Study on the European Regulatory Framework in the Field of Electricity

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Abstract

Legal studies[2] *on the energy crise have to be considered more than a necessity even an emergency and, in order to be valuable, these studies have to offers clear solutions not only for the authorities but for all the actors that are playing on the energy field. Into this one I analyze some of these solutions on a swat perspective, I point the actors that have to behave responsible in this field and I focus my epistemological approach on the analysis of European regulations (2019), how to implement their regulations and the consequences of implementation at European and national level.*

Keywords: *legal option, energy, contingency, deduction, capped price, risk, operator.*

JEL Classification*:* K11, K34

1. Introduction

Today more than ever we, all, have to focus on the energy issue in order to find national, European and international solutions to manage this energy crisis. These solutions have to be complex - multidimensional and multidisciplinary - taking into consideration the economic, legal, social, environment etc. paradigms, based on different levels.

A first level of national solutions - identified in direct connection to the specific of each state, a second level of European solution - corelated to the common European framework and a final third level, an international - global one.

From the legal point of view, all the solutions identified into other fields then legal, on each level, have to have a legal contain. But we also can identify legal solutions to reduce the impact of this crisis and here we can point some possibilities us: to establish capped prices; to establish deductions from the final price; risk sharing by invoking contingency; withdrawal from the competitive market for reasons of national energy security; nationalization of companies etc.

This study focuses on some of the regulations adopted at European level - in particular Directive (EU) 2019/944 on common rules for the internal market in electricity -, how these recommendations and provisions have been implemented and the effects measures taken on both European and national level but especially on the national level.

From the beginning I want to express my real concern over the reduction of electricity generation capacity at European and national level in recent years, situation which I allow myself to describe, along with other specialists, as at least a major vulnerability for European and, of course, national energy security.

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[2] See Aida Diana Dumitrescu, *Reflections on the evolution of the national and European context in the field of state aid, compensation and price caps*, „Curierul Judicar", no. 8/2021, pp. 457- 460.

The strengths of today's energy situation include, in an exemplary list, aspects such as: diversification of electricity production sources, awareness of the need to opt for green sources of electricity, greater ideological and action cohesion of the states of the European Union.

But unfortunately, the weaknesses are, in my view, more numerous and more substantial, including insufficient support for the implementation of new sources of electricity; a risky and inexplicable reduction in existing production capacity on European an on national level during the last years; a delayed, uncoordinated, inconsistent and susceptible reaction of the actors with competences in the field.

In my opinion, from the point of view of legal solutions, the field is in line with the general trend. At list on national level the solutions were often uneven, late, lacking the necessary predictability, hesitant.

2. Considerations on the actors involved at European level in the energy sector

Let's start our approach by identifying who are the actors" acting" in the field of energy on both national and European level. We are roughly talking about producers, suppliers, consumers, the state, international organizations, and the authorities.

On a general regard of the "European actors" in the field of energy, this study only aims to point legally relevant issues from the recent work of the European Parliament and the Council (2019, 2021) and the work of the OSCE.

At the same time, I would like to point out the need for applied studies aimed at the regulatory solutions adopted by EU states in the field of energy[3] to find out what are the real problems due to which the states of the European Union register significant increases in the price of electricity and even some of them, including Romania, register unjustified and exacerbated increases in these prices.

a. Recent activity of the European Parliament and Council (2019.2022). There are two recent normative[4] moments that I would like to discuss in this European normative study; one of them is represented by 2019 and it is represented by the Directive (EU) 2019/944 on common rules for the internal market in electricity and another, on 2022, is represented by Complementary Climate Delegated Act, approved by the Commission on 2 February 2022[5] .

In terms of European regulations, the year 2019 is marked in the field of energy by the adoption of two very important documents: Directive (EU) 2019/944 on common

[3] In the context of the present position of Turkey as an EU candidate state, it will be of real interest to analyze the particularities of the Turkish energy market and the possible impact in this plan of a possible accession. https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/negotiations-status/turkey_ro, consulted on 1.11.2021.

[4] The energy sector has a wide range of European standards. An example of this is Directive 2012/27 / EU of the European Parliament and of the Council on energy efficiency. "Energy Efficiency Directive". Its content provides for systematic strategic measures that are in line with the European Union's strategy to reduce energy consumption by 20% by 2020. This directive has been transposed into national law by Law no. 121/2014 (Published in the Official Gazette number 574 dated August 1, 2014), amended and supplemented by Law no. 160/2016 Published in the Official Gazette number 562 of July 26, 2016). See on: https://go.tuv.com/eficienta-energetica, consulted on 1.11.2021.

[5]https://ec.europa.eu/info/publications/220202-sustainable-finance-taxonomy-complementary-climate-delegated-act_en, consulted on 1.11.2021.

rules for the internal market in electricity[6] and Regulation (EU) 2019/941, Regulation (EU) 2019/942, Regulation (EU) 2019/943[7]. The main body of this research focuses on the recommendations of this Directive, its transposition, and the consequences of its transposition at national level.

For 2022, the mean event until now it is represented by the fact that was approved the taxonomy document (2 February 2022). This moment has a particular importance at European and national level because it allows, under strict conditions, specific nuclear energy and gas activities to be included in the list of economic activities covered by the EU taxonomy. For our country, which has and is developing nuclear power generation capacity, this possibility of obtaining financing for the nuclear energy sector is remarkable - it is a real opportunity for development. According to the document itself and its fact sheet[8], we note that the following are included in the category of sustainable investments targeted by the taxonomy:

- activities such as research, development and deployment of advanced technologies what can minimise the waste and improve safety standards.

- nuclear projects – new plant projects with existing technologies for energy generation of electricity or heat until 2045;

- activities what can upgrade and modify the existing nuclear plants for lifetime extension purposes until 2040.

b. Recent activity of OSCE. One of the international organization[9] that have an important role on energy is OSCE[10] given the essential role of energy on security.

Since 2018, the Vienna Energy Security Dialogue[11], organized by this organization and the Austrian Member Committee of the World Energy Council (WEC Austria) is an well - known international forum for energy stakeholders, a space where it is possible to share experiences and ideas on energy systems.

As we know, constantly, inclusive during the 2021's Edition of the Dialogue (Vienna, 22 October 2021) they put together participants from all the fields that can help on finding viable solutions for the energy crisis - politics, industry, science and civil

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[6] https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32019L0944&from=ES, consulted on 1.11.2021. Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market in electricity and amending Directive 2012/27/EU (OJ L 158, 14.6.2019, pp. 125-199).

[7] Regulation (EU) 2019/941 of the European Parliament and of the Council of 5 June 2019 on risk preparedness in the electricity sector and repealing Directive 2005/89/EC (OJ L 158, 14.6.2019, pp. 1-21). Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing the European Union Agency for the Cooperation of Energy Regulators (OJ L 158, 14.6.2019, pp. 22-53). Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market in electricity (OJ L 158, 14.6.2019, pp. 54-124).

[8]https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/sustainable-finance-taxonomy-complementary-climate-delegated-act-factsheet_en.pdf, consulted on 1.11.2021.

[9] „The Energy Regulators Regional Association (ERRA) is an inter-institutional non-profit organisation unified by the shared goal of its regulatory members to improve energy regulation" - https://erranet.org/about-us/what-is-erra/, consulted on 1.11.2021. The association aims to increase the exchange of information between members; sharing the experience among its members and expanding access to the experience of energy regulation worldwide. In order to achieve these objectives, the association carries out multiple activities, including the organization of webinars in the field.

[10] https://www.osce.org/whatistheosce, consulted on 1.11.2021. „The OSCE has a comprehensive approach to security that encompasses politico-military, economic and environmental, and human aspects".

[11] https://www.osce.org/economic-activities, consulted on 1.11.2021, IV Energy Security Dialogue, Vienna, October 22, 2021.

society pointing out the problem of the energy transition in correlation with post - Covid recovery.

3. Directive (EU) 2019/944 on common rules for the internal market in electricity

I will begin this analysis with the conclusions I have drawn from the study of the documents - Directive 2019/944 identified above. Paradoxically, although in 2019, when the documents were adopted, there were elements that foreshadowed the energy crisis, their content did not sufficiently reduce the effects of this crisis. Its magnitude has escalated, which is true, due to other crises - the health crisis generated by the Covid pandemic, the socio-economic crisis and events, but all these elements must be taken into account when developing security strategies.

From a normative point of view, the documents provide the necessary regulatory framework for European energy policy, but the question arises to the extent that they contain sufficient mechanisms to prevent, anticipate and reduce the negative effects of the occurrence of risk factors, escalation of vulnerabilities or threats.

The preamble to the European Internal Energy Market, which includes the idea of contributing to the security of electricity supply and sustainable development, can be taken from the preamble to the Directive.

The text of the document clearly mentions the special conditions in this sector "the common goal of decarbonizing the energy system creates new opportunities and challenges for market participants. ... technological advances allow new forms of consumer participation and cross-border cooperation", it was emphasized that" it is necessary to adapt to a new market reality". In other words, the directive is the result of extensive knowledge, documentation, etc. Is it sufficiently anticipatory, flexible, and cautious that it can generate prompt reactions in crisis situations?

The answer tends to be a partially positive one because today we are in a situation of a reasonably managed energy crisis at European level. At the national level, however, the document did not eliminate the specific risk factors and the issue of energy security is of unprecedented magnitude in terms of impact on the consumer.

When standardizing in security sectors such as this electricity sector, you need to make sure that you identify the best methods and mechanisms to allow the market to function within reasonable parameters, to allow for quick adjustments. These actions are essential to counteract effectively and promptly the major negative effects that may occur and can only be conceived through the close cooperation of all responsible actors in the field.

Otherwise, the effects are those that we fully feel, perhaps less significant at the European level but, undoubtedly, very significant at the national level.

Specifically, in the context of the desire to create the much-desired European integrated electricity market and to implement the concept of clean and sustainable energy, Directive 2019/944 regulates:

- production, transmission, distribution, supply and storage of electricity.
- retail electricity market.
- consumer's protection.

The three regulations were also adopted in accordance with this concept[12] are:

- Regulation (EU) 2019/941 of the European Parliament and of the Council of 5 June 2019 on risk preparedness in the electricity sector and repealing Directive 2005/89/ EC;

- Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing the European Union Agency for the Cooperation of Energy Regulators;

- Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market in electricity.

In full, the content of the directive covers several main guidelines, of which we mention:

- the situation of customers - customers (final consumers) to whom it consolidates a number of existing rights and grants them new rights and the energy communities of citizens.

- bills.

- actions by EU Member States and national electricity regulators.

- electromobility, data access and interoperability.

- distribution system operators; transmission and system operators.

a. Consumers and citizens' energy communities. Regarding consumers and citizens' energy communities, the Directive expressly recognizes a number of rights and clarifies the relationship between the consumer and the energy community. At the national level, the concept of "citizens' energy community" in the content of the directive is too little known and even less implemented.

The energy food chain starts at the producer and ends at the customer - consumer. The consumer is granted the right to freely choose the supplier; the right to protection in the event of an energy crisis (energy poverty), including through price-fixing; the right to a dynamic price contract and the right to information on the terms of the contract; the right to benefit from the installation of a smart meter; the right to produce, consume, store and sell electricity; the right of potential customers to receive real-time and reasonable information about available alternatives etc.

So, right from the first stage of the analysis, reading the expressly guaranteed rights of the consumer, you can't help but wonder how this situation came about, especially if you are a consumer from a country like Romania where the price of energy is at least between two - five times higher than originally contracted.

There are several issues here. One of them refers to the concrete materialization of" the right of vulnerable customers or those affected by energy poverty to benefit from specific protection" as required by the directive. The second issue arises in terms of

[12] The analysis must also take into account previous related documents such as: Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) no. 715/2009 of the European Parliament and of the Council of Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, of Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) no. Regulation (EC) No 525/2013 of the European Parliament and of the Council (OJ L 328, 21.12.2018, pp. 1-77); Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (OJ L 328, 21.12.2018, pp. 82-209); Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 on common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 14.8.2009, pp. 55-93).

qualification of the customer conditions in the category “vulnerable customer”.

The mere provision of certain rights without identifying clear ways of securing these rights and sanctioning their non-compliance leaves without legal effect the possible violation, limitation, in a word, abuse of those rights.

On the other hand, in the context of substantial and unpredictable short-term price increases for energy, we question the general vulnerability of the customer of this product. There is also the general "captivity" of the client which has the effect of making him vulnerable. In this sense, I constantly support the idea that in the current circumstances, the customer of the energy product is a vulnerable customer because he is generically captive to his need, his need to consume this energy. This concept is because we are in the situation of a reconsideration of the concept of "primary need". However, constant access to energy at a reasonable price fall today into the category of a "primary need". The primary needs of modern man include reasonable access to this product, energy.

b. EU Member States and national electricity regulators. The competent authorities to act in the electricity market must have clear, fast, efficient levers to be able to realize their role as intervening and sanctioning illegal distortions, non-competitive practices, abuses of all kinds. In this category, too, we include the institutions in legislative power and those in the area of executive power, both at national and European level.

As regards the non-uniform way in which the institutions of the various European countries have acted, this issue must also be considered. Concerning the defective way in which the national authorities and institutions acted, we have already carried out some studies in this regard and the process of research and analysis of these actions is underway. The study of problems at the national level led me to conclude that it acted late, inconsistent, and inconsistent, which allowed the negative effects to evolve progressively and drag on putting great socio-economic pressure even today[13].

As regards invoices, another issue developed in the directives, they should be "clear, correct, concise and presented in a way that facilitates comparison" and the information contained in these documents should be made available on a regular basis, namely:

- at least every six months or three months, when the customer requests or when he has chosen to receive electronic invoices,
- minimum monthly if the customer has a meter installed that makes it possible to read it remotely.

Regarding Directive (EU) 2019/944 in this study, I think it is appropriate to discuss some aspects of how the role of states, national authorities and operators is identified.

The first point of the discussion concerns the Member States, and I would like to expressly call into question the provisions of points 14, 21 and 22 of the Directive, which we must state from the outset that they are formulated in the form of recommendations, as follows from the interpretation texts.

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[13] Aida Diana Dumitrescu, *Study on identified and identifiable national legal solutions to reduce the impact of the energy crisis*, „Curierul Judiciar” no. 12/2021.

Thus, according to point number 14 of the document, member states should:

- to ensure that there are no unjustified obstacles (to identify which obstacles can be included in this category) within the internal market of electricity in terms of entry - operation - exit from this market. The unjustified obstacles that may arise in the internal market do not only belong to one sector and may also come from the legal field, whether we are referring to the adoption of internal acts at all levels necessary for the specific market or the concrete application of those rules. The role of the provision is to emphasize, to draw attention to the importance of identifying such situations, because I believe that the principles of law can substantiate the concept that the obligation itself lies with the states.

- clarify that the obligation identified above (emphasis added) is not likely to affect the competences of member states in relation to third countries. Without this clarification being interpreted as allowing a member state to extend its competence and exercise the exclusive competence of the Union. This provision is appropriate and necessary, thus resolving the problem, preventing any discussions or solutions to the contrary, the legal effects of which would have been much more difficult to eliminate.

- also, it should be clarified that third country market participants operating in the internal market must also comply with Union law and national law. I do not think that this clarification was necessary because it merely reconfirms a rule and is not a statement of an exception, it does not produce concrete legal effects, nor does it have an effect of underlining the importance of a situation.

As regards the provisions of point 21 of the Directive, they state that:

- measures that may be taken by EU states, to ensure a level playing field, should be based on priority requirements of general interest.

- the Commission should be consulted on the compatibility of those measures with the provisions of the TFEU and other provisions of Union law.

The above provisions do not produce effective legal effects but are intended to signal to these states the hierarchy of interests to be considered when adopting measures, or to suggest them as good practice intended to prevent possible regulatory inconsistencies; it is detected and express the need to consult the Commission.

We also set out to make a few remarks on the provisions of point 22 of the Directive, in which we note that there are two main points to keep in mind: on the one hand, the fact that member states should have "wide discretion" to enable them to impose public service obligations on electricity undertakings; on the other hand, states must ensure that household customers and, where necessary, small businesses, have the right to be supplied, at appropriate prices and quality, with electricity.

A very important aspect refers to the topic of “energy price”, a topic that is widely debated by specialists from all fields involved in the energy sector, considering its multiple and profound effects in economic and social terms. Without prohibiting price regulation in this sector, to raise awareness of the relevant factors, the risks of price regulation in this sector are signaled:

- distortion and restriction of competition.

- limiting the consumer's ability to choose and reduced satisfaction.

- decreasing the quality of services, including the presence of a smaller number of innovative products and services on the market.

The signaling of the risks based on price regulation is also accompanied by recommendations, so-called "alternative routes" to obtain a similar or perhaps even

better effect. It is therefore recommended that states use other policy instruments, preferably social policy measures. The liberalization of the market is pointed out as a positive aspect; it is noted that full liberalization of the retail electricity market would be likely to stimulate price competition and provide incentives for new entrants by diversifying supply for the consumer.

The above-mentioned recommendations provided for in the Directive require, for materialization, an applied professional analysis. Precisely because they are recommendations, their role is to offer options - options, to warn, to emphasize Member States. The concrete solutions that are then applied in each of the states, based, as we indicated, on a very good analysis; you have to take into account the concrete, particular situations of each state. Unfortunately, in our country the effect of not adapting properly to this option is visible to the naked eye.

Romania is today in a situation of unprecedented energy crisis:

- electricity production capacity has been reduced during the last years.
- diversification of energy production sources has not been achieved to the desired standards.
- the liberalization of the energy market has taken place without proper prior training.
- the timing of the liberalization of the energy market was inopportune, during pandemic crisis, with far-reaching economic and social consequences.
- producers and suppliers did not negotiate prices with consumers in the event of unforeseen circumstances.
- the regulators did not intervene through measures to ensure compliance with competition rules and a reasonable increase in prices.
- the regulatory authorities had an inconsistent, unclear, and unproductive position etc.

What is the consequence? A sharp rise in prices, one of the highest in Europe (prices more than five times higher than those originally contracted), a clear lack of predictability of the regulatory framework and especially on the measures of the authorities, a maximum vulnerability of consumers in all categories.

c. Operators on energy. Concerning the operators, the Directive is pointing to the category of distribution system operators and the category of transmission and system operators. The Directive recommends and regulates an increase in the liability of all categories of operators.

The liability of distribution system operators also covers the following issues:

- ensuring the long-term capacity of the system to meet electricity demands. In this regard, these operators should also consider the efficient integration of new renewable energy production facilities, as well as the appropriate dissemination to system users of the information needed to access and use the system.
- ensuring development predictability by publishing network development plans that provide for investment for the next five to ten years.
- use of storage facilities (ownership, development, administration, operation) in compliance with specific conditions, etc.

As far as transmission and system operators are concerned, they must have the necessary scale to ensure the long-term capacity of the electricity transmission system to operate the system safely. Safe management of the energy system expressly includes the ability to maintain balance in the market. However, at the national level, there is a

clear problem on this subject if a balance between the demand and supply of electricity has not been ensured. In order to respect the concurrence rules this operator have not rights on energy storage facilities (to own, develop, operate or operate) under conditions similar to those applicable for the other category of operators.

4. Conclusions

To identify the best regulatory solutions internally the study and knowledge of the European regulatory framework in the field of electricity is a necessity during this period, especially for lawyers. Only in this way, from a legal point of view, can we manage this unprecedented situation in the energy sector.

This study is part of a project, a project that aims to review the European regulatory framework and the regulatory options of other EU member states, precisely in order to identify national solutions.

For this epistemological stage, my conclusions are that we have a European regulatory framework in place that allows internal authorities to take effective and predictable measures, respecting the legal treatment standards of investors in the field[14], to deal with the energy crisis, as an analysis of the provisions Directive (EU) 2019/944 on rules for the internal market in electricity emissions. However, the national energy strategy, including its regulatory component, raises efficiency issues and forces reactions accordingly.

Beyond the fact that the decision of the European Commission to introduce nuclear energy in the taxonomy of the ecological transition is debatable, Romania must regard this decision as an opportunity, but also as a responsibility, considering the major problems posed using this energy source.

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[14] See Cristina Elena Popa (Tache), *Legal treatment standards for international investments. Heuristic aspects*, Adjuris – International Academic Publisher, Bucharest, Paris, Calgary, 2021, pp. 43, 72.

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