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COMPARATIVE ANALYSIS OF ENERGY REGULATORS SERBIA, CROATIA AND MONTENEGRO

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Abstract: *Since the establishment of independent regulatory bodies, to date, their work has been continuously developed along with the extension of their competencies. One of the key features of regulatory institutions is their independence which allows them to strike a balance between the opposing interests of energy companies, consumers and policy makers. In order for this to be feasible, it is necessary that the energy sector be excluded from the sphere of politics. In achieving this goal, the regulators, at the European and national levels, must have the dominant role, which should enable the proper balance between the political and market aspects. The second question is whether the energy sector can be clearly defined and different from other sectors, and as such survive in the future? Bearing in mind the complexity of the tasks of independent regulatory bodies, as well as the need to create a favorable environment for their proper work, it is clear why they originated first in modern states and their legal systems. The paper analyses three energy regulators, through an overview of their foundation, organization, goals and tasks they perform. The current regulatory phase is greatly influenced by the changes taking place in EU policies, which certainly influence the new and different approach to energy regulation.*

Keywords: *regulatory bodies, energy sector, comparative analyses, independence*

1. INDEPENDENT REGULATORY BODIES IN ENERGY - HISTORY AND ROLE

Over time, through experience, it became known that some state administration tasks could be transferred to regulatory bodies that they will perform faster and better. Regarding the creation of a favorable environment for their proper work, most EU members have long and rich practices, and therefore it is not surprising that they were originally created in modern countries and their legal systems.¹

Regulation, as an activity in the energy sector, is under the influence of an appropriate political and institutional framework, and therefore the „energy policy” reflects the way in which regulators apply their knowledge and expertise within the boundaries of the given framework. Observing the development of regulatory processes in Europe over the past twenty years, three main phases are noted: 1) the period from 1989 to 1997, characterized by the onset of informal cooperation between individual regulators (Italy, Spain and Portugal) and the entry into force of the first Directive 96/92/EC concerning common rules for the internal market in electricity.² This phase can be characterized as discovering the European dimension of energy regulation; 2) the period from 1998 to 2003, in which there is further development and improvement of regulations in the field of internal energy market, as well as the institutionalization of regulatory cooperation through the establishment of the Union of Regulators at the EU level (ERGEG - European Regulator, with the Group for Electricity and Gas); 3) the period from 2004 to the present, which is characterized by an EU enlargement from 15 to 25 members, and in this regard the introduction of independent energy regulators in all Member States, as well as the adoption of new legislation called the „Third Energy Regulatory Package” proposed by the European Commission in September 2007. This phase can also be called the „consolidation“.³

In the Republic of Serbia, the establishment and operation of independent regulatory bodies began in parallel with the implementation of comprehensive political and economic reforms in the autumn of 2000. In this regard, the Energy Agency of the Republic of Serbia was established by the Energy Law („Official Gazette of the Republic of Serbia” No.84/04) and continued its work in accordance with the provisions of the Energy Law („Official Gazette of the Republic of Serbia” No. 145/14) as a regulatory body established to promote and direct the development of the energy and natural gas market on the principles of non-discrimination and effective competition, through the creation of a stable regulatory framework, as well as for

1 D. Šuput: Independent regulatory bodies in the legal system of the Republic of Serbia, 2009, p.49-56.

2 Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, Official Journal L 27.

3 J. Vasconcelos: Energy regulation in Europe: regulatory policies and politics of regulation, European Review of Energy Markets, volume 3, issue 3, October 2009.

carrying out other tasks established by law. This law has extended the powers of an independent regulatory body - the Energy Agency of the Republic of Serbia, and enhanced the functional and financial independence of this institution, in accordance with the requirements of European Union directives. The above requests are directed towards expanding competencies and strengthening functional and financial independence, which requires a higher number of employees in this regulatory body compared to the current staffing capacity. In connection with the above, it should be noted that this Agency is completely independent and independent in its work, both from the executive authority, and from other state bodies and organizations, legal and physical entities dealing with energy activities.⁴

2. ESTABLISHMENT, FINANCING AND ORGANIZATION OF REGULATORS

The European Union regulations in the field of energy have established the obligation of the member states to give authority to a certain „regulatory body” to influence market behavior by its decisions and to de facto regulate market relations. This obligation is a consequence of the balance between „regulation” and „deregulation” of the market. This process is called a regulatory reform.

In the field of energy, it can not be talked about complete deregulation, bearing in mind that only some of the prices are deregulated and they are priced in the part of the energy market, which is called „open”, where electricity and natural gas have the treatment of goods⁵, unlike regulated prices, such as prices for access to a transmission and distribution system for electricity, natural gas transport and distribution, price of access to a natural gas storage facility and other⁶, bearing in mind that the performance of the above activities should not be strictly controlled. In this regard, we can conclude that regulation and deregulation are in constant interaction.

2.1. Energy Agency of the Republic of Serbia

The Energy Agency of the Republic of Serbia was established by the Energy Law (“Official Gazette of RS” No. 84/04) and continued its work in accordance with the provisions of the Law on Energy (“Official Gazette of the Republic of Serbia” No. 145/14), as a regulatory body established in order to promote and direct the development of the energy and natural gas markets on the principles of non-discrimination and effective competition, through the establishment of a stable regulatory framework, as well as for carrying out other tasks established by law.⁷

4 Article 38, paragraph 2, Energy Law.

5 B. Lepotic-Kovačević: Law in the Energy field in the European Union, Energy Law-Transaction, Belgrade, 2005, p.480.

6 Article 88, Energy Law, „Official Gazette of the Republic of Serbia” No. 145/14

7 Information on the work of the Energy Agency of the Republic of Serbia, Belgrade

Funds for financing and operation of the Agency are regulated by the provisions of Art. 61 and 62 of the Law on Energy. According to the aforementioned provisions of the Law, the funds for the establishment and operation of the Agency are provided from the revenues generated from fees for the issuance of licenses, part of the tariff for access and use of the system, as well as other revenues that it realizes in carrying out activities within its competence in accordance with the Law. In addition, the Agency can also provided funds from donations, other than donations from energy entities or related entities.

When we talk about organizational structure, the Energy Agency of the Republic of Serbia is autonomous in undertaking organizational and other activities that ensure the performance of legally determined tasks. The organization of the Agency has been established so that it can respond to the demands of efficiency and rationality of its work. In this sense, the work of the Agency is carried out within four sectors, with a defined scope of work, with the establishment of the necessary level of mutual coordination in carrying out complex tasks and an independent job position of the Special Adviser of the Agency. The sectors are as follows: Sector for Energy and Technical Affairs, Sector for Economic and Financial Affairs, Department of Legal Affairs and Division for Organizational and General Affairs.⁸

2.2. Croatian Energy Regulatory Agency

Croatian Energy Regulatory Agency (HERA)⁹ is an independent regulatory body established for the regulation of energy activities in the Republic of Croatia. Her competencies are determined by the Law on the Regulation of Energy Activities,¹⁰ as well as the Law on Energy.¹¹ In addition to the aforementioned Act, its competencies are regulated in more detail by special regulations, bearing in mind that this body is responsible for all energy markets in Croatia (oil, biofuels and heat), and not only for the gas and electricity markets.

For its work, the Agency responds to the Croatian Parliament. The work of this regulator is managed by the Administrative Council, which is responsible for its work and which consists of five members (one of its member is President of the Administrative Council and one is his deputies), to whom this duty is the only one. The President and members of the Governing Board are appointed by the Croatian Parliament for a period of seven years, with the possibility of another re-election.

2018, <http://www.aers.rs/Index.asp?l=1&a=17>, 15.10.2018.

8 Information on the work of the Energy Agency of the Republic of Serbia, Belgrade 2018, <http://www.aers.rs/Index.asp?l=1&a=17>, 15.10.2018.

9 The abbreviated name of HERA is determined by the Statute of the Croatian Energy Regulatory Agency, https://www.hera.hr/hr/docs/Statut_2013-10-16.pdf, 18.10.2018.

10 Law on Regulation of Energy Activities, Official Gazette, No. 120/12.

11 Energy Law, Official Gazette, No. 120/12, 14/14, 102/15 и 68/18.

In carrying out its activities, this body has the power to make binding decisions on energy entities, supervise the functioning of the energy market, ask the energy entity to explain its decision rejecting the request for access to the network, determines the facts and provides appropriate instructions in resolving disputes related to complaints on the work of the system operator, publishes data related to mutual transactions and contracts of participants in the electricity and gas market, as well as their contracts with system operators, initiates misdemeanor procedures in the event of failure to fulfill obligations prescribed by law or those that resulting from legally binding decisions of the HERA. The work of the Administrative Council takes place at sessions that are held as needed, and at least once a month. As a rule, meetings of the Governing Council are public. Exceptionally, this body may decide that a hearing on a particular item or a whole session shall be closed to the public, if it is in the interest of preserving official and business secrets, or if the public of the meeting would contravene the legally protected legal interests of citizens and legal persons.

There are several sectors within the expert services of HERA, including the electricity sector, the gas and oil sector, the thermal energy sector, the legal and human resources department and the service for common affairs. The Electricity Sector deals with the performance of expert tasks related to the area of electricity, while the Department of Petroleum and Gas deals with expert activities in this field.¹²

The way of financing HERA is regulated by the Law on Energy Regulatory Regulation (Official Gazette, No. 120/12, 68/18). In this regard, the revenue of this Agency is comprised of fees for performing activities related to regulation of energy activities, assistance and donations to the Agency from bodies and funds of the European Union for the purpose of improving professional and technical knowledge (Article 32 of this Law). The amount of fees for performing activities, related to the regulation of energy activities, is prescribed by the Decision on the amount of fees for performing activities regulating energy activities (Official Gazette 155/08, 50/09, 103/09, 21/12).¹³

2.3. Montenegro Energy Regulatory Agency (RAE)

The Montenegro Energy Regulatory Agency was established by the Parliament of the Republic of Montenegro on 22 January 2004 in accordance with the Energy Law, as an independent, non-profit organization, legally and functionally independent of state authorities and energy entities. This regulator is supplied with competences in the field of electricity, natural gas, oil and petroleum products and heat, as well as competencies in the field of public utilities in the regulation of public water supply and waste water management costs.

12 Croatian Energy Regulatory Agency, Annual Report for 2016, https://www.hera.hr/hr/docs/HERA_izvjesce_2016.pdf, 19.10.2018.

13 Financing the work of HERA, <https://www.hera.hr/hr/html/financiranje.html>, 19.10.2018.

The Agency is financed from fees for licensing, annual fees for the use of licenses, fees for determining the status of a closed distribution system, annual fees for the use of the closed distribution system and dispute settlement fees, as well as fees paid by the providers of regulated utility services. The funds necessary for the financing of the Agency are determined by the annual financial plan adopted by the Parliament of Montenegro.¹⁴

This regulator is managed by the Board, consisting of a president and two members, who perform the function professionally. The Managing Authority of the Agency is the Executive Director, and besides it, the Agency also has a Deputy Executive Director. The President and members of the Committee shall be appointed in the manner and in the procedure established by the Law on energy. The internal organization of the Agency shall be established in a manner that ensures efficient and quality performance of the tasks determined by law, and its work is organized through organizational units - services, such as: services for energy technical regulation, department for economic affairs of regulation, department for legal affairs of regulation, general affairs services, gas, oil and utility services and services for regulated utility services.¹⁵

3. OBJECTIVES AND ACTIVITIES OF REGULATORY BODIES

3.1. Regulatory body of the Republic of Serbia

The tasks of the Energy Agency of the Republic of Serbia are defined in Articles 48-60. Law on Energy. The enactment of the Energy Act aimed to ensure the full implementation of a set of EU energy regulations, called the Third Energy Package. This package brings major changes in the reform sense and its implementation implies resolving previous issues and amending a number of regulations in the Republic of Serbia. In this respect, the said regulations are implemented in the applicable legislation of the Republic of Serbia, and the regulatory body of our country implements them by respecting the obligation to implement the regulations arising from the EU accession process.

In this regard, the competence of regulatory bodies has also been expanded. What presents the novelty of the Third Energy Package, in relation to the Second Regulatory Package, is the Certification of the Transmission System Operator of Electricity and Gas. This area is regulated to Articles 10 and 11 of the Directive, as well as Art. 100. - 107. Law on Energy. In this regard, the Law on Energy prescribes the obligation of the electricity and gas transmission system operator to be certified

14 Energy Regulatory Agency of Montenegro, http://regagen.co.me/site_cg/public/index.php/index/artikli?id=13, 22.10.2018.

15 Statute Regulatory Agency of Montenegro, http://www.regagen.co.me/cms/public/image/uploads/2017.06.05_RAE_STATUT_RAE.pdf, 22.10.2018.

in accordance with this Law before it obtains a license to perform energy activities and thus be designated for the transmission system operator. Connection with the aforementioned, the energy entity that, on the day of the entry into force of the Energy Law, has a license to perform the activity of electricity transmission and transmission system management, continues to perform this activity until the completion of the certification procedure, which shall be executed within two years from the date of entry in force of this law (Article 407 of the Law).

3.2. Regulatory body of the Republic of Croatia

HERA's duties are of interest to the Republic of Croatia, and the Agency carries out them on the basis of public authorities.

Pursuant to Article 11 of the Law on the Regulation of Energy Activities, the basic activities of the Agency are: Supervision of the implementation of the provisions on the separation of entities within the energy sector, supervision of the implementation of the prohibition of granting subsidies, in accordance with the laws regulating individual energy markets, supervision of the observance of the principles, issuance, transfer and extension of permits for the performance of energy activities, supervision of the work of energy entities transparency, objectivity and impartiality in work energy market operators, as well as with the Agency for Cooperation of Energy Regulators, and implementation of legally binding decisions of the Agency and the European Commission, and others.

Particularly important are the powers related to enabling customers to access their own energy consumption data, and making and providing consumers with an easily understandable and uniform format for displaying consumption data, and determining the process of exercising the rights of consumers and suppliers to access to consumption data, as well as the control of the confidentiality of customers' data on energy consumption.

The Agency is autonomous in taking organizational and other measures necessary for the smooth running of the business and fulfilling its obligations in accordance with the regulations regulating individual energy markets. The Agency submits an annual report to the Croatian Parliament on its work in the previous year, once a year, by June 30.¹⁶

3.3. Regulatory body of Montenegro

Within the competencies regulated by the Law on Energy, this Agency determines the methodologies for determining the regulatory income and prices for the operators of the system and the market operator, adopts the rules on the minimum quality of supply, promises general conditions for electricity supply and a number of other acts defining the regulatory framework in the energy sector sector of Monte-

16 M. Klaric: Regulatory Bodies in the Energy Market of Gas and Electricity, Proceedings of the Law Faculty in Split, 3/2015, p. 675.

negro. Within the competences regulated by the Law on Energy, it determines the status of privileged electricity producers, the status of the closed distribution system, the issuance of licenses for the performance of energy activities, keeps a register of issued licenses, a register of guarantees of origin and gives consent to acts that are in accordance with the Law brought by energy entities. It also supervises the activities and duties of energy entities and takes appropriate measures within its competencies. The Agency shall carry out the aforementioned competences in order to fulfill the set objectives that consist in the promotion and cooperation with the competent authorities of the Community, as well as with the regulatory organizations of other Community members.

4. COMPARATIVE ANALYSIS OF ENERGY REGULATORS

At the national level, the national regulatory agencies that regulate the markets of the Member States, cooperate in their work with each other at the level of the Regulatory Board of the Energy Community (ECRB - Energy Community Regulatory Board). This body mainly has an advisory role, ie it represents a coordination platform for the exchange of knowledge and the development of best practices in order to regulate the electricity and gas market in the Energy Community. It builds its activities on three pillars, namely: ensuring a coordinated position of regulators in discussions on energy policy, harmonization of regulatory cross-border rules and exchange of regulatory knowledge and experiences.¹⁷

The subject of this paper is an analysis of the role of regulatory bodies in the energy market of the European Union, that is, the role of the regulatory bodies of Serbia, Croatia and Montenegro. Their organization and competencies are characteristic for regulatory agencies of this type. Therefore, having in mind the harmonization of national regulations with the EU's communitarian regulations, they do not have too many legal and administrative practices that would clearly indicate all the advantages and disadvantages of the newly established model, given that it is more characteristic of the countries with Anglo-Saxon legal traditions. Having this in mind, the main challenges facing regulatory bodies in the energy sector, both at the EU level and at the national level, are the protection of consumers' rights, and in that connection, the suppression of the monopoly and the enabling of equal market competition. Therefore, in the future, additional efforts should be made to improve existing regulatory frameworks, as well as to strengthen regulatory bodies, especially in the direction of their independence and autonomy in their work. This effort will be more pronounced also because the new regulatory model of public service delivery is something that is not inherent in the tradition of the European administrative and legal system, so theory and practice are confronted with the challenge of

¹⁷ Energy Community Regulatory Board, <https://www.energy-community.org/aboutus/institutions/ECRB.html>, 22.10.2018.

building a new model of public service delivery, in which public interest, but with a strong market dimension.

Rules on the appointment, dismissal and operation of the top management are regulated by Art. 35. (5) of Directive 2009/72 /EC¹⁸ and Art. 39. (5) of Directive 2009/73/EC.¹⁹ Based on these provisions, as well as the relevant national regulations, the highest management of the regulatory body is appointed for a certain period of five to seven years (Montenegro - 5, a seven-year mandate is defined in Croatia, and in Serbia the President of the Council is elected for a period of 7 years, two members to 6 and two to 5 years), with the possibility of another re-election, as well as on the basis of an appropriate rotation scheme, so that the end date of the mandate of the members of the management can not be the same for all members. In this sense, Montenegro and Serbia have prescribed the most stringent conditions for the election of presidents and members of their regulators, starting from education, work experience, and neutrality in the political sense. In Montenegro, the approval of the Government is required, which limits their functional independence from other state bodies. Analyzing the national regulations of Serbia, Croatia and Montenegro regarding the election and duration of the mandate of the highest management of the regulator, it is concluded that they are in line with the requirements of the Third Energy package of regulations, including the possibility of re-election. However, when it comes to the request for the establishment of the rotation scheme, so that the deadline for the mandate can not be the same for all members, this condition is only fulfilled in the legislation of the Republic of Serbia (Article 43 of the Law on Energy).

When it comes to earnings, national regulators must be able to attract sufficiently qualified staff to carry out their responsibilities in a significant way. This can only be guaranteed if the salary levels are too attractive. Fulfilling this criterion may be limited in cases where employees have the status of an official. The status of staff (civil servant or not) varies between EU Member States and the Energy Community. When it comes to our country, the competitiveness of the AERS salary has decreased in relation to earnings since the establishment of this regulator, compared to the private industry and the public sector, due to the conservative salary increase policy compared to the average rate of salary in this sector, as well as the introduction of certain rules on wages in the state sector. Similarly, wages of employees in Montenegro, initially about 20% more than salaries in the energy sector, were reduced by the decision of the Assembly. Both cases must be considered particularly critical as the staff of both independent regulators does not have the status of civil servants. In Montenegro, the approval of the budget of the regulator by the Assembly is also,

18 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, Official Journal of the European Union, L 211, p. 55-93.

19 Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, Official Journal of the European Union, L 211, p.39-81.

through the Government, subject to a reduction in salaries. Related practice must be clearly seen as an unusable intervention in the financial independence of the regulator. The lack of approval of the annual budget is a powerful weapon for the implementation of political demands that violate independence.²⁰

The analysis shows compliance with the criteria of independence, which are prescribed by the common regulations, regarding several central elements:

- in all the cases considered, the independence of the regulator is prescribed by law;
- all observed regulators can autonomously define their annual work program without the need for its approval by any other institution;
- national legislation in all analyzed markets envisages the establishment of these bodies solely on the basis of the law, which means that they can not be liquidated (and re-established) by the act of other public institutions;
- all have been established as unique regulatory authorities with competencies at the state level;
- in all cases considered, the top management is prohibited from establishing a labor relationship in the energy sector or performing a political function.

However, financial independence remains a major weakness, bearing in mind that the Assembly must approve the budget, which ultimately reflects the salaries of employees. Also, the lack of approval of the annual report is the reason for the dismissal of the highest leadership of the Montenegrin regulator.

The conclusion that is undoubtedly imposed is that the implementation of the Third Energy Package, which introduces new tasks and tasks of the regulator, requires additional human resources which will be key to their ability to fulfill extensive new competencies. The question that arises is with which staff they will achieve this, if they are not able to attract those who are qualified and trained?

Therefore, with regard to the organization of the Montenegrin regulator, it fulfills the criteria of independence prescribed by Directives 2009/72/EC and 2009/73/EC, with two exceptions. The first refers to the fact that the management is not completely free to decide on the internal organization of this body, bearing in mind that the Government gives its consent to the Statute RAE (Energy Regulatory Authority of Montenegro). Second, the regulator has no right to impose penalties because they are within the jurisdiction of the court, reflecting the limited ability of the regulator to ensure the implementation of the law.²¹ In other words, it does not have adequate legal means to sanction disreputable energy entities. All in all, this regulator

20 Independence of National Regulators in the Energy Community, A Critical Review, June 2015, https://www.energy-community.org/dam/jcr:6b9a408f-fbb5-4c08-81e2-1d3299aa1c20/ECRB_Independence_review.pdf, 24.10.2018.

21 Assessment of the Application of Community Law in a Third Country, Review of Montenegro, March 2017, https://www.energy-community.org/dam/jcr:3fd775d6-0fc8-4d55-a202-22d25987573a/EnCS_Review_ME.pdf, 25.10.2018.

has shown a high degree of professionalism in his work. In the electricity sector, it developed a successful market model and proved to be a proactive promoter of national and regional reforms envisioned by the Western Balkans 6 (WB6). The efforts of the regulators led to the certification of the transmission system operator in June 2017. However, its functioning and independence were called into question by reducing the number of employees, which was due to the lack of funds in the state budget, bearing in mind that the salaries of civil servants are applied to the salaries of employees, even though the regulator is not financed from the state budget. This circumstance certainly weakens the regulator's ability to attract qualified personnel.

When it comes to the organization of AERS, it is in accordance with the criteria of independence, which are established by the communal regulations, except that the National Assembly (Article 47 of the Law on Public Procurement) approves the Statute, which regulates the internal organization and method of work of this Agency, which indicates the absence of complete autonomy of the governing body. Also, the financial plan is approved by the National Assembly (Article 61, paragraph 2 of the Law), which jeopardizes the financial independence of this regulator and affects the increase in the number of employees.²²

5. CONCLUSION

Within the European Union, there is a common market for electricity and natural gas, which was previously in the exclusive competence of the member states. By liberalizing the performance of these activities in a single European market, jurisdiction is shared between the Union and its members. This is because there is a need for establishing a balance between public and private interests, that is, the need of citizens to provide them with secure energy supplies at affordable prices, on the one hand, and the necessary private investments in the energy sector, on the other. In order to protect the public interest, the Union, together with the Member States, creates a regulatory framework for the provision of various services. Therefore, the role of regulatory bodies is very important, both for the regulation and secure supply of electricity to the market in the European Union as well as the markets of the observed countries.²³

At the level of EU regulators, the Agency for the Cooperation of Energy Regulators (ACER) is coordinated between them, as an important institution that helps to harmonize national energy markets and harmonize the practices of national regulators. Its task is to ensure that national regulatory bodies act in accordance with

22 Annual Implementation Report, Energy Community Secretariat, 1. September 2017, https://www.energy-community.org/dam/jcr:b03950a0-9367-4618-961b-3efad53b79fd/EnC_IR2017.pdf, 25.10.2018.

23 M. Klaric: Regulatory Bodies in the Energy Market of Gas and Electricity“, Proceedings of the Law Faculty in Spčit, 3/2015, p. 665.

Directive 2009/72/EC and Directive 2009/73/EC.²⁴

The ultimate goal is to create a common and unified European market, enabling a market game between several different service providers, with simultaneous oversight by regulatory bodies. Natural gas and electricity markets follow this model of liberalization, and in that sense, there are ongoing organizational changes in order to move from the classical model of „public services” where the absolute monopoly was in the hands of state-controlled public companies on the new model. According to the new model, operators supply consumers in a liberalized market, according to market conditions. Therefore, regulatory bodies must be independent and must ensure equal conditions for all market participants. Of course, that part of the infrastructure that can not be liberalized, such as transmission and distribution, should not be used in a way that puts someone in a privileged position compared to other entities. This is precisely the importance of the role of regulatory bodies when it comes energy supply of households.

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