

## ENERGY SECURITY IN A LEGAL CONTEXT

### SOME REMARKS IN THE LIGHT OF COMMUNITY LAW AND TREATY ESTABLISHING THE ENERGY COMMUNITY IN PARTICULAR

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#### 1. INTRODUCTION

The process of creating an integrated market in electricity among Member States has nearly reached completion<sup>1</sup>. The internal energy market should be subject to, among other things, common minimum standards respected by all Member States, and there should be common objectives with respect to “three pillars of the energy in the European Union”, i.e. security of supply, environmental protection and equivalent levels of competition<sup>2</sup>.

At the same time, the notion of “energy security”, understood in general as adequacy of energy supply at a reasonable price<sup>3</sup>, is becoming an issue of increasing importance to the European Union. What is more, Member States view energy security not only in an economic or political context but also perceive it from a legal perspective. The problem is that the multi-faceted nature of energy security, involving its legal (e.g. definitions and regulations), political (e.g. dependence of the European Union on supplies from outside sources) and technical (e.g. physical availability of energy, satisfactory operation of the grid) aspects, makes it very difficult to provide a definition of energy security that is accepted by all<sup>4</sup>.

The main aim of this paper is to analyse whether the notion of “energy security” is condemned to be only a carrier notion in political discussions and empty words in legal texts, or whether it truly deserves to be one of the pillars of energy policy in the European Union. A good illustration of this issue seems to be the Treaty establishing the Energy Community concluded on 25 October 2005 between the European Community, on the one hand, and several countries of South East Europe, including Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Republic of Macedonia, Montenegro, Romania and Serbia, as well as the United Nations Interim Administration Mission in Kosovo (as Kosovo representative under resolution of the Security Council no. 1244), on the other (hereinafter referred to as the “Energy Treaty”). It is because one of the main tasks of the Energy Treaty is to organise relations between the parties in order to enhance the security of supply of the single regulatory space. However, the Energy Treaty does not contain any operational measures in this respect. Furthermore, although the signatory states undertook to adopt in prescribed terms certain EU

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<sup>1</sup> See T. Skoczny, *Energetyka* [in:] J. Barcz (ed.) *Prawo Unii Europejskiej. Prawo materialne i polityki*, Warsaw 2005, p. II-712.

<sup>2</sup> See: E. D. Cross, *EU Energy Law. The Treaty Framework* [in:] M. Roggenkamp, C. Redgwell, I. del Guayo, A. Ronne (ed.), *Energy Law in Europe. National, EU and International Regulation*, Oxford 2007, p. 228.

<sup>3</sup> See: S. S. Haghighi, *Energy Security and the Division of Competences between the European Community and its Member States*, “European Law Journal” 2008, vol. 14, no. 4, p. 461.

<sup>4</sup> *Ibidem*.

single market regulations, called the “*acquis communautaire* on energy”, these regulations did not concern, for instance, any document, with respect to the development of energy security.

Before the issue of energy security in the Energy Treaty is addressed, it seems necessary to review the notion of "energy security" in the Community law, relationship between energy security and energy market liberalisation and, finally, legislation on the energy security in the Community law.

## **2. “ENERGY SECURITY” IN THE COMMUNITY LAW**

### **2.1. Notion**

There are many definitions of “energy security”, however, only few of them are legal ones. One of such legal definitions, although very general, was proposed in the Directive 2003/54/EC of the European Parliament and of the Council of 26 July 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (hereinafter referred to as the “Directive 2003/54”). In accordance with Article 2 point 28 of this Directive 2003/54, (energy) “security” means security of supply and provision of electricity, and technical safety. In order to define notion of “security of supply” we have to refer to Article 2 (b) of 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 (hereinafter referred to as the “Directive 2005/89”) which defines “security of electricity supply” as the ability of an electricity system to supply final customers with electricity. At this stage, it should be noted that the Energy Treaty also uses notion of “security of supply”.

“Security of supply” and “energy security” cannot be treated as synonyms – the latter seems to be broader one. However, even if we assume that “security of supply” is part of “energy security” only, we have to admit that it constitutes the most important part of “energy security”. Therefore, the presented understanding of “energy security” which defines it as “adequacy of energy supply at a reasonable price” constitutes a definition of “energy security” in a narrow sense. Of course, one should bear in mind that many factors may constitute the notion of “adequacy of energy supply”: diversification of sources, development of energy renewable sources and consolidation of an energy industry are only a few examples. Similarly, many other elements may constitute the notion of “energy security”, including for instance network security. In such case, one will deal with definition of “energy security” in a wide sense.

Also, definitions proposed by representatives of legal doctrine or appearing in non-binding documents of international organizations or institutions seem to correspond to narrow understanding of energy security. For instance, in 2000 the United Nations Development Programme defined energy security as “the continuous availability of energy in varied forms, in sufficient quantities, and at reasonable prices”<sup>5</sup>.

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<sup>5</sup> See: *World Energy Assessment: Energy and the Challenge of Sustainability*, New York 2000, p. 113.

## 2.2. Energy security and the energy market liberalisation

One authors state that the question of energy security (security of supply) arises in the context of market liberalisation, consequently, it is not clear that security of supply was truly guaranteed in the past<sup>6</sup>, whilst others prove that the issue of energy security was dealt since the Funding Treaties, i.e. long time before the process of market liberalisation has started<sup>7</sup>. Undoubtedly, integration of national energy markets into internal energy market could substantially increase energy security of Member States. Therefore, one cannot be surprised that energy security considerations have risen to the forefront of the European Union agenda at the same time the debate over energy market liberalisation has increased<sup>8</sup>.

Directive 2003/54 points out “security of supply” as one of its aims. Moreover, it contains some measures that are aimed at ensuring Member States’ energy security.

- i. Firstly, in the interest of security of supply, the supply/demand balance in individual Member States should be monitored. The construction and maintenance of the necessary network infrastructure, including interconnection capacity, should contribute to ensuring a stable electricity supply. In accordance with Directive 2003/54, the maintenance and construction of the necessary network infrastructure, including interconnection capacity and decentralised electricity generation, are important elements in ensuring a stable electricity supply (see Article 4). It should be underlined that the European Commission is also obliged to monitor the energy market. The European Commission must submit an overall progress report to the European Parliament and the Council on an annual basis. The report must cover among other things an examination of issues relating to system capacity levels and security of supply of electricity in the European Community, and in particular the existing and projected balance between demand and supply, taking into account the physical capacity for exchanges between areas (see Article 27).
- ii. Secondly, Member States shall ensure that technical safety criteria are defined and that technical rules establishing the minimum technical design and operational requirements for the connection to the system of generating installations, distribution systems, directly connected consumers' equipment, interconnector circuits and direct lines are developed and made public. These technical rules shall ensure the interoperability of systems and shall be objective and non discriminatory (see Article 5).
- iii. Thirdly, Member States shall ensure the possibility, in the interests of security of supply, of providing for new capacity or energy efficiency/demand-side management measures through a tendering procedure or any procedure equivalent in terms of transparency and non-discrimination, on the basis of published criteria. However, one should remember that these procedures can only be launched if on the basis of the authorisation procedure the generating capacity being built or the energy efficiency/demand-side management measures be-

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<sup>6</sup> See: G. Luciani, *Security of Supply for Natural Gas markets. What is it and What is it not?*, available on the website : <http://www.feem.it/Feem/Pub/Publications/WPapers/default.htm>), pp. 2-3.

<sup>7</sup> See: S. S. Haghighi, *Energy Security...*, pp. 466-468.

<sup>8</sup> P. Belkin, *The European Union's Energy Security Challenges*, “CRS Report for Congress”, Washington 2008, p. 24.

ing taken are not sufficient to ensure security of supply (see Article 7). Transmission System Operator (hereinafter referred to as “TSO”) is an entity that contributes to security of supply through adequate transmission capacity and system reliability. Moreover, TSO shall, within its competence, be responsible for dispatching the generating installations in its area and for determining the use of interconnectors with other systems. However, a Member State may, for reasons of security of supply, direct that priority be given to the dispatch of generating installations using indigenous primary energy fuel sources, to an extent not exceeding in any calendar year 15 % of the overall primary energy necessary to produce the electricity consumed in the Member State concerned (see Article 11).

In September 2007 the European Commission presented a proposal of the directive amending Directive 2003/54<sup>9</sup>. Presented draft emphasises that the safeguarding of energy supply is an essential element of public security and is therefore inherently connected to the efficient functioning of the EU electricity market. However, in principle, it does not introduce new measures aimed at ensuring of supply security. It only points out that amongst the regulatory authority’s duties shall be the following: monitoring network security and reliability, and reviewing network security and reliability rules, as well as monitoring investment in generation capacities in relation to security of supply (which particularises monitoring undertakings of the Member States on the ground of the Directive 2003/54).

### **2.3. Energy security and the Directive 2005/89**

Main frameworks within which Member States are to define transparent, stable and non-discriminatory policies on the security of electricity supply, compatible with the requirements of a competitive internal market for electricity are established in Directive 2005/89. This Directive establishes measures aimed at safeguarding the security of electricity supply so as to ensure the proper functioning of the internal market for electricity and to ensure: (i) an adequate level of generation capacity; (ii) an adequate balance between supply and demand; and (iii) an appropriate level of interconnection between Member States for the development of internal markets.

Directive 2005/89 also defines “operational network security” which, as mentioned above, could be more widely defined in terms of “energy security”. Thus, “operation network security” is the continuous operation of the transmission and, where appropriate, the distribution network under foreseeable circumstances. Member States or the competent authorities shall ensure that transmission system operators set the minimum operational rules and obligations on network security (see Article 2 (c)).

Member States must take appropriate measures to maintain a balance between the demand for electricity and the availability of generation capacity (and consequently enhance energy security).

- i. In particular, Member States must encourage the establishment of a wholesale market framework that provides suitable price signals for generation and consumption and require transmission system operators to ensure that an appropriate level of generation reserve ca-

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<sup>9</sup> See COM (2007) 528 final. As of 1 April 2009, amendments are still under consideration.

capacity is available for balancing purposes and/or to adopt equivalent market based measures (see Article 5).

- ii. Furthermore, Member States must establish a regulatory framework that provides investment signals for both the TSO and distribution system operators to develop their networks in order to meet foreseeable demand from the market and facilitates maintenance and, where necessary, renewal of their networks.
- iii. Finally, Directive 2005/89 provides that Member States must ensure that the report from the monitoring carried out under Directive 2003/54 (see above) covers the overall adequacy of the electricity system to supply current and projected demands for electricity, comprising operational network security, the projected balance of supply and demand for the next five-year period, the prospects for security of securing electricity supply for the period between five and 15 years from the date of the report and the investment intentions, for the next five or more calendar years, of TSO and those of any other party of which they are aware, as regards the provision of cross-border interconnection capacity.

#### **2.4. Energy security and the Lisbon Treaty**

At the current stage of Community law, the issue of energy security appears neither in the Treaty establishing the European Community, nor the Treaty on the European Union. The situation will change with the entry into force of the Treaty of Lisbon of 13 September 2007 amending the Treaty on the European Union and the Treaty establishing the European Community (hereinafter referred to as the “Lisbon Treaty”)<sup>10</sup>.

The Lisbon Treaty will not only be the first document introducing a legal basis for the activities of the European Union in the energy sector, but will also contain provisions regarding energy security. The Lisbon Treaty establishes a new Article in the Treaty on the Functioning of the European Union (being the legal successor of the Treaty establishing the European Community) (hereinafter referred to as the “TFEU”), according to which in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to ensure the security of energy supply in the Union. The European Parliament and the Council shall establish the measures necessary to achieve this objective. These measures will not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply (see Article 194 of the TFEU)<sup>11</sup>. The insertion of this limit was most likely the result of pressure on the part of countries, such as the Netherlands, Den-

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<sup>10</sup> As of 1 April 2009 the Czech Republic, Ireland and Poland were the only countries that have not ratified the Lisbon Treaty.

<sup>11</sup> However, the Council shall adopt measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply (see Article 192 of the TFEU).

mark and Great Britain, which sought to reserve the right to regulate the methods of exploiting their reserves<sup>12</sup>.

Some authors underline that Article 194 places the issue of “energy security” in its broader context because the European Union can undertake activities to secure energy flow at any time, i.e. these activities are no longer limited to times of crisis<sup>13</sup>. In fact, such regulation is justified by the provision of Article 122 of the TFEU, which allows the Council, on a proposal from the European Commission, to decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation - in particular, if severe difficulties arise in the supply of certain products, notably in the area of energy.

### **3. ENERGY SECURITY AND THE ENERGY TREATY**

The Energy Treaty represents a major step forward in the development of the internal market policy in the European Union and its extension to its neighbours<sup>14</sup>. It extends the European Union internal energy market to several countries of southeast Europe. In fact, the European Commission by means of the conclusion of this Energy Treaty, in a sense creates a precedent by extending the *acquis communautaire* of the internal market in the field of electricity and gas to the contracting parties to the Energy Treaty<sup>15</sup>.

What is more, an analysis of relevant provisions of the Energy Treaty could help to answer the question whether the internal energy market in the European Union is only a step towards the internal energy market throughout Europe<sup>16</sup>. It also seems that through its actions the Energy Community can make a large contribution to the security of supply in wider Europe.

At the official website of the Energy Community<sup>17</sup> one can read that a regional approach to energy security offers significant advantages both in terms of improved utilisation of existing supply and production capacities as well as optimising future investments. Therefore, the *raison d'être* of the Energy Community was to facilitate this process.

One of the recitals to the Energy Treaty provides that the parties thereto by signing the Treaty desired to enhance the security of supply of the single regulatory space by providing a stable regulatory framework necessary for the region. Consequently, in accordance with Article 2 of the Energy Treaty, one of the tasks of the Energy Community shall be to organise relations between the Parties and create a legal and economic framework in relation to Network Energy (defined as electricity and gas sectors falling within the scope of Directive 2003/54 and Directive 2003/55/EC of the

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<sup>12</sup> See: S. S. Haghighi, *Energy Security...*, p 470.

<sup>13</sup> *Ibidem*, p. 471.

<sup>14</sup> See: Ch. W. Jones and W. Webster, *EU Energy Law. Volume 1. The International Energy Market*, Leuven 2006, p. 361.

<sup>15</sup> See: European Parliament resolution on the conclusion by the European Community of the Energy Community Treaty; P6\_TA(2006)0225

<sup>16</sup> See: P. Bogdanowicz, *Traktat ustanawiający Wspólnotę Energetyczną – w stronę europejskiego wspólnego rynku energetycznego?* [in:] A. Kołtunowska, W. Maciejewski, A. Zawadzka (eds.), *Prawo europejskie w dobie reform. European Law Towards Reform*, Warsaw 2008, p.174

<sup>17</sup> See: [http://www.energy-community.org/portal/page/portal/ENC\\_HOME](http://www.energy-community.org/portal/page/portal/ENC_HOME)

European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas) in order to enhance the security of supply of the single regulatory space by providing a stable investment climate in which connections to Caspian, North African and Middle East gas reserves can be developed, and indigenous sources of energy such as natural gas, coal and hydropower can be exploited. Unfortunately, in my opinion, at the current stage the Energy Treaty does not provide relevant measures in order to implement this task.

- i. First of all, amongst the activities of the Energy Community for the purposes of all the tasks specified in the Energy Treaty, there are no activities to be carried out in order to enhance energy security.
- ii. Secondly, the Energy Treaty does not provide parties thereto with any operational measures. Without such measure, contained for instance in Directive 2005/89, parties to the Energy Treaty are only obliged to update "security of supply" statements every two years, describing in particular diversity of supply, technological security, and the geographic origin of imported fuels. The statements have to be communicated to the Secretariat and are made available to any party to the Energy Treaty. The Secretariat gives guidance and assistance with respect to such statements (see Article 29)<sup>18</sup>. It should be emphasized that as of today these updates constitute the sole mechanisms concerning security of supply in the Energy Treaty.
- iii. Thirdly, as mentioned above, although the Energy Treaty provided that the signatory states must adopt in prescribed terms certain EU single market regulations, called the "*acquis communautaire* on energy", initially these regulations did not concern the development of energy security. In particular, it related to such important documents as the abovementioned Directive 2005/89 (adopted after the signing of the Energy Treaty, however, a few months before its entry into force) and Directive 2004/67 concerning measures to safeguard the security of natural gas supply (adopted before the Energy Treaty). Fortunately, in December 2007 the Ministerial Council of the Energy Community decided to extend the *acquis* on electricity to Directive 2005/89 and Directive 2004/67 and agreed to implement these Directives prior to 31 December 2009. Undoubtedly, this is a very important step towards fulfilling the task of enhancing the security of the supply of the single regulatory space.
- iv. Finally, the Energy Community may adopt measures to foster development in areas of renewable energy sources and energy efficiency, taking into account their advantages with respect to, among other things, security of supply (see Article 35). However, there are no clear rules on how such issues as security of supply should be taken into account in this process. Additionally, it seems that the European Commission should review inclusion of provisions and programmes to replace energy infrastructure and support renewable energy by parties to the Energy Treaty, notably to reduce widespread energy poverty, energy/hydrocarbon import dependence and the harmful environmental impact of energy production, transport and use, with a more active attitude. It could help to develop renewable energy sources in the countries of the Energy Community at the Communitarian level.

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<sup>18</sup> One should bear in mind that Article 29 does not imply a necessity to change energy policies or purchasing practices (see Article 30 of the Energy Treaty).

#### **4. CONCLUSION**

The main aim of this paper was to analyse whether the notion of “energy security” constitutes empty words in legal texts only, or whether it truly deserves to be one of the pillars of energy policy in the European Union. I decided to answer this question in a twofold way: (i) after an analysis of the regulation of energy security in Directive 2003/54 - being the most important act of secondary Community law regarding the issue of energy, Directive 2005/89 - being the most important act of secondary Community law regarding the issue of energy security, and the Lisbon Treaty - introducing for the first time a legal basis for the activities of the European Union in the energy sector and (ii) after an analysis of the energy security issue in the Energy Treaty, in the light of the abovementioned legal acts. In my opinion, the Energy Treaty constitutes a good illustration of the way of thinking in the European Union on energy security.

On the one hand, the enhancing of energy security is one the tasks of the Energy Community, on the other, except for the obligation to update every two years the security of supply statements there are no separate operational measures to safeguard the security of energy supply in the text of the Energy Treaty. The same situation was present for years with the energy law in the European Union. On the one hand, there is a process of energy market liberalisation; and an integration of national energy markets into internal energy market could substantially increase the energy security of Member States. On the other, for a long time there were no operational measures that could enhance future energy security.

This can be described as "one step forward, two steps aside" - the European Union policy on energy security. Fortunately, with the adoption of Directive 2005/89 and the future ratification of the Lisbon Treaty, the situation may change substantially. It would be of benefit to the internal energy market not only in the European Union but also throughout Europe. However, to make it more real, the European Union should also support the energy security in the territory of the Energy Community.

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