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Intrusive scrutiny of energy companies

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In the new energy regulatory framework passed last year, additional duties have been imposed on companies in the energy sector. Among them is a broad notification duty that increases the regulatory burden without explaining the policy objective.

Last year saw a major overhaul of the entire regulatory framework for energy companies in Slovakia. In July, Parliament passed a new Energy Act and a new Network Industries Act, which both came into effect in September.

Several areas of the new legislation have received much media attention, including in particular the reinforcing of consumers' right to switch their suppliers and the extension of price regulation to cover not only supplies to households, but also to small businesses. Finally, Slovakia also had to introduce unbundling in the gas sector, which coincided with the sale of SPP, with the Government ultimately opting for the independent transmission operator model, thus keeping eustream in the SPP group. Despite these interesting topics, in this article we discuss another novelty introduced by the new legislation, which has received considerably less media attention, although it significantly increases the regulatory burden on many firms.

Notification of contracts

Under the new Network Industries Act, each energy company that has previously been the addressee of any price decision is obliged to notify all of its contracts worth more than EUR 300,000 to the Regulatory Office for Network Industries (the URSO). The obligation affects energy companies that are not part of a vertically-integrated undertaking. Companies that are parts of vertically-integrated undertakings are subject to even more stringent notification duties. The notification duty is framed in a way that it catches numerous companies that have been the addressees of price decisions. For example, Slovnaft, the Railway Operator ŽSR, the Bratislava Airport or U.S. Steel – although not being primarily active in the energy sector – also carry out activities that are subject to price regulation and have thus also been addressees of price decisions.

At the same time, the provision is drafted in such broad terms that under a literal interpretation, once a company falls within its ambit, the notification duty catches all of its contracts, not only those that relate to the activity for which the price decision was issued. In other words, due to having some limited energy activities, these companies must disclose information on all of their contracts exceeding EUR 300,000, even those that have nothing to do with their energy activities and despite the fact that the details of such contracts may contain sensitive business information.

Moreover, the notification duty is made even more onerous by the fact that it uses unclear terms and undefined concepts. For example, the regulated entity is obliged to notify a contract after it has been completed, but the threshold of EUR 300,000 is based on its expected value. It remains unclear whether contracts that have been expected to exceed EUR 300,000, but which ultimately do not (or conversely contracts expected to be below the threshold, but which ultimately exceed it) should be notified. Finally, even after the obligation to notify a particular contract has been established, it is still unclear which details of the transaction have to be notified.

Last but not least, it is unclear what policy objectives the new regulation intends to achieve. The notification duty in the form as set out in the new Network Industries Act does not exist under the relevant EU directives, and it has not been included in the draft legislation proposed by the Government. It was only inserted during parliamentary deliberations without an explanatory note of its purpose.

Reasonable interpretation

It would certainly be preferable if onerous obligations imposed on businesses with no clear policy objective would not be adopted in the first place. However, once such obligations become law, it should be, in our view, the task of regulators and courts to interpret them reasonably.

In particular, we believe that despite the provision's literal wording, it should be interpreted as applying only to contracts relating to the activity for which the price decision has been issued. In other words, we take the view that, for example, Slovnaft should not be obliged to notify contracts for crude oil that have nothing to do with its electricity production.

Interestingly, in a guidance published shortly after the new legislation was adopted, the URSO claimed that all contracts need to be notified, whereas this position was later retracted and currently, even the URSO takes the view that only contracts relating to the regulated activity need to be notified.

Secondly, we also believe that obligations should not be extended by a broad reading of the law. Therefore, if the Network Industries Act mandates the notification of contracts, such notification should contain a summary of basic details, such as value and date of realisation. Sadly, on this question the URSO published a guidance (without a clear empowerment to do so under the law) extending the statutory duty and requesting the notification of additional details, including sensitive business information such as data on subcontractors.

To conclude, it is unfortunate when the legislator imposes obligations that are not justified by clear policy objectives. It is even more unfortunate when the regulator interprets these obligations in a way that goes beyond the statutory provision. One way or the other, regulated entities will have to find a way to cope with the regulatory burden imposed on them, which will certainly not facilitate the pursuit of their core business.

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