

**Filip Elżanowski, *Polityka energetyczna. Prawne instrumenty realizacji*
[*The Energy Policy. Legal Instruments of its Implementation*]
LexisNexis, Warszawa 2008, 240 p.**

The subject matter of Dr. Elżanowski's book is not a novel one. It is, however, also not an easy topic despite the considerable literature already devoted to it. Very different views on the merits of energy policy and liberalisation, including its feasibility and desirability, are expressed by legal and political science experts, not to mention economists, environmental scientists, engineers and, increasingly, international relations experts. Polish energy policy obviously poses its own questions as well as practical challenges stemming from its specific energy consumption patterns, fuel mixes, supply sources, and natural resources endowments. Furthermore, due to its heavy dependence on oil and gas imports, Poland faces different problems stemming from its proximity to and specific relationship with Russia, the main gas partner of the EU. This fact strongly influences the formation of Polish energy policy. Nevertheless, the key legal issues concerning the creation and implementation of energy policy remain common to the whole of continental Europe.

Looking at energy policy from the EU perspective, it is easy to realize that the need to establish an integrated energy market, governed by a common energy policy, can be clearly derived from the three fundamental Treaties. However, it took a long time for the political will to develop to translate this idea into practice at the EC level. As correctly observed by the Author, the decades up to the mid 1980s have seen the Member States' energy sectors strongly dominated by public monopolies, heavily dependent on the command and control of governments and thus very resistant to change. Cross-border energy trade has been limited to wholesale transactions among incumbent utilities; cross-subsidies between different parties have been tolerated even though they constituted state aids. In the case of the energy sector, be it electricity or gas, all Member States have granted *de jure* or *de facto* exclusive or special rights to sell, import, export, or construct infrastructure. As a result, competition among utilities did not exist and consumers had little or no choice in relation to the price or quality of energy service they acquired. Moreover, network access by third parties did not enjoy special legal protection in the majority of Member States. Unsurprisingly therefore, EC steps meant to facilitate the development of a common energy policy did not generate much progress – domestic interests prevailed over the community goals with regard to the energy sector. This has resulted in a strong State presence in the energy field of almost all EU Member States, Poland included.

The book under review here presents the results of an in-depth research on the legal tools and methods of formulating and implementing energy policy, the restraints placed on the fundamental right of business freedom (freedom of economic activity) in particular. The Author is a lawyer and his analysis is primarily a legal one, albeit somewhat enriched by policy studies. The book considers the energy market from the perspective of administrative rather than competition law or international relations, even though some remarks in this direction are made (chapter five and six) in an elegant manner.

The book is composed of six chapters: 1. Energy in Poland and the European Union – Introduction; 2. Restraints on the freedom of economic activity in the energy sector; 3. Competences of public administration in regulating the energy sector; 4. Legal methods of implementing the energy policy in regard to environmental protection; 5. Legal methods of implementing the energy policy in regard to competition protection; 6. Legal methods of implementing the energy policy in regard to energy security. The structure is logical, showing that the Author has a very good grasp of the sector and the discussed issues.

Chapter 2: Restraints to the freedom of economic activity in the energy sector – touches upon several important issues such as, most importantly, the constitutional legal order and the proportionality rule. The Author claims that the legislator may introduce restraints to business freedom only when they pass the proportionality test: a) the restraint will lead to the desired effects; b) it is necessary to protect public interest; c) there is correlation and proportionality between the restraint and the goal to be achieved. Dr. Elżanowski highlights in this context the often overlooked in Poland issue of public service obligations (service of general economic interest). Still, this matter could have taken an even more central stage in this chapter. Although PSOs are perceived to be a strong force for liberalization, the Author correctly points out that there is an element of conflict between the obligation to fulfil the public interest and the fundamental right of business freedom. Liberals would claim that every obligation imposed by a State on an enterprise restricts competition and entrepreneurship, even those respecting the proportionality test. It is true on the other hand that imposing obligations on enterprises (e.g. public service obligations) is a requirement that derives from public security considerations, if not from economic necessity.

The electricity and gas directives declare that respect for the public service requirements is a fundamental requirement¹. Thus, the establishment, monitoring and fulfilment of public service obligations cannot be left to the market itself – they are the purview of Member States that develop them according to their national particularities. For example, gas system operators may refuse third party access to

¹ Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ [2003] L 176/37, Recital 26; Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ [2003] L 176/57, Recital 27.

the system if such access would prevent them from carrying out their public service obligations or would endanger the security of supply. As a result, countries dominated by vertically integrated undertakings might rely on PSOs to limit competition or slow down market opening.

The EU understands this dilemma, at least implicitly, and has directed much effort toward ensuring that PSOs should not be used so as to favour one system operator or energy producer over another or to hinder competition. And yet companies are able to engage in such discriminatory or anti-competitive activities due to the discrepancies among the notion of public service obligations, Europe's competition rules and Article 86 EC. The impression might even present itself that Article 86 itself might constitute an incentive for undertakings to accept public service obligations in order to obtain an exemption from the application of competition rules considering that Article 86(2) states that: "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, **insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.** The development of trade must not be affected to such an extent as would be contrary to the interests of the Community".

However, those providing public service obligations or services of general economic interest may be exempted from the Treaty rules only to the extent that such an exemption is absolutely necessary to enable them to fulfil their general economic interest mission. In the *Commission v. Netherlands*² case (presented by the Author in chapter two), the ECJ upheld the exclusive import rights of the Netherlands³ on the grounds of the public service exceptions contained in Article 86(2), provided that trade will not be affected to an extent contrary to EC interests. The Court phrased Article 86(2) as follows: "[P]aragraph 2 may be relied upon to justify the grant by a Member State, to an undertaking entrusted with the operation of service of general economic interest, of exclusive rights which are contrary to, in particular (Article 31) of the Treaty, to the extent to which performance of the particular tasks assigned to it can be achieved only through the grant of such rights and provided that the development of trade is not affected to such an extent as would be contrary to the interests of the Community(...)"⁴.

Unfortunately, assessing Article 82 in conjunction with Article 86 EC might create an additional dilemma for energy companies. This is the case for an undertaking which has been granted an exclusive right to transport and/or distribute electricity or gas in a given territory, based on the public service obligation (e.g. relating to the security of supply, regularity of supply, quantity and prices of supplies or environmental protection). Such an energy company might in practice be regarded as dominant in comparison to other market players and thus, potentially, in breach of Article

² Case C-157/94 *Commission v The Netherlands* [1997] ECR I-5699.

³ In the Netherlands electricity could only be imported (for public supply) by Samenwerkende Elektriciteits Productiebedrijven (SEP).

⁴ See Case C-157/94 *Commission v The Netherlands*, para 32.

82. Although the prohibition of Article 82(1) are designed to apply to all dominant undertakings, some of them may be exempted from it by the provisions of Article 86(2) that apply to those entrusted with the provision of services of general economic interest⁵. This is an area of some sensitivity for the Internal Energy Market since it raises the possibility of avoiding market opening on the grounds that the security of supply, or public security in general, must be protected. Article 86(2) exemptions are a source of actual or potential constraint on the efforts to promote competition in the EC energy markets. They are thus vulnerable to scrutiny under Articles 81 and 82 EC. On one hand therefore, Member States are allowed to establish exclusive and special rights, but on the other, they must observe the rules of the Treaty, in particular the rules on free movement and competition.

Chapter 3: Competences of public administration in regulating the energy sector – discusses the main players involved in the formulation of Polish energy policy: the Minister responsible for the economy, the President of the Energy Regulatory Office (URE), the Council of Ministers and, indirectly, the Minister of Treasury as the owner of the key energy companies. In a well-designed style, the Author presents the complexity of the relationship between public administration and those companies subject to regulation. While the position of ministerial agencies in creating energy policy is made clear, the position of the independent regulator could have been given more attention.

Statutory regulation is still a fairly new concept in Poland. Moreover, there is neither a general legal framework nor a commonly held view concerning the question of how should regulatory agencies function in practice. Limits to the political independence of regulators and to the scope of their powers are still being debated. However, the trend is clear: in spite of residual constitutional doubts and democratic concerns, independent regulators have become a necessary component of effective governance in all industrialized countries. The Author's awareness of this problem becomes apparent in his discussion regarding the tenure of the URE President. Until 2006, the Polish energy regulator was appointed for a fixed term of five years. Unfortunately, this provision was removed by the Act on State Human Resources and Senior Higher State Offices of 24 August 2006⁶. As precisely observed by Dr. Elżanowski, this fact has effectively eliminated one of the main pillars of the independence of the energy regulator and, by doing so, violated the requirements of the electricity and gas directives. This legal act should thus be perceived as a major step backwards on Poland's road to an independent energy regulator. The third energy package proposed by the Commission might remedy this concern since it envisages, among other things, mandatory tenures for the heads of national regulators.

Chapter 4: Legal methods of implementing the energy policy in regard to environmental protection – discusses the problem of restraining the freedom of

⁵ Specific grounds for exemption include public policy and public security. Public security is also ground for exemption under Article 30 EC. In general Member States can impose restrictions on import or export of energy if these restrictions can be justified under Article 30 EC.

⁶ Journal of Laws 2006 No. 170, item 1271.

economic activity on environmental protection grounds, perceived to be a public good for present and future generations. Unmistakably, the operation of the energy sector carries with it various clear threats to the sustainability of the environment. The Polish 1997 Energy Law Act is thus a real milestone in the environmental protection process – it provides the necessary legal conditions for economic activity in the area of energy production, transmission, distribution and trade, introduces third party access and sets the general framework for gradual market opening. In light of environmental protection needs – it is aimed at a sustainable development of the country, energy security, efficient and rational use of fuels and energy and the development of competition. It defines the relevant responsibilities of the Government, ERA, energy companies, local government units and manufacturers, including specific mandates and duties to promote energy efficiency and renewable energies.

Dr. Elżanowski emphasizes in his discussion the promotion of renewables which translates, more colloquially, into the obligation imposed on energy undertakings to buy electricity from renewable resources. This obligation clearly represents a restraint to the freedom of economic activity in the energy sector (limits the possibility of choosing a cheaper supplier e.g. supplier of electricity produced from coal). However, in the opinion of the Author, the doctrine and EC institutions, it is a justified (e.g. on the ground of public service obligations) and necessary tool in combating global warming and pollution in general.

Chapter 5: Legal methods of implementing the energy policy in regard to competition protection – is particularly interesting. Although competition can expose energy companies to the risk of losing market share if they are not sufficiently efficient and innovative, it is also a force that benefits customers by lowering prices, costs and improving service quality. As a result, competition in the energy market should be seen as an essential means of enhancing Poland's overall competitiveness, especially since energy is a key input for the national industry to compete on European markets. Only competitive markets generate the right investment signals, offer fair network access for all potential investors and provide effective incentives to both system operators and generators to invest billions of Euros in infrastructure. A competitive and efficient energy market is also a precondition for tackling climate change – developing an effective emission trading mechanism and a renewable energy industry is only possible on a well-functioning market.

The Author correctly points out that the protection of competition on the energy market should serve a general public interest. The creation of competition might be therefore seen as a restraint to the freedom of economic activity according to Article 22 of the Polish Constitution. However, this has to be done based on the constitutional proportionality test partially expressed in its Article 31(3). Still, the analysis contained in Chapter 5 is not limited to Polish legislation only, it also touches upon directives and regulations adopted by the EU aimed at the protection of competition in Member States. The discussion is centred on third party access, unbundling and actions against cross-subsidies considering the fact that, while competition can be promoted in the generation/production and supply side of the vertical chain, the transmission and distribution segments remain natural monopolies where market mechanisms

do not work properly. On this basis, Dr. Elżanowski concludes that transmission and distribution require regulation, for instance, by means of legal and functional unbundling of system operators and third party access.

Chapter 6: Legal methods of implementing the energy policy in regard to energy security. Energy security seems to be the most complex issue in the book – it involves many domestic, international, legal, business and geopolitical considerations. The Author presents a well thought through analysis of Polish energy policy with regard to energy security considering the issue from an administrative law perspective. Relevant legislation (e.g. the Energy Law or the Act on fuel supplies and reserves⁷) receive adequate attention highlighting restraints on the freedom of economic activity by way of concessions as well as those occurring on the basis of public service obligations and, in particular, energy security as a public good.

I have read Dr. Elżanowski's book with particular interest since it concerns issues with which I have been closely involved with as an academic for many years. In light of the existing academic literature and jurisprudence on this subject, I believe this book to constitute an important input into the Polish energy law doctrine. It gives the reader essential information on the methods, main players and tools at the disposal of the State involved in creating its energy policy as well as on the restraints to the freedom of energy activity which fulfils the public interest, security and constitutional criteria. All of this has been done in a very precise and elegant manner.

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⁷ Act of 16 February 2007 on Reserves of Oil, Oil Products, Natural Gas and on Procedures in Case of Emergency in Security of Fuel Supply and Disturbance on Oil Market (Journal of Laws No. 52, item 343).