

**Legal regime of the acquisition of the assets through which licensees carry out their licensed activities within the meaning of the Energy Act in cases of non-implementation of such activities for more than a year**

**[Katerina Gramatikova Attorney-at-law](#)**

The Energy Act regulates the types of licensed activities and the procedure applicable to the issuance and termination of licenses. Typically, the license is terminated either at the request of the licensee or upon the occurrence of certain objective conditions such as the transfer of the assets used in the implementation of the licensed activity or the perish of such assets, the winding up of the legal person of the license holder and declaring the insolvency of the latter, or when a decision is made to terminate the activity of the license holder due to liquidation proceedings.

However, there is a specific case, in which the Energy and Water Regulatory Commission (EWRC) will terminate a license issued under the Energy Act, i.e. where the Commission finds that the licensee has not carried out the licensed activity for more than a year. This case is set out in Article 55(5) of the Energy Act and Article 71(1)(6) of Regulation No 3 on the Licensing of Activities in the Energy Sector respectively. The objective of these provisions is to protect the public interest in the cases in which a single license is issued for a specific license area, especially when a service of general interest is provided, for instance, public service supply of electricity or natural gas, transmission and distribution of electricity or natural gas or heating generation, and the license refers to the production capacities needed for the relevant area.

In view of the Commission's regulatory functions and the need for ensuring a robust energy market, in such cases of prolonged non-implementation/inactivity, the Commission is entitled to terminate the license and also to obligate the licensee to make the assets which had to be used for the purposes of the licensed activity available to a third party. The Commission would make an assessment of the need for such a measure ex officio in any of the following cases set out in Article 74(1) of Regulation No 3: (i) the termination of the activity would affect the security of electricity, heating or natural gas supply to customers; and (ii) the termination would cause a threat to the national security and public order.

Since the Commission has the powers to decide on its own whether to only terminate the license or the specific circumstances warrant a transfer of the assets, the factors which should be in place for the transfer to take place need to be highlighted. The factors which the Commission has already examined in connection with the decommissioning of energy facilities are the following:

- the availability of a residual useful life of the facilities;
- the poor financial performance of the licensee and the licensed activity;
- the existence of customers of the electricity generator;

the permanent decommissioning of the energy facilities would affect the energy balance of a specific area, including the occurrence of additional technological losses in the transmission of electricity;

the existence of good investment prospects for the facility, including investment that would improve its environmental assessment.

In accordance with Article 74(2) of Regulation No 3, for the purposes of making its decision, the EWRC may request the opinions of the Ministry of the Economy, Energy and Tourism, the Ministry of Defence, the Ministry of Regional Development and Public Works, the relevant local government, and other stakeholders. If the termination of a license for the generation of heating energy and/or electricity is requested, the relevant transmission undertaking may be asked to give its opinion.

Where the Commission's assessment is that there exists a threat to the security of supply or to the national security and public order, the Commission makes a decision (Article 74(2) of Regulation No 3), instructing the licensee either to transfer the ownership rights to the assets used for the licensed activity to a third party or to grant the rights to use those assets to a third party. In Article 55(5) of the Energy Act and Article 74(3)(1) of Regulation No 3, the law-makers make it explicit that these provisions apply to the assets only "in their entirety". While identifying the transferable assets, the Commission is guided by the list and description of the facility/facilities used for the licensed activity with their technical and technological characteristics, which is attached to the license. As is seen in Article 45(3) of the Energy Act and Article 49(2)(1) of Regulation No 3, this list is an integral part of the license.

The Commission's decision should specify the time limit for the transfer/granting of the right to use, as well as the time limit within which the licensee should apply to the Commission for approval of the transaction in accordance with Article 53(3) of the Energy Act in case the termination of the license could affect the security of electricity/heating supply and the transferee meets the requirements for the issuance of a license for the relevant activity. A copy of the decision is sent to the licensee within three days of its adoption (Article 74(4) of Regulation No 3).

For the purposes of ensuring the actual continuation of the licensed activity, the requirements to the third party, as set out in Article 55(5) of the Energy Act, are that the third party should either be a licensee or meet the requirements for exercising the relevant activity and have filed an application to this effect.

So far the Energy and Water Regulatory Commission has not made a decision, obligating a licensee to transfer the ownership rights to the assets used for the licensed activity to a third party or to grant the rights to use them to a third party. The Commission terminated licenses in

accordance with Article 55(2) of the Energy Act on several occasions, in which it came to the conclusion that there did not exist any conditions warranting the transfer of the property either because the license did not cover activities of general interest, the discontinuation of which could affect the security of supply or the national security and public order, or that it was a case of decommissioning of facilities which did not fall within the scope of these provisions and it was objectively impossible for the assets to be transferred to a third party.

At the same time, it should be noted that even if the regulatory authority makes such a decision, there exists no effective form of coercion for the transfer to actually take place, insofar as the Commission's decision cannot produce the transfer effect on its own. The actual transfer or granting of rights to use should take place through a separate transaction which is undertaken by the licensee and the only way to make the licensee carry out the transaction is to have penalties imposed for failure to implement the Commission's decision.

It is precisely for this reason that in the event of failure of the licensee to fulfill the obligation to transfer the ownership or grant rights to use the assets within the time limits prescribed by the Commission or in the event of refusal of the Commission to approve the transaction, the EWRC has the powers to appoint, at its own choice, a special business representative (Article 55(5), second sentence of the Energy Act in conjunction with Article 56(4) to (11) of the Energy Act). The powers of the special business representative are set out in Article 56(4) to (11) of the Energy Act and Articles 83 to 86 of Regulation No 3.

The representative takes over the assets used for the licensed activity, as they are described on the list, for the purpose of managing them as from the first day following the expiration of the license. The representative continues the licensed activity at the expense of the licensee pending the transfer of the ownership rights to the energy facilities and the selection of a new licensee. The special business representative has the powers to undertake action and transactions which are directly related to the licensed activity and has no powers to alienate or encumber the immovable property or to engage in activities which are expressly enumerated in the Commission's appointment act. The name and the address of the representative are entered into the Companies Register and promulgated in The State Gazette. After the registration, the managing bodies of the licensee may engage only in activities which are intended to prepare and carry out a transaction for the transfer of ownership or granting rights to use to a new licensee.

As stated above, the energy regulator has not made a decision obligating the licensee to the transfer the assets used for the licensed activity to a third party or to grant the rights to use such assets and therefore there has been no need to appoint a special business representative of a license holder yet. Nevertheless, the legal framework for the activities and powers of the representative, as prescribed by the law, generates serious doubts as to how the appointment of this special business representative could lead to the actual transfer of the assets used for the

licensed activity and to protection of public interest since the only activities in which the representative could engage relate to the preparation and carrying out of a transaction of transfer or granting the rights to use of the assets to a new licensee but the law does not provide for the implementation of such transaction. Furthermore, there is a lacuna in the legal framework in relation to the questions who would select the possible third party which would become the transferee and what eligibility criteria would apply.

With a view to ensuring the future application of these provisions, perhaps they should be amended by introducing effective mechanisms which guarantee the effective transfer of the assets so that to ensure the unhindered continuation of the licensed activity and by specifying the selection of the third party to which the assets would be transferred or the rights to use the assets would be granted.