

## *New Challenges in Times of Crisis: The State in a Liberalised Energy Market*

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The European Union's goal of liberalising the energy sector and creating an integrated energy market has been in the making for almost three decades. There are significant differences between EU Member States, so achieving an integrated energy market must involve eliminating differences between Member States, establishing common rules and competition between companies at European level, harmonising prices and setting and achieving common environmental targets. However, the Member States will continue to play an important role in shaping energy policy, and the question is whether they will be able to pursue their individual private policies in the context of the crisis, alongside their public role in the EU.

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## 1. Introduction

Over the last 30 years, the European Union (EU or Union) has adopted five energy packages, progressively increasing liberalisation in the energy sector to new levels. The liberalisation of the energy market has had an impact on the economies of the Member States (MSs) and on energy market players, including suppliers and consumers. Over the last three decades, the sector has been characterised by privatisation, restructuring, reorganisation and rationalisation of processes, dominated by monopoly (mainly state) power, lack of competition, barriers to entry, abuse of dominant position and opaque pricing practices.

The role of the state in the process of marketisation has been crucial from the outset, as it should serve to protect consumers from high prices and negative externalities in the sector, to facilitate the freedom of choice of supplier by enabling households to become active players and to encourage investment in quality and cheap energy.

The liberalisation process across Europe aims to create an integrated EU-wide energy market. Significant progress has been made in energy marketisation in different countries across Europe, but the ultimate goal is still a long way off. There are significant differences between EU MSs, so achieving an integrated energy market must involve eliminating differences between MSs, establishing common rules and competition between companies at European level, harmonising prices and setting and achieving common environmental targets. But one thing is certain: the state will continue to play an important role in shaping energy policy, and the question is whether it will be able to play a private role in the changing environment alongside its public role of an EU member.

## 2. Disappearing State?

Liberalisation can be seen as a way of organising the market, allowing a market to change its form while at the same time promoting the four freedoms of the EU. Liberalisation is a long multi-step process, involving

the privatisation of state monopolies, the unbundling of competitive segments, the restructuring of generation and transmission, and the opening up of the wholesale energy market to multiple players.

After the Second World War, the area of European integration was affected by globalisation like the rest of the world, with the emergence of more and more international companies with cross-border activities, to which EU regulation had to respond. At the same time, the concept of the welfare state, which had been prevalent since the 1970s, began to be replaced by a neoliberal approach that put market conditions first. In these circumstances, the time had come for the EU to address energy issues in depth. In the 1990s, the energy sector was characterised by a rather monopolistic, oligopolistic nature, with the state carrying out most of the activities in this area in some MSs or with only a few incumbent players in the market. The existence of natural monopolies and the vertical integration of market activities did not encourage operators to improve quality, develop and reduce prices, while consumption volumes continued to increase. But as energy liberalisation progresses, the state is still needed. The EU must not restrict the right of MSs to determine the conditions for exploiting energy resources, to choose between different energy sources (energy mix) and to determine the general structure of their energy supply. Energy is a networked service due to the way it is transported and supplied, as its supply is heavily dependent on infrastructure. This can lead to a large number of market failures, which, besides being an automatic by-product of the market, may not always be uniform in magnitude, varying from sector to sector. For reasons of economies of scale, the energy sector networks are characterised by the emergence of natural monopolies, where it is up to the state to determine where intervention is necessary to ensure fair competition. There is also a high incidence of misinformation in this sector, which can lead consumers and producers to make wrong choices. The state can improve the efficient functioning of markets by providing information, setting standards or imposing minimum requirements to ensure the quality of certain products. Negative externalities are also common, as the activities of incumbent firms may impose additional costs on those who are not involved in the process. These are usually the reasons given by the State for stricter environmental regulation, the introduction or increase of taxes, the internalisation of external costs, or the development of universal services.

## 2.1. State Aid Role in the Energy Sector

State subsidies are a necessary and dangerous form of intervention, which can take the form of financial support, guarantees, sureties or even tax exemptions. State subsidies can improve quality and make prices more attractive for consumers, but their distortive effect on competition requires caution. State subsidies should be seen in the light of EU legislation which, as a general rule, prohibits such interventions, precisely in order to achieve liberalisation and an integrated internal market (Treaty on the Functioning of the European Union - TFEU, Art. 107/1).

State aid to the energy sector can have a variety of motives, including the provision of services of general economic interest, but also the direct objectives of EU energy policy (ensuring the functioning of the energy market, guaranteeing security of energy supply in the EU, energy efficiency and energy saving, and promoting the development of new and renewable energy sources, and the interconnection of energy networks) (TFEU, Art. 194/1). Furthermore, environmental objectives are becoming increasingly important in the integration process, for which climate protection measures (e.g. renewable energy sources) are essential. Technical and social reasons can also be cited as reasons for support (López, 2021). However, there is also a negative side to state support of the energy sector: subsidies can reduce the efficiency of the energy market (companies are not incentivised), cause additional pollution, and, if targeted in the wrong way, can have a negative impact on the uptake of renewable energy and other environmentally friendly technologies and solutions.

In many cases, the European Commission (EC/Commission) will have to consider whether the intervention constitutes State aid and, if so, whether it is permissible. In the energy sector, too, the impact of the various crises (economic and financial crisis of 2008, refugee crisis of 2015, then the COVID-19 pandemic and the recession caused by the Russian-Ukrainian war) has led the Commission to declare much more state aid permissible, which supports state-favoured companies in the MSs and more economically developed countries (Germany, France) in the EU, distorting competition in the energy sector between companies and MSs (Horváth, Bartha & Lovas, 2023).

In 2020, in the wake of the COVID-19 pandemic, the EC introduced a temporary framework to give MSs a broader scope to provide subsidies, in particular for sectors heavily affected by the virus (EC, 2020). It is important to underline that these provisions are both complementary

and can be used alongside and independently of existing subsidies, and temporary, but have the potential to distort competition in the long term. During the distorted economic situation caused by the global economic crisis of 2008, the institution adopted a similarly permissive behaviour, which it can do in the light of two legal bases; the same proved true for the situation created by the COVID-19 pandemic. While Art.107/2 (b) of the TFEU allows compensation to private operators for damage suffered as a direct result of the epidemic (natural disasters or exceptional occurrences), Art. 107/3 (b) allows specific aid to remedy a serious disturbance in the economy of a MS.

The energy crisis caused by the Russia-Ukraine war has hit the energy sector hard, and after 2022, mainly due to increased energy prices, several states granted large amounts of aid under Art. 107/3 (b) of the TFEU, citing serious disturbances in their economies. Such aid may be considered compatible with the internal market on the basis of a discretionary decision of the EC. This legal basis has been used only a few times in the earlier history of European integration, but the practice changed after the 2008 global economic crisis and became a popular reference point.

## 2.2. The Role of the State in Free Market Conditions

The EU aims to achieve liberalisation and an internal integrated energy market, but the most difficult issue is to define the optimal role of the state in a free market. Since the 1970s, the popular concept of the welfare state has been replaced by a neoliberal approach. The market is at the centre of this policy, so state intervention should be reduced as much as possible, and its role as a private actor and public authority should be minimised, since it does not operate according to the rules of free competition (Venugopal, 2015). As a result, the EU is seeking to reduce the role of the state, as reflected in the first three energy packages. In this view, a market-driven economy is essential for efficiency, quality products and services and rapid development.

However, there will always be disadvantaged industries and individuals in the market allocation of resources that require state intervention (Sadeh et al., 2020). The need for regulation is always market-driven, on the one hand because of market failures and the fact that short-term interests always win out over long-term ones (the tragedy of the commons), such as pollution, and on the other, because vulnerable groups need public intervention (services of general economic interest). The state has a very

wide range of instruments for intervention, including the institution of the golden share, the maintenance of state ownership of gas and electricity transmission, regulation, state financing, taxes, state production of certain goods, and the provision of financial transfers to certain vulnerable groups (Tanzi, 2011).

Energy transmission and distribution are organised in networks, which are time-consuming and expensive to build, so their construction and the improvement of their quality are not considered a priority in the case of monopolies. But the EU's vision is that a liberalised, multi-actor market will bring lower prices and better quality for consumers. Regulatory action by the state is needed to set the framework for competition, to protect consumer interests and the environment. The phasing out of monopoly is gradual, so that MSs will continue to have a service obligation in non-liberalised areas of the market, and there will always be a need for the State in the area of public services, as there will always be areas of the market where there is no interest to extend competition (Branger, Flacke & Gräber, 2020).

The supply of energy to consumers can be considered a public service activity, and therefore the first energy package provides for the possibility for states to maintain it, provided that it is clearly defined, transparent, non-discriminatory, verifiable and public (Cseres, 2008). The second energy package no longer sets conditions for the definition of public service and this trend can be seen in the third and subsequent energy packages, with the addition of the category of vulnerable persons and their protection.

A public presence is also essential for security of supply. The reason is that energy is a capital-intensive sector and, with the rise of renewables in particular, energy that is currently less manageable – e.g., storage problems, underdeveloped infrastructure – is entering the market. The existence of renewable energy sources is only suitable for short-term goals due to the technologies known today, but long-term decisions need to be taken to ensure security of energy supply, which requires national responsibility.

In my view, the liberalisation of the energy sector was completed between 1990 and 2008, but the crises and environmental objectives are strengthening the position of the MSs, combined with the permissive attitude of the EU. The global economic crisis of 2008 has weakened the concept of neoliberal economic policy and the need for state involvement has increased significantly due to market failures.

### 3. Public Service in the Energy Sector

The basic provisions on services of general interest and services of general economic interest (SGEI) are contained in primary law without explaining their precise meaning. The former includes market and non-market services, as well as those which may be subject to specific public service obligations, while the latter includes services which serve a general interest purpose and are market-based, typically regulated by law without creating a legal obligation, and left to the MSs to decide what to include (Wolf, 2014). These services have evolved over time, along with perceptions of the role of the state.

The Court of Justice of the European Union (CJEU) has also ruled in several cases that where the State establishes and maintains a system designed to fulfil its social, cultural and educational obligations towards its citizens, it cannot be considered an economic activity, since its purpose is not to make a profit. Thus, while services of general interest are not covered by EU internal market law and competition law, SGEI are.

This concept appears in two places in the TFEU: Art. 14 requires the EU and the MSs to ensure that the principles and conditions necessary to enable them to carry out their missions without infringing the rules of competition law are in place, and Art. 106/2 requires that the profit-oriented undertakings entrusted with the operation of such services and having the character of monopolies are subject to the Treaty only in so far as the application of such principles and conditions does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The MSs therefore have a wide margin of discretion in relation to these services, within the framework of the EU (TFEU Protocol No. 26).

It can also be noted that the CJEU, when it finds that the provision of a service of general economic interest is threatened, is more favourable to infringements of competition rules because of the need to safeguard the public interest, if disregarding them would not affect the development of trade to an extent contrary to the interests of the Union. The specific public interest task can therefore be interpreted in a broad sense, subject to the limits of Art. 106/2 TFEU (Case C-157/94). The most typical example of services of general economic interest is network industries, where the EU generally applies sector-specific rules.

These definitions must be distinguished from a specific type of SGEI, universal services, which are based on the premise that energy is part of our daily lives and that everyone in society should have the opportunity to

access these services, geographically, materially and socially. The definition of universality implies accessibility and connectivity, the importance of which is recognised by both the advocates of natural monopolies and the proponents of a competitive market (Joskow, 2007).

In the energy sector, the concepts of public services and universal services are often used synonymously, although they do not mean the same thing. The universal service model has replaced the former public service model as a result of liberalisation, although their similarity shows that they both result in a legal obligation towards consumers. However, while the key principles of the latter are equality, continuity and applicability, those of the former are accessibility – geographically and socially – and affordability. While the scope of public services is mainly defined by the MSs, the minimum scope and main rules for universal services are defined by the EU law (Wolf, 2014).

The liberalisation of the energy sector started with the 1996 electricity and 1998 gas directives. Both acts use the concept of public service obligations and stress that the requirement for public services must be property neutral and that it is up to the MSs to decide what they consider is encompassed by this definition. The directives state that undertakings must operate in a way that does not compromise the fulfilment of these obligations and that the existence of market failures may make it important for MSs to impose certain public service obligations, given the need to take account of principles such as security, quality, continuity and price of supply, as well as environmental protection. In designing these obligations, the MSs should take into account the principles of clarity, transparency, non-discrimination and verifiability.

In fact, the directives allow for long-term planning, including contracted capacity reservations, in order to meet their requirements (Directive 96/92/EC, Chapter II). Natural gas undertakings are also given the option to refuse access to the network on the grounds of their public service obligations, after having given a reasoned justification (Directive 98/30/EC, Art. 17). This provision has therefore provided them with a loophole to continue to assert their dominance.

The second energy package also uses the definition of public service obligations and sets out the principles – minimum rules for consumer protection, security of supply, environmental protection and competition – that the MSs must take into account, but beyond these, each MS can decide for itself, taking national specificities under consideration. This package introduces for the first time the requirement to notify the EC when these



services involve State aid. An innovation is that the principles of its predecessor are complemented by the importance of energy efficiency, energy from renewable sources and climate protection. This is because the EU has been increasingly involved in the fight against climate change since the 2000s (one of the main instruments of which is to increase the share of renewable energy sources and energy efficiency), and one of the sectors most affected is the energy sector. Other key provisions concern the strengthening of consumer protection obligations and the role of national regulators. The term universal service is also used in several places in the document, emphasising the need to ensure a high level of universal service (Directive 2009/72/EC).

Since 1993, the concept of universal service in the EU has covered public services organised on a market basis. It means providing high-quality service at a price that is affordable for all. Universal service is defined in all the documents dealing with it as a category that varies over time and can change considerably depending on changes in the technology, market structure and consumer needs of the sector concerned (Bauer, 1999). The Gas Directive does not include the term universal service and maintains the exception for the provision of a public service as a reason for refusing access to the network.

It should be noted here that universal service and the competitive market that liberalisation is intended to create are complementary categories. The opening up of markets must also ensure the provision of public services, which can best be justified on social-philosophical grounds, since they must be provided not because they are economically useful, but because of the needs of the society. Electricity and gas services must be made available to all consumers in the territory of a MS, at reasonable prices and of appropriate quality. The provision of this category does not necessarily require strong State intervention; instead, it will always depend on the market characteristics of the MS concerned, as it is generally more efficient when market mechanisms are in place rather than State-driven ones (EC, 2007a).

The lack of EU legislation on public services has not been helped by the adoption of the Internal Market Services Directive (2006/123/EC). On the one hand, the Directive does not define the basic concepts of public goods, public services, services of general economic interest, liberalisation and the public sector, and on the other hand, it does not cover services of general economic interest. The third and subsequent to two energy packages does not change the provisions of the second, so while electricity is

still a universal service in all MSs, it is up to the MS to decide whether to classify gas as such.

At the same time, the EC has produced a number of documents to clarify the relationship between public services (services of general economic interest) and state aid in order to help practitioners. Among other things, the 2011 Communication based on Art. 106/2 TFEU on State aid in the form of public service compensation granted to undertakings entrusted with the operation of a SGEI is worth highlighting (EC, 2011). The purpose of this document was to review the framework and decision adopted in 2005.

The EC Communication was intended to launch a policy debate with stakeholders and other institutions in view of the upcoming review of the 2016 State aid package for services of general economic interest. In this document, the EC has also clarified the application of Art. 106 and 107 TFEU to compensation for services of general economic interest (EC, 2007b). It stated the long-accepted principle that undertakings providing services are subject to competition rules to the extent that the application of these rules does not restrict them in the performance of their public interest tasks (Case C-364/92; Case C-343/95; Case C-159/91). This position is confirmed in the 2016 Communication (EC, 2016a).

MSs have discretionary powers to define SGEIs, where the only limits are those set by the EU law and the avoidance of manifest errors of judgement (Case T-17/02.; Case T-289/03.). The scope of these services and their organisation vary considerably between MSs, due to different geographical, social and cultural situations. It is thus up to national, regional or local authorities to decide on the nature and scope of a service of general interest. The EU law limits the discretion of MSs, as there are framework rules and sectors harmonised at the EU level (e.g. telecommunications, postal services and energy) where MSs' discretion cannot interfere with the rules of this harmonisation. Moreover, MSs' discretion can always be reviewed – by the EC and the EU courts – in the event of manifest error (EC, 2013).

#### 4. National Energy Regulators in the European Union

To achieve the free market that liberalisation will bring, it is not enough to expand the market, but it is also necessary to build the institutions to keep it within limits. In a free market, market failures - such as abuses of

dominant positions or various merger formations – will occur and need to be counteracted (Joskow, 2007).

There are several reasons for the emergence of energy regulators to keep the market in order, such as the need to resolve disputes arising from the elimination of monopoly situations at national level. The Second Energy Package made it an obligation for MSs to set up these authorities, which were expected to have the same and at least minimum powers everywhere, working to ensure non-discrimination in the market, effective competition and efficient functioning of the market (Directive 2003/54/EC). Integration has left the choice of the form of public authority to the MSs, with three options. Most states opted for an autonomous regulatory authority, only a few – the Germans and Austrians – opted for a general competition authority and no MS opted for a ministry.

Since the adoption of the legislation, the experience has shown that regulators with special powers are dependent on their national governments and their limited powers prevent them from achieving the purpose for which they were created. The EC therefore foresaw the need to examine the need for autonomy (EC, 2006).

Following this legislative work, the third energy package has already increased the *ex ante* regulatory role of public authorities and provided for the right of national authorities to consult other authorities. Alongside the extension of powers to cement independence, the package took the first steps towards laying the foundations for an EU-wide regulation by establishing Agency for the Cooperation of Energy Regulators (ACER), following the foundations already laid (Regulation 713/2009). The reason for setting up the body is both to ensure the independence of national authorities and to recognise that cross-border energy services go beyond the sovereignty of a single MS. The primary objective of the integration was therefore to facilitate cooperation between national energy regulators.

The Third Energy Package greatly increased the independence of national energy regulators by giving them autonomous decision-making and pricing powers, and the Fourth Energy Package reduced them by strengthening them at the EU level. The EU body's main remit used to be cross-border infrastructure, but over the years it has grown in scope, citing security of supply, cross-border coordination and the need to meet decarbonisation targets (Regulation 2017/1938).

ACER is a part of the group of regulatory agencies. These bodies are mostly set up to carry out tasks that require specialist expertise, support the development of sector strategy and ensure appropriate regulation. They can

make decisions that are legally binding, but only within the framework of the Meroni doctrine (*Meroni v. High Authority*, ECR 133). creation was not intended to take away the powers of national authorities, but to create a division of labour between the national and supranational levels.

An EU body European Network of Transmission System Operators for Electricity (ENTSO) has also been set up to oversee the system operators. The reason for its creation is the Third Energy Package, which stated that network activities should be separated from supply and generation activities – ownership unbundling – empowering national authorities to refuse certification to network operators who breach unbundling rules. Its main powers under the Energy Package are to set tariffs, determine their methodology and inform competition authorities and the EC about the anti-competitive nature of prices (Directive 2009/72/EC; Regulation 2019/942).

The Fourth Energy Package also explicitly declares the independence of national regulators as a national obligation. EU bodies ACER and ENTSO will continue to support them in facilitating their cooperation and coordinating their activities and help them to achieve their independence. It is true that the construction of this body as a pan-European regulator was considered, but the need for increased staff infrastructure and costs involved in such a case led to the concept being rejected (EC, 2016b). This legislation already reflects the experience and expectations observed since 2012. The EU has realised that ensuring the independence of national authorities will not solve the distortions of competition caused by cross-border trade and the uncertainties of supply caused by renewable energy. Decentralised energy production and technological development can only be mapped by strengthening the powers of supranational bodies and subordinating national authorities to them (EC, 2016b).

This cooperation continues to be strengthened by the Council of European Energy Regulators (CEER), established in 2000, to promote the development of a single, competitive, efficient and sustainable European internal market for electricity and gas through the provision of technical advice to the EC.

The Fifth Energy Package is the Green Deal and its successor, the REPowerEU plan (see Chapter 6). The REPowerEU plan gives a major role to national and EU regulators in achieving the energy transition, especially in the development of green infrastructure. However, it should not be overlooked that regulators are still mainly organised at national level, under pressure from national governments and market players.

## 5. The Changing Role of Consumers in the Energy Sector

Initially, the EU aimed to break energy monopolies and the exclusive ownership of the energy sector by the state, giving MSs wide discretion in how to do this. The aim was also to extend the scope of activities to a wider range of operators and to ensure that competition was as strong as possible (Directive 96/92/EC). The status of consumer was already included in the first energy package, but the definition of the concept was not clarified, and only power plants and consumers as defined in the directive (but not final consumers) were allowed to enter the free market under this act. The second energy package was a step forward as it included higher level consumer protection provisions. In addition to ensuring free access for eligible consumers, it provided for market opening for household consumers by 2007. However, these legal acts were still inadequate, and the adoption of the next legislative package was therefore imminent.

In 2009, the third energy package was adopted, which included some ground-breaking provisions on consumer rights. Like the 2007 Communication, it includes the importance of sustainability, competitiveness and security of energy supply. The document argues that the interests of consumers would be best served by effectively decoupling production and energy supply from transmission, and new unbundling rules have been defined to this end. The Commission's 2015 Communication "Delivering a new deal for energy consumers" (EC, 2015a) stresses the need for energy companies to enable consumers to participate in the energy transition through new innovative technologies, by making their consumption more conscious, thereby helping to increase the share of renewable energy in energy use. Another EC Communication in 2015 underlines the need for integration in the energy market to ensure affordable prices. It says that national markets are not sufficiently interconnected, leaving consumers exposed to uncertainties in energy supply. It is for these reasons that the Communication set out to prepare a legislative proposal, which was adopted in 2019 (the Winter Energy Package), which places a strong emphasis on the full participation of consumers in the market and the importance of protecting vulnerable consumers (EC, 2015b).

The fifth energy package of the Green Deal, following up on previous documents, further strengthens the role of consumers (protection and information) in the energy sector, in particular to promote the green transition (EC, 2022).

## 6. Towards a Greener Energy Policy

The energy issue has set the direction of cooperation between MSs from the very beginning, since it was also the tension over the ownership of energy resources that led to its creation. It is therefore not surprising that this area cannot be considered an isolated sector; it is inevitably linked to a number of policies that have an impact on its development and evolution. The closest link is with environmental policy, which is the cradle of its development. The EU's objectives can be achieved by better integrating environmental considerations into certain sectoral policies, including the energy sector. Another important aspect linked to climate protection is sustainable development, which forms a link between the two policies, since all three pillars of the concept – environmental, economic and social – can be linked to the energy sector. Fossil fuels are not sustainable because they are polluting and finite. It is for these reasons that the EU has committed itself to reforming the energy sector, and thus a policy environment has been created which would lead to this sector becoming autonomous. As the EU is an economic community whose main objective is to maintain competitiveness, it is not surprising that a narrow understanding of sustainability has taken root in its thinking and documents, with the economic side becoming dominant.

Initially, the liberalisation acts only include the obligation for MSs to ensure environmental protection and the promotion of renewable energy as an objective. The reason for including these aspects in the energy packages is that, in the field of environmental protection, the market cannot be left to repair the damage, since in order to remedy the harmful consequences, it is necessary to clearly define property rights, which is often impossible in this area – Coase's theorem – and therefore the presence of the State is essential (Drago & Gatto, 2022).

As energy policy is a shared competence with MSs, countries have wide room for manoeuvre in defining their energy baskets and making strategic choices. The EU must maintain its economic dominance and pursue its climate objectives in this context. To achieve these objectives, it has allowed MSs a wide scope for permitting subsidies in the field of renewable energy sources – and then in many other areas as a result of the crises – but this decision could have a distorting effect on competition in the long term.

Following the global economic crisis of 2008, the role of the state as a regulator has been strengthened and more ambitious efforts to enforce

environmental requirements have been made, leading to an increasing number of co-ordinated regulations from central government. At the same time, areas influenced by national intervention have been increased. It remains to be seen how the age of crises will leave its mark, how much of a reduction in the involvement of the state can be expected in some countries (especially in Eastern Europe) and to what extent the EU will be able to pursue this aim.

As far as environmental protection is concerned, however, it is the measures taken at the central government level that can lead to results, so the fourth energy package (and the fifth, to an even greater degree) deals cardinally with the issue of renewable energy sources, in some cases exempting them from market competition rules (Directive 2018/2001). The act will have an impact on the energy mix in the MSs, while also strengthening provisions to achieve environmental objectives (Directive 2018/2001). The rules for the promotion of renewable energy sources are tied, they lack well thought-out market incentives, and the scope for discriminatory taxes to support these energy sources is very wide (Directive 2018/2001). By allowing a wider state involvement in renewables, it reinforces the presence of MSs in the market, which may have a distortive effect on competition in the long term. The same is true for energy efficiency, coupled with the EU's permissive attitude (Case C-561/16). For primary energy sources, however, there are more restrictive provisions, since if a MS wishes to invest in energy production, it must assess whether it meets the EU's requirements on the basis of a predefined EU methodology. Member States should report to the European Commission explaining why a change in national legislation would not remedy the situation and then consult with the MSs physically interconnected at grid level on the importance and justification for the investment (Menner & Reichert, 2019). The EC's proposal for the fifth energy package, "Towards 55%", presented in 2021, does not follow the previous structure but is explicitly structured around a single objective: to align the EU's energy objectives with Europe's climate objectives. To achieve decarbonisation, the aim is to reduce greenhouse gas emissions by 55% by 2030, for which the Council and the European Parliament adopted the necessary legislation in 2023 (Regulation 2023/955).

However, the 55% package has a number of shortcomings, such as the lack of a climate-neutral roadmap (with less than seven years to go to reach the targets) and the continued protection of the large corporate sector. It is unclear how the EU will prevent the costs of the transition

from being passed on to consumers. It is therefore foreseeable that public intervention will be necessary, resulting in public funding of the costs of large companies, which will also indirectly impose a burden on consumers - through taxation. Therefore, it would be worth considering tackling the support of individual companies at EU level, because if it is left to MSs, inequalities could further increase between Eastern and Western European countries.

In 2022, the Russian-Ukrainian war has made energy security and ensuring low prices for consumers a priority, leading the EU to declare its goal of completely ending its dependence on Russian fossil fuels in the Commission's REPowerEU Communication in March 2022. New proposals have thus been made for coordinated action to reduce demand for gas, tackle high energy prices and intervene in emergencies to reduce the energy bills of European citizens and businesses. These provisions show that the EU attaches high priority to sustainability coordinated at the central level, but mainly from an economic viewpoint, as the main objective is to strengthen energy security, to which climate protection goals can contribute (e.g., the expansion of renewable energy sources can compensate in the long term for the fossil fuels coming from Russia). The plan updates the Green Deal and aims to replace natural gas imported from Russia.

As a part of the REPowerEU, the EC has proposed amendments to the Renewable Energy Directive (REDIII) to speed up the transition to renewables and gradually end dependence on Russian fossil fuels. The measures also cover the Energy Performance of Buildings Directive and the Energy Efficiency Directive to further increase the Fit for 55 commitments. The Recovery and Resilience Building Instrument (the core component of NextGenerationEU), originally designed to help recover from the coronavirus crisis, was added to the REPowerEU objectives, which also include making European economies and societies more sustainable and preparing MSs for the green and digital transition. The amendment was proposed on 18 May 2022, and as part of the REPowerEU, an external energy strategy was presented entitled "The EU's external energy role in a changing world", linking energy security to the global energy transition through energy policy and diplomacy.

However, while seeking to reduce its energy dependence on Russia, the EU is developing closer ties with belligerent or illiberal states such as Israel, Qatar, Egypt and Azerbaijan. These contradictory policies further deepen the energy system's dependence on fossil fuels, making it more difficult to achieve green goals. It is also true that the use of renewables



is increasing as a result of energy transition, but European industry is not yet ready, while e.g. China is leading the way in renewable industry. The EU could therefore find itself in the trap of being dependent on external suppliers for renewables.

What makes it difficult to achieve green targets in Europe is the wide discretion of MSs to define and provide services of general economic interest (e.g. price regulation). The only constraints are those imposed by EU law and the need to avoid manifest errors of judgement. The scope of these services and their organisation vary considerably between MSs, due to different geographical, social and cultural situations. It is thus on national, regional or local authorities to decide on the nature and scope of a service of general interest. EU law limits the discretion of MSs, as there are framework rules and, in sectors harmonised at EU level (e.g. telecommunications, postal services and energy), the discretion of MSs cannot interfere with these harmonisation rules. Furthermore, MSs' discretion can always be reviewed (by the EC and the CJEU) in the event of manifest error. In this area, however, there is evidence of a permissive attitude on the part of the CJEU, particularly in view of the increased energy poverty caused by the crises (Case C-121/15). In many cases, this results in low gas prices, hindering the achievement of green objectives.

## 7. Conclusion

In the decades since the EU's energy policy was established, we have witnessed a process of development which has resulted in the field being regulated by the Treaty in its own legal framework and continuing to evolve to the present day. Governance at the EU level has become more important in the field of energy policy, but the crises have led to an increasing role for MSs.

The optimal relationship between state intervention and the market is always at the centre of academic debate. The EU aims to promote the fullest development of the market, while MSs seek to achieve a competitive advantage in their own interests. Liberalisation in the energy sector has also shown that market failures require centralised management, but that the solution must sometimes come from the level of EU government rather than from MSs. The shared nature of competence in the energy sector gives MSs a very wide margin of discretion, but the EU's influence in this area appears to be gradually increasing, as it can block national

measures that often hinder market opening and the completion of the internal market through other related policies such as competition. There is no universally accepted view on the right level of involvement in solving the problems caused by market and governance failures, which is always determined by the legal, social and economic policy context of the situation. This situation is further complicated by tensions between the EU and its MSs (and between MS and MS), often further aggravated by global challenges.

The EU's single rule aims to ensure a level playing field for market players in the competitive sector, while preventing unfair competitive advantages for companies created by or benefiting from public or state resources. The EU state aid rules have undergone significant changes in the last few years. State subsidies are part of competition policy, which aims to ensure an efficient economy and consumer welfare. Among the market failures in the energy sector, the most significant disadvantage is the presence of externalities and natural monopolies. These need to be addressed through government assistance and its direct and indirect regulatory instruments.

Competition law also covers economic services of general interest, which are closely linked to the issue of state subsidies. MSs have discretion to define services of general economic interest, subject only to the limits set by EU law and to avoid manifest error of assessment. The energy packages include the term "universal service" for electricity, but not for gas, leaving it to the discretion of the MS to decide on the latter.

The crises have brought with them a breakdown of neoliberal ideas and, as a consequence, a strengthening of the tendencies in favour of state regulation. In most MSs, we are witnessing a closure, voices critical of the EU in many respects (e.g., Hungary and Poland in the context of the Art. 7 procedure) and Brexit has had a negative impact on communitarisation policies.

The Fourth Energy Package already reflects the increasing role of the state in the wake of the crises, sometimes exempting renewables from market rules and pushing for state intervention. This change in approach confirms renewed strengthening of the role of the State, which is also supported by the EC having proposed the legislation that forms part of the Fourth Energy Package. This change is in line with the general trend towards a more permissive approach to state aid, which has been reinforced by the coronavirus pandemic and the war between Russia and Ukraine, as reflected in the Fifth Energy Package. In these last two energy packages, the role of state aid in increasing the use of energy from renewable

sources has become even more pronounced and more acceptable to the EU institutions.

The five energy packages adopted by the EU between 1996 and 2023 are forward-looking, but they raise questions on several points: to what extent liberalisation can be demanded from third countries, and how the EU will deal with the crises that have closed the EU and increased state involvement. It is also apparent that there is a mismatch between the EU's liberal strategy and its policy of supporting energy companies, which is typically permissive in terms of state subsidies for renewable energy, possibly leading to distortions of competition between energy companies in the market.

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## NEW CHALLENGES IN TIMES OF CRISIS: THE STATE IN A LIBERALISED ENERGY MARKET

### Summary

*In the decades since the European Union's energy policy was established, we have witnessed a process of development which has resulted in the field being regulated by the Treaty in its own legal framework and has continued to evolve to the present day. Governance at the EU level has become more important in the field of energy policy, but the crises have led to an increasing role for Member States. The EU's single rule aims to ensure a level playing field for market players in the competitive sector, while preventing unfair competitive advantages for companies created by or benefiting from public or state resources. The EU state aid rules have undergone significant changes in the last few years. State subsidies are part of competition policy, which aims to ensure an efficient economy and consumer welfare. Among the market failures in the energy sector, the most significant disadvantage is the presence of externalities and natural monopolies. These need to be addressed through government assistance and its direct and indirect regulatory instruments. Competition law also covers economic services of general interest, which are closely linked to the issue of state subsidies. Member States have discretion to define services of general economic interest, subject only to the limits set by EU law, and to avoid manifest error of assessment. The energy packages include the term "universal service" for electricity, but not for gas, leaving it to the discretion of the Member State to decide on the latter. The crises have brought with them a breakdown of neoliberal ideas and, as a consequence, a strengthening of the tendencies in favour of state regulation. In most Member States, we are witnessing a closure, voices critical of the EU in many respects (e.g. Hungary and Poland in the context of the Art. 7 procedure) and Brexit has had a negative impact on communitarisation policies.*

*Keywords: energy sector, liberalisation, state intervention, European Union, Green Deal, national energy regulators, public services*

## NOVI IZAZOVI U VREMENIMA KRIZE: DRŽAVA U LIBERALIZIRANOM TRŽIŠTU ENERGIJOM

### Sažetak

U desetljećima otkako je uspostavljena energetska politika Europske unije svjedoči smo razvoja koji je rezultirao time da je to područje regulirano Ugovorom o funkcioniranju Europske unije u vlastitom pravnom okviru te se nastavlja razvijati do danas. Odlučivanje na razini EU-a postalo je važnije u području energetske politike, no kriza je dovela do sve veće uloge država članica. Jedinствена regulacija na razini EU-a ima za cilj osigurati jednake uvjete za tržišne igrače u tom kompetitivnom sektoru, istodobno sprječavajući nepravedne konkurentске prednosti za tvrtke koje su osnovale javne vlasti ili se financiraju iz javnih proračuna. Pravila EU-a o državnim potporama doživjela su znatne promjene u posljednjih nekoliko godina. Državne potpore dio su politike tržišnog natjecanja čiji su ciljevi osigurati učinkovito gospodarstvo i dobrobit potrošača. Među tržišnim je nedostacima u energetsom sektoru najvažniji nedostatak prisutnost eksternalija i prirodnih monopola. Njima se treba pozabaviti putem državne pomoći i njezinih izravnih i neizravnih regulativnih instrumenata. Pravo tržišnog natjecanja također pokriva gospodarske usluge od općeg interesa, koje su usko povezane s pitanjem državnih potpora. Države članice imaju diskrecijsko pravo definirati usluge od općeg gospodarskog interesa, podliježući samo ograničenjima određenim pravom EU-a i izbjegavajući očitu pogrešku u procjeni. Paketi energetske politike uključuju pojam univerzalne usluge za električnu energiju, ali ne i za plin, ostavljajući državama članicama da odlučuju o potonjem. Krize su sa sobom donijele slom neoliberalnih ideja i, kao posljedicu, jačanje tendencija u korist državne regulacije. U većini država članica svjedočimo zatvaranju, odnosno glasovima koji kritiziraju EU u mnogim aspektima, a i Brexit je imao negativan utjecaj na politike jače integracije.

Ključne riječi: energetska sektor, liberalizacija, državna intervencija, Europska unija, Zeleni plan, nacionalni regulatori, javne usluge