



GRANTING VULNERABLE CUSTOMERS AN ACCESS TO ENERGY

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SUMMARY: I. INTRODUCTION. II. VULNERABLE CUSTOMERS AND ENERGY POVERTY. III. ACCESS TO ENERGY AND ENERGY POVERTY IN INTERNATIONAL LAW. IV. EU LIBERALIZATION OF ENERGY MARKETS, ENERGY POVERTY AND VULNERABLE CUSTOMERS. V. GRANTING ENERGY ACCESS TO VULNERABLE CUSTOMERS ON A NATIONAL LEVEL - THE CASE OF POLAND. VI. CONCLUSION.

Palabras clave

Energy poverty; Vulnerable customers; Energy law; Energy market; Energy.

Abstract

The problem of access to energy from the international perspective is not only the matter of protection of vulnerable customers but also of energy poverty, which is strongly correlated with the global problem of poverty itself. In our opinion energy is crucial for any development, and poverty cannot be eradicated without reducing energy poverty. Access to energy seen from the frame of reference of public international law let us distinguish between two main dimensions of that issue: the so-called development perspective and the human rights perspective. Access to energy is one of the major factors stimulating the achievement of progress and development, which should be meant as the sustainable development. Although the matter of access to energy falls under the competences and functions of myriad of international governmental and nongovernmental organizations and is subject to different international agreements and regulations, the most widely reaching are the UN's regulations. Those regulations are the main subject of the analysis of international legislative framework in our paper. The second area of our interest is the human rights perspective. Firstly we

analyse the influence of granting access to energy on the implementation of various human rights, not only socioeconomic, but also the political and civil ones. Secondly, we turn to consider the idea, whether a «right to energy» could be formulated as a single human right. Doing that, we then turn to EU and national perspective (analysing the example of Poland), finding that there are no explicit grounds in treaties neither for the protection of vulnerable customers nor for «a right to energy». The same refers to the Constitution of the Republic of Poland. Vulnerable customers are protected through provisions of directives in the EU and acts of Parliament in Poland. The scope of protection in the future in the EU in our opinion will expand along with advancements in liberalization of energy markets.

I. INTRODUCTION

The United Nations, the OECD and the IEA estimate that there are 1.4 billion people around the world, and almost 85% of them in rural areas, who have no access to electricity and about 3 billion people rely on solid fuels (traditional biomass and coal) to meet their basic energy needs¹. From the international perspective, the problem of providing proper access to energy is not only the matter of vulnerable customers but moreover energy poverty is correlated with the global problem of poverty itself. In that sense it seems to be obvious that eliminating energy poverty and providing universal access to modern sources of energy should constitute a major concern for the international community. In our paper we will try to establish the nature of access to energy in three dimensions, namely the public international law, the European Union law and domestic legislation. At the international level of our considerations we will focus on the United Nations as the most widely reaching international organization and a creator of rules binding its 193 member states. We will show the correlation between the access to energy, sustainable development and poverty. We also will try to answer the question whether an access to energy may be considered a human right in the international legal framework.

At the lower, i.e. regional level, the problem of access to energy and vulnerable customers is addressed by various regional organizations. Those organizations bring together countries at different levels of economic development, and consequently they represent various approaches to vulnerable customers. Among those organizations, there is the European Union, with probably the most developed approach to abovementioned problems. Although the legal framework regarding vulnerable customers in the EU is quite indigent, the concept is developing and several measures that granted vulnerable customers

¹ *Energy Poverty, How to make modern energy access universal? Special early excerpt of the World Energy Outlook 2010 for the UN General Assembly on the Millennium Development Goals*, International Energy Agency, Paris, September 2010, p. 7, hereinafter. *Energy Poverty, How to make modern energy access universal, Universal access to modern energy for the poor*, UNDP, http://www.undp.org/content/undp/en/home/ourwork/environmentandenergy/focus_areas/sustainable-energy/universal-access.html

an access to energy have been adopted. Therefore it seems worthwhile to analyse the EU legal framework regarding vulnerable customers, to find out if there is a place in it for “the right to energy” and to determine the legal obligations of the EU Member States to grant vulnerable customers an access to energy. Much research has been done on the analysis of cases of particular countries. Considering that, we will focus on a case study of Poland, trying to find the specificity of the legislative framework regarding vulnerable customers in this country. To our best knowledge the Polish legal framework in this matter has not been presented in foreign legal literature so far. In our paper we are presenting legal approach, but to better understand the problem of vulnerable customers, we decided first to refer to shed some light on a concept of vulnerable customers and the problem of energy poverty from the point of view of social science and economy to better understand legal concepts based on those fields of research.

II. VULNERABLE CUSTOMERS AND ENERGY POVERTY

The scope of legal research regarding vulnerable customers is limited by the fact that the position of such customers is an issue of interest for social and economic sciences². Customers’ vulnerability has been broadly explored in the economic literature, where we can find various definitions of this phenomenon and the exploration of the issue in different areas of the economy (e.g. vulnerability in financial services, healthcare, energy, telecommunications). What is important for us is that studies on vulnerability frequently touch upon the problem of affordability of energy. Apart from affordability, another other important feature in economic terms is its accessibility. Bearing in mind the variety of different approaches to defining vulnerability, we have adopted, after Andreasen and Manning, a view that vulnerable customers are those who are at a disadvantage in exchange relationships where that disadvantage is attributable to characteristics that are largely not controllable by them at the time of transaction³. Examples include children,

² M. BAZILIAN, S. NAKHOODA, T.VAN DE GRAAF, *Energy governance and poverty*, Energy Research & Social Science 1, 2014, pp. 217–225; B.K. SOVACOL, *The political economy of energy poverty: A review of key challenges*, Energy for Sustainable Development 16, 2012, pp. 272–282; R. SINGH, X. WANG, J. C. MENDOZA, E.K. ACKOM, *Electricity (in)accessibility to the urban poor in developing countries*, WIREs Energy Environ 2014. doi: 10.1002/wene.148; P. NUSSBAUMER, M. BAZILIAN, V. MODI, *Measuring energy poverty: focusing on what matters*, Renewable Sustainable Energy Rev. 16 (1), 2011, pp. 231–243; U. Dubois, *From targeting to implementation: The role of identification of fuel poor households*, Energy Policy, n.º 49, 2012, pp. 107–115; D. SAGAR AMBUJ, *Alleviating energy poverty for the world’s poor*, Energy Policy 2005, n.º 33, pp.1367–72; S. BOUZAROVSKI, S. PETROVA, R. SARLAMANOVA, *Energy poverty policies in the EU: A critical perspective*. Energy Policy, vol. 49, 2012, pp. 76–82.

³ A.R. ANDREASEN, J. MANNING, «The Dissatisfaction and Complaining Behaviour of Vulnerable Consumers», *Journal of Consumer Satisfaction, Dissatisfaction and Complaining Behavior*, vol. 3, 1990, p. 13.

the elderly, the uneducated, the structurally poor, the psychically handicapped, ethnic and racial minorities and those with language problems⁴. A similar list of vulnerable customers is presented by Burden, who identified six socio-economic characteristics which could be potentially associated with vulnerability: age (both the elderly, and those under 18); education (lack of formal study); income (low income); employment status (unemployment); health (restrictions caused by poor health); and ethnicity (ethnic minorities)⁵. In the case of energy, many countries that adopt measures of protection, limit the concept of vulnerable customers to the low-income ones.

The above definition, when adopted to energy transactions in the retail market, should be complemented by the nature of legal relationships between the energy provider and the customer. Those relations cannot be shortened to the mere transaction of energy purchase should be referred to long term relations between a customer and one or more providers while customers situation can be changed. Legal measures adopted to help those consumers may be either of private law nature (e.g. special rules for disconnections) or public law ones (e.g. subsidies).

We found economic literature (esp. behavioural economics) useful when we defined terms connected with the subject of our article and delimited their meaning. Frankhauser and Tepic define affordability as the share of utility payments in total household expenditures, relating it with the ability of certain consumers or consumer groups to pay for a minimum level of service (ability to pay)⁶. The ability to pay in their view is closely related with terms such as “willingness to pay” and “energy poverty”⁷. In the context of payments, it is noteworthy that in liberalized energy markets, payments are made for energy as a commodity and for the grid services (access to the grid). The access problem is not only related to the transmission and distribution. In developing countries, the problem may also be connected with the lack of access to generation, either in the energy system or the off-grid facilities (access to energy source). Those two aspects of “access” have prompted us to attempt to define this term. It should be noted that there is no common definition of “access”. Considering that, the International Energy Agency, when referring to households, defines access, listing:

- Household access to a minimum level of electricity
- Household access to safer and more sustainable (i.e. minimum harmful effects on health and the environment as possible) cooking and heating fuels and stoves

⁴ *Idem.*

⁵ R. BURDEN, *Vulnerable Consumer Groups: Quantification and Analysis*, London 1998, Office of Fair Trading, p. 5.

⁶ S. FANKHAUSER, S. TEPIC, «Can poor consumers pay for energy and water? An affordability analysis for transition countries», *European Bank for Reconstruction and Development, WP. n.º 92*, may 2005, p. 4.

⁷ *Idem.*

- Access to modern energy that enables productive economic activity, e.g. mechanical power for agriculture, textile and other industries
- Access to modern energy for public services, e.g. electricity for health facilities, schools and street lighting⁸.

According to the IEA «All of these elements are crucial to economic and social development, as are a number of related issues that are sometimes referred to collectively as «quality of supply», such as technical availability, adequacy, reliability, convenience, safety and affordability»⁹. Adopting such a broad approach for the purpose of our paper, we limit our analysis to the problem of vulnerable customers. Assuming that, we will consider access to energy as a possibility to connect to the energy grid, to get the access to energy, or to use an off-grid energy source to satisfy energy needs of a household related to special group of customers, determined as vulnerable ones.

Energy poverty does not have a single universal definition wither in economic, or legal terms. One of the reasons is that researchers, international institutions and governments adopt different measures of energy poverty and corresponding with them legal measures to tackle the problem of this type of poverty. Pachauri and Spreng have identified three means of measuring energy poverty, namely:

- 1) deriving an «energy poverty line» or «fuel poverty line» from a conventional income or expenditure poverty measure,
- 2) using engineering type estimates for determining direct energy required to satisfy basic needs;
- 3) defining energy poverty in terms of access to energy services¹⁰.

Discussing customers' vulnerability implies first and foremost a need to determine certain general policy measures that can be adopted to particular vulnerable groups (e.g. complex care of the elderly, social assistance to the structurally poor). In the case of energy, the problem is narrowed to the access to energy for vulnerable customers and subsequently differed according to many variables. First of all, it should be noted that energy poverty is used in relation to different energy sources, such as electricity, heat, or natural gas. The geographic position of countries as well as whole variety of their energy mixes determine that the energy poverty problem must be referred in relation to various energy sources. For example, in countries with a cold climate, the problem of access to heating is much more important than in countries where the climate is warm. As regards the variety of energy

⁸ IEA, *Defining and modelling energy access*

Available at: <http://www.worldenergyoutlook.org/resources/energydevelopment/definingandmodellingenergyaccess/>

⁹ *Idem.*

¹⁰ S. PACHAURI, D. SPRENG, «Energy use and energy access in relation to poverty», *CEPE Working Paper* n.º 25, june 2003, p. 2.

sources, in some countries homes are heated using electricity, in others the system of district heating is a primary source of heat in homes. Another dimension of energy poverty is related to the economic well-being of a country. In poor or developing countries, the main problem may be the access to energy as such and its affordability, while in developed economies, the problem is much more focused on the aid for more or less narrowed groups of population as the grid infrastructure and generation ensures energy supply on, at least satisfactory, level. Granting an access to such infrastructure is based on the execution of legal measures ensuring connectivity (and protection against disconnection) and (at least in the case of households) less dependence on the economic factors. Another feature that may be important in considering energy poverty is the liberalization and maturity of the energy market. In the case of liberalized and mature markets, the variety of competitive offers shall by definition ensure affordability of energy on a general level. In such a case, the problem of intervention is shifted to the targeted group of vulnerable customers¹¹. In the case of underdeveloped markets, a lack of competition may broaden the scope of vulnerability. Another factor that is important when we analyze access to energy is urbanization, since the development of energy infrastructure is, typically, more developed in urban areas than in the rural ones.

Various approaches to energy poverty implied by the factors described above are responsible for the fact that this type of poverty cannot be tackled using a single definition and a unified basket of legal and policy measures. Such a conclusion refers most of all to the international legal order where we will try to find legal and policy measures regarding the access to energy.

III. ACCESS TO ENERGY AND ENERGY POVERTY IN INTERNATIONAL LAW

The matter of access to energy is a task of various international governmental organizations of universal and general character as well as regional organisations and specialized agencies. Consequently, access to energy is subject to different international agreements and regulations of binding and non-binding force. Let us briefly mention the most important ones :the United Nations and its specialized programmes and agencies whose work is coordinated by the UN-Energy, Organization of Economic Cooperation and Development and its specialized agencies: the International Energy Agency, the International Energy Forum, the Organization of the Petroleum Exporting Countries, the Energy Charter Treaty and the Organization of the Energy Charter Conference, the

¹¹ M. BARTL, «The Affordability of Energy: How Much Protection for the Vulnerable Consumers?», - *Journal of Consum Policy*, 33, 2010, p. 228.

European Union and the quite recently created The International Renewable Energy Agency (IRENA). Apart from those, energy matters are pivotal to many NGO's and international initiatives including the World Energy Forum or the International Cooperative of Energy Regulators.

As a matter of fact, the phenomenon of duplicating or crossing of organizations' competences is not unique when it comes to the access to energy. This results from the fact that there are many modern international governmental organizations vested by their respective governments with a wide range of tasks. This, in consequence, leads to a growing number and a broadened scope of objectives laid down in statutes of those organizations whose tasks simply duplicate or overlap. That phenomenon of duplication of an organization's objectives has stimulated the development of one of the new areas of an organization, referred to as inter-organisationalism, which is understood as a mutual cooperation between international organizations with similar areas of interest¹².

Access to energy seen from the frame of reference of public international law lets us distinguish between two main dimensions of that issue.

One is the development perspective, by which we understand the access to energy as one of the major factors stimulating the achievement of progress and development, which should be meant as the sustainable development. Beyond any doubt no progress or eradication of poverty is possible without common access to reliable and affordable energy services. Achieving that ambitious goal requires joint actions of all members of the international community supported by different organizations and their regulative powers. We will show the international community's changing attitude to energy issues correlated with sustainable development, and will seek what possible measures should be undertaken to overcome the global problem of energy poverty.

The other dimension of access to energy, constituting the second area of our interest, is the human rights perspective. It seems that we can analyse that problem taking two different points of view. First of all, it must be emphasized - although it may not be obvious - that providing universal access to energy appears to be one of the crucial means

¹² See e.g. *Expert Workshop Inter-Organizationalism In International Relations: Theories And Cases organized jointly by Vesalius College and Institute for European Studies and the Vrije Universiteit Brussel (VUB)*, available at <http://www.ies.be/node/1083>, N. BUCHOWSKA, *Ramy prawne współpracy Unii Europejskiej z Organizacją Narodów Zjednoczonych w dziedzinie ochrony praw człowieka*, *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, vol. 3, 2014, p. 79, J. KOOPS, «Assessing the European Union as an Inter-organizational Actor: From Policy-oriented Analysis to Theory-Guided Research», Paper presented at the Expert Workshop «The EU in International Organisations Across Time: Structure, Commitment and Consistency» GREEN Scientific Workshop, Institute for European Studies, ULB, 18 & 19 June 2012, R.A. LONGORIA, «Is Inter-Organizational Collaboration Always a Good Thing», *Journal of Sociology and Social Welfare*, Vol. 32, Issue 3 (September 2005), pp. 123-138, R.S. LEE, «Legal Developments in the United Nations: The Emergence of Inter-Organizational Institutions», *Asian Yearbook of International Law*, Vol. 4, pp. 227-238.

of achieving the full realization and implementation of various human rights not only socioeconomic, but also the political and civil ones. Seen in that wider context, access to energy becomes a means of implementing such variety of rights as the right to the proper standard of living, the principle of equality of men and women, or the right to education¹³. However, the issue of access to energy may be the scope of a much narrower, and at the same time, deeper analysis, by which we mean the question that has recently arisen in international writings, namely whether a «right to energy» could be formulated as a single human right. As said above, billions of people around the world lack access to energy at all, or are deprived of access to modern sources of energy and mostly depend on unreliable ones, such as biomass or solid fuel¹⁴. These two indicators, namely the lack of access to electricity and the reliance on the traditional use of biomass for cooking, defines the notion of energy poverty¹⁵. To be more precise, energy poverty means the absence of a sufficient choice of accessing adequate, affordable, reliable, high-quality, safe, and environmentally benign energy services to support economic and human development¹⁶. In the context of providing access to energy it is very important to understand the specific needs of particular regions. Nowadays, it is understood that developing countries cannot, and should not, adopt the same measures as the developed countries do. This is because, on the one hand due to obvious financial and structural reasons, and on the other hand, because it would be environmentally unsustainable¹⁷. The bipolar division that shows different problems and needs of developed and developing countries is well known. However, the need to differentiate the developing countries from those the least developed is also indicated. The numbers are striking: while the average world electrification rate is 78.2%, it amounts to 99.8% in the OECD member states and countries in transitions, keeping the level of 72% in developing countries, it dramatically falls down to 21% in the least

¹³ A.J. BRADBROOK, J.G. GARDAM, M. CORMIER, «A Human Dimension to the Energy Debate: Access to Modern Energy Services», vol. 26, *Journal of Energy & Natural Resources Law*, November, 2008.

¹⁴ R. CENTURELLI, «Energy Poverty: Can We Make Modern Energy Access Universal? Focus on Financing Appropriate Sustainable Energy Technologies», *Colorado Journal of International Environmental Law and Policy*, vol. 22, Spring 2011, p. 221, L. GURUSWAMY, «Energy Justice and Sustainable Development», *Colorado Journal of International Environmental Law and Policy*, vol. 21, Spring 2010, p. 234.

¹⁵ R. CENTURELLI, «Energy Poverty. How to make modern energy access universal?...», *cit.*, p. 7.

¹⁶ *World Energy Assessment: Energy and the Challenge of Sustainability*, United Nations Development Programme Bureau for Development Policy, New York September 2000, p. 44. Text available at:

<http://www.undp.org/content/dam/aplaws/publication/en/publications/environment-energy/www-ee-library/sustainable-energy/world-energy-assessment-energy-and-the-challenge-of-sustainability/World%20Energy%20Assessment-2000.pdf>, hereinafter: *World Energy Assessment*.

¹⁷ A.J. BRADBROOK, «Sustainable Energy Law: The Past and the Future», *Journal of Energy & Natural Resources Law*, vol. 30 n.º 4, p. 512, hereinafter: *Sustainable Energy Law*.

developed countries¹⁸. Energy poverty affects mostly Africa and parts of Asia, where the largest number of the least developed countries are located, although even in those regions countries face different problems. In East Asia and the Pacific region less than 200 million people lack access to electricity and almost 1.1 billion rely on solid fuels for cooking¹⁹. It is even worse in Sub-Saharan Africa where the electrification rate is 26%²⁰ and the number of people relying on the traditional use of biomass is 80%²¹. In addition, the total number of households without access to energy is rising, not falling down²². It needs to be further indicated that people suffering from energy poverty usually are inhabitants of states that can be identified as so-called failed (or fallen) states²³. These are the states, that lack any effective government and which as a rule is corrupted, and they struggle with the internal conflicts, failing to provide, or providing unreliable, and very basic social services. Thus the existence of ineffective, unstable and corrupted governments may explain the paradox of oil-producing African countries which shown a low energy rates²⁴.

It should be further stressed that the issue of the lack of access to energy is very strongly combined with the global problem of poverty itself. It should be remembered that energy is crucial for any development, and poverty cannot be eradicated without reducing energy poverty²⁵. Nowadays, most researchers and practitioners agree that providing access to energy is one of the pivotal instruments of achieving development and elimination of poverty²⁶, sometimes defined as the «fundamental need and the driving

¹⁸ *The Energy Access Situation in developing countries. A Review Focusing on the Least Developed Countries and Sub-Saharan Africa*, UNDP and World Health Organization 2009, p. 10-11.

¹⁹ *Ibid.* p. 1.

²⁰ *Ibid.* p. 11.

²¹ R. CENTURELLI, «Energy Poverty. How to make modern energy access universal?», *cit.*, p. 7.

²² *Africa Energy Outlook 2014, A Focus On Energy Prospects In Sub-Saharan Africa*, *World Energy Outlook Special Report* International Energy Agency, Paris 2014, p. 13, R. CENTURELLI, *cit.*, p. 221.

²³ This conclusion becomes striking when one makes comparison of maps indicating failed (or recently called «fragile») states and countries with low electrification rates; see *Found For Peace 2014 Fragile States Index map* available at: <http://ffp.statesindex.org>; and *The Energy Access Situation in developing countries. A Review Focusing on the Least Developed Countries and Sub-Saharan Africa*, UNDP and World Health Organization 2009 maps at pp. 11 and 13.

²⁴ See E. AIKEN, «Energy Justice: Achieving Stability In Oil-Producing African Nations», *Colorado Journal of International Environmental Law and Policy*, vol. 22, Spring 2011, pp. 296-299.

²⁵ H. SHUE, «Climate Hope: Implementing the Exit Strategy», *Chicago Journal of International Law*, vol. 13, Winter 2013, p. 385.

²⁶ See e.g.: A.J. BRADBROOK, J.G. GARDAM, M. CORMIER, *cit.*, p. 526; R. CENTURELLI, *cit.*, p. 222; *Synthesis of Energy-Related Issues Highlighted in National Reports of Rio+20*, Division for Sustainable Development United Nations Department of Economic and Social Affairs, January 2014, pp. 3-5; for the opposite view see: E.A. POSNER, D. WEISBACH, «Climate Change Justice», *Princeton University Press*, 2010.

determinant of human progress»²⁷. However, it was not before 1980s that energy issues started to be combined with development and sustainable development²⁸.

First, it should be noted that the global legal framework dealing with issues of providing universal access to energy and eradication of poverty, mostly consists of non-binding documents and *soft law*. As far as it comes to any binding international regulations it must be noted that both, the United Nations Framework Convention on Climate Change²⁹ and the Kyoto Protocol to the UNFCCC³⁰, although dealing with the issues of sustainable development and, partially, with renewable energy³¹, lack any provisions referring to the conjunction of the need to provide a universal access to energy and poverty eradication³². At the regional level, the Energy Charter Treaty³³ supplemented by the Protocol on Energy Efficiency and Related Environmental Aspects³⁴ are worth mentioning, as so far they are the only multilateral treaties that regulate energy. However, these treaties predominantly refer to the areas of trade (including competition), investment and transit³⁵ and as far as any environmental issues are concerned, their regulations concentrate

²⁷ L. GURUSWAMY, *cit.*, p. 233.

²⁸ In 1970 s. and early 1980s the energy issues occurred mostly in potential environmental disasters and damages cases, see: S. BRUCE, «International Law and Renewable Energy: Facilitating Sustainable Energy for All?», *Melbourne Journal of International Law*, vol. 14, June 2013, pp. 28-34; A.J. BRADBROOK, *Access to energy services in a human rights framework*, Parliamentary Forum on Energy and Sustainable Development, Oct. 2005, text available at: http://www.un.org/esa/sustdev/sdissues/energy/op/parliamentarian_forum/bradbrook_hr.pdf, pp. 6-7, hereinafter: *Access to energy*.

²⁹ *United Nations Framework Convention on Climate Change*, United Nations Treaty Series, vol. 1771, p. 107; hereinafter UNFCCC

³⁰ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, United Nations Treaty Series, vol. 2303, p. 162.

³¹ UNFCCC mentions those issues in preamble only, as it recognizes that all countries, especially developing countries, need access to resources required to achieve sustainable social and economic development and that their energy consumption will need to grow taking into account the possibilities for achieving greater energy efficiency, while Kyoto Protocol in art. 2.1.(a)(iv) calls upon state-parties, in order to promote sustainable development, to research on, and promotion, development and increased use of, new and renewable forms of energy.

³² See: S. FERREY, «The Failure Of International Global Warming Regulation To Promote Needed Renewable Energy», *College Environmental Affairs Law Review*, vol. 37, Boston, 2010.

³³ *The Energy Charter Treaty*, signed on 17 December 1994, entered into force 16 April 1999, United Nations Treaty Series reg. No. 36116, vol. 2080, p. 95. See also *The Energy Charter Treaty And Related Documents, A Legal Framework For International Energy Cooperation*, http://www.encharter.org/fileadmin/user_upload/document/EN.pdf#page=211

³⁴ *Energy Charter Treaty Protocol on Energy Efficiency and Related Environmental Aspects*, United Nations Treaty Series reg. n.º 36117, vol. 2081, p. 3.

³⁵ D. AZARIA, «Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade», *Journal of Energy & Natural Resources Law*, vol. 27, November 2009, p. 563.



on the obligation of states to »minimize, in an economically efficient manner, harmful environmental impacts»³⁶.

Therefore, as it has been mentioned above, in order to analyse the international legal framework concerning issues of access to energy and poverty, one needs to go through the non-binding documents and *soft law*. Where it comes to non-binding documents and reports, a milestone of the international debate on progress and development correlated with energy issues was the so called Brundtland Report of 1986 which contained a whole chapter devoted to energy. The chapter, called «Energy: Choices for Environment and Development»³⁷ provided the most widely cited definition of sustainable development³⁸. And so, para 116 of the report reads: «*Energy is not so much a single product as a mix of products and services, a mix upon which the welfare of individuals, the sustainable development of nations, and the life-supporting capabilities of the global ecosystem depend. [...] Energy is too important for its development to continue in such a random manner. A safe, environmentally sound, and economically viable energy pathway that will sustain human progress into the distant future is clearly imperative. It is also possible. But it will require new dimensions of political will and institutional cooperation to achieve it.*»

Another non-binding document that is worth mentioning and which alleviates the global energy debate in the context of correlating access to energy with sustainable development and, most importantly, with poverty, is the report «World Energy Assessment: Energy and the Challenge of Sustainability»³⁹. This huge paper refers very widely to the issues of conjunction of energy and poverty. The report states *inter alia* that: «Eradicating poverty is a long-term goal of development. But long before that goal is achieved, convenient and affordable energy services could dramatically improve living standards and offer more opportunities to people»⁴⁰. Thus it also shows that there is a strong linkage between the energy use patterns of the poor and the aggravating poverty⁴¹.

³⁶ See: art. 19 of The Energy Charter Treaty.

³⁷ *Report of the World Commission on Environment and Development: Our Common Future*, GA document No A/42/427 Development and International Co-operation: Environment, Annex, text available on the UN page: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N87/184/67/IMG/N8718467.pdf?OpenElement>

³⁸ «Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of “needs”, in particular the essential needs of the world’s poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs.»; see Chapter 2: Towards Sustainable Development, IV Conclusion, point 1.

³⁹ *World Energy Assessment: Energy and the Challenge of Sustainability*, United Nations Development Programme Bureau for Development Policy, New York September 2000, text available at: <http://www.undp.org/content/dam/aplaws/publication/en/publications/environment-energy/www-ee-library/sustainable-energy/world-energy-assessment-energy-and-the-challenge-of-sustainability/World%20Energy%20Assessment-2000.pdf>

⁴⁰ *Ibid.* p. 9.

⁴¹ *Ibid.* p. 40.



As far as the UN *soft law* is concerned, the first document that is worth mentioning is the outcome document of the United Nations Conference on the Human Environment held in 1972, called Stockholm Declaration⁴². The Declaration only briefly refers to the issues of energy, mostly concentrating on the informative policy and imposes a recommendation only to the Secretary General to undertake a study «on available energy sources, new technology, and consumption trends, in order to assist in providing a basis for the most effective development of the world's energy resources, with due regard to the environmental effects of energy production and use»⁴³. Another document that is noteworthy is the Rio Declaration⁴⁴ - the outcome document of The United Nations Conference on Environment and Development held in Rio de Janeiro in 1992. The Rio Declaration addressed environmental issues and development topics and showed an understanding of different needs of developing and developed countries⁴⁵. It did not, however, include any direct reference to an access to energy or energy itself. A different attitude was employed in Agenda 21⁴⁶, a non-binding document accompanying the Rio Conference. Its Agenda referred to energy issues by, among others, encouraging states to environmentally sustainable use of new and renewable sources of energy⁴⁷, indicating links between the need of sustainable development and access to energy⁴⁸ as well as stating, that «energy is essential to economic and social development and improved quality of life»⁴⁹. The Agenda itself, however, received different assessments. On the one hand, it was praised for giving states an opportunity to be flexible in the implementation of necessary measures⁵⁰. On the other hand —because the whole chapter devoted to energy was removed from the document, under the pressure of oil-producing states— the Agenda was described as a failure and a «step backwards from the Brundtland Report»⁵¹.

Having in mind all the above-mentioned documents, we have to state that regrettably and quite surprisingly one of the most important UN's achievements in the area of sus-

⁴² *Declaration of the United Nations Conference on the Human Environment*, Stockholm, 16 June 1972, Doc No A/CONF.48/14/Rev.1, hereinafter Stockholm Declaration.

⁴³ See: Stockholm Declaration Recommendation 59.

⁴⁴ *Rio Declaration on Environment and Development*, Rio de Janeiro, 14 June 1992, Doc No A/CONF.151/26 (Vol. I).

⁴⁵ L. GURUSWAMY, *cit.*, p. 247.

⁴⁶ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

⁴⁷ Agenda 21 Chapter 4 *Changing Consumption Patterns*, Part B. Developing national policies and strategies to encourage changes in unsustainable consumption patterns, pp. 4.17, 4.18.

⁴⁸ Agenda 21, Chapter 5 *Demographic Dynamics And Sustainability*.

⁴⁹ Chapter 9 *Protection Of The Atmosphere*, B. *Promoting sustainable development*

1. Energy development, efficiency and consumption, p. 9.9.

⁵⁰ See: S. BRUCE, *cit.*, p. 31 footnote 81.

⁵¹ A.J. BRADBROOK, *Access to energy*, p. 7.

tainable development issues, namely the Millennium Development Goals (MDGs) lacks any direct reference to the access to energy or to the correlation of access to energy and poverty⁵². In addition, which should be stressed here, in the United Nations Millennium Declaration⁵³ itself, the word «energy» does not appear at all. The sole issue of eradication of poverty falls under the MDG 1 (Eradicate extreme poverty and hunger) and an indirect reference to energy issues could be made mostly through the environmental point of view and the MDG 7 (Ensuring environmental sustainability). Notwithstanding the fact of an absence of explicit connotations to energy in MDGs, it is beyond any doubt that achieving each and every of eight millennium goals would be impossible without providing access to affordable energy services. The UNDP in one of its reports gives some clues of how energy issues could be integrated into MDGs, namely, by demonstrating how those problems are being referred to in National MDGs Reports⁵⁴. The UNDP Review strongly articulates that «Energy is indispensable for sustainable development and poverty reduction. Without access to adequate quantity and quality of modern energy services, the achievement of the MDGs will not be possible. [...] While there is no MDG directly addressing energy, it is clear that reaching all of the MDGs will require much greater volumes and quality of energy services [...], especially in rural areas»⁵⁵. It has been emphasised in relevant literature that MDGs introduce a new definition, or be it better to say - a new attitude to sustainable development, that gives «more specific overlap between its three components: social development, economic development, and environmental protection»⁵⁶. Needless to say, it needs to be emphasised that in our opinion the absence of any precise and exact correlation of access to energy and sustainable development in the MDGs has deprived the international community of the opportunity to move much more quickly forward in the direction towards providing the universal access to energy and fighting energy poverty⁵⁷.

⁵² Although UNDP proposed in 2001 to add one more MDG, that is: halving the proportion of people without access to clean and affordable fuels and electricity by 2015, the amendment was not adopted during the Johannesburg Summit in 2002; see: S.T. TULLY, «The Contribution Of Human Rights To Universal Energy Access», *Northwestern Journal of International Human Rights*, 518, Spring 2006, pp. 28-29.

⁵³ United Nations Millennium Declaration, UN Doc No A/RES/55/2.

⁵⁴ *A Review of Energy in National MDG Reports*, Lead Authors: M. TAKADA and S. FRACCHIA, United Nations Development Programme, New York, January 2007.

⁵⁵ *Ibid.* p. 3.

⁵⁶ L. GURUSWAMY, *cit.*, p. 252.

⁵⁷ As the consequence of the lack of direct reference to energy issues in MDGs insignificant attention to those problems is given by the states. For example 47 of the total number of 112 state's reports contain little or no mention of energy and only 29 of them offer a «thorough coverage» by which half a page or more on energy issues» is meant, see *A Review of Energy in National MDG Reports*, p. 10.

Much hope was invested in the Johannesburg World Summit on Sustainable Development held in 2002 in Johannesburg, which produced the Johannesburg Plan of Implementation⁵⁸. The document refers to the question of access to energy many times and also makes direct references to the correlation between access to energy and eradication of poverty⁵⁹, claiming *inter alia*, that state actions should include the enhancement of «international and regional cooperation to improve access to reliable, affordable, economically viable, socially acceptable and environmentally sound energy services, as an integral part of poverty reduction programs [...]»⁶⁰. As far as evaluation of the Johannesburg Plan of Implementation «should be regarded as qualified success»⁶¹ and Bruce pointed out that the Plan provided clear goals for states even though the document itself lacked enough precision⁶². On the contrary, Pring⁶³ recalled the strong criticism of both the Johannesburg summit and the Plan of Implementation formulated by NGO's⁶⁴ and although he avoided an extreme evaluation, his conclusion was that the summit did not deliver any considerable outcome and was a wasted opportunity for advancement of international environmental law⁶⁵.

The latest UN development in the field of access to energy is the «Sustainable Energy for All» (SE4ALL) initiative introduced by the Secretary General Ban Ki Moon as a follow up of proclamation, by the General Assembly, the year 2012 as the International Year of Sustainable Energy for All, and the United Nations Conference on Sustainable Development - Rio+20 held in 2012⁶⁶. The general aim of the SE4ALL initiative is to achieve, by 2030, three main goals: ensuring universal access to modern energy services, doubling the global rate of improvement in energy efficiency, doubling the share of renewable energy in the global energy mix⁶⁷. Encouraged by those actions, the General Assem-

⁵⁸ Plan of Implementation of the World Summit on Sustainable Development.

⁵⁹ Chapter II. of the Plan of Implementation titled *Poverty eradication*.

⁶⁰ Chapter II. of the Plan of Implementation *Poverty eradication*, point 9 (f).

⁶¹ A.J. BRADBROOK, *Access to energy*, p. 10.

⁶² S. BRUCE, *cit.*, p. 32.

⁶³ G.W. PRING, «The 2002 Johannesburg World Summit On Sustainable Development: International Environmental Law Collides With Reality, Turning Jo'burg Into «Joke'burg», *Denver Journal of International Law and Policy*, Summer 2002, vol. 30, p. 410.

⁶⁴ By NGO's the Summit has been called a «betrayal», «disaster», «shameful», «disgraceful» and has been nicknamed by G.W. PRING the «Joke'burg», *Ibid*.

⁶⁵ G.W. PRING, *cit.* pp. 410 and 420.

⁶⁶ Resolution adopted by the General Assembly on 16 February 2011 *International Year of Sustainable Energy for All*, Doc No A/RES/65/151

⁶⁷ Report of the Secretary-General: *International Year of Sustainable Energy for All, 2012*, 16 August 2012, UN Doc No A/67/314, p. 3, see also: *Sustainable Energy for All. A Global Action Agenda Pathways for Concerted Action toward Sustainable Energy for All*, The Secretary-General's High-Level Group on Sustainable Energy for All, April 2012, p. 2.



bly declared the period 2014–2024 the United Nations Decade of Sustainable Energy for All⁶⁸. Alike the SG reports, the GA resolutions, the Rio+20 outcome document⁶⁹, and the SE4ALL initiative should all be considered very welcomed. They precisely, clearly and expressively indicate a strong linkage between providing universal access to modern energy sources and eradication of poverty. They also indicate that actions taken should be adjusted to the conditions and specific needs of particular countries⁷⁰. Although, acknowledging the UN for finally seeing the unbreakable correlation between the access to energy and poverty elimination, we nevertheless wonder if the year 2030 is a realistic deadline. As indicated by the Secretary General «*the World Bank has estimated that to achieve the three targets of sustainable energy for all (and the proposed sustainable development goal on energy), total global investments required will be about \$600 billion to \$800 billion per year, which includes \$50 billion per year for energy access alone, and the rest for energy efficiency and renewable energy targets.*»⁷¹ Therefore the huge challenge remains how to provide the needed financial resources for energy sector reforms.

Taking awider, or shall we even call it, a holistic approach to the UN activities, leads us to the thesis that none of the UN goals canbe achieved without one another; they all overarch and complement one another. The same applies - even if not at the first glance - to the conjunction of providing access to energy and protection of human rights. As we prove it earlier in this paper, the correlation between the access to energy and sustainable

⁶⁸ Resolution adopted by the General Assembly on 20 March 2013 *Promotion of new and renewable sources of energy*, Doc No A/RES/67/215.

⁶⁹ Outcome document of the United Nations Conference on Sustainable Development *The future we want*, Annex to the Resolution adopted by the General Assembly on 27 July 2012, UN Doc No A/RES/66/288

⁷⁰ Resolution A/RES/65/151 reads: «*access to modern affordable energy services in developing countries is essential for the achievement of the internationally agreed development goals, including the Millennium Development Goals, and sustainable development, which would help to reduce poverty and to improve the conditions and standard of living for the majority of the world's population*», Resolution A/67/314 stresses «*the need for a coherent, integrated approach to energy issues and the promotion of synergies across the global energy agenda for sustainable development, with a focus on eradicating poverty and achieving the Millennium Development Goals*» and «*calls upon Member States to galvanize efforts to make universal access to sustainable modern energy services a priority, as such services contribute to poverty eradication*», the Secretary General's Report on International Year of Sustainable Energy for All (A/67/314) indicates that «*the availability of adequate, affordable and reliable energy services is essential for alleviating poverty, improving human welfare, raising living standards and, ultimately, achieving sustainable development.*», the Outcome document of Rio +20 (A/RES/66/288) recognizes: «*the critical role that energy plays in the development process, as access to sustainable modern energy services contributes to poverty eradication, saves lives, improves health and helps to provide for basic human needs*» and «*the need to address the challenge of access to sustainable modern energy services for all, in particular for the poor, who are unable to afford these services even when they are available*».

⁷¹ Report of the Secretary-General to the General Assembly on the United Nations Decade of Sustainable Energy for All, 22 September 2014, UN doc No A/69/395, point 27, p. 7.



development⁷² should mean a correlation between providing universal access to energy and the implementation of human rights. In other words, if one defined fulfilment of basic human's needs as being one of the objectives of human rights protection, then such definition would be (and is) visibly consistent with realisation of sustainable development strategies⁷³. Of course one may say that access to energy is not a basic human need in the same way as it is water or food, nor is it a basic human right. Notwithstanding that, taking into consideration all the achievements of modern technology and science, access to energy appears to be a crucial instrument of the fulfilment of various human rights, and the socioeconomic ones in particular. The latter include: the right to an adequate standard of living, the right to work, the right to the highest available standard of physical and mental health and the right to education. Above that, access to energy can also be seen in a much wider perspective of general human rights principles as a principle of equality of men and women and such fundamental rights as the right to life⁷⁴. Let us have a look at a few examples. The International Covenant on Economic, Social and Cultural Rights⁷⁵ establishes in its Article 11.1 the right to adequate standard of living, which includes «adequate food, clothing and housing» and to the right to «continuous improvement of living conditions». Access to energy is not expressly referred to in that provision, but it is beyond any doubt that energy is crucial not only for lighting, but also for providing proper heating or cooling the houses, cooking, refrigeration and accessing safe water and sanitation and as such constitutes an element responsible for adequate living condition or quality of life⁷⁶. As far as the right to the highest available standard of physical and mental health is concerned as it is recognized in Article 12 of the ICESCR, we may quote here Alex Pederson who wrote: «Dinner by candlelight sounds romantic; surgery by candlelight does not»⁷⁷. It is absolutely obvious that making full use of the advantages of medical science is impossible without access to reliable energy sources. Moreover, it has even been proposed that access to energy can be seen as a means of implementation of the right to life, in a sense that proper realization of the right to life should include

⁷² It seems obvious that there is a synchronicity between achieving sustainable development and the protection of human rights.

⁷³ S.T. TULLY, *cit.*, p. 33.

⁷⁴ That issue has been recently analysed in some international writings, see e.g.: A.J. BRADBROOK, J. G. GARDAM, M. CORMIER, p. 540.

⁷⁵ UN Treaty Series Registration No. No. 14531, vol. 993, p. 3.

⁷⁶ A.J. BRADBROOK, *Access to energy*, p. 12, Energy Poverty Issues and G8 Actions, The World Bank, Moscow - Washington DC February 2, 2006, p. 1. Available at:

http://siteresources.worldbank.org/INTRUSSIANFEDERATION/Resources/Energy_Poverty_Issues_Paper_Russia_G8_eng_summary.pdf

⁷⁷ A. PEDERSON, «Financing Energy Access On The Edge Of The World», *Colorado Journal of International Environmental Law and Policy*, vol. 21, Spring 2010, p. 355.

measures of reducing infant mortality and increasing life expectancy. Such measures definitely require access to energy⁷⁸. Articles 6 and 7 of the ICESCR guarantee the right to work and the right to the enjoyment of just and favourable conditions of work. It is highly unlikely that any modern workplace would do without access to energy needed not only in factories but in offices as well, since interrupted access to contemporary means of communication (telephones, the Internet or electronic mail) is dependent upon access to energy. Even such basic areas of activity like farming need reliable access to fuel for the machinery in order to develop and progress, otherwise they would have to rely on the manual and animal work only. Having the above-mentioned examples in mind, it does not need much further reasoning that adequate realization of the right to education provided by Article 13 of the ICESCR, requires access to energy as well. While it is possible, although still with some limitations, to provide basic education with no access to energy it is absolutely impossible nowadays to achieve any higher level of education without access to electricity, which ensures the use of computers and the internet and makes the exchange of knowledge accessible and possible.

It also appears that full implementation of the principle of equality of men and women and the idea of empowerment of women is impossible without providing access to energy⁷⁹. The reason for that is that in traditional communities, which usually inhabit countries with low electrification rates and mostly rely on solid fuel or biomass as sources of energy, generally it is women who are responsible for collecting fuel for heating and cooking⁸⁰. It is also women who, as the principal consumers, are likely to be more directly affected by tariff increases or resource scarcity. Improved energy access can thus free women's time spent otherwise on satisfying basic survival needs and enable them to undertake employment activities, leading, in consequence, to their economic independence and improved social standing⁸¹. Having access to modern energy sources would also improve women's health. It has been found that using solid fuel and biomass for cooking

⁷⁸ Access to energy can be seen as a means of implementation of right to life, in a sense that proper realization of right to life should include measures of reducing infant mortality and increasing life expectancy and such measures would definitely require access to energy See: A.J. BRADBROOK, J.G. GARDAM M. CORMIER, *cit.*, p. 11.

⁷⁹ It is worth noting that promotion of gender equality as well as empowering women and improvement of maternal health are constituent elements of MDGs.

⁸⁰ See e.g. *2004 World Survey on the Role of Women in Development: Women and International Migration*, United Nations Division for the Advancement of Women, p. 49, *Women, Gender Equality and Climate Change*, UN Women Watch *FactSheet*, http://www.un.org/womenwatch/feature/climate_change/downloads/Women_and_Climate_Change_Factsheet.pdf

⁸¹ S.T. TULLY, *cit.* p. 12.

is not only environmentally unsustainable, but also highly unhealthy, as people breath in hazardous substances while burning fuel⁸².

Another very interesting question that has recently arisen in international writings is the question whether «the right to energy» or «the right to access to energy» could be formulated as a human right per se⁸³. Firstly, as the idea itself is concerned, an analogy to the emerging right to water seems adequate. At the same time it must be said that although the right to energy cannot be as widely recognized as the right to water for the simple reason that after all, energy is not as basic human need as water is; there are many other human rights and human needs the realization of which depends on proper access to energy, and their number exceeds the number of is much wider than those which depending on access to water. This, which could be yet another an argument supporting in favour of the concept of the proposal that formulating human right to access to energy be regarded as a human right, too⁸⁴. Therefore the If so, a question of the contents of such a possible rights and the legal obligations deriving from it should be considered. Bradbrook declares that such a right should impose on states and the obligation to «ensure, access on the basis of equality and non-discrimination, access to a sufficient, regular, reliable, efficient, safe, and affordable supply of (ideally clean and sustainable) energy»⁸⁵. It must be noted though, that it would be pointless to formulate a new human right if there were no chance for such right to be properly implemented. Therefore the obligations imposed on states should be realistic and achievable, also taking into consideration different levels of economic development in different countries. Thus a question should be asked whether successful formulation of such a right is feasible in the nearest future.

Although very refreshing and alleviating the world debate, the human rights perspective of access to energy cannot be overemphasized for several reasons. First of all, proper implementation of human rights itself constitutes a major global concern It should be remembered that there is no human rights treaty that would be of universal reach, in the sense that it has been ratified by all the states all over the world, not all human rights are globally recognized as part of international customary law, which is binding upon all states. It also needs to be emphasized that obligations of states under socioeconomic rights are different from those imposed on states in political and civil rights frameworks. The ICSECR obliges states to take steps, to the maximum of their available resources, with a view to achieving progressively the full realization of the rights recognized in the

⁸² L. GURUSWAMY, *cit.*, pp. 315-318, R. CENTURELLI, *cit.* pp. 224-227.

⁸³ See: A.J. BRADBROOK, *Access To Energy*, A.J. BRADBROOK, J.G. GARDAM, M. CORMIER, *cit.*, L.A. AVILES, «Electric Energy Access In European Union Law: A Human Right?», *Colum. J. Eur. L. Online* 2, vol. 19.

⁸⁴ See: A.J. BRADBROOK, J.G. GARDAM, M. CORMIER, *cit.*, pp. 546-547.

⁸⁵ A.J. BRADBROOK, *Access to energy*, p. 15.

Covenant⁸⁶. However, it does not oblige them «to respect and to ensure» those rights, as it is the case of political and civil rights. Secondly, the human rights approach to the issue of access to energy is directed at enhancing social and economic welfare rather than at increasing energy access per se⁸⁷. Accordingly, combining access to energy with human rights issues may undoubtedly strengthen the world's debate on the provision of a universal access to energy but would not easily cure both of the world illnesses: the lack of universal access to energy and the non-fulfilment of human rights.

IV. EU LIBERALIZATION OF ENERGY MARKETS, ENERGY POVERTY AND VULNERABLE CUSTOMERS

Liberalization of the energy markets in Europe was presupposed by the neo-liberal vision of competition and rational choice of customers – *homo oeconomicus*, benefiting from the market interplay of supply and demand⁸⁸. Limiting the scope of analysis to the liberalization vs. energy poverty seems to be a simplification, as the economic wellbeing of energy customers (as much as regards the price of the media) is also a variable of costs of other EU energy policies in the areas of security of energy supply and sustainable development, affecting the final price a customer pays.

The protection of vulnerable customers is not directly addressed in the EU treaties, either is a subject of regulations of so-called liberalization directives in the case of electricity and gas. To establish the basis for the protection of vulnerable customers in the EU treaties, it is necessary to refer first to more general norms of the Treaty of the European Union⁸⁹. Article 2 of the TEU stipulates foundation values of the Treaty, such as respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minority groups. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. The role of energy is that it enables taking advantage of most of the values mentioned in the above article of the TEU, such as, e.g. human dignity.

Article 3 TEU, stipulating binding aims of the Union, supports protection of vulnerable customers. Article 3(1) TEU refers to the «well-being», which is interpreted as a

⁸⁶ See article 2 of ICSECR.

⁸⁷ S.T. TULLY, *cit.*, pp. 58-59.

⁸⁸ J. CLIFTON, D. DIAZ-FUENTES, M. FERNANDEZ-GUTIERREZ, J. REVUELTA, «Is Market-Oriented Reform Producing a “Two-Track” Europe? Evidence from Electricity and Telecommunications», *Annals of Public and Cooperative Economics*, 82:4, 2011, p. 500.

⁸⁹ The Treaty of the European Union, 2008 O.J. (C 115) 16, hereinafter TEU.

referral to economic, social and ecological conditions of life⁹⁰. The concept of a “highly competitive social market economy, aiming at full employment and social progress” stipulated in this Article refers to the Ordoliberal approach to the economy, which assumes an active role of the state in correcting market imperfections. Protection of vulnerable customers is even more rooted in the subsequent phrase of Article 3 TEU, stipulating that the Union “shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child”. All those provisions do not expressly call for protection of vulnerable customers as such but presuppose a progressive direction of Union’s regulations and leave an open way for primary legislation to adopt specific rules more focused on addressing specific social problems. It must be mentioned though that in any way it is possible to directly derive specific forms of protection of vulnerable customers from those norms of a very general character.

One of the problems explored in the legal literature is the protection of vulnerable customer in the light of services of general economic interest and the right to energy⁹¹. As art. 6 TEU refers to the Charter of Fundamental Rights of the European Union of 7 December 2000 (hereinafter: CFR), a question of legal implications of CFR in the context of access to energy for vulnerable customers arises⁹². While analysing the CFR it must be noted that vulnerable customers are not explicitly mentioned in the provisions of that act. This means that like in the case of the TEU, while looking for a possible legal basis for the protection of vulnerable customers, it will be necessary to refer to more general stipulations of the CFR. Among those provisions there are more general provisions of the Charter, in which in Article 36 of its fourth chapter titled «Solidarity», there are guarantees of access to Services of General Economic Interest (SGEI), including energy. Although such access should be granted in order to promote “social and territorial cohesion of the EU”, it does not guarantee that it will be granted as a consequence of the execution of a right. Moreover, as it was rightly noted: «Unfortunately, for advocates of access to energy as a human right, Article 36 of the Charter does not guarantee the right to access SGEI. The phrase «recognizes and respects» implies that access rights to SGEI

⁹⁰ K.P. SOMMERMANN, «The Objectives of the European Union», in H.J. BLANKE, S. MANGIAMELI (eds.) *The Treaty on European Union (TEU): A Commentary*, Springer, 2013, p. 168.

⁹¹ P. ROTT, «Liberalisation and protection of vulnerable customers in services of general interest», *Europaettslig Tidskrift*, vol. 14, n.º 3, 2011, pp. 483-502.

⁹² Charter of Fundamental Rights of the European Union, proclaimed by the Commission, 7, December 2000. Proclamation and text, 2000 O.J. (C 364) 1.

created by the national laws and practices of Member States must not be trumped by the acts of the EU institutions»⁹³.

The Treaty on the Functioning of the European Union, similarly to the TEU and CFR, does not refer explicitly to vulnerable customers or to energy poverty⁹⁴. Facing the lack of clear references, similarly to the TEU, it again fails to refer to energy poverty and vulnerable consumers. Social ambitions of the EU are expressed in provisions stipulating: 1) objectives and values of the Union (Articles 2 and 3 TFEU), 2) the mainstreaming clauses concerning e.g. social objectives (Articles 8 - 10 TFEU), 3) concrete social objectives of the EU (Articles 152 and 153 TFEU)⁹⁵. Within this framework, there is a space for the adoption, through directives, of concrete legal provisions aiming at combating social exclusion (art. 153 TFEU). Therefore, we assume that protection of vulnerable customers and fighting energy poverty, although not expressly articulated, is well grounded in the general provisions of the TFEU. Such a protection may be achieved also through an Open Method of Coordination, which - according to art. 153(2)a TFEU, may include measures: “designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States.

Consequently, we assume that on the basis of the TEU, the TFEU and the CFR it is not possible to treat energy as a human right. It is not possible either to find in those acts an explicit basis for the protection of vulnerable customers. Referring to more general rules of social origin the institutions of the EU may develop special rules of access to energy for particular groups of customers, e.g. the vulnerable ones.

Historically, the first European directives liberalizing the energy markets did not distinguish any special group of vulnerable customers. Clear references to energy poverty and protection of vulnerable customers were adopted in directives of so-called third liberalization package. Since the issue of the affordability of energy has been thoroughly deeply explored in the literature, in this paper we focus on targeted measures of protection of vulnerable customers⁹⁶ and consequently analyse Directive

⁹³ J.A. AVILES, «*Electric Energy Access in European Union Law: A Human Right?*», *Colum. J. Eur. L.F.*, vol. 19, 2012, <http://ssrn.com/abstract=2008887>, p. 4.

⁹⁴ Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47, hereinafter TFEU.

⁹⁵ K. LÖRCHER, «Social Competences», in N. BRUUN, K. LÖRCHER, I. SCHÖMANN, *The Lisbon Treaty and Social Europe*, Oxford, 2012, p. 181.

⁹⁶ M. BARTL, *cit.*

2009/72, bearing in mind that similar provisions were enacted with regard to gas in Directive 2009/73⁹⁷.

Directive 2009/72 is an act in which vulnerable customers protection has been developed the most extensively so far. The provisions of that act do not grant vulnerable customers any rights but put some obligations on Member States and NRAs. We will explore them in subsequent parts of this paper.

Directive 2009/72 refers to vulnerable customers in the provisions of Article 3, relating to public service obligations and customer protection. Taking a broad perspective, it is possible to consider vulnerable customers protection also through general measures of protection of all end-users of electricity, but their “vulnerability” is the basis for adopting special measures that we are interested in. Such an approach is grounded also in the wording of Art 3 (7) which puts an obligation on Member States to take appropriate measures to protect final customers, ensuring particularly that there are adequate safeguards to protect vulnerable ones. Protection of such customers, according to the next sentence of the abovementioned Article implies adoption of a definition of the “concept of vulnerable customers”. The directive links this concept with energy poverty and protection against disconnections, although leaving a space for Member States to wider the area of protection. Such protection shall be effective and cover also customers in remote areas. Analysing the abovementioned provisions, we can observe that while obliging Member States, the directive leaves much space for implementation in national legal orders.

It also sets out more concrete “appropriate measures” of protections, containing:

- formulating national energy action plans, providing benefits in social security systems to ensure the necessary electricity supply to vulnerable customers, or
- providing for support for energy efficiency improvements, to address energy poverty where identified, including in the broader context of poverty (art. 3(8)).

The list of those measures is not closed, so Member States can adopt also other measures of protection, suitable for particular conditions. Such flexibility in adopting measures of protection is limited to the extent of the imperative of the effective opening of the market (art. 33).

While analysing obligations arising from the provisions of Directive 2009/72 discussed above, it should be noted that it is not clear whether protection of vulnerable customers should be placed in the area of public law or private law. Considering that a

⁹⁷ 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 [1994] L 211/94 (dir. 2009/73 or gas directive); 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 [2009] L 211/55 (dir. 2009/72 or electricity directive).

contract between a customer and an electricity undertaking is based on private law, it is acknowledged that some concepts enshrined in Directive 2009/72 as special rules for disconnections or termination of a contract for vulnerable customers may be regarded as a part of private law, constituting exceptions from a principle of the freedom of contract⁹⁸. On the other hand, a reference made to social policy, leaves an open space for deployment of measures that are of public law origin (like subsidies or getting advice).

What is also important when we look at measures of protection of vulnerable customers is that in both liberalization directives, they concentrate on social security and protection against supply disconnections. Although, as we noted earlier, directives leave much space for Member States to adopt specific measures, identification of only two aspects does not cover all possible forms of aid for vulnerable customers, including, for example, improvements in energy efficiency. Both liberalization directives refer to energy efficiency as a measure of protection only in their preambles, which is understandable as the content of those acts regards in particular the liberalization issues. Such a provision can also be found in Directive 2012/27 which, among others provides that «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». This, however, is stated only in its preamble. As energy efficiency is one of the flagship EU policies, rapid developments in this area may effect in the exclusion of those customers who cannot afford to improve energy efficiency, and/or lack specific knowledge. Indeed, there is much space in energy efficiency measures (like renovations and thermal insulation of buildings, smart metering etc.) to help vulnerable customers. An obvious advantage of such measures is that one-time cost brings long-lasting benefits⁹⁹. Thus, in our opinion, the EU law and policy shall pay more attention to energy efficiency as a tool of protection of vulnerable customers. The same refers to promotion of renewables and energy generation. An example from the U.S. shows that low-income customers can be engaged in various forms of energy generation by e.g. assigning them subscriptions of community solar plants¹⁰⁰. Similar opportunities seem to give energy cooperatives developed in various states in Europe, though experiences gained so far show that members of such cooperatives are not necessarily characterized by

⁹⁸ P. ROTT, «The Low-Income Customer in European Private Law», in K. PURNHAGEN, P. ROTT (eds.), *Varieties of European Economic Law and Regulation. Liber Amicorum for Hans Micklitz*, Springer 2014, p. 680.

⁹⁹ E. ZAMETICA, A. BEDNARSKA, A. ZUBAVICIUTE, *Capacity Building for Sustainable Energy Regulation in Eastern Europe and Central Asia*, a textbook by the Energy Regulators Regional Association, 2011, p. 45.

¹⁰⁰ E.g. according to *Colorado Community Solar Gardens Act*, HOUSE BILL 10-1342, each qualifying retail utility shall set forth in its plan for acquisition of renewable resources a proposal for including low-income customers as subscribers to a community solar garden. The utility may give preference to community solar gardens that have low-income subscribers.

low-income¹⁰¹. Indeed, various forms of social participation in energy generation in the EU are yet to be developed to become a real measure of vulnerable customers protection.

The institutional framework in the area of energy poverty and vulnerable customers in the EU is not regulated in liberalization directives, as those acts do not assign tasks in the area of protection of vulnerable consumers to any specific institutions of the EU. Both gas and electricity directives mention vulnerable customers among general objectives of regulatory authorities, which, helping to achieve high standards of universal and public service in electricity supply, shall contribute to the protection of vulnerable customers (...). Although such a general and vaguely stated objective does not constitute a concrete task, National Regulatory Agencies (NRAs) very often engage in working out policies towards vulnerable customers protection (the best example here is the British Ofgem). Also, the CEER – a council of European energy regulators (and formerly the ERGEG) is active in monitoring policies relating to vulnerable customers. CEER contributions are really a valuable source of comparative knowledge about solutions adopted in various European countries. Another body acting in closer relation to the EU Commission is The Vulnerable Customer Working Group that has been established by Commission services DG Energy in collaboration with DG Health and Consumers to address Member States' obligations to vulnerable customers as defined in the EU energy-related legislation, and the need for comprehensive transposition of relevant directives¹⁰².

The EU as a regional organisation consisting of countries standing on a relatively high level of economic development has adopted rules regarding vulnerable customers only quite recently, but has not developed a "right to energy" as a human right. Therefore nobody expects a development of such right in the EU legal framework, at least not in the nearest future. The concept of vulnerable protection will develop along with the implementation of directives of the 3rd liberalization package.

V. GRANTING ENERGY ACCESS TO VULNERABLE CUSTOMERS ON A NATIONAL LEVEL – THE CASE OF POLAND

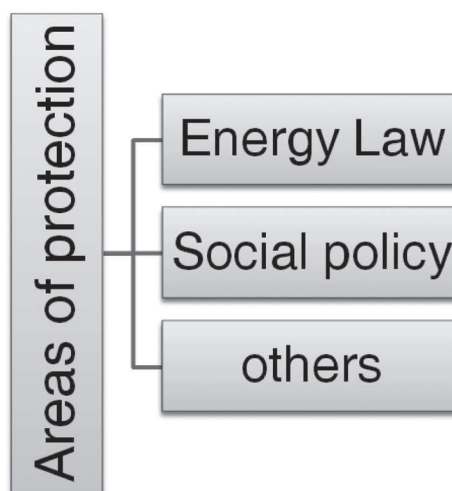
EU Member States are obliged to implement the provisions of the 3rd liberalization package which stipulates sets forth more concrete regulations. Regarding vulnerable customers than those under international law. The EU Commission acting as a guardian of the Treaty monitors the activity of Member States in this area, but is also a subject of

¹⁰¹ Ö. YILDIZ, J. ROMMEL, S. DEBOR, L. HOLSTENKAMP, J.R. MEY F. MÜLLER, J. RADTKE, J. ROGNLI, *Renewable energy cooperatives as gatekeepers or facilitators? Recent developments in Germany and a multidisciplinary research agenda*, Energy Research & Social Science, vol. 6, 2015, p. 64.

¹⁰² Vulnerable Customer Working Group Guidance Document on Vulnerable Customers, November 2013. http://ec.europa.eu/energy/sites/ener/files/documents/20140106_vulnerable_customer_report.pdf

reports of the CEER and other organizations¹⁰³. Case analyses have also been a subject of a growing number of economic and social research in recent years¹⁰⁴.

Since our analysis is focused first and foremost on the EU, it must be noted that Member States use different definitions of vulnerable customers and adopt various means of their protection. In general, the measures of protection can be categorized as follows:



¹⁰³ CEER Status Review of Customer and Retail Market Provisions from the 3rd Package as of 1 January 2012

Ref: C12-CEM-55-04 07 November 2012 (Hereinafter: CEER 2012); ERGEG report, Status review of the definitions of vulnerable customer, default supplier and supplier of last resort Ref: E09-CEM-26-04, 16 July 2009; Energy Community, *Outline of the Social Strategy in The Energy Community*, Energy Community Secretariat 2013,

[https://www.energy-community.org/portal/page/portal/ENC_HOME/DOCS/2918042/OUTLINE_OF_THE_SOCIAL_STRATEGY_04_03_2014_Final_\(Web_Version\).pdf](https://www.energy-community.org/portal/page/portal/ENC_HOME/DOCS/2918042/OUTLINE_OF_THE_SOCIAL_STRATEGY_04_03_2014_Final_(Web_Version).pdf)

¹⁰⁴ U. DUBOIS, «From targeting to implementation: The role of identification of fuel poor households», *Energy Policy*, vol. 49, 2012, pp. 107–115; D. GERBERY, R. FILČÁK, *Exploring multi-dimensional Nature of Poverty in Slovakia: Access to Energy and Concept of Energy Poverty*, *Ekonomický časopis*, 2014, 62(6), 2014, pp. 579–597; F. BARTIAUX, T. DE MENTEN, O. SERVAIS, N. FROGNEUX, *Policies affecting energy poverty in Belgium: paradoxes between social and climate policies*, Paper presented at the INCLUESEV meeting in Durham, NC, USA, October the 6 th-7th, 2011; R. WALKER, CH. LIDDELL, P. MCKENZIE, CH. MORRIS, S. LAGDON, «Fuel poverty in Northern Ireland: Humanizing the plight of vulnerable households», *Energy Research & Social Science*, vol. 4, 2014, pp. 89–99; H. THOMSON, C. SNELL, «Quantifying the prevalence of fuel poverty across the European Union», *Energy Policy*, vol. 52, 2012, pp. 563–572. K.M. BRUNNER, M. SPITZER, A. CHRISTANELL, «Experiencing fuel poverty. Coping strategies of low-income households in Vienna/Austria», *Energy Policy*, vol. 49, 2012, pp. 53–59; R. MINIACI, C. SCARPA, P. VALBONESI, «Energy affordability and the benefits system in Italy», *Energy Policy*, vol. 75, 2014, pp. 289–300.

Recognized by the CEER 2012 the means of protection used in various Member States of the EU are different, covering:

- 1) Measures related to protecting customers from disconnection:
 - General prohibition of disconnection;
 - Prohibition of disconnection at critical times; and
 - Adequate number of warnings and notifications before disconnection.
- 2) Specific protection of customers in remote areas;
- 3) Supplier of last resort (for vulnerable customers or for customers who are unable to find a supplier);
- 4) Default supplier (for vulnerable customers or for customers who are unable to find a supplier);
- 5) Support for energy efficiency improvements;
- 6) Social security benefits for vulnerable customers dedicated to support the payment of energy bills;
- 7) Other social security benefits;
- 8) Social tariffs for vulnerable customers;
- 9) Other specific assistance measures.

In general, it is possible to distinguish between two main directions of aid for vulnerable customers under the energy and social law and policy.

Vulnerable customer and the right to energy have not been a subject of expanded research in social science¹⁰⁵. Poland as the EU Member State obviously has to implement the EU law. Looking for a legal background to adopt appropriate means, it is necessary first to refer to the constitution. The Constitution of the Republic of Poland neither counts the right to energy in its catalogue of human rights nor refers to vulnerable customers. As access to energy is the basic factor of the improvement of quality of life and realization of other human rights, it can be considered as a derivative of other constitutional rights from the catalogue of social and economic rights. As regards those rights, the basis for their development is art. 2 of the Constitution, which ordains the Republic of Poland to be «*a democratic state governed by law implementing the principles of social*

¹⁰⁵ M. SWORA, A. BEDNARSKA, *Energetyka: odbiorca wrażliwy społecznie*, Rzeczpospolita of 11.12.2007, p. C2.; T. DŁUGOSZ, «Odbiorca wrażliwy społecznie a unijne ramy prawnej regulacji», w: Z. MURAS i inni, «Polityka energetyczna – wczoraj, dziś i jutro», Warszawa 2010, p. 83; T. DŁUGOSZ, «Ochrona odbiorcy wrażliwego w dyrektywach trzeciego pakietu energetycznego», In H. GRONKIEWICZ – K. WALTZ, JAROSZYŃSKI (eds.), *Europeizacja publicznego prawa gospodarczego*, Warszawa 2011, p. 64; I. FIGASZEWSKA, «Ubóstwo energetyczne – co to jest?», *Biul, URE* 5(67)2009, p. 3; P. KUROWSKI, *Ubóstwo energetyczne w Polsce na podstawie badań GUS z 2008 r.*, *Polityka Społeczna* 11-12/2011, p. 17; A. SKOCZYŁAS, M. SWORA, *Wsparcie dla odbiorcy wrażliwego w świetle przepisów ustawy – Prawo energetyczne*, Samorząd Terytorialny 9/2014, p. 4.

justice»¹⁰⁶. The characteristic of those rights is that they are not enforceable directly but the Constitution obliges the State to undertake an active social policy to guarantee their fulfilment¹⁰⁷. Among those rights, the most general clause regards protection of human dignity. According to Article 30 of the Constitution: «*The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities*».

Polish Constitution does not explicitly refer to vulnerable customers of energy or other goods and/or services but this does not mean that there is no basis for protection of this a group of people. According to Article 67 of the Constitution: «*A citizen shall have the right to social security whenever incapacitated for work by reason of sickness or invalidism as well as having attained retirement age. The scope and forms of social security shall be specified by statute*». Listing those vulnerable groups and granting them a right to social protection, the Constitution opens the way for an active role of state agencies in various areas of social assistance, including guaranteeing those groups access to energy. And yet, the Constitution of the Republic of Poland cannot be considered as a direct source of any enforceable right to energy. As the State is obliged by constitutional norms to undertake general social policy, the government and legislature can grant the access to energy. Also international law, as it was argued, does not include enforceable human right to energy, so the only upper normative level, we are able to refer to is the legal order of the EU, where both liberalization directives contain clear references to the energy poverty and protection of vulnerable energy customers.

The implementation of the EU energy directives in Polish primary legislation means that the Constitution now contains specific norms protecting explicitly vulnerable customers, although this protection is enhanced by additional and more general regulations stemming from (legal) provisions of a general system of social assistance as well as (technical) rules regulating connections and disconnections of utilities etc. Looking at the Polish system of energy price regulation it can be argued that the customer is protected at two levels. At the level of administrative regulations it is President of the Energy Regulatory Office (hereinafter: PERO) who executes the power to approve the tariffs for household customers (both regarding the sales and the distribution of electricity and natural gas). There is no place in this paper for a detailed analysis of the protective function of the PERO, it is enough to mention that energy law imposes an obligation on energy companies to calculate tariffs taking into account the protection of customers from unreasonably high prices and rates. The PERO controls whether energy company meet this obligation

¹⁰⁶ R. CHOLEWIŃSKI, «The Protection of Human Rights in the New Polish Constitution», *Fordham International Law Journal*, Vol. 22(2), 1998, p. 273.

¹⁰⁷ *Idem*.

in the administrative process of approving tariff (art. 45(1)(3) of Energy Law)¹⁰⁸. Thus in general terms, all energy customers are protected against unreasonably high prices and rates as the retail market (i.e. selling energy to households) since energy and gas is still under control of the energy regulator. Such general protection though is not aimed at the protection of vulnerable customers who are protected by a specific legal provision.

A specific feature of Poland is that households use different sources of energy for heating their homes and among those the most popular are: central heating, district heating, coal and electricity. As regards heating, social assistance is stipulated in art. 6 (7) of the Act of 21 June of 2001 on housing subsidies¹⁰⁹. Pursuant to its provisions, if the home does not have central heating, gas or central hot water, the municipality has the ability to grant, as part of housing subsidy, a lump sum for the purchase of fuel. This lump sum is paid together with the housing subsidy. Its amount is not the same for all and depends on the size of occupied premises and the number of people constituting the household. The granting of such assistance entails responsibilities and anyone who receives such support must not default on payment of the rent for the premises. If rent is not paid regularly, the payment of a bonus along with a lump sum for fuel is suspended until the municipality until the debt has been covered. It must be mentioned that the AoHA determines the lump sums payable to vulnerable customers on a mixed basis, taking into account the level of income, the number of people constituting a household and the occupied area. Thus we may state when it comes to heating vulnerable customers are identified predominantly on the basis of economic presumptions.

The adoption of legislation protecting vulnerable customers of electricity in Poland was accompanied by prolonged discussions regarding measures that supposed to be adopted to tackle the problem. The initial idea was to employ social tariffs as a special kind of lower tariff applied by energy undertakings for vulnerable customers. The idea was finally rejected as such kind of tariffs was believed to create price distortion as a result of subsidizing vulnerable customers by non-vulnerable ones. On the other hand, it was argued that energy undertakings are not specialists in social assistance and vesting in them a task of protection of vulnerable customers would impose on those undertakings extra operational costs. Finally, the idea of social tariffs was rejected and the policymakers decided to adopt a special social assistance tool namely energy subsidy. As a consequence, in the 2013 amendment to the Energy law, the following regulations were adopted:

- the definition of vulnerable electricity customer (art. 3(13c));

¹⁰⁸ Energy Law Act of 10 April 1997, Official Journal of the Republic of Poland (OJ RP) 1997, No 54, pos. 348 as amended, hereinafter: Energy Law.

¹⁰⁹ OJ RP, 2013 position 966 (consolidated text), hereinafter AoHA.

- the right of an electricity vulnerable customer to receive a fixed energy subsidy together with the rules for determining the amount thereof (art. 5c);
- procedural rules authorizing city mayors to issue a decision in the field of energy (art. 5e);
- the technical rules regarding payment of the subsidy (art. 5d);
- the tasks regarding the form of payment of the subsidy and the rules for granting subsidies to municipalities for its implementation (art. 5e-5f).

The definition of a vulnerable customer as adopted in energy law, links a vulnerable customer with beneficiaries of housing subsidies, referring indirectly to the criteria adopted in the AoHA. In this sense Polish energy law does not create its own category of vulnerable customers, but merely adds some technical criteria, such as e.g. customer being a part of energy contract and the residence at the place of delivery of electricity. It is worth noting that when adopting the above definition, Polish legislative acts for the first time referred to a special category of customers distinguished by their «vulnerability». However, it is also noteworthy that since the criteria of identification of such customers refer to income, those customers might as well be called the low-income ones. Referring to vulnerable customers («vulnerable end-users»), the Polish legislator probably wished to avoid any doubts regarding provenience of the vulnerable customer concept contained in Directive 2009/72 and the need for its implementation.

According to art. 5c of Polish Energy Law, the right to an energy subsidy is an individual right of social origin. The execution of such a right is a task of the lowest level of self-government («*gmina*») which –according to the constitutional principle of subsidiarity– holds primary responsibility for social aid. According to energy law, the only form of fighting energy poverty is the energy subsidy, and communities rarely engage in other non-financial forms of social aid to vulnerable energy customers, including assistance in energy efficiency improvement.

When guaranteeing the protection to vulnerable customers, energy law provides that the energy subsidy shall be paid directly to those customers. On the other hand, borrowing the criteria employed in the definition of vulnerable customers from other legislative acts, energy law does not link the subsidy with a specific kind of poverty, namely energy poverty. In our opinion, this means that the construction of an energy subsidy can be regarded as a means of improvement of the general economic position of customers but it is not targeted specifically at fighting energy poverty. Neither at the central, nor at the local level, are public authorities not obliged to adopt policy plans on combating energy poverty.

Apart from subsidies, there are other forms of aid to vulnerable customers, namely special regulations on prepayment meters. Such meters can be installed if the end user has delayed payment for gas, electricity or heat two or more times within the last 12 months, or has not paid for the services for a period of at least one month (art. 6a). In the case of

vulnerable customers of gas or electricity, an energy enterprise is required to install a prepayment metering system within 21 days after receiving a request from such a customer. The cost of such metering system is born by the energy enterprise.

As the concept of vulnerable customers is sometimes linked in the literature and with a «default supplier», but Polish law does not distinguish such an institution. What can only be found is a regulation of so called «supplier of last resort» (further: SoLR) which is not, however, defined *expressis verbis* in Polish energy law. The position and function of this specific participant of the electricity market can be nevertheless interpreted and deduced from the detailed provisions of energy law.

According to its art. 5(2a)(1)b., a contract between the customer and the distribution system operator (DSO) concerning the provision of a distribution service to that customer, mandatorily has to include the identification of the supplier who will take over the supply of electricity to the given customer in the case the supplier of choice is not be able to fulfil its obligations under the contract with the customer. Moreover, in a contract with the DSO, a customer has to include its consent to conclude by the DSO (in the name and to the benefit of that customer) a supply electricity agreement with an identified SoLR. This construction makes it possible to create direct relations between the customer who has suddenly lost his previous electricity supplier (of its choice) with the new one (SoLR) without engaging this customer into a long procedure of searching for a new supplier and negotiating a new contract.

Theoretically, a customer has full discretion as far as the choice of a potential SoLR is concerned. One practical condition is that a SoLR has to conclude the agreement on the provision of distribution services with a DSO. Therefore, DSOs are obliged to publish on their websites a list of supplying companies with which they concluded supply contracts. Analyzing the legal position of SoLRs, it is difficult to associate this institution with vulnerable customers or the situation of energy poverty.

Although the inclusion of regulations regarding vulnerable customer protection in Energy Law suggests that the Polish legislator decided to apply means of protection lying within the energy system, the basic form of aid, namely energy subsidy, should be regarded as a part of a system of social assistance. As the subsidy is not directly linked with energy debts of a customer, despite the nomenclature used in Energy Law, it is difficult to consider that energy subsidy as a means of protection of vulnerable energy customers. The regulation of energy tariffs in the sector of households, even though it contains an element of balancing interests of energy customers and enterprises, cannot be seen as a form of a direct protection of vulnerable customers. An analysis of the provisions of Polish Energy Law, it must be noted that Poland has adopted a system that does not put any obligations on energy enterprises as regards o vulnerable customers protection, except for a duty to install prepayment meters.

VI. CONCLUSION

As we have stated in our paper, the issue of access to energy falls under the competences and functions of various international governmental organizations, which gather countries at different levels of economic development. Consequently, they represent various approaches to energy poverty and vulnerable customers and they respond to the different needs of their member states. We proved in our paper, that not only developing countries cannot, and should not, adopt the same measures as the developing countries do but there is also a need to differentiate the developing countries from those the least developed ones. Many of the least developed countries are considered to be the so-called failed states, that lack any effective government, which as a rule is corrupted, struggling with the internal conflicts. In our opinion it is infeasible that those countries would provide reliable, affordable and modern energy services. Therefore we think that taking those countries into the consideration, the programmes aiming at providing access to energy should be strongly correlated to the international measures to maintain international peace and security.

We are also of the opinion that none new organization dealing with energy access issues should be created. Notwithstanding that, strong effort should be taken to coordinate the work of existing international bodies, for example under the auspices of SE4ALL initiative and/or UN-Energy. This should prevent the fragmentation of international legislative framework.

Although the international community's attitude to energy issues correlated with sustainable development has been changing throughout years, we are of the opinion, that regrettably the most important UN's achievements in the area of sustainable development issues, namely the Millennium Development Goals (MDGs) lacks any direct reference to the access to energy or to the correlation of access to energy and poverty. We have to acknowledge creating the initiative SE4ALL, what in our opinion proves that, the matter of providing sustainable access to energy finally became one of the crucial areas of interest of the UN and its specialized agencies. Nevertheless we wonder if the year 2030 is a realistic deadline and it has to be remembered, that the huge challenge remains how to provide the needed financial resources for energy sector reforms.

We are of the opinion that the human rights perspective of access to energy is very refreshing and important for the world debate. As we proved, access to energy appears to be a crucial instrument of the fulfilment of various human rights. Those are primarily socioeconomic ones, in particular: the right to an adequate standard of living, the right to work, the right to the highest available standard of physical and mental health and the right to education. However it also appears, that access to energy can be seen in a much wider perspective of general human rights principles as a principle of equality of men and women and such fundamental rights as the right to life. We also represent the view, that recently initiated discussion on possibly emerging new «right to energy» could enrich the

international debate on providing universal access to energy. On the other hand we have to remember, that obligations imposed on states should be realistic and achievable, also taking into consideration different levels of economic development in different countries. Thus we doubt whether successful formulation of such a right is feasible in the nearest future.

Considering the three levels of the current legal debate on vulnerable customers and the access to energy, we have found that the problem of vulnerable customers and energy poverty is present both in international law and in the framework of the EU as an regional organization (including its member states). Neither international law, nor in the EU legal framework we have found the right to energy enacted as a human right. Looking and the EU and its Member States we must remember that it is probably most developed system of protection of vulnerable customers. Although Member States differ in measures which they have individually adopted at their national levels to address the problem of vulnerable customers, most of them recognize the problem and Poland is no exception. Both in the EU and its member states, protection of vulnerable customers may be treated as a derivative from more general legal norms referring to social sphere of functioning of modern states or international organizations. In the 21st century, energy is a crucial factor for realization of human rights, like a right to dignity or a right to education. Although, various legal regimes do not recognize a right to energy, the role of the modern state should be to carry on inclusive policy, assuring that the energy is available for the largest possible part of population. Assuming that it is the role of the market to deliver energy and energy services, contemporary law contains various provisions guaranteeing the access to energy for vulnerable customers. Those provisions may be of public or private law character, but in our opinion they should not disturb normal functioning of the energy market.

TÍTULO

LA GARANTÍA DE ACCESO A LA ENERGÍA DE LOS CONSUMIDORES VULNERABLES

SUMARIO

I. INTRODUCCIÓN. II. CONSUMIDORES VULNERABLES Y POBREZA ENERGÉTICA. III. EL ACCESO A LA ENERGÍA Y POBREZA ENERGÉTICA EN EL DERECHO INTERNACIONAL. IV. LIBERALIZACIÓN DE LOS MERCADOS ENERGÉTICOS, POBREZA ENERGÉTICA Y CONSUMIDORES VULNERABLES. V. LA GARANTÍA DE ACCESO A LA ENERGÍA DE LOS CONSUMIDORES VULNERABLES A NIVEL NACIONAL. EL CASO DE POLONIA. VI. CONCLUSIONES.

PALABRAS CLAVES

Pobreza Energética; Consumidores vulnerables; Derecho energético; Mercados energéticos; Energía.

RESUMEN

La cuestión del acceso a la energía desde una perspectiva internacional, está relacionada no solo con la protección de los consumidores vulnerables sino con la pobreza energética, a su vez estrechamente relacionado con el problema



mismo de la pobreza desde una perspectiva global. En nuestra opinión, la energía es esencial para cualquier desarrollo, y la pobreza no puede erradicarse sin reducir la pobreza energética. El acceso a la energía desde la perspectiva del Derecho Internacional Público nos permite distinguir dos dimensiones de esta cuestión: la perspectiva del denominado desarrollo y la perspectiva de los derechos humanos. El acceso a la energía es uno de los principales factores de estímulo de los procesos de progreso y desarrollo, que deben identificarse con el desarrollo sostenible. Aunque el acceso a la energía es una cuestión relacionada con las competencias y funciones de una miríada de organizaciones internacionales, gubernamentales o no, y está sujeto a distintos acuerdos internacionales y normativas, son las regulaciones de Naciones Unidas las que presentan mayor alcance, constituyendo el objeto de análisis más importante del marco legislativo internacional de nuestra contribución. La segunda dimensión considerada es la perspectiva de los derechos humanos. En primer lugar, analizamos la influencia del acceso a la energía en la efectividad de varios derechos humanos, no solo socioeconómicos sino también civiles y políticos. En segundo lugar, nos planteamos la viabilidad de formular el «derecho a la energía» como derecho humano: para ello, atendemos la perspectiva de la Unión Europea y nacional (analizando el ejemplo de Polonia), resultando que no hay una base explícita en los Tratados ni para la protección de consumidores vulnerables ni para un eventual «derecho a la energía», conclusión que debe también sostenerse respecto de la Constitución de la República de Polonia. Los consumidores vulnerables se protegen a través de las Directivas europeas y de actos legislativos en Polonia: en nuestra opinión, los progresos en la liberalización de los mercados energéticos en la UE supondrán un reforzamiento en el ámbito de protección.

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