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enabling consumer
to become prosumer
in the energy transition era

Needs and Barriers of Prosumerism in the Energy Transition Era

Editor
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Brief Considerations on the Criminal Aspects Connected to the Figure of the Prosumer, with Particular Regard to the Phenomenon of Energy Poverty and the Theft of Electricity

Antonella Merli

Abstract There is no shared definition of prosumer (in Italian, 'prosumatore') but the importance of a common operational definition has been underlined by the European Parliament. In general, prosumers are citizens who, individually or collectively, without being entrepreneurs, self-produce, self-consume and market goods and services, not without remarking, however, that such activities have not yet been unequivocally identified as rights. In connection with the figure of the prosumer, a plurality of criminal provisions are highlighted, such as those related to the spread of the Internet and, in particular, to the issue of controls on the Internet and the related liability of the provider-prosumer. But the viewpoint of investigation of particular importance in the criminal field, on which - above all - this contribution focuses, concerns the tools to combat the widespread phenomenon of theft of energy, of electricity in particular, which is part of the phenomenon of energy poverty.

The figure of the prosumer (in Italian 'prosumatore') concerns citizens who, individually or collectively, can produce and consume goods (or offer energy services) without being entrepreneurs, as entrepreneurs of themselves.¹ The word derives, in fact, from the fusion of the English words 'producer' and 'consumer'. The European Parliament stressed that it is 'important that the European Union adopt a common operational definition of prosumer':² a definition - as claimed by an Italian MEP - 'within which to identify unequivocal rights such as that of self-production, self-consumption and storage of energy produced from renewable sources'.³

In connection with the different articulations of the research topic, a plurality of criminal provisions is highlighted, from the classic cases for the protection of assets (fraud), to pivotal offences in the criminal law applied to financial markets (market abuse). The spread of the Internet, and with it the now constantly evoked digital revolution, opens up also in this sector scenarios of reflection until a few years ago unimaginable. The use by prosumers of the platform for the completion of exchanges of goods and services raises the debated issue of the provider's liability ('always oscillating between understandable preventive needs and impending risks of position responsibility')⁴ due to the omission of controls on the Network. Even against the prosumers, if the information circulating on the network with the online offer of

¹ M.A. Giffoni, 'Prosumer, il primo passo verso una definizione giuridica (Prosumer, the first step towards a legal definition)' available at Nextville.it (last visited 5 December 2020).

² European Parliament resolution of 26 May 2016 on a 'new deal' for energy consumers (2015/2023 (INI)).

³ Dario Tamburrano, coordinator and member of the ITRE parliamentary committee.

⁴ So, A. Gullo, 'Nuove tecnologie e Sistema penale (New technological frontiers and the penal system)' 2 *DPC-RT*, VIII (2019).

services relating to the production and consumption of energy is not true, a criminal or extra-criminal liability, similar to that of the provider, can be configured. For the prosumer, all other forms of liability related to the use of the network inevitably remain, for example, that for the online transmission of unfair competition practices, or data that is detrimental to the consumer's reputation.

A separate issue is the creation, and/or integration, of sanctioning regulations (understood in a broad sense, i.e. inclusive of criminal and extra-criminal sanctions, by the principle of strict necessity, which is one of the pillars of the criminal system) for environmental pollution or connected to the offer by the prosumer of services relating to the production and consumption of energy that increase (or do not prevent, in the presence of a legal obligation) energy poverty in individual-specific sectors, with consequent damage to health (and for other goods) of people.

Given that the figure of the prosumer is at the centre of the energy revolution taking place in the market, the prospect of investigation of particular importance, in the criminal field, is that relating to the instruments to fight the widespread phenomenon of theft of energy, of electricity in particular. A phenomenon, as we will immediately see, which is placed in the context of energy poverty, and the connected theme of the use of renewable energies (functional, among other things, to protect the environment), which requires a multiform collaboration that involves energy conversion policies of local governments, in addition to the inevitable technological interventions; the dissemination of the phenomenon awareness, which becomes increasingly crucial in a perspective aimed at empowering the population; the so-called energy citizenship, a network of citizens who produce, consume and exchange clean energy, as an alternative to nationalized sources of energy production, which, as has been observed, 'are mostly in the hands of a few large companies that own huge plants and expensive'⁵ and that have energy keys: 'a structure consisting of an economic and social pyramid that towers over the citizens'.⁶ A network of citizens organized as prosumers can contribute to overturning this pyramid, moreover by producing, consuming and exchanging clean energy.⁷ All this with globalization and harmonization of the basic rules of national democratic systems.

A family is said to be in energy poverty if it has difficulty in acquiring a minimum basket of energy goods and services, or if it has access to energy services that involve a diversion of income above a 'normal value'. Energy poverty depends on the economic crisis, job loss, excessive energy bills, low incomes or poor energy efficiency, and involves, among other things, indeed above all, living in homes without the comfort of heating or air conditioning systems.⁸

⁵ M.A. Giffoni, n 1 above.

⁶ M.A. Giffoni, n 1 above.

⁷ M.A. Giffoni, n 1 above.

⁸ M. Cornelis, 'COVID-19 e povertà energetica: è il momento di un diritto all'energia (Covid-19 and energy poverty: it is time for a right to energy)' available at <https://www.rivistaenergia.it/2020>

As for the 'energy poor' in our country, it is good to remember that the number of families who, according to the latest Istat data, are unable to pay their electricity bills (which are among the most expensive in Europe, about + 30%) is 4, 7 million.⁹

Energy poverty causes poor people the need to procure energy illegally. Therefore, it has strong repercussions on crimes against property; in particular, it is one of the causes of the increase in crimes of theft.

The theft of electricity falls within the provision of Art. 624, paragraph 2, of the Criminal Code, which establishes that electricity and any other energy of economic value are portable (also). It is a crime with a continuing offence (a permanent crime). The event, consisting of the subtraction of energy, once it occurs, continues to occur over time until the subtraction ceases. Despite its persistence, however, the stealth action, which produces the event, is unique, and therefore a single crime is configured.

The offence can be committed through various methods of conduct: 1) through the abusive direct connection to the cables of the distribution network, which leads to the subtraction of energy from the supplier; 2) by connecting to another user's power cable; 3) by tampering with its meter.

In the first case (and also in the second), the dominant jurisprudence considers that the abusive connection of a cable to an Enel junction box integrates the crime of theft aggravated by the use of fraudulent means. And this is because the tampering of the system involves a necessary use of violence against things.

In the latter case, old jurisprudence believed that the crime of fraud should be configured because in tampering with the meter, the artifices and deceptions provided for by the case of the fraud would materialize, more than the aggravating circumstance of the use of the fraudulent means.

Today, the jurisprudence has changed its opinion: it recognizes in this hypothesis the crime of aggravated theft. This is because it considers tampering with the meter, not artifice, but a form of 'violence against things' - the aggravating factor of theft. The 'tampering' is therefore conceived as physical energy on a thing, so that, even if not damaged, the same is transformed, or made unsuitable for its destination. Tampering with the meter therefore falls within the commonly accepted notion of 'violence against things' according to article 624, paragraph 2, Penal Code.

It is interesting to note that, according to the constant jurisprudence of the Court of Cassation on the subject of theft of electricity, a situation of economic difficulty

/05/ covid-19-e-poverta-energetica-e-il-momento-di-un-diritto-allenergia/ (last visited 29 November 2020).

⁹ See the report on energy poverty presented by *Oipe* (Italian Observatory on Energy Poverty) in Milan on 4 June 2019 at the headquarters of the 'Autorità di Regolazione per Energia Reti e Ambiente' (ARERA).

cannot be invoked to recognize the cause of justification due to a state of necessity according to article 54 Penal Code. The reason given by the jurisprudence is that the primary needs of a person who is in a state of poverty are provided by the social assistance bodies. It follows, therefore, that those who, to protect themselves from the cold, are forced to steal electricity because they are destitute, cannot invoke the state of necessity.

In conclusion: the subjects who commit the theft of electricity, as they are at the same time in conditions of energy poverty and economic difficulty, cannot be exempt from punishment thanks to the exemption in question. The presence of adequate institutional structures aimed at supporting people in a state of economic hardship excludes the situation governed by article 54 of the Italian Penal Code, which requires that the criminal action is committed to avoiding an imminent danger not 'otherwise avoidable'.

The exclusion of the state of necessity is just as easy, and convincing, when the subject withdraws electricity to enjoy greater 'comfort and opportunities' with the use of the numerous household appliances commonly used in one's home, which are not necessary to avoid the risk of a 'current danger of serious harm to the person', required by article 54 Penal Code.

Therefore, the Court of Cassation¹⁰ has a good game in not recognizing the exemption to those who steal electricity outside of a situation of 'irrepressible necessity', that is to say, all the times when living without electricity does not jeopardize physical safety.

Moreover, it is clear that qualifying the aforementioned conducts, for criminal purposes, as 'acts of necessity', that is, in essence, allowing that, in the presence of the aforementioned situations, it is possible to steal electricity with impunity, to using it to enjoy greater 'comforts and opportunities' would open the doors to widespread illegality, complicating, even more, the management of an energy system that is already very complex in itself. It should not be overlooked, among other things, that the thefts of energy end up in the so-called 'network losses' paid in bills by all users; hence the need for penal sanctions.

These reflections on the criminal law point out that the problem of the lack of electricity goes well beyond the legal aspects: it also affects, and above all, cultural, social and political profiles. It is illusory that it is resolved by law.

If punishing the theft of electricity, in the absence of imminent danger of serious harm to the person, is the unavoidable result of a correct application of criminal law

¹⁰ So, for example, Cassazione penale, sez. IV, 18 January 2019, n. 18329, *Guida al diritto*, 29, 92; Cassazione penale, sez. IV, 11 December 2018, n. 121, available at www.Dejure.it (last visited 7 December 2020); Cassazione penale 31 September 2017 n. 39884 available at <https://www.altalex.com/documents/news/2017/09/20/furto-di-elettricita-lo-stato-di-indigenza-non-integra-di-perse-lo-stato-di-necessita> (last visited 7 December 2020).

(since the lack of comfort and opportunities does not put at risk the survival), however, outside the criminal law sphere, it is clear that defining electricity as a 'non-essential' good is very perplexing.

Indeed, energy poverty has enormous negative consequences on other personal goods and other aspects of individual life. Just think of the dramatic condition of multitudes of families living in homes without electricity. It affects almost 50 million people at European level and is exponentially increasing on a global level. In developing countries, there are about one billion people who do not have access to the electricity grid and those who use dirty and polluting fuels for a cooking amount to about 2.7 billion.

The problems related to access to energy to meet the primary needs of life and the material needs of families have emerged overwhelmingly with the current phenomenon of the lockdown determined by Covid 19, which has resulted in an increase in the energy needs of consumers residential buildings, a serious economic crisis and a contraction in the labour market, with a sharp reduction in incomes, and, despite the various emergency policies implemented by governments in Italy and Europe to meet immediate needs, the conditions of vulnerability and pre-existing inequalities.

Energy poverty is a situation that causes very serious inconveniences, connected precisely to the deprivation of those comforts and opportunities considered (and perceived as) essential to make a decent housing and a comfortable life for its occupants. Therefore, energy poverty can affect and have serious consequences over time, therefore not immediately according to Art. 54 of the Criminal Code, on the same physical and mental health of the weakest people. This is due to 'unpleasant temperatures' (which can lead to respiratory and heart disease) and, as regards mental illness, due to the stress associated with the inability to pay bills.¹¹

Excluding, on the one hand, a rethinking on the possibility of applying to subjects who are in energy poverty the cause of justification of the state of necessity for the reasons already illustrated, but, on the other hand, considering that the threat of criminal sanction is a fragile instrument to combat the theft of electricity because it is 'needed' (although not in a criminal sense), it is necessary to recognize and ensure the right to the energy of current and future populations ('also to guarantee social cohesion and democracy')¹² through social-economic and environmental support interventions (energy poverty also has environmental and technical roots and in some countries, for example, Nigeria, it is linked not only to the high rate of poverty but also to the spread of corruption phenomena that induce distributors to stop

¹¹ B. Atanasiu et al, *Alleviating Fuel Poverty in the EU. Investing in Home Renovation, a Sustainable and Inclusive Solution* (Bruxelles, Buildings Performance Institute Europe, 2014), *passim*.

¹² M. Cornelis, n 8 above.

investing in the development of the network).¹³ The European Commission, for its part, in the legislative package ‘Clean Energy for all Europeans’ has started the transition to a new energy system with a new strategy called the resilient Energy Union to provide European consumers with safe, sustainable, competitive and affordable energy.¹⁴

¹³ In Europe, too, people living in energy poverty are generally vulnerable consumers who have low incomes, face high energy costs and live in energy-inefficient homes and, as rapporteur Kata Tüttő (HU/PSE) said, councilor of the XII district of Budapest, today there are over 50 million Europeans forced to choose whether to eat or warm up, and who live in a situation of energy poverty.

¹⁴ See on this point N. Della Valle, ‘People’s decisions matter: understanding and addressing energy poverty with behavioral economics’ 204 *Energy and Buildings*, 204 (2019); H. Thomson and S. Bozarovski, *Addressing Energy Poverty in the European Union: State of Play and Action* (Manchester: EU Energy Poverty Observatory 2018), *passim*.