic with the electric power systems of the EAEU member states, the accession of the Republic of Armenia to the Treaty on the Eurasian Economic Union will require introduction of a new concept of "quasi-IST", the technical implementation of which will depend on the goodwill of the state that is not a member of the EAEU. The legal literature specifies that the main problem of transit is to find a balance between the territorial sovereignty of the state and the needs of free trade. [9]

Based on the concept of the IST of electricity (capacity) formalized in the Treaty on the EAEU, the contract for provision of services for transmission of electricity (capacity) concluded to sell electricity (capacity) for export cannot be attributed to the IST implemented in the form of movement. This means that the concept of "electricity transmission" is broader than the concept of the "IST". This peculiarity is caused by the fact that certain export and import operations are carried out not within the IST but on the basis of separate contracts for purchase and sale of electricity (capacity), performance of which is not subject to the need to transit electricity (capacity) across the territory of the member state or its substitution, while the organization that exports electricity (capacity) usually concludes a contract for provision of services for electricity transmission with a grid organization authorized by the member state, from the territory of which electricity (capacity) is exported.

The formation of the common electric power market of the EAEU will entail development of relations between the participants of the domestic wholesale electric power markets of the EAEU member states mediated by contracts for purchase and sale and transfer of electricity (capacity). Herewith, in some cases, transmission of electricity will not be identical to the IST since it will not be associated with transit or substitution of electricity, at the same time, the priority of implementation of this transfer is a guarantee of the formation of the common market, and it should be reflected in the international treaty.

The concept of the IST in the form in which it is specified in the Treaty on the EAEU is not known to the legislation of foreign countries and is collective as in case of implementation of the IST in the form of substitution, interrelations of the parties complicated by a foreign element will be based on counter contracts for purchase and sale of electricity and capacity of the same volume at different supply points. At the same time, substitution is the only way to implement the IST in the Russian Federation due to a number of factors. First, it is the length of the Russian Federation and the UNPG (territorial distribution). Second, it is the structure of the UES of Russia, that is, although the UES of Russia generally operates in parallel with the electric power systems of foreign states (the Republics of Belarus and Kazakhstan),