

**THE NEW DRAFT LAW ON ELECTRICITY IN THE CONTEXT OF THE EU-MOLDOVA ACTION PLAN IMPLEMENTATION***Ion PREAȘCA*

The Government submitted to the Parliament for approval a new draft Law on electricity, in order to respect the conditions on Moldova's joining the Energy Community Treaty of the South-Eastern Europe. If approved, the Project will replace the existent Law on Electricity, approved 10 years ago and that requires a radical change for a long time. [1]

**The draft law does not have an economical-financial argumentation**

The information note (signed by the prime-vice-prime-minister, minister of Economy and Trade, Igor Dodon) that accompanies the draft law provides a vague argumentation, in some places even "utopian", stating that "the harmonization of legislation by adjusting the energy sector to principles of the EU law system is part of an larger process of harmonizing the national legislation with the community *acquis* launched at parliamentary and government levels within implementing the commitments and promises of the Republic of Moldova assumed by signing the EU – Moldova Action Plan".

The note does not specify the nature of promises, but the Government mentions that "according to the Energy Strategy of the Republic of Moldova until 2020, approved by the Government's decision no. 958, from 21.08.2007, one of the strategic goals of the national energy policy is to get the status of member with full rights of the Energy Community Treaty, and for achieving this goal – the domestic implementation of the community *acquis* is necessary". Even more! According to the Government, "implementation of EU principles will allow the future development of the electro-energy sector of the Republic of Moldova, so that it can be integrated in the UCTE (the Union for the Co-ordination of Transmission of Electricity), becoming a safe and viable energy transit space on the East-West axis". In its argumentation, the Government refers to some documents of the European Union, especially, to the EU Directive 2003/54/CE from June 26 2003, concerning the common rules for the internal energy market. [2]

The first question this draft law raises is the scarce motivation for being approved, the total lack of the so-called AIR (Regulatory Impact Analysis) and of an economical-financial basis. It should be also taken into account that the new law contains a set of amendments to the chapter on the activity of energy sector enterprises.

**Republic of Moldova and the Energy Community Treaty of the South-Eastern Europe**

The Government's motivation shows that the new law is necessary for "respecting Moldova's conditions to join the Energy Community Treaty of the South-Eastern Europe". Even though Moldova is not a contracting party to this Treaty, being only an observer so far, the EU-Moldova Action Plan, approved on February 2, 2005, includes energy related provisions (paragraphs (62) – (66)). [3]

The 63<sup>rd</sup> paragraph stipulates, among other things: *(1) that Moldova should establish a list of measures for gradual convergence towards the principles of the EU internal electricity and gas markets; (2) further development of the National Energy Regulatory Agency (ANRE) and strengthening of its independ-*

ence;(3) *energy price developments and tariff reforms towards the elimination of distortions; improvement of bill collecting rates.*

The 20<sup>th</sup> paragraph of the Action Plan mentions that Republic of Moldova will improve the functioning of market economy and business climate through appropriate structural reforms aimed also at achieving transparency and predictability of business conditions and would further advance implementation of legislative and regulatory framework in order to fulfil this goal.

### **Market liberalization**

For accomplishing the provisions of the 63<sup>rd</sup> Paragraph of the EU-Moldova Action Plan, claiming that *Moldova should establish a list of measures for gradual convergence towards the principles of the EU internal electricity and gas markets*, the new law states that “the opening of the electricity market will take place in several steps established by ANRE, after coordinating with the Government, until:

- for non-domestic consumers – January 1, 2013;
- for domestic consumers – January 1, 2015”. [4]

According to the draft law, the Government will separate the electricity transmission and central dispatch activities by bookkeeping and organizational perspectives. Besides, until January 1, 2013 the distribution units can as well be electricity suppliers at regulated tariffs. Meanwhile, each of the distribution units will legally and functionally separate the distribution activity from the activity of electricity supply at regulated tariffs, through reorganization, creating two enterprises: for distribution and for supply. The newly created enterprises will be the successors of the distribution license and, respectively, of the electricity supply license at regulated tariffs, held when this law enters in force. If accomplished, these actions will be a step ahead towards stimulating the competition in this field.

It should be added that, today, three electricity distribution and supply enterprises work in Moldova: ICS “RED Union Fenosa” SA – approx. 792 000 consumers, “RED Nord” SA – approx. 290 000 consumers and “RED Nord Vest” SA – approx. 180 000 consumers. They will all have to separate their activities.

The separation of these activities is necessary not only for a clear delimitation between distribution and supply activities, but also for facilitating the access to the supply activity for other enterprises, that will finally stimulate the market competition. This is also necessary for avoiding conflicts of interest inside a company. Regarding this subject, *Neelie Kroes, the European Commissioner for Competition Policy*, stated in a speech held on March 26, 2007 in Düsseldorf (Germany) that: ***“The EU's liberalization directives introduced a system of legal unbundling. This was intended to ensure that the incumbent supplier would not use its ownership of distribution and transmission networks to prevent new entrants from gaining access to the market. But when companies control energy networks as well as production or sales, there is a fundamental conflict of interest inside a company. Enabling non-discriminatory third party access to the network is absolutely key for a competitive market. But this may not always be compatible with optimizing the return of other parts of such a vertically-integrated business.”*** [5]

According to the provisions of the analyzed draft law, the full liberalization of the energy market should take place until January 1, 2015. The deadlines seem reasonable and completely achievable but, taking into account the existent precedents in fulfilling field decisions, we can expect anything to happen.

In 2003, the Parliament approved amendments to legislation which set the deadline for energy market liberalization of March 2005, and then the deadline was extended for July, 2007. But the prolongations did not give any notable results; therefore the Government demanded from the Parliament the delay of the complete energy market liberalization for January 1, 2015. These are some reasons for this delay:

- Non-finalized development of the automatic monitoring system for electricity flows bought/ sold on the energy market (SAECE), as well as of the Supervisory Control and Data Acquisition (SCADA). Forming these systems is part of the third component of Energy Project II, that has to be implemented by the end of 2009;
- Reduced capacity of interconnections to the energy systems of neighbouring countries necessary for electricity transactions. At present, the transmission system can provide unlimited transmission only for electricity produced by national power plants. The construction of the overhead electricity lines LEA – 330 kV Bălți-Novodnestrovsk, LEA – 400 kV Bălți-Suceava and LEA – 110 kV Fălciu – Gotești, for improving the interconnection

capacities with neighbouring countries is established for the 2008 – 2010 years, according to the IS “Moldelectrica” Development Plan.

- The national electricity production capacity is reduced and the existent plants cover less than 30% of the internal consumption. Besides, it will not be possible to extend the production capacity soon.
- The attractive regional electricity market (Ukraine) is monopolized, which unable the eligible consumers and suppliers to enter this market at non-regulated prices. At the same time, the prices are too high on the Romanian energy market.
- The market liberalization is impossible without establishing differentiated tariffs for different voltage levels of electricity supplied to the final consumers. The tariff implementation will lead to a rise in tariffs for consumers connected to the 0.4 kV voltage networks, mostly domestic consumers.[6]

### **ANRE depends on the Government**

The new draft law does not change a lot the present legal provisions on the further development of the regulatory authority – ANRE and the consolidation of its independence.

It is well known that establishing a healthy, stable and independent regulatory framework is crucial for integrating and liberalizing the energy markets, stimulating the competition, reducing the risks for new participants, creating rules equally applied to all interested parts, monitoring the market’s behaviour, solving conflicts and building trust and long-standing relationships among market participants.

ANRE was given enough responsibilities to comply with the requirements of the EU Directive 2003/54/CE from 26.06.2003, concerning the common rules for the internal electricity market and the 2003/55/CE Directive of the European Parliament and Council from June 26, 2003, concerning the common standards for the internal gas market. In fact, ANRE responsibilities are favourable as compared to other South-Eastern Europe regulatory authorities. The directives only demand the member countries to designate competent institutions as regulatory authorities totally independent of the energy or gas sectors. This requirement is imposed by *the 23 (1) article of the Directive on electricity and the 25 (1) article of the 2003/55/CE Directive* of the European Parliament and Council from June 23, 2003, concerning the common standards for the internal gas market. [7]

The Directives also establish that at least the regulatory bodies have to be responsible for insuring non-discrimination, healthy competition and efficient market functioning in the electricity, thermo-energy and gas sectors. The Directives also establish the specific fields the regulatory institution must monitor. [8]

The existent ANRE structure and functions comply with the above-mentioned requirements, but there are some legal issues that limit ANRE independence and impede the agency from fulfilling its monitoring responsibilities.

One of these issues is *ANRE dependency on the Government for designating and dismissing the Directors* (including the Director-General). [9] This stipulation remains in force also in the new draft law. [10] The only good news refers to the prolongation of the Director’s term of office: 6 years instead of 4 years. Due to the existent situation, not only ANRE independence is limited, but the Agency’s capacity to act quickly and reasonable is seriously threatened.

ANRE independence could be strengthened by including in the draft law a stipulation stating that the Parliament, not the Government, will designate and discharge the Director of ANRE Administration Council, including the General-Director.

The second issue refers to *Government’s involvement in forming the ANRE budget*. The Government has the right to approve the ANRE budget and thus to exert political control. EU and USAID experts recommended more than once the revision of these provisions. It seems that this recommendation was taken into account and the new law excludes Government’s intervention in the process of forming ANRE budget. According to article 10, each year, until November 15, the Agency forms the budget for the next year, based on: a). the regulatory payments applied each year by the Agency to the license holders; b). the payments for offering licenses; c). other sources stipulated by the legislation. The draft law stipulates that the Agency has to approve the budget at the level of 0.08 – 0.15% of the annual price of electricity, gas sup-

plied to the consumers, main oil products and imported liquefied gas. Besides, the Agency has the unique right to use the resources from its account, and the unused resources during the current financial exercise are transferred for the next year's budget.

Even more! If, during the current financial exercise, a fund deficit is created, the Agency has the right to recover it from the next year budget, correspondently rectifying the regulatory payments, or even taking bank loans on reasonable interests, for covering the current expenses that can not be covered from current regulatory payments.

The third issue is connected to the *ambiguous content of the article 5(3) from the Laws on electricity and gas* (in force), stipulating that “the Government according to this law approves the Agency's Regulations”, content maintained in the new draft law. The article 6(3) from the analyzed project is formulated as follows: “The Agency's Regulations are created according to the present law and are approved by the Government”. It should be mentioned that none of the Laws indicates the limits of the ANRE Regulations, approved by the Government, and that the Regulations in force reproduce a lot of provisions of the Laws on electricity and gas, regarding ANRE. There is no apparent need for these Regulations, but its existence supposes the capacity of the Government to designate the activity sphere of ANRE. Although this thing is not forbidden by the EU Directive, taking into account the obstacles to put the ANRE independence into practice, it would be useful to give ANRE more attributions that those required by the Directive. And the elimination of control from the behalf of the Government on ANRE Regulations would be a first step towards this direction.

There is a similar problem with *the procedure through which ANRE decisions enter into force*. A decision has to be published in the Official Monitor in order to be applied; but at the same time, its publishing can take place only after the decision is registered at the Ministry of Justice. [11] The Ministry of Justice can impede or delay the entry into force of one or another ANRE decision if rejects its registration. The 2005 year case can be reminded here, when the Government instead of ANRE (that had this responsibility) approved the new Regulations on electricity supply and consumption. As reason for this decision was invoked a provision of the Law on energy concerning energy (previous version of art. 12, paragraph (1)), stipulating that “the supply and consumption of combustibles, gas, electricity and thermal energy are done according to Regulations approved by the Government”. [12]

Later on, it became clear that the Regulations need some amendments and adjustments that the Government did not have time to introduce. Thus, Government Decision no. 88 from 4.02.2009 abrogated the previous Regulations, approved by the Government Decision no. 1194 on November 22, 2005. But this happened only after the Parliament modified art. 12, paragraph (1) of the Law on energy that now stipulates that the gas, power and thermo-energy supply and consumption are done according to Regulations approved by ANRE. On February 11, 2009 ANRE announced that it approved a new version of Regulations on electricity supply and consumption. [13]

Finally, the ANRE independence can not be assured considering that, according to the Law concerning the regulation of entrepreneurial activity from July 20, 2006, the regulatory authority must submit the drafts documents for advise to the Working Group for Regulating the Entrepreneurial Activity, that complicates in certain cases the approval procedure of these papers. For example, art. 14 of the concerning the regulation of entrepreneurial activity, stipulates express the fact that the standards for business initiation, development and closing must have the legal force. Considering these facts, it is not clear how free is the Agency in approving Regulations which establish the duties that must be respected by the power plants during their activity. But, according to the present Law on energy, one of the Agency's functions is to approve normative acts that would equitably, transparently and non-discriminatory regulate the relations between electricity enterprises, as well as the relations between the latter and electricity consumers. By the way, art. 1 of the Law concerning the regulation of the entrepreneurial activity says that the financial sector (itself regulated) is exempted from applying the Law. Such a stipulation might have been done for ANRE as well.

At the same time, even without the Law concerning the regulation of entrepreneurial activity, ANRE was and is compelled when working out the drafts to launch an active procedure of consulting responsible authorities and energy market participants, including domestic consumers (through representative organizations) and non-domestic consumers.

## Recommendations:

1. Include into the draft law a provision that Parliament, not Government, will appoint and dismiss directors of ANRE Administration Council, including Director-General;
2. ANRE budget to be established by Agency, but audited by an audit company selected through a transparent bidding;
3. Remove Government's control on the ANRE Regulations;
4. The Ministry of Justice should advise the ANRE normative acts before these acts are adopted;
5. Remove the provisions that ANRE must submit its draft normative acts to the Working Group for Regulating Entrepreneurial Activity for its advice.

## Sources:

1. The new draft law can be found on the Parliament web page, <http://www.parlament.md/download/drafts/en/21.2009.doc>.
2. It is to be mentioned that the Directive 2003/54/EC from 26.06.2003 traces only the goals that should be achieved by the member countries when the legislative and institutional frame in the energy sector will be established, and the mechanism that has to be applied for achieving these goals should be established by each of the EU member countries, according to the particularities of the energy sector in every country. See art. 249 from the European Community Treaty [http://eur-lex.europa.eu/fr/treaties/dat/12002E/htm/C\\_2002325FR.003301.html](http://eur-lex.europa.eu/fr/treaties/dat/12002E/htm/C_2002325FR.003301.html)
3. The EU-Moldova Action Plan can be found here [http://www.europa.md/upload/File/plan\\_actiuni/PlanulActiuniRM\\_UE.pdf](http://www.europa.md/upload/File/plan_actiuni/PlanulActiuniRM_UE.pdf)
4. Art. 48, par. 2 from the draft Law on electricity <http://www.parlament.md/download/drafts/en/21.2009.doc>.
5. Excerpt from "Improving Europe's energy markets through more competition", speech of Mrs. Neelie Kroes, European Commissioner for Competition Policy, [http://www.competitions.ro/newsletter/nr3\\_mar\\_07\\_ro.pdf](http://www.competitions.ro/newsletter/nr3_mar_07_ro.pdf)
6. The liberalization of the energy market may be delayed for 2015, "Energia" magazine, nr. 46, 2007
7. <http://eur-lex.europa.eu/Notice.do?val=285616:cs&lang=ro&list=285616:cs.413956:cs.285615:cs.413955:cs.285614:cs.285613:cs.285506:cs.285415:cs.285411:cs.285410:cs.&pos=1&page=3&nbl=61&pgs=10&hwords=&checktexte=checkbox&visu=#texte>
8. Ibidem.
9. Check art. 8 (3), (4), (5) of the Laws in force concerning electricity and gas [http://lex.justice.md/index.php?search=true&current\\_page=1](http://lex.justice.md/index.php?search=true&current_page=1)
10. Check art. 9 (3), (4), (5) of the Law concerning electricity <http://www.parlament.md/download/drafts/en/21.2009.doc>
11. According to Government's Decision no. 1104 from 28.11.1997 on the fulfilment of the judicial expertise and state registration of the department documents and according to the Law concerning the publishing in the Official Monitor, nr. 173 06.07.1994, and the Law 31718.07.2003, before being published in the Official Monitor, the department documents are to be sent to the Ministry of Justice for avizare and examination.
12. [http://www.anre.md/upl/file/Lege\\_en\\_el.doc](http://www.anre.md/upl/file/Lege_en_el.doc)
13. <http://www.anre.md/news/index.php?vers=1&sm=41&ct=155>

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#### Strategic Objectives

- Contribute to the efficient implementation of the governmental strategies aimed at the socio-economic development and democratization of Moldova;
- Promote and consolidate the democratic institutions and procedures;
- Encourage and facilitate citizen participation in the decision-making and governance processes.