Retail Price Regulation and EU Law: Mapping the Issues

This talk does not contain any official position of the Court of Justice of the EU

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<table>
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<th>Component</th>
<th>Description</th>
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| Wholesale energy                | • EU ETS  
• Capacity Mechanisms  
• EU state aid, competition and free movement rules  
• EU energy legislation, foreign EU Energy policy |
| Tax and levies                  | • Energy Tax Directive  
• EU state aid rules (RES support, support to nuclear decommissioning / coal-based electricity / old plant efficiency improvement...) |
| Network operation and expansion | • EU energy legislation (access reg, unbundling...)  
• Competition rules |
| Retail energy                   | • EU state aid and (mainly national) competition law  
• EU contract law  
• EU energy legislation (PSOs, vulnerable customers...)  
• Energy efficiency Directive |
Retail price regulation and EU law: Mapping the issues
Art 3(2) Elec/Gas Directive (→ Art 106 TFEU):

« Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection. ” → open – ended formulation

Key questions:
– Which public policy rationale?
– Proportionality test
Case C-121/15 (pending), ANODE

- Barrier to the achievement of competitive gas markets (Gas Directive + Art 106(2) TFEU)?
  - Decree enacted 6y after full retail market liberalization
  - New entrant suppliers offer lower tariffs than the regulated tariff + no monopoly on import
  - Which public policy rationale (SGEI)? affordability (price ceiling), price stability, territorial cohesion?

- Proportionality (in particular of the methodology)
  - Costs of the incumbent?
  - May include components other than the portion representing long-term of supply?
• The French margin squeeze case (EDF/Direct Energie, 2007)
  – Wholesale prices were higher than regulated tariffs → no hope to enter free market w/o access to nuke (as « essential facility »)
  – Led to regulated access to wholesale nuke (Loi Nome)

• In the post-regulated tariff world: how to control predatory and exploitative strategies, in particular in least competitive markets?
• Vulnerable customers covered in EU law by the Third Package and the Energy Efficiency Directive
• Regulated tariffs as the best form for protecting vulnerable customers?
  – How to limit market distortions?
  – Does it address the root causes of vulnerability?
  – How to target support?
  – May decrease the incentive for energy-efficient behaviour
• Regulated tariff vs social tariff
  – Social tariff may place a relatively higher burden on less wealthy customers who fall outside vulnerability criteria
  – Favour direct payment?
• Unfair Contract Terms Directive, Unfair Commercial Directive Services (provision for misleading environmental claim...)
  – Dynamic body of EU case law

• Gas contracts complies with the requirements of good faith, balance and transparency if (RWE Vertrieb AG v. VNW, 21 March 2013):
  – the contract sets out in transparent fashion the reason for and method of the variation of those charges, so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made to those charges
  – the ability to terminate the contract is real
What about the post-regulated tariffs world?

Consumer law

Competition law

Vulnerable consumers

Curbing market power?
Concluding remarks

• Energy policy priorities & context have changed but the phasing-out strategy has not been reconceptualized
  – Need to differentiate among Member States and customer segments? → towards better targeted retail tariffs?
  – Should COM enact guidelines on Art 3(2) of the Elec/Gas Directive?
• EU law: a multidimensional toolbox for regulating retail prices
  – But a problem largely in the hands of Member States once they are gone
• The problem of market power will remain → fine-tuning and synergy of existing instruments
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