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CHANGES OF LEGAL REGULATION ON NATURAL GAS MARKET IN THE CONTEXT OF THE THIRD EUROPEAN UNION ENERGY PACKAGE

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Abstract. *The article analyzes the changes of legal regulation on natural gas market in the context of the third European Union (EU) energy package. The paper consists of the introduction, two parts and conclusions. The first part analyses the main provisions on the natural gas market of the Third EU energy package. The second part of the paper focuses on the effect of the Third EU energy package on legal regulation of natural gas market in Lithuania. For this purpose, the author analyzes the relevant provisions of the future legal regulation that are laid out in the Conception on draft amendment of the Lithuanian law on natural gas (the Conception) that was adopted by the Resolution of 19 May 2010 No. 585¹ of the Government of the Republic of Lithuania (the Government). The author analyses the chosen model of implementation of the Directive 2009/73/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas of 13 July 2009 and repealing Directive 2003/55/EC (Directive 2009/73/EC),² and the possible*

- 1 Resolution of the Government of the Republic of Lithuania of 19 May 2010 No. 585 „On approval of the Conception on draft amendment of the Natural gas law of the Republic of Lithuania“. *Official Gazette*. 2010, No. 61–2996.
- 2 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 (OL 2009 L 211, p. 94).

negative and positive consequences of the implementation of the model chosen by the drafters of the Conception. The paper is ended with motivated conclusions.

Keywords: *natural gas, natural gas market, legal regulation, reliability of supply, Third EU energy package.*

Introduction

The problem of the research. The paper focuses on the problem of transferring the Third EU energy package into the national law of the Republic of Lithuania. The author considers that the drafters of the Conception did not make a thorough research of all possible alternatives of implementing the Directive No. 2009/73/EC and did not take a due regard to positive and negative consequences of the chosen implementation model. Moreover, the positions of neighbouring countries which have the only external supplier of natural gas, just like Lithuania and which are similar in the form of governance and the legal system, were not analysed. Besides these problems, the ownership unbundling model chosen by the Conception drafters in the long run might have a positive effect on the competitiveness of the natural gas markets, consumers, prices of natural gas, investments, other sectors of energy, various types of economic activities, and overall for the state economy, provided that a liquid gas terminal is built in the Lithuanian Republic or (and) possibilities to use other alternative natural gas sources are provided.

Relevance of the research topic. The research is topical, as shown by the extent of the problem (related not only to the needs and interests of the actors in the natural gas market but of the society as a whole), its complexity (solution of the problem requires purposeful legal regulation adequate to the public needs and interests and those of the natural gas market participants), the novelty and practical significance of the research (the problem is not studied in Lithuanian legal studies), ongoing debates (the informational war is being led by the Government, AB Lietuvos dujos, and the company's main shareholders) on the planned reform of the natural gas sector.

Purpose of the research – to analyze the planned changes of legal regulation on natural gas market in the context of the Third EU energy package.

The objectives of the research:

1. To analyse the main provisions on legal regulation of natural gas market of the Third EU energy package.
2. To evaluate the effect of the Third EU energy package on the legal regulation of the Lithuanian natural gas market.

The object of the research – the changes of legal regulation on natural gas market in the context of the Third EU energy package.

Methodology of the research.

1. *Systemic analysis method* was applied to analyse the legal regulation on the natural gas market, established in separate EU legal acts in the overall context of the Third

EU energy package, and systematically evaluate its main provisions on legal regulation.

2. *Document analysis method* was used to obtain information by examining the scientific literature, various EU and national legal acts, press releases of AB Lietuvos dujos and main shareholders, and other documents. This method facilitated assessing the changes of the legal regulation natural gas market and the possible negative and positive effects.

3. *Professional experience method*. The author of the article has a two-year professional experience in the National control commission for prices and energy (the NCC), the regulatory institution of the national energy sector. He has experience in drafting relevant NCC's resolutions, process documents, taking part in disputes between natural gas consumers and natural gas companies, checking the compliance with the license terms, and representing the NCC in ordinary and administrative courts in proceedings related to the issues of legal regulation of the natural gas market.

1. The Main Provisions on Legal Regulation of Natural Gas Market of the Third EU Energy Package

The Third EU energy package is the continuation of the former EU energy politics, aimed at ensuring the right of choice of the consumers, honest prices, clean energy and security of energy supply. This package contains 5 specific EU legal acts: Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (Regulation 713/2009),³ Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (Regulation 714/2009),⁴ Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (Regulation 715/2009),⁵ Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (Directive 2009/72/EB),⁶ and Directive 2009/73/EC. Considering the topic of the paper, Directive 2009/73/EC, Regulation 713/2009 and Regulation 715/2009 are the most relevant because Regulation

3 Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OL 2009 L 211, p. 1).

4 Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (OL 2009 L 248, p. 38).

5 Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OL 2009 L 309, p. 87).

6 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OL 2009 L 211, p. 55).

714/2009 and Directive 2009/72/EC contain provisions related to the legal regulation on electricity market. The main feature of the Directive 2009/73/EC is unbundling of natural gas transmission activities from production or supply activities (Article 9 part 1), not through application of rules on legal and functional unbundling of activities, as established by Directive 2003/55/EC but rather, by choosing the method of ownership unbundling. It means that the same company cannot produce natural gas or supply it to the consumer, and at the same time by the right of ownership or otherwise control the main gas pipelines for transmission of natural gas. The European Parliament in its Resolution of 10 July 2007 on prospects for the internal gas and electricity market noted that it considers “transmission ownership unbundling to be the most effective tool to promote investments in infrastructures in a non-discriminatory way, fair access to the grid for new entrants and transparency in the market”.⁷ The EU member states must ensure that laws and other regulations for the implementation of Directive 2009/73/EC come into force from 3 March 2011 and the provisions on ownership unbundling, from 3 March 2012. Point 10.5 of the Conception states that ownership of transmission system operators is unbundled in 12 member states, among them Denmark, United Kingdom, Spain and Sweden.⁸ Notably, 8 member states (Austria, Bulgaria, Greece, Latvia, Luxembourg, Slovakia, Germany and France) submitted alternative proposals, thus ownership unbundling model is not mandatory binding for those member states which had vertically integrated company running the transmission system on 3 September 2009.⁹ Such a member state can choose one of the alternatives to the ownership unbundling model, taking due regard to the objective criteria set in Article 9 part 8 of Directive 2009/73/EC: 1. Designate an independent system operator according to Article 14 of Directive 2009/73/EC; 2. Designate an independent transmission operator according to chapter IV of Directive 2009/73/EC. Contradictory opinions are expressed on the ownership unbundling model. Its supporters think that ownership unbundling will increase the investments to infrastructure, e.g., 4 liquid natural gas terminals have been built in the United Kingdom since ownership unbundling. Opponents claim that most of the new member states of the EU are dependent on the sole external supplier of natural gas, have no technical possibilities to receive supplies of natural gas from alternative sources, thus ownership unbundling is meaningless.

According to the model of independent system operator's (ISO), the companies active in production or supply of natural gas would retain the ownership of natural gas networks but would lose the control of their management. The main feature of ISO is

7 European Parliament resolution of 10 July 2007 on prospects for the internal gas and electricity market (OL C 175 E, 2008 7 10, p. 206).

8 Resolution of the Government of the Republic of Lithuania of 19 May 2010 No. 585 „On approval of the Conception on draft amendment of the Natural gas law of the Republic of Lithuania.“ *Official Gazette*. 2010, No. 61–2996.

9 Article 2 point 20 of Directive 2009/73/EC provides that: “vertically integrated undertaking means a natural gas undertaking or a group of natural gas undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission, distribution, LNG or storage, and at least one of the functions of production or supply of natural gas.”

unbundling the infrastructure ownership and infrastructure management. In business practice, companies quite often are not managed by their owners but the company directors who in essence aim at the purposes set by the owners (shareholders). In this case, such interconnection of owners and managers of the natural gas companies is forbidden. It constitutes the main disadvantage of the model. According to the model of independent transmission operator (ITO), vertically integrated companies would retain the ownership of natural gas networks but would be managed by and would have to entrust the networks' management entirely to an independent transmission operator.

The second and not less important feature of Directive 2009/73/EC is strengthening of the protection of consumer rights and legal interests through development of a competitive gas market. For this purpose, Annex 1 on Measures of consumer protection is attached to the Directive 2009/73/EC. The annex establishes these additional consumer protection measures: the right to terminate contract with the gas supplier free of charge and choose another supplier in three weeks; the right to receive a compensation and return the money in case where the quality of services, including imprecise or late bills, does not correspond to the quality agreed upon in the contract; the right to receive without charge the data on factual gas consumption and prices; the right to receive the final closure bill not later than in 6 weeks after the change of supplier.¹⁰ Moreover, member states should establish joint information centres that supply consumers with the necessary information on their rights, legislation in force, and available remedies in disputes. All disputes between the suppliers of natural gas services' supplier and consumers should be settled fairly and promptly, no later than in 3 months, with provision, where warranted, for a system of reimbursement and/or compensation. Out-of court dispute settlement procedures should be in line with the principles set out in Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.¹¹

The third feature of Directive 2009/73/EC is related with strengthening of independency of the national regulatory institutions, and defining their objectives, duties and powers, providing the conditions for cooperation of the European energy sector's regulatory institutions at the regional and EU levels (Chapter VIII). Article 39 part 4 and 5 of Directive 2009/73/EC establishes the state's duty to ensure that when carrying out the regulatory tasks conferred upon it by legislation, the regulatory authority: 1. is legally distinct and functionally independent from any other public or private entity; 2. its staff and the persons responsible for its management: a. act independently from any market interest; and b. do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks; 3. can take autonomous decisions, independently from any political body, and has separate annual budget allocations, with autonomy in the implementation of the allocated budget (adequate human and financial resources) to carry out its duties; 4. the members of the board of the regu-

10 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 (OL 2009 L 211, p. 94).

11 Commission Recommendation No 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (OL L115, 1998 4 17, p. 31).

latory authority or, in the absence of a board, the regulatory authority's top management are appointed for a fixed term of five up to seven years, renewable once (an appropriate rotation scheme must be applied, the managerial bodies may be relieved from office only upon specific clearly defined conditions, established by the national law).¹²

The legal regulation provided under Article 41 of Directive 2009/73/EC expands the duties and powers of the regulatory institution. The regulatory institution has these duties: fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies; ensuring compliance with set duties by all natural gas companies, ensuring publishing sufficiently in advance of their entry into force at least the methodologies used to calculate or establish the terms and conditions for connection and access to national networks, provision of balancing services, cross-border infrastructures, including the procedures for the allocation of capacity and congestion management; ensuring that there is no cross-subsidizing of natural gas transmission, allocation, keeping and supplying activities; undertaking monitoring duties established by Directive 2009/73/EC; at least once per year issue recommendations on compliance of supply prices to the set requirements, and etc. With the view of these duties, the regulatory institutions are given these powers: to issue binding decisions on natural gas undertakings; to demand that transmission, storage, liquid natural gas and distribution system operators, where appropriate, change conditions, including tariffs and methodologies, to make them proportional and non-discriminatory; to carry out inspection of activities at natural gas markets and to decide upon and impose any necessary and proportionate measures to promote effective competition and ensure the proper functioning of the market; to require any information from natural gas undertakings; to conduct studies and issue guidelines on dispute settlement, when the party complaining on the operator's activities related with its duties, submits a complaint to the regulatory institution in capacity of the disputed settlement institution.¹³

Directive 2009/73/EC also provides the duty of member states' regulatory institutions to cooperate on inter-state questions and the duties to cooperate with the Agency for the Cooperation of Energy Regulators (the Agency) established by Regulation 713/2009. The purpose of the Agency is to assist the regulatory authorities at the EU level the regulatory tasks performed in the member states and where necessary, coordinate their activities. Article 4 of Regulation 713/2009 provides that the Agency: a. issues opinions and recommendations addressed to transmission system operators; b. issues opinions and recommendations addressed to regulatory authorities; c. issues opinions and recommendations addressed to the European Parliament, the Council, or the Commission; d. takes individual decisions in the specific cases referred to in Articles 7, 8 and

12 See on independency of natural gas market's regulatory institutions and other key elements of their legal status in Lithuania and other EU member states. Urmonas, A.; Kanapinskas, V. Key elements of the legal status of the natural gas market regulatory institutions in Lithuania and in the European Union member states: a comparative analysis. *Jurisprudence*. 2010, 2(120): 379–395.

13 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 (OL 2009 L 211, p. 94).

9; e. submits to the Commission non-binding framework guidelines in accordance with Article 6 of Regulation 714/2009.¹⁴

At the regional level, the regulatory institutions are entrusted with the duty to cooperate with the view at these main objectives: promoting joint gas exchanges; coordinating the development of all network codes for the relevant transmission system operators and other market actors; and coordinating the development of the rules governing the management of congestion (Article 42 part 2 of Directive 2009/73/EC).

Another feature of the Third EU energy package, provided in more detail under Regulation 715/2009, is the duty imposed on members states' transmission system operators to cooperate at regional and EU level. Article 12 of the Regulation provides that transmission system operators have to build regional cooperation ties within the Community a European Network of Transmission System Operators for Gas (ENTSO for Gas) which will be established in 2011. At the EU level, these areas are the fields of cooperation: drafting and adopting of network codes; monitoring of implementation of network codes; coordination of network exploitation; and joint investment planning.¹⁵

Systemic evaluation of the Third EU energy package also has to include the Regulation No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC (Regulation 994/2010). The Regulation aims at safeguarding the security of gas supply by ensuring the proper and continuous functioning of the internal market in natural gas, by allowing for exceptional measures to be implemented when the market can no longer deliver the required gas supplies and by providing for a clear definition and attribution of responsibilities among natural gas undertakings, the Member States and the Union regarding both preventive action and the reaction to concrete disruptions of supply.¹⁶

Regulation 994/2010 was adopted with the view of these main circumstances: 1. Natural gas is one of the most important EU energy resources and equates to 25 percent of the supplied primary energy, mostly used for production of electricity, heating and as a primary industry material; 2. During the last decade, the consumption of natural gas in Europe has been increasing rapidly. As extents of internal production have been decreasing, the imports of natural gas supplies have been growing and thus the dependence on imports has increased, and at the same time, the need to find a solution for certain questions of natural gas supply security; 3. Some member states of the EU are still dependent upon the single external source and are called islands of natural gas for lack of any infrastructure links with the other EU member states; 4. In accordance with the measures for security of natural gas supplies established at the EU level by Directive 2004/67/EC,

14 Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OL 2009 L 211, p. 1).

15 Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OL 2009 L 309, p. 87).

16 Regulation No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC (OL 2010 L 295, p. 1).

the EU member states have wide discretion in choosing the measures, thus where security of gas supply in one of the member states is threatened, a clear danger arises that the measures adopted unitarily by that EU member state may impede adequate functioning of the natural gas internal market and supply of natural gas to consumers (e.g. gas supply in EU was disturbed due to gas crisis in Russian and Ukraine in January of 2009, when gas imports to the EU for two weeks decreased by 30 percent); 5. Common mandatory criteria to ensure security of natural gas supply should guarantee uniform conditions in the field of ensuring natural gas supply security, and would promote development of necessary infrastructure and foster preparation for crises, taking due regard to the national and regional circumstances; 6. It is necessary to set clear roles and responsibility of all natural gas companies and competent institutions. The roles and responsibility must be set in such a way that it is ensured that three-level approach is adopted: first, the relevant natural gas companies and industry should adopt actions, afterwards, the EU member states at the national or regional level, and finally the EU should do it as the last recourse; 7. In consideration of the scope of activities or the aimed effect, the EU member states cannot themselves reach the main purpose of Regulation, i.e., to ensure the security of natural gas supply at the EU level, thus the Regulation is the most appropriate measure for this, according to the principles of subsidiarity and proportionality. We consider that the Regulation is a more appropriate legislative form because: 1. It is directly applicable to the EU member states competent authorities, natural gas supply companies and consumers; 2. The long procedure of transposition into the national law provisions is not applicable; 3. It ensures the clarity and consistency of applicable standards and duties at the EU level, and directly defines participation of the EU institutions.

2. Effect of the Third EU Energy Package on the Lithuanian Legal Regulation of Natural Gas Market

The effect of the Third EU energy package on the Lithuanian legal regulation of natural gas market in essence is reflected in the Conception. Most of the Conception's provisions are copied from Directive 2009/73/EC and other EU legal acts. Point 3 of the Conception says that the purpose of the draft amendment of the Natural gas law is to set the common principles of natural gas sector's activities organization and functioning, activities of gas undertakings, their interconnections, and their relations with consumers, in the supply, distribution, transmission, liquefaction and storage of natural gas, in order to: 1. Ensure the sufficient level of gas supply reliability; 2. Effectively unbundle the transmission activities and supply activities, ensure security of supply and solidarity in the gas sector; 3. Strengthen protection of consumer rights and legitimate interests; 4. Expand the functions of regulatory institutions of national energy sector, guarantee their independence, harmonize activities, and facilitate cooperation with the European energy sector's regulatory institutions at the regional and EU level; 5. Promote the cooperation

of the EU transmission system's operators at the regional and EU level.¹⁷ These are the main features of the Third EU energy package, discussed in the first part of this paper, thus in the author's opinion, there is no need to analyze these provisions due to limited extent of the paper. Besides, according to point 26 of the Rules on legislation of the Government of the Lithuanian Republic, conceptions are not adopted for the purposes of drafting laws on implementation of requirements imposed by the EU legislative acts.¹⁸ Therefore, this article concentrates on analysis of the implementation model in Lithuania of Directive 2009/73/EC chosen by the drafters of the Conception (point 15) and its positive and negative effects. The implementation model has inspired a heated debate of energy specialists, politicians, economists, participants of natural gas market and journalists. The model consists of full unbundling of ownership of the natural gas transmission networks from production and supply. The persons not in compliance with the requirements of ownership unbundling model are: gas undertakings that carry out the function of production or supply and are directly or indirectly controlled by the EU or third countries subjects, which at the same time control directly or indirectly the transmission system operator or transmission system, or have some rights towards transmission system operator or transmission system; or transmission system operators or transmission system controlling undertakings that are directly or indirectly controlled by the EU or third countries' subjects, at the same time directly or indirectly controlling the undertaking that carries out some function in production or supply, or having some rights towards such undertaking. From 3 March 2010, the same person cannot be the member of a board, administrative council, or body legally representing the undertaking carrying out any function of production or supply, or transmission system operator, or transmission system. The Conception establishes that if the ownership unbundling model is not implemented in six months from coming into force of the Natural gas law amendment, the gas undertakings will have to initiate reorganizing proceedings. Point 15.7 of the Conception provides that if gas undertakings fail to comply adequately or timely with the requirements of the Law (e.g. the national regulation authority should be provided with timely information on their reorganization terms, reorganization procedure must be completed, and etc.), the national regulation authority has the right to apply fines to the law infringing subjects (up to 10 percent of the company's annual turnover), and (or) to appoint an independent system operator who would carry out his functions until the infringing company complies with the requirements set by the Law and the implementing law. It will be considered that the independent system operator administers the ownership of a specific company on the basis of the Law.¹⁹

17 Resolution of the Government of the Republic of Lithuania of 19 May 2010 No. 585 „On approval of the Conception on draft amendment of the Natural gas law of the Republic of Lithuania.“ *Official Gazette*. 2010, No. 61–2996.

18 Resolution of the Government of the Republic of Lithuania of 30 September 2009 No. 1244 „On approval of the Rules on legislation of the Government of the Republic of Lithuania.“ *Official Gazette*. 2009, No. 121–5212; 2010, No. 7–317.

19 Resolution of the Government of the Republic of Lithuania of 19 May 2010 No. 585 „On approval of the Conception on draft amendment of the Natural gas law of the Republic of Lithuania.“ *Official Gazette*. 2010, No. 61–2996.

AB Lietuvos dujos in its press release of 27 May 2010 and its shareholders AAB „Gazprom“ and E.ON Ruhrgas International GmbH criticized the mentioned provisions of the Conception in their press release of 16 June 2010. They noted that the model of implementation of the Directive 2009/73/EC will have negative effects on stable work of company: ensuring of natural gas supply security and reliability, financial capacity of company to undertake new infrastructure projects and market development. It will lower the investors' interests and will increase administrative costs and natural gas prices.²⁰ The key shareholders of AB Lietuvos dujos claim that in the last 5 years they have invested almost 700 million litas (development of new infrastructure, increase in capacity of international links, and projects' implementation according to the National energy strategy). Moreover, international corporate management standards and structural changes have been introduced in the company, and accounting of various types of activities has been unbundled. Private shareholders own 76 percent of AB Lietuvos dujos shares but the decision-making rights on the issues of natural gas transmission would be given to the Lithuanian state, which owns only 17,7 percent of shares.²¹ Similar view is expressed in a specialized journal *Heren European Spot Gas Market* (2010-06-30). Jonathan Stern, Director of Gas Research of Oxford Institute for Energy Studies, claims that ownership unbundling will not change anything because Lithuania does not have alternative natural gas sources and nationalization of transmission networks might raise the price of natural gas to the final consumers because main shareholders' losses will have to be compensated. Such actions of the Government, according to Stern, might raise dissatisfaction of the only current supplier (AAA Gazprom).²²

Therefore the author of the paper considers that while adopting decision that has a great effect on the company, the Conception drafters should have considered the provisions of relevant international treaties on investment promotion and security, and the effect of the legal regulation on natural gas market's competitiveness, consumers, natural gas prices, investments, other energy sectors, different types of economic activities, and overall on the state economy. Consultations with the main shareholders of AB Lietuvos dujos, other participants of the natural gas market (e.g. consumers), and associated structures could have taken place.

On the other hand, the implementation of model of ownership unbundling in the long run should have positive effects, provided that a liquid natural gas (LNG) terminal is built in Lithuania and (or) other alternative gas sources are found. It would increase the energy security of the Lithuanian Republic and would lessen the dependence on the sole supplier of natural gas. LNG notably involves gas but it is transported by ships

20 Press release of AB Lietuvos dujos of 27 May 2010. [interactive]. [accessed 26-07-2010]. <<http://www.dujos.lt/index.php/ziniasklaidai/pranesimai-spaudai/ab-lietuvos-dujosisplatinio-informacija-del-lr-vyriausybes-patvirtintos-lr-gamtiniu-duju-istatymo-koncepcijos/37941>>.

21 Press release of AB Lietuvos dujos of 16 June 2010. [interactive]. [accessed 26-07-2010]. <<http://www.dujos.lt/index.php/ziniasklaidai/pranesimai-spaudai/ab-lietuvos-dujos-akcininku-gazprom-ir-eon-ruhrgas-pareiskimas/38254>>.

22 Press release of AB Lietuvos dujos of 26 July 2010. [interactive]. [accessed 26-07-2010]. <<http://www.dujos.lt/index.php/naujienos/skaidymas-lietuvoje-ar-lietuvos-spaudimas-lietuvos-dujoms-atsisakyti-perdavimo-sistemos-kontroles-zymiai-sumazins-kainas-ar-jas-padidins/38508>>.

rather than pipelines. It is clear from the term defined under the Natural gas law. Article 3 part 7 of the law says that natural gas means the mixture of hydrocarbons extracted from the entrails of the earth, which under normal conditions exists in a gaseous state, also liquefied natural gas, biogas, gas made from biomass, and other types of gas which may be technically and safely supplied to natural gas system or transported by it.²³ LNG are brought by ships into sea ports and supplied to the natural gas transmission system. In order to transport bigger quantities of LNG, the gas is cooled to minus 161 degrees (Celsius), thus reducing its volume by 600 times, and making long-distance transportations of LNG profitable: e.g. from Qatar, Nigeria, Pacific ocean states into markets of Europe, USA, Asia (China, Japan). LNG technology and infrastructure facilitates the supply to the market of those gas resources which were unavailable to this date, and for the owners of gas production infrastructure, LNG opens up the global gas market. The gas prices on the global market have decreased due to surplus of LNG from Qatar and other LNG-supplying states of the Near East, which results from better reclamation of shale gas in USA. According to the Lithuanian Prime minister Andrius Kubilius, AAA Gazprom supplies Lithuania with gas for the price of approximately 100 USA dollars per 1 thousand square meters higher, than the price of gas supplied to the Western Europe, and approximately 150 USA dollars higher than the price of gas transported by ships.²⁴ In this aspect it must be noted that the Lithuanian Government on 21 July 2010 adopted the decision to build the LNG terminal in Klaipėda. State enterprise Klaipėdos nafta was chosen as the main constructor of the LNG terminal.²⁵ It is foreseen that the LNG terminal's capacity will be up to 3 billion square meters per year. In the opinion of the drafters of the Conception, if the ownership unbundling model is not implemented, the state could not transmit the gas brought to Klaipėda to consumers because it does not control the main pipelines for transmission of natural gas, thus ownership unbundling and construction of the LNG terminal are related and supplementary measures. Besides LNG terminal and ownership unbundling, other steps for liberalizing the natural gas market have to be taken: development of natural gas market, construction of pipeline Klaipėda-Jurbarkas (thus creating the "circle" of main pipelines for natural gas transmission in Lithuania), and building natural gas network links with Poland (EU financial support is expected for this project).

The draft project on national energy (energy independence) strategy²⁶ which was approved by the Government on 6 October 2010 establishes strategic initiatives. These initiatives, e.g., LNG terminal, pipeline to Poland, natural gas storage, liberalizing of natural gas market (full unbundling of natural gas supply and transmission), supporting

23 Natural gas law of the Republic of Lithuania. *Official Gazette*. 2000, No. 89-2743; 2007, No. 43-1626.

24 Press release of the Government of the Republic of Lithuania of 21 July 2010. [interactive]. [accessed 26-07-2010]. <<http://www.lrv.lt/lt/naujienos/aktualijos/?nid=7116>>.

25 Resolution of the Government of the Republic of Lithuania of 21 July 2010 No. 1097 „On development of natural gas terminal.“ *Official Gazette*. 2010, No. 90-4755.

26 Resolution of the Government of the Republic of Lithuania of 6 October 2010 No. 1426 „On submission to the Parliament of the Republic of Lithuania of draft Resolution of the Parliament of the Republic of Lithuania “On approval of the National energy (energy independence) strategy.“ *Official Gazette*. 2010, No. 121-6174.

the search for shale gas in Lithuania, in essence correspond to the mentioned provisions and should be assessed positively. However, no official economic calculations have been published on the scope and sources of investments needed for implementation of these measures, nor the effect of investments on the state economy, consumers, service prices, and overall investments.

Furthermore, the author presents these critical observations on the implementation model of Directive 2009/73/EC chosen by the drafters of the Conception:

1. The Constitution in its Article 138 establishes the principle of supremacy of international treaties over the national legal acts. The Law on treaties of the Republic of Lithuania clearly provides in Article 11 part 2 that “If a ratified treaty of the Republic of Lithuania which has entered into force establishes norms other than those established by the laws, other legal acts of the Republic of Lithuania which are in force at the moment of conclusion of the treaty or which entered into force after the entry into force of the treaty, the provisions of the treaty of the Republic of Lithuania shall prevail.”²⁷ In this regard it must be noted that investments of the main shareholders of AB Lietuvos dujos (E.ON Ruhrgas International GmbH ir AAB „Gazprom”) are protected by voluntarily undertaken obligations under the public international law, the Energy charter ratified by the Lithuanian Seimas in 1998, the Agreement of Germany and Lithuania of 1992 for the promotion and reciprocal protection of investments, and the Agreement of Russia and Lithuania for the promotion and protection of investments. These instruments establish the obligations for the contracting parties to abstain from affecting the investments by unreasonable and discriminatory measures, to treat investments in a fair and just way, to grant them total protection and security. According to Articles 2 and 3 of the Agreement of Russia and Lithuania (1999), Lithuania must ensure the protection of investments from Russia, to guarantee the just and equivalent regime for the investments and related activities, which does not encompass discriminatory measures that might impede controlling, supporting, using or disposing of investments. According to Article 6 of the Agreement, the expropriation, nationalization or similar measures against investments is forbidden, except for those cases when actions are taken in accordance with the laws for public needs, are not discriminatory, and adequate and effective compensation is promptly provided. Thus the doubts arise whether the model chosen by the drafters of the Conception does not contradict with Article 138 of the Constitution and the mentioned international treaties.

2. AB Lietuvos dujos is a vertically integrated undertaking that has absolute and strategic superiority in the Lithuanian natural gas market. The absolute advantage of the company in respect of other economic operators is in essence determined by ownership control of the main pipelines and transmission pipelines that cover almost all territory of the Lithuanian Republic. The strategic advantage of AB Lietuvos dujos is determined by funding capacities (good reputation of a long-term company in the market decreases investment risks, facilitates funding in more favourable conditions, and drafting of effective investment plans), economies of scale (larger market share allows

27 Law on treaties of the Republic of Lithuania. *Official Gazette*. 1999, No. 60-1948.

receiving lower average operational costs than those of potential competitors), and time and financial input (much time and large investments are needed for construction of main and transmission pipelines and acquiring good reputation, and the investments only return in decades of years). It would be difficult to unbundle AB Lietuvos dujos into three separate transmission, distribution and supply undertakings because of these reasons: 1. The implementation deadline is rather close (3 March 2012); b. Accounting and tax reasons; c. The need to change information technology systems, procedure for issuing bills, internal procedures, trademark, agreements with third parties, workers, and to install indicators in places where the transmission system ends and the distribution system starts.

3. The costs of ownership unbundling in a short run might increase the natural gas prices to final consumers in Lithuania. According to the author's data, the Estonian ministry of economy and regulatory institutions undertook an economic assessment of unbundling the vertically integrated undertaking Eesti Gaas into two companies and it appeared that separation of infrastructure from supply would raise the natural gas prices for Estonian consumers by 17 percent.

4. The drafters of the Conception did not estimate the compensation mechanism for possible losses of AB Lietuvos dujos if it does not have the possibility to sell the shares at market prices or if the prices of shares decrease. For selling the shares of AB Lietuvos dujos at market prices, it is needed: a. to have sufficient time; b. the potential buyer of shares has to comply with qualification criteria of a strategic shareholder; c. The regulation of natural gas prices must be clear and predictable for the future investors.

Notwithstanding the critical observations, these important arguments base the opposite opinion:

1. Directive 2009/73/EC provides that in order to provide full protection of interests of vertically integrated undertakings, the EU member states have a possibility to unbundle ownership by directly transferring the property or by distributing the integrated company's shares to network undertaking and the remaining supply and production undertaking. These are the principles that the Conception is based upon. The European Commission has noted that none of the models of implementation of Directive 2009/73/EC has influence on bilateral investment agreements of the EU member states, nor the Energy charter treaty. While unbundling the transmission system operator, the shares of present vertically integrated company (investments of shareholders) are distributed adequately to their ownership, without any changes (without reducing, nationalizing, expropriating, or any similar actions).

2. The EU member states have to ensure that the laws and other regulations for implementation of Directive 1009/73/EC come into force by 3 March 2011, and the provisions on unbundling activities by 3 March 2012, thus there are no legal possibilities to postpone the deadline (infringement proceedings might be launched against Lithuanian Republic). Adherence to requirements of Directive 2009/73/EC will require additional efforts but there are no objective reasons that would render reorganization of AB Lietuvos dujos impossible.

3. The costs of ownership unbundling implementation in a short run might increase the prices for the final consumers in Lithuania but in the long run, once the adequate measures are implemented, it may have positive effects to the competitiveness of natural gas market, natural gas prices, and overall, to the state economy, provided that large-scale projects would be funded by the EU.

4. Implementation of ownership unbundling itself should not result in losses to shareholders of AB Lietuvos dujos, and in any case state authorities have the obligation to compensate the damage inflicted by its illegal actions according to the Civil Code. In addition, according to the author's data, the EU management has made an unofficial promise to compensate the shareholders of AB Lietuvos dujos all losses that may arise due to actions of institutions of the Lithuanian Republic.

Conclusions

1. The analysis of the Third EU energy package's provisions on natural gas market regulation allows distinguishing these main features: unbundling of natural gas transmission from production and supply activities; strengthening of protection of consumer rights and legitimate interests through competitive gas market development; increase of independence of the national regulatory institutions, defining their purposes, duties and obligations, while setting conditions of cooperation of the European energy regulatory authorities at the regional and EU level, obligation of member states transmission system operators to cooperate at the regional and EU level in such fields as drafting and adopting of network codes, monitoring of implementation of network codes, coordination of network exploitation, and joint investment planning.

2. Regulation 994/2001 is very important for systemic analysis of the Third EU energy package. The Regulation aims at safeguarding the security of gas supply by ensuring the proper and continuous functioning of the internal market in natural gas, by allowing for exceptional measures to be implemented when the market can no longer deliver the required gas supplies and by providing for a clear definition and attribution of responsibilities among natural gas undertakings, the member states and the EU regarding both preventive action and the reaction to concrete disruptions of supply. Adequate implementation of measures established under Regulation 994/2010 would facilitate more effective functioning of the natural gas market, would decrease the dependence of the Lithuanian Republic on the sole supplier of natural gas and would improve energy security.

3. The analysis of provisions of the Conception shows that the drafters of the Conception did not analyze in detail all the alternatives of implementation of Directive 2009/73/EC and did not assess their positive and negative effects, nor the positions of neighboring countries which (like Lithuania) have the sole external supplier of natural gas and are similar in the form of governance and legal system. Notwithstanding the said shortcomings of the Conception, implementation of ownership unbundling model in a long run might have positive effects on competitiveness of natural gas market, consu-

mers, natural gas prices, investments, other energy sectors, various types of economic activities, and overall to the state economy, if large-value projects (such as LNG terminal, natural gas link with Poland, and etc.) that facilitate alternative natural gas sources, would receive financial support from the EU.

References

- Commission Recommendation No 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (OL L115, 1998 4 17, p. 31).
- Council Directive 2004/67/EC of the European Parliament and of the Council of 26 April 2004 concerning measures to safeguard security of gas supply (OL L 127, 2004 4 29, p. 92).
- Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OL 2009 L 211, p. 55).
- 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 (OL 2009 L 211, p. 94).
- European Parliament resolution of 10 July 2007 on prospects for the internal gas and electricity market (OL C 175 E, 2008 7 10, p. 206).
- Law on treaties of the Republic of Lithuania. *Official gazette*. 1999, No. 60-1948.
- Natural gas law of the Republic of Lithuania. *Official gazette*. 2000, No. 89-2743; 2007, No. 43-1626.
- Press release of AB Lietuvos dujos of 16 June 2010. [interactive]. [accessed 26-07-2010]. <<http://www.dujos.lt/index.php/ziniasklaidai/pranesimai-spaudai/ab-lietuvos-dujos-akcininku-gazprom-ir-eon-ruhrgas-pareiskimas/38254>>.
- Press release of AB Lietuvos dujos of 26 July 2010. [interactive]. [accessed 26-07-2010]. <<http://www.dujos.lt/index.php/naujienos/skaidymas-lietuvoje-ar-lietuvos-spaudimas-lietuvos-dujoms-atsisakyti-perdavimo-sistemokontroles-zymiai-sumazins-kainas-ar-jas-padidins/38508>>.
- Press release of AB Lietuvos dujos of 27 May 2010. [interactive]. [accessed 26-07-2010]. <<http://www.dujos.lt/index.php/ziniasklaidai/pranesimai-spaudai/ab-lietuvos-dujos-isplatino-informacija-del-lr-vyriausybes-patvirtintos-lr-gamtiniu-duju-istatymo-koncepcijos/37941>>.
- Press release of the Government of the Republic of Lithuania of 21 July 2010. [interactive]. [accessed 26-07-2010]. <<http://www.lrv.lt/lt/naujienos/aktualijos/?nid=7116>>.
- Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OL 2009 L 211, p. 1).
- Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (OL 2009 L 248, p. 38).
- Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OL 2009 L 309, p. 87).
- Regulation No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard se-

- curity of gas supply and repealing Council Directive 2004/67/EC (OL 2010 L 295, p. 1).
- Resolution of the Government of the Republic of Lithuania of 19 May 2010 No. 585 „On approval of the Conception on draft amendment of the Natural gas law of the Republic of Lithuania“. *Official gazette*. 2010, No. 61–2996.
- Resolution of the Government of the Republic of Lithuania of 21 July 2010 No. 1097 „On development of natural gas terminal“. *Official gazette*. 2010, No. 90-4755.
- Resolution of the Government of the Republic of Lithuania of 30 September 2009 No. 1244 „On approval of the Rules on legislation of the Government of the Republic of Lithuania“. *Official gazette*. 2009, No. 121–5212; 2010, No. 7–317.
- Resolution of the Government of the Republic of Lithuania of 6 October 2010 No. 1426 „On submission to the Parliament of the Republic of Lithuania of draft Resolution of the Parliament of the Republic of Lithuania “On approval of the National energy (energy independence) strategy.“ *Official gazette*. 2010, No. 121-6174.
- Urmonas, A.; Kanapinskas, V. Key elements of the legal status of the natural gas market regulatory institutions in Lithuania and in the European Union member states: a comparative analysis. *Jurisprudence*. 2010, 2(120).

GAMTINIŲ DUJŲ RINKOS TEISINIO REGULIAVIMO POKYČIAI TREČIOJO EUROPOS SAJUNGOS ENERGETIKOS PAKETO KONTEKSTE

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Santrauka. *Straipsnyje analizuojami Gamtinių dujų rinkos teisinio reguliavimo pokyčiai, numatyti Trečiajame Europos Sąjungos (toliau – ES) energetikos pakete. Straipsnis sudarytas iš įvado, dviejų dalių ir išvadų. Pirmojoje dalyje analizuojamos svarbiausios Trečiojo ES energetikos paketo nuostatos, susijusios su gamtinių dujų rinkos teisiniu reguliavimu, apibrėžiant šiuos aspektus: gamtinių dujų perdavimo veiklos atskyrimas nuo gavybos ir tiekimo veiklos; vartotojų teisių ir teisėtų interesų apsaugos stiprinimas, sukuriant konkurencingą dujų rinką; nacionalinių reguliavimo institucijų nepriklausomumo stiprinimas, jų tikslų, pareigų bei įgaliojimų apibrėžimas, numatant sąlygas Europos energetikos sektoriui reguliuojančioms institucijoms bendradarbiauti regioniniu ir ES lygmenimis; įpareigojimas valstybių narių perdavimo sistemos operatoriams bendradarbiauti regioniniu ir ES lygmenimis, rengiant ir priimant tinklo kodeksus, prižiūrint tinklo kodeksų įgyvendinimą, koordinuojant tinklo eksploatavimą, planuojant bendras investicijas. Vertinant sistemingai Trečiąjį ES energetikos paketą, aktualizuojamos 2010 m. spalio 20 d. Europos Parlamento ir Tarybos reglamento (ES) Nr. 994/2010 dėl dujų tiekimo saugumo užtikrinimo priemonių, panaikinančio Tarybos direktyvą 2004/67/EB, priėmimo priežastys. Reglamento tikslas – garantuoti gamtinių dujų tiekimo saugumą, užtikrinant tinkamą ir nenutrūkstamą šių dujų vidaus rinkos veikimą, leidžiant įgyvendinti išimtinio pobūdžio priemones,*

kai rinka nebegali tiekti reikalingo gamtinių dujų kiekio, bei aiškiai apibrėžiant gamtinių dujų įmonių, ES valstybių narių ir ES atsakomybę už preventinius veiksmus bei reaguojimo į konkrečius tiekimo sutrikimus priemones. Tinkamai įgyvendinant Reglamente Nr. 994/2010 numatytas priemones, būtų sudarytos prielaidos efektyviau veikti gamtinių dujų rinką, sumažėtų Lietuvos Respublikos priklausomybė nuo vienintelio gamtinių dujų tiekėjo ir padidėtų energetinis saugumas.

Antroje straipsnio dalyje įvertinamas Trečiojo ES energetikos paketo poveikis Lietuvos gamtinių dujų rinkos teisinio reguliavimo pokyčiams, analizuojamos aktualiausias būsimojo teisinio reguliavimo nuostatos, numatytos Lietuvos Respublikos gamtinių dujų įstatymo pakeitimo įstatymo koncepcijoje, įvertinamas jos rengėjų pasirinktas 2009 m. liepos 13 d. Europos Parlamento ir Tarybos direktyvos 2009/73/EB dėl gamtinių dujų vidaus rinkos bendrųjų taisyklių, panaikinančios direktyvą 2003/55/EB, įgyvendinimo modelis, galimos jo teigiamos bei neigiamos pasekmės.

Autorių nuomone, nuosavybės atskyrimo modelio įgyvendinimas ilgainiui galėtų turėti teigiamų pasekmių gamtinių dujų rinkos konkurencingumui, vartotojams, gamtinių dujų kainoms, investicijoms, kitiems energetikos sektoriams, įvairioms ekonominės veiklos rūšims, taip pat ir visam šalies ūkiui, jeigu didelės vertės projektai (SGD terminalas, gamtinių dujų tinklų jungtis su Lenkija ir kt.), užtikrinantys alternatyvius gamtinių dujų šaltinius, sulauktų ES finansinės paramos.

Reikšminiai žodžiai: gamtinės dujos, gamtinių dujų rinka, teisinis reguliavimas, tiekimo patikimumas, Trečiasis ES energetikos paketas.

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