

PROBLEMS AND TASKS OF LEGAL REGULATION OF EXCHANGE TRADE IN ENERGY RESOURCES IN THE RUSSIAN FEDERATION AND IN THE EURASIAN ECONOMIC UNION

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In accordance with the National Plan on the Development of Competition, development of exchange trade is referred to the fundamental principles of the national policy of the Russian Federation in this sector. In the implementation of the National Plan on the Development of Competition, the expected results include, without limitation, an increase in the sales of natural gas at the organized tenders; in the field of oil and oil products, it is planned to develop market pricing mechanisms through development of organized trade in oil for export and formation of a benchmark for Russian oil, and development of the terminal market of oil products.

In the Russian Federation, exchange trade in oil, oil products, and gas is currently performed at Joint-Stock Company Saint-Petersburg International Mercantile Exchange, Joint-Stock Company Saint-Petersburg Stock Exchange, futures contracts for oil are traded at the Moscow Stock Exchange, and exchange trade in certain oil products and liquefied hydrocarbon gases is also carried out at Joint-Stock Company Crimean Stock Exchange. The most active exchange trade in energy resources in the Russian Federation is performed at SPIMEX, JSC.

Taking into account that there are currently few legal studies on the legal regulation of exchange trade in energy resources, and considering the tasks set by the National Plan on the Development of Competition, it seems relevant to conduct a legal analysis of the current state of legal regulation in the Russian Federation, the legal framework for development of exchange trade within the Eurasian Economic Union, and to identify gaps and contradictions. In the performed study, the author examines the general requirements to the organization and conduct of exchange trade established at the level of national legislative and subordinate regulatory legal acts, performs a legal analysis of the acts of SPIMEX, JSC, as related to organizing, regulating, and controlling the exchange trade in oil, oil products, and natural gas, provisions of the Eurasian Economic Union Treaty on formation of common energy markets, Concepts and Programs for the formation of a common electricity market, a common gas market, and common markets of oil and oil products. The work proposes a conditional classification of exchange contracts for trade in energy resources, identifies gaps and contradictions in legal regulation, and suggests possible solutions for their elimination. This work may be useful for further legal research, in the implementation of law-making work, and in the educational process on energy law.

Keywords: energy law; legal regulation of exchange trade in energy resources, contractual regulation in the energy sector, energy supply, oil futures.

Development of exchange trade is referred to the fundamental principles of the national policy of the Russian Federation on the development of competition. In accordance with the National Plan on the Development of Competition, it is planned to systematically develop organized trade in the commodity markets, to identify mechanisms for formation of key commodity items, to establish market prices for relevant groups of goods, to encourage and attract business entities to participate in exchange trade, and to use the potential of small- and medium-sized entities to develop the organized trade [1].

Pursuant to the National Plan on the Development of Competition in the Russian Federation, the expected results of development of competition in the gas supply sector include transition to market pricing through formation of exchange and over-the-counter indicators of prices for natural gas ensured, among other things, by an increase in the sales of natural gas at the organized tenders; in the field of oil and oil products, it is planned to develop market pricing mechanisms through development of organized trade in oil for export and formation of a benchmark for Russian oil, development of the terminal market of oil products, development of organized small-scale wholesale trade and formation of market price indicators for the small-scale wholesale market, deregulation of prices for transportation of oil products through trunk pipelines of oil products that provide for maintaining the scope of organized trade in oil products at the level exceeding 10 percent of supplies to the domestic market, and increase in the scope of the settled export transactions in oil [2].

In the Russian Federation, exchange trade in oil, oil products, and gas is currently performed at Joint-Stock Company Saint-Petersburg International Mercantile Exchange, Joint-Stock Company Saint-Petersburg Stock Exchange, futures contracts for oil are traded at the Moscow Stock Exchange, and exchange trade in certain oil products and liquefied hydrocarbon gases is also carried out at Joint-Stock Company Crimean Stock Exchange.

The most active exchange trade in energy resources in the Russian Federation is performed at SPIMEX, JSC.

Legal analysis of the provisions determining the status of a mercantile exchange shows that the stock exchange performs several basic functions: organizational, regulatory, and supervising.

General requirements to the procedure for holding exchange trade are established in the following regulatory legal acts: Federal Law No. 325-Φ3 dated November 21, 2011, *On Organized Trading*, Federal Law No. 7-Φ3 dated February 7, 2011, *On Clearing, Clearing Activities, and the Central Counterparty*, Federal Law No. 135-Φ3 dated July 26, 2006, *On Protection of Competition*, Federal Law No. 224-Φ3 dated July 27, 2010, *On Countering the Illegal Use of Insider Information and Market Manipulation, and on Amending Certain Legislative Acts of the Russian Federation*, subordinate regulatory legal acts, Resolutions of the Government of the Russian Federation, the Provisions of the Central Bank of Russia No. 437-Π dated October 17, 2014, *On Activities for the Organized Trading*, and acts of the stock exchanges. Herewith, it should be noted that the acts of the stock exchanges include both general exchange rules and rules for exchange trade in certain types of energy resources or their derivatives. Legal regulation of the procedure for exchange trade in energy resources at the level of acts of stock exchanges is most fully developed by SPIMEX, JSC.

It refers both to the general exchange rules of this stock exchange, including the requirements to the procedure for admission to trading, requirements for the bidders as well as the provisions on contractual regulation. Despite the fact that these provisions can be further improved, a certain system of contractual regulation of energy resources has already been formed. It is also worth mentioning the considerable work done in order to mitigate the legal risks arising from trading at the stock exchange in the specified energy resources and their derivatives.

The legal analysis of the provisions of the laws of the Russian Federation and the acts of SPIMEX, JSC, where exchange trade in energy resources and their derivatives is most active, shows that the contractual regulation of exchange trade includes several groups of contracts.

1. Organizational contracts concluded between the bidders and the Stock Exchange, and between the bidders and the clearing entity.

These contracts pertain to a number of terms and conditions to be met in order to be admitted to trading, and they include the following types of contracts.

1.1. Organizational contracts between the bidders and the Stock Exchange:

1.1.1. Contract for Rendering of Services Related to Holding of Organized Trading;

1.1.2. Contract for Rendering of Services of Providing the Bidder with Software and/or Hardware for Remote Access to the Services of the Stock Exchange.

1.2. Organizational contracts between the bidders and the clearing entity:

1.2.1. Contract for rendering of Clearing Services;

1.2.2. Contract on Accession to the Rules of Electronic Document Management of the Clearing Entity;

1.2.3. Contract for Provision of Technical Access to the Software and Hardware Complex of the Clearing Entity.

2. Contracts for provision of transportation services and arrangements for transportation concluded between the bidders and entities engaged in transportation of oil products and gas.

These contracts are also included in the terms and conditions for admission to trading.

2.1. To participate in trading in the Natural Gas section, it is necessary to conclude the agency contract with the Transportation Organizer, Gazprom Mezhhregiongaz Postavka, LLC [3].

2.2. To be admitted to trading in the Oil products section of SPIMEX, JSC, to supply the products through trunk pipelines, the bidders shall conclude the service contract for transportation of oil products purchased at mercantile exchanges of the Russian Federation with Transneft, PJSC [4].

3. Contracts concluded between the bidders.

3.1. Energy Supply Contracts.

The procedure for conclusion and the terms and conditions of supply contracts are defined in the Rules for Admission to Organized Trading at SPIMEX, JSC and also detailed in the Rules for Organizing Trading in the Oil products Section

of SPIMEX, JSC; in the Rules for Organized Trading in the Oil Section of SPIMEX, JSC; in the Natural Gas Section of SPIMEX, JSC [5-8].

3.2. Futures Contracts.

3.2.1. Supply Futures Contracts (including those with a basic pricing point; at balance points; for Russian export diesel fuel; for Russian export oil of Urals-Primorsk grade; for Russian export oil of ESPO grade).

3.2.2. Settlement Futures Contracts (including on regional stock indices of prices for oil products; on territorial stock indices of prices for oil products).

Considering that introduction of forward contracts for gas supplies for 2 to 6 months is specified by the management of SPIMEX, JSC, among the priority tasks of development of exchange trade in energy resources, it seems that, eventually, provisions on forward supplies will also be added to the contractual system of exchange trade in energy resources [9].

Legal regulation of exchange trade in electricity and capacity has special features in comparison with legal regulation of such energy resources as oil, gas, and their derivatives.

This is due to the peculiarities of the models of legal regulation in the energy sector, including in the wholesale electricity and capacity market.

In accordance with Federal Law No. 35-Φ3 dated March 26, 2003, *On the Electric Power Industry*, in accordance with the laws of the Russian Federation on the electric power industry, the Government of the Russian Federation is authorized to approve the rules of the wholesale market, the material terms and conditions of the contract on accession to the trading system of the wholesale electricity and capacity market.

In accordance with the Rules for the Wholesale Electricity and Capacity Market approved by Resolution No. 1172 of the Government of the Russian Federation dated December 27, 2010, the material terms and conditions of the contract on accession to the wholesale market trading system shall include the procedure for determining the obligations of the wholesale market players for purchase (supply) of capacity, including, among other things, the procedure for registering free contracts for sale and purchase of electricity and/or capacity, including those concluded

upon exchange trading; requirements to the procedure for conclusion of the free contracts for sale and purchase of electricity and/or capacity upon exchange trading and price determination in these contracts, other terms and conditions of exchange trading as well as for the procedure for information interaction of the mercantile exchange with the commercial infrastructure entity.

Pursuant to the Rules of the Wholesale Market approved by the Government of the Russian Federation, legal entities that have acquired the status of the wholesale market entity shall have the right to participate in relations concerning circulation of electricity and/or capacity in the wholesale market.

According to Article 33 of the Federal Law *On the Electric Power Industry*, the functions of determining the procedure for maintenance and maintenance of the register of wholesale market entities, and deciding to assign or deny the status of the wholesale market entity are assigned to NP Market Council Association.

In accordance with Article 33 of the Federal Law *On the Electric Power Industry*, the functions for provision of services for organization of wholesale trade in electricity, capacity, and other goods and services admitted to circulation in the wholesale market; organization of a system of guarantees and settlements in the wholesale market, conclusion of contracts and settlement of payments for electricity and the rendered services; registration of bilateral contracts for sale and purchase of electricity capacity were imposed on the commercial infrastructure entity (ATS, JSC).

Therefore, for the stock exchange that intends to participate in organizing trading in the wholesale market, it is not enough to just have a license of the Central Bank, but it also needs to have the status of the wholesale market entity and enter into the contract on accession to the wholesale market system.

Despite the fact that exchange trade in electricity and capacity is specified in the Rules of the wholesale market, the functions relating to arrangements for trade in electricity in the wholesale market are clearly set at the level of a legislative act.

This raises the issue of the extent, to which the provisions on other terms and conditions of

organization of exchange trading specified in a subordinate act comply with the terms and conditions of the organized trading set forth in the Federal Law *On Organized Trading*, the powers of the Bank of Russia as related to the organized trading as well as with the provisions of the Federal Law *On the Electric Power Industry*, which provide for the powers of the Market Council and the Commercial Operator.

It should be noted that there are prerequisites for further development of the legal regulation of exchange trade in energy resources at the national level.

Thus, in the course of actual implementation of trade in the terminal market at the stock exchanges in the Russian Federation, there is no definition of the concept of the terminal market in the laws, including the laws on the electric power industry.

Certain requirements to the procedure for conclusion, performance, and terms and conditions of the futures contracts are specified in Federal Law No. 39-Φ3 dated April 22, 1996, *On the Securities Market*, and in the Tax Code of the Russian Federation.

Issues concerning the procedure for termination, suspension, and resumption of organized trading also deserve attention. These powers are granted to the Central Bank of Russia as well as to the Stock Exchange.

Pursuant to Article 21 of the Federal Law *On Organized Trading*, the trade institutor shall suspend or terminate organized trading in the cases, in the manner and within the time limits established by the regulatory acts of the Bank of Russia as well as in the cases established by federal laws, and in the event a relevant order of the Bank of Russia on suspension or termination of organized trading in foreign currency is received. Legal analysis of the provisions of the law shows that the legislator provides for the possibility of both suspension and termination of organized trading. At the same time, at the level of federal laws, the grounds for these decisions are not set forth and not differentiated either. The legislator makes reference to the regulations of the Bank of Russia, and also provides that cases and the procedure for suspension, termination, and resumption of organized trading should be specified in

the trading rules, that is, they shall be specified in the acts of the Stock Exchange. The Rules for admission to the organized trading at SPIMEX, JSC, distinguish the grounds for suspension and termination of admission to the organized trading. If you refer, for example, to the Rules for the Organized Trading in the Oil products Section of SPIMEX, JSC (Section 13. Cases and Procedure for Suspension, Termination, and Resumption of Organized Trading), clause 13.1., actually, contains a reference to the cases, procedure, and terms established by the federal laws and regulations of the Bank of Russia. A similar provision is also specified in the Rules for the Organized Trading in the Natural Gas Section as well as in the Oil Section. It seems that in order to mitigate the legal risks of disputable situations in connection with the adoption of decisions on termination or suspension of organized trading, it is advisable to set forth the grounds for termination or suspension of organized trading at the level of the federal law.

It should also be taken into account that the laws of the Russian Federation (at the level of the Government of the Russian Federation) establish criteria for regularity and uniformity of sales of goods at the stock exchange for individual commodity markets, in which oil and/or oil products are traded. The volumes of sales of natural gas produced by Gazprom, PJSC, and its affiliates are set in accordance with the laws of the Russian Federation (at the level of the resolution of the Government of the Russian Federation as well) solely for sale in the domestic market of the Russian Federation taking into account securing by Gazprom, PJSC, and its affiliates of the obligations under previously concluded contracts.

Not only requirements to minimum quantities of the oil products sold at the stock exchange as well as of certain categories of goods produced from oil and gas, but also requirements to exchange trading for transactions involving oil products as well as certain categories of goods produced from oil and gas are imposed by the entity domineering in the commodity markets, and these provisions relate, inter alia, to the procedure for calculation of the starting price and the weighted average price.

Taking into account that the state acts as the shareholder in many major energy companies, it seems expedient to work out the provisions on relevant criteria upon fulfillment of the tasks of exchange trading within the Eurasian Economic Union with due account for the principle of priority in provision of the member state's internal energy needs.

The goals of development of exchange trade in energy resources are based on the fundamental principles of the formation of common energy markets of the Eurasian Economic Union.

The main principles of the formation of common energy markets in accordance with the Eurasian Economic Union Treaty include: ensuring market pricing for energy resources; ensuring development of competition in the common energy markets; absence of technical, administrative, and other barriers to trade in energy resources; and ensuring non-discriminatory terms and conditions for business entities of member states in the common energy markets.

Exchange trade in oil and oil products is envisaged by the Concept for the Formation of Common Markets for Oil and Oil Products of the EAEU dated May 31, 2016.

This Concept makes provision for exchange trade in oil and oil products in accordance with the rules approved by the authorized bodies of the member states, mentions the formation of the exchange commodity market of the Union, the creation of electronic exchange institutions, the regulation of the terminal market, and determines the areas of interaction of exchange trade operators in the common markets of oil and oil products, including not only the provision for settlements between the players of the common markets of oil and oil products of the Union, but also the interaction with the operators of oil and oil products transportation systems of the member states and the operators of oil storage and warehousing infrastructure.

Development of gas wholesale trade is envisaged by the Concept for the formation of a common gas market of the Eurasian Economic Union dated May 31, 2016.

This Concept provides for establishment of a procedure approved by the authorized bodies of the member states for exchange trade in gas in

the Union's common gas market, ensures functioning of one or several mercantile exchanges in the territory of the Union where gas can be traded, non-discriminatory access of the Union's common gas market entities to exchange trade in gas at the mercantile exchanges of the member states, the possibility of creation of an interstate exchange of the Union, the inclusion of trading in physical volumes of gas with different terms of gas supply as well as trading in derivative financial instruments in the field of gas supply in the exchange trading in gas, and adoption of uniform technical standards for gas in respect of which trading is conducted at the mercantile exchanges of the member states.

The Concept of the formation of a common electricity market of the Eurasian Economic Union dated May 8, 2015 provides for mutual trade in electricity between the common electricity market entities of the Union at centralized trading, including day-ahead market, an electronic trading system in accordance with the acts regulating the common electricity market of the Union, and provides for the interaction of the centralized trading operators and the financial operators.

The Program for the Formation of a Common Electricity Market of the Eurasian Economic Union provides for the formation of an electronic trading system that ensures centralized trading in futures contracts, methods of mutual electricity trading at centralized tenders, including centralized trading in futures contracts, and centralized day-ahead trading, specifies that it is necessary to determine the possibility of using platforms existing in the member states for centralized trading in futures contracts or that it is necessary to create new platforms, the manner and the procedure for admission of the entities to the common electricity market of the Union to centralized trading in futures contracts, bidding procedure, terms and conditions for conclusion of contracts upon centralized trading in futures contracts, procedure for recording contracts upon centralized trading in futures contracts, requirements for trading platforms and the rules of their operation.

It should be noted that the Concept and the Program for the Formation of a Common Electricity Market do not contain the term

“exchange trade”, and the term “centralized trading” is used in them. The definition of the concept of centralized trading is not disclosed. Accordingly, the question arises, what are the differences between the concepts of centralized trading and the exchange trading, whether there will be differences in the legal status of the institution of centralized trading in electricity and the stock exchange, which organizes trading in oil, oil products, and gas.

At the same time, organized trading, including trading in futures contracts, is provided for all common energy markets specified in the Eurasian Economic Union Treaty.

It seems that in this case it is appropriate to work on the unification of regulations on organized trade in energy resources, the requirements to trading platforms, the procedure for trading followed by detailed elaboration of the features for organized trade in certain types of energy resources and their derivatives.

Taking into account the tasks set for the organized trading within the framework of the Eurasian Economic Union, it seems relevant to work on harmonization at the level of the international treaty. This harmonization can be implemented within the framework of development of relevant international agreements on the formation of a common electricity market, a common gas market, and common markets of oil and oil products; however, given that the terms for conclusion of these agreements are different, it would be most expedient to conclude a separate international agreement on organized trade in energy resources within the Eurasian Economic Union.

In order to harmonize the regulations on exchange trade in oil, oil products, gas, and possibly electricity, it is advisable to define a model for the legal regulation of exchange trade in energy resources. This legal model may include development and adoption within the framework of the Eurasian Economic Union of uniform rules for exchange trade, uniform rules for the procedure for conducting exchange trade in energy resources, uniform rules for exchange trade in oil and oil products, gas, and electricity. In the uniform rules for exchange trade, for exchange trade in energy resources, it is advisable to determine the legal status of the stock exchanges, the procedure

for interaction of mercantile exchanges, member states, the supervisory authority(-ies), the requirements to the procedure for suspension and termination of trading. It seems relevant to define the legal model for the formation and functioning of the EAEU interstate exchange.

Harmonized regulations on exchange trade in energy resources under development should include definitions of the concepts of the terminal market and the futures contracts, provisions on the procedure for conclusion, and material terms and conditions of the contract concluded by participants of the exchange trade in energy resources, the requirements to rules and standards for

energy resources, the requirements for their accounting, procedure for delivery and acceptance, the provisions on the status of the entity engaged in exchange trading, and the rules relating to contractual regulation.

In this regard, it is advisable to conduct legal studies of the peculiarities of legal regulation of exchange trade in the member states of the Eurasian Economic Union and in the third countries, to identify common approaches to legal regulation and gaps, to analyze the practice of settlement of disputes arising in connection with exchange trading in energy resources, including with the use of derivative financial instruments. ■

Reference List

- 1–2. Decree of the Russian President No. 618 dated November 21, 2017 On Basic Directions of the National Policy on the Development of Competition // Official Internet portal of legal information <http://www.pravo.gov.ru>, December 22, 2017
3. Procedure for Admission to Trading in the Natural Gas Section of SPIMEX, JSC // <http://spimex.com/markets/gas/get-access/>
4. Procedure for Admission to Trading in the Oil products Section of SPIMEX, JSC // http://spimex.com/markets/oil_products/get-access/
5. Rules for Admission to Organized Trading at SPIMEX, JSC // <http://spimex.com/upload/iblock/cf2/cf22804a3ec6d-34401d2e83ae9dcc973.pdf>
6. Rules for Holding of Organized Trading in the Oil products Section of SPIMEX, JSC // <http://spimex.com/upload/iblock/e7a/e7a3cd3131020b5afd2fd52238eaeddf.pdf>
7. Rules for Holding of Organized Trading in the Oil Section of SPIMEX, JSC // <http://spimex.com/upload/iblock/e7f/e7fdaaab1ddf61436d483b08ab838090.pdf>
8. Rules for Holding of Organized Trading in the Natural Gas Section of SPIMEX, JSC // <http://spimex.com/upload/iblock/1ce/1ce40f02515b214b73b9d0585e5c7370.pdf>
9. http://spimex.com/press_centre/news/9737/?sphrase_id=28171