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## Right to energy? The protection of vulnerable recipients on national and international level

**Key words:** protection of vulnerable recipients, energy solidarity, energy security, third liberalization package, energy law

### Introduction

What is actually well visible now is that the world is currently facing energy crisis that can be illustrated by at least two significant issues: the increasing dependence on import of energy sources and, arising therefrom, growing concern around the question of energy security. The first issue mentioned represents the problem that not only fails to be rectified, but actually becomes more and more acute. The present level of dependence of the European Union, taken in its entirety, amounts to approximately 50% and tends to attain higher levels. According to communication of the European Commission ‘European energy policy’<sup>1</sup>, level of dependence of the European Union from import of hydrocarbons will rise up to 65%, while dependence on import of gas will rise from 57% to 84%, and on import of oil from 82% to 93%. In the European Union there are no regulations determining the diversification thresholds, although it is widely accepted (at least theoretically) that supplies from one source should not amount to more

than 30% of the total import. In case of Poland approximately 90% of natural gas import has been dominated by one supplier<sup>2</sup>. What is even more alarming, this actually entails or aggravates other problems, as for instance increase in energy demand, the necessity of investments pertaining to energy infrastructure of the European Union or hurdles appearing on the way to create competitive market<sup>3</sup>. Therefore, it should not be deemed astonishing that, in particular at the level of the European Union as well as its Member States, deeper awareness with regard to the issue of energy security sheds a new light on the entire energy policy, whereas that issue was not a long time ago rather dimmed by other important targets set within the framework of energy policy, such as liberalization of the market and environmental protection. According to newer definitions, these targets are also comprised by the energy security, encompassing not merely the security of supplies<sup>4</sup>, however that

<sup>2</sup> J. Krzak, *Zaopatrzenie w gaz ziemny. Europa, Polska – problemy dywersyfikacji* [in:] M. Sobolewski (ed.), *Polityka energetyczna*, Warszawa 2010, p. 153 i 162.

<sup>3</sup> Z. Hrubý, *The New EU Energy Policy: economic rationality for the single market?* [in:] T. Karásek (ed.), *European Union in a new security environment*, Prague 2008, *passim*.

<sup>4</sup> *Vide* M. Nowacki, *Prawne aspekty bezpieczeństwa ener-*

<sup>1</sup> Communication of the European Commission to European Council and European Parliament of 10.01.2007 ‘European energy policy’, COM/2007/0001 final version.

should not disguise the fact that security of supplies should constitute a fundamental aim of energy policy of the European Union. Unfortunately, as T. Karásek wrote: “the EU still grapples with the unfinished business of creating common energy market, aims at standing on the forefront of the fight against global warming, and is attempting to spark a new round of technological innovation which would push its energy industry into new direction. Economic, environmental and security concerns mingle and make it difficult to propose and implement a clear-cut strategy (...)”<sup>5</sup>.

Nevertheless, among miscellaneous intertwining and sometimes contradictory matters and aims falling in the domain of energy policy, one deserves special attention. In pursuit of those many goals the problem of protection of vulnerable recipients should not be overlooked. It is also getting more and more acute as the energy crisis takes its toll. When one raises concern about energy security in general or energy security perceived in a traditional way, as security of supplies of energy and its resources, hardly ever the question of security of supplies for vulnerable recipients is taken into account. Energy security is nowadays deemed to be a circumstance concerning states or regional integration organizations like European Union. However, definitely the issue of protection of vulnerable recipients deserves proper attention.

Passing to proper part of considerations in this article, I would like to analyze the following issues in turn. First, I would like to examine what actually is encompassed by the problem of energy poverty. In further considerations I will focus on the notion of energy solidarity and its interrelationship with the topic, also providing an evaluation of that mechanism with regard to its effectiveness in grappling with energy poverty, as in my opinion there is a connection between the notion of energy solidarity and the protection of vulnerable recipients. Then I would like to examine the issue of services provided in general economic interest and its relation with the subject matter of this article. From my point of view, another problem crucial for protection of vulnerable recipients is energy efficiency, as lack thereof is one of major causes of energy poverty. After analyzing that issue, I will describe specific instruments

*tycznego w UE*, Warszawa 2010, *passim*, as well as R. Riedel, *Su-pranacjonalizacja bezpieczeństwa energetycznego w Europie. Podejścia teoretyczne*, Warszawa 2010.

<sup>5</sup> T. Karásek, *EU energy policy, eastern enlargement and the concept of securitization* [in:] Karásek T. (ed.), *European Union in a New Security Environment*, Prague 2008, *passim*.

that emerged and are destined to solve the problem of energy security for vulnerable recipients. This analysis will encompass third liberalization package, and I will try to assess solutions proposed by Polish legislator. At the end I will present conclusions.

### **The protection of vulnerable recipients and energy poverty *per se***

As the European Economic and Social Committee states in its opinion<sup>6</sup>, energy poverty occurs when a household finds it difficult or impossible to ensure adequate heating in the dwelling at an affordable price and to have access to other energy-related services for a reasonable price. The Committee invokes three causes of energy poverty construed in the aforementioned manner: low income, inadequate building quality and high energy prices. The opinion is not a binding law and the Committee itself makes a reservation that the definition is not exhaustive, however, it can be of aid. The opinion expresses concern of the Committee and encourages other bodies within the framework of the European Union to take up some actions aimed at rectifying the problem, namely to ensure the adequate protection of vulnerable recipients. The Committee puts an emphasis on the fact that energy poverty is a growing problem and that it does not get so much attention as it deserves. As there is expressed in point 6.1. of the opinion: “Energy poverty is a new social priority, which needs support at all levels. Although the legal documents presented by the EU are good ones, the reaction of the Member States has to date been inadequate. By way of example, despite the fact that they were made mandatory in the common market directives on gas and electricity (first Directive 2003/54/EC and then Directive 2009/72/EC), only 10 of the 27 Member States provide social tariffs for vulnerable customers and in only 8 Member States is the term “vulnerable customer” in common use. The Committee even proposes that account be taken of energy poverty when any proposal on energy policy is drawn up” therefore it wishes combating energy poverty to constitute another horizontal clause, such as article 11 of the Treaty on the functioning of the European Union, enshrining environmental protection in shaping and implementing of all policies of the European Union.

<sup>6</sup> Opinion of the European Economic and Social Committee on ‘Energy poverty in the context of liberalization and the economic crisis’ (exploratory opinion), OJ C 44–53, 2011.

Energy poverty is defined as follows: it is an occurrence consisting in facing difficulties in satisfying basic energy needs in place of residence for a reasonable price, the aforementioned needs comprising maintenance of adequate heating standard and other kinds of energy supplies serving for satisfying, in an acceptable way, basic needs of biological and social functioning of household members<sup>7</sup>. As A. Skoczylas and M. Swora noted, the notion of 'vulnerable consumer' rarely appears in normative acts and never in jurisprudence, which corresponds to limited level of additional protection for such category of consumers<sup>8</sup>. Such state may inflict astonishment, bearing in mind how wide the problem of energy poverty actually is, irrespective of the estimation method used. Experts emphasize that apart from objective methods (using objective data and thresholds – so-called affordability measures), also consensual, subjective measures, focusing on difficulties with ensuring proper heating of dwellings, declared by households, are important<sup>9</sup>. Such subjective definition of energy poverty is adopted by the European Social and Economic Committee in its opinion (in point 2.3. thereof energy poverty is declared to mean a situation "where a household finds it difficult or impossible to ensure adequate heating in the dwelling at an affordable price (...) and having access to other energy-related services, such as lighting, transport or electricity for use of the Internet or other devices at a reasonable price"). It is difficult (if even not viable) to assess precisely the range of energy poverty, since different methods give results differentiated to a great extent. For instance, while applying a threshold of 10% of energy expenses in relation to incomes of households, being the threshold widely used in Great Britain, examinations demonstrated that in 2013 44,4% of Poles suffered from energy poverty (adoption of a corrected threshold of 13% share of energy expenses in income diminished that figure to 32,4%), whereas application of Low Income High Costs method (encompassing combination of two criteria – high expenses for energy and low income of households) resulted in conclusion that in 2013 17,1% of Poles were stricken

by energy poverty<sup>10</sup>. Anyway, there is no doubt that the problem is widespread. Moreover, against *prima facie* statement, it is separate from the problem of poverty in general as sameness of poor people and people suffering from energy poverty is very modest as to numbers – maximally 30% of people stricken by energy poverty is also poor in economic meaning of that word<sup>11</sup>. Therefore, even at that stage of considerations it is justified to draw the conclusion that special measures, other than just pecuniary aid, are necessary to fight with energy poverty, as causes thereof seems to lie deeper than causes of economic poverty and cannot be overcome with the same instruments.

### The notion of energy solidarity

"Being in statu nascendi EU energy policy is now to a large degree a process without a single institutional and legal framework" – reads one of the studies<sup>12</sup>. Within the framework of this policy many issues are inseparably interwoven, not to mention divergent interests and attitudes of Member States. To acquire stronger bargaining position in the energy dialogue, the European Union ought to put an emphasis on acting in concert. Therefore, the Treaty of Lisbon introduced a separate chapter devoted to energy policy of the European Union. Among other significant rules, there is a passage often referred to as comprising 'energy solidarity clause' (placed in article 194.1 of the Treaty on the Functioning of the European Union<sup>13</sup>), stating that the energy policy of the European Union should be conducted "in a spirit of solidarity between Member States". This clause was conceived under the influence of Poland and Lithuania.

It may be stated that the idea of energetic solidarity originates in noticeable general solidarity rules which may be found in the Treaties. As it was claimed by the doctrine, within the framework of the European Union the solidarity concerns are gaining more and more

<sup>7</sup> D. Owczarek, A. Miazga, *Ubóstwo energetyczne w Polsce – definicja i charakterystyka społeczna grupy*, Warszawa 2015, p. 11.

<sup>8</sup> A. Skoczylas, M. Swora, *Wsparcie dla odbiorcy wrażliwego w świetle przepisów ustawy – Prawo energetyczne*, „Samorząd terytorialny”, 9/2014, *passim*.

<sup>9</sup> M. Lis, K. Sałach, K. Świącicka, *Rozmaitość przyczyn i przejawów ubóstwa energetycznego*, Instytut Badań Strukturalnych, Warszawa 2016, *passim*.

<sup>10</sup> D. Owczarek, A. Miazga, *Ubóstwo energetyczne...*, *op. cit.*, p. 7–8.

<sup>11</sup> *Ibidem.*, p. 50.

<sup>12</sup> Z. Brunarska, A. Jarosiewicz, A. Łoskot-Strachota, I. Wiśniewska, *Between energy security and energy market integration. Guidelines for the future development of the EU's external energy policy in Europe's neighbourhood*, Warszawa 2011, p. 14.

<sup>13</sup> Treaty on the Functioning of the European Union (consolidated version), OJ. C 83 z 30.03.2010, p. 47–200.

importance<sup>14</sup>. Energy solidarity<sup>15</sup> is highly controversial issue because the energy policy is a field of shared competences, so the principles of subsidiarity and proportionality should be taken into account. The energy policy, as a matter of utmost importance for every state, is perceived as being very vulnerable. Therefore not infrequently while some Member States urge on intervention in some cases (like the energetic solidarity), the others object to the slightest activity of the European institutions destined to harmonize the national energy policies. Also, until relatively recently this sphere of energy policy was realized rather ineffectively. To mention one example, formerly binding directive 2004/67/EC<sup>16</sup> included the definition of ‘major supply disruption for a significant period of time’ (construed on the basis of article 2.2. and motive 17) which was too narrow to be of use for many states including Poland. It included only situations when the European Union would be exposed, for at least eight weeks, to the risk of losing over 20% of its supplies from third countries. Actually, it may be alleged that the definition was discriminatory. According to it, a yearly interruption of gas supplies to Member States on the east border of the EU would not qualify as ‘major supply disruption’<sup>17</sup>, which was a nonsense.

The concept of energy solidarity seems to encompass, first, acting in concert in order to attain common aim. That aspect may easily be associated with principle of loyalty placed in article 4.3 of the Treaty on European Union<sup>18</sup> – which states as follows: “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the

Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of” the Union’s objectives. In accordance with ruling in *Zwartveld*<sup>19</sup>, obligations resulting from the principle of loyalty encumber not only the Member States, but also the European Union. Secondly, the concept of energy solidarity comprises additional element, namely aid given by one party to the other in need, i.e. whose energy security is in danger that cannot be avoided or overcome by that state itself.

However, I would differentiate another sphere belonging to the domain of the concept of energy solidarity. It comprises actions aimed at aiding consumers that cannot be reasonably expected to incur costs of energy delivery (affected by energy poverty), although it consists in vertical relations (state-consumers) rather than horizontal ones (for instance states-states). From my point of view, measures adopted in pursuit of combating energy poverty and ensuring protection of vulnerable recipients do enshrine the concept of energy solidarity at the level of recipients. Moreover, if we include economic element in the concept of energy security (like availability of energy for reasonable prices) we cannot escape conclusion that energy security at horizontal level influences level of protection of vulnerable recipients, i.e. the level of ensuring their energy needs be satisfied.

### Services provided in general economic interest

Article 36 of the EU Charter of Fundamental Rights<sup>20</sup> states as follows: “The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union”. Services of general interest may be characterized by three major features: commonness, accessibility and the obligation to provide the determined (universal) quality level<sup>21</sup>. As providing energy to con-

<sup>14</sup> C. Mik, *Solidarność w prawie Unii Europejskiej. Podstawowe problemy teoretyczne* [in:] Mik C. (ed.), *Solidarność jako zasada działania Unii Europejskiej*, Toruń 2009, p. 29.

<sup>15</sup> Broader analysis of the notion of Energy security is given in I. Przybojewska, *Energetic solidarity in the European Union* [in:] Godula N., Puczko A. (red.), *Międzynarodowe Aspekty Prawa Administracyjnego. Publikacja pokonferencyjna*, Kraków 2011, p. 251–260.

<sup>16</sup> Council Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply, *OJ L 127, 29.4.2004*, p. 92–96, replaced with regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, *OJ L 295, 12.11.2010*, p. 1–22

<sup>17</sup> M. Nowacki, *Prawne aspekty bezpieczeństwa energetycznego w UE*, Warszawa 2010, p. 140.

<sup>18</sup> Treaty on European Union, *OJ C 326, 26.10.2012*, p. 13–390.

<sup>19</sup> Order of the Court of 6 December 1990 C-2/88 *J.J. Zwartveld and others*, Reports of Cases 1990, p. I-04405.

<sup>20</sup> *Charter of Fundamental Rights of the European Union*, *OJ C 364, 18.12.2000*, p. 1–22.

<sup>21</sup> *Karta Praw Podstawowych Unii Europejskiej. Komentarz*, ed. A. Wróbel, Warszawa 2012, p. 1014–1020; see also

sumers can definitely be perceived as a service of general interests (as said the European Court of Justice in famous case *Almelo*<sup>22</sup>; the hybrid character of energy as a commodity and public good has been emphasized by the doctrine<sup>23</sup>), there arises the question whether the Charter introduces a new right for individuals here. Nevertheless, from the standpoint of vast majority of representative of the doctrine, this provision serves solely as a restraint for the European Union which should not fully 'marketize' (or liberalize to greater extent) such services without the consent of the Member States. I think that it is hard to assume that there is a new 'solidarity' right created as actually article 36 does not grant any actual rights to private entities.

However, directives from third liberalization package include some mentions about public services connected with energy supply. The recital 50 of the directive concerning electricity market and the recital 47 of the directive concerning gas market<sup>24</sup> state: "The public service requirements, including as regards the universal service, and the common minimum standards that follow from them need to be further strengthened to make sure that all consumers, especially vulnerable ones, are able to benefit from competition and fair prices. The public service requirements should be defined at national level, taking into account national circumstances; Community law should, however, be respected by the Member States". Article 3 section 3 of the directive on electricity market clearly provides for a duty of the Member States to ensure universal service: "Member States shall ensure that all household customers, and, where Member States deem it appropriate, small enterprises (namely enterprises with fewer than 50 occupied persons and an annual turnover or balance sheet not exceeding EUR 10 million), enjoy universal service, that is the right to be supplied with electricity of a specified

quality within their territory at reasonable, easily and clearly comparable, transparent and non-discriminatory prices". Such duty is not mirrored in the directive concerning gas market, nevertheless, that directive contains some provisions devoted to special protection of vulnerable recipients – article 3 section 3 of the directive on gas market states: "Member States shall **take appropriate measures** to protect final customers, and shall, in particular, ensure that there are adequate safeguards to protect vulnerable customers. In this context, each Member State shall define the concept of vulnerable customers which may refer to energy poverty and, inter alia, to the prohibition of disconnection of gas to such customers in critical times. Member States shall ensure that rights and obligations linked to vulnerable customers are applied". The differentiation is also visible when juxtaposing duties arising from the directives in question for national regulatory authorities. Namely, they shall take all reasonable measures in pursuit of, *inter alia*, the following objective: helping to achieve high standards of public service, contributing to the protection of vulnerable customers. The divergence lies in wording '**universal** and public service **in electricity supply**' (article 36 letter h) of the directive on electricity market), whereas in case of gas supply the EU legislator mentions only '**public** service' (article 40 letter h) of the directive on gas market). Public services, unlike universal services, do not entail co-relation between duties to provide such services and rights of recipients<sup>25</sup>. Following such differentiation in favour of strengthening rights of recipients of electrical energy, the directive concerning electricity market gives stronger support for consumers than the directive concerning gas market. But it is much more visible at the level of Polish law, by virtue of which only a vulnerable recipient with regard to electrical energy is vested with the right to demand an energy allowance.

K. Karasiewicz, *Usługi świadczone w ogólnym interesie* [in:] *Quo Vadis Europa III?*, ed. E. Piontek, K. Karasiewicz, Warszawa 2009, p. 362–382.

<sup>22</sup> Judgment of the Court of 27 April 1994, *Municipality of Almelo and others v NV Energiebedrijf IJsselmij*, Case C-393/92, Court Reports 1994, p. I-01477.

<sup>23</sup> P. Bogdanowicz, *Interes publiczny w prawie energetycznym Unii Europejskiej*, Warszawa 2012, p. 167–168.

<sup>24</sup> 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, *OJ L 211*, 14.8.2009, p. 55–93, and directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, *OJ L 211*, 14.8.2009, p. 94–136.

### Energy poverty and energy efficiency

Energy poverty clearly remains in causal nexus with inadequate energy efficiency. As the European Social and Economic Committee wrote in point 1.9. of its opinion: "It is important to implement approved measures

<sup>25</sup> M. Stoczkiewicz, *Przedsiębiorstwo energetyczne jako przedsiębiorstwo świadczące usługi w ogólnym interesie gospodarczym a pomoc państwa (część I)*, „Przegląd Ustawodawstwa Gospodarczego” 2010, no. 2, p. 17.

relating to the energy performance of buildings and, in this case, of private homes. Given the difficulties that low-income households may face, the Member States should consider setting up assistance measures as and when possible". Some stipulations suggesting crucial role of ensuring energy efficiency as a way to combat energy poverty are included in the directive on energy efficiency<sup>26</sup> as well as in Polish Act enacted in respect of that issue<sup>27</sup>.

The recital 20 of the directive concerning energy efficiency expressly mentions protection of vulnerable consumers when providing for "means of national energy efficiency obligation schemes for energy utilities or other alternative policy measures that achieve the same amount of energy savings. It is appropriate for the level of ambition of such schemes to be established in a common framework at Union level while providing significant flexibility to Member States to take fully into account the national organisation of market actors, the specific context of the energy sector and final customers' habits (...). **The common framework should allow Member States to include requirements in their national scheme that pursue a social aim, in particular in order to ensure that vulnerable customers have access to the benefits of higher energy efficiency**". The directive does not state who should be construed to be a vulnerable consumer in light of the aforementioned provision, however, it may be presumed that the aforementioned notion is used within the same meaning both in the directive on energy efficiency as well as directives on electricity and gas markets.

Solutions encompassed by the Directive are harnessed to attain general aim of Union's 20 % headline target on energy efficiency in 2020. Important part of solutions comprise encumbering Member States with a burden to create a long-term strategy for mobilising investment in the renovation of the national stock of residential and commercial buildings, both public and private. The directive focuses also on removing the barriers hindering taking up investments destined to ensure or improve energy efficiency of buildings. Article 20 section 1 of the directive on energy efficiency provides for financing possibilities – it comprises obliga-

tion of Member States to "facilitate the establishment of financing facilities, or use of existing ones, for energy efficiency improvement measures to maximise the benefits of multiple streams of financing".

In some respect Polish act on energy efficiency seems more ambitious than the directive in question. Article 4 of the act elaborates on the national action plan concerning energy efficiency, the mandatory element of which should be strategy of support of investments in renovation of buildings. The plan is prepared every three years by the Minister of Energy and adopted by the Council of Ministers. However, in my opinion crucial element of the act on energy efficiency that could actually be helpful with regard to combating energy poverty is the mechanism of so-called 'white certificates', acting similarly as the system of green certificates with regard to energy from renewable sources. Namely, obliged entities (the group of which consists first and foremost of energy enterprises leading commercial activity within the scope of production or trade of electrical energy, heat or natural gas and selling electrical energy, head or gas to final recipients connected to network within the territory of Poland) must realize investment or investments serving to improve energy efficiency of a final recipient and must obtain and present for redemption of certificate of energy efficiency. Article 19 of the act on energy efficiency, among other kinds of undertakings, as undertaking serving to improve energy efficiency mentions modernization or renovation of a building jointly with installations and technical devices. Saving of energy, resulting from realization of the above-mentioned undertakings, shall be confirmed by a certificate of energy efficiency. Proprietary interest from such certificates is stock commodity and is transferable, so its possessor may receive pecuniary means for their sale.

It is hard to evaluate the aforementioned solutions as the aforementioned Polish act on energy efficiency is relatively new and many solutions remain only in written form when the present article is being created. However, from my point of view, utilization of market-based instruments like white certificates, encompassing the element of incentive for investments in improvement of energy efficiency of buildings has a great potential and can be of much more aid than solutions introduced directly to combat energy poverty, constructed by Polish legislator in implementation of directives of the third liberalization package.

<sup>26</sup> Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, OJ L 315, 14.11.2012, p. 1–56.

<sup>27</sup> Act of 20 May 2016 on energy efficiency, J.L. of 2016, item 831, as amended.

## Solutions introduced by the third liberalization package

The third liberalization package introduced ownership unbundling as stronger dimension of separation of transmission and production together with supplies. At present, ownership unbundling is an option for Member States, which may instead choose weaker forms – as institution of independent system operator (ISO) or independent transmission operator (ITO). Ownership unbundling consists in a situation where a vertically integrated enterprise would have to sell the transmission networks and create separate entity which would manage them. In case of ISO, the requirement is that the transmission network must be operated by a separate entity, while picking ITO option implies conduct according to special regime preventing the parts of enterprise occupying respectively transmission and production or supplies from undertaking actions in concert. The doctrine pointed out that ITO option embodies the present legal unbundling with reinforced surveillance<sup>28</sup>, as there are also such instruments as compliance programs appearing, which will be controlled by a compliance officer. There is also a third country clause – sometimes called *anti-Gazprom clause* – forcing external entities to comply with the solutions introduced by the liberalization directives.

Also, the directives pertaining to gas and electricity markets encumbered the Member States with a duty to introduce mechanisms of protection of vulnerable recipients within their legal orders. In the directive on rules for electricity market, recital 45 states as follows: “Member States should ensure that household customers and, where Member States deem it appropriate, small enterprises, enjoy the right to be supplied with electricity of a specified quality at clearly comparable, transparent and reasonable prices (...) **Member States should take the necessary measures to protect vulnerable customers in the context of the internal market in electricity. Such measures may differ according to the particular circumstances in the Member States in question and may include specific measures relating to the payment of electricity bills, or more general measures taken in the social security system**”. The recital 53

of the directive concerning electricity market and the recital 50 of the directive concerning gas market state: “Energy poverty is a growing problem in the Community. Member States which are affected and which have not yet done so should therefore develop national action plans or **other appropriate frameworks to tackle energy poverty, aiming at decreasing the number of people suffering such situation. In any event, Member States should ensure the necessary energy supply for vulnerable customers. In doing so, an integrated approach, such as in the framework of social policy, could be used and measures could include social policies or energy efficiency improvements for housing. At the very least, this Directive should allow national policies in favour of vulnerable customers**”.

There is no definition of vulnerable consumer introduced in any of the above-mentioned directives (that is the reason of recommendation of European Economic and Social Committee in its opinion referred to hereinabove, in which it wrote that it suggests the EU to “adopt a common general definition of energy poverty that can then be adapted by each Member State as this would help to quantify and tackle energy poverty more effectively” – point 1.4. of the opinion). Moreover, there is no array of mandatory or even facultative instruments to be used by Member States in grappling with energy poverty. The directives often use wording such as ‘take appropriate means’ which actually does not provide Member States with any indices. The only restriction consists in duty of Member States “**to ensure the necessary energy supply for vulnerable customers**” (the recital 53 of the directive concerning electricity market and the recital 50 of the directive concerning gas market). Therefore, what we have here is the obligation to achieve certain result, typical for directives providing for only minimal harmonization. However, many directives often elaborates on various mechanisms to be harnessed to attain the given result. For instance, the directive on promotion of use of renewable energy<sup>29</sup> imposes percentage aims of share of use of renewable energy in total energy balance to be covered by the Member States, but also anticipates use of various support schemes, defining them as follows: “‘support scheme’ means any instrument, scheme or mechanism applied by a Member State or a group of Member States, that

<sup>28</sup> D. Adamiec, *Cele i inicjatywy Unii Europejskiej w dziedzinie polityki energetycznej* [w:] M. Sobolewski (ed.), *Polityka energetyczna*, Warszawa 2010, p. 53, see also: B. Nowak, *System Regulacji Energetyki – niezależny organ regulacyjny w kontekście trzeciego pakietu energetycznego*, „Studia Europejskie”, 3/2010, p. 111–128.

<sup>29</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, p. 16–62.

promotes the use of energy from renewable sources by reducing the cost of that energy, increasing the price at which it can be sold, or increasing, by means of a renewable energy obligation or otherwise, the volume of such energy purchased. This includes, but is not restricted to, investment aid, tax exemptions or reductions, tax refunds, renewable energy obligation support schemes including those using green certificates, and direct price support schemes including feed-in tariffs and premium payments” (article 2 letter (k) of the directive in question). Even such exemplary list is not included in the directives pertaining to electricity and gas markets, that is why the European Social and Economic Committee wrote in its opinion: “Combating energy poverty is a new social priority that needs to be tackled at all tiers of government and **the EU should provide common guidelines to ensure that all Member States adopt the same approach to eradicating this phenomenon**” (point 1.2. of the opinion).

Moreover, bearing in mind that the directives are abundant with wording referring to ‘taking appropriate means’, therefore the emphasis is put on observing due diligence in efforts, not on the actual result. As already mentioned, the only obligation to achieve certain result in respect of protection of vulnerable customers in the directives concerning electricity and gas markets is the obligation “**to ensure the necessary energy supply for vulnerable customers**” (the recital 53 of the directive concerning electricity market and the recital 50 of the directive concerning gas market). The intended effect seems to be, though, of a very general character.

Alas, up to now the results of actions adopted in implementation of the directives in respect of combating energy poverty have to be deemed rather modest, of course with some exceptions. There is a great variety of solutions chosen by particular Member States in this respect, for instance there were introduced possibilities aimed at financing or co-financing amounts due for electricity or bans on withholding supply of electricity in certain periods (autumn-winter), with regard to certain persons (ill ones) or in circumstances that cannot be attributed to a recipient, or before lapse of certain period from expiry of deadline for payment of energy bills<sup>30</sup>. Without a doubt, the state that is the most advanced in enshrining instruments devoted to help con-

sumers affected by energy poverty (defined there as taking place when the recipient in question remits over 10% of their incomes for keeping the appropriate temperature in their household) is Great Britain. This state has organized a lot of campaigns and also introduced a wide variety of mechanisms preventing and remedying the energy poverty.

### Solutions introduced by Polish legislator

As far as Poland is concerned, there is a draft of legislative act that was enacted, destined to provide appropriate measures to deal with the aforementioned issue. The system comprises primarily a determined lump sum for vulnerable recipients with regard to electricity that shall be granted to them by communes. Moreover, vulnerable electricity recipients as well as vulnerable gas recipients are vested with right to demand installation of prepayment metering systems. Such solution is destined to decrease expenses incurred for supply of electricity and gas, because in case of utilization of such metering systems, vulnerable consumers will use the amount of energy they paid for in advance. Furthermore, another advantages consist in limitation of costs of withholding energy supplies and length of proceedings brought by energy enterprises to enforce payment for supplied energy<sup>31</sup>.

The energy law divides vulnerable recipients into two categories, depending on what they rely on – electricity or gas. What is more interesting, there are definitions of vulnerable recipients of both categories, being crucial factor in their identification and, therefore, decision on granting of certain rights thereto. Namely, article 3 point 13 c) of Energy Law<sup>32</sup> defines vulnerable recipient with regard to electricity as the person who was granted a dwelling allowance, who is a party to a master agreement or agreement for sale of electrical energy concluded with an energy enterprise and who resides in place of delivery of energy. Article 3 point 13 d) mentions similar premises to be fulfilled apart from the condition referring to the dwelling allowance – instead, it sets forth the requirement that a vulnerable recipient of gas fuels shall be granted lump sum for purchase of combustible.

<sup>30</sup> Numerous forms of support in miscellaneous Member States are mentioned in: M. Krzykowski, *Ochrona odbiorców wrażliwych energii elektrycznej i paliw gazowych – uwarunkowania prawne*, „Polityka Energetyczna”, v. 17, no. 3, 2014, p. 260.

<sup>31</sup> M. Krzykowski, *Ochrona odbiorców...*, *op. cit.*, p. 263–264.

<sup>32</sup> Act of 10 April 1997 – Energy Law (uniform text J.L. of 2012, item 1059, as amended).



Both dwelling allowance, as well as lump sum for purchase of combustible and rules for their granting are mentioned in the Act on dwelling allowances<sup>33</sup>. The aforementioned act provides for the right to receive the dwelling bonus on the basis of criteria of threshold average monthly income for a member of the given household and area of the dwelling (the lower both values, the more probable is granting a dwelling allowance). Stricter criteria are imposed when deciding on granting a lump sum for purchase of combustible – as article 6 section 7 of the Act on dwelling allowances states as follows: “If a dwelling is not equipped with installation leading heat energy for the purposes of heating, with installation of hot water or conduit gas from external source outside the dwelling, to a person entitled to a dwelling allowance there shall be granted a lump sum for purchase of combustibles, constituting a part of the dwelling allowance”. This provision in connection with article 3 point 13 d) of Energy Law seems to create a riddle – how could someone be a vulnerable recipient with regard to gas fuel while living in a flat without installation of conduit gas?

The right to receive energy allowance is exercised by a vulnerable recipient with regard to electricity solely upon request. Also according to court rulings, there is no possibility of granting the energy allowance otherwise than upon application of interested party<sup>34</sup> and there is no automatism in that respect<sup>35</sup>. The energy allowance amount to 30% of a product of the limit of use of electrical energy and average price of electrical energy. By virtue of current announcement of the Minister of Energy, concerning the amount of the energy allowance<sup>36</sup>, at present (from 1 May 2017 up to 30 April 2018) it equals an amount from a range between PLN 11.22 to PLN 18.70 monthly, the amount being influenced by number of persons in the household (it is higher for households with more persons). Certain inconsistency can be noticed here, because Energy Law suggests that it is each vulnerable recipient with regard

to electrical energy that is entitled to receive the energy allowance, not their household. However, the amount stipulated in the aforementioned regulation is expressly destined to a household as the entirety. As it can easily be seen, the dimension of the support seems rather modest, especially when we bear in mind the demanding criteria to be fulfilled to obtain the status of vulnerable recipient with regard to electrical energy. Another discrepancy that is visible is of rather technical character – namely, Energy Law delegates issuance of regulation to the Minister of Energy who is to determine amount of the energy allowance for the next 12 months. The energy allowance is paid monthly and equals 1/12 of the amount set by the Minister in the aforementioned regulation (article 5e of Energy Law). However, actually the Minister determined monthly, not yearly amount.

While the energy allowance is available solely for vulnerable recipients with regard to electrical energy, the ancillary instrument in the form of installation of prepayment metering systems is possible to be obtained by both categories of vulnerable recipients, also these with regard to gas fuels. By virtue of article 6f of Energy Law, in case in which a vulnerable recipient with regard to electrical energy or gas fuels apply for that, an energy enterprise occupying with distribution of electrical energy or gas fuels is obliged to install prepayment metering system within 21 days as of receipt of the application, at its cost.

Election of system that balances encumbrances upon states and energy enterprises with regard to support of vulnerable customers is appreciated in doctrine. M. Krzykowski indicates that choosing special tariffs determined by administration could lead to a sort of cross-subsidizing, prohibited by the European Union law, whereas placing too heavy burdens upon energy enterprises could result in infringement of constitutional rule of freedom of business activity<sup>37</sup>. However, in my opinion theoretical compliance of introduced solutions with the European Union law cannot be perceived as valuable, as it is indispensable to assess the efficacy of such solutions. The EU legislator gave one binding duty for the Member States with regard to protection of a vulnerable recipient in respect to energy – namely supply of energy should be ensured to such recipient. It is hard to escape a sad conclusion that solutions introduced by Polish legislator in this respect are not tantamount to ensuring anything. The amount of support is very modest and right to demand installation

<sup>33</sup> Act of 21 June 2001 on dwelling allowances (uniform text J.L. of 2013, item 966, as amended).

<sup>34</sup> Judgement of the Voivodship Administrative Court in Szczecin of 15 June 2016, case reference number II SA/Sz 618/15.

<sup>35</sup> Judgment of the Voivodship Administrative Court in Cracow of 6 May 2016, case reference number III SA/Kr 1421/15.

<sup>36</sup> Announcement of the Minister of Energy of 13 April 2017 on the amount of energy allowance binding as of 1 May 2017 up to 30 April 2018, Official Gazette of the Republic of Poland (Monitor Polski) of 2017, item 394.

<sup>37</sup> M. Krzykowski, *Ochrona odbiorców...*, *op. cit.*, p. 261.

of prepayment metering system can be only considered a supplementary mechanism. In my opinion, the most effective from traditional, command-and-control type of instruments to struggle with energy poverty would be a ban or restriction on suspension of energy supply to vulnerable recipients. At present, in accordance with article 6b section 1 of Energy Law, an energy enterprise leading commercial activity within the scope of transport or distribution of gas fuels or energy may withhold supply of gas fuels or energy *inter alia* if the recipient is in default with payment for the services provided, at least for the period of 30 days after expiry of deadline for payment. When the recipient is in default with payment, an energy enterprise is obliged to notify them of intention to withhold supplies if the recipient does not pay overdue and currently due amounts within the period of fourteen days as of receipt of notification (article 6b section 3 of Energy Law). Interesting issue consists in use by Polish legislator in article 6b of Energy Law of the word 'default', not 'delay', as it seems to suggest that the aforementioned provisions apply only if lack of payment is due to fault of a recipient. However, such premise is not examined in practice. Furthermore, in Energy Law there are neither categories of people protected against suspension of energy supplies nor periods when energy supplies should not be withheld. I deem it worth considering to introduce category of vulnerable recipients and its proper definition in Polish legal order – such step would allow for their adequate protection by making express injunction on suspension of energy supplies thereto.

## Conclusions

I would assess as astonishing that in the vast domain of energy policy the question of protection of vulnerable recipient has seemed to be somehow left aside until recently. In comparison with consumer protection systems present in branches of law other than energy law, it is glaringly insufficient both on the level of European Union as well as particular Member States. I dare to draw the conclusion that instruments employed to combat energy poverty should comprise both traditional mechanisms (however, with a restriction that actually effective mechanisms should be elected, like ban on suspending energy supplies to certain category recognized as vulnerable recipients) as well as market-based mechanisms, like white certificates giving incentives for improvement of energy efficiency, the more that there-

by also underlying causes of energy poverty could be properly addressed.

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