

## Integration of Energy Markets through Public Services Obligations

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### 1. Roles played by services of public economic interest

The liberalization policy launched by the Commission in the energy sectors encountered the opposition of some Member States (led by France) because it would erode their domestic notions of public services. The real reason, however, was that the Commission policy would disrupt Member States' well-established organization, regulation, and funding schemes for gas and electricity supply. The Commission, on the other hand, never envisaged its policy to act against services of general economic interest; however, the liberalization of the electricity market and the boost given to the creation of an internal energy market has been possible thanks to the incorporation of public service obligations in Community legislation.

Indeed, Member States have been willing to support Community energy directives, provided the Commission accepts the inclusion of public and universal service obligations. This has fulfilled a dual political role. Domestically, these directives provided justification for opening up the electricity sector to the market, which did not lead to a decline in service quality, price, or supply conditions. At the Community level, they allowed Member States to invoke the exemption included in Article 82.6 EC referring to the implementation of competition rules. The model adopted was that of granting a broad margin of discretion to Member States in order to define and impose public and universal service obligations, while at the same time reinforcing the activity of the Commission in the implementation of competition rules.

Along with its role in negative integration (through removal of obstacles to internal

market and free competition), the Commission developed gradually an important role in positive integration via legislative and institutional reforms (the latter from the inclusion of energy policy as a legal basis for Community activity in the Lisbon Treaty). In this sense, Directive 2003/54/EC on the internal electricity market strengthened measures on public service obligations matters. This is achieved in two main ways (Cameron 2001, 350). First, several measures are intended to protect the final (vulnerable) consumer from breaks in supply, and second, some other measures are intended for Member States to ensure public services' goals: social and economic cohesion, environmental protection, and security of supply. The result is Article 3, Directive 2003/54/EC which includes both protection measures for domestic customers and vulnerable customers, and the imposition of public service obligations "in the general economic interest" regarding the following: security, including security of supply; regularity of supply; quality of supplies; price of supplies; and environmental protection, including energy efficiency and climate protection.

Member States made sure during the negotiation phase that security of supply would be included in the electricity Directive as a public service obligation, a measure that would allow them to call for exemption from competition rules in accordance with Article 86.2 EC (Cameron 2001, 368). In this sense, the Directive establishes that obligations should be clearly defined, transparent, non discriminatory, and verifiable since the establishment of a public service obligation may lead to granting an exclusive right of supply in a particular area or any other type of financial compensation, and it may hin-

der electricity companies from gaining equal access to national consumers.

To the Commission, “energy is essential for every European” the provision of which requires the respect of legally established public and universal services obligations (Communication from the Commission to the Council and the European Parliament, “An Energy Policy for Europe” (COM(2007) 1final), 10). However, subsequent legal reforms will not be accompanied by the adoption of new public service obligations. In fact, the rough draft of the Directive presented by the Commission in September 2007 to modify the enforced Directive 2003/54/CE, only adds a section to Article 3, granting the Commission power to adopt guidelines for the execution of the aforementioned proviso.<sup>1</sup> Foreseen reforms in matters of energy as a public service will come together with what the Commission has named “energy poverty”. In this sense, to realize the internal energy market through positive integration measures, the Commission has planned the approval of a non-legislative document: the “Energy Customers’ Charter”, based on the text already presented in the Communication “Towards a European Charter on the Rights of Energy Consumers” (COM(2007) 386final). Together with the objective of protecting the most vulnerable citizens against the increase in energy prices, the targets proposed by the Commission tend to protect the customer against unfair sales practices, warrant greater information, and make effective the freedom of choice and the opportunity to change provider in a liberalized market.

## 2. Assessment from the perspective of energy users

Opening up energy markets, the Commission held, would benefit customers because they would be able to choose the energy provider offering the best service at the lowest price, hence lowering energy prices. However, almost 20 years after the beginning of the liberalization of the electricity market, energy prices are as high as ever,

<sup>1</sup> This measure is aimed at modifying elements of the electricity Directive which are not essential to its completion, and it will follow the comitology procedure (Decision 1999/464/CE).

and customers do not have real choice in terms of alternative electricity suppliers – although from July 2007 all customers, and not just big or industrial consumers, have the right to change supplier. Moreover, those who have been able to change, do not appear satisfied with the range of offers they receive (Communication “Prospects for the internal gas and electricity market” COM(2006) 841final).

The verdict on the execution of public service obligations and customer protection

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established in the electricity Directive is not much better. At the time of release of the Communication “Prospects for the internal gas and electricity market” (COM(2006) 841final), the Commission pointed out that Member States had not clearly described the measures adopted to implement Directive 2003/54/CE in relation to the protection of end-users and vulnerable customers. Besides, very few Member States have imposed precise public service obligations to protect vul-

nerable customers and only half of them have tried to define this group of customers.

With respect to the protection of non-vulnerable customers, the Commission has recorded the existence of regulated tariffs for supplying electricity which are justified on the imposition of public service obligations. This is the case of France, Ireland, Latvia and Spain.<sup>2</sup> The Commission considers the existence of a regulated electricity supply tariff much lower than the market price of electricity to be contrary to Community law. First, the increasing difference between tariff price and market price is making clients return to the tariff market, so that the measure hinders the implementation of an electricity market open to competition. Second, operators are receiving State compensation because of the deficit caused by current low electricity regulated tariffs. In part, such compensation comes from the access tariffs paid by all clients, including those who opted for the free market. And thirdly, a system of regulated supply tariffs, which is justified in the frame of public service obligations, impedes equal access to new operators' markets, it does not respond to changes in market conditions, it is not transparent, and it is not aimed at vulnerable customers. Hence, the Commission concludes that the exclusive right to supply electricity at a regulated tariff much lower than the market price is guaranteed in a discriminatory and hardly transparent way.

This assessment from the Commission, together with the decision to stop introducing public service obligations, indicates that the greatest obstacle for the protection of end-users and vulnerable customers, and above all, of the rest of the customers, is the implementation of Directive 2003/54/CE. In its Communication "Services of general interest, including social services of general interest: a new European commitment" (COM(2007) 725final, rough draft) the Commission insists on one of its most important guidelines: it is possible to reach public interest objectives in the single market because, as elec-

<sup>2</sup> SEC(2006) 1709 accompanying document COM(2006) 841final, Communication from the Commission to the Council and the European Parliament "Prospects for the gas and electricity market".

### Further reading

This policy brief is based on research carried out within the NEWGOV project no. 8 on "European Public Services Regulation". The project explores the mutual influence of Community and national regulation on the provision of public services and analyses the way in which this mutual influence shapes the institutional framework for the provision of public services.

The aim of the research is to determine whether the influence that Community law receives from the national notion of public service (and vice versa) and the multilevel institutional framework settled for the provision of public services pave the way for the creation of an European notion of service public. This will determine the content of the internal energy and competition policies and the degree of national intervention vis-à-vis Community intervention. To this aim, the project focuses on the Community and Spanish regulation and case-law concerning the functioning of the Spanish electricity market, the internal energy market and the institutional framework to provide public services in this sector.

Further information can be found on the NEWGOV Website in the [special section](#) of project no. 8.

tricity and gas legislation shows, the gradual opening of these sectors to competition is achieved simultaneously with the definition of public service obligations relative to universal services and customers' rights.

In this sense, Cameron (2006) draws attention to the judgment of the case C-17/03<sup>3</sup> in which a Dutch group representing electricity consumers contested the measure adopted by the Dutch regulator (which followed instructions from the Ministry of Economy) for the booking of a big part of trans-frontier capacity to import energy for some

<sup>3</sup> Case C-17/03 *Vereniging voor Energie, Milieu en Water, Amsterdam Power Exchange Spotmarkt BV, Eneco NV v Directeur van de Dienst uitvoering en toezicht energie*, [2005] ECR I-4983.

privileged undertakings, in a discriminatory way, without following the procedure of the transitional period established by Article 24 of Directive 2003/54/CE. The ECJ concluded that Articles 7.5 and 16 of the electricity Directive must be interpreted in order to prevent Member States from adopting measures guaranteeing preferential capacity to an undertaking in the system of transfrontier electricity transmission, whether such measures emanate from the system operator, the system controller, or the legislative power, if such measures would not have been authorized according to the procedure described in Article 24 of the electricity Directive.

This judgment reveals that the achievement of the internal market strongly depends on Member States, which were granted a broad margin of discretion in the organization, regulation, and funding of services of general economic interest, while the Commission has to monitor and report on the progress made by Member States in the transposition and implementation of the Directive. Nevertheless, paradoxically in this issue, the Commission did not support the group of customers contesting the discriminatory measure and, consequently, defending the internal energy market, since the support of the Dutch Government was crucial to give a fresh impetus to the liberalization of the gas markets (Cameron 2006, 123). In the end, although the judgment supported the position of Dutch electricity consumers, their interests were far from being protected by a procedure that lasted three years at the domestic level, two years at the Community level, and that continues once the national

tribunal receives the answer to the preliminary ruling. Even for major electricity consumers, the time employed for the judicial protection of their rights reduces the benefits they could obtain.

### 3. Conclusions

Now almost two decades after the start of the liberalization process, customers still do not have the real choice to opt for an alternative supplier. They are hindered either by persisting obstacles regarding the change of a supplier, or by the fact that there are no existing satisfactory alternatives. Public and universal service obligations have not been defined by Member States and they may occasionally be counterproductive since the cost of warranting security of supply could impede the affordability of electricity prices or the ideal degree of environmental protection. It is certain that if the liberalization of the sector was justified by the benefits it would supposedly bring to end-users (including the lowering of electricity prices), few of these benefits are seen today due to a poor execution of Directive 2003/54/CE by all Member States. The Commission has opened non-compliance procedures against most Member States on grounds directly or indirectly related to public service obligations: the absence of notification to the Commission of the obligations imposed by the States; the existence of regulated electricity supply tariffs, which are justified on public service obligations; and the attribution of exclusive or special rights to privileged enterprises to compensate them for the imposition of public service obligations.

In this scenario of generalized non-compliance, and with the ratification of the Lisbon Treaty pending, the Commission has already presented rough drafts of the third package of directives for the liberalization of the electricity and gas market. It is making a fresh attempt at solving the scarce implementation of the electricity Directive, by approving a new one. Nevertheless, one must ask why this political strategy, which proved useless before, should work today when the barely implemented Directive 96/92/CE has been substituted by the even less implemented Directive 2003/54/CE?

#### Bibliography

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