SOME ASPECTS OF UNIFORMIZATION OF THE LAW AND THE PROBLEMS OF ELECTRICITY AND THE NATIONAL REGULATORY AUTHORITY FOR ENERGY IN ROMANIA[1]

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Abstract

Overview*. The concept of internal market it is a crucial and central ones in European modern construction. After the third legal package in energy the internal market of energy (electricity and gas) have to be fulfill until the end of 2014.Is this functional or just a theoretical projection? Can we see a direct and quantifiable effects? Is the regulation of energy network industries a proper answer and a direct intervention of State or have to be balance by competition? Is competition possible without regulation on this issue? Regulation of network industries is the prerequisite condition but without a real competition will be not an internal market.* ***Methods.*** *We assessed an individual case and possible scenario for Romania. Also a comparative methods was in place for understanding and analyses institutions (national regulatory authority) and mechanism of the market with some focus on the financial markets.* ***Results.*** *The methods used revealed that institution, with unambiguously attribution and competence, autonomous and independent and working mechanism with unambiguously attribution and competence represent a tools for achieve a real market. Nevertheless the predictable and well done regulations in energy, with a large debate with all the actors involved it is indispensable tools.*

Keywords: *energy law, internal market, European Union*

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A few observations have to be done at the beginning of the present article. In the earlier days of Union based on the provision of Article 8(1) of the Treaty Establishing the European Economic Community(1957) was established a common market objective, then assume by the Single European Act of 1986 it was introduced a new concept, the internal market , what appears slightly narrower than the initial statement. Today we have a provision that reinforces concepts and values to the present European construction, by Article 3(3) Treaty on European Union and extensively in the contents of an entire title, primarily through Article 26 Treaty on the Functioning of the European Union, all about internal market.

Due to complicated energy history in European law[3], which includes both different policy and legislation in the Members States, one of the ways used by the European Commission in fulfillment of the objectives in energy was a foundation of working tools on provisions of Article 114 Treaty on the Functioning of the European Union, successor provision to Article 95 Treaty establishing the European Community, principal provision for the harmonization measures for the achievement of the objectives set out in Article 14 Treaty establishing the European Community internal market (at present Article 26 Treaty on the Functioning of the European Union).

Also we have to indicate as working hypothesis that in the process of harmonization of European law[4], main topic of present being focus on energy, highlights will be on the existence of the acquis communautaire on energy. As well, from the perspective of European law together with other authors we stated that uniformity of law is achieved using the specific provisions rather than a method, of harmonization. Basic legal text after entry into force of the Lisbon Treaty in the field of legislative harmonization is provisions of article 114 Treaty on the Functioning of the European Union (TFEU).

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[3] See Pierre Mathijsen, *A guide to European Law* (7th edition), Sweet & Maxweel LTD, Romanian translation, Club Europa Publisher, 2002, p.378-381.

[4] "Harmonization sets common EU standards of, for example, health or consumer protection, which deprive States of the ability to take unilateral action in defence of such interests which inhibit free trade", in Stephen Weatherill, *Case & Materials on EU Law,* 11th edition, Oxford University Press, 2014, section Harmonization policy, p.521.

Legal core in energy market consists of three legislative packages on energy, with attention here to the last adopted in 2009, and the most dynamic in the proposed purpose creating internal market of energy. In this order we consider: Directive 2009/72 / EC of 13/07/2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54 / EC; Directive 2009/73 / EC of 13/07/2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55 / EC; Regulation (EC) no.713 / 2009 of 13/07/2009 for the establishment and functioning of the Agency for the Cooperation between regulators (ACER); Regulation (EC) no.714/2009 of 13/07/2009 on conditions for access to the network and cross-border exchanges in electricity and repealing Regulation (EC) no.1228/2003; Regulation (EC) nr.715/2009 of 13/07/2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) no.1775/2005.

One of the vital players in the energy market is represented by the national regulatory authority; in Romania for ease of use we will abbreviate this institution with the acronym ANRE. The legal ground are the provisions of Law no.160 of October 2, 2012 for the approval of the Government Emergency Ordinance no.33/2007 regarding the amendment of the Electricity Law No.13/2007 and Gas Law no.351/2004 and the energy content on electricity and gas in Law No. 123 of July 10, 2012.

We must clearly indicate that this is not a new institution; Romanian legal framework was open to accept over time the transposition of European legal norms. Why are we interested in this subject: a/ is the main actor in the energy market, a real "referee" b/ the status, role and responsibilities of ANRE have significantly influence across national domestic market, directly or collateral. In harmonization process regarding electricity, Romania had to transpose into national law the provision of Directive 2009/72/EC/. Using a directive on energy is a good chance for exemplifying the harmonization process, witnessing that in sensitive areas as there is an energy, this process will intensify in the post Lisbon period. It is observed that it is up to the Member States to choose the way of implementation of the directive, we quote «article 49 Transposition 1. Member State shall bring into force the laws, regulation and administrative provisions necessary to comply with this Directive».

We turn to the analysis of the legal foundations of the institution, therefore Law 160/2012 by Article 1 which set that ANRE are "an autonomous administrative authority, with legal personality under parliamentary control, fully financed from own revenues, with decisional, organizational and functional independence, having as object of activity developing, approving and monitoring the application of mandatory assembly of national regulations necessary for the functioning of the domain and of energy market ".In the same time we have a new legal definition by Law No.123/2012 Article 3 section 2 ANRE as a competent authority, literally, and by Article 7, ANRE being a regulation authority, paragraph 1, "is organized and operates as an autonomous administrative authority with legal personality" and accordingly with paragraph 2 "organization, functioning, powers and duties of ANRE are set by the law.", completely clear. In light of judicial proceedings triggered by the European Commission against Romania were introduced in emergency in September 2014, an addition to the law related to compliance and relationships of this institution

What we can find in the mirror are Chapter IX of the Directive provides by Article 35, paragraph 4 and 5 in particular "Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently" and regulatory authority "is legally distinct and functionally independent from any other public or private entity" , ensures that its staff and the persons responsible for its management: act independently from any market interest and do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks. "and simultaneously "the regulatory authority can take autonomous decisions, independently from any political body, and has separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties … the members of the board of the regulatory authority or, in the absence of a board, the regulatory authority's top management are appointed for a fixed term of five up to seven years, renewable once."

We see increased attention in the European legislator to define existence and complete independence of the regulatory institution, to ensure that the professional body cannot be influenced by external interests of its activity, with attention to conflict of interest. There is here an omnipresent red wire, stating repetitive about an independent regulatory institution.

There have been recent changes in the Romanian law in considering European standard but at the same time we notice that although have a basic law namely Energy Law no.123 / 2012 does not even take as a reference the regulatory law for the establishment and organization of the institution ANRE. There is a highly regulatory balance from a shy enunciation of independence of national regulators to an abundance of terminology, definitions indiscriminately abundant, ambiguous declaring the same independence, as shown by the Law no.160 / 2012 and by Law no.123/2012. Why is it important to analyze the referee of electricity market? The correct settlement in legal terms is vital for the national economy as a whole, the reality raising some issues as we can exemplify: legislative initiative is limited; operations, investigation and monitoring operations under same umbrella, also licensing and authorization, the powers to settle complaints which is jurisdictional competence of the institution and so on.

Regarding the problem of independence of the institution, recently in 2012 it was subordinated to the national Parliament. If we analyze the law on the organization of the institution we see that in its general lines of organization activity is governed by a Regulation of organization and functioning subsequent act itself of its administration. This administrative regulation adjusts also labor relations subsequent to law establishing the institution no.160/2012, the law is silent or unclear in the best case in terms of management of the institution and the explicit way and criteria for appointment and revocation. Is true that the law details the regulatory council, whose members are the leaders of the institution in question that the president and two vice presidents. But appointing them or revoking them as members committee, is conferred to them a leading position that may change after all or supports until the expiry of the mandate, according to the will of parliament.

Top management of ANRE is represented by president, having full legal powers, assisted by two vice presidents described by Article 3. What they do? By Article 4 we receive clarification by settling Regulatory Committee which is appointed, suspended or revoked by the plenary session of the Parliament. The regulatory committee members, members appointed by Parliament, consist of and contain the persons who effectively run the institution namely the president and vice presidents. How they are elected or appointed remains a different story, untold by law. Moreover by Article 7 stipulates that hiring and dismissals, of their individual contracts, is performed according to the Regulation for organizing and functioning of ANRE. The law simply avoids `responding in a manner unambiguous, concise and clearing to the simple question: how it is chosen the management of institution

If we look from historical point of view, the institution was subordinated from one ministry to another, depending on changes on energy strategy and/or policy changes which entitles us to pretend after passing under parliamentary control of ANRE to pretend that eventually this institution became a point at which the substantial improvement of the legal framework of regulation in energy is enhanced. In a sensitive market like this we appreciate that is the lack of essential mechanism of transparency, in terms of work and method of appointment, although show up in the mirror the suspension or revocation. All the problems was left at the national regulatory level so natural question could arise whether we are ready or not for independence all so beautiful set forth by laws already listed.

The lack of single and uniform regulations on energy in Romania is the first observation related to this reality, so although is not the place to develop by present paper one question arising: why not have all regulations comprised into a code.

The concern in this case occurs after solving preliminary ruling in a case important for European energy market, file court that dealt specifically on the sensitive subject of energy price, direct intervention of a regulator authority to set a reference price in gas market, as particular application of the regulations of the energy legislative package no.2. In the following we focus on

the Case C-265/08, Federutility and others against the Autorità per l'energia elettrica e il gas ('the AEEG'), in which the Court (Grand Chamber) ruled on April 20, 2010 a decision which brings an interpretation of common rules for the internal market in the national gas sector, namely Directive no. 2003/55/CE (package no.2).

Apparently that decision is related to natural gas should lead to a lack of interest, but, on the contrary relevance lies in several arguments: the imperative of creating an internal market (European) of energy; conflict that might arise between national law and European standard in terms of implementation and enforcement, solution to be analyzed in the case of a dispute before a national court ; supranational intervention in sensitive issues as energy and regulatory scope for in the Member State most often under its own agenda. Briefly this file indicates that in the matter of intervention in the free market the State has to respect the following principles: 1/ Intervention have to be justified in the general economic interest 2/ intervention is in compliance with the principle of proportionality and analysis has to assess we quote: "First, such an intervention must be limited in duration to what is strictly necessary in order to achieve its objective.. Secondly, the method of intervention used must not go beyond what is necessary to achieve the objective which is being pursued in the general economic interest… Thirdly, the requirement of proportionality must also be assessed with regard to the scope *ratione personae* of the measure, and, more particularly, its beneficiaries". Finally the intervention "is clearly defined, transparent, non-discriminatory and verifiable, and guarantees equal access for EU gas companies to consumers". This is a significant step forward in practice for energy law, in terms of execution and implementation of European norms into national law, indicating the manner in which a particular situation should be evaluated and analyzed.

One of the conclusions is that the uniformity of European law has not yet reached the end of the road, and the process of harmonizing Romanian legislation energy is not completed. The best answer comes from a good knowledge and understanding of the post Lisbon world and the changes we experience today through internationalization of energy law.

In ours understandings uniformization of energy law can be approximated as best practice in the field, namely a correct view on national realities, establishing clearly mechanisms and tracking functionality of energy market, could be the right answer. In this area answers, solutions, are reflected directly in the economy and development of society.

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