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UNBUNDLING MEASURES AND WTO RULES

In July 2009, the European Union adopted the “Third Energy Package” which contain provisions regarding electricity and gas market. The main purpose of this law was to diverse sources of energy, to enhance antitrust regulations and to open up the market. The most important element of this package is ownership unbundling, which requires the separation of companies' generation and sale operations from their transmission networks. Obviously, such severe regulations caused dissatisfaction in several countries, and one of them, the Russian Federation launched a complaint to the world trade organization (WTO) with a claim that certain provisions of third energy package violates WTO rules, regarding unbundling, Russia reckoned that it violates Article I:1 and III:4 of GATT 1994. Here, in Ukraine we also adopted unbundling measures in our energy sector, therefore this case is extremely important for us, especially because of our position as the biggest transporter of natural gas to the European Union.

In this thesis, highlights of the decision of WTO dispute settlement body, in this case, were given and an impact on the energy market in Europe was also considered.

This topic has been researching by mainly foreign scientists, such as Alan Riley, Michael Pollitt and Helmuth Cremer.

First of all, we have to understand what is unbundling exactly and how these measures could, probably, break WTO law. So, EU requires "vertically integrated natural gas undertakings" ("VIUs") to undergo "unbundling" and to separate their transmission system assets, or the transmission system operator ("TSO"), [1, p. 293] from assets relating to production and supply. Furthermore, this package gives rights to member states to choose one of three alternative unbundling models: ownership unbundling, independent system operator ("ISO"), and independent transmission operator ("ITO") [3, p. 8].

It is clear that the first model ownership unbundling is the most restrictive model. Because it precludes the same person or persons from exercising control over an undertaking performing any of the functions of production or supply and exercising control or any right over the TSO or the transmission system. The ISO model, in contrast, permits the VIU to retain full ownership of the TSO upon designation of an outside entity, the ISO, to operate the TSO. The ITO model is even less restrictive and permits VIUs to maintain control and operate the TSO through a separate subsidiary.

Moreover, the package provides that when the owner of the VIU is the Member State or another public body, two separate public bodies exercising control over the TSO and over an undertaking performing production or supply functions shall be deemed not to be the same person or persons. Regarding these provisions, Russia

claims that such exceptions, permits a Member State government to own and control both the TSO and the production or supply portions of the VIU, whereas third-country service suppliers, including those of Russia, may not. Therefore, the Russian Federation considers that these measures are inconsistent, *de jure*, with the obligations of Croatia, Hungary and Lithuania (EU member states which use this exception) under GATS Article XVII to accord services and service suppliers of any other Member treatment no less favorable than they accord to their own like services and service suppliers [2, p. 11].

On the other hand, the European Union contests Russia's claim that the public body measure is inconsistent with Article XVII. According to the European Union, the public body measure requires an examination of whether the two public bodies are truly separate in addition to verifying whether the entities concerned comply with the unbundling requirements. Moreover, such measures allowed to the third country public body, and therefore the public body measure does not constitute an "exemption" from the requirement to unbundle and consequently there is no less favorable treatment [4, p. 26].

Now when we got acquainted with positions of parties to the dispute we can look into the decision of WTO and understand whether unbundling measures violate GATT. Firstly, the ownership unbundling and public body measures by its nature does not constitute a violation of WTO rules, they would constitute violation only if such measure leads to less favorable treatment. Now, we need to understand what less favorable treatment in terms of WTO is. According to one of the decisions of the Appellate Body, "if the measure at issue modifies the conditions of competition to the detriment of services and service suppliers of any other Member, it will be inconsistent with Article XVII". Therefore, in this case, Russia had to demonstrate that the public body measure modifies the conditions of competition to the detriment of service suppliers of any other Member in comparison to like domestic service suppliers.

Another interesting statement regarding the nature of public body measures we can find in this decision. WTO indicates that, while the government in question is one and the same person, it is considered as consisting of two persons for the purposes of the ownership unbundling requirement. In this sense, the public body measure could be understood as creating a "legal fiction". Furthermore, in the view of WTO, this fiction should be ignored and the organization ought to examine relevant facts and evidence, as submitted to by the parties. By this statement, WTO refused to believe in the examinations made by the EU. However, at the same time WTO recognized that if by means of this legal fiction TSO and VIU are indeed separate, there would be no violation of GATT provisions [4, p. 33].

In the decision, WTO established that nor public body measures nor unbundling measures itself constitute a breach of GATT. By this, the Panel stated that there are more instances where Gazprom continues to supply pipeline transport services through the commercial presence of ITOs than instances of VIUs from any other non-EU country continuing to provide pipeline transport services through the commercial presence of ITOs. On this basis, the Panel decided that the unbundling measure

complies with Article II:1 of the GATS, therefore interests and rights of Russian suppliers were not affected [4, p. 240].

In conclusion we can say that unbundling measures adopted by the EU in order to restrict antitrust legislation are not contrary in any case with GATT, therefore in Ukraine, we can use all three form of unbundling and also we can use public body measure which is extremely important because we do not need to change the form of ownership of our transportation system. However, both parties to the dispute made appeals, and for now, the appellate body did not make a decision, therefore this case definitely will take the attention of scientists and governments in the future.

Sources

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ПРАВА І СВОБОДИ ЛЮДИНИ В АДМІНІСТРАТИВНО-ПРАВОВОМУ ПОЛІ УКРАЇНИ: ЗАБЕЗПЕЧЕННЯ ЧИ ОБМЕЖЕННЯ?

Сьогодні проблема захисту прав і свобод людини та громадянина набула особливої гостроти в нормативно-правовому дискурсі України, оскільки її вирішення на рівні держави забезпечує дотримання демократичного курсу розвитку суспільства, відбір на рівні держави та суспільства таких форм і напрямів діяльності правозахисних органів та інституцій, що сприяють реалізації принципу гарантування безпеки громадянам, закріпленого у багатьох міжнародних документах й у нормах національного законодавства.

Тривалий збройний конфлікт на території України, економічна нестабільність і зростання соціально-правових ризиків загострює необхідність поглибленого розуміння сутності прав і свобод людини в контексті діяльності правоохоронних органів, чітке виокремлення тих прав і свобод, що мають охоронятися, і тих, до яких може здійснюватися законне обмеження, а також формування сенситивного ставлення до визначення меж застосування