

CHALLENGING ASPECTS OF THE LEGAL REGULATION OF INTERNATIONAL ECONOMIC ACTIVITIES OF GAS EXPORTERS AS PARTIES TO EXCHANGE TRADE IN GAS ABROAD

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According to the Energy Strategy of the Russian Federation until 2035, the indicator of solution of the task of a flexible response to the world gas market dynamics is retaining by the Russian Federation of the dominant position of top three world gas exporters. Russian exporting companies are interested in trading in natural gas in European exchanges, as exchange trade in natural gas gives an opportunity to diversify the existing natural gas export mechanisms, gain access to highly liquid natural gas sales channels. At present, there is little legal research dedicated to challenging aspects of the legal regulation of exchange trade in energy resources, access of exporting companies to foreign exchanges. There are gaps and discrepancies in the existing legal regulation of this sector.

The author reviews peculiarities of the legal regulation of relationships arising in trade in natural gas in European exchanges, the requirements set for exchange participants, the existing restrictions of these operations for Russian exporting companies, brings forward legal regulation development proposals.

Keywords: energy law, legal regulation of energy security, legal regulation of gas export, exchange trade in natural gas, legal regulation of the access of Russian exporting companies to foreign markets.

According to the Energy Strategy of the Russian Federation until 2035 (the “Energy Strategy”), the main aim of the development of the power industry of the Russian Federation is strengthening and retaining of the

positions of the Russian Federation in the world power industry, at least up to 2035.

The Energy Strategy also recognizes that the indicator of solution of the task of a flexible response to the world gas market dynamics

is retaining by the Russian Federation of the dominant position in the top three of the world gas exporters.

One of the most efficient instruments of retaining and increasing the gas market share by Russian companies in the conditions of the growing competition in the European gas market is the use of additional sales channels. One of such sales channels could be exchange trade in natural gas in European exchanges.

Russian exporting companies are interested in the trade in natural gas in European exchanges as exchange trade in natural gas gives an opportunity to diversify the existing natural gas export mechanisms, gain access to highly liquid natural gas sales channels.

There is still little legal research of the peculiarities of the legal regulation of exchange trade in energy resources. [1] The legal studies carried out in the Russian Federation review challenging aspects and tendencies of the legal regulation of exchange trade in energy resources in the Russian Federation within the framework of the Eurasian Economic Union. Studying the tendency of the legal regulation of exchange trade within the framework of the Eurasian Economic Union, V.V. Romanova pays attention to the expediency of unification of provisions on exchange trade in energy resources, requirements for exchanges, trade procedure with further breakdown of peculiarities of exchange trade in separate energy resource types and their derivatives. [2]

An analysis of the applicable legal regulation of the procedure for carrying out of international economic activities and the trading rules in European exchanges shows that Russian companies have some legal obstacles to take part in the trade in natural gas in European exchanges caused by the following circumstances.

1. The requirements for carrying out of international economic activities by Russian exporting companies

International economic activities of gas exporters are carried out pursuant to the requirements of Federal Law No. 173-ΦЗ of December 10, 2003, *On Foreign Exchange Regulation and Foreign Exchange Control* (the “Law on Foreign Exchange Regulation”).

The key requirement of the Law on Foreign Exchange Regulation lies in the obligation of a resident (exporting company) to ensure credit of foreign currency revenue for the goods transferred to non-residents to its accounts with authorized banks within the terms stipulated by foreign trade contracts (Clause 1 Part 1 Article 19 of the Law on Foreign Exchange Regulation).

A Russian exporting company carrying out international economic activities shall register a contract with an authorized bank to be used as a basis for export of goods from the Russian Federation and make settlements under the contract only using the accounts opened with the authorized bank having registered the contract (Clause 5.1 of Instruction of the Central Bank of the Russian Federation No. 181-И of August 16, 2017, *On the Procedure for Provision of Documents and Information to Authorized Banks by Residents and Non-Residents Carrying out Foreign Exchange Transactions, on Unified Foreign Exchange Transaction Accounting and Reporting Forms, Procedure for and Terms of Submission Thereof*).

Credit institutions organized under the laws of the Russian Federation and entitled to perform bank transactions with foreign currency based on the licenses issued by the Central Bank of the Russian Federation are acknowledged authorized banks pursuant to Clause 8 Part 1 Article 1 of the Law on Foreign Exchange Regulation.

Thus, the laws on foreign exchange regulation and foreign exchange control set the requirements for the procedure for registration of export contracts on supply of goods by Russian residents, the obligation of an exporting company to repatriate the foreign currency revenue for the goods transferred to non-residents and the procedure for exercising of control over receipt of foreign currency revenue.

2. The procedure for and conditions of trading in natural gas in European exchanges

Russian legal entities are obligated to comply with exchange trade rules set by an exchange to take part in trading in European exchanges. The rules are universal and mandatory for all exchange trade participants.

The rules for participation in exchange trade are published on official websites of European exchanges. Such rules determine the trade procedure, requirements for trade participants, framework agreements concluded at an exchange, specification of the goods, etc. [3]

An advantage of the exchange trade in natural gas is a guarantee of discharge of the obligations of the parties in respect of concluded transactions. It is achieved by using clearing and the central counterparty model in carrying out of settlements between trading participants.

The following entities are parties to exchange trade in natural gas: a seller, a buyer, an exchange, a clearing organization, a seller's clearing member and a buyer's clearing member.

One of the largest European gas exchanges is the European Energy Exchange AG (EEX). [4] The volumes of natural gas sales on the EEX reached 2.542 TW in 2019. [5] The clearing functions in respect of trades on the EEX are performed by European Commodity Clearing (ECC). [6]

Reviewing peculiarities of the exchange trade carrying out procedure, one may, for the sake of discussion, single out several levels of relationships between trading parties. Each of the levels has its characteristic subject and a set of members.

It makes sense to review two horizontal levels to determine peculiarities of the procedure for conclusion of exchange transactions and performance of settlements between exchange parties: the trading level and the settlement level.

a) The trading level

The following entities act as parties to exchange trade: a Seller, a Buyer and an Exchange. The procedure for cooperation between the parties at the trading level is as follows: Seller → Exchange ← Buyer.

Trading is carried out electronically within trade sessions when the Seller and the Buyer submit natural gas sale and purchase orders. A transaction is considered concluded if the terms and conditions of the orders submitted by the Seller and the Buyer coincide, including in terms of volume and price.

The exchange records the submission of reciprocal orders and, as a consequence, a

transaction conclusion. When a transaction conclusion is recorded, the exchange transfers such information to a clearing organization to perform settlements under the transaction.

b) The settlement level

The transaction conclusion step is followed by its performance. Absolutely all transactions in the modern European gas exchange market are subject to clearing by a central counterparty guaranteeing gas supply and withdrawal [7].

Special subjects are attracted to perform settlements under exchange transactions: clearing organizations (clearing chambers), buyer's clearing banks (the "CB 1") and seller's clearing banks (the "CB 2"). The main function of these subjects is carrying out the settlements and guaranteeing the performance of exchange transactions. The settlement carrying out procedure following the results of exchange trade is as follows: Buyer → CB 1 → Clearing Organization → CB 2 → Seller.

The Buyer carrying out settlements transfers money for natural gas supply to Clearing Bank 1 (CB 1) represented by the bank recognized by a clearing organization. CB 1, in its turn, transfers money for the supply to the clearing organization.

The clearing organization verifies (clears) mutual obligations of the parties and if the obligations are confirmed, it transfers money for the supply to another bank on the Seller's part recognized by a clearing organization, i.e. Clearing Bank 2 (CB 2), whereafter CB 2 transfers money to the Seller.

Thus, when settlements are performed with the use of clearing, money for the supply due to the Seller from the Buyer is transferred not directly, but through a clearing organization and authorized clearing banks.

Clearing is a procedure of the financial stream of commerce when a clearing subject is operating as an intermediary undertaking the role of a buyer and a seller in a transaction to support orders between the two parties.

Clearing determines obligations of the parties subject to discharge and arising based on concluded exchange transaction.

A clearing house performs mutual settlements and provides financial guarantees for all exchange transactions. Authorized banks

cover any expenses in the event of default of a contractor. Such configuration of the trading infrastructure ensures security of supplies. [8]

At the same time, it should be noted that clearing reduces the number of settlement transactions between the parties. One of the elements of clearing is netting, i.e. full or partial termination of obligations admitted to clearing by way of offset. If a Seller and a Buyer have reciprocal obligations, a clearing organization will not make two settlement transactions, but will set off the corresponding amounts pursuant to the obligations of the Parties and pay the difference to one of the Parties where required.

Reduction of the number of settlements under exchange transactions results in reduction of the incoming foreign currency revenue in respect of the goods sold in an exchange as some Seller's obligations are terminated by way of netting.

It is remarkable that the reviewed model of relationships in European exchanges is similar to the model of exchange trade in energy resources in the Russian Federation. V.V. Romanova pays attention to the fact that exchange trade in the Russian Federation is carried out by means of conclusion of exchange agreements between trading participants and an Exchange, between trading participants and a clearing organization as well as energy resource supply agreements between trading participants. [9]

However, the existing procedure for trade in natural gas in European exchanges contradicts the requirements of the laws on foreign exchange regulation imposed on the parties to international economic activities in terms of repatriation of foreign currency revenue due to the following circumstances:

3. The existing legal restrictions for the involvement of Russian companies in exchange trade in natural gas abroad

An analysis of the Law on Foreign Exchange Regulation shows that the currently applicable provisions of foreign exchange laws do not take into account peculiarities of carrying out of exchange transactions concluded in European exchanges.

The reviewed peculiarities of carrying out of exchange trade in natural gas show that Russian

companies have now no opportunity to perform such activities due to the following restrictions.

a) Restrictions related to authorized banks

Clearing is performed with the involvement of banks certified by a clearing organization. One of the conditions for obtaining a clearing license by a bank to perform clearing in European exchanges is being incorporated in the European Union, Switzerland, or Norway.

The above stated requirements mean that clearing banks are not authorized banks pursuant to the Law on Foreign Exchange Regulation.

At the same time, the full list of transactions releasing a resident of the responsibility to credit foreign currency revenue to its accounts with authorized banks is given in Part 5 Article 12 of the Law on Foreign Exchange Regulation.

In view of the above, it would be reasonable to broaden the list of transactions allowing a resident to credit foreign currency revenue for the goods transferred to non-residents to its accounts with non-authorized banks by means of supplementing Part 5 Article 12 of the Law on Foreign Exchange Regulation.

b) Restrictions related to netting

Article 19 of the Law on Foreign Exchange Regulation now stipulates an exhaustive list of cases allowing termination of obligations by way of offset for the purposes of compliance with the established requirements for repatriation of foreign currency revenue in the course of carrying out of international economic activities.

Termination of obligations by way of offset in any cases not stipulated by Article 19 of the Law on Foreign Exchange Regulation will, in fact, mean for the resident a failure to discharge the obligation to repatriate foreign currency revenue for the goods transferred to non-residents.

At the same time, as noted above, one of the main means of settlements in European exchanges is netting performed by a clearing organization. This offset case is not stipulated by Article 19 of the Law on Foreign Exchange Regulation.

Thus, in order to give Russian companies an opportunity to trade in natural gas in European exchanges, it seems reasonable to supplement the cases allowing offset in Article 19 of the Law on Foreign Exchange Regulation as a confirmation

of discharge of the resident's obligation to repatriate foreign currency revenue; for this purpose, it is suggested to supplement Part 2 Article 19 with the following wording: "*Residents are entitled not to credit foreign currency or the currency of the Russian Federation to their bank accounts with authorized banks in the following cases: in the course of carrying out of netting (offset) of reciprocal claims by a clearing organization*

following the performance of exchange transactions between residents exporting natural gas and non-residents".

The worded proposals will allow Russian natural gas exporting companies to take part in exchange trade in European exchanges leading to the growth of the Russian export volumes and incomes of the consolidated budget of the Russian Federation from export duty.

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