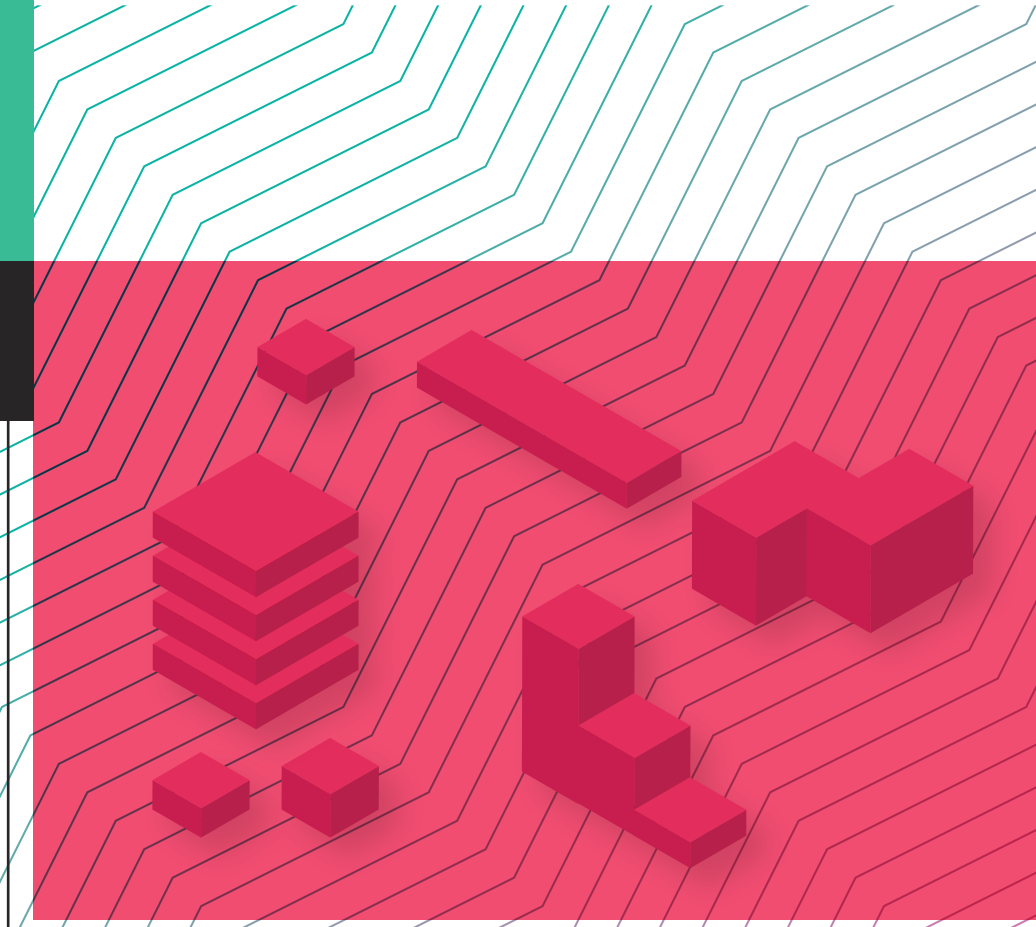

An Anti-corruption Assessment of the Legislation - a Report on the Energy Law

Darko Avramovski

ПЛАТФОРМА
на граѓански организации
за борба против корупцијата

FOUNDATION ФОНДАЦИЈА
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Introduction

The reforms focused on achieving full integration of North Macedonia into the European Union include the harmonization of the national energy legislation to the EU standards and regulations in order to harmonize, liberalize and link the energy market to that of the European countries. In this way the EU strives to avoid energy market monopoly, reinforce its competitiveness, improve energy market access, and thus reinforce consumer protection, as well as improve the efficiency and sustainability of both energy production and distribution, which would at the same time contribute to lowering their market price. Having in mind the strategic significance of this sector, and in line with the commitment that was outlined, the Energy Community was established as an organization that aims to improve the cooperation between the EU and other countries and further expand the energy market, but also one that monitors the progress of the Southeast Europe countries towards meeting the foreseen criteria and harmonizing national legislation to that of the EU.

As one of the activities required for harmonizing the domestic laws to those of the European Union, in cooperation with the Energy Community, in order to provide high-quality energy supply, an efficient, competitive and sustainable energy sector, production maintenance and development, energy transfer and distribution, lowering of the risk of conflict of interest, as well as to stimulate the use of energy from renewable sources in order to protect the environment, in May 2018 North Macedonia enacted the Energy Law, which was amended a year later, in May 2019. This Law, inter alia, in line with the decisions of the Energy Community, where the Republic of North Macedonia is a member, incorporates the following in the domestic legislation[1]:

• Directive 2009/72/EC concerning common rules for the internal market in electricity;

• Regulation 714/2009 on conditions for access to the network for cross-border exchanges in electricity;

• Directive 2009/73/EC concerning common rules for the internal market in natural gas;

• Regulation 715/2009 on conditions for access to the natural gas transmission networks;

• Directive 2005/89/EC concerning measures to safeguard security of electricity supply and infrastructure investment;

• Directive 2004/67/EC concerning measures to safeguard security of natural gas supply;

• Directive 2009/28/EC on the promotion of the use of energy from renewable sources as well as

[1] Decision of the Ministerial Council of the Energy Community no. D/2011/02/MC-EnC, available at: https://energy-community.org/legal/decisions.html

• Regulation 543/2013 on submission and publication of data in electricity markets.

Consequently, an exceptionally broad field is regulated by the Law, including provisions on the goals and methods for implementing energy policy and construction of energy facilities, the status and competences of the Energy and Water Services Regulatory Commission, the markets for electricity, natural gas, heat energy, as well as crude oil, oil derivatives and transport fuels, the obligations to provide a public service on the electricity, natural gas and heat energy markets, the rights and obligations of the energy consumers and the users of the energy systems, such as the manner and conditions for encouraging the use of renewable energy sources and so on. Still, despite the fact that the Energy Law comprises many segments from the energy sector, it does not codify all provisions in this sector; the more significant ones include the provisions on energy efficiency, regulated by the Law on Energy Efficiency (Official Journal of the Republic of Macedonia no. 32/2020), as well as the provisions related to biofuels, which are encapsulated in the old Energy Law (Official Journal of the Republic of Macedonia no. 16/11, 136/11, 79/13, 164/13, 41/14, 151/14, 33/15, 192/15, 215/15, 6/16, 53/16 and 189/16), which, in line with Article 239 of the Energy Law (Official Journal of the Republic of Macedonia no. 96/2018 и 96/2019) are still in force. In addition, the Law passes on a large number of competences to the Government, the Ministry of Economy, the Ministry of Transport and Communications and the Regulatory Commission, which should regulate the implementation of the Law in greater detail using bylaws (decrees, rulebooks etc.); some of the more significant ones, which are part of this analysis, are the Decree on the measures for support of electricity production from sustainable sources and its amendment and supplement, the Rulebook for renewable energy sources and its amendment and supplement, as well as the Rulebook for preferential producers that use a feed-in tariff.

The methodology of the State Commission for Prevention of Corruption[2], for anti-corruption screening of the legislation, the comparative analysis and methodology of the Regional Cooperation Council of Southeast Europe, as well as the Regional Anti-corruption Initiative were used for the needs of the analysis[3].

[2] https://www.dksk.mk/fileadmin/PDF/Metodologija_za_antikorupciska_proverka_na_legislativata.pdf
[3] http://rai-see.org/wp-content/uploads/2015/06/Comparative_Study-Methodology_on_Anti-corruption_Assessment_of_Laws.pdf

Detected risks of corruption and conflict of interest in the Energy Law

The Energy Law primarily abides by the rules of European lawmaking, translating and transposing the provisions stemming from the EU directives and regulation, and thus it has established a sound framework for regulating the energy sector. Still, bearing in mind the dynamic nature of the energy sector, which frequently requires a swift response, as well as the sheer scope of the matter encapsulated in this Law, which, if regulated in detail, would contribute to a law which is very comprehensive and which boasts great detail, the detailed regulation of the energy sector in line with the Energy Law is done using bylaws, mostly by decrees and rulebooks that are usually adopted by the Government, the Ministry of Economy and the Regulatory Commission for energy. Bearing in mind the nature of the bylaws, the degree of publicity and participation of the stakeholders in their adoption, the discretionary powers of the competent institution or person in the institution, as well as the preventive mechanisms available for controlling the bylaws, the greatest risks of corruption and conflict of interest can be found precisely in these bylaws that regulate the matter encapsulated by the Energy Law in greater detail.

First of all, it must be pointed out that the very Law is a sound framework for delineating ownership, but also for avoiding the other risks related to corruption and conflict of interest, with a major exception, namely the discord between the provisions in Article 22 of the Energy Law and those of Article 8 of the Law on Prevention of Corruption and Conflict of Interest, in terms of how the concept of "people closely related to the speaker" is defined. Thus, in Article 22 of the Energy Law, it is prescribed that "the president, a member or an employee of the professional service of the Energy Regulatory Commission, as well as First of all, it must be pointed out that the very Law is a sound framework for delineating ownership, but also for avoiding the other risks related to corruption and conflict of interest, with a major exception, namely the discord between the provisions in Article 22 of the Energy Law and those of Article 8 of the Law on Prevention of Corruption and Conflict of Interest, in terms of how the concept of "people closely related to the speaker" is defined. Thus, in Article 22 of the Energy Law, it is prescribed that "the president, a member or an employee of the professional service of the Energy Regulatory Commission, as well as *their spouse or a lineal kin up to once removed,* cannot possess or apply for a license for carrying out an energy-related activity, to be a shareholder, a partner or member of the bodies for management and supervision of persons who possess or apply for a license for carrying out an energy-related activity". It is obvious that the specific Article does not abide by the established definitions for people closely related to the speaker, and so this Article encompasses only the spouse and a lineal kin up to once removed, which leaves out unmarried couples, lineal kin and collateral kin up to four times removed, relatives by marriage up to twice removed, as well as every physical or legal entity that shares financial interest with the official. In this way, the Energy Law in practice fails to meet the criteria for preventing corruption and conflict of interest when it comes to appropriate delineation of the interests of the members or employees of the Regulatory Commission and any person that in any way participates in the energy market. Thus, the Law in practice gives plenty of leeway for situations in which the president, a member or an employee of the Regulatory Commission can be in a relationship with a person who possesses or has applied for a license for carrying out any energy-related activity or a member of the management bodies of a legal entity who possesses or has applied for a license, and in violation of Article 8 of the Law on Prevention of Corruption and Conflict of Interest.

It is important to mention that this Article in fact poses the greatest specific risk of corruption or conflict of interest that can be seen in the legal provisions themselves, which is the result of the unsuitable wording of the text of the Law. This situation mainly stems from the fact that the Law merely establishes the framework in which the energy sector is regulated in greater detail using bylaws. In this context, as it was already mentioned, because of the very nature of the bylaws and the procedures for their adoption, the elbowroom left for regulation of the energy sector by means of bylaws inevitably contributes towards higher risk of corruption or conflict of interest. A specific field that attracts special attention in this context is precisely the regulation of electricity production from renewable sources, regulated by Articles 172-194 from the Energy Law. In line with these legal provisions, the production of electricity from renewable sources is regulated by bylaws, and here are some of the more significant ones:

• The Decree on the measures for support of production of electricity from renewable energy sources and its amendments and supplements enacted by the Government of the Republic of North Macedonia that regulate the types of technology and the conditions in which the power plant should work so that it qualifies for state support, the type of support, as well as the conditions, methods and their length as well as

• The Rulebook for renewable energy sources and its amendments and supplements enacted by the Ministry of Economy, that regulate the types of power plants that are considered to be power plants that use renewable energy sources, the conditions and the method of selling the extra electricity, the methods for issuing, transferring and revoking the guarantees for the origin of the energy etc.

In line with Articles 186 and 187 of the Law, the producers of electricity from renewable sources are considered preferential producers of electricity, and so they are entitled to state support, which is manifested mainly through a feed-in tariff for buying the produced energy, that is by using a more favorable price for the sale of this type of energy. In line with Article 185, the Government prescribes the measures for support of preferential producers, the types of power plants that are considered renewable energy sources, as well as the conditions and the methods that are to be used for acquiring the status of a preferential producer and benefitting from the measures. Thus, pursuant to the Decree on support measures for electricity production from renewable energy sources, the power plants that use renewable energy sources exclusively and that are entitled to a feed-in tariff include hydroelectric power plants with installed capacity of up to 10 megawatts (small hydroelectric power plants), wind power plants with installed capacity of up to 50 megawatts, biomass or biogas-fired thermal power stations with a capacity of up to 1 megawatt, while the feed-in tariff may be used for 20 years in case of hydroelectric power plants and wind power plants, and 15 years for biomass or biogas-fired thermal power stations. This is closely linked to the Rulebook on preferential producers that use a feed-in tariff, issued by the Regulatory Commission, which regulates the procedure for acquiring the status of a preferential producer and acquiring the right to use a feed-in tariff, as well as to the Rulebook on renewable energy sources, issued by the Ministry of Economy, that regulates the method for buying the energy produced from renewable sources, that is the Rulebook that, in line with the Energy Law, prioritizes the buying of electricity produced from renewable sources. This begs the question as to why these provisions are dispersed in 3 bylaws instead of being an integral part of the law, bearing in mind their significance for

production of electricity from renewable sources. The lack of a systematic organization and clarity in the presentation of these provisions, because of the fact that they are regulated by different bylaws, coupled with the fact that the potential conflict of interest between the members of the Regulatory Commission and people close to them is not fully resolved, as we have already mentioned, inevitably increases the risk of corruption or conflict of interest, especially when producers of energy from renewable sources benefit from the support measures.

An additional risk factor is the relatively long, 20-year period for using the feed-in tariff, especially in the case of small hydroelectric power plants and wind power plants. Bearing in mind the fact that the main argument for the need of regulating part of the matter using bylaws is precisely achieving flexibility when taking action due to the frequent changes in the situation and development of the electricity production technology, a 20-year period may be unprofitable in the long term. This is precisely a result of advancements in technology that may pave the way for cheaper electricity production, which would in turn mean that the feed-in tariff used to buy it may, in due course, become expensive and not beneficial for the country. This is compounded by the fact that the support measures are, inter alia, aimed at quickening the advancements of the technologies for electricity production from renewable sources, as well as to promoting greater exploitation of energy from those sources, which means that it is necessary that the support measures match the development in technology.

Bearing in mind that the public debate on the real effect of small hydroelectric power plants on the environment has been raging for some time now, this analysis showed that the Energy Law and the bylaws related to it do not set clear criteria for protection of the environment that must be met by the producers of electricity from renewable sources. Without delving into the question of the environmental justification for constructing certain types of plants for electricity production, the absence of clear provisions for the criteria and obligations for environmental protection that must be met poses a separate risk of corruption. Despite the fact that this legal gap may contribute to endangering the environment, it may also contribute to situations where different procedures are being used and different criteria are being set in different cases without any justification, but it also has direct influence on the potential of misuse and corruption. Even though in practice it is really difficult to set clear-cut environmental protection criteria in advance, still, a complete lack of predictability in terms of the requirements that the power plants using renewable sources should meet in the sense of minimal environmental protection standards and monitoring of their long-term effect on the environment must not be allowed.

[4] http://ombudsman.mk/MK/predmetno_rabotenje/godishni_izveshtai.aspx

Conclusions and recommendations

The main conclusions in terms of the anti-corruption screening of the Energy Law and the related bylaws relate specifically to the broad competences of the executive government and the Regulatory Commission, which, by using bylaws, are competent to regulate in greater detail the authorization procedures for construction of energy power plants, the granting of the status of preferential producer from renewable energy sources, as well as the support measures that these producers are entitled to, their duration, type and scale. An additional risk that compounds the issue is precisely the dispersion of a number of related provisions throughout the related regulations, including 3 laws and tens of bylaws, including a Government decree and a plethora of rulebooks issued by the line ministries and the Regulatory Commission. In this context, it is important to make efforts in order to ensure that all regulations that pertain to energy are appropriately codified in a single act, or that the separate provisions are sectioned and grouped suitably into several different laws.

Even though the Law itself establishes a sound framework for regulating the energy sector and provides guarantees for avoiding corruption and conflict of interest, still, minor, but not insignificant deviations from the standards for regulating conflict of interest in the provisions of the Law have been detected. In this context comes the first recommendation, that relates to Article 22 of the Energy Law. In order to ensure full harmonization with the provisions of the Law on Prevention of Corruption and Conflict of Interest, paragraph 1 of the Article, which lists the persons close to the president, members and the employees in the professional service of the Regulatory Commission, should be expanded in order to include unmarried couples, lineal kin and collateral kin up to four times removed, relatives by marriage up to twice removed, as well as any physical or legal entity that shares financial interest with the president, the members and the employees of the Regulatory Commission. This would bolster the guarantee mechanisms that should contribute to minimizing corruption and conflict of interest by obstructing malfeasance of the members or employees of the Regulatory Commission and by impeding any opportunity for people close to them to acquire illegal gains.

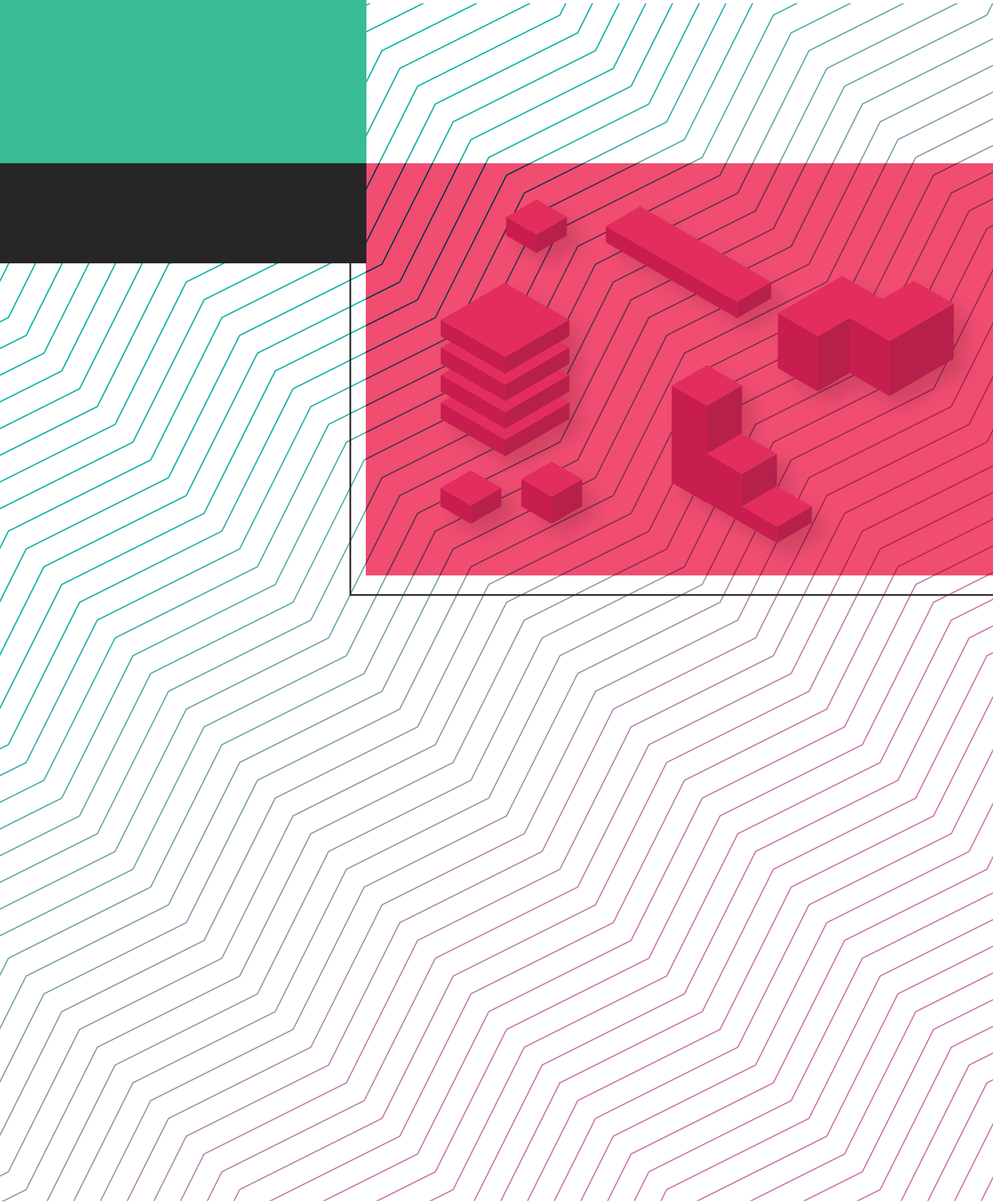
As it has already been stressed, the considerable leeway left for regulating this matter by means of bylaws inevitably implies an increased risk of corruption and conflict of interest, mostly due to the different degree of control, transparency and inclusivity when passing these acts. This is especially evident when it comes to the regulation of the production of electricity from renewable sources, which, apart from the basic provisions that establish the general framework, is in practice fully done using a few bylaws. Even though it must be acknowledged that the energy sector is specific, dynamic and fluctuating, it is inevitable that it is partly regulated using bylaws, which would ensure a timely response to any needs that arise from any change in the society or in the sector. Still, bylaws represent generally stable, long-term solutions when it comes to regulating the

production of energy from renewable sources, so the reason why these provisions are in a bylaw, instead of the Law itself, remains unclear. So, in this context, we would recommend either to integrate most of the provisions of the bylaws in the Energy Law itself, or to enact a new, separate Law on Production of Energy from Renewable Sources. This would bolster the competences and the influence of the Assembly, the highest house of representatives of the people, on the energy sector, and especially on the production of energy from renewable sources. In addition, if the provisions were regulated by law, it would not be simple for the executive government to amend them easily and by whim, and a greater degree of codification of the provisions would be ensured, which would naturally influence the legal predictability. This in turn would reduce the risks of corruption due to different interpretations of the provisions, and it would finally make sure that the stakeholders are more involved in enacting and amending the provisions for production of energy from renewable sources.

Apart from this, there is also a need of full revision of the feed-in tariffs that are awarded to producers of electricity from renewable sources, which are in a way a state-subsidized price for the purchase of this energy. The fact that these feed-in tariffs are awarded on long, 20-year periods, may be counterproductive for the state, and quite beneficial for the person that produces energy from renewable sources, and, more to the point of this analysis, this heightens the corruption risks in the procedures for awarding such tariffs. If this is considered in the context of the fact that all of the persons close to the members and employees of the Regulatory Commission that are entitled to a feed-in tariff are not clearly defined, the risk of corruption or conflict of interest becomes a real danger.

In this context, the corruption risk is exacerbated even further due to the absence of standards and criteria for the protection of the environment in any of the acts that refer to the procedure for acquiring the status of a preferential producer entitled to support measures. Furthermore, if we consider that the renewable energy sources are improved and promoted precisely with the purpose to protect the environment and to thwart unwanted effects on the environment, the absence of at least the minimum such standards is an issue that must be addressed as soon as possible. Thus, we would still recommend the adoption of a special law on renewable energy sources, that would establish the rules of the procedures for acquiring such a status in greater detail, as well as the criteria and the minimal standards that must be met in order to preserve the environment. This would boost legal predictability and security, which in turn would inevitably reduce the risks of corruption and conflict of interest. An alternative solution would be to integrate more detailed rules and standards for measuring the effects of the power plants on the environment, as well as the obligations and competences they have for its preservation.

Finally, it is necessary to reinforce the Assembly control of the Regulatory Commission, as well as the control over the decisions made at the level of bylaws, especially in case there is no decision to enact a separate law for regulating the production of electricity from renewable sources. This would reduce the risk of arbitrariness by the executive government when prescribing the conditions and methods for establishing eligibility for certain support measures, and it would at the same time boost the competences and the influence of the Assembly on the energy sector as an exceptionally significant strategic sector for the entire country and all of its citizens.



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