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## DISCRETIONARY POWERS OF THE ENERGY REGULATOR IN UKRAINE

**Abstract.** The article analyzes the discretionary powers of the National Commission for State Regulation of Energy and Utilities in Ukraine, including in the field of setting tariffs for electricity. In order to achieve the specified goals, the task was set, namely, to investigate the essence of discretionary powers and trace the application of the norms of granting discretionary powers to the Regulator; to study their impact on the functioning of electricity market entities; to determine ways to eliminate shortcomings. The issues discussed in the article are extremely relevant for Ukraine as its energy sector is undergoing a transition from the Soviet model of state control and management to the European (market) one. On the way towards changes and transformations, the position and approaches of the Regulator play a decisive role. Legislation on energy and control of the Regulator's activities is far from perfect and contains many contradictions within its structure. Contradictions and imperfections are also manifested in the activities of the Regulator itself and its approaches to the regulatory process. On the one hand, the Regulator has a very significant and wide range of powers in the energy sector and the ability to influence energy market participants regarding the approval of tariffs, investment programs, network development programs, etc., including the possibility of noticeably worsening the position of one participant and considerably improving the position of another through the mechanisms of inspections and approvals, while on the other hand not showing real principles, a professional approach and orientation to effective regulation to reduce tariffs for socially important services of natural monopolies. Under martial law, the Regulator increasingly resorts to manual regulation of specific processes and procedures, thereby delaying changes and transformations. For example, the issue of electricity theft in our country is within the competence and responsibility area of distribution system operators, which, following current legislation, shall detect the facts of electricity theft, record them, and seek compensation for damages caused by violators. At the same time, under the European approach to settling the issue concerned, the function of the energy distribution company is only to reveal such facts, and everything else is within the jurisdiction of law enforcement agencies. In order to change approaches to dealing with energy issues, the Regulator's standpoint should be more active and professional. **Purpose.** The purpose of the article is to analyze and identify shortcomings in exercising discretionary powers by the Regulator when making decisions on setting tariffs. **Research methods.** The following scientific methods were used: methods of system analysis and generalization, formal-logical method (to define the concept of discretionary powers), comparative legal method (to compare the legislation of different countries on decision-making on tariff setting by the regulator, statistical method (to analyse statistical information on court decisions), as well as functional-legal method. **Results.** The research analyses the broad statutory regulation of the Regulator's discretion and the lack of regulatory limits and a legislative mechanism to control the implementation of the Regulator's discretionary powers in tariff setting, evidenced by numerous court cases under which the National Commission for State Regulation of Energy and Public Utilities is the defendant. The research consists of separate parts that are aimed at achieving a common goal: 2. Terminological definitions; 3. Regulatory definition of the limits of the Regulator's discretion; 4. Powers of the Regulator to set tariffs. **Conclusions.** As a result of the study, the author has urged to legislate a mechanism for the individual responsibility of the Regulator's members for their decisions. Furthermore, the regulatory decisions of the national energy regulatory authorities have to be made under the principle of sole management or individual responsibility. The principle ensures greater efficiency in decision-making because it does not require the separate standard organisational procedures that always accompany collegial decision-making.

**Key words:** energy regulator, discretionary powers, regulator's control, legality, reasonableness.

### 1. Introduction

The issues of energy tariffs and their regulation are among the main social issues of any country in the world. The Regulator's decisions in the area concerned inevitably and directly affect the living standards of citizens and business profitability. For Ukraine, the energy issue is of increased relevance. In addition to its legal significance in balancing the interests of consumers, economic agents, and the state, it also has great political, geopolitical, and fundamental importance for the existence of Ukraine as a state. Specialists in economics, security, political science, and law have dealt with energy security issues.

In 2016, Ukraine adopted Law No. 1540-VIII, "On the National Commission for State Regulation of Energy and Public Utilities." Among the regulatory challenges at that time, one was to "create the prerequisites for the sustainability of state regulatory influence on the activities of natural monopolies in the energy sector through the Regulator's decision. It would avoid abrupt fluctuations in the economic management of entities and make such activities predictable over a longer period. This is one of the main levers for the efficient functioning of the energy sector as the basic sector of Ukraine's economy, ensuring energy security and balancing the interests of consumers, energy entities, and the state", as the explanatory note to the draft law "On the National Commission for State Regulation of Energy and Public Utilities" says. The challenge of achieving a permanent state of regulatory influence, linked to the principle of legal certainty, is part of the rule of law, a necessary condition for the effective functioning of economic sectors.

Unfortunately, over the five years that the Law has had a regulatory effect on social relations, these challenges remain. This is evidenced not only by the general dissatisfaction of citizens and economic entities with the performance of the National Commission for State Regulation of Energy and Public Utilities (hereinafter referred to as the Regulator) but also registered petitions on the website of the President of Ukraine for liquidation of the Regulator and revocation of its competence (Pro likvidatsiyu rehulyatora taryfiv NKREKP; Likviduvaty antynarodnu Natsional'nu komisiyu).

The above provides rationale for further study of the statutory regulation of discretionary powers, control over the Regulator's activity and the legality and reasonableness of the decisions taken for further improvement and optimisation. Accordingly, the purpose of the article is to analyse and identify shortcomings in exercising the discretionary powers by the National Commission for State Regula-

tion of Energy and Public Utilities and decision-making on electricity market regulation in Ukraine and to put forward proposals for their elimination. In order to achieve the specified purposes, we set the objective to investigate the essence of discretionary powers and to trace, through the application of the rules granting discretionary powers to the Regulator, their impact on the functioning of electricity market entities and to identify ways to eliminate deficiencies in the current legislation.

Following the research purpose, we used the following scientific methods: methods of system analysis and generalization, formal-logical method (to define the concept of discretionary powers), comparative legal method (to compare the legislation of different countries on decision-making in tariff setting by the Regulator), statistical method (to analyse statistical information on court decisions), and functional-legal method.

Since the issue of the powers of the National Commission for State Regulation of Energy and Public Utilities has recently become relevant, scientific papers devoted to the Regulator's powers have appeared in the Ukrainian specialised literature in recent years. The lead researcher is Yulia Vashchenko, who in 2015 defended her doctoral thesis "State Regulation in the Energy Sector of Ukraine: The Administrative and Legal Aspect." (Vashchenko, 2015, pp. 22–26). Her more recent works concern the normative regulation of the general legal status of regulators not only in the energy sector but also in other areas (Vashchenko, 2010, pp. 22–26; Vashchenko, 2014, pp. 211–220) and administrative and tort relations in the energy sector (Vashchenko, 2016, pp. 13–18).

Benedyk Yana's writings deal with the requirements of international organisations and international legal provisions in the field of energy regulation (Benedyk, 2015, pp. 122–126). In her writings, the researcher focuses on the need to maintain correlation and balance between the national legal order and Ukraine's obligations arising from the Association Agreement and the Energy Community Treaty. Therefore, she argues for an appropriate level of autonomy for the Regulator by amending the Constitution of Ukraine and defining its legal status similar to that of the National Bank of Ukraine (Benedyk, 2020, pp. 62–69).

Experts also carry out studies on the effectiveness of exercising powers by the Regulator, and the results appear in the media and within relevant platforms (Grytsyshyna, 2021; Formaghey, 2020).

As for the study of discretionary powers, the following scholars have covered the gen-

eral issues of discretion in modern Ukrainian jurisprudence: Averyanov V.B., Andriyko A.F., Barabash Yu.Gh., Bytyak Yu.P., Guivan P.D., Ziller J., Kobylnik D.A., Kolomojets T.O., Kolpakov V.K., Kuybida R., Lobach O.M., Lojuk I.A., Melnik R.S., Omeljan V., Khanova N.O. and other researchers.

A number of studies were devoted to the exercise of discretionary powers by some authorities. Thus, Diana Krasowska (Krasowska, 2020) and Iryna Loyuk (Loyuk, 2016, pp. 115–120) examined the discretionary powers of the National Bank of Ukraine. Unfortunately, the issue of exercising the discretionary powers by the National Commission for State Regulation of Energy and Public Utilities regulating the electricity market remains obscure. In this regard and considering the issue's topicality, this aspect requires further scientific research and the identification of ways to eliminate the identified shortcomings.

## 2. Terminological definitions

The Great Ukrainian Law Encyclopedia defines discretionary powers as a set of rights and obligations of the subjects of public administration authorizing, based on administrative discretion, to fully or partially determine one of the alternatives of public administration, which is most acceptable in specific public relations with specific parties involved (Velyka ukrayins'ka yurydychna entsyklopediya: u 20 t., 2020, p. 303).

To interpret the term 'discretion', scholar Barabash Yu. Gh. suggests referring to the English version of 'discretion', translated as 'common sense' or 'freedom of discretion' (Barabash, 2007, p. 50). Therefore, discretion must be implemented on the basis of "common sense" (i.e., it must correspond to the objective circumstances of the case and be reasonable), and thus, its implementation must also be a manifestation of statutory framed freedom in the exercise of their powers by public authorities (Khanova, 2018, p. 155). In this context, it seems correct to suggest that the primary concept of 'discretion' is the idea that within a particular area of power, an official should act in accordance with objectives and then determine tactics and strategies to achieve them. This can be discretion in clarifying and interpreting objectives; discretion in the tactics, standards, procedures necessary to achieve certain, defined objectives (Savchyn, 2015, p. 165).

According to researchers Tseller E., Kuybida R., Melnyk R., in their report "Administrative discretion and judicial review of its implementation," discretionary powers enable a state authority, a local government authority as well as other subjects of administrative activity to make the most balanced and fair decisions dur-

ing law enforcement. But when political expediency takes precedence over legality and fairness, discretionary powers can be applied quite differently in the same situations, putting the subjects of legal relations in an unequal position. The judiciary has a particularly important role in verifying the use of discretionary powers by power entities (Tseller, Kuybida, Melnyk, 2020).

At the same time, information available on the official website of the National Commission for the State Regulation of Communications and Informatisation correctly notes that the list of corruption risks includes discretionary powers, as the ability to act at one's discretion is what creates the environment for corruption offences (Dyskretsiyni povnovazhennya, yak holovna prychnyna vynyknennya koruptsiynoho seredovyscha v publichniy sluzhbi). The reason for this is that discretion contains limits, and law is such a limit: public administration authorities "must be guided by the criteria laid down in the law and the task assigned to them and assess these limits within the limits of their powers." (Schmidt-Assmann Eberhard, 2009). Consequently, there are requirements for the law quality, which must specify both the limits of discretion and the manner they are exercised, taking into account the legitimate aim of a particular action.

However, despite corruption risks and potential threats for arbitrary action, legal provisions cannot avoid the wording to define discretion and enshrine discretionary powers. As scholars point out, the purpose of administrative discretion comes down to the fact that, firstly, discretion ensures individualisation and fairness in the resolution of certain cases, as they are considered within the specific circumstances that can be regarded by the relevant entity; secondly, such powers contribute to administrative flexibility, allowing administrative decision-makers to adapt to changing circumstances and priorities (while respecting the limits of legality and reasonableness) and promote efficiency (rationality) and responsiveness in management; thirdly, discretion allows the fullest possible consideration of the rights, freedoms and interests of the private person and especially when they are considered against the public interest (Tseller, Kuybida, Melnyk, 2020, p. 27).

## 3. Regulatory definition of the limits of the Regulator's discretion

In Ukraine, the regulatory definition of the concept of "discretionary powers" is not regulated by law but is enshrined in the decree of the Ministry of Justice of Ukraine from 24.04.2017 no. 1395/5. In accordance with the decree's provisions, discretionary powers

are the totality of rights and obligations of state and local governments, persons authorized to perform the functions of the state or local government, which allow determining at their discretion the type and content of management decisions that are taken fully or partially, or the ability to choose at their sole discretion one of several options of management decisions provided for by a regulatory legal act or a draft regulatory legal act. This definition of discretionary powers does not contain an indication of the limits of discretion due to the fixation of the whole and objectives, so it is a prerequisite for the manifestation of arbitrariness in the actions of power entities.

The definition of “discretionary powers” given in the draft Law on Administrative Procedure No. 3475 dated 14.05.2020, which was adopted by the Verkhovna Rada of Ukraine in the first reading on September 2, 2020 and is now submitted for the second reading in the Parliament, positively differs from the given definition. In this case, a power is defined as discretionary, when it allows an administrative body to act at its own discretion in deciding or choosing one of the possible solutions in accordance with the law and the purposes for which such a power has been granted. In the event that the law on administrative procedure is adopted in the wording prepared for the second reading, the range of discretionary authority of the power entities will be significantly expanded, but its limits will be clearly delineated by the law limits and the objective framework. This is important because the power entity exercises administrative discretion by weighing the law goals and basic principles against the specific powers granted by the legislature (Karabin, 2019, p. 128).

The court practice has also formed certain definitions of discretionary powers. They are, in particular, such powers, within the limits defined by law, an administrative body is able to independently (at its own discretion) choose one of several options of a particular lawful decision (Case No. 826/14033/17).

To establish the scope and limits of discretionary powers of the National Commission for State Regulation of Energy and Public Utilities as a regulator of the electricity market and their role in the overall mechanism of regulation of the electricity market in Ukraine, it is first necessary to highlight the existence of such powers and the fact of discretion.

The existence of the Regulator’s discretionary power is established by law. According to the provisions of Article 3 of the basic law, the Regulator carries out state regulation in order to achieve a balance of interests of consumers, economic entities operating in the field

of energy and public utilities, and the state, to ensure energy security, European integration of electric energy and natural gas markets of Ukraine. The regulator carries out state regulation via: 1) legal regulation in cases where the relevant powers are given to the regulator by law; 2) licensing of activities in the field of energy and utilities; 3) formation of pricing and tariff policy in the energy and utilities sectors and implementation of the relevant policy in cases where such powers are granted to the regulator by law; 4) state control and enforcement measures; 5) using other means provided by law. The same Law stipulates that the Regulator acts independently in the performance of its functions and powers, and the decisions of the Regulator are not subject to approval by public authorities, except in special cases.

It is evident that such law provisions declare a high degree of independence and autonomy of the state regulator, i.e., they provide for a wide range of discretionary powers within the subject of regulation.

The National Commission conducts state regulation, monitoring, and control over the activities of state-owned enterprises in the energy sector, in particular, regulating production, transmission and distribution activities, supply of electricity, organising the purchase and sale of electricity on the day-ahead market and the internal market, ensuring the purchase of electricity at a “green” tariff, trading activities, etc. In general, the scope of competence of the energy regulator is wide. The list of competences is available in Article 6 (3) of the Law on Electricity Market, which consists of 22 clauses.

#### 4. Powers of the Regulator to set tariffs

Undoubtedly, the main issues regulated by the National Commission involve setting tariffs for services and goods in the energy sector, approval of investment programmes of transmission system operator and distribution system operators, licensing of economic activities in the electricity sector, and control over compliance with the licensing conditions of economic activities. However, more detailed attention and analysis should be given to the regulator’s competence of tariff setting given the importance and complicated nature of implementation.

Parts 1 and 2 of Article 277 of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other, provide that the regulatory authority must be legally distinct and functionally independent from any public or private enterprise and sufficiently empowered to guarantee effective competition and efficient market

operation. The decisions and procedures used by the Regulator must be unbiased in relation to all market participants.

Under the provisions of clause 7 of part 3 of the Article 6 of the Law, the National Commission for State Regulation of Energy and Public Utilities is entitled to set tariffs for universal service provider, supplier of last resort, tariff for dispatch (operational and technological) management services, tariffs for electricity transmission services, tariffs for electricity distribution services. The Law also stipulates that electricity market tariffs regulated by the state (including connection fees) must be non-discriminatory transparent, set with regard to the integrity of the UES of Ukraine, economically justified and transparent costs of the relevant electricity market participant and an appropriate level of profit margin.

Journalism states that from 1 July 2019, the Regulator has lost its power to set electricity prices for household consumers (Larina, 2021). It is based on the fact that at that time the Cabinet of Ministers of Ukraine set a flat rate for households for electricity consumption of up to 100 kWh/year at 0.9 UAH/kWh/year and 1.68 UAH/kWh/year for consumption of more than 100 kWh/year. But it was abolished at the end of December 2020. From 2021, the fixed price was set for all consumers at 1.68 UAH/kWh and remains the same until now. This transitional price should cushion the transition to market-based pricing, which would lead to a sharp increase in the household tariff to at least 3.30 UAH/kWh. However, after the abolition of the fixed tariff for electricity supply to household consumers and the transition to market prices, the part of the tariff regulated by the NKREKP will amount to an average of 20% to 40% of the cost of 1 kilowatt of electricity. Accordingly, regulatory issues and the Regulator's discretionary power in tariff setting will not lose its relevance.

In 2019, the Accounting Chamber audited the actual legality, timeliness and completeness of management decisions related to the activities of the Regulator. According to the Report on the Audit of the Performance Efficiency of the National Commission for State Regulation of Energy and Public Utilities of the state regulation of electricity generation, transmission, distribution and supply activities, it was found that during the tariff regulation in the electricity sector during 2016–2018, the Regulator did not consider the interests and financial performance of all electricity producers (Decision of the Accounting Chamber No. 6-2 dated 19.03.2019). When processing justified tariff proposals submitted for approval by different enterprises, it was mainly reduced

for state-owned generators (nuclear, hydro and hydro) and not for private producers (TPS and CHP). For example, for NAEK Energoatom and Ukrhydroenergo, the NKREKP systematically reduced the tariff by almost a third of the level calculated by the companies. At the same time, for private producers of CHP, it was not more than 10 percent. Such artificially induced financial shortages for state-owned enterprises have resulted in a lack of funds for nuclear fuel purchases, a wage freeze, an exodus of skilled personnel, and stunted modernisation and development of production capacity. As a result of the NKREKP's pricing and tariff policies in the electricity sector, private producers operated under more favourable conditions than public sector producers.

Distribution System Operators (hereinafter referred to as DSOs), which ensure the transportation of electricity from the main power grids to consumers' meters, constitute natural monopolies that provide consumers with resource supply services critical for proper functioning. The operation of natural monopolies is regulated by a set of legislative acts, including the Law of Ukraine on Natural Monopolies, which aims to ensure the efficient operation of natural monopoly markets by balancing the interests of society, the subjects of natural monopolies and the consumers of their goods.

The efficiency of the operation of the DSOs is ensured by a specific mechanism, one of the most important components of which is the electricity distribution service tariff. It is the price of the electricity distribution service that primarily determines the income level of the operators and hence is the driving force that establishes the extent of cost reimbursement incurred after providing consumers with resource delivery services. Thus, it is the mechanism and the tariff that have a decisive influence on the functioning of the electricity distribution infrastructure.

Actions and decisions of the Regulator in setting the DSO's electricity distribution tariff are often subject to litigation in claims by the DSOs.

Therefore, in the decision of the Seventh Administrative Court of Appeal (Vinnytsia) dated June 22, 2021, in case 120/1950/20-a, the Court found violations of the Regulator in establishing economic coefficients of predicted process costs of electricity networks of voltage classes 1 and 2 for 2020 regarding the approval of economic coefficient of predicted process costs of electricity networks of voltage class 2 for Vinnytsiaoblenergo Joint Stock Company. The decision annulled the relevant decision of the Regulator that approved such coefficients and effectively obliged NKREKP to recalculate

the electricity distribution tariff in the manner prescribed by law. In decision No. 120/1950/20-a, the Court stated: “Transparency in administrative procedures is an effective safeguard against state arbitrariness. A reasoned decision demonstrates to a party that it has been heard and gives the party an opportunity to appeal against it. Only through a reasoned decision, a proper public and, in particular, judicial review of the administrative acts of the power entity can be ensured.” At the same time, the Court dismissed part of the claim, namely regarding the obligation of NKREKP to approve economic coefficients in a specific amount, determining that this is the Regulator’s discretion, and such issues should be decided at its meeting in accordance with the procedure set out in the applicable legislation.

Cases No. 480/3100/20 on the claim by Sumyoblenergo Joint Stock Company and No. 360/2013/20 on the claim by Lugansk Energy Association LLC are similar in substance to the subject matter of the claims, and the Court also sided with the claimants and partially satisfied the claims of the DSOs, recognising a violation by the Regulator when setting tariffs for electricity distribution. These cases have not been reviewed by the Supreme Court, so we can only predict the final position of the highest court in such cases.

If we take as an analogy the decision of the Supreme Court in the cases No. 826/13735/18, No. 826/7112/18, No. 640/2694/19 concerning finding unlawful the inaction of the Regulator to revise the tariff for natural gas transportation by natural gas distribution pipelines towards economically justified, in these cases the Court clearly sided with the claimants and obliged the Regulator to set economically justified tariff for natural gas distribution to claimants. In particular, the Court included in the costs the amounts specifically identified in the claim, noting: “The power of the defendant to take relevant decisions, including tariff setting, is, by its legal nature, discretionary. At the same time, justice is by nature recognised as such only if it meets the requirements of fairness and ensures effective redress (paragraph 10 of point 9 of the Decision of the Constitutional Court of Ukraine dated 30 January 2003, no. 3-rp/2003). Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (right to an effective remedy) guarantees that everyone whose rights and freedoms recognised in this Convention are violated shall have an effective legal remedy in a national authority, even if the violation has been committed by those exercising their official functions. At the same time, an effective remedy (method) must be under-

stood as one that leads to the desired results, consequences, and has the greatest effect. That is, an effective remedy must ensure restoration of the violated right and be adequate to the circumstances.” In the cases in which the DSOs were the claimants, the courts of the first and appellate instances recognised the discretionary power of the NKREKP in setting the tariff and denied part of the claim regarding the Regulator’s obligation to approve the tariff with specific coefficients, referring only to the procedure under which the NKREKP must approve such tariff. Meanwhile, in cases involving claims by entities on natural gas distribution, the Supreme Court upheld the position of the lower courts, which effectively interfered with the discretionary powers of the NKREKP and obliged the latter to approve the natural gas distribution tariff on the basis of specific monetary indicators.

Thus, the existence of a large number of court cases in which the NKREKP is a defendant, including tariff setting issues, the existence of deficiencies in legislation on the activities of the National Commission for State Regulation of Energy and Utilities indicates the risks associated with the activities of such an authority, given the current provisions of the Law, which grants the Regulator a wide range of discretionary powers.

Apart from the unresolved problem of the wide range of the Regulator’s discretionary powers that sometimes are used without any supervision, a common question of the legitimacy of the body, linked to the organisation of its activities, has also recently arisen. Thus, as noted by a member of the National Commission for State Regulation of Energy and Utilities, 2018-2019, Formaghey O., “the legality of the NKREKP members’ status in 2020 has been the subject of judicial challenge both in the Constitutional Court of Ukraine and in the District Court of Kyiv, which creates legal uncertainty and reduces the authority of the body as a whole. The body’s legitimacy has also been affected by the novelty of clause 3 of Section II of Law 394-IX, whereby the members temporarily appointed for three months have been legally transformed into permanent members with six-year terms of office, avoiding the general competitive selection procedures and thus changing the rules of the game in their favour, against the public interest of conducting a transparent selection of the Regulator members to ensure fair regulation” (Formaghey, 2020).

### 5. Conclusions

An analysis of the discretionary powers of the National Commission for State Regulation of Energy and Utilities has led to the following conclusions.

Firstly, there is the overly broad statutory regulation of the Regulator's discretion and the lack of regulatory limits.

Secondly, there is a lack of a statutory mechanism to control the exercise of the Regulator's discretionary powers in tariff setting, as evidenced by numerous court cases under which the National Commission for State Regulation of Energy and Public Utilities is the defendant.

Thirdly, there is the need to legislate a mechanism for the individual responsibility of the Regulator's members for their decisions. Such a position is also evident in the final report "Institutional Reform of Ukraine's Energy Sector in the Context of its Integration into the EU Market," where a group of international experts and consultants who, in the context of proposals for Ukraine to reform the national

energy regulatory authority, suggested that Ukraine should depoliticise the formation of key management personnel and the activities of the national energy regulatory authority to ensure the best performance its functions (Instytutsiyna reforma enerhetychnoho sektoru Ukrainy. 2016). Furthermore, the experience of most countries of the Visegrad Group shows that their national energy regulatory authorities make relevant decisions following the principle of sole management or individual responsibility. This principle ensures greater efficiency in decision-making because it does not require the separate standard organisational procedures that always accompany collegial decision-making. The principle of sole management does not create the preconditions for 'blurring' responsibility.

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## ДИСКРЕЦІЙНІ ПОВНОВАЖЕННЯ РЕГУЛЯТОРА У СФЕРІ ЕНЕРГЕТИКИ В УКРАЇНІ

**Анотація.** У статті проведено аналіз дискреційних повноважень Національної комісії, що здійснює державне регулювання у сферах енергетики та комунальних послуг України, у т.ч. у сфері встановлення тарифів на послуги в сфері електроенергетики. Для досягнення визначених цілей поставлено завдання, а саме дослідити сутність дискреційних повноважень та простежити шляхом застосування норм надання дискреційних повноважень Регулятору, вивчити їх вплив на функціонування суб'єктів ринку електричної енергії та визначити шляхи усунення недоліків. Питання, про які йде мова у статті, є вкрай актуальні для України, оскільки сфера енергетики в Україні проходить етап переходу з радянської моделі державного контролю та управління до європейської (ринкової). На цьому шляху змін та трансформацій позиція та підходи Регулятора виконують визначальну роль. Законодавство у сфері енергетики та регулювання діяльності Регулятора є в значній мірі недосконале, містить у структурі своїй значну частину протиріч. Протиріччя та недосконалість також проявляється у діяльності самого регулятора та його підходів до процесу регулювання. З одного боку, регулятор у сфері енергетики має дуже значне та широке коло повноважень та можливість впливу на учасників ринків енергетики щодо затвердження тарифів, інвестиційних програм, програм розвитку мереж тощо, у т.ч. можливість значно погіршити через механізми перевірок та погоджень становище одного учасника та значно покращити становище іншого, при цьому, з іншого боку, не проявляючи дійсної принциповості, професійного підходу та орієнтації на ефективне регулювання з метою зниження тарифів на соціально важливі послуги у сферах природних монополій. В умовах воєнного стану Регулятор все більше вдається до ручного регулювання тих чи інших процесів та процедур, затягуючи тим часом процеси змін та трансформацій. Для прикладу, процеси крадіжки електричної енергії у нашій країні є компетенцією та задачами операторів системи розподілу, які чинним законодавством зобов'язані виявляти факти розкрадання електричної енергії, фіксувати їх та добиватися компенсації порушниками завданих збитків. При цьому у європейському підході вирішення цього питання, функція енергорозподіляючої компанії полягає тільки у виявленні таких фактів, все інше – це питання правоохоронних органів. Для зміни підходів у вирішенні тих чи інших питань у сфері енергетики позиція Регулятора має бути більш активна та професійна. **Мета.** Метою статті є аналіз і виявлення недоліків у процесі реалізації Регулятором дискреційних повноважень під час прийняття рішень щодо встановлення тарифів. **Методи дослідження.** У статті використовувалися такі наукові методи: методи системного аналізу та узагальнення, формально-логічний метод (для встановлення сутності поняття дискреційних повноважень), порівняльно-правовий метод (для порівняння законодавства різних країн щодо прийняття рішень регулятором у сфера тарифоутворення), статистичний метод (для аналізу статистичної інформації щодо судових рішень), а також функціонально-правовий метод. **Результати.** У статті проведений аналіз широкого законодавчого регулювання дискреційних повноважень Регулятора та відсутність нормативних обмежень, а також відсутність нормативного механізму контролю за виконанням дискреційних повноважень Регулятора при тарифоутворенні, про що свідчить низка судових справ, у яких відповідачем є НКРЕКП. Дослідження складається з окремих частин, які спрямовані на досягнення спільної мети: Термінологічні визначення; Нормативно-правове визначення меж дискреційних повноважень Регулятора; Повноваження Регулятора щодо встановлення тарифів. **Висновки.** У результаті дослідження автор призвів до необхідності законодавчого закріплення механізму індивідуальної відповідальності членів Регулятора за свої рішення. Крім того, регуляторні рішення національних органів регулювання енергетики повинні прийматися на основі принципу одноосібного управління або індивідуальної відповідальності. Цей принцип забезпечує більшу оперативність у прийнятті рішень, оскільки не вимагає окремих стандартних організаційних процедур, які завжди супроводжують колегіальне прийняття рішень.

**Ключові слова:** Регулятор у сфері енергетики, дискреційні повноваження, контроль регулятора, законність, обгрунтованість.

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