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A NEW EU ENERGY POLICY: TOWARDS LOCAL DEMOCRACY

1. Introduction

In recent years the importance of local communities, including local government, in the growth of the renewable energy market has increased significantly. The legal systems of individual EU Member States and the European Union as a whole contain a variety of documents including legislation on the production of renewable energy by decentralized entities: those belonging to the sphere of public administration, and those owned by private entities such as natural persons, cooperatives or other forms of association. Moreover, throughout Europe we may now observe the widespread emergence of a phenomenon called the energy democracy[1].

These opening remarks lead to a conclusion that in the coming years the importance of local communities and local government in the development of the renewable energy market will continue to rise, especially as regards EU law. Moreover, it appears that local energy will play a salient role in the overall generation of energy from renewable sources at the national level. Hence support for this trend, especially from

[1] See C. Kunze, S. Becker, *Energy democracy in Europe. A survey and outlook*, Stuttgart 2014; C. Morris, A. Jungjohann, *Energy Democracy. Germany's Energiewende to Renewables*, Palgrave Macmillan 2016, J. Angel, *Strategies of energy democracy*, https://www.rosalux.de/fileadmin/rls_uploads/pdfs/sonst_publikationen/strategies_of_energy_democracy_Angel_engl.pdf (access: 4.2018).

the legal point of view, should be increased to encourage the emerging grassroots initiative which has already taken shape in a number of EU countries (mainly in Germany and the Scandinavian region) and has led to certain developments in the renewable energy market.

This article discusses selected issues investigated during a scientific project carried out in Poland on "The production and use of energy from renewable sources in the municipality as a sphere of municipal management. Legal and administrative analysis"[2]. It presents some of the project's conclusions relating mainly to legal and social issues involved in the local production of renewable energy. One of the project's important achievements is that it has put local energy on the current agenda of the EU energy law. The EU Member State chosen for the case study was Poland, a country in which renewable energy, a relatively new business, has been expanding at a dynamic rate in recent years. The project consisted of a wide survey concerning the production and use of renewable energy by Polish lowest-tier local government units (municipalities). The survey involved 2479 such units, and data was collected from 91% of them. Further analysis concerned the EU law and draft bill proposals in connection with the Winter Package, which is to regulate energy and power generation at the local government level.

2. The development of EU law on renewable energy sources

2.1. The origins of European energy law and the law on renewable energy sources

Some aspects of EU energy policy go back to the Treaties and other primary legislation[3]. However, documents directly addressing renewable

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[2] The project was financed from the funds of the National Science Center granted on the basis of decision No. DEC-2013/09/N/HS5/01406 (contract No. UMO-2013/09/N/HS5/01406).

[3] See Treaty establishing the European Coal and Steel Community from 1951, Treaty establishing the European Atomic Energy Community from 1957, Single European Act

energy issues were not published until the 1990's, when they appeared partly thanks to the activity of the United Nations. The first documents, e.g. the 1995 White Paper entitled "An energy policy for the European Union" were not legislative[4]. This document says that the Union will take the necessary measures to propagate the use of renewable energy sources by supporting relevant R&D projects, promoting co-operation in the development and dissemination of new and competitive technologies, introducing appropriate legislation for the diverse devices and installations, and establishing an EU international framework for tax (and other) incentives. The next important publication was the 1996 Green Paper entitled "Energy for the future: renewable sources of energy"[5], which predicted a 200% increase in the gross consumption of renewable energy over the next 15 years, up to a 12% annual rise in 2010. In 1998 the EU Council published this forecast in a resolution on renewable energy sources[6].

The real milestone was marked by the adoption of the following legislative documents: Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market[7], and Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport[8]. The next crucial step was the communication issued by the EU Commission on 10 January 2007,

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from 1986, Treaty on the Functioning of the European Union from 2016.

[4] An energy policy for the European Union, white paper, Brussels, 13.12.1995, COM (95) 682 final.

[5] Communication from the Commission – Energy for The Future: Renewable Sources of Energy – Green Paper for a Community Strategy of 20 November 1996, COM/96/0576 final not published.

[6] Council Resolution of 8 June 1998 on renewable sources of energy (98/C 198/01), Dz. U.UE.C.1998.198.1.

[7] Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, L 283.

[8] Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport, L 123.

entitled "Renewable Energy Road Map: Renewable energies in the 21st century: building a more sustainable future"[9], which postulated that the market share of renewable energy within the EU should reach 20% by 2020[10]. Two years later, Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC[11] established the first systematic framework for the operation of the renewable energy market in the EU, marking a genuine breakthrough. "Renewable Energy: a major player in the European energy market," another communication issued by the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Renewable Energy, defined crucial areas which should receive special attention in order to keep a constant increase of renewable energy production in operation by 2020[12]. The next step was the issue of Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency[13], followed by the 2013 "Energy roadmap 2050"[14], which contains a number of arrangements concerning energy efficiency. The 2013 Green Paper "A 2030 framework for climate

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[9] Communication from the Commission to the Council and the European Parliament: Renewable Energy Road Map Renewable energies in the 21st century: building a more sustainable future, COM (2006) 848 final.

[10] http://europa.eu/legislation_summaries/energy/renewable_energy/l27065_pl.htm, (access: 04.2018).

[11] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, Dz. U.UE.L.2009.140.16.

[12] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Renewable Energy: A major player in the European energy market, COM (2012) 271 final.

[13] Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, Dz. U. UE. L 315/1.

[14] Energy Roadmap 2050, European Parliament resolution of 14 March 2013 on the Energy roadmap 2050, a future with energy (2012/2103(INI)), P7_TA

and energy policies"[15] shows that the EU is making a major effort to achieve the 2020 target of gross renewable energy consumption at 20%[16]. The consumption level forecast has risen even further, to 27% by 2030, as the 2014 "Climate Summit Conclusions" say[17]. Meanwhile the Directive on the promotion of the use of energy from renewable sources has undergone several amendments. Consecutive developments regarding energy policies have led to the introduction of the Winter Package and several legal amendments which I discuss below.

2.2. The Winter Package: a breakthrough in the shaping of EU law on renewable energy sources

A number of EU-level documents were announced in late 2016. Their purpose is to quickly set up an Energy Union[18]. The new plans, collectively referred to as the Winter Package, relate primarily to the strengthening of EU Member States' activities to improve the climate, and to promote cross-border cooperation in the field of energy. Winter Package documents include legislative as well as directional and planning documents – the whole set was presented in the "Clean Energy For All Europeans" communication[19]. The most important legislative proposals are as follows:

(2013)0088, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0088+0+DOC+XML+V0//EN, (access: 04.2018).

[15] Green Paper, A 2030 framework for climate and energy policies, COM (2013) 169 final, 27.3.2013, http://www.mos.gov.pl/g2/big/2013_05/3dea32c1403f7e52a91aeca337bc5343.pdf, (access: 04.2018).

[16] *Ibidem*, p. 5.

[17] Conclusions (23 and 24 October 2014), European Council, EUCO 169/14, CO EUR 13, CONCL 5.

[18] http://ec.europa.eu/energy/en/news/commission-Proposes-New-Rules-Consumer-Centred-Clean-Energy-Transition, (access: 04.2018).

[19] Communication from the Commission, Clean Energy for all Europeans, Brussels 30.11.2016, COM (2016) 860 final, http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016DC0860&from=EN, (access: 04.2018).

- for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources[20],
- for a Regulation of the European Parliament and of the Council on the Governance of the Energy Union[21],
- for a Regulation of the European Parliament and of the Council on the internal market for electricity[22],
- for a Directive of the European Parliament and of the Council amending Directive 2012/27/EU on energy efficiency[23].

The prospective documents and creation of an Energy Union within the European Union are a big challenge for EU Member States. The main concern here is a smooth achievement of planned percentage ratios for the renewable energy share in final gross energy consumption. For comparison, the current ratio is at a steady level of 17% for the entire EU[24], while the 2020 target envisaged in strategic documents is 20%. There is a large disproportion in the range of declared RES share ratios among individual EU countries. We have states with a very high rate

[20] Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast), Brussels, 23.2.2017, COM (2016) 767 final/2, 2016/0382 (COD).

[21] Proposal for a Regulation of the European Parliament and of the Council on the Governance of the Energy Union, amending Directive 94/22/EC, Directive 98/70/EC, Directive 2009/31/EC, Regulation (EC) No 663/2009, Regulation (EC) No 715/2009, Directive 2009/73/EC, Council Directive 2009/119/EC, Directive 2010/31/EU, Directive 2012/27/EU, Directive 2013/30/EU and Council Directive (EU) 2015/652 and repealing Regulation (EU) No 525/2013, Brussels, 23.2.2017, COM (2016) 759 final/2, 2016/0375(COD).

[22] Proposal for a Regulation of the European Parliament and of the Council on the internal market for electricity, Brussels, 23.2.2017, COM (2016) 861 final/2, 2016/0379 (COD).

[23] Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/27/EU on energy efficiency, Brussels, 30.11.2016, COM (2016) 761 final, 2016/0376 (COD).

[24] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0057&qid=1488449105433&from=EN, p. 4, (access: 04.2018).

of around 40-50% (Sweden, Finland, Latvia), countries within the middle range – around 20-30% (Denmark, Austria, Portugal), and those with low rates (Poland, Belgium, the Czech Republic, Malta)[25]. However, the documents planned under the Winter Package will not impose a strict obligation on Member States to achieve a share of 27% thanks to their own efforts by 2030. On the contrary, a statement has been issued that a linear EU-wide trajectory will be set up to help track progress towards the achievement of the EU-wide goal without being binding on Member States individually. The progressive introduction of support for renewable electricity is needed to remedy the fragmentation of the internal market and ensure cross-border tradability, especially for common regulations on transport fuels[26].

As far as the principles behind the draft regulation on the introduction of the Energy Union are concerned, it must be noted that this document introduces energy union management principles based on Member States' obligations to define certain indicators, objectives and strategies for their integrated national energy and climate plans. The general objectives of introducing these principles are twofold:

- to implement strategies and measures designed to meet the objectives and targets of the Energy Union, and in particular to set the EU's 2030 targets for energy and climate for the first ten-year period from 2021 to 2030,

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[25] EU energy in figures. Statistical pocketbook 2016, https://ec.europa.eu/energy/sites/ener/files/documents/pocketbook_energy-2016_web-final_final.pdf, p. 27 (access: 04.2018).

[26] Proposal for a Directive Of The European Parliament And Of The Council on the promotion of the use of energy from renewable sources, http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016PC0767R(01)&from=EN, (access: 04.2018); V. Duscha, A. Fougeyrollas, C. Nathani, M. Pfaff, M. Ragwitz, G. Resch, W. Schade, B. Breitschopf, R. Walz, *Renewable energy deployment in Europe up to 2030 and the aim of a triple dividend*, «Energy Policy» 95/2016, s. 314-323, D. Fouquet*, Policy instruments for renewable energy e From a European perspective*, «Renewable Energy» 49/2013, p. 15-18.

- to ensure the timeliness, transparency, accuracy, consistency, comparability and completeness of reporting by the Union and its Member States to the United Nations Framework Convention on Climate Change and the Paris Agreement secretariat.

Under the proposed Article 3.1 of the Regulation on the Governance of the Energy Union, by 1 January 2019 and every year thereafter, each Member State should notify the Commission of its integrated national energy and climate plan. The first plan will cover the period from 2021 to 2030, and follow on from the previous plan. This means that each EU Member State must prepare these plans on the grounds of specific guidelines defined in the Regulation.

The draft regulation also sets out specific guidelines regarding renewable energy. For instance, with respect to the EU 27% renewable energy goal, each Member State must specify its contribution to this target in terms of its share of energy from renewable sources in gross final consumption in 2030, with a linear trajectory for its contribution from 2021 onwards. This is directly connected with the indication of trajectories for the sectorial share of renewable energy in final energy consumption from 2021 to 2030 in the heating and cooling, electricity, and transport sectors, and trajectories for renewable energy technology that the Member State is planning to use to achieve the overall and sectorial trajectories for renewable energy from 2021 to 2030, including total expected gross final energy consumption per technology and sector in Mtoe, and total planned installed capacity per technology and sector in MW. So the guidelines invoke the necessity to review both the existing action plans in the field of national energy mixes, and the basis for the trend to be taken for the development of the renewable energy market.

However, the envisaged directive amending the Directive on the promotion of renewable energy introduces directional principles for the achievement of the 27% goal in 2030 within the entire European Union. The specific objectives defined in the directive are: to address investment uncertainty, along a path that takes medium- and long-term decarbonisation objectives into account; to ensure cost-effective deployment and market integration of renewable electricity; to ensure

collective attainment of the EU-wide target for renewable energy in 2030; to establish a policy framework in coordination with the Energy Union Governance that avoids any potential gap; to develop the decarbonisation potential of advanced biofuels and clarify the role of food-based biofuels post-2020; and to develop renewable energy potential in the heating and cooling sector. In this case, however, due to the nature of the legal act (a directive), certain goals have been set to be reached by the Member State through the use of internal, national mechanisms.

From the perspective of rule implementation resulting from the Winter Package, the percentage share of energy from renewable sources will not be a major problem for Poland (and similar countries), as each Member State will have full independence in this regard. On the other hand, two issues will remain – adaptation to the new principles resulting from energy efficiency, and the implementation of prosumer market principles and the diversification of energy sources at the local level. In Poland, the new 2016 Act on energy efficiency proposes the following measures to improve energy efficiency:

- the implementation and financing of a project to improve energy efficiency;
- the purchase of low energy consumption and low running-cost equipment, installations, and vehicles;
- the modernization of equipment, installations, and vehicles currently in use, or their replacement with low energy consumption or low running-cost alternatives;
- thermal efficiency improvement and the implementation of the environmental management system defined in Article 2.13 of Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009[27].

EU documents, both working papers and legislation, endeavour to provide a definition of renewable energy sources. Due to the constant

[27] Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC, L 342/1.

advances made in technology, this definition will certainly be changing, and will always be based on the currently available methods of non-fossil based energy generation[28].

It should be noted that energy is a specific area of EU activity which, according to Article 4.2 letter i) of the Treaty on the Functioning of the European Union, is part of the competence shared between the European Union and its Member States[29]. The regulation does not stand in contradiction to the right of a Member State to choose its preferred energy mix, as each country is free to establish the conditions for the use of its own energy resources, make independent choices of the energy sources it uses and determine the general structure of its energy supply[30].

As rightly pointed out in the rulings of the European Court of Justice, this provision constitutes the legal grounds intended to apply to all acts adopted by the European Union in the energy sector to allow the implementation of those objectives, subject to the more specific provisions laid down by the TFEU on energy (as can be deduced from the terms without prejudice to the application of other provisions of the Treaties at the beginning of Article 194(2) TFEU)[31]. In the assessment of the practical importance of the establishment

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[28] See: IRENA (2015), Rethinking Energy: Renewable Energy and Climate Change, http://www.irena.org/rethinking/IRENA%20_REthinking_Energy_2nd_report_2015.pdf, (access: 04.2018).

[29] See Judgment of the Court (Fourth Chamber) of 26 November 2014, Green Network Spa v Autorità per l'energia elettrica e il gas, C-66/13 - Green Network.

[30] However, on the grounds of Article 192.2 letter c) of the Treaty on derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply. See Judgment of the General Court (Seventh Chamber) Republic of Poland v European Commission, 7 March 2013, T-370/11.

[31] Judgment of the Court (Second Chamber) European Parliament v Council of the European Union, 6 September 2012, C-490/10.

of a separate title dedicated solely to energy issues for the creation and functioning of EU energy policy, we should note that the lack of an energy policy and the difficulties in creating the EU internal energy market were due solely to Member States' concerns for potential competence loss in their ability to control their own national energy markets[32]. To remedy the problem the EU has issued directives creating a basic policy framework for renewable energy sources. However, the directive-based definitions may be modified, even slightly, within the legal systems of individual Member States – as is the case, for example, with renewable energy sources in Poland.

The grounds for the definition of renewable energy sources in EU law are given in Directive 2009/28/EC[33]. Under Article 2 letter a) the term "energy from renewable sources" means energy from renewable non-fossil sources, namely wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases. This definition will be modified in the directive proposed in the Winter Package: the term "solar (energy)" will be clarified and further divided into solar thermal and solar photovoltaic.

The existing definition is extensive and incorporates currently available technologies for the production of energy from renewable sources, however, in practice this definition may in some cases cause problems with interpretation. For instance, in the case concluded with the 2 March 2017 judgment of the Court of Justice of the European Union – J.D. vs Prezes Urzędu Regulacji Energetyki (Chairman of the Energy Regulatory Office, Poland)[34]. A request was brought in

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[32] M. Nowacki, *Komentarz do art. 194 Traktatu o funkcjonowaniu Unii Europejskiej*, [in:] *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz, Art. 90-222*, eds. K. Kowalik-Bańczyk, M. Szwarc-Kuczer, A. Wróbel, II, Lex Omega 2012.

[33] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, L 140/16.

[34] Judgment of the Court (Second Chamber) of 2 March 2017, J. D. v Prezes Urzędu Regulacji Energetyki, C-4/16 - J. D. This request for a preliminary ruling concerns the interpretation of the second subparagraph of Article 2(a) of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion

proceedings against Prezes URE concerning the defendant's refusal to prolong a licence issued to J. D. to produce electricity in a small-scale hydropower plant located at a place where waste water from another plant is discharged. The ECJ pointed out in its ruling that Directive 2009/28 does not make a reference to national law as regards the meaning of the term "hydropower," in so far as that national law covers energy generated from renewable sources, within the meaning of that directive. It follows that for the purposes of the directive the term must be regarded as an autonomous concept of European Union law which must be interpreted in a uniform manner throughout the Member States[35]. In the light of all the above considerations, the answer to the terminological question is that the concept of "energy from renewable sources" in the second subparagraph of Article 2(a) of Directive 2009/28 must be interpreted as covering energy generated by a small-scale hydropower plant which is not a pumped-storage power station or a hydropower plant with a pumping installation, located at the point of discharge of industrial waste water from another plant which uses the water for its own purposes[36]. This ruling shows the vast scope covered by the definition in the directive of what "renewable energy source" means.

The extant EU regulations have necessitated the introduction of legal definitions of renewable energy sources in the national legal systems of EU Member States. In Poland a definition was introduced in Article 2.22 of the Renewable Energy Sources Act of 22 February 2015[37], under which renewable energy sources mean non-fossil energy sources including wind energy, solar radiation energy, aerothermal energy, geothermal energy, hydrothermal energy, hydropower, wave energy, currents and tides, energy obtained from biomass, biogas,

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of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p. 16).

[35] *Ibidem*.

[36] *Ibidem*.

[37] Ustawa z dnia 22 lutego 2015 o odnawialnych źródłach energii, Dz. U. 2015, Item 478 and amendments.

agricultural biogas and bioliquids. The definition in Polish law is actually the same as the definition in Article 2 (a) of Directive 2009/28/EC, with the addition of energy obtained from bioliquids[38]. The Polish legislator decided to add a passage from the Polish Production of Bioliquids and Energy from Bioliquids Act, and presumably this addition has been put into the Polish definition of RES[39]. However, the requirements for bioliquids and energy from bioliquids to meet the criteria of sustainable development have been introduced within further regulations[40].

3. Energy after the Winter Package

As I have already said, Western Europe is experiencing a new trend which recent publications have named the "energy democracy." This movement began in Denmark, and has undergone intensive development in Germany, where "climate camps" are being organized. During the Lausitz 2012 camp the idea of an energy democracy was defined as a condition in which everyone has access to sufficient energy from socialized and democratized means of production[41]. It is often emphasized that the basis for energy democracy lies in the technological potential for the generation of energy from dispersed, generally available, inexhaustible and free sources, e.g. solar, wind, water, or geothermal energy, which calls for profound economic, social, ecological, and cultural transformation[42]. A currently emerging idea which is beginning to play an important role in the strategic documents is the concept of a scattered power industry (distributed energy) and a "smart grid" – as a power system that combines economically efficient, safe and reliable

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[38] A. Frąckowiak, *Komentarz do art. 2 ustawy o odnawialnych źródłach energii*, [in:] *Ustawa o odnawialnych źródłach energii. Komentarz*, eds. J. Baehr, P. Lissoń, J. Pokrzywniak, M. Szambelańczyk, Lex Omega 2016.

[39] *Ibidem*.

[40] *Ibidem*.

[41] C. Kunze, S. Becker, *op. cit*., p. 8.

[42] D. Szwed, B. Maciejewska, *Demokracja energetyczna*, Warszawa 2013, p. 5.

activity for all participants in the power market, both in terms of energy generation, transmission and distribution, with power consumption[43].

Local communities are playing a major role in this movement. They are also particularly important for the growth of power generation from renewable energy sources. Due to various economic or military conditions, local communities may decide to increase energy independence in their area. Therefore, residents subject to particular local authorities very often decide to create their own resources for energy production on a level that meets local needs. This state of affairs is also reflected in drafts for new EU legislation, in particular for the Winter Package.

The European Union has observed that local energy communities which use renewable energy should play a fundamental role in the development of new energy policies in the near future. This can only lead to an increase in local energy security.

In Art. 16 of the Proposal for a directive of the European Parliament and of the Council on common rules for the internal market in electricity, the local energy community is defined as an association, cooperative, partnership, non-profit organization, or other legal entity that is effectively controlled by local shareholders or members, usually focused on value rather than profit, and involved in distributed production and functioning as a distribution system operator, supplier, or concentrator on the local (including cross-border) level. According to this proposal Member States shall ensure that local energy communities

- are entitled to own, establish, or lease community networks and to manage them autonomously;
- may access all organized markets either directly or through aggregators or suppliers in a non-discriminatory manner;
- benefit from non-discriminatory treatment with regard to their activities, rights and obligations as final customers, generators, distribution system operators or aggregators;

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[43] J. Gronkowska, *Model energy cluster – special energy zone delivering integrated territorial energy*, «Geomatics, Land management and Landscape» 3/2017, p. 49.

- are subject to fair, proportionate, and transparent procedures, and cost-reflective charges.

The document also invokes the idea of an energy social network, which may be understood as an energy network created exclusively for the needs of a local community. Taking the European Union policy into account, such a local power grid should also be connected to the given country's general energy network. Moreover, any surplus energy production may be sold to the general network on general terms regulated by the market. In Poland and some other countries there is actually a legal requirement obliging the national energy company to purchase the surplus electricity.

The draft for new EU legislation allow local energy communities to create and run energy clusters, energy cooperatives, and other local energy associations. This open catalogue will certainly encourage local communities to formalize their activities in renewable energy generation.

In Polish law the concept of "the energy cluster" has been defined as an agreement in civil law that may be concluded by natural persons, legal persons, scientific units, research institutes, or local government units, for the generation, supply-demand balancing, distribution, or sale of energy from renewable forces or from other sources or fuels, within a distribution network with a rated voltage up to 110 kV, within the operational area of a cluster not exceeding the boundaries of one *powiat* or 5 *gmina* territorial units. An energy cluster is represented by its coordinator – the cooperative, association, foundation, or any member of the energy cluster appointed in the civil law agreement. As rightly pointed out in the literature, the energy cluster must be qualified as a civil law agreement of a specific nature, which is not a special organizational and legal type of commercial business recognized under Polish law[44]. The law does not make it obligatory for energy clusters to register as civil partnerships or commercial companies whose function would cover the purpose of an "energy cluster;" and such business types are not be necessary for the parties to the agreement to qualify as an "energy

[44] J. Gronkowska, W. Pyzioł, A. Walaszek-Pyzioł, *Aspekty finansowo-prawne klastra energii Teza nr 1*, «Przegląd Ustawodawstwa Gospodarczego» 12/2017, p. 2.

cluster"[45]. It should be noted that the concept of the energy cluster as understood within EU law is relatively open, because the semantic scope of this wording will probably depend on the national laws and practices adopted under national law.

Recently there has been a high level of activity in private energy production by individuals. Under EU law a person who produces energy for their own needs and transfers the surplus to the energy system is called a prosumer of renewable energy. This category is very important from the point of view of the new EU energy policy, which is clearly visible in the legislation. Article 2 letter aa) the proposal for a directive on the promotion of the use of energy from renewable sources defines a prosumer of energy from renewable sources as an active consumer who consumes and can store and sell electricity generated in their facilities, including multi-family housing, commercial premises, or shared service premises, or in a closed distribution system, provided that these activities do not constitute their main commercial or professional activity. Under this proposal Member States shall ensure that prosumers, either individually or through aggregators

- are entitled to engage in the consumption of energy from renewable sources for their own needs, and sell their excess production of renewable electricity, including through power purchase agreements, without being subject to disproportionate procedures and charges that are not cost-reflective;
- maintain their rights as consumers;
- are not considered energy suppliers under EU or national legislation on account of the renewable electricity they feed into the grid, providing it does not exceed 10 MWh on an annual basis for private households, or 500 MWh per annum for legal persons; and
- are paid for the self-generated renewable electricity they feed into the grid, and the payment reflects the market value of the electricity they feed in.

[45] *Ibidem*.

Again, Poland may serve as an example of how the national law on the prosumer market is being shaped even before the Winter Package regulations come into force. Under Article 2.27a of the Act on renewable energy sources, a prosumer is the final consumer purchasing electricity on the basis of a comprehensive contract, generating electricity only from renewable energy sources by employing a microinstallation for his own use, not related to the commercial activities regulated by the Entrepreneurs' Rights Act of 6 March 2018. The EU draft regulation clearly states that the prosumer's legal status is related to the nature of his operations and he should be recognized as a consumer, not as a commercial businessman. This is what happens in Poland; prosumers are exempted from various types of obligations related to running a business and they benefit from their consumer-like status.

The examination of my two main topics, i.e. the prosumer's legal status and energy clusters in the broader context of local energy communities, unambiguously shows that the energy market at the EU level (and consequently at the national level) will undergo a very significant change. The tendency in the drafts for new regulations is to reduce the role of monopolies, viz. large energy companies, in order to increase the role and participation of local communities in generating energy from renewable sources.

At this point, it is tempting to propose definitions of local energy, which, considering the trends I have discussed, may be characterized as a social phenomenon consisting of all the activities related to local-level renewable energy production, i.e. actions taken in the interest of local communities whose primary goal is to achieve energy autonomy, including independence from external energy supplies, especially during crises.

4. Conclusions

What follows is the question about the ways to support the trends indicated in this article, which are, after all, tendencies of a local nature coming from good practices within the Member States. Therefore,

it is only natural to protect and support this trend at the basic level of the national law, and subsequently at the level of EU law. From the perspective of Polish law, however, we can see that this is not happening to the full extent possible. As the project's monograph on "the production and use of energy from renewable sources in the municipality as a sphere of municipal management: a legal and administrative analysis"[46] says, there is no transparent system of tasks and powers for the administering entities concerning the promotion and development of renewable energy sources at the local level. Energy is still being treated in a very centralized way, i.e. from the vantage-point of entities under government administrative bodies. Moreover, the Polish legislation does not provide local authorities with a sufficient scope for action, primarily in the field of defining the tasks of local government units.

Furthermore, it appears that taking into account the current course of action pursued by Western European countries, including EU Member States – the next 10 years will be crucial for the development of new technologies related to energy production. Currently Western Europe is clearly moving towards unconventional energy, and away from other sources such as coal or nuclear energy. The extremely rapid progress in innovation and technology is already bringing us to the conclusion that in the coming years unconventional sources will be able to satisfy the demand for energy, especially at the local level. Several countries, for example Germany and Denmark, are showing promise in this respect, as in many places their demand for energy is being fully met by renewable energy alone, thanks to the new technologies and regulations. So it seems that the drafts for new legislation under the Winter Package will be successful in finding the right solutions for the democratization of the energy market. This democratization should be understood as a departure from the rigid rules of the energy market established in the late 1980s and 1990s. Energy supply is no longer the business

[46] M. Szyrski, *Rola samorządu terytorialnego w rozwoju odnawialnych źródeł energii*, Warszawa 2017, p. 150.

of the state and large energy companies but, thanks to new technologies, it is also accessible to local communities.

Nowa polityka energetyczna UE: w kierunku demokracji lokalnej

Streszczenie

Artykuł ten stanowi jeden z ostatnich elementów projektu naukowego prowadzonego w Polsce pt. „Tworzenie i wykorzystanie energii z odnawialnych źródeł na obszarze gminy jako sfera gospodarki komunalnej. Analiza prawno-administracyjna". Celem tego artykułu jest sformułowanie wniosków – w tym głównie w przestrzeni prawnej i społecznej – związanych z wytwarzaniem energii ze źródeł odnawialnych na poziomie lokalnym. Istotnym elementem jest także uchwycenie definicji zjawiska energetyki lokalnej.

W artykule dokonano analizy zmieniającego się prawa w sferze energetyki ze szczególnym uwzględnieniem prawa odnawialnych źródeł energii. W pierwszej części wskazano historyczne ujęcie – najważniejsze unijne akty normatywne stanowiące podstawę rozwoju europejskiej energetyki. Następnie omówiono podstawowe założenia Winter Package – pakietu dokumentów, które w znacznym stopniu mają na celu zmienić sposób postrzegania energetycznej polityki unijnej. W końcowej części artykułu dokonano próby wskazania najwyższych trendów w zakresie tzw. energetyki lokalnej, także z próbą podania definicji tego zjawiska.

A New EU Energy Policy: Towards Local Democracy

Summary

This article is one of the last parts of a scientific project conducted in Poland and entitled "The production and use of energy from renewable sources in the municipality as a sphere of municipal management: legal and administrative analysis," The purpose of this article is to formulate conclusions, mainly in the legal and social aspects, on the production of energy from renewable sources at the local level. One of the main points I address is the definition of "local energy".

The article analyzes the changes in the law on energy, with particular emphasis on the law on renewable energy sources. The first part presents a historical approach: the most important EU legislation constituting the foundation for the development of European energy. Next I discuss the basic principles of the Winter Package, a set of documents intended to transform the EU's energy policy. In the final part of the article I attempt to indicate the latest trends in "local energy," and to give a definition of this phenomenon.

Słowa kluczowe: prawo energetyczne; demokracja energetyczna; odnawialne źródła energii.

Keywords: energy law; energy democracy; renewable energy sources.

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