

Security and regulation of the energy market: national academic conference on the 5th anniversary of the Society of Energy Law and Other Infrastructural Sectors of the University of Łódź, 24 May 2017

On 24 May 2017, the First National Academic Conference “Security and regulation of the energy market” was held at the Faculty of Law and Administration of the University of Łódź (WPiA UŁ). The Society of Energy Law and Other Infrastructural Sectors of the University of Łódź (NKPEiSI) was the main organiser. The Strategic Partner of the Conference was Polskie Górnictwo Naftowe i Gazownictwo S.A., the co-organisers were: the Department of European Economic Law of WPiA UŁ, the Polish Foundation of Competition Law and Sector Regulation *Ius Publicum* and the University of Economics in Katowice. The Conference was held under the patronage of the President of the Energy Regulatory Office and the Centre for Antitrust and Regulatory Studies of the University of Warsaw.

The Conference was opened by its organiser – M. Kraśniewski (Deputy Chairman of *Ius Publicum*). Next, the floor was taken by Prof. M. Królikowska-Olczak, head of the Department of European Economic Law of WPiA UŁ. She stressed the importance of the topics discussed and expressed gratitude to all persons who contributed to this event.

Next, a letter by Minister Piotr Naimski (Undersecretary of State at the Chancellery of the Prime Minister, the Government Plenipotentiary for Strategic Energy Infrastructure) was read. The author stressed the importance of the energy sector for Poland’s economic development and safety. He also mentioned that each and every energy market – electricity, gas, fuel – were facing regulatory challenges which needed to be addressed. Mr. Naimski wrote that the limitations in energy supply in August 2015 and losses incurred thereunder by Polish companies showed the urgency and scale of action required in the electricity sector. In particular, it is necessary to create new conditions for construction and modernisation of power plants. In his opinion, the gas market needed diversification of sources of supply. Mr. Naimski noted that thanks to consistent actions of the Polish government, the Committee of Permanent Representatives of the Governments of the Member States to the European Union reached an agreement on the Security of Gas Supply Regulation on 10 May 2017. Its solidarity mechanism, included in the draft regulation upon Poland’s request, is a tool which will automatically help ensure supply of natural gas from neighbouring countries in case of an emergency. As for the fuel market, actions are carried out

to improve conditions for the functioning of legal entrepreneurs by restricting the so-called grey market.

After the official opening of the Conference, Prof. Królikowska-Olczak opened the first panel – “Security and regulation of the energy market – theoretical approach”.

The first to speak was M. Pawełczyk, D. Sc. (Chairman of the Board of the Polish Foundation of Competition Law and Sector Regulation *Ius Publicum*, Professor, Department of Public Economic Law, University of Silesia), who delivered a lecture entitled: “The normative aspect of energy security”. He indicated that both academic discourse and public debate had a deservedly growing interest in “energy security” and presented a list of sources related to energy security as well as an analysis of energy security itself as a legal term. The second paper – “The development of energy clusters in Poland” – was presented by M. Czarnecka, PhD (Assistant professor, University of Economics in Katowice). She pointed out that the amendment to the Renewable Energy Sources Act had introduced the concept of energy clusters, which was in line with the proposals of the Winter Package. Next, she discussed the definition of an energy cluster as well as its subjective and material scope. The next to take the floor was Z. Muras, PhD (Head of the Department of Legal Issues and Dispute Settlement, Energy Regulatory Office), who gave a lecture “The regulator of fuel and energy sectors – market regulation versus promotion. Deliberation on case law on tariffs.” He highlighted the scale of legal regulation required in the energy industry and discussed the issue of tariff regulation based on selected case law of the Supreme Court. The final lecture of the panel was delivered by A. Szafranski, D. Sc. (Faculty Member, Department of Commercial and Banking Administrative Law, Faculty of Law and Administration, University of Warsaw), who focused on legal circumstances of delivery of the Sustainable Development Strategy regarding energy. He pointed at strategic areas of the energy sector and stressed that they would require appropriate legal environment and stability. It was noted that two strategic projects – e-mobility and the power market – were unable to function properly without appropriate statutory regulation and required more attention in that respect. The lectures were followed by a discussion.

The second part of the Conference was a plenary discussion on security and regulation of the energy market in a practical approach, which was moderated by A. Fornalczyk, D. Sc. (first President of the Antimonopoly Office, founding partner of COMPER Fornalczyk i Wspólnicy). Lectures were delivered by F. Grzegorzczak, D. Sc. (Chairman of the Board of Tauron Polska Energia S.A, associate professor, Cracow University of Economics), Ł. Kroplewski (Deputy Chairman of the Board of Polskie Górnictwo Naftowe i Gazownictwo S.A.), M. Pawełczyk, D. Sc., and Z. Muras, PhD.

The main topic of the discussion was the Sustainable Development Strategy, which is also related to the energy industry. In the introduction, Ms. Fornalczyk referred to cyclical sociological research of the Polish Academy of Sciences and Public Opinion Research Center on energy awareness among Poles. The research shows that 70% of respondents think that energy is a very important infrastructure sector for social and economic life. The respondents were also asked about renewable energy sources – 60% were willing to use renewable energy. They are also ready to pay more for energy, but by not more than 6% of current prices.

The first question was about diversification of supplies and development plans. Ł. Kroplewski pointed out that technical and economic conditions were important for the diversification of gas supplies, but it should not hamper the provision of energy security. The aim of actions taken by PGNiG is to ensure energy security. As an example, he mentioned the project of pre-operational extraction of coal-mine methane (CMM) and coal-bed methane (CBM) from mines. The company pays a lot of attention to innovation as it contributes to the diversification of natural gas supplies. He also mentioned that important changes regarding infrastructure, whose improvement helped sell larger amounts of gas, had taken place. Mr. Kroplewski indicated that for the first time PGNiG's current strategy was focused on innovation development. New technologies may reduce costs, e.g. of wells, by up to 30%. In his opinion, the diversification of gas portfolio and infrastructure improvements would contribute to larger sales – the activity of PGNiG agency in London and PGNiG Supply & Trading GmbH shows that there is potential for trade in gas abroad. PGNiG's strong entry into the LNG and CNG market results also from the EU's climate policy, which is heading towards replacement of conventional fuels with unconventional ones (e.g. methane). Furthermore, PGNiG is becoming a technically stronger company. It is planned to create a gas hub in the future, which will certainly strengthen PGNiG's position in Europe, especially in Central and Eastern Europe. However, he also explained that the company had to make sure that Gazprom saw it as a partner. He believes that it was important that PGNiG was seen as a business partner due to being one of strategic companies in Poland – therefore, it should not be dependent on foreign entities. In summary, he stated that energy security should be ensured at any cost. Mr. Kroplewski explained that profits and rationality of decisions were vital as well. He admitted that innovation would be of increased importance for energy security.

Prof. F. Grzegorzczuk argued that energy security and business do not always go along with each other. He also referred to renewable energy sources and their role in the provision of energy security. In his opinion, energy security could not be based on uncontrollable energy sources. At the same time, he explained that modern technologies already existed but could not be used from the business point of view. It is not about the lack of technologies but their unprofitability. As an example, he mentioned coal gasification. It is technologically possible but unacceptable in business terms. Therefore, actions which will make modern technologies profitable must be found. According to Prof. Grzegorzczuk, the Sustainable Development Strategy clearly defined the basis of the Polish energy policy – it presented facts instead of beliefs. The Strategy stresses the importance of energy security, continuity of supply and diversification of energy sources. He explained that if coal of specific parameters was burnt, smog would not be a problem. Electric heating would be the best solution, but it would be hard to convince society. At the same time, a question should be asked whether entire cities can be connected to an electric network.

Prof. M. Pawełczyk pointed at incoherent regulation of infrastructure sectors. He said he was in favour of the adoption of strong and powerful legal instruments, which would bring order in these sectors of economic life. The sectors themselves contain many similar solutions. In his opinion, we were on the eve of a revolution of the

economic model, which would establish a canon of instruments securing the interest of market operators and the public interest. Expectations of cheap and reliable service must be reconciled with public security.

Z. Muras also discussed the issue of sector regulation. He said that primarily the regulator had to investigate legitimate costs as it was the essence of infrastructure markets. In other words, the regulator must balance interests. It should be remembered that energy security and innovation will be paid for by the customers. The panellist also said that society needed a reliable regulator as it would be the one to set prices at the right level. Mr. Muras argued that innovation should also be applied to tariffs. The Winter Package suggests that tariff performance should head towards an absorption of less stable sources. This removes price peaks and helps absorb new technologies as well as sources. However, he mentioned that this issue required a legal framework – performance requires very accurate laws.

Prof. M. Pawełczyk referred to the previous speaker's statement and added that a legal framework was an inevitable process as blanket regulations did not work in practice. At the same time, he stressed that the "marriage" between the Polish energy sector and coal had to be continued. In his opinion, this meant that a return to administrative solutions was required.

Mr. Kropiewski said that coal should be used in the Polish economy for a long time, but a more effective way was needed. He also mentioned that the European Commission had a very narrow view on coal and recommended to limit its use. The UN has a completely different opinion on this resource as it is widely used worldwide and due to the fact that it would be difficult to replace it overnight.

Among the questions asked by the audience, A. Szafrński, D. Sc. asked whether electricity undertakings should be excluded from the definition of an entrepreneur pursuant to the Act on freedom of economic activity and whether the restrictions of the Commercial Code were appropriate for electricity undertakings.

Prof. F. Grzegorzczuk said that inclusion of transmission companies in energy groups was a bad idea from the start. He expressed his support for the following solution: if a country carries out own tasks (not only related to energy) via economic activity, it should not be involved in public limited companies because the basic rule of the Commercial Code is that a company should be profitable. In his opinion, the public law had been unnecessarily privatised. For instance, a connection agreement has so many obligatory elements that it is hard to talk about contractual freedom upon its conclusion. He also presented an example of violation of the commercial law by the State Treasury – it obligated Polska Grupa Energetyczna S.A. to enter a nuclear programme. Prof. A. Fornalczyk agreed that the obligation imposed on Polska Grupa Energetyczna S.A. by a resolution of the Council of Ministers had been illegal and added that the State Treasury should always comply with the commercial law, not only as it deemed fit. However, she disagreed with the previous speaker on another issue. In her opinion, execution of public tasks should not lead to unlimited funding for their execution. Commercial companies were introduced to solve this problem. i.e. to control the budget of an undertaking and limit state subsidies for it. Prof. Grzegorzczuk concluded that energy operators always had to have the economic

balance in mind as they carried out an economic activity. Prof. M. Pawełczyk stated that perhaps instead of a public limited company, a state enterprise, which would provide services of general economic interest, should be chosen. In his opinion, not only the energy sector but also rail transport and airports would be able to function in such a form.

The third panel titled “Security in the power sector” moderated by Robert Zajdler, PhD (Warsaw University of Technology), began with the presentation on energy storage by Andrzej Nentwig, LL.M. and Andrzej Walkiewicz, LL.M. (both Bird & Bird). They said that storage was geared towards specific services or products called storage related to network management and network efficiency. In their opinion, storage was primarily related to renewable energy sources, i.e. sources that are characterised by a certain variability in production. Mr. Nentwig disagreed with the theses from previous panels, according to which renewable energy sources are uncontrollable. Experience of other jurisdictions showed that these were highly predictable sources and that the fact that more or less energy was produced at certain times did not pose an unsolvable problem. In their presentation, the speakers showed the advantages and disadvantages of storage, the regulatory situation in relation to storage and planned legal changes.

Another lecture was delivered by M. Kraśniewski, MA who talked about a stock ticket contract. He began with the definition of a stock ticket contract as a new form of implementation of the obligation to create and maintain mandatory gas reserves. He analysed the most important changes in the law on compulsory gas reserves. The speaker noted that a number of changes had been made in both the liquid fuel market and the natural gas market. The key changes in the natural gas market included the extension of the scope of the obligation of mandatory natural gas reserve and the introduction of a gas storage contract. He discussed the subjective and material scope of a stock ticket contract and the procedure for its control and approval by the regulator, as well as legal doubts associated with it.

The next speaker was M. Piekarski, LL.M (Baker McKenzie), who delivered a speech on the reconstruction of the power system in case of a blackout. At first, he gave his own understanding of energy security and highlighted the multidimensional nature of this concept. The speaker emphasized that the system should defend itself on many levels, first and foremost, to provide adequate generating capacity. He also pointed out that energy security also meant the reliability of network operation. In the end, he presented the role of gas-fired power plants in the reconstruction of the power system.

The fourth paper: “The positive impact of the development of the renewable energy sector on the safety of the power grid” was delivered by M. Izbicki, MA (WPiA UŁ). In the introduction, he put forward the thesis that in the long term the development of renewable energy could have a positive impact on the long-term operation of the network and, above all, influence its modernisation and expansion. He presented the arguments for this thesis by comparing two basic obligations of energy companies – on the one hand, the operator is obliged to connect all stakeholders to the managed

network, and on the other hand – to ensure that the network remains in place to meet electricity demand. In addition, he discussed the obligation of renewable energy producers to finance their connection to the grid.

The last paper on the functioning of the President of the Energy Regulatory Office (URE) was delivered by M. Karpiński, MA (University of Silesia in Katowice, Kancelaria Prawna Pawełczyk).

A parallel panel discussed regulation in the energy sector. The moderator of this session was Marzena Czarnecka, PhD.

The opening paper was delivered by J. Sroczyński, LL.M. (Kancelaria Markiewicz & Sroczyński), whose speech was about out-of-court consumer disputes in the energy industry and an attempt to answer the question of how to adapt to new regulations on solving disputes. He analysed a new institution, which is the negotiating coordinator at URE and discussed the competences and rules of conduct before the coordinator. In addition, he analysed the obligation of energy companies to adapt to the requirements of the new law. In the final part of the paper, the speaker presented two draft executive regulations to the act on out-of-court settlement of consumer disputes.

Another lecture was delivered by R. Maruszkin (DLA Piper), in which he discussed the legal framework of e-mobility in Poland. The speaker started with an analysis of the very concept of e-mobility, referring to its advantages, disadvantages and, above all, its impact on infrastructure development. He also discussed EU regulations, paying particular attention to Directive 2014/94 on the deployment of alternative fuels infrastructure. Mr. Maruszkin also presented Polish regulations and a draft act on e-mobility and alternative fuels. His speech ended with a sketch of the opportunities and challenges for the business of electro-mobility.

The third paper – “Forwards or futures as the primary energy trade instrument in the light of MIFID II regulation. The risk of contract equivalence” was delivered by P. Hawranek, LL.M. (Hawranek Kancelaria Prawnicza). He pointed out the inseparable element of trade in goods such as forward and futures products. He discussed forwards on the Polish commodity exchange and Phelix Futures on the European energy markets. Mr. Hawranek also asked whether forward and futures with physical delivery differed from each other, as they both created similar operational risks and showed further similarities in relation to risk. The speaker stated that it would not be possible to eliminate the risk of recognising the above-mentioned as equivalent and all the consequences arising therefrom, irrespective of the final national regulations.

The next paper was given by M. Olszewska-Staniec, MA (Cardinal Stefan Wyszyński University in Warsaw, Kancelaria CMS). Her speech was devoted to selected aspects of tariff decisions and their control, based on the example of gas fuel tariffs. In the first part of her speech, she presented the rules of setting tariffs and conducting the approval procedure before the President of URE. She referred to doubts regarding the tariff procedure. Ms. Olszewska-Staniec discussed the application of Article 316 of the Code of Civil Procedure in appeal proceedings against the decision of the President of URE to deny approval for a tariff. The last lecture – “Changes for participants in the wholesale energy market in light of MIFID II – evolution or revolution?” – was

delivered by A. Janosz, MA (University of Silesia in Katowice). In the introduction, she discussed issues related to the scope of the MIFID II Directive, including the scope of commercial activity without the need to apply for a brokerage license. Next, she outlined the grounds for exemptions to avoid the full application of the provision of MIFID II by energy sector entities. The speaker also discussed the definition of financial instruments and the impact of its revised definition on trade in energy. In the final part of her speech, she referred to questions concerning interpretations that appear in the legislative works on the amendment to the Act on Trading in Financial Instruments.

In the next session, the following students and PhD students of the University of Warsaw appeared as speakers: Jan Gryza, Adrian Król, Michał Bałdowski and Magdalena Porzeżyńska, MA. The panel moderator was Łukasz Grzejdziak, PhD (WPiA UŁ).

J. Gryza gave a speech about “The issue of execution of the TPA (third party access) rule and unbundling illustrated by the complaint filed by PGNiG to the Court of Justice of the European Union against the decision of the European Commission regarding access to the OPAL pipeline”. He analysed the matter of access to the OPAL pipeline and the complaint against the Commission’s decision to allow Gazprom to use 80% of the pipeline’s capacity. The author pointed out arguments revolving around the lack of competence on the Commission’s side to “renegotiate” the decision or the Commission using disproportionate measures. He presented possible judgments of the Court of Justice in the matter.

A. Król presented a paper about the regulatory assessment of growth of power markets in the European Union Member States. At the beginning, the author briefly explained the concept of a power market and factors of its development. Subsequently, he analysed the regulatory challenges faced by the power market, both at the European and domestic level. He also mentioned the issue of state aid in the context of the power market and the “Winter Package”.

The paper entitled “The application of MAR Regulation in commodity derivatives trading” was presented by M. Bałdowski. He underlined the connection between his subject and the capital market. According to the speaker, one of the most important matters of the MAR Regulation was entrepreneurial information obligation, the definition of confidential information and the problem of insider dealing. He pointed out that the public energy entrepreneurs and the ones engaged in trade in emission rights should comply to the fullest extent with the MAR Regulation. The author enumerated the traits of the confidential information regarding the commodity derivatives. He emphasised the accuracy of said information.

Magdalena Porzeżyńska gave a speech about the influence of the amendments proposed to the Directive 2009/28/EC on the promotion of the use of energy from renewable sources on the security of the energy market in Poland. She stated that the amendment established an integrated vision of the market in four spheres: the domestic energy market, energy efficiency, security of supplies and energy transformation. The author put an emphasis on the contents and assessment of the amendment (also pointing out the negatives).

Following the main part of the session, the moderator called for a discussion. M. Izbicki asked M. Porzeżyńska about the average share of renewable energy sources in the energy mix on the European level. She responded that the aforementioned Directive had precautionary measures that obliged the Member States to maintain their previous renewable energy production levels. Mr. Grzejdziaż pointed out that the opportunity to regulate the power market as compensation for services of general interest was wasted. A. Król retorted that he was not familiar with the European Commission's reasons to base the concept of the power market on Article 107 (3) (c) of the Treaty on the Functioning of the European Union.

Concurrently, a neighbouring session about selected issues of the energy law took place. The moderator of this session was Prof. M. Pawełczyk. The following persons took part: Marta Urbańska-Arendt, LL.M (WPiA UŁ), Przemysław Zdyb, MA (University of Szczecin), Aleksandra Barwaniec, MA (WPiA UŁ), Katarzyna Chojcka, MA (WPiA UW) and Mateusz Sokół (WPiA UŁ).

First, M. Urbańska-Arendt gave a speech about the influence of ECHR on treating "guilt" as grounds for permissibility of financial sanctions in the antitrust and energy law. The author pointed out the fact that such grounds had been very imprecise and that the doctrine had underlined the need for a change on numerous occasions. Subsequently, P. Zdyb presented a paper on "Imposing administrative financial sanctions by the President of the Energy Regulatory Office in the light of the Code of Administrative Procedure amendment of 7 April 2017. The author covered the legal definition of a financial penalty, penalty directives, limitation periods, rules for reductions, rules for calculating interests, terms and conditions of enforcement, imposing penalties and resigning from penalisations. He also presented the sequence of regulations to be used by the President of URE when imposing penalties.

A. Barwaniec dealt with the matter of a special hydrocarbon tax. She stated the purpose of introducing it and the following principles covered by it: the rule of fair taxation, effective taxation, general taxation and universal taxation.

The paper entitled "Permits for building offshore wind farms in investment process in Poland and Germany – comparative comments" was presented by K. Chojcka. The major part of her speech was devoted to the many requirements which must be met to obtain building permits in both jurisdictions. The author criticised the discretionary freedom of Poland's economy minister in this regard. In comparison to Poland, Germany has a stable and detailed regulation concerning spatial planning for the Baltic and the Northern Sea.

M. Sokół covered in his paper the issue of transmission corridors in the United States of America. The author presented the general idea of a corridor as a normatively isolated terrain of special legal status, where transmission infrastructure is or will be located. He indicated the existence of the said issue also in Polish legislation, presented the division of different types of transmission corridors and gave a detailed description of those, along with the contemplation concerning their relations.

After the last contributor, Prof. Pawełczyk, summarised all the deliberations. M. Czarnecka, D. Sc. closed the Conference, thanking the organisers and underlining her admiration for the level of professionalism of the presented speeches. She also

invited everyone present to take part in next year's edition of the Conference. Prof. Pawełczyk encouraged every participant to contribute to the post-conference publication.

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