



Ivane Javakhishvili Tbilisi State University
Faculty of Law

Journal of Law

№1, 2020



უნივერსიტეტის
გამომცემლობა

Legislative Tendencies of Europeanisation of the Georgian Electricity Market

Fundamental change of the Georgian Electricity Market structure and transition to qualitatively new model, emerged necessity of correct perception of new regulation of electricity sector and its proper usage. On the one hand, mentioned model was established with the purpose to facilitate development of competitive market. The new law created possibility to conduct trading with electricity on organized markets (day-ahead and intraday), as well as based on long-term bilateral agreements. New actors appeared on the market. At the same time, strict liability measures were defined for market participants. Development of new model of Georgian electricity market is related to signing of the Association Agreement with the EU and afterwards – accession to treaty establishing Energy Community. Hence, we should search for mechanisms, implementing renewed Georgian energy legislation, in the European legislation.

Key words: *Liberalization of Electricity Market, harmonization, electricity wholesale market, opening of electricity market, target model of electricity market, competition of the electricity market, physical trading with electricity, financial trading, organized market, stock exchange, bilateral agreements, Association Agreement, Energy Community.*

1. Introduction

Trading with energy, as a modern phenomenon, was rooted in commencement of liberalization process of the Energy Sector in Europe. Beginning/Development of liberalization process of Electricity Markets (as well as, in general of Energy Markets) was directly connected to the existence of transparent and competitive environment.

The liberalization process of the Energy Market in Europe is considered to have started in 1990-2000 years. In 1996, by the first directive on Electricity market liberalization, the first common rule regarding the functioning of electricity market was established (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).¹ The rules regulating functioning of electricity market were improved and renewed in 2003 (second energy package) and then in 2009 (third energy package). These rules, considering relevant renewals, were gradually incorporated into national legislations.² For instance, by special law from April 1998 all consumers in the Federal Republic of Germany were given possibility to freely choose entity, which would ensure provision of electricity.³

* Assistant in the field of Private Law (TSU), Doctoral Student (TSU), Managing Partner at “Jorbenadze Gatslerelia Counsellors”, Advocate, Mediator.

¹ *Haucap J., Heimeshoff U., Energiekartellrecht*, Kap. 2, Rn. 4.

² *Ibid.*

³ *Ibid.*, Rn. 5.

In November 2016 European Commission initiated amendments, that comprised issues of novel regulation of almost all areas falling under Electricity Sector (issues related to renewable energy, electricity supply infrastructure and energy efficiency) (winter energy package⁴).⁵

“Development of energy law in Georgia, in essence, must be considered as subject of law reform”.⁶ In the period after restoration of independence, taking into account relevant positive dynamics, the grounds were created to give possibility to the country for taking first steps in establishing open and competitive electricity market.⁷ In the establishment and development of electricity market crucial role was played by the law of Georgia from 27 June 1997 on “Electricity and Natural Gas”⁸ and Order N77 from 30 August 2006 on “Rules for Electricity (power) market” adopted by the Minister of Energy of Georgia based on this law. Alike European model of electricity market, Georgian legislation envisaged provisions regulating retail, as well as wholesale trading of electricity from the very beginning, however these provisions were substantially different from the European model.

Fact of accession of Georgia to the Treaty establishing Energy Community must be considered as an initial stage of irreversible process for transition of electricity market to the European model, because membership in the Energy Community accelerated the harmonization process of Georgian legislation to the European law. By the Accession Agreement, Georgia took obligation to align its legislation to the European standards in a certain period of time. During last years, several laws and bylaws were released/adopted, which certainly was solid prerequisite for introducing European model of electricity market in Georgia.

Rules existing with regard to the functioning of European model of electricity market in Georgia and grounds for obligation to reflect European standards of electricity market by the country in its own legislation will be overviewed in this article. The purpose of current study is putting in parallel provisions regulating wholesale electricity market of Georgia and rules acting in this area in Europe. As a conclusion, the article will present author’s point of view for the perspective of establishing European model of electricity market in Georgia.

2. Wholesale Trading of Electricity in Europe (Brief Overview)

From 1990ies there was an active discussion in Europe, whether the natural monopoly existing in the energy sector (service of electricity transmission infrastructure) should have been isolated from other core activities in this sector (for instance, from electricity production).⁹ Precisely this

⁴ Energy package comprised issues related to regulation of natural gas trading on the natural gas market.

⁵ *Haucap J., Heimeshoff U.*, *Energiekartellrecht*, Kap. 2., Rn. 4.

⁶ *Samkharadze I.*, *Energy Law, as academic discipline*, Journal “Justice and Law”, №2 (58), 2018, 71 (in Georgian).

⁷ *Energy Community Secretariat*, *Energy Governance in Georgia*, Report on Compliance with the Energy Community Acquis, 2017, 10.

⁸ Law of Georgia on “Electricity and natural gas”, Parliament Gazette, №33, 31/07/1997 (repealed, 20/12/2019).

⁹ *Zuber A.*, *Energiekartellrecht* Kap. 3 Rn 1.

circumstance became one of the most important factors which prompted decision to initiate introduction of unified energy package regulating electricity sector in Europe.¹⁰

In parallel with the regulation of aggravated economic condition, electricity trading law developed.¹¹ Electricity trading caused the fact, that along with the receipt of potential benefit by participants of wholesale electricity market, risks related to this process (for instance, differentiated prices and their instability, probability of interruption in electricity supply) emerged as well.¹²

Energy policy of Europe is based on guaranteeing supply of sustainable, competitive and secure energy.¹³ Process of harmonization of provisions regulating energy sector in Europe develops continuously, which primarily is evident by the increase of transparency of processes, taking place on electricity markets, and by strengthening of security of these markets.¹⁴ For the systematized functioning of the electricity market in Europe, it is crucial to conduct electricity trading in member countries of the European Union on the basis of determining approximate prices, as far as possible.¹⁵ On the other hand, establishing common European price for electricity is based on necessity to create identical structures of electricity by these countries.¹⁶ Therefore, taking into account these factors, we may say, that, as a result of promoting common wholesale trade with electricity by member countries of the European Union, the unified trading commodity market of Europe was developed.¹⁷

Europe played very important role in the development of energy trade.¹⁸ The crucial step in direction of opening electricity market was the respective EU directive regulating electricity market, which enforced effective principles restricting competition to be considered during electricity trading.¹⁹ At the initial stage of market development, Europe was trying to accelerate its liberalization process in order to change provisions restricting competition prescribed by member states' legislations and monopolistic structures of market in possible short period.²⁰

Another factor considered important for opening of electricity market of Europe is ensuring free accessibility to electricity transmission/electricity distribution lines for third parties, thus giving clients possibility to freely choose electricity suppliers, and entitling electricity producers to export electricity for realization on free market.²¹ On the one hand, liberalization of electricity markets aimed at strengthening free movement of goods and trading between EU member states. The solid prerequisite for achieving this aim was ensuring unrestricted and free trade among electricity market participants in

¹⁰ Hufendiek K. in: Hufendiek K., Schwintowski H. P., Scholz F., Schuler A. (Hrsg.), Handbuch Energierecht, 4. Aufl. Rn. 81.

¹¹ Zenke I., Dessau C. in: Danner W., Theobald C. (Hrsg.), Werkstand: 99. EL Septemer, 2018, Rn. 3.

¹² Ibid., Rn. 2.

¹³ Rademaekers/Slingenberg/Morsy, Review and analysis of EU wholesale energy markets (final report), Rotterdam, 2008, 9.

¹⁴ Zenke I., Dessau C. in: Danner W., Theobald C. (Hrsg.), Werkstand: 99. EL September, 2018, Rn. 3.

¹⁵ Lintzel P., Borchert J. in: Zenke I., Schäfer R. (Hrsg.), Energiehandel in Europa, 2012, Rn. 27.

¹⁶ Ibid. Rn. 28.

¹⁷ Hufendiek K. in: Schwintowski H. P., Scholz F., Schuler A. (Hrsg.), Handbuch Energierecht, 4. Aufl., Rn. 111.

¹⁸ Du Buisson J., Dessau C. in: Zenke I., Schäfer R. (Hrsg.), Energiehandel in Europa, 2012, Rn. 3.

¹⁹ Ritzau M., Schuffelen L. in: Zenke I., Schäfer R. (Hrsg.), Energiehandel in Europa, 2012, Rn. 6.

²⁰ Du Buisson J., Dessau C. in: Zenke I., Schäfer R. (Hrsg.), Energiehandel in Europa, 2012, Rn. 2.

²¹ Ritzau M., Schuffelen L. in: Zenke I., Schäfer R. (Hrsg.), Energiehandel in Europa, 2012, Rn. 6.

each country.²² Hence, cross border trade of electricity gave possibility for optimizing readiness of respective power plants in seasonal and hourly perspective.²³

2.1. Features Characteristic to Electricity Wholesale Market

Market envisaged (organized) for electricity trading (electricity market) is characterized with 2 specific features:

- 1) Nowadays it is very complicated to store/warehouse big amount of electricity produced and/or it requires significant expenses. On one hand, generated electricity determines necessity to consume it in certain particular (coinciding) period;²⁴
- 2) Produced electricity must be supplied to the consumer through appropriate transmission/distribution infrastructure.²⁵

Producing electricity and its consumption often is not coinciding in geographic perspective. Hence, in order to properly manage the planned process, it is crucial to use electricity transmission/distribution infrastructure.²⁶ This factor of natural monopoly may be economically unprofitable for parties to the transaction, as it will affect price determination of the electricity to be supplied to end consumer.

Therefore, European legislators payed specific attention to issues such as determining necessary preconditions for using electricity transmission/distribution infrastructure and calculating value for its usage.

2.2. Products Admitted for Trading on Electricity Wholesale Market

According to the European Law, electricity is commodity intended for trade, which evolves from the meaning of fundamental freedom established by the treaty on functioning of the European Union.²⁷ In line with the uniform practice of the Court of Justice of the European Union, “commodity” is defined widely and includes all goods, which have monetary value, and thus are suitable for trade.²⁸ For instance, in the Federal Republic of Germany for the sale and purchase of electricity, rules of sale and purchase for movable objects defined by civil law are applied.²⁹ In general, the notion of electricity is equaled to notions of object or raw material. Therefore, electricity is a product, which, if wanted, may be exchanged. Despite spreading definition of “commodity” to electricity, electricity market significantly differs from markets designed for the trade of other goods, where specific and obligatory rules are defined for electricity suppliers.³⁰

²² Ibid. Rn. 16.

²³ Ibid. Rn. 19.

²⁴ *Haucap J., Heimeshoff U.*, *Energiekartellrecht*, Kap. 2, Rn. 10.

²⁵ Ibid. Rn. 8.

²⁶ Ibid.

²⁷ *Fried J.* in: *Schwintowski H. P., Scholz F., Schuler A. (Hrsg.)*, *Handbuch Energierecht*, 4. Aufl., Rn. 188.

²⁸ Ibid.

²⁹ Ibid. Rn. 189.

³⁰ Ibid. Rn. 190.

In Europe, trading with electricity is, as a rule, conducted in megawatt hour (MWh).³¹ The subject for trade on electricity wholesale market may be electricity (physical trading), as well as financial instruments closely related thereto, for instance derivatives (financial trading).³²

Auxiliary terms - “physical trading” and “financial trading” – give possibility to see the difference, which is related to the following issue: trading with electricity (physical trading) takes place if the agreement is concluded, the aim of which is to provide insurance of future obligation, deriving from the agreement between parties, related to money reimbursement (financial trading).³³ The classical example of financial trading is when one party to the agreement takes obligation to compensate to second party the difference between price agreed in past for the precise amount of electricity and future market price of electricity defined in the specific period.³⁴

2.3. Means for Trading With Electricity on the Wholesale Market

The process of liberalization of energy markets of Europe, created increasing demand for trading by diverse means with energy carriers (for instance, electricity).³⁵ Considering the special character of electricity, as of subject of trade, is possible that trading takes place among interested persons, as well as on specially created markets (stock exchanges).

Modern principles on electricity demand and supply substituted traditional approaches of electricity allocation.³⁶ The novelty is that the trading with electricity proceeds through direct transmission and consumption of electricity (Over the Counter (OTC) Trade), as well as by special regulated markets (stock exchanges).³⁷ Big international banks are involved in trading, however this financial institutes are trading not with electricity itself, but with financial instruments related thereto.³⁸

2.3.1. Trading Based on Bilateral Agreements (OTC Trade)

The subject of electricity sale and purchase agreements is to provide electricity to purchaser in exchange for compensation. This agreement is concluded for own consumer, as well as for future distribution of electricity.³⁹ Comparing to trade on stock exchange where because of high quality of standardization and big amount of agreements special mechanisms are created for easing the organization of trade, in case of trade outside stock exchange – so called Over the Counter (OTC)

³¹ *Rademaekers R., Slingenberg A., Morsy S., Review and analysis of EU wholesale energy markets (final report), Rotterdam, 2008, 11.*

³² *Ritzau M., Schuffelen L. in: Zenke I., Schäfer R. (Hrsg.), Energiehandel in Europa, 2012, Rn. 22.*

³³ *Fried J. in: Schwintowski H. P., Scholz F., Schuler A. (Hrsg.), Handbuch Energierecht, 4. Aufl., Rn. 191.*

³⁴ *Ibid.*

³⁵ *Nill-Theobald C., Theobald C. (Hrsg.), Grundzüge des Energiewirtschaftsrechts, 3. Aufl., 2013, 138.*

³⁶ *Roggenkamp M., Redgwell C., Del Guayo I., Ronne A., Energy Law in Europe, second edition, Oxford University Press, 2007, 674.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Nill-Theobald C., Theobald C. (Hrsg.), Grundzüge des Energiewirtschaftsrechts, 3. Aufl., 2013, 134.*

Trade – it becomes necessary to conduct direct (possibly more expensive) negotiations between parties.⁴⁰ Moreover, in case of over the counter trade third persons do not participate in the transaction as important parties, who are responsible for concluding agreement and insuring risks related to payment.⁴¹

In comparison to trade on stock exchange, the trade conducted based on bilateral (OTC) contracts is not anonymous (parties of transaction are familiar), participants of electricity market are trading through usage of telephone, facsimile or other electronic means and in this case, there is no need to create special environment for trade.⁴² As a rule, trade by bilateral contracts proceeds without intermediaries (brokers), who are trading with prepared products identified by priorly defined terms and/or price and do not provide service of coinciding demand and supply in particular period.⁴³ Activity of broker differs from activity of party to the agreement or commissioner (person, who acts in his/her name but on expense of others) in a way that his/her inclusion is limited to mediation. On the biggest energy markets of Europe (for example, in the Federal Republic of Germany) trading with electricity preferable takes place not through organized electricity markets (stock exchanges), but through long-term bilateral agreements.⁴⁴

2.3.2. Trading on Stock Exchange

Stock exchange is a place where trading with electricity (physical amounts), as well as with other financial instruments takes place.⁴⁵ The main function of stock exchange is to provide leading of trade fairly and in accordance with rules, as well as accessibility to proper information related to prices of products purchased on stock exchange.⁴⁶

2.3.3. Electricity Traders

Diverse forms of trading are used on electricity market.⁴⁷ As a rule, sellers of electricity are energy companies having proper title and experience. However, considering the specifics of electricity sector, comparing to electricity sellers, purchasers of electricity may be intermediary energy companies (with the purpose of distributing this electricity later on), as well as end consumers.⁴⁸

⁴⁰ *Fried J. in: Schwintowski H. P., Scholz F., Schuler A. (Hrsg.), Handbuch Energierecht, 4. Auflage, Rn. 198.*

⁴¹ *Ibid.*

⁴² *Rademaekers R., Slingenberg A., Morsy S., Review and analysis of EU wholesale energy markets (final report), Rotterdam, 2008, 13.*

⁴³ *Ibid.*

⁴⁴ *Haucap J., Heimeshoff U., Energiekartellrecht, Kap. 1, Rn. 40.*

⁴⁵ *Rademaekers R., Slingenberg A., Morsy S., Review and analysis of EU wholesale energy markets (final report), Rotterdam, 2008, 12.*

⁴⁶ *Ibid.*

⁴⁷ *Nill-Theobald C., Theobald C. (Hrsg.), Grundzüge des Energiewirtschaftsrechts, 3. Aufl., 2013, 133.*

⁴⁸ *Ibid.* 134.

3. Novel regulation of the electricity sector of Georgia

As mentioned above, in Georgia the rules more or less approximate to the European model related to electricity retail, as well as wholesale trade, were determined by the law of Georgia on “Electricity and natural gas” and by the order N77 from 30 August 2006 on “Rules for Electricity (power) market” adopted by the Minister of Energy of Georgia based on this law. In particular, before transfer to new model of electricity market, acting legislation related to the electricity trade entailed (considering the period of validity of normative acts, partially entails also today) wholesale trade with electricity (power), electricity production, transmission, dispatching, export, reexport, import, transit and other important issues.⁴⁹ “Performing these activities properly has particular importance in terms of organized and secure functioning of electric power sector.”⁵⁰

For ensuring fulfillment of obligations by Georgia – approximating with European standards – it became necessary to revise and renew legislation regulating electricity market. Exactly for this purpose the new legislative package was elaborated, the part of which is enacted. The named issues will be discussed in details in this article.

3.1. International Obligations Taken by Georgia in the Electric Power Field

European Union is “exporter” of its energy rules and the area of their coverage may include many non-member states as well.⁵¹ Georgia, as one of such countries, took obligation to harmonize its legislation with the European law by signing Association Agreement with the EU and acceding Treaty establishing Energy Community.⁵²

3.1.1. Association Agreement, Deep and Comprehensive Free Trade Area

On June 17 of 2014 the “Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part”, including Deep and Comprehensive Free Trade Area.

The second chapter of the Association Agreement determines core principles and aims for cooperation in the field of energy, where the key issues are integration of energy markets and regulatory approximation, considering need for provision of secure, ecologically clean and accessible energy.⁵³ According to the Agreement cooperation must include diverse areas, involving energy strategies and policy, development of competitive, transparent and effective energy market, where third persons will be given possibility to access, in non-discriminative way, networks and consumers,

⁴⁹ *Gatsserelia A.*, Energy law. See *Khubua G., Zimmerman K. (eds.)*, Legal basis for public administration, Handbook, Tbilisi, 2016, 347, area 901 (in Georgian).

⁵⁰ *Ibid.* Area 902.

⁵¹ *Samkharadze I.*, Energy Law, as academic discipline, Journal “Justice and Law”, №2 (58), 2018, 68-69 (in Georgian).

⁵² *Ibid.*

⁵³ *Kvernadze M.*, Commercial-legal aspects of electricity trade and perspectives of its development in Georgia, Master’s Thesis, TSU, 2016, 43 (in Georgian).

in line with the EU standards.⁵⁴ The agreement foresees obligatory reservation on accession of Georgia to the Energy Community.⁵⁵

Deep and Comprehensive Free Trade Area, which is the part of Association Agreement, includes obligations to ensure free trade with energy resources, as well as free transit.⁵⁶ Hence, Georgia belongs to those countries (their number is small), which have free trade regime of the EU.⁵⁷

3.1.2. Energy Community

Energy Community is an international organization working on energy policy issues.⁵⁸ This is a group mostly comprising countries (by now 9 countries) located in south-east Europe, which tends to harmonize its legislation regulating energy sector with the EU legislation, what practically means development of energy markets (electricity, as well as natural gas market) and free trade.⁵⁹

Georgia had observer status in the Energy Community from 2007. On 14 October 2016 in Sarajevo, on the 14th Meeting of Ministerial Council of the Energy Community the accession of Georgia to the Treaty establishing Energy Community was approved (accession treaty). The respective protocol entered into force on 21 April 2017 after ratification by the Parliament of Georgia.

Accession treaty, in its essence, is the timetable confined to the specific period of time (schedule), which indicates to EU directives and decisions. Energy legislative database of the EU is regulated by structure of well advanced, legally binding directives and decisions.⁶⁰

The main mission of the Energy Community is to regulate relations between signatory parties to the “Charter establishing Energy Community” and creating binding legal framework, which entails several issues, including implementation issues defined by the Energy Community charter for set of EU legal acts in the field of electricity.⁶¹

The set of EU legal acts in the field of electricity are following:

- 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;
- Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity;⁶²
- Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment;

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid. 44.

⁵⁷ *Devidze A., Mirianashvili G.*, Manual for European Union Law, Tbilisi, 2019, 118 (in Georgian).

⁵⁸ *Kvernadze M.*, Commercial-legal aspects of electricity trade and perspectives of its development in Georgia, Master’s Thesis, TSU, 2016, 43 (in Georgian).

⁵⁹ Short overview of Regulatory Impact Assessment of the Draft Law of Georgia on “Energy and Water supply”, prepared by USAID Energy Project and Ministry, 2019, 1 (in Georgian).

⁶⁰ Ibid.

⁶¹ *Kvernadze M.*, Commercial-legal aspects of electricity trade and perspectives of its development in Georgia, Master’s Thesis, TSU, 2016, 45 (in Georgian).

⁶² Repealed by Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019.

It must be noted, that the level of implementation and application of relevant legislation of Energy Community by potential candidate country tending to become EU member, is decisive in ongoing negotiations regarding the membership in the EU.⁶³ Meanwhile, signatory parties evaluate correspondence with legislation not only on the basis of transposition, but its effective implementation and application.⁶⁴

3.2. Legislation of Georgia Regulating Electricity Sector

Introduction of new legislation regulating energy sector creates numerous practical challenges for the existing framework and requires systematic approach to law reform.⁶⁵ For this purpose we must discuss what steps have been taken for approximating legislation of Georgia to the European legislation.

3.2.1. Concept for Electricity Market Model (Initial Version)

For developing competition on electricity market all relevant consumers must have possibility to select electricity supplier by themselves.⁶⁶ Attempt to establish liberal model determined by energy legislation of Europe, oriented on encouraging competition, anticartel, enforcement of market economy and information transparency, as well as to improve legislation for the purpose of harmonization with this model and to adapt to modern reality is a total novation for Georgia.⁶⁷

By the Order №1-1/605 of Minister of Economy and Sustainable development from 24 December 2018 on the “Concept for electricity market model of Georgia” (hereinafter – Concept) was approved, which was document of recommendatory nature supporting process of energy sector reform of Georgia and would have been used during elaboration of respective draft legislative, normative acts and bylaws in the process of reform.⁶⁸

Legally the concept was a viewpoint of the Ministry of Economy and Sustainable Development (hereinafter - Ministry) on general structure, organization and functioning of electricity market of Georgia and would have been used as guideline document for development and opening of organized electricity market of Georgia.

The core, guiding principles of concept included electricity sale purchase on organized electricity markets – day-ahead, intraday and balancing markets, as well as during trading over the

⁶³ Kochladze M., Gochitashvili T., Tchiabrishvili I., Maghradze N., Kvaratskhelia T., Georgia and Energy Community of Europe, Green Alternative, 2015, 18 (in Georgian).

⁶⁴ Ibid.

⁶⁵ Samkharadze I., Energy Law, as academic discipline, Journal “Justice and Law”, N2 (58), 2018, 71 (in Georgian).

⁶⁶ Kochladze M., Gochitashvili T., Tchiabrishvili I., Maghradze N., Kvaratskhelia T., Georgia and Energy Community of Europe, Green Alternative, 2015, 26 (in Georgian).

⁶⁷ Samkharadze I., Foreign aspects of Energy law of Europe and their impact on Georgian legislation, “Law Journal”, №1, 2018, 250 (in Georgian).

⁶⁸ Order №1-1/605 of Minister of Economy and Sustainable development from 24 December 2018 on the “Concept for electricity market model of Georgia”.

counter of organized electricity markets ensuring non-regulated pricing in bilateral wholesale agreements.

Article 5 of the concept determines general characteristics of organized electricity market. According to this norm participants of market will have possibility conclude agreements with the aim to trade with electricity (or instruments related thereto) on organized electricity markets, as well as in conditions of bilaterally agreed free price, however this process must be led in accordance with relevant legal provisions of Energy Community.

It is inherent, that the mentioned bilateral agreements must be concluded between wholesale purchasers and sellers, without intermediary (Over the Counter (OTC)) and final payment must be carried out among these subjects.

As it was noted, in Georgia, along with market of bilateral agreements, intraday and balancing markets must be established.⁶⁹

According to article 6 of the concept, relations between market participants and Energy Exchange must be regulated with standard terms, that will facilitate establishment of self-regulating regime in Georgia.

3.2.1.1. Day-Ahead Market

According to the concept, on the day-ahead market trading must be conducted in the hourly perspective for the 24 p.m. of the next day through placed bids. Hence, the process of sale and purchase of electricity must be regulated on the basis of single anonymous auction algorithm. The day-ahead market suggests to its participants organized, marginal pricing structure, which gives possibility to place the named bids.

3.2.1.2. Intraday Market

As stated in concept, comparing to trading on the day-ahead market, on the intraday market trading takes place during trade hours, in automatic regime, based on registration of corresponding bids in trading system. Participants of the market may be entitled to negotiate on financial agreements, which must be executed in accordance to requirements prescribed by electricity market rules.

3.2.1.3. Balancing Market

Special attention in the concept is given to the necessity of existence of the balancing market. According to the Document, balancing market and mechanism for managing unbalance must exist in the country, the aim of which is ensuring power balance. At the same time, responsibility of those market participants must be defined, whose actions result in unbalance.

⁶⁹ *Bochorishvili E., Chakhvashvili M., Overview of Electricity Market, Galt & Taggart, 2019, 11 (in Georgian).*

3.2.1.4. Financial Agreement

Financial agreement is a novelty for electric power sector of Georgia. It is not defined comprehensively in the concept, however, as mentioned above, according to the document, market participants will have right to freely negotiate on financial agreements. Issues related to financial agreements must be regulated by rules of electricity market.

3.2.1.5. Transitional Period

As stated above, electricity market model is on transitional stage. According to the concept, purpose of the reorganization of market structure is to create possibility of coexistence of regulated and deregulated sectors. For this reason, development of systems, procedures and software has started and launched in pilot regime.

According to the concept, in the regulated segment the price for electricity to be supplied to non-qualified consumers may be limited with respective marginal tariff rate, as for the competitive segment, trading will be conducted there on the basis of bilateral agreements and/or on organized electricity markets.

The government of Georgia has been entitled to renew the concept and prepare even more detailed document.⁷⁰

3.2.2. Law of Georgia on “Energy and Water Supply” (New Law)

In May 2019, the Parliament of Georgia started discussion of the draft law of Georgia on “Energy and Water supply” (new law), which mostly repeated main essence of energy legislation of Europe and was in compliance with obligations taken by Georgia after accession to Energy Community.⁷¹ Moreover, the draft law envisaged significant reform of existing energy market and aimed at determining fair prices on the electricity market, and through creating reliable and attractive environment for investors, developing competitive and transparent market.⁷²

The Parliament of Georgia adopted the law of Georgia on “Energy and Water Supply” (hereinafter – new law) on 20 December 2019. It establishes general legal framework of production, transmission, distribution, supply and trade in the electric power sector. The new law creates legal framework for adopting and implementing requirements of the Energy Community into the legislation of Georgia.⁷³ Its purpose is to ensure facilitation for creation, opening, development and integration of organized, transparent and competitive electricity market. In addition, the new law regulates free access to competitive electricity market and issues related to cross border trade with electricity.

⁷⁰ Ibid.

⁷¹ Ibid. 9.

⁷² Ibid.

⁷³ Forbes Georgia, Energy reforms 2020 (Interview with Davit Narmania), Tbilisi, 2020. See: <https://forbes.ge/news/7833/energoreformebi2020?fbclid=IwAR0PkwK7x3N8p_LHgCel8YWGMraANLw_q_WgYuk9gyVh8gT4BrRk7THPgIQ> [17.12.2020].

The reservation of paragraph 4 of article 1 of the new law is highly important for electricity trading, according to which this law creates legal framework in the legislation of Georgia for future consideration and application of requirements of the following EU legal acts:

- 1) 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;
- 2) Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003;⁷⁴
- 3) Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment.

Requirements of the named legal acts must be considered in the legislation of Georgia and must be enacted in accordance with the decisions of the Ministerial Council of Energy Community and protocol on accession of Georgia to the Treaty establishing Energy Community.

3.2.2.1. Novelty in the Energy Legislation of Georgia

Comparing to the Law of Georgia on “Electric power and natural gas” acting before enactment of the new law adopted on 20 December 2019,⁷⁵ in the new law, new actors of the electricity trade process appeared on retail, as well as wholesale market.⁷⁶ In this regard, special attention must be given to the status and functions of electricity traders on wholesale market – supplier (supplier of last alternative and supplier of universal service) and trader.

3.2.2.1.1. Trader

Trader is participant of wholesale market, who trades with electricity.⁷⁷ Trader performs its activities with the purpose to sale and purchase electricity on the territory of Georgia or outside its borders, based on the rule determined in line with electricity market rules approved by the Georgian National Energy and Water Supply Regulatory Commission (hereinafter Commission).

It must be noted that trader enjoys status of consumer,⁷⁸ in general, as well as additionally nonresidential consumer⁷⁹ status. The new law does not consider system operators⁸⁰ and small enterprises⁸¹ as traders.

⁷⁴ Repealed by Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019.

⁷⁵ Law of Georgia on “Electric Power and Natural Gas” of 27 June 1997 (Parliamentary Gazette, №33, 31 July, 1997, p.20).

⁷⁶ *Bochorishvili E., Chakhvashvili M.*, Overview of Electricity Market, Galt & Taggart, Tbilisi, 2019, 10 (in Georgian).

⁷⁷ *Ibid*, See also Article 124 paragraph 4 of the new law (in Georgian).

⁷⁸ Consumer is considered to be a person, who purchases electricity with the status of end consumer, trader or power supplier. See article 3 subparagraph “t” of the new law, Law of Georgia on “Energy and Water Supply”, 20/12/2019.

⁷⁹ Status of nonresidential consumer is enjoyed by people, who purchase electricity from nonresidential usage, including enterprises and traders. See Article 3 subparagraph “h⁴⁸” of the new law.

Activities of a trader, that does not require a license from the Commission,⁸² may be completed by small power plants and power supplier, however, in accordance with the requirements of the new law (see Article 11, paragraph 4), they are required to notify the Commission about the above decision.⁸³ The commission maintains a registry of traders. Data and contact information of these persons are published on the official website of the said body.⁸⁴

The new law does not directly define the list of sources of electricity providers for a trader. This does not apply to the case where the trader is the generator of electricity himself. It can be assumed that the trader buys electricity in an organized market of electricity.

3.2.2.1.2. Electricity Supply

An electricity supplier is a power supplier that delivers electricity⁸⁵ to an end consumer.⁸⁶ Thus, as an electricity supplier is considered as a person or entity that provides electricity to the end consumer (including the population).⁸⁷

It should be noted that, under the new law, we find the term “electricity supplier” only in the “definition of terms”, namely, in Article 3, subparagraph “h⁴”, while, in other places, the general term – “supplier” - is used. However, as the new law provides electricity and natural gas supply, given the teleological interpretation of the norm, a “supplier”, depending on the context, should be considered an electricity or natural gas supplier. From the point of view of legal technique, the purpose of defining a term in law (to give it a corresponding meaning) is to use it later in that sense, and if the term is not used in law, it is unjustified to give it any meaning.

Excluding the exceptions directly provided by the new law, the supplier provides unregulated electricity supply to the customer on the basis of a supply contract, and the supplier himself buys electricity on an organized market or on the basis of a bilateral contract.

⁸⁰ In the sector of electric power, the system operators are operator of electricity transfer system and operator of electricity distributor. See Article 3 subparagraph “h⁶⁶” of the new law.

⁸¹ Small enterprise is nonresidential consumer, where number of employees, annual turnover, accounting balance and/or other indexes do not exceed the amount prescribed by the Government of Georgia. See Article 3 subparagraph “h⁶⁰” of the new law.

⁸² See Article 11 paragraph 4 of the new law.

⁸³ With regard to the imposed obligations and respective terms see Article 102 of the new law.

⁸⁴ See Article 102 paragraph 6 of the new law.

⁸⁵ See Article 3 subparagraph “h⁴” of the new law.

⁸⁶ End-consumer is a person, who purchases electricity for his/her own use (See Article 3 subparagraph “h¹³” of the new law). Therefore, the end-consumer is considered as: 1) Qualified consumer, which is entitled to purchase electricity from the selected supplier or on the organized market, in accordance with the supply or market rules (See Article 3 subparagraph “h⁹” of the new law). All end consumers are entitled to register as qualified consumer. Moreover, the government of Georgia has the right to determine terms for considering end-consumer as qualified consumer in compulsory manner and registration terms (respective criteria and timeframes) (See Article 166 paragraphs 1 and 2 of the new law); 2) Residential consumer, which purchases electricity for own, residential use, and this does not entail commercial and professional activity (See Article 3 subparagraph “h¹⁸” of the new law).

⁸⁷ *Bochorishvili E., Chakhvashvili M., Overview of Electricity Market, Galt & Taggart, Tbilisi, 2019, 10 (in Georgian).*

3.2.2.1.3. Electricity Supply in the Form of Public Services

The objective of the new law is to provide the conditions for fulfilling the public service obligation to protect the interests of the end user in the electricity sector.⁸⁸ A public service obligation⁸⁹ is imposed on the electricity utility, considering the common economic interest, to provide services that may be related to safety (including security of supply), continuity, quality or price, environmental protection. At the same time, this obligation must not discriminate and restrict competition more than is necessary for the provision of public services.⁹⁰ The Government of Georgia has the authority to impose public service obligations as well as to determine the recipients of these services based on consultation with the relevant competent authorities, the Commission and the Secretariat of the Energy Union.⁹¹

The Commission oversees the high-quality delivery and implementation of obligation of public services.⁹² Additionally, this body is authorized to set the relevant tariff for the delivery of public service obligations.⁹³

Electricity supply, as a public service, is provided in the form of universal service as well as the last alternative form.

3.2.2.1.3.1. Universal Service

Within the framework of universal service, household consumers and small enterprises are entitled to purchase electricity from universal service provider.⁹⁴ In this case, the following question arises: why is a small enterprise authorized to receive this service, and why qualified customers are not given such opportunity directly by the new law? This view is also supported by the fact that the universal service provider ensures the supply of electricity to end-users as defined by public services and takes measures to set the most acceptable prices for them.⁹⁵

3.2.2.1.3.2. Supplying Last Alternative

Supplying last alternative is carried out when the electricity supplier terminates market activity predictably or unpredictably or recklessly breaches obligation and end consumer cannot receive electricity, provision of electricity to end consumer is ensured by supplier of last alternative. The agreement on supply between supplier of last alternative and end consumer is considered to be stipulated from the day of electricity supply to the consumer. This term does not depend on the fact, whether there was or not respective query from the consumer.

⁸⁸ See Article 2 subparagraph “f” of the new law.

⁸⁹ Obligation of public service is not considered as performance of public law authority and is only a temporary measure, See Article 3 subparagraph “h⁵⁵” of the new law.

⁹⁰ Ibid. Article 3 subparagraph “h⁵⁵”.

⁹¹ Ibid. Article 9 paragraphs 2 and 5.

⁹² Ibid. Article 29 paragraph 1 subparagraph “a.t”.

⁹³ Ibid. Article 9 paragraph 6.

⁹⁴ Ibid. Article 108 paragraph 1.

⁹⁵ Ibid. Article 108 paragraph 8 subparagraphs “a” and “d”.

It must be noted that the time for alternative supply is not unlimited. It is possible to conduct last alternative supply not more than during 3 calendar months. If the end consumer does not/cannot conclude respective agreement with the new supplier, the electricity will be cut off.

The tariff for last alternative supply is defined by the Commission in transparent and non-discriminative way, however the Commission must ensure that this tariff shall exceed the average market price of electricity supplier in normal conditions for the same category of consumers.

The supplier of last alternative is chosen by the Government of Georgia through open bidding. It is admissible that the supplier of last alternative is supplier of universal service. The government of Georgia, along with other requirements of bidding terms, determines period for authorization of supplier of last alternative, which must not exceed 5 years. If the bidding is not held, the Government of Georgia is entitled to name power supplier suggested by the Ministry without conducting bidding.

Additional issues related to the supply of last alternative is regulated by the rules of last alternative supply approved by the Commission.

3.2.2.2. Functioning of the Electricity Market

The basis for establishment of electricity markets was fast development of industrialization process, as in parallel to the dynamics of this process the speed of demand and supply of electricity was increasing.⁹⁶ Electricity market (as well as, energy market, in general) is definitely in the center of special attention, as two qualitatively different market area are intercrossing each other, which, on the one hand, participate with different level in the operational process and are based on different rules and principles (energy field and financial market).⁹⁷

3.2.2.2.1. Electricity Market

Electricity market is an organized market in accordance with the terms prescribed by the legislation for electricity and supporting service trade.

Electricity market entails organized market (electricity day-ahead market, electricity intraday market, electricity balancing market) and bilateral agreements' market.⁹⁸ Hence, market created for electricity trade implies organized market, as well as bilateral agreements' market. It must be noted, that for electricity trade electricity market is organized not by the new law, but by the rules of electricity market.⁹⁹

Bilateral agreements' market (market for so called over the counter trade) exists independently from organized market. In the Guiding document of the Energy Community the fact is underlined, that trade with bilateral agreements has important function, and hence, destruction of structures of organized market, in short perspective, shall not change the possibility to trade with bilateral

⁹⁶ Hufendiek K., in: Schwintowski H. P., Scholz F., Schuler A. (Hrsg.), *Handbuch Energierecht*, 4. Aufl., Rn. 103.

⁹⁷ Du Buisson J., Dessau C. in: Zenke I., Schäfer R., *Energiehandel in Europa*, 2012, Rn. 3.

⁹⁸ See. Article 2 subparagraph "h" of the new law.

⁹⁹ Ibid. Article 121 paragraph 1.

agreements.¹⁰⁰ The right of participants of electricity market to trade with electricity unlimitedly based on bilateral agreements, must be preserved as an alternative mechanism of organized market.¹⁰¹ This opinion is partially reinforced by the norm, envisaged in the concept approved by the Order of the Minister of Economy and Sustainable Development N1-1/65 from 24 December 2018, which, as mentioned above, strengthening of possibility of nonregulated pricing in the bilateral wholesale agreement during trading outside organized electricity market is the guiding principle of this concept.¹⁰² Therefore, electricity market encompasses organized market and market of bilateral agreement. Market of bilateral agreements functions along with the organized market or independently.

In the new law there are numerous gaps with regard to the definition of “electricity market”. In the “Definition of terms”, namely in the subparagraph “h” of article 3, “electricity market” is defined as “organized market ... and/or bilateral agreements’ market”, which, on the one hand, implies only wholesale market. In the article 120 paragraph 1 of the same law it is noted, that “electricity market entails retail and wholesale electricity markets.” Hence, the significance of “electricity market” provided in the “Definition of terms” differs from the meaning of electricity market presented in the same law.

3.2.2.2.1.1. Retail Electricity Market

On the retail electricity market respective trading transactions take place between the end consumer and supplier. Therefore, end consumer (including heavy user) purchases electricity based on the agreement concluded with the supplier selected by himself/herself/itself.¹⁰³

3.2.2.2.1.2. Wholesale Electricity Market

Comparing to trading on retail electricity market, the new law envisages how trading of electricity is managed on the wholesale electricity market. It imposes an obligation to elaborate rules for organizing this market on the Government of Georgia. For this purpose, segments of wholesale electricity market must be regulated by the concept of electricity market model approved by the Government of Georgia. The concept of electricity market model (new concept) was approved on April 16 of 2020.

As for the organization of segments of electricity organized markets, this obligation is imposed on electricity market operator, which performs this activity in accordance with the concept of electricity market model, within the framework of duties conferred by the new law and rules of electricity market.¹⁰⁴

¹⁰⁰ Energy Community, Policy Guidelines on the Promotion of Organised Electricity Markets in the Contracting Parties, PG 03 / 2015 / 24 September 2015, 7.

¹⁰¹ Ibid.

¹⁰² See Article 3 subparagraph “e” of the concept.

¹⁰³ See Article 7 of the Concept of Electricity market model (new concept).

¹⁰⁴ See Article 121 paragraph 1 of the new law.

3.2.2.2.2. Participants of Electricity Market

Power suppliers and other legal entities or natural persons have possibility to obtain status of electricity market participant with the purpose to purchase and sale electricity. Besides, for receiving this status they must satisfy terms prescribed by the new law and rules of electricity market. These rules also regulate the framework of executing rights and obligations deriving on the basis of agreement concluded between electricity market participants.

All participants of the electricity market have possibility to trade on the organized electricity market in accordance with the requirements determined by the new law and rules for electricity market.

While carrying out electricity purchasing obligation with particular purpose and in cases directly prescribed under the new law, it is possible that respective persons would be special participants of the electricity market, however their special characteristics are additionally defined by electricity market rules.

3.2.2.2.3. Opening Electricity Market

In the process of liberalization of electricity markets, considering difficulty of implementing respective directives, European countries applied diverse approaches and made particular exceptions deriving from their markets' structures.¹⁰⁵ In Georgia, by the decision of responsible persons, possibility of opening electricity market at once was not discussed. Generating objects were given possibility to trade for the price defined by the Commission on so called regulated market, the volume and size of which will decrease constantly. In future they will continue trading on day-ahead and intraday markets, as well as on the grounds of bilateral agreements.¹⁰⁶

2020 is the first year of reform in terms of the total modernization of the Georgian electricity market.¹⁰⁷ As it was mentioned, for the development of competition on electricity market all respective consumers must be given possibility to freely choose electricity supplier.¹⁰⁸ However, as it was mentioned, on the first stage electricity market will open partially, because, considering practice of the European countries, for ensuring competition full opening of the market needs at least 5 years.¹⁰⁹

¹⁰⁵ *Kochladze M., Gochitashvili T., Tchiaberashvili I., Maghradze N., Kvaratskhelia T., Georgia and the European Energy Community, Tbilisi, 2015, 24 (in Georgian).*

¹⁰⁶ Interview with Irina Milorava, Future of the energy exchange and necessity in Georgia, *Jalaghonia D.*, 2019, <<https://bm.ge/ka/article/energetikuli-birjis-momavali-da-sachiroeba-saqartveloshi-interviu-irina-miloravastan-45341>> [16.07.2020] (in Georgian).

¹⁰⁷ Interview with Davit Narmania, Energy reforms 2020, Forbes Georgia, 2020, <https://forbes.ge/news/7833/energoreformebi2020?fbclid=IwAR0PkwK7x3N8p_LHgCel8YWGMraANLw_q_WgYuk9gyVh8gT4BrRk7THPgIQ> [16.07.2020] (in Georgian).

¹⁰⁸ *Kochladze M., Gochitashvili T., Tchiabrishvili I., Maghradze N., Kvaratskhelia T., Georgia and Energy Community of Europe, Green Alternative, Tbilisi, 2015, 26 (in Georgian).*

¹⁰⁹ Interview with Davit Narmania, Energy reforms 2020, Forbes Georgia, 2020, <https://forbes.ge/news/7833/energoreformebi2020?fbclid=IwAR0PkwK7x3N8p_LHgCel8YWGMraANLw_q_WgYuk9gyVh8gT4BrRk7THPgIQ> [16.07.2020] (in Georgian).

3.2.2.2.4. Legislative Regulation of the Opening of Electricity Market

Qualified consumer is entitled to freely choose and then, in case of such desire, change electricity supplier.¹¹⁰ This norm is unconditionally the first and most important indication to the fact, that the electricity market of Georgia has moved to essentially new stage. The mentioned norm may become precondition for development of numerous events with interesting, and the same time, in some occasions, unpredictable scenario in the field of trading with electricity. If before adoption of the new law, electricity retail consumer maybe in reality did not have information on the status and functions that the electricity supplier had (at that time – distribution licensee),¹¹¹ the new law “imposes burden” exactly on the consumer to individually search and carefully select electricity supplier, which will provide proper service.

Hereby, it must be mentioned that one of the main preconditions for liberalization of the electricity market is effective implementation of the competition law. As it is known, the aim of competition law is to liberalize market in Georgia, facilitate free trade and competition.¹¹² This filed of law stipulates norms prohibiting Anticompetitive Agreements, as well as abuse of market power by dominant economic agent and concentrations restricting effective economic competition.¹¹³ For this purpose the new law envisages norm, according to which, the commission, in case on necessity, determines vital and proportional measures for ensuring proper functioning of the electricity market, in order to promote development of effective economic competition on the market.¹¹⁴

3.2.2.2.4.1.1. Importance of Competition of the Electricity Market

Effective competition¹¹⁵ results in effective distribution of resources in the society and effectiveness of production, which is unconditional guarantee for growing welfare of consumers.¹¹⁶ Obligation to ensure proper conditions for the existence and development of effective competition on the electricity market is imposed on the Commission, which supervises market for timely identification and suppression of actions restricting market, and in case of necessity conduct market research.¹¹⁷ In this regard, the term prescribed in the paragraph 2.3.2 of the Guiding Document of the

¹¹⁰ See Article 114 paragraph 1 of the new law.

¹¹¹ *Gatsserelia A.*, Energy law. See *Khubua G., Zimmerman K. (eds.)*, Legal basis for public administration, Handbook, Tbilisi, 2016, 360, area 955 (in Georgian).

¹¹² See Article 2 of the Law of Georgia “on Competition”.

¹¹³ *Menabdishvili S.*, Essence of cartel and modern tendencies of its development (in particular on the example of competition law), Dissertation, TSU, Tbilisi, 2016, 11 (in Georgian).

¹¹⁴ See Article 115 paragraph 1 of the new law.

¹¹⁵ Effective competition implies such optimal combination of market structure and market activity of economic agents, when market successfulness equals to possibly high index. See Article 2 Paragraph 1 subparagraph „a“ of the „Methodic indication of market analysis“ approved by the order N30/09-3 from 30 September 2014 of the Chairperson of the Competition Agency.

¹¹⁶ *Menabdishvili S.*, Essence of cartel and modern tendencies of its development (in particular on the example of competition law), Dissertation, TSU, Tbilisi, 2016, 12 (in Georgian).

¹¹⁷ See Article 117 paragraphs 1 and 2 of the new law.

Energy Community is noteworthy (Requirement of Market Functioning), according to which, among three strategies for reaching market liquidity the first one is creating proper stimulating environment by total suppression of factors obstructing competition, which will ensure uninterrupted participation for market participants.

3.2.2.2.4.2. Significant Impact on the Electricity Market

Enterprise participating in the electricity market is considered as having important influence, if it holds significant market share independently or by agreement with one or more enterprises. Significant is the market share, which gives economic power, to conduct commercial activity characteristic to electricity market independently from competitors, clients and/or consumers. The new law defines amount of significant market share and the rule of its determination. This authority is conferred on the Commission.

It is noteworthy that the new law does not indicate on those legal consequences, which could be related to the existence of significant influence on the electricity market and abuse of this influence. There is only mentioned, that, if the Commission identifies fact of existence of significant influence on the electricity market, this may result in applying measures for stimulating market opening.

It is obvious, purpose of the determination of respective code of conduct is always achievement of precise, legitimate result. For identifying purpose of the mentioned norm of the new law, in particular to determine, wither the abuse of influence obtained in such way by the enterprise having significant influence on the electricity market will results in respective legal responsibility, it is reasonable to call on the acting law on competition. This opinion is reinforced by article 30 of the Law of Georgia “on Competition”, according to which, the Competition agency and respective body regulating field of economy, subject to regulation (in such case Commission) are cooperating, in order to study and eliminate cases of violating competition in the regulated field of economy. As in electricity sector (subject to regulation) Commission is studying the infringement of competition legislation, it is considered as executive body in the competition sector and exactly this commission must apply provisions prohibiting abuse of dominated position, prescribed in the Law “on Competition”.

According to the Law of Georgia on “Competition”, dominating position of the economic agent, along with other factors of market power, is determined on respective market considering the market share thereof.¹¹⁸ Moreover, the law stipulates, that abuse of dominated position by one or several (in case of group domination) economic agents is inadmissible.¹¹⁹ On the one hand, purpose of prohibiting abuse of dominated position is reinforcing competitive environment, as the competition, as legal welfare protected by the legislation, is considered as dynamic process, preservation of which aims at ensuring sound competitive environment in the respective market.¹²⁰

¹¹⁸ Law of Georgia “on Competition Law”, date of adoption, Article 5 paragraph 1.

¹¹⁹ Ibid. Article 6 paragraph 1.

¹²⁰ *Adamia G.*, Perspective of private enforcement of competition law in Georgia, on the example of abuse of dominating position, “Comparative Law Journal”, M10, 2020 (in Georgian).

It must be asked, whether the term “significant influence” is recognized as synonym for “dominating position”. Considering the aim of the mentioned norm of the new law, it is clear that definition of “significant influence” implies occasions of dominating position.

Deriving from the all presented above, it is prohibited for enterprise to abuse significant influence obtained on the electricity market, and in case of this fact, it is charged with the respective responsibility.

In this regard, it must be noted that also Article 102 of the Treaty on functioning of the European Union, which prohibits abuse of dominating position having on the market.¹²¹ Besides, it is possible to impose stricter prohibitions under respective legislation for the single unilateral actions restricting competition carried out by dominating enterprises (Unilateral Behavior by Dominant Firms).¹²²

3.2.2.2.4.3. Concentration of the Electricity Market

In the new law “concentration” is not defined. However, analysis of the content of legal norms shows that in the new law “concentration” is used to express merger and/or acquisition of regulated enterprises participating in the electricity sector.

The purpose of control over merger/acquisition of enterprises is to avoid possibility for restricting competition on the market, based on creation of the Excessive Market Power as a result of enterprise growth.¹²³

For this purpose, the new law determines that such concentration, which restricts effective competition on the market of Georgia, its part or any party to the Energy Community, is inadmissible.¹²⁴ Besides, if competition creates or reinforces dominating position, it is presumed that this restricts effective competition, and obligation to prove contrary and respective burden is imposed on regulated enterprise.

The question is, whether the concentration, which does not essentially restrict effective competition, is admitted on the market. This question derives from the law of Georgia “on Competition”, which established such possibility, that, if concentration does not essentially restrict effective competition on the market of Georgia, or its biggest part or service market and its result is to obtain or reinforce dominating position, it may be considered compatible with normal competitive environment.¹²⁵ In this regard, it must be studied whether the mentioned norm of the law of Georgia “on Competition” specifies provisions determined by the new law, the new law simply excludes possibility to apply this rule of competition law on the electricity market.

As it was mentioned above, in general, the new law prohibits concentration, which restricts effective competition. Moreover, it does not exclude existence of such concentration, during which

¹²¹ *Zuber A.*, Energiekartellrecht, Kap. 3, Rn. 58.

¹²² *Ibid.*

¹²³ *Doms B.*, Energiekartellrecht, Kap. 5, Rn. 54.

¹²⁴ See Article 119 paragraph 3 of the new law.

¹²⁵ See Article 11 paragraph 4 of the Law of Georgia “on Competition”.

restriction of effective competition may be nonessential. The mentioned occasion, on the one hand, is completely compatible with competitive environment. Hence, it is presumed that in case of concentration on the electricity market the quality of restriction (essential/nonessential) must be evaluated by the rules of competition law. If the restriction of effective competition is nonessential, this fact shall not be considered as illegal action. It must be mentioned, that during discussion of the draft new law at the Parliament of Georgia, in the remarks presented by the Commission there is indication on inadmissibility of such concentration, which essentially restricts effective competition.¹²⁶

As it was said, in the energy sector concentration is strictly controlled. The new law obliges regulated enterprises, participating in the concentration, to provide notification about concentration to the Commission, beforehand, before realization of concentration, and Commission prepares conclusion on the competitive effect of prospective merger/acquisition.¹²⁷ For the merger registration of regulated enterprise, it is necessary to have positive conclusion of the Commission on the competitive effect of prospective merger/acquisition.¹²⁸

Hereby it must be mentioned, that restriction does not apply to all regulated enterprises and is applied only to those regulated enterprises participating in concentration, which have actives, individual, as well as common, or annual turnover (according to the data of financial year before concentration) that exceeds marginal amount defined by the Commission.

3.2.3. The New Concept of the Electricity Market Model

The new concept of the electricity market model (hereinafter – new concept) was elaborated by the Ministry in collaboration with the Commission.¹²⁹ It was adopted by the Decree of the Government of Georgia N246 from 16 April 2020. The new concept significantly differs from the concept, which is the document of recommendatory nature supporting reform process of the energy sector of Georgia and is limited to the vision of the Ministry on general structure, organization and functioning of the Georgian electricity market – it is only a guiding document.

The new concept, by its essence, is a document defining particular measures. Its main purpose is to outline electricity market model, which ensures creation of attractive investment environment on retail, as well as wholesale level, and also possibility of free choice for the consumer. Target (Market) Model envisages creation of equal, non-discriminatory environment for participants of free market and establishment of competitive price on the market through transparent methods.

In this regard, guiding principles of the new concept are noteworthy, which are novelty for the new electricity market of Georgia. They include trading electricity through competitive market mechanisms (bilateral agreements and/or on organized electricity markets), as well as so called self-dispatching, responsibility on unbalance and ensuring establishment and application of completely new mechanisms of public service.

¹²⁶ See Explanations for remarks on the draft law of Georgia “on Energy and Water Supply” presented by the Commission with the letter №1/01-1-4009 dated of 30 April 2019, 23 (in Georgian).

¹²⁷ See Article 119 paragraphs 1 and 2 of the new law.

¹²⁸ Ibid. Article 119 paragraph 5.

¹²⁹ Ibid. Article 123 paragraph 1.

3.2.3.1. Segments of Wholesale Market and Their Operating

The new concept defines segments of wholesale market. They are following:

- 1) Day-ahead Market;
- 2) Intraday Market;
- 3) Bilateral Agreements Market;
- 4) Balancing and Ancillary Service Market.

As it was mentioned, issues related to organization of electricity market are regulated by the rules of electricity market, and authority to organize relevant segment (segments) of organized electricity market, for the purpose of electricity trade, is conferred on the electricity market operator.¹³⁰

Electricity market operator can operate a respective segment (segments) of electricity market only on the grounds of license issued by the Commission. For operation of this segment (segments) only one license is issued, which gives to licensee exclusive right to conduct specific activity prescribed by the license on the territory of Georgia for indefinite period of time.¹³¹

Right to operate on Day-ahead and intraday electricity markets (segments of wholesale market) is conferred on operator of the stock exchange.¹³² Even though, in the new concept the electricity market operator is considered as a subject of wholesale market, and not the stock exchange operator,¹³³ from the purpose of the document, it is undisputable, that stock exchange operator and electricity market operator is the same person.

“In Georgia liberalization of electricity market was surpassed by the process of energy exchange establishment”.¹³⁴ “Energy Exchange of Georgia” was founded by direction and coordination of the Ministry, with 50-50% share participation of “Georgian State Electrosystem” and “Electricity System Commercial Operator”.¹³⁵ The stock exchange conducts development and operation of Day-ahead Market and Intraday Market through software service of consulting company “Nord Pool Consulting”.¹³⁶

¹³⁰ Ibid. Article 3 subparagraph “h¹”. Electricity market operator is the person, which is responsible for organization of certain segments of electricity market of Georgia, which is defined by the new law and bylaws adopted based on that law.

¹³¹ Ibid. Article 15 paragraphs 1 and 2.

¹³² See Article 5 paragraph 1 of the new concept.

¹³³ Ibid. Article 4 subparagraph “a”.

¹³⁴ Interview with Irina Milorava, Future of the energy exchange and necessity in Georgia, *Jalaghonia D.*, 2019, <<https://bm.ge/ka/article/energetikuli-birjis-momavali-da-sachiroeba-saqartveloshi-interviu-irina-miloravastan-45341>> [16.07.2020] (in Georgian).

¹³⁵ Web page of the Ministry of Economy and Sustainable Development, “Energy exchange has been established in Georgia”, 3/12/2019, <<http://www.economy.ge/?page=news&nw=1353&s=saqartveloshi-energetikuli-birja-dafudznda>> [16.07.2020] (in Georgian).

¹³⁶ Interview with Irina Milorava, Future of the energy exchange and necessity in Georgia, *Jalaghonia D.*, 2019, <<https://bm.ge/ka/article/energetikuli-birjis-momavali-da-sachiroeba-saqartveloshi-interviu-irina-miloravastan-45341>> [16.07.2020] (in Georgian).

3.2.3.2. Period and Stages of Transition to Target (Market) Model

Physical bilateral agreements (forward) market and electricity stock exchange (except intraday market) will be launched from 1st July 2021, however this process must be preceded by establishment-arrangement of respective systems¹³⁷ and platforms,¹³⁸ testing and launching in the simulation regime.¹³⁹ From 1st July 2022 stock exchange operator must ensure operation of the intraday market platform as well.

It is noteworthy that annex N1 of the new concept defines precise stages of market opening. Until 1st July 2026 market must be open for all consumers (except residential consumer and small enterprise).

3.2.4. Electricity Market Rules

Organization and operation of electricity market, including all procedures related to any segment of market prescribed under new concept, are regulated with market rules approved by the Commission.¹⁴⁰ These rules, along with other terms, determine products intended for trading on the electricity market, as well as types and samples of contracts to be concluded. Moreover, it is the most important, that for transition to Target (Market) Model the mentioned rules define issues related to calculation of unbalance and responsibility for unbalance.

4. Conclusion

Before adoption/after adoption of the new law and new concept the structure of trading with electricity entailed/entails many technical, commercial and legal aspects, without comprehensive analysis of which, it would be impossible to properly manage difficult and complex process related to trading with electricity. During years establishment and application of existing methods of trading in Georgia has resulted in many outcomes: positive, as well as in certain occasions – negative. Persons responsible for Energy Sector had to deal with many nonstandard circumstances, however difficulties related to trading still were increasing yearly.

Transition to qualitatively new model, related to electricity trading, is huge challenge for energy sector participants. Legislative framework changes radically in terms of technical and legal standpoint. Opening of electricity market, free formation of price on the market and determination of new periods of time for electricity trading (for instance trading on day-ahead or intraday market) will definitely become attractive for representatives not only of energy sector, but other sectors as well. Along with the development of electricity trading, development of trading with instruments closely related to

¹³⁷ System necessary for organizing of wholesale public service by JSC “Electricity System Commercial Operator” (ESCO) is implied.

¹³⁸ Day-ahead market and balancing market platforms are implied.

¹³⁹ Interview with Irina Milorava, Future of the energy exchange and necessity in Georgia, *Jalaghonia D.*, 2019, <<https://bm.ge/ka/article/energetikuli-birjis-momavali-da-sachiroeba-saqartveloshi--interviu-irina-miloravastan-/45341>> [16.07.2020] (in Georgian).

¹⁴⁰ See Article 123 paragraph 2 of the new law.

electricity market is also expected. Electricity market will be saturated with completely new and unknown products and therefore, proper management of these processes will be possible on the example of European countries having long-standing experience. It is important, that the content of new law and bylaws adopted based on the law does not cause additional questions and does not create artificial barriers obstructing free and competitive trade. Georgia has historical possibility to create legal base for making its electricity market interesting for foreign investors.

It must be mentioned, that this article is one of the first attempts to compare Georgian electricity market, after renewal of legislation, to the European market (in direction of academic research), however during superficial comparison of norms regulating mentioned markets, those active issues were relieved, which need additional research and deep/systemic analysis for establishing in practice. Hopefully, representatives of academia and practicing lawyers will pay more attention to these extremely interesting issues related to legislation regulating the sector full of challenges.

Bibliography:

1. Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, 27/07/2014, Date of publication: 11/09/14, preliminary application period: 01/09/2014, fully in force from: 01/07/2016.
2. 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”, 13/07/2009.
3. Regulation (EC) №714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity 13/07/2009 Repealed by Regulation (EU) 2019/943 of the European Parliament and of the Council 5/06/2019;
4. Directive №2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment; 18/01/2016.
5. Law of Georgia on “Energy and Water Supply”, 20/12/2019.
6. Law of Georgia “on Competition”, 08/05/2012.
7. Decree of the Government of Georgia №246 from 16 April 2020 “on approval of the Concept of the Electricity Market Model”, 16/04/2020.
8. Law of Georgia on “Electricity and natural gas”, 31/07/1997 (repealed, 20/12/2019).
9. Order №77 from 30 August 2006 on “Rules for Electricity (power) market” adopted by the Minister of Energy of Georgia, 30/08/2006.
10. Order №1-1/605 of Minister of Economy and Sustainable development from 24 December 2018 on the “Concept for electricity market model of Georgia”, 24/12/2018.
11. Order №30/09-3 from 30 September 2014 of the Chairperson of the Competition Agency „on the Methodic indication of market analysis“, 30/09/2014.
12. *Adamia G.*, Perspective of private enforcement of competition law in Georgia, on the example of abuse of dominating position, “Comparative Law Journal”, M10, 2020 (in Georgian).
13. *Bochorishvili E., Chakhvashvili M.*, Overview of Electricity Market, 2019, 10-11 (in Georgian).
14. *Du Buisson J., Dessau C.* in: *Zenke I., Schäfer R. (Hrsg.)*, Energiehandel in Europa, 2012, Rn. 2, 3.
15. *Devidze A., Mirianashvili G.*, Manual for European Union Law, Tbilisi, 2019, 118 (in Georgian).
16. *Doms B.*, Energiekartellrecht Kap. 5 Rn 54.
17. *Fried J.* in: *Schwintowski H. P., Scholz F., Schuler A. (Hrsg.)*, Handbuch Energierecht, 4. Aufl. Rn. 188, 191, 198.

18. *Gatsserelia A., Energy law. See Khubua G., Zimmerman K. (eds.), Legal basis for public administration, Handbook, Tbilisi, 2016, 347, area 901, 902. 360, area 955 (in Georgian).*
19. *Haucap J., Heimeshoff U., Energiekartellrecht, Kap. 2 Rn 4, 8, 10, 40.*
20. *Hufendiek K. in: Schwintowski H. P., Scholz F., Schuler A. (Hrsg.), Handbuch Energierecht, 4. Aufl., Rn. 81, 103, 111.*
21. *Kochladze M., Gochitashvili T., Tchiabrishvili I., Maghradze N., Kvaratskhelia T., Georgia and Energy Community of Europe, Green Alternative, 2015, 18, 24, 26 (in Georgian).*
22. *Kvernadze M., Commercial-legal aspects of electricity trade and perspectives of its development in Georgia, Master's Thesis, TSU, 2016, 43, 45 (in Georgian).*
23. *Lintzel P., Borchert J. in: Zenke I., Schäfer R. (Hrsg.), Energiehandel in Europa, 2012, Rn. 27.*
24. *Menabdishvili S., Essence of cartel and modern tendencies of its development (in particular on the example of competition law), Dissertation, TSU, Tb., 2016, 11-12 (in Georgian).*
25. *Ritzau M., Schuffelen L. in: Zenke I., Schäfer R. (Hrsg.), Energiehandel in Europa, 2012, Rn. 6, 22.*
26. *Rademaekers R., Slingenberg A., Morsy S., Review and Analysis of EU Wholesale Energy Markets (Final Report), Rotterdam, 2008, 9, 11-13.*
27. *Roggenkamp M., Redgwell C., Del Guayo I., Ronne A., Energy Law in Europe, 2nd ed., Oxford University Press, 2007, 674.*
28. *Samkharadze I., Energy Law, as academic discipline, Journal "Justice and Law", №2 (58), 2018, 69, 71 (in Georgian).*
29. *Samkharadze I., Foreign aspects of Energy law of Europe and their impact on Georgian legislation, "Law Journal", №1, 2018, 250 (in Georgian).*
30. *Nill-Theobald C., Theobald C. (Hrsg.), Grundzüge des Energiewirtschaftsrechts, 3. Auflage, 2013, 133, 134, 138.*
31. *Zuber A., Energiekartellrecht Kap. 3 Rn 1, 58,*
32. *Zenke I., Dessau C. in: Danner W., Theobald C. (Hrsg.), Werkstand: 99. EL Septemer, 2018, Rn. 3.*
33. *Short overview of Regulatory Impact Assessment of the Draft Law of Georgia on "Energy and Water supply", prepared by USAID Energy Project and Ministry, 2019, 1 (in Georgian).*
34. *Explanations for remarks on the draft law of Georgia "on Energy and Water Supply" presented by the Commission with the letter №1/01-1-4009 dated of 30 April 2019, 23 (in Georgian).*
35. *Interview with Davit Narmania, Energy reforms 2020, Forbes Georgia, 2020, <https://forbes.ge/news/7833/energoreforme2020?fbclid=IwAR0PkWk7x3N8p_LHgCel8YWGMraANLw_q_WgYuk9gyVh8gT4BrRk7THPgIQ> [16.07.2020] (in Georgian).*
36. *Interview with Irina Milorava, Future of the energy exchange and necessity in Georgia, Jalaghonia D., 2019, <<https://bm.ge/ka/article/energetikuli-birjis-momavali-da-sachiroeba-saqartveloshi--interviu-irina-miloravastan-45341>> [16.07.2020] (in Georgian).*
37. *Web page of the Ministry of Economy and Sustainable Development, "Energy exchange has been established in Georgia", 3/12/2019, <<http://www.economy.ge/?page=news&nw=1353&s=saqartveloshi-energetikuli-birja-dafudznda>> [16.07.2020] (in Georgian).*
38. *Energy Community Secretariat, Energy Governance in Georgia, Report on Compliance with the Energy Community Acquis, 2017, 10.*
39. *Energy Community, Policy Guidelines on the Promotion of Organised Electricity Markets in the Contracting Parties, PG 03 / 2015 / 24 September 2015, 7.*