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International Cooperation and Consumer Protection in Retail Energy Markets

by
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Abstract:

The promotion of consumer protection and competition is essential for the well functioning of the energy sector. Consumers need to make informed choices and a well functioning market should enable them to choose between various energy suppliers and offers. Despite retail competition has been supported by a gradual reform in many countries, most customers are not actively participating in the energy markets. The European Commission and UE National Regulatory Authorities support the development of the energy sector by promoting competition as well as consumer protection. Moreover, the Energy Community and the Association of Mediterranean Regulators for Electricity and Natural Gas operate to establish a common frame and a well functioning energy market.

Thanks to the above mentioned entities, the best regulatory models are shared for the benefit of customers and in order to deal with numerous areas of concern, such as the lack of incentives for new suppliers to enter the market, the unfair terms and asymmetries affecting consumers in a negative way and the need of measures to ensure the supply to vulnerable customers.

The purpose of the present paper is to provide an overview of the international cooperation in the field of consumer protection in the energy sector and of the way private law tools (regulated contract terms or mandatory quality standards, for example) may be used to overcome inequalities in bargaining power and to ban unfair practices which distort competition and harm consumers. The paper will be also focusing on the Italian retail energy market as a case study.

Keywords: Consumer protection; energy law; regulation; national regulatory authority; retail markets; international cooperation; contract terms; quality of service.

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1. Introduction

The past few years have seen numerous legislative developments and regulatory policies addressing consumer protection in the energy markets. Moreover, the interconnection of national markets and the birth of new entities are expected to further support the promotion of consumer interests as well as giving rise to positive changes in the energy sector. Competition in EU energy markets has been underpinned by a gradual reform in many countries and the latest changes to the legal and regulatory framework have provided consumers with the opportunity to benefit from a competitive energy market. On the other hand, however, most customers are not actively participating in it and they are not aware of the chance to exercise choice among different offers. The action of EU Member States and of their National Regulatory Authorities aims to adopt new measures in order to ensure that consumers may take advantage of competition in retail energy markets. Undoubtedly, these measures can be more efficient and fruitful when transparency is really effective.

The present contribution addresses the wide topic of consumer protection and empowerment in retail energy markets, without restricting the survey to EU countries (even though the EU energy sector has undergone significant changes and the solutions implemented by very recent Directives are regarded as a remarkable pattern by other jurisdictions and countries).

Consumer protection may be valuably enhanced by a stable and harmonised regulatory framework, especially when it is set up for the benefit of a much wider community. Apparently, this does not cause the weakening of consumer interests as long as common rules and shared values aim to guarantee the best practices. By focusing on the approach of different countries and jurisdictions, one can notice how actively and positively new organisations are working to establish a common frame and a well functioning energy market. The Energy Community and the Association of Mediterranean Regulators for Electricity and Natural Gas (hereinafter referred to as MEDREG) represent indeed worth noting experiences in the achievement of the above mentioned objectives.

A competitive and integrated market is able, or rather, is bound to maximise consumer benefits as well as optimising the allocation of resources. However, it is necessary to assess whether the energy

sector also needs the implementation of tougher rules, such as the obligation on suppliers to provide customers with information to compare prices¹ and terms and to switch to better deals: generally speaking, making them benefit from a set of standards of conduct that retailers have to comply with when dealing with household customers and small businesses.

A well functioning market should enable consumers to choose between various energy suppliers and offers; as a consequence, consumers need to be given the opportunity to make informed choices between different suppliers and products. As stated by BEUC², consumers are still not benefiting from the liberalised energy market. Consumers will benefit from it and informed choices will be easier for them if clear, reliable and accessible information is available and offers on the market are easily comparable. Consumers need also to be enabled to easily switch supplier and to be provided with information on their consumption.

Each country faces however its own difficulties and a wide range of areas of concern may be analysed. In some jurisdictions consumers seek lower prices and innovative services or, on the contrary, they do not take advantage of switching and, even worse, they switch to higher-cost suppliers. In other countries customers do not have the chance to choose among different offers.

Governments and National Regulatory Authorities consequently deal with different problems and they are committed either to empower customers (through information obligations and the implementation of smart technologies) or to overcome the lack of incentives to switch supplier. In addition, regulatory concerns address: the adoption of the necessary measures to ensure the supply to vulnerable customers; the lack of investments if prices do not fully cover the costs of production, generation and transportation; the challenge of opening the energy market to competition or the lack of incentives for new suppliers to enter the market³.

¹ Consumers are generally confused when comparing tariffs and prices.

² BEUC is the European Consumers' Organisation. It has a membership of 42 national consumer organisations from 31 European countries and its main task is to defend the interests of all Europe's consumers.

³ In addition, please see Waddams Price, C., and Pham, K. (2007), *The impact of Electricity Market Reform on Consumers*, CCP Working Paper 08-7, 3, electronic copy available at: <http://competitionpolicy.ac.uk/it/publications/utilities-policy>: in South East Europe many residential customers pay much less than the minimum tariff required to sustain supply in the long run, even though, on the other hand, the increase in tariffs is bound to place a heavy burden on consumers whose incomes are generally low.

According to Cseres's opinion, "consumers are often not able to take the advantages made possible by effective competition as a result of information asymmetries, unfair trade practices, unfair standard contract terms, high search and switching costs or imperfect decision-making processes"⁴. It is certainly true that state regulation should focus only on those aspects of transactions displaying market failures⁵; on the other hand, this intervention cannot be limited to address the phenomenon of unfair standard terms used by companies entering into numerous similar transactions. The intervention should also guarantee an adequate quality of service regardless the degree of competition and it should ensure that all consumers have access to energy (meeting the needs of remote customers, for example).

The purpose of the present paper is to provide an overview of the international cooperation in the field of consumer protection in the energy sector and of the way private law tools and rules may be used, from a regulatory perspective, to the benefit of competition and consumers. This depends, however, on the level of maturity of the market: in some jurisdictions, for example, information obligations are not immediately useful if competition has not been implemented yet, but other regulatory tools may be adopted, such as regulated contract terms or mandatory quality standards. Apart from this, the analysis of the interventions in the retail energy sector across Europe and in the Mediterranean basin is useful to assess if regulatory tools and techniques are effective in the daily task of balancing opposite interests between different customer classes or between energy companies and consumers. Broadly speaking, the regulatory approach may represent an intervention into the sphere of the freedom of contract and into the development of private autonomy; at the same time, it is necessary to overcome inequalities in bargaining power and to ban practices which distort competition and harm consumers. The paper will be also focusing on the Italian retail energy market regarded as a case study.

⁴ Cseres, K. J. (2008), *What Has Competition Done for Consumers in Liberalised Markets?*, in *The Competition Law Review*, Volume 4, n. 2, 78, electronic copy available at: <http://ssrn.com/abstract=1273611>.

⁵ Basedow, J. (2008), *Freedom of Contract in the European Union*, in *European Review of Contract in the European Union*, 905.

2. EU energy markets: consumer protection and empowerment as a means of stimulating competition

EU energy markets are fully opened to competition and consumers are entitled to choose among a wide range of available retailers and offers. According to the opinion of the Advocate General delivered on 20th October 2009 with reference to Case C-265/08⁶, however, “once barriers have been removed there remain certain requirements which the market alone is not able to meet”⁷. For this, state involvement in the market should focus on the protection of consumer rights.

One is nowadays aware that competitive injury is no longer a necessary element to protect consumers, even though consumer protection plays a very important role in the path to competition.

New EU directives - especially Directives 2009/72/EC and 2009/73/EC of the European Parliament and of the Council of 13th July 2009 - aim to reduce information disparities and asymmetries between undertakings and customers. At the same time, this goal is eased by the setting of National Regulatory Authorities whose activities can support and guarantee the transition to a fully competitive market as well as taking into account consumer issues and needs.

Competition does not entail the uselessness of consumer protection rules. Although “not all consumer protection measures aim at fostering competition” - and “more often than not, there will be a tension between different goals: measures which promote competition could be incompatible with

⁶ Reference for a preliminary ruling from TAR Lombardia, Regional Administrative Court, Lombardy.

⁷ The request for a preliminary ruling addressed a different dilemma: whether it is contrary to the provision of Article 23 of Directive 2003/55/EC and to the principles of community law for a national provision to maintain in effect after 1st July 2007 the power of the National Regulatory Authority (pursuant to an Italian law) to set reference prices for the supply of natural gas to domestic customers which suppliers are bound to include in their commercial offers or the provision in question (Article 23) is to be read in conjunction with Article 3 of the same Directive, which provides that Member States may impose on undertakings, in the general economic interest, public service obligations which relate to the price of supplies as meaning that it is not contrary to those provisions of community law for a national provision which, having regard to the circumstances of the market, still characterised by an absence of conditions of effective competition, at least in the wholesale sector, to allow a public authority to set a reference price for natural gas. According to the Judgment of the Court of Justice of 20th April 2010, the answer to the questions referred must be that Articles 3 (2) and 23 (1) of Directive 2003/55 do not preclude national legislation which permits determination of the price level for the supply of natural gas by the definition of “reference prices” after the 1st July 2007, provided that such intervention: pursues a general economic interest consisting in maintaining the price of the supply of natural gas to final consumers at a reasonable level having regard to the reconciliation which Member States must make, taking account of the situation in the natural gas sector, between the objective of liberalisation and that of the necessary protection of final consumers pursued by Directive 2003/55; compromises the free determination of prices for the supply of natural gas after the 1st July 2007 only in so far as it is necessary to achieve such an objective in the general economic interest and, consequently, for a period that is necessarily limited in time; is clearly defined, transparent, non discriminatory and verifiable, and guarantees equal access for EU gas companies to consumers.

those which impose public service obligations”⁸ - one should take into account that competition does not eliminate the need for “obligations on retailers to disclose detailed energy offer information to customers, as well as general consumer protection laws that prohibit, amongst other things, misleading, deceptive and unconscionable conduct”⁹.

Customers, whether they be consumers or small businesses, need tools, information and tips to make efficient decisions in terms of swift, easy and effective choice¹⁰. Areas of concern thus include misleading marketing activities because of unfair commercial practices that may undermine consumer confidence in the market and competition as well¹¹. An open market enables all consumers freely to choose their suppliers, but the increasing number of suppliers adds to the complexity of consumers’ choices as they now face new costs and difficulties¹². In addition, consumers are sometimes not able to switch to the best supplier¹³.

Information obligations make the offers of the different suppliers easier to compare. However, the regulatory intervention that relies only on information obligations is not able to positively affect those consumers who are less educated or insensitive to information¹⁴.

Directive 2005/29/EC of the European Parliament and of the Council of the 11th May 2005 aims to protect consumer economic interests from unfair commercial practices. This Directive also indirectly protects undertakings from their competitors who do not play by the rules provided by it and

⁸ Bellantuono, G., Boffa, F. (2008), *Residential energy markets in Europe: Designing effective institutions*, 11, electronic copy available at: <http://ssrn.com/abstract=1121272>.

⁹ *Consumer Protection in a Deregulated retail Energy Market* (2008), Final Report, 21, Monash Centre for Regulatory Studies, Faculty of Law, Monash University, electronic copy available at: http://www.eraa.com.au/db_uploads/ConsumerProtectioninaDeregulatedRetailEnergyMarketFinalReporttotheERAAApril08.pdf.

¹⁰ Cseres, K. J. (2008), *What Has Competition Done for Consumers in Liberalised Markets?*, cit.,120.

¹¹ Misleading commercial practices can deceive consumers and prevent them from making an informed and efficient choice. Directive 2005/29/CE of the European Parliament and of the Council of 11th May 2009 addresses the topic of unfair business-to-consumer commercial practices in the internal market.

¹² Bellantuono, G., Boffa, F. (2007), *Energy Regulation and Consumers’ Interests*, Final Report, 33, Regional Technical Centre of Research on European Consumption – CTRRCE, electronic copy available at: <http://ssrn.com/abstract=1120928>.

¹³ For interesting findings on the degree of capacity of customers to choose the best alternative suppliers, see Wilson, C. M., Waddams Price, C. (2006), *Do consumers switch to the best suppliers*, electronic copy available at: <http://else.econ.ucl.ac.uk/conferences/consumer-behaviour/wilson.pdf>.

¹⁴ Rott, P. (2007), *Consumers and services of general interest: Is EC consumer law the future?*, in *Journal of Consumer Policy*, 51, who points out that only the Unfair Contract Terms Directive 93/13/EEC fully protects uninformed consumers by declaring unfair terms not binding.

guarantees, in this way, the fairness of competition and commercial practices in the internal market. According to its Article 1, this Directive aims to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests. Thus, its main goals are the promotion of freedom of decision-making, market transparency and information¹⁵ in order to overcome market failures originated by misleading practices “which cause damage to consumer confidence in general and not simply cause injury to particular individual victims of fraud and duress”¹⁶.

The protection of consumers by the undue influence of a supplier, for example, requires to ban the exploitation of a position of power thanks to which the business applies pressure in a way which significantly limits the consumer's ability to make an informed decision. For this reason, according to article 5 of the Directive a commercial practice shall be regarded as unfair if it is “contrary to the requirements of professional diligence” and if “it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers”.

In addition, on 3rd December 2009 the European Commission issued a Guidance on the implementation of the above mentioned Directive, providing a very useful guidance on its provisions and practical examples on how they work.

Moving on to general remarks, it is important to highlight that regulation may make use of private law tools to guarantee a better functionality of the market – by regulatory functions of private

¹⁵ Micklits, Hans-W. (2009), *Unfair commercial practices and misleading advertising*, Micklits, Hans-W., Reich, N., Rott., P., *Understanding EU Consumer Law*, Intersentia, Antwerp – Oxford – Portland, 71.

¹⁶ Collins, H. (2006), *The Alchemy of Deriving General Principles of Contract Law from European Legislation: In search of the Philosopher's Stone*, in *European Review of Contract Law*, 217.

law some authors significantly mean the ability of private law instruments to address market failures¹⁷ - despite the likely contrasts between private law and regulation¹⁸.

Consumer empowerment may be enhanced by making customers aware of their rights and of market opportunities. A recent Study – which has pointed out the problems consumers face in making the right choice for them - has proposed the tools that can help consumers participate more actively in the market¹⁹. Liberalization has the potential to deliver the best prices, choice and innovation, on conditions that the opening of the market is accompanied by measures to protect and empower consumers. Member States whose retail markets opened earlier have already adopted useful measures, for the benefit of consumers, which can serve as a source of inspiration for other markets.

The findings of the survey show how competition widens consumer choice, but they provide at the same time the evidence of the complexity of this choice. For example, consumers are not aware of potential savings and believe that the incentives to switch are too small when compared to the costs. In addition, consumers struggle to compare products and offers and the complexity of tariffs and prices cause their disengagement and contributes to their resistance to change.

By focusing on detailed findings, one can notice that only 28% of consumers across the EU were satisfied with the way their complaint was dealt with. More than one in three consumers who have a problem do not even make a complaint (as they do not know how or where to complain or they think the sum involved is too small, that they are unlikely to get a satisfactory solution or that submitting a complaint is too difficult)²⁰.

¹⁷ Cafaggi, F., Muir Watt, H. (2007), *The making of European Private Law: Regulation and Governance design*, 5, electronic copy available at: <http://www.ihs.ac.at/publications/lib/ep13.pdf>.

¹⁸ Collins, H. (2006), *The Alchemy of Deriving General Principles of Contract Law from European Legislation: In search of the Philosopher's Stone*, cit., 219.

¹⁹ “The functioning of the retail electricity markets for consumers in the European Union” (2010), Commission staff working paper, electronic copy available at:

http://ec.europa.eu/consumers/strategy/docs/SWD_function_of_retail_electricity_en.pdf.

²⁰ Ibid., 27-28.

The role of information duties thus shifts from a mere contractual guarantee to an empowerment tool, which should enhance transparency and participation of consumers by providing them with easy and accessible information on their rights and on their consumption data²¹.

3. EU energy markets: the Third Energy Package

Directive 2009/72/EC and Directive 2009/73/EC – also known as the Third Energy Package - have been adopted on the grounds that previous rules and measures had not provided the necessary framework for achieving the objective of a well functioning internal market. A fully competitive market oughts to always overcome barriers to access for new entrants and to give customers the opportunity to save on their bills by switching supplier.

According to recital n. 37 of Directive 2009/72/EC concerning common rules for the internal market in electricity, energy regulators should be granted the power to decide on appropriate measures ensuring customer benefits through the promotion of effective competition necessary for the proper functioning of the internal market. Moreover, recital n. 42 provides that household customers and, where Member States deem it appropriate, small enterprises should also be able to enjoy public service guarantees, in particular with regard to security of supply and reasonable tariffs.

As significantly stated in recital n. 51, “consumer interests should be at the heart of this Directive”: existing rights of consumers need to be strengthened and guaranteed and consumer protection should ensure that all consumers benefit from a competitive market. The promotion of competition in the energy sector is essential for the benefit of consumers. Market sharing, to cite just on example, is a very serious antitrust infringement as it hinders price competition and deprives customers of more choice of suppliers²²; moreover, provisions on unbundling are necessary remedies to

²¹ Please see Di Porto, F., Lorenzoni, L. (2012), *Consumer protection in Europe*, 5-6, electronic copy available at: www.iern.net.

²² Hariharan, S., Ghaya, K. (2011), *Competition Law in the Energy Sector: The European Experience*, in *European Energy and Environmental Law Review*, 201.

overcome anticompetitive practices, as the lack of these measures would make the market suffer a great deal “and ultimately the same would be passed on to the consumers”²³.

Indeed European Union pursues the aim of allowing consumers to take full advantage of the opportunities of a liberalised internal market. And it is, of course, one of the most important tasks that energy regulators are called to carry out.

Article 3 (3) of Directive 2009/72 plays a very important role for consumer protection when it lays down that Member States shall ensure that all household customers, and, where Member States deem it appropriate, small enterprises (namely enterprises with fewer than 50 occupied persons and an annual turnover or balance sheet not exceeding EUR 10 million), enjoy universal service, that is the right to be supplied with electricity of a specified quality at reasonable, easily comparable, transparent and non discriminatory prices²⁴. Member states shall also take appropriate measures to protect final customers and shall ensure that there are adequate safeguards to protect vulnerable customers. In this context, each Member State shall define the concept of vulnerable customers which may refer to energy poverty and to the prohibition of disconnection of electricity to such customers in critical times. In addition, they shall ensure high levels of consumer protection - particularly with respect to transparency regarding contractual terms and conditions -, general information and dispute settlement mechanisms and that eligible customers are able easily to switch to a new supplier. As regards at least household customers, the above mentioned measures shall include those set out in Annex I.

Annex I contains a list of measures on consumer protection. These measures aim to ensure that customers have a right to a contract with their electricity service provider that specifies: the duration of the contract; whether withdrawal from the contract without charge is permitted; any compensation and the refund arrangements which apply if contracted service quality levels are not met including

²³ *Ibid.*, 201.

²⁴ Article 3 (3) of Directive 2003/54/EC of the European Parliament and of the Council of 26th June 2003 in the same way stated that Member states shall ensure that all household customers, and, where Member States deem it appropriate, small enterprises (namely enterprises with fewer than 50 occupied persons and an annual turnover or balance sheet not exceeding EUR 10 million), enjoy universal service, that is the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable and transparent prices. To ensure the provision of universal service, Member States may appoint a supplier of last resort.

inaccurate and delayed billing. Conditions shall be fair and well-known in advance and information should be provided prior to the conclusion of the contract. The measures aim also to guarantee that customers are not charged for changing supplier and benefit from transparent, simple and inexpensive procedures for dealing with their complaints.

Directive 2009/73/EC concerning common rules for the internal market in natural gas expresses the same objectives of Directive 2009/72/EC.

In addition to the already mentioned provisions, the importance of complaints handling is stressed in recital n. 51 by stating that greater consumer protection is guaranteed by the availability of effective means of dispute settlement for all customers and that Member States should introduce speedy and effective complaint handling procedures.

Moreover, Member States shall ensure the provision of single points of contact to provide consumers with all necessary information concerning their rights and the means of dispute settlement available to them in the event of a dispute. They shall also ensure that an independent mechanism, such as an energy ombudsman or a consumer body, is in place to guarantee efficient treatment of complaints and out-of-court dispute settlements²⁵.

Generally speaking, Directives 2009/72/EC and 2009/73/EC enhance the role of National Regulatory Authorities on a wide range of consumer issues. Specifically, these Directives pursue, among others, the aim to make consumers more confident and informed. Unfortunately, consumers are sometimes reluctant to deal with the formalities involved in changing the supplier and their confidence in the market is not high. For this reason, they need to be fully aware of their rights and the experiences developed by some countries may represent very good footsteps to be followed by countries where liberalisation is moving.

Regulation is expected to enhance consumer protection and it should be regarded as a suitable answer to market failures, especially when conflicting interests need to be balanced. As regards

²⁵ On alternative dispute resolutions see the European Commission's *Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)*, issued on 29th November 2011.

transparency, there is no word that matters to energy regulators more: consumers need transparent information about prices, comprehensible bills, guaranteed quality of supply standards; on the contrary, the lack of information may affect their interests. In addition, it's not easy for consumers to keep up with changing prices. As a consequence, the role of regulation is to make prices and contract terms clear and to make it easy to compare one supply or product with another.

On 19th June 2008 the European Parliament issued a resolution on “Towards a European Charter on the Rights of Energy Consumers”. This document has represented a very important step in the direction of consumer protection: it has significantly pointed out that in a sector with imperfect competition market mechanisms alone do not always fully ensure consumers’ interests and it has consequently proposed the enforcement of customer protection and stressed the need to ensure the protection of universal rights - especially access to energy and security of supply - also by promoting cooperation between Member States and neighbouring countries. In addition, the resolution has significantly stated that energy regulators must have the competence to protect consumers against unfair commercial practices and cooperate with the competent competition authorities²⁶.

4. Cooperation in UE countries and protection of energy consumers by enforcing regulation measures and competition law

Market integration and infrastructure development have been generally supported by economic interests. Nevertheless, current challenges as well as shared practices addressing consumer protection may lead to new remarkable improvements and pave the way for accelerating the deployment of electric and gas transmission lines and networks. The Council of EU Energy Regulators (hereinafter referred to as CEER) is a not-for-profit association, which represents the voice of EU National Regulatory Authorities of electricity and gas. Thanks to the setting of CEER, energy regulators cooperate and exchange best practices in order to ease the creation of a single, competitive and efficient

²⁶ For an example of cooperation between a National Regulatory Authority and an Antitrust Commission, see the Memorandum of Understanding signed on 13th September 2012 by the Italian energy regulator and the Italian competition authority, available at: www.agcm.it and www.autorita.energia.it.

EU energy market. CEER activities are performed by working groups and task forces, composed of staff members of National Regulatory Authorities; and as regards consumer issues, CEER constantly points out that regulation is expected to protect and empower customers without creating unjustified barriers for market entry. In order to make consumers feel confident in the energy market, CEER suggests that basic information about market functionality and consumer rights should be available and easy to understand. Especially suppliers are called to provide customers with easy to understand information and to deal with complaints and enquiries promptly and efficiently²⁷.

CEER activities are strongly supported by the European Commission. On 10th November 2010 a “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions” was issued in order to address the “Energy 2020 A strategy for competitive, sustainable and secure energy”: the Commission announced the need of new measures to help consumers better participate in the market and specifically the development of guidance based on best practice in the area of switching, the implementation and monitoring of billing and complaint-handling recommendations and the identification of best practices in alternative dispute resolutions.

The role of European institutions is really important to promote consumer protection and it can be appreciated also by focusing on the regulatory and enforcement tools used by the European Commission to overcome market malfunctioning, such as the implementation of the Third Energy Package and the numerous antitrust and merger control investigations and proceedings (often closed with commitment decisions). It is in fact clear that access by new entrants to the energy, the networks and the customers is essential to the well functioning of the market and barriers or obstacles to any one of these elements may render “futile any progress achieved” on the regulatory front²⁸.

²⁷ “Retail market design, with a focus on supplier switching and billing Draft Guidelines of Good Practice” (2011), A CEER Public Consultation Paper, 10, available at: http://www.energy-regulators.eu/portal/page/portal/EER_HOME. This public consultation has addressed the role and responsibilities of market players in the EU electricity and gas retail markets.

²⁸ Calzado, J. R., Motta, R., Leoz Martin Casallo, M. E. (2011), *The European Commission’s Recent Activity in the Electricity and Gas Sectors: Integrated Approach, Pragmatism and Guidance in EU Competition Enforcement*, in *The European Antitrust Review*, 90-91.

Moreover, the Commission has established a Citizens' Energy Forum aimed at implementing competitive, energy efficient and fair retail markets for consumers and involving energy companies, network operators, national regulatory authorities, consumers associations and independent dispute resolution bodies. Significantly, since 2007 the Forum has been dealing with critical topics such as billing, complaint handling and smart metering²⁹ and a Vulnerable Consumer Working Group and a Price Transparency Working Group have been established to focus on the issues raised in the Forum.

5. MEDREG: the Association of Mediterranean Regulators for Electricity and Natural Gas

MEDREG was established in 2006 as a permanent working group and it became a non-profit Association in 2007. It currently gathers energy regulators from Albania, Algeria, the Palestinian Authority, Bosnia-Herzegovina, Croatia, Cyprus, Egypt, France, Greece, Israel, Italy, Jordan, Lebanon, Malta, Montenegro, Morocco, Portugal, Slovenia, Spain, Tunisia and Turkey. MEDREG is co-financed by the European Union with the purpose of promoting a stable and harmonised legal and regulatory framework for an integrated Euro-Mediterranean energy market. MEDREG's activities aim to facilitate the development of investments and infrastructures and to support the integration of energy markets in the Mediterranean basin. In fact, a greater harmonization of energy markets is destined to foster sustainable development in the sector and to stimulate initiatives of mutual interest; the above-mentioned activities are also able to guarantee the maximum benefits to energy consumers in the region³⁰. As a consequence, this will make countries much more than just neighbours and their cooperation and mutual support will create a common vision of energy regulation.

MEDREG has been set up with the aim to enhance and foster a closer cooperation and coordination among Mediterranean countries and energy regulators through the mutual exchange of experiences. It is an answer to the widespread need for public authorities and energy regulators in

²⁹ *An energy policy for consumers* (2010), Commission Staff Working Paper, electronic copy available at: [http://ec.europa.eu/energy/gas_electricity/doc/forum_citizen_energy/sec\(2010\)1407.pdf](http://ec.europa.eu/energy/gas_electricity/doc/forum_citizen_energy/sec(2010)1407.pdf)

³⁰ "MEDREG Response to EC Public Consultation on the External Dimension of the EU Energy Policy" (2011), 1, available at: http://www.medreg-regulators.org/portal/page/portal/MEDREG_HOME.

charge of monitoring the implementation of competition rules, empowering consumers and making them more aware of their rights and of the opportunities provided by the market.

As a matter of fact, the harmonisation of legal, technical and economic frameworks is strongly linked to the setting up of a stable regulatory context, which is bound to encourage investments and guarantee a high level of consumer protection³¹. Thus, MEDREG's role will support permanent collaboration between EU National Regulatory Authorities and energy regulators of the Mediterranean countries³². Energy regulators need to share an inventory of current practices in terms of rights and obligations of consumers, with a particular attention to the protection of vulnerable customers. As self regulation was proven unsatisfactory in some countries, it's necessary that energy regulators are endowed with powers to protect consumers.

Energy regulators have different tools to enhance consumer protection. In some countries³³, the regulator has provided that consumers are entitled to withdraw from a contract without penalties and that termination fees must be consequently removed. Moreover, the protection of consumers in default service is guaranteed by a set of rules - addressing billing and meter reading frequency, payment of bills, interest rates for non payment, payment by instalments, disconnection - that have been issued by the energy regulator. For customers who have entered into a contract in the market, clauses are agreed between consumers and suppliers but retailers have to disclose information for the benefit of prospective users.

Different regulatory approaches in MEDREG countries have encouraged energy regulators to take steps towards the harmonisation of consumer protection rules. In fact, MEDREG Institutional AdHoc Group – Customers Task Force has issued a set of “Recommendations on minimum requirements considered necessary to ensure consumer protection in the field of electricity and gas in

³¹ “MEDREG Response to EC Public Consultation on the External Dimension of the EU Energy Policy” (2011), cit., 2-3.

³² The Institutional Issues Working Group has been set up with the aim to enhance closer cooperation and coordination among countries participating in the MEDREG. A Task Force on Consumer Issues has been created in order to assess the state of the art and to issue recommendations on consumer protection in the Mediterranean Region.

³³ In Italy, the energy regulator has issued numerous resolutions addressing the topic of consumer protection and empowerment.

the Mediterranean region”³⁴. As a consequence of the data submitted by energy regulators (on the legal and institutional framework on competition and consumer protection, on the overview of the market and on consumer protection and transparency), a set of minimum requirements has been regarded as a necessary means to ensure consumer protection in the energy markets. Among the best practices, it is recommended for MEDREG countries to have, in addition to the general law on consumer protection, a specific legislation which ensures the supply of energy, its continuity and the quality of service. The legislation should also grant the regulator or another independent authority a specific power addressing complaints handling, access to networks and assessment of the performance of the public service. The document issued by MEDREG points out that some countries have fully opened their market (generation and supply) to competition whereas for others the energy market is partially or not at all opened. As regards consumer protection and transparency, energy regulators should: be able to allow the setting of service quality standards, both technical (quality of supply, duration of outages, regulation of voltage) and commercial (such as response time to complaints or punctuality to appointments with customers); improve the set of information given to consumers (e.g. prices transparency, consumer consumption, readability of bills); allow consumers to be compensated if the operator fails or causes damages; have a dedicated department dealing with complaints and imposing fines on companies when they do not meet their obligations; have a clear procedure for the settlement of disputes between customers and operators.

If the market is not (fully) opened to competition, most consumers are not likely to focus on clear pre-contractual information on non-core matters and there is no incentive to compete in the sense of providing better or different contractual terms³⁵. Nevertheless, the regulatory approach should try to improve the participation of consumer associations and customers in the regulatory process and should intervene when the quality of service, from a technical and commercial point of view, is poor. Moreover, the lack of competition and inequalities in bargaining power should lead each country to

³⁴ Available at: http://www.medreg-regulators.org/portal/page/portal/MEDREG_HOME.

³⁵ Rott, P. (2009), *The user-provider relationship: protection through private law*, in *The changing legal framework for services of general interest in Europe. Between competition and solidarity*, edited by Kraiewski M., Neergaard U., Van De Gronden, J., T.M.C. Asser Press, 223.

grant its own National Regulatory Authority the competence to impose fair contract terms on suppliers. Private law tools may be used by the energy regulator, on the grounds of its expertise and knowledge of the market, to protect consumers by the asymmetry of contractual power they suffer from in the relationship with their supplier and to specifically envisage contractual provisions which take into account the interests and needs of consumers (without leaving the definition of all supply terms to the discretion of the other party, the energy company)³⁶.

6. *The Energy Community*

On 25th October 2005 the Treaty Establishing the Energy Community was signed by the European Community and the authorities of Albania, Bulgaria, Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Romania, Serbia, Montenegro and the United Nations Interim Mission in Kosovo³⁷. Moldova joined the Energy Community on 1st May 2010 and Ukraine on 1st February 2011.

By signing the Treaty the above mentioned countries are committed to implement the *acquis communautaire* on electricity, gas, environment, competition and renewables. In fact, the Treaty aims to establish “an integrated market in natural gas and electricity, based on common interest and solidarity” and “to create a stable regulatory and market framework capable of attracting investment in gas network, power generation and transmission networks”. This means the creation for the parties of a market without internal frontiers, which includes the coordination of mutual assistance in case of serious disturbance to the energy networks or external disruptions and the achievement of a common external energy policy.

The Energy Community Regulatory Board (hereinafter referred to as ECRB) has been established by Article 58 of the Energy Community Treaty: it takes the role of a coordination body of the national regulators of the Energy Community for exchanging knowledge and developing common

³⁶ One of the challenges for legal regulation of markets has been the requirement to restrict the advantages of businesses when they deploy standard form contracts: Collins, H. (2003), *The Law of Contract*, LexisNexis Butterworths, UK London, 3.

³⁷ For details on the Treaty and the Energy Community please visit www.energy-community.org.

best practices. Significantly, the activities of ECRB are characterized by the following objectives and priorities: development of competitive national gas and electricity markets; integration of national markets and development of competitive regional markets in electricity and gas; abolishment of barriers for cross border trade and competition; protection of customers; security of supply and quality of service. As regards consumer protection, support schemes for protection of vulnerable energy customers operate in most contracting parties, such as direct subsidies (through government funds), specific energy prices and protection against disconnection from the network during winter and extreme cold weather. Typically, low income customers and disabled people are entitled to use energy related support schemes³⁸. However, there is broad agreement that competition cannot be hindered by the support system implemented and that is necessary to allow customers to take part in the liberalized market and take advantage of cheaper offers³⁹.

Some countries have below-cost energy prices and “the transition to pricing covering costs plus a reasonable return on capital will imply a rise in end-user energy prices, which might not be affordable to certain consumer groups”⁴⁰. To address this social matter, the implementation of voucher financing can stimulate competitive pricing and it may provide poor consumers with an incentive to choose the cheapest supplier⁴¹. “It is obvious that in new conditions traditional forms of consumer protection have to undergo changes and to be adjusted to the requirements of the liberalised market”⁴².

As a consequence, consumer protection should be addressed by implementing “transparent information about supply prices and network tariffs, comprehensible bills, non-discriminatory contracts, dispute settlement mechanisms and guaranteed quality of supply standards. Almost all countries recognize these criteria in their legislation and include it in their regulation”⁴³, but at the moment “credible steps toward developing high levels of protection for customers have not been

³⁸ Please see the paper *Treatment of the vulnerable customers in the Energy Community*, 11, 14, 18, electronic copy available at: <http://www.energy-community.org/pls/portal/docs/1296177.PDF>.

³⁹ Ibid., 19.

⁴⁰ Filipovic, S., Tanic, G. (2008), *The Policy of Consumer Protection in the Electricity Market*, in Economic annals 2008, Volume 53, 159, available at: <http://www.doiserbia.nb.rs/img/doi/0013-3264/2008/0013-32640879157F.pdf>.

⁴¹ Ibid., 172-173.

⁴² Ibid., 180.

⁴³ Ibid., 172.

presented by most of the Contracting Parties. Instead, most still try to ensure customer protection via non-cost reflective regulated energy tariffs, which leads to market distortion and ultimately endangers security of supply”⁴⁴.

7. *The retail energy markets: a case study. Conclusions.*

Competition alone is not sufficient to protect or empower customers and a set of rules is necessary to achieve the goal of an effective consumer protection. From this point of view, the recent experience shows that regulation, especially when it is regarded as the set of rules issued by a National Regulatory Authority, is necessary to overcome market failures⁴⁵ in parallel with the enforcement of competition law.

Consumer protection is one of the necessary requirements for a well functioning and competitive market and regulation issued by a National Regulatory Authority should shape contracts and behaviours where necessary, especially to overcome market failures and asymmetries. Furthermore, “the quality of consumer protection measures is a significant variable in reducing prices” and consumer protection rules support the development of competitive retail markets⁴⁶.

Due to the fact that competition is still to function well, energy regulators should have the power to impose contractual terms in residential energy markets. For example, “residential consumers should have the right to terminate the contract at any moment. Allowing energy companies to apply restrictive conditions to consumers’ withdrawal risks increasing switching costs. Moreover, there isn’t any convincing evidence that energy companies are not able to bear the risk of early termination”⁴⁷.

⁴⁴ Annual Report on the implementation of the Acquis under the Treaty establishing the Energy Community, issued on 1st September 2012 and available at: www.energy-community.org.

⁴⁵ Laguna de Paz, J. C. (2012), *Regulation and Competition Law*, in *European Competition Law Review*, 77. The author points out that the concurrence of two separate sets of rules – competition law and regulation – governing the same conduct entails legal uncertainty and he significantly recalls the Deutsche Telekom case, when the European Commission fined the abuse of a dominant position of a vertically-integrated company, although its prices had been authorised by the national regulator. For more information on the case, see Vedder, H. (2011), *Competition in the EU Energy Sector – An Overview of Developments in 2009 and 2010*, *European Energy Law Report VIII*, 11-12, edited by Roggenkamp, M. M. and Hammer, U., Intersentia, Cambridge – Antwerp – Portland.

⁴⁶ Bellantuono, G., Boffa, F. (2008), *Residential energy markets in Europe: Designing effective institutions*, cit., 18, 29.

⁴⁷ Bellantuono, G., Boffa, F. (2007), *Energy Regulation and Consumers’ Interests*, cit., 20.

If one regards regulation as a set of measures only indirectly affecting private law, it is true that “private law examines the particular case, whereas regulation contemplates the distributive effect on groups in the market of a type of market transaction” and that “private law is concerned with the outcome between individuals” whereas “regulation with consequences on the operation of the market and on economic groups”⁴⁸. However, in the energy markets “sector regulation interferes with contractual relationships to promote competition and, in some cases, to give final users what markets are not able to deliver (eg universal service, a specific level of service quality)”⁴⁹ and the role of a National Regulatory Authority increases its own importance with reference to this topic.

In a modern regulatory perspective, the function of the law of contract is to regulate markets, improve competition and steer “contractual relations in ways that are likely to help to maximise the joint wealth of the parties”⁵⁰. As a consequence, a better enforcement of competition law and of consumer protection measures is necessary. In addition to the promotion of competition, effective consumer protection calls for the setting of regulated terms and compulsory obligations on energy businesses in order to balance the opposite interests of suppliers and consumers. Regulated terms should be adopted especially if one takes into account that there is no competition with reference to contractual terms⁵¹; and specifically, these terms should address different provisions of the supply contract, such as billing frequency, billing transparency, payment, fair procedures before disconnecting a customer for non payment, complaints handling, alternative dispute resolution and short notice without penalties to terminate the contract. Moreover, service quality needs to be guaranteed both by the supplier (in terms of complaints handling and management of customers’ requests) and by the network operator (with reference to interruptions and activation time); and a commercial code imposed on suppliers may play a very important role to overcome the risk of unfair commercial practices.

⁴⁸ Collins, H. (2006), *The Alchemy of Deriving General Principles of Contract Law from European Legislation: In search of the Philosopher’s Stone*, cit., 219.

⁴⁹ Bellantuono, G. (2010), *The Limits of Contract Law in the Regulatory State*, 2, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1628691, also published in *European Review of Contract Law*, 2010, 115.

⁵⁰ Collins, H. (2003), *The Law of Contract*, cit., 35.

⁵¹ Collins, H. (2003), *The Law of Contract*, cit., 260, who clearly states that one of the causes of market failures is “consumer ignorance of the terms of contracts apart from key items such as price, so that there is no incentive for traders to compete with respect to the other terms on offer”. Price is in fact the main driver for switching.

As regards the above mentioned measures, the Italian experience is worth noting. Law 14th November 1995, n. 481 has instituted the Regulatory Authority for Electricity and Gas (hereinafter referred to as AEEG) and set its main objectives: guaranteeing the promotion of competition and efficiency in the electricity and gas sectors; ensuring adequate service quality standards⁵²; ensuring uniform availability and distribution of services throughout the country by establishing a clear and transparent tariff system based on set criteria; promoting the interests of users and consumers.

With reference to the quality of service, AEEG has set specific service standards supported by automatic refund mechanisms for users and consumers if standards are not met, such as response time to complaints⁵³ (40 days) or the time to respond to requests of billing adjustments (90 days). After the birth of AEEG, service quality regulation is no longer established by each company (before 1997 service quality regulation was under the citizen's charter and very few utilities adopted automatic compensation mechanism schemes). Provisions addressing service quality aim to guarantee an efficient and timely performance of contracts and automatic compensations are suitable tools to make companies comply with rules issued by AEEG as well as deterring them from breaching the supply contract.

The Commercial code of conduct approved by AEEG applies to all gas and electricity suppliers presenting commercial offers to household customers and small businesses (customers who have less bargaining power than larger corporations and are thus in greater need of protection). The Code sets specific obligations in terms of transparency of information, means of presenting offers, comparability of prices, breaking down of the various components that determine the final cost for the customer and

⁵² Please see AEEG's website: www.autorita.energia.it . As regards service quality regulation, it's necessary to make a distinction between services provided by the network operator (the DSO still performs a monopoly activity and in most countries the distribution activity is separated from the supply activity) and services provided by the supplier (company acting under competitive conditions).

⁵³ A complaint is a written communication sent to the supplier regarding the non compliance of the supplied service with the terms of the contract or with regulation. Complaints handling can help energy regulators find out market failures and whether a supplier is infringing rules or giving poor service quality and evaluate the state of the art (in order to propose changes to current rules).

Complaint handling standards have been defined for suppliers. There is an obligation to answer and a complete answer should be given within 40 days. When the standard is not met, compensation must be paid to the customer. Before the issuing of commercial standards regarding the time to respond to complaints, customers were largely dissatisfied with the way suppliers handled complaints. Complaints are a direct and easy way for customers to communicate their needs and concerns.

simplicity of contract wording. For the benefit of customers, suppliers have to provide prospective users with a written document that summarises their main rights and allow them to verify if the contract being offered complies with AEEG's resolutions. The content of the Code, i.e. the detailed list of obligations imposed on energy suppliers, may even represent an appropriate answer to the criticism regarding concepts such as good faith and fair dealing requirements in precontractual negotiations⁵⁴.

The Code “regulates the pre-contractual phase, requesting the suppliers to communicate with the consumers through a specific format aimed at simplifying the comparability of offers”. Moreover, it “regulates marketing practices, the terms to be included in each contract and the procedure for their modification, consumers’ termination rights and automatic refunds in case of breach by the supplier”⁵⁵. The experience of early liberalizations shows that the failure of competition in retail markets can be avoided if the following solutions are implemented: a code of commercial practice that regulates the precontractual phase and the comparability of offers discouraging energy firms from creating unnecessary complexity in their offers⁵⁶.

In conclusion, the best practices implemented in some countries should be regarded as a valuable experience by other jurisdictions and the mutual exchange of consumer protection regimes should be encouraged in order to support the harmonisation of regulatory models not only at the retail level. The commitment to sharing practices and enhancing coordination between energy regulators – which should be extended to the cooperation between energy regulators and antitrust commissions⁵⁷ - is essential in the direction of a well functioning market. Energy regulators are thus called to cooperate in order to empower consumers in the market and to balance consumers’ demands with the necessity

⁵⁴ As regards criticism on good faith please see *Allen&Overy Response to European Commission green paper on policy options for progress towards a European contract law for consumers and businesses*, available at: http://ec.europa.eu/justice/news/consulting_public/0052/contributions/5_en.pdf.

⁵⁵ Bellantuono, G., Boffa, F. (2007), *Energy Regulation and Consumers’ Interests*, cit., 63.

⁵⁶ Bellantuono, G., Boffa, F. (2007), *Energy Regulation and Consumers’ Interests*, cit., 65-66.

⁵⁷ This kind of cooperation is recommended especially when the same conduct may be regarded as an infringement both by the energy regulator and by the antitrust commission or, on the other hand, when it is regarded as an infringement by the antitrust commission although it complies with the rules issued by the energy regulator. In addition, one should take into account that commitment decisions – by which the antitrust commission closes, for example, an unfair commercial practice proceeding - often contain regulatory measures which add to the current regulation without being approved by the energy regulator. These regulatory measures, adopted by an energy supplier to avoid the fine, might in some cases represent a competitive advantage.

of an efficient management of energy companies, also in the light of the promotion of energy efficiency and of environmentally friendly energy sources.