

# **COMPETITION IN ELECTRICITY MARKET ACCORDING TO THE REGULATION OF DIRECTIVE 2003/54/ EC**

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Energy policy is a kind of a subject in the European Community, which is generally not in the field of common legislation. The main element of European energy policy is the creation of internal gas and electricity markets. From 1<sup>st</sup> of July 2007 all consumers can choose their electricity and gas services free. It sounds very simple, but it is not so simple legislative task for member states. Common market for gas and electricity promotes the use of renewable energy sources, increases the safety of gas and electricity supply and competitiveness of the European Community.

## **Electricity market, competition, energy supply, public service**

### **I. Problems of energy supply and internal market of electricity**

European energy policy's three aims are: energy supply's sustainability, safety and competitiveness. The main instrument of European energy policy is creation of internal gas and electricity markets, because a European energy market promotes the use of renewable energy sources, increases the safety of gas and electricity supply and competitiveness of the European Community. The idea to liberalise energy sector appeared late (only in the 1980<sup>th</sup>) at Community level due to resistance of member states and the specialities of the sector. Electricity power has advantages and disadvantages. Electricity is mostly produced in the Community, it is not depends on import and it can be generated using different technologies and raw material. But electricity can't be stored, so supply has to follow consumers' and electricity supply is fixed to network, so all actors of the market need access to the network-system. [1] Member states want to protect their competence above market regulation and especially above energy sectors. Electricity supply is a public service, while safety and continuousness of supply is very important for whole or for biggest part of society. The task of states is to guarantee continuousness and safety for everyone, even if the suppliers are reluctant to satisfy consumers' demand. A state generally restricts

competition in these sectors to fulfil high social expectations. Some undertakings are obliged by the state to supply energy for all consumers, who have a demand for electricity or gas. To recompense this obligation, suppliers can get special or exclusive rights, and state compensations. The results of this process are the appearance of monopolies. Monopolies can be owed for activities of the state (legal monopolies), but also for the mechanism of electricity and gas sector. The European Community would like to abolish unwanted monopolies and liberalise national gas and electricity markets to create an internal energy market and to guarantee the best conceivable level of competition in these sectors.

According to the specialities of electricity market the general competition rules of the EC are not enough to create an internal electricity market. Special regulation was needed, which comes before and completes general rules. [2] The liberalisation of electricity markets started with directive 1996/92/EC, which was expired by directive 2003/54/EC concerning common rules for the internal market in electricity. The difficulty of task, to fit up the market for the new requirements, is the reason, why these directives have determined the principle of progressivity. It means that the requirements of competition have to be stricter step by step. Common regulation, liberalisation until now has not resulted free competition, because in some fields of electricity sector restrictions still has to be preserved. In my work I would like to introduce these fields and their awarding at European-level.

## II. Discrimination

*„Member States shall ensure, on the basis of their institutional organisation and with due regard to the principle of subsidiarity, that, without prejudice to paragraph 2, electricity undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in electricity, and shall not discriminate between these undertakings as regards either rights or obligations.”[3]*

Electricity directive's main principle is prohibition of discrimination. The prohibition of discrimination, which is one of the fundamental principles of Community law, requires that comparable situations are not treated differently unless such difference in treatment is objectively

justified. [4] This prohibition must be interpreted to all kind of discrimination. According to the directive in electricity sector rules of discrimination can be examined in three subjects:

- fairly proceed network access,
- technical conditions of access,
- refusal of access.

Infringement of prohibition can not occur if member states determine objective, transparent and non-discriminatory conditions of access.

Discrimination can come from legal relations originated before and also after opening-up market. Before community regulation some member states have made long-term contracts to secure their energy-supply. These contracts infringe rules of directive, because they give priority access rights, or because their content doesn't fulfil requirements of directive. Member states can excuse themselves that these long-term contracts guarantee the continuous and safe supply of an important sector of economy, and these infringements must be maintained until the end of contracts. European Commission generally accepts these arguments, while liberalisation of electricity sector can not be fulfilled one day to another, but member states must abolish discriminations after a transition period. Some cases of discrimination are determined in directive, these are public service obligations. The directive correctly specifies the cases when member states have the right or they are obliged to regulate public service obligations and they can give special or exclusive right to undertakings. In the next part I'm going to introduce Public Service Obligation and its two special cases: universal service and promotion of alternative technologies.

## II. 1. Public Service Obligations

*„The respect of the public service requirements is a fundamental requirement of this Directive, and it is important that common minimum standards, respected by all Member States, are specified in this Directive, which take into account the objectives of common protection, security of supply, environmental protection and equivalent levels of competition in all Member States.”[5]*

In spite of principle of competition electricity supply is still a public service (or in European terminology one of services of general interests). Member states still have the right to determine public service obligations (PSO) but in a common legal frame. The rules of public service obligations have two groups: when member states shall determine public service obligation, and when it is possible for member states to regulate these types of services. [6] For security of PSO member states can still give special, exclusive rights, compensations for appointed undertakings. All national rules - which determines public service obligations, or exclusive, special rights or compensations – must be reported to European Commission and their compatibility with Community rules must be examined.

## II. 2. Universal service as public service obligation

The most important public service obligations are universal services. For consumers liberalisation of electricity markets means a right to choose their suppliers. According to the principle of progressivity opening up energy market had three steps:

1. until 1<sup>st</sup> July 2004 only consumers those, who were determined in the 1996<sup>th</sup> directives, mainly large consumers,
2. after 1<sup>st</sup> July 2004 all non-household consumers, (non-household consumers are those natural and legal persons, who buy energy not for supply of their household),
3. from 1<sup>st</sup> July 2007 all consumers can choose their services free.

Today all consumers have the right to decide on energy supply, but member states have to ensure minimum level of supply for some consumers. This is so called universal service. “Universal service is the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable and transparent prices.” Universal service provides a security that the most uninformed consumers, household consumers have never been closed out of service by reason of economic interests of undertakings. To protect household consumers’ supply, even if universal supplier has gone into bankruptcy or become insolvent, member states may apply a supplier of last resort. It means that an undertaking takes over the task to provide service for these consumers until appearance of a new universal supplier.

### II. 3. Promotion of alternative technologies as public service obligation and common aim

*„Member States shall implement appropriate measures to achieve the objectives of social and economic cohesion, environmental protection, which may include energy efficiency/demand-side management measures and means to combat climate change, and security of supply. Such measures may include ..... adequate economic incentives.”*

*„A Member State may require the system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources or waste or producing combined heat and power.” [7]*

Public service obligations can be determined for environmental reasons and for safety of energy supply. European directives have determined obligations to increase the use of some alternative technologies. In 2001 the European Community has accepted a directive about the use of renewable energy sources in electricity. [8] Member states have to accept legal rules to reach this common aim. The use of alternative technologies and energy sources, like renewable energy sources, (waste and combined heat and power) can promote environmental protection and safety of supply. Some member states give subventions to increase use of non-traditional energy sources and technologies. The reasons of subventions and special rights are very simple: costs of these alternative technologies are very high. This subvention can appear in charges paid for the use of networks or in obligatory feed-in of electricity generated from renewable energy sources. Obligatory feed-in means a special priority by access to network, because some actors of the market have to take over electricity produced from renewable energy sources in a fixed quantity and price.

Institution of obligatory feed-in was examined by European Court in several cases. In Case “Preussen Elektra” the facts were the following. German law regulated that electricity supply undertakings which operate a general supply network have to purchase electricity produced from renewable sources of energy and have to pay compensation. The subject of examination was the question: if this German law has realized infringement of EC Treaty or not. Although these compensations are state subventions the European Commission and the European Court has found them compatible with community law, because they do not fulfil requirements of

community prohibition. National rules are the basic of discrimination and surplus receipts of some producer, but this surplus is not guaranteed from national budget, it is worth in legal relations of private undertakings. Of course European Court and Commission are not so compliant in all cases. Slovene system of obligatory feed-in was valued differently by the European Commission. In Slovenia electricity produced from renewable energy sources had to be purchased only from three favoured power plant in a fixed price, but obligants can sell electricity in a lower price. This loss was compensated by the state from network access tariffs, which are paid by users of network (consumers, producers, suppliers), so it is a kind of taxation and it is part of national budget. There are two differences between German and Slovene cases: in Germany all producers, who produce electricity from renewable energy sources are favoured, in Slovenia only three plants had this priority. The other difference is in the source of subventions, in German law there wasn't any duty for national budget, but in Slovenia obliged undertakings could get compensation from the state. In these cases the possibility for member states to give special rights, subventions for undertakings using non-traditional technologies on the bases of special directive and European obligation, are not enough reasons to be excused. National regulations have to fulfil requirements of general competition rules and they can be allowed after strict examination by European institutions.

### III. Legal conditions of production and transmission

#### III. 1. Unbundling

*„In order to ensure efficient and non-discriminatory network access it is appropriate that the distribution and transmission systems are operated through legally separate entities where vertically integrated undertakings exist.” [9]*

Unbundling is mainly in connection with transmission and distribution system operator. If system operator is part of a vertically integrated undertaking, the rules of unbundling come to the front. Unbundling has four forms: ownership-, legal-, and management unbundling and unbundling of accounts. [10]

Ownership unbundling means, that undertaking is independent in ownership of assets. It is the highest level of unbundling, but the 2003<sup>rd</sup> directive hasn't determined it compulsory.

Legal unbundling: „the distribution and transmission systems are operated through legally separate entities where vertically integrated undertakings exist.” Undertakings must be independent in legal form, in its organisation and in decision making from other activities. These rules don't contain the necessity to separate the ownership of assets of the transmission system from the vertically integrated undertaking.

Management or functional unbundling is related to the work of management. This is the minimum obligatory level of unbundling. It means, that persons, who takes part in management of the transmission system operator, can't participate in the decisions of the integrated electricity undertaking, which directly or indirectly provide generation, and supply of electricity. These persons make their decision independently and have effective decision-making rights, independent from the integrated electricity undertaking.

Unbundling of accounts: Member States shall ensure that undertakings keep separate accounts for each of their activities, separately for transmission or distribution and separately for supply and generation. National authorities have the right to access to the accounts of electricity markets.

The European Commission has examined the result of liberalization and found that the rules of unbundling are not enough. Functional unbundling – as minimum requirement - can not achieve the expected aims. The directive must be modified to create legal unbundling as basis of separating the activities of undertakings. [11]

### III. 2. State control over generation and transport

*„For the construction of new generating capacity, Member States shall adopt an authorisation procedure, which shall be conducted in accordance with objective, transparent and non discriminatory criteria.” [12]*

Generation means production of electricity. According to the characteristic of electricity, that it can't be stored and supply and demand always have to be balanced, member states need control above production to secure safety of supply. Producers are authorized by the state and this process has to fulfil conditions determined in the directive (for example: protection of environment and public health, land-use). To lighten this control the directive oblige member states, that if power plants authorized by the state are not sufficient to satisfy the demands of consumers, new plants have to be appointed through tendering procedure.

*“Member States shall designate, or shall require undertakings which own transmission/distribution systems to designate, for a period of time to be determined by Member States having regard to considerations of efficiency and economic balance, one or more transmission/distribution system operators.” [13]*

Transport means two activities in electricity market: transmission and distribution. The differences between the two activities are in the voltage of system and in the end of transport (transmission in extra high-voltage and high-voltage system to final customers or to distributors, distribution in high-voltage, medium voltage and low voltage distribution system to customers). They are responsible for operation and development of the system; operators have to ensure the „long term ability of system to meet reasonable demands for the transmission of electricity.” The network system allows only one or a few system operators, whose are appointed by the state. The directive still maintains monopolies in transport, but determines the principle of non-discriminatory access to the system for all users of network. Conditions of non-discriminatory access are regulated by the state and to balance this strict obligations and tasks of undertakings, member states can give special or exclusive rights for system operators.

#### IV. Conclusions

Liberalisation of markets has accomplished, but its result is not a free competition in electricity (and gas) market. Free competition in these sectors can't be managed by reason of the high priority of service and specialities of electricity supply (first of all fixity to networks). For several years member states didn't let European measures in their national regulation of energy markets.



But the problems of energy supply, the necessity to create more competitive common market put internal electricity and gas market into the front. Competition in electricity sector is still restricted but in a common legal frame. Some undertakings still have exclusive, special rights and compensations, but these measures are necessary to ensure not only competition, but also safety of supply in this market. The biggest result of opening up electricity sector is consumers' right to choose their services and supplier free. The process has not ended with directive 2003/54/EC the European Commission urges stricter common measures in the field of legal unbundling, consumers' protection and tasks of national authorities.

## Literature

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