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Roggenkamp, Martha; Diestelmeier, Lea

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Energy Market Reforms in the EU

A New Focus on Energy Consumers, Energy Poverty, and Energy (in)Justice?

Martha Roggenkamp and Lea Diestelmeier*

I. Introduction

The position of end-consumers in the European energy market has changed drastically over the last few decades. This change is primarily due to the process of market liberalization, that is, a market based on the principle of free movement of goods, services, persons, and capital without obstacles to competition, but more recently also as a result of the need to increase the consumption of renewable energy sources (RES) in order to meet the 2020 and subsequent 2030 and 2050 goals.¹ Whereas in the European Union (EU) the process of market liberalization started in 1988 when the European Commission presented its Working Document on the internal energy market (IEM),² it has been substantiated by the introduction of a wide range of EU laws since 1996.³ Energy consumers play a specific role in the process of EU market liberalization. The assumption is that a liberalized and competitive market provides energy consumers with a free choice of supply and supplier and, accordingly, consumers become part of a process that should result in lower energy prices and improved quality of service. Gradually, energy consumers have been transformed from being merely ‘captive’ customers to becoming ‘active’ customers.⁴

One of the key issues in the process of market liberalization is the extent to which these principles should apply equally to all energy consumers, and/or whether a distinction

* The authors would like to thank Louis Sandiford, LL.M. Energy and Climate Law, for his assistance in preparing this chapter.

¹ The Third Energy and Climate Package of 2007 provided for an EU target of 20 per cent renewable consumption in 2020. In 2014, the European Council agreed on a new EU-wide binding target for renewable energy of at least 27 per cent in 2030. On 28 November 2018, the Commission presented its strategic long-term vision that the EU should be climate neutral by 2050. See <http://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union>, last visited 9 September 2019.

² Commission of the European Communities, Communication ‘The Internal Energy Market’, Brussels 2 May 1988, COM(88) 238 final (hereafter *The IEM*).

³ The first directive entered into force in 1996 as Directive 96/92/EC concerning common rules for the internal market in electricity [1996] OJ L 77/20 (hereafter *1996 Electricity Directive*), and was amended in 2003, 2009, and 2019. See in more detail section II.

⁴ Whereas *The IEM* (n 2), 4, identified in 1988 that ‘some energy end-uses [...] inevitably involve virtually captive markets’, the 2019 Electricity Directive introduces the concept of ‘active’ customer.

needs to be made between different types of consumers. It is crucial to ask: is it necessary to distinguish between large and small consumers, industrial and household consumers, and/or active and vulnerable consumers? Implicit within this is an evaluation of whether all energy consumers can act effectively in the competitive market setting—if they cannot, then how can this be remedied? And if they can act effectively, why place limits on competition? The approach thus far has been to treat specific categories of consumers differently in order to ensure energy justice and to protect against energy poverty. EU law therefore requires Member States (MS) to take appropriate measures to protect small (household) consumers, whilst also providing adequate safeguards to protect vulnerable customers.⁵ Despite an EU legal framework on the protection of energy consumers, energy poverty and energy injustice are still present throughout the EU.⁶ While the need to protect small consumers has been explicitly recognized within EU energy law since 1996, the existence of energy poverty was not acknowledged in statute until the 2009 Electricity and Gas Directives. Both Directives include the concept of energy poverty in an identical recital, recognizing energy poverty as a ‘growing problem’ and requiring MS to take action via the implementation of social policies and/or energy efficiency improvements.⁷ The Directive on the internal electricity market was reformed in 2019 and further develops the role of small consumers by enabling them to participate to a greater extent in the market. Consumers’ ability to stimulate competition by being more ‘active’ regarding their purchasing choices, alongside the potential for them to exert pressure on producers by themselves generating electricity for private use, is viewed by the EU as pivotal to these ends.⁸ Recital 4 of the 2019 Electricity Directive envisages a market wherein *‘citizens take ownership of the energy transition, benefit from new technologies to reduce their bills and participate actively in the market, and where vulnerable consumers are protected’*.⁹ Energy consumers are thus expected to benefit from the reforms of the 2019 Electricity Directive as they can expect to benefit financially from participating in the market by means of new technologies (as buyers and sellers), whilst also benefitting from increased consumer protections—with vulnerable customers singled out as requiring additional support. This twofold role, however, also suggests that consumers, in particular small consumers, might develop into two categories. One category of consumers who are able to ‘take ownership of and benefit from new technologies’ (for example, consumers who produce energy and have access to battery storage), and another category of consumers who are less able to invest in such technologies and thus being more at risk of falling into energy poverty.

⁵ Directive (EU) 2019/944 on common rules for the internal market in electricity [2019] OJ L 158/125 (hereafter *2019 Electricity Directive*), Article 28(1); Directive (EU) 2019/692 concerning common rules for the internal market in natural gas [2019] OJ L 117/1 (hereafter *2019 Gas Directive*) Article 3(3).

⁶ Agency for the Cooperation of Energy Regulators (hereafter *ACER*) and Council of European Energy Regulators (hereafter *CEER*), ‘Annual Report on the Results of Monitoring the Internal Electricity and Natural Gas Markets in 2017: Consumer Empowerment Volume’ (ACER/CEER 2018), 5 (hereafter *ACER/CEER, Annual Report for 2017*).

⁷ Directive 2009/72/EC concerning common rules for the internal market in electricity [2009] OJ L 211/55 (hereafter *2009 Electricity Directive*) recital 53; Directive 2009/73/EC concerning common rules for the internal market in natural gas [2009] OJ L 211/94 (hereafter *2009 Gas Directive*) recital 50.

⁸ *2019 Electricity Directive* (n 5), recital 10.

⁹ *Ibid.*, recital 4.

Moreover, against the background of energy poverty being recognized as being a form of energy injustice, this discrepancy might cause the risk of distributional and social injustices among small customers in the EU.¹⁰

Considering the above, this chapter will focus on the position of small (predominantly household) energy consumers in the EU. For this purpose, it is necessary to present briefly the process of energy market liberalization in the EU, and the types and roles of consumers identified under EU law (section II). Following on from this, the chapter will present an overview of the current legal framework governing consumer protections for small/household energy customers generally in the EU (section III). Moving from theory to practice, the chapter will then look at how vulnerable customers are currently protected in the EU, with examples of how existing EU legislation has been implemented at MS level (section IV). This is then followed by an analysis of the EU energy market reform and how it addresses this potential discrepancy between participation (consumer empowerment) and protection of small consumers in the energy sector (section V). Concluding, this chapter elaborates on the question of whether this requires a new focus on energy poverty and injustice in EU energy law (section VI).

II. The Role of Consumers in a Liberalized Energy Market

The current role of consumers in the energy market and the ensuing legal challenges cannot be understood without some background on the development of the energy market and the role of consumers in the process of market liberalization. The most recent energy market reform of 2019 again emphasizes the role of energy consumers in the liberalized energy market, and aims to increase their level of market integration. This is achieved through enabling new forms of participation, and subsequently, the creation of new categories of consumers.

A. Process of Market Liberalization

The first energy market liberalization reforms were introduced at the end of the 1980s, with the process beginning in earnest with the passing of the first Directive on the internal electricity market in 1996 (followed by a Directive on the internal gas market in 1998).¹¹ These Directives were reformed in 2003,¹² 2009,¹³ and 2019.¹⁴ Moreover,

¹⁰ G. Walker and R. Day, 'Fuel Poverty as Injustice: Integrating Distribution, Recognition and Procedure in the Struggle for Affordable Warmth' (2012) 49 *Energy Policy*, 69.

¹¹ 1996 *Electricity Directive* (n 3); Directive 98/30/EC concerning common rules for the internal market in natural gas [1998] OJ L 204/1 (hereafter 1998 *Gas Directive*).

¹² Directive 2003/54/EC concerning common rules for the internal market in electricity [2003] OJ L 176/37 (hereafter 2003 *Electricity Directive*); Directive 2003/55/EC concerning common rules for the internal market in natural gas [2003] OJ L 176/57 (hereafter 2003 *Gas Directive*).

¹³ 2009 *Electricity Directive* (n 7); 2009 *Gas Directive* (n 7).

¹⁴ 2019 *Electricity Directive* (n 5); 2019 *Gas Directive* (n 5). The regulatory reform of the 2019 *Gas Directive* is far more limited than the reform of 2019 *Electricity Directive*. There is, for example, no reference to 'active' consumers.

several other Directives governing, inter alia, the use of RES¹⁵ and Regulations governing cross-border electricity and gas trade supplemented the liberalization process.¹⁶ The latter Regulations are relevant as the EU not only aims to liberalize MS' energy markets, but at the same time also aspires to integrate these markets into one single market.

In seeking to create one IEM, drastic alterations to the very structure of the energy market became necessary. The network-bound energy sector has for several decades been organized around the concept of public undertakings or undertakings assigned with a *de facto* or *de jure* task of general economic interest, that is, the supply of electricity and/or gas to end-consumers 24/7.¹⁷ Hence, these undertakings (utilities) were generally exempted from the rules of free movement and competition in order to enable them to fulfil this particular task assigned to them. Market liberalization, however, required that this approach should be changed. EU policy thus aimed to (i) apply more stringently the key principles of free movement and competition as established by the TFEU (primary law); and (ii) to implement secondary legislation (e.g. Directives and Regulations) based on the same principles. In other words, the same principles apply to these public undertakings *ex ante* via Directives and Regulations, as well as *ex post* (via e.g. dispute settlement and merger control procedures).

It follows from the above that the Directives governing energy market liberalization aim to further competition within the EU energy market. When assessing the legal instruments governing the network-bound energy sector, it is necessary to distinguish between the grid and those who are connected to the grid. Whereas the grid is considered a natural monopoly and thus needs to be regulated in order to avoid any abuse of that monopoly position, those who are connected to the grid (producers and consumers) should in a liberalized market be given the opportunity to freely operate in that market.¹⁸ Energy producers should thus be exempted from any exclusive rights regarding the production and sale of their products.¹⁹ Similarly producers as well as consumers should be able to act (to buy and to sell) in a competitive market. Indeed, energy market liberalization in the EU is based on the concept of energy consumers having a

¹⁵ Most recently through Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources [2018] OJ L 328/82 (hereafter *2018 Renewable Energy Directive*).

¹⁶ For electricity: Regulation (EC) 714/2009 on conditions for access to the network for cross-border exchanges in electricity [2009] OJ L 211/15, amended by Regulation (EU) 347/2013 on guidelines for trans-European energy infrastructure [2013] OJ L 115/39 and Regulation 543/2013 on submission and publication of data in electricity markets [2013] OJ L 163/1.

For gas: Regulation (EC) 715/2009 on conditions for access to the natural gas transmission networks [2009] OJ L 211/36, amended by Commission Decision 2010/685/EU [2010] OJ L 293/67, Commission Decision 2012/490/EU [2012] OJ L 231/16, Regulation (EU) 347/2013 on guidelines for trans-European energy infrastructure [2013] OJ L 115/39, Commission Decision (EU) 2015/715 [2015] OJ L 114/9 and Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action [2018] OJ L 328/1 (hereafter *2018 Governance Regulation*).

¹⁷ Consolidated Version of the Treaty on the Functioning of the European Union [2012] C 326/01 (hereafter *TFEU*), Article 106.

¹⁸ *The IEM* (n 2): 'Monopolies of electricity distribution to consumers' and 'Exclusive rights of the use of distribution and interconnecting transmission systems, particularly insofar as this affects consumers' ability to obtain supplies from sources other than their allotted distributor' were both identified as 'suggested priorities to address'.

¹⁹ *Ibid.*, 66: 'Decomartmentalization of the natural gas networks' is listed under 'suggested priorities in the natural gas sector'.

free choice of supply, meaning that they (in principle) can switch supplier and be part of a process that leads to lower energy prices and better services.²⁰ In order to achieve this goal, energy networks and network activities had to be separated (i.e. unbundled) from the commercial activities (i.e. production and supply).²¹

B. Types of Consumers pre-2019

While the EU has sought to grant specific rights to energy consumers, access to these rights has not always been universal. EU legislation long utilized the term ‘eligible consumer’ as a means of specifying who was to be entitled to freely choose their supplier and conclude supply contracts—with ineligible customers having no such rights at EU-level. By specifying minimum consumption thresholds, the 1996 Electricity Directive and the 1998 Gas Directive only required MS to open up their markets to large consumers.²² However, these thresholds were merely minimum requirements, and therefore the degree to which markets were opened was not fully harmonized. The legal reforms of 2003 put an end to this approach, establishing that all non-household customers were to become eligible consumers (for the purposes of the establishing rights contained in the Directives) as of July 2004, and subsequently all customers (including households) were to become eligible by July 2007.²³ The legal reforms of 2009 did not change the concept of eligible customers and restated that all customers are eligible—something that in effect rendered the term ‘eligible’ redundant. All references to eligible customers were finally removed in the 2019 Electricity Directive.²⁴ However, as one distinction ceased to be, a new one came into existence, with the Directive introducing a new category of consumers, namely ‘active customers’ (see further below in section II.C).

While all consumers are now entitled to freely choose their supplier, there are still a number of different categories of customers (with different applicable protective legal frameworks) at EU level. The most general distinction made is that between ‘*wholesale or final customers*’.²⁵ Whereas wholesale customers are customers purchasing electricity and/or gas for the purpose of resale,²⁶ final customers purchase them for own use.²⁷

For the purpose of this chapter, the category of ‘final customers’ is particularly pertinent. From a technical perspective, the types of final customers can generally be distinguished by two characteristics, namely the quantity of consumption (volume) and

²⁰ 2019 Electricity Directive (n 5), recital 11.

²¹ Under EU law there are several unbundling regimes. See, inter alia, M.M Roggenkamp, et al., *Energy Law in Europe—National, European and International Regulation* (Oxford University Press, 3rd edn, 2016) (hereafter Roggenkamp, *Energy Law in Europe 3rd edn*).

²² 1996 Electricity Directive (n 3), Article 19(1) and Article 19(2); 1998 Gas Directive (n 11), Article 18(2).

²³ 2003 Electricity Directive (n 12), Article 21(1); 2003 Gas Directive (n 12), Article 23(1).

²⁴ Please note that this distinction still exists in the Gas Directive.

²⁵ 2019 Electricity Directive (n 5), Article 2(1); 2009 Gas Directive (n 7), Article 2(24).

²⁶ Ibid., Article 2(2); *ibid.*, Article 2(29).

²⁷ Ibid., Article 2(3); *ibid.*, Article 2(27).

the size of the connection (capacity). This translates, into the categorization of ‘large’ and ‘small’ consumers. The energy market Directives define these categories as ‘non-household customers’ and ‘household customers’. A non-household customer is ‘[...] a natural or legal person who purchases electricity / natural gas that is not for own household use, [the electricity Directive additionally explicates:] including producers, industrial customers, small and medium-sized enterprises, businesses and wholesale customers’.²⁸ Household customers are defined as ‘customers purchasing natural gas / electricity for his own household consumption, [the electricity Directive additionally explicates:] excluding commercial or professional activities’.²⁹ The latter category may nevertheless include small enterprises if these enterprises employ less than fifty persons and their annual turnover or balance sheet does not exceed EUR 10 million. Clearly, the legislation does not seek to make distinctions based on technical differences alone (large versus small consumption), instead seeking to infer the purpose for which the energy is required. Whereas non-household customers are final customers and use energy for commercial purposes, household customers are consuming energy for the purpose of private and individual well-being. This distinction is relevant as the protective legal framework aims to provide safeguarding measures exclusively for the latter purpose. The specific measures are further outlined in section III below.

C. 2019: An Expanded Role for Consumers

In addition to these pre-existing distinctions, the 2019 Electricity Directive provides for an additional class of consumers by institutionalizing the phenomenon widely referred to as ‘prosumers’.³⁰ Prosumers are ordinarily understood as being consumers who also produce electricity.³¹ This particular category of consumers had not previously been explicitly recognized at an EU level and therefore uncertainty existed as regards the rights and protections that would enable these prosumers across the EU to participate in the market. This changed with the introduction of the 2019 Electricity Directive, which uses the term ‘active customers’ instead of ‘prosumers’ and defines the class as follows:

‘active customer’ means a final customer, or a group of jointly acting final customers, who consumes or stores electricity generated within its premises located within confined boundaries or, where permitted by a MS, within other premises, or who sells self-generated

²⁸ Ibid., Article 2(5); ibid., Article 2(26).

²⁹ Ibid., Article 2(4); ibid., Article 2(25).

³⁰ Sometimes also referred to as ‘self-consumers’, see for different regulatory approaches on prosumers for example C. Banet, ‘Prosumer Legislation in Norway—A First Step for Empowering Small Energy Consumers’; L. Diestelmeier and D. Kuiken, ‘Legal Framework for Prosumers in the Netherlands’; and M. Lang, ‘Prosumer Legislation in Germany’, in M.M. Roggenkamp and C. Banet (eds) *European Energy Law Report XII* (Intersentia, 1st edn, 2018).

³¹ N. Šajn, *Electricity ‘Prosumers’* (European Parliament Research Service, 2016).

*electricity or participates in flexibility or energy efficiency schemes, provided that those activities do not constitute its primary commercial or professional activity;*³²

That the term ‘active customers’ was preferred to ‘prosumers’ gives insight into the minds of legislators in this area. As the definition makes clear, the class is far wider than ‘consumers who also produce electricity’. Besides producing electricity, being an active customer may entail storing electricity or participating in energy efficiency schemes. The legal reform can therefore be seen as enabling prosumers to become market participants also by means of demand flexibility, that is, the process where consumers act upon incentives to adjust their demand. Through this, active customers may be able to contribute to the development of new markets for demand flexibility, which becomes increasingly important for the integration of RES.³³ However, with past experiences having shown that not all consumers are even able to participate in the market, it must be questioned whether the restructuring of the EU energy market to include a new tier (with high entry costs) atop the existing market may exacerbate rather than mitigate these issues. Such concerns are often expressed in the ‘utilities death spiral’ argument.³⁴ These arguments contend that, as those who can save money invest in technology that allows them to save money, the price differences (as the customer base dwindles) become more and more pronounced. Within the context of demand flexibility, it can be readily identified that participation in the market is likely to require initial investments, meaning that poor and vulnerable customers are at risk of being excluded from these markets and reaping subsequent benefits. As this chapter argues, this might require a new focus on energy poverty and energy (in)justice. The following section outlines the legal framework on the protection of energy consumers.

III. EU Legal Framework on the Protection of Energy Consumers

While the liberalization of the energy sector granted consumers a central role by giving them the freedom to choose their supplier, it also required explicit protection measures to be put into place for those consumers who may be at risk due to an inequality of bargaining power within the energy sector. This is especially the case for small (household) customers, who—in spite of a liberalized market setting, which theoretically should provide competitive market prices and better services—remain in a weak negotiating position and are therefore considered to be in need of a protection regime. The EU legal framework thus requires MS to implement several instruments in this regard. As a general rule MS are called upon to ensure high levels of consumer protection and thus to take measures to increase transparency as regards contractual terms and conditions,

³² 2019 *Electricity Directive* (n 5), Article 2(8). The moniker ‘renewables self-consumers’ is preferred within the 2018 *Renewable Energy Directive* (n 5), Article 2(14).

³³ M. Kubli, M. Loock, and R. Wüstenhagen, ‘The Flexible Prosumer: Measuring the Willingness to Co-create Distributed Flexibility’ (2018) 114 *Energy Policy*, 540.

³⁴ W. Boyd, ‘Public Utility and the Low-Carbon Future’ (2014) 61 *UCLA Law Review*, 1614, 1675.

and to establish adequate dispute settlement mechanisms.³⁵ In addition, some specific instruments apply, which range from specific protections under EU energy law to general EU consumer protection law. These will be discussed in the following subsections.

A. EU Energy Law: Public Service Obligations

One of the most prominent measures for protecting energy consumers, which was introduced in the first set of Directives, is the option for MS to impose public service obligations (PSO) on electricity and gas undertakings, that is, undertakings which carry out a task that can be defined as a general economic interest, such as the continuous and non-discriminatory supply of energy to small customers.³⁶ Such PSOs 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 also climate protection. They have to be clearly defined, transparent, non-discriminatory, and verifiable and at the same time guarantee equality of access for EU undertakings to national consumers.³⁷

Several MS made use of the opportunity to apply a PSO in order to regulate the price of energy supply for small consumers (through retail tariffs) in order to ensure that these consumers would never be in a position that they would pay tariffs they could not afford. Examples of such regulated supply tariffs based on a PSO can, amongst others, be found in Denmark, France, and Spain.³⁸ However, regulated supply tariffs have a negative impact on market liberalization efforts as they foreclose competition and consumers have no incentive to switch between suppliers. As an effort to further competition, the 2019 Electricity Directive now explicitly requires that supply prices (as a general rule) should be market-based.³⁹ The only instance in which an exception to this rule may be made is for the benefit of ‘energy poor or vulnerable household customers’—and even in such instances any public interventions must pass a strict five-stage test essentially assessing the necessity and proportionality.⁴⁰

B. EU Energy Law: Universal Service and Supplier of Last Resort

The 2003 Electricity Directive introduced some additional protections for small customers. MS were required to ensure that all household customers and, if appropriate, small enterprises, shall enjoy universal service, which is defined as the right to be supplied with electricity of a specified quality within their territory at reasonable, easily,

³⁵ 2019 *Electricity Directive* (n 5), Article 26 and 2009 *Gas Directive* (n 7), annex I, 1(f).

³⁶ This provision was included in Article 3 of the Electricity and Gas Directives from 1996/1998 until 2009.

³⁷ This passage is replicated verbatim in 2019 *Electricity Directive* (n 5), Article 9(2).

³⁸ See chapters on Denmark, France, and Spain in: Roggenkamp, *Energy Law in Europe 3rd edn* (n 21).

³⁹ 2019 *Electricity Directive* (n 5), Article 5.

⁴⁰ *Ibid.*, Article 5(4).

and clearly comparable and transparent prices. Moreover, distribution companies have the obligation to connect (all) customers to their network under regulated terms, conditions, and tariffs.⁴¹ In addition, the Directives provide that MS may appoint a supplier of last resort (SoLR).⁴² However, in the absence of a definition of what a SoLR entails, MS have in practice applied this concept in two different manners. The concept of SoLR can refer to the concept of a default supplier and as such be used by MS in situations where customers have not chosen a specific supplier, or as an alternative supplier in case an existing supplier is no longer able to supply, for example, due to bankruptcy or the revocation of a supply licence. Whereas several examples can be found of MS applying a SoLR as a default supplier,⁴³ examples of SoLR acting in cases of suppliers going bankrupt can only be found in the Netherlands, Belgium, Germany, and the UK.⁴⁴ The 2019 Electricity Directive changes little with regards SoLR(s), a tacit (though not express) approval of the many ways in which MS have chosen to utilize the SoLR structure.

C. EU Consumer Protection Law

The provisions governing consumer protection in the Electricity and Gas Directives cannot be considered in isolation, as Directive 2011/83/EU (amending Directive 93/13/EEC) on Consumer Rights⁴⁵ also provides rules on the protection of energy consumers.⁴⁶ This Directive is based on the principle of maximum harmonization, and thus prevents MS from enacting or maintaining stricter rules.⁴⁷ Although sector-specific measures (such as those included in the Electricity Directive) apply without prejudice to Directive 2011/83/EC, the provisions of the general Consumer Protection Directive would still prevail in the rather unlikely case of a conflict.⁴⁸ In practice the situation can be even more complicated, as in addition to the EU Directives and domestic consumer protection legislation, national civil laws (which often contain general rules on the conclusion of contracts and the principle of good faith) must also be considered.

This complexity became evident in *RWE Vertrieb v Verbraucherzentrale Nordrhein-Westfalen*,⁴⁹ wherein the European Court of Justice (ECJ) examined the compatibility of

⁴¹ 2009 *Electricity Directive* (n 7), Article 3(3); replicated in 2019 *Electricity Directive* (n 5), Article 27(1).

⁴² 2009 *Gas Directive* (n 7), Article 3(3); 2019 *Electricity Directive* (n 5), Article 27(1).

⁴³ ACER/CEER, 'Annual Report for 2017' (n 6), 11.

⁴⁴ R. van 't Hof, 'Regulating Security of Energy Supply for End Consumers—A Comparative Overview', in M.M. Roggenkamp and C. Banet (eds) *European Energy Law Report XI* (Intersentia, 1st edn, 2017), 317–45.

⁴⁵ Directive 2011/83/EU on consumer rights [2011] OJ L 304/64 (hereafter *2011 Consumer Rights Directive*)

⁴⁶ The *2011 Consumer Rights Directive* applies as of 13 June 2014 and replaces Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L 372/31, Directive 93/13/EEC on unfair terms in consumer contracts [1993] OJ L 95/29, Directive 97/7/EC on the protection of consumers in respect of distance contracts [1997] OJ L 144/19 and Directive 1999/44/EC on certain aspects of the sale of consumers goods and associated guarantees [1999] OJ L 171/12.

⁴⁷ See for the different harmonization methods Chapter 5 section C5 of M. Roggenkamp, et al., (eds), *Energy Law in Europe—National, EU and International regulation* (OUP, 1st edn, 2001).

⁴⁸ B. Jan Drijber, 'EU Case Law Applying to the Energy Sector and the Protection of Consumers, Environment and Investments: A Review', in M.M. Roggenkamp and H. Bjornebye (eds) *European Energy Law Report X* (Intersentia, 1st edn, 2014), 11–27.

⁴⁹ *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.* [2013] ECLI:EU:C:2013:180 (hereafter *RWE Vertrieb v Verbraucherzentrale Nordrhein-Westfalen*)

price variation clauses with the general rules on consumer protection contained within Directive 93/13/EEC (now Directive 2011/83) and the 2003 Gas Directive. Generally, Article 1(2) of Directive 93/13/EEC stated that contractual terms which reflect mandatory, statutory, or regulatory provisions of national law are not subject to the Directive, as there is a presumption that the national legislature struck a balance between all the rights and obligations of the parties to a certain category of contracts. However, that this principle does not always prevail was proven in *RWE Vertrieb v Verbraucherzentrale Nordrhein-Westfalen*, highlighting a resistance on the part of the ECJ to narrow the scope or effect of the Consumer Protection Directive. Although this case dealt with gas supply contracts, it has a wider application and potentially also applies to electricity contracts owing to the basis of the ruling being that energy consumers are in a weak position vis-à-vis suppliers both as regards bargaining power and level of knowledge.

IV. Identifying Energy Poverty and Protecting Vulnerable Customers

The above has shown that a special regime applies to small customers in order to protect them from possible market abuses. However, in practice, these consumers' circumstances may differ, and they are faced with a variety of challenges. Some will be able to act in a liberalized market, while others will only be able to do so to a lesser extent or not at all. The latter category is often regarded as vulnerable customers. Such small and vulnerable customers may be more prone to 'energy poverty'.

A. Vulnerable Customers

The 2003 Energy Market Directives added a requirement for MS to '*take appropriate measures to protect final customers, and shall in particular ensure that there are adequate safeguards to protect vulnerable customers, including measures to help them avoid disconnection*'.⁵⁰ As the concept of vulnerable customer is not clearly defined at EU level, MS have a discretionary power to establish their own definitions. Monitoring reports on the implementation of the concept of 'vulnerable customers' at MS level conclude that the concept depends on a wide range of factors such as socio-demographic attributes, for example, age or health status, or circumstances, such as single parenthood or unemployment.⁵¹ An indication of the breadth of these discrepancies can be illustrated by contrasting the share of vulnerable customers within each MS (9.9 per cent of French consumers were considered 'vulnerable' in 2016 compared to 0.7 per cent in Poland and 0.8 per cent in Hungary),⁵² as well as the wide variety of measures deemed necessary to

⁵⁰ 2003 *Electricity Directive* (n 12), Article 3(3); 2003 *Gas Directive* (n 12), Article 3(5).

⁵¹ ACER and CEER, 'Annual Report on the Results of Monitoring the Internal Electricity and Natural Gas Markets in 2016' (ACER/CEER 2017), 36 (hereafter ACER/CEER, 'Annual Report for 2016').

⁵² *Ibid.*, 35.

protect vulnerable customers.⁵³ Besides defining the concept of a vulnerable customer, each MS must also ‘take appropriate measures, such as providing benefits by means of their social security systems to ensure the necessary electricity supply to such vulnerable customers, or to provide support for energy efficiency improvements.’⁵⁴ Such measures ‘shall not impede the effective opening of the market [...] or market functioning and shall be notified to the Commission [and] [...] may include measures to be taken within the general social security system’.⁵⁵

The 2019 Electricity Directive appears to take a step further in a definitional sense, setting out in Article 28(1) the factors that ought to be considered when defining the range of the class: ‘*The concept of vulnerable customers may include income levels, the share of energy expenditure of disposable income, the energy efficiency of homes, critical dependence on electrical equipment for health reasons, age or other criteria.*’ It is doubtful, however, whether the guidance set out in Article 28(1) of the 2019 Electricity Directive will be sufficient to corral MS into updating their definitions. The only aspects of the passage that act as binding obligations on MS are to ‘take appropriate measures’ and to ‘define the concept of vulnerable customers.’ The guidance in the sentence following is only that (wording like ‘may include’ and ‘or other criteria’ are the death knell for enforceability), and indeed directly contradicts the 2014 Vulnerable Consumer Working Group (VCWG) Guidance Document. The Guidance Document pushed for the class to be defined more by reference to circumstances rather than socio-demographic properties, stating that an approach which ‘*seeks to avoid assumptions that particular “groups” of consumers are by definition vulnerable, such as old people*’ should be avoided.⁵⁶

The discrepancy between definitions can best be illustrated by comparing the definitions of two neighbouring MS, the UK and Ireland. UK energy regulator Ofgem’s definition of vulnerability broadly follows the VCWG Guidance Document, with reference to a combination of circumstances and characteristics, avoiding assumptions of vulnerability within particular groups:

*Our definition of vulnerability is when a consumer’s personal circumstances and characteristics combine with aspects of the market to create situations where he or she is: (a) Significantly less able than a typical consumer to protect or represent his or her interests in the energy market; and/or (b) Significantly more likely than a typical consumer to suffer detriment, or that detriment is likely to be more substantial.*⁵⁷

In Ireland, meanwhile, explicit references to characteristics (as a sole qualifier) continue to exist:

⁵³ ACER/CEER, ‘Annual Report for 2017’ (n 6), 16.

⁵⁴ 2019 Electricity Directive (n 5), Article 28(2).

⁵⁵ 2019 Electricity Directive (n 5), Article 28(2); 2009 Gas Directive (n 5), Article 3(4).

⁵⁶ Vulnerable Consumer Working Group (hereinafter VCWG), ‘Vulnerable Consumer Working Group Guidance Document on Vulnerable Consumers, November 2013’ (VCWG 2014), 7, 11.

⁵⁷ Office of Gas and Electricity Markets (hereinafter Ofgem), ‘Consumer Vulnerability Strategy’ (Ofgem 2013), 4.

*a household customer who is: (a) critically dependent on electrically powered equipment, which shall include but is not limited to life protecting devices, assistive technologies to support independent living and medical equipment, or (b) particularly vulnerable to disconnection during winter months for reasons of advanced age or physical, sensory, intellectual or mental health. Advancing age is taken to be a person of pensionable age (66 years or above) living alone, with another vulnerable person or with minors.*⁵⁸

One may note that while Queen Elizabeth II may not be considered a vulnerable customer in the UK, she would be considered vulnerable in Ireland (if living alone or with only her husband).

B. Energy Poverty

As mentioned previously, energy poverty is considered a ‘growing problem’ within the EU, with the issue of energy poverty already acknowledged in the 2009 Directives. Recitals 50 and 53 of the 2009 Gas Directive and the 2009 Electricity Directive clearly state that MS should ‘[. . .] take appropriate measures, such as formulating national energy action plans [. . .] providing for support for energy efficiency improvements, to address energy poverty where identified, including in the broader context of poverty’.⁵⁹ The 2019 Electricity Directive goes a step further, emphasizing the need for a stronger focus on energy poverty and vulnerable customers compared to its predecessor. It includes various new recitals and articles acknowledging the existence of energy poverty among vulnerable customers.⁶⁰

Article 29 of the 2019 Electricity Directive requires MS to (i) define a set of criteria for the purposes of measuring energy poverty; (ii) continuously monitor the number of households in energy poverty; and (iii) report on the evolution of energy poverty and measures taken to prevent it to the Commission every two years as part of their Integrated National Energy and Climate Progress Reports, in accordance with Article 21 of the 2018 Governance Regulation. This provision overlaps with Article 3(3)(d) of the 2018 Governance Regulation, which requires MS to identify the numbers of customers in energy poverty and therefore are required to ‘[. . .] establish and publish a set of criteria, which may include low income, high expenditure of disposable income on energy and poor energy efficiency’.⁶¹ The focus on economic aspects (when establishing and publishing a set of criteria) is noteworthy, and indicates which aspects are considered pertinent when defining energy poverty—solely economic, none social. More generally, the above passage also showcases the 2019 Electricity Directive’s recognition of the need to introduce measures to reduce energy poverty. However, when read in conjunction with other provisions of the 2019 Electricity

⁵⁸ S.I. No. 463/2011 European Communities (Internal Market in Electricity and Gas) (Consumer Protection) Regulations of 2011 s 2(1).

⁵⁹ 2009 Electricity Directive (n 7), recital 53; 2009 Gas Directive (n 7), recital 50.

⁶⁰ 2019 Electricity Directive (n 5), recital 59 and recital 60.

Directive (namely those that remove some of the previous weapons in a MS's arsenal to protect consumers, such as the phasing out of regulated retail prices via a PSO), a clear dichotomy emerges. It appears that while the EU is extremely eager to get to grips with the problem of energy poverty, it no longer countenances interferences in the market to achieve this goal. This broadly follows the EU's approach across other areas of energy law,⁶¹ wherein market-based solutions have been strongly preferred to State-led solutions.

In order to take measures against energy poverty, it is necessary to identify and measure it. Although the 2019 Electricity Directive attempts to provide more clarity regarding the concept and the extent of energy poverty in the EU, getting to grips with how to define and address the issue is still a major challenge as the concept of energy poverty is multifaceted, may vary across MS, and cannot be captured by a few indicators.⁶² Energy poverty, or fuel poverty, is in practice a complex interaction between issues like high energy bills, poor energy efficiency, and low income. Moreover, these factors are likely to amplify each other and thereby further create conditions exacerbating energy poverty.⁶³ Attempts to capture the extent of energy poverty throughout the EU have shown significant differences between MS both with regard to the definition and the severity of the problem.⁶⁴ As of 2017, only five MS national regulatory authorities reported as having a definition for energy poverty.⁶⁵

V. EU Energy Market Reform: Extending Consumer Empowerment

The reforms of the EU energy market legislation (more specifically the 2019 Electricity Directive and the 2018 Renewable Energy Directive) reiterate the important role of energy consumers for a liberalized market. In addition to the existing empowerment of consumers, which primarily consists of their right to switch supplier, the new Directives aim to incentivize consumers to participate in the market not only as consumer, but also as producer, demand-response service provider, or energy community member. This may raise the level of participation in the market, offering new benefits to consumers. However, as this chapter argues, this might also require a new focus on energy poverty and vulnerable customers. The following sections outline the ways in which consumers can participate in the market, varying from switching to developing energy communities

⁶¹ Such as in capacity auctions for cross-border (interconnector) capacity.

⁶² Íñigo del Guayo, Chapter 3 of this book.

⁶³ S. Pye and A. Dobbins, 'Energy Poverty and Vulnerable Consumers in the Energy Sector Across EU: Analysis of Policies and Measures' (2015) INSIGHT_E, 16.

⁶⁴ H. Thomson and C. Snell, 'Quantifying the Prevalence of Fuel Poverty Across the European Union' (2013) 52 *Energy Policy*, 563–72.

⁶⁵ ACER/CEER, 'Annual Report for 2017' (n 6), 17.

A. Switching Procedures

One of the key elements of market liberalization is the right of consumers to choose their supplier and thus also to switch suppliers. In order to facilitate switching, special measures have been introduced to ensure that small (household) consumers can switch without unnecessary obstacles. These measures are twofold. Firstly, they provide as a basic rule that all consumers have the right to a contract with a supplier. Secondly, they govern the switching process, which entails that one supply contract is replaced by a contract with another supplier. As the market liberalization evolved, the provisions governing the supply contract and the switching process have been expanded. Hence, the number of provisions in the 2019 Electricity Directive has increased.

The supply contract governs the relationship between consumer and supplier. It therefore needs to specify the identity and address of the supplier regardless of the MS where it is registered, the services they provide, the duration of the contract, information on tariffs, maintenance charges and compensation, and refund mechanisms.⁶⁶ All conditions need to be fair and well known in advance,⁶⁷ and there should be adequate notice of any intention to modify the contract.⁶⁸ Moreover, consumers need to be offered a wide and non-discriminatory choice of payment methods, including prepayment methods.⁶⁹ The 2019 Electricity Directive also contains a requirement for suppliers to prominently display on each bill issued the end date of the contract (if applicable); the final customer's switching code.⁷⁰ As the right of consumers to switch supplier is essential for the development of a competitive market, the directives try to minimize any barriers to switching. Switching is not only promoted by providing transparency as regards the contractual conditions but also by providing consumers with independent information on the available energy supply offers. MS are therefore required to inform small consumers of at least one independent comparison tool (e.g. a website).⁷¹ MS are required to ensure that such a switching process should take place within a reasonable time. This means that the total duration of the process should not exceed three weeks from the date of the customer's request.⁷² Last but not least, when changing supplier, customers will not be charged for changing supplier⁷³ and are entitled to receive a final closure account.⁷⁴

Despite the acknowledgement that switching supplier is essential for the development of a competitive market, switching rates (on the whole in the EU) have been rather low, with wide variations between MS. In 2017, the highest switching rate of

⁶⁶ 2019 Electricity Directive (n 5), Article 10(3); 2009 Gas Directive (n 7), annex I, 1(a).

⁶⁷ Ibid., Article 10(2); *ibid.*, annex I, 1(a).

⁶⁸ Ibid., Article 10(4); *ibid.*, annex I, 1(b).

⁶⁹ Ibid., Article 10(6); *ibid.*, annex I, 1(d).

⁷⁰ Ibid., annex I, 1.2(f). No equivalent provision was introduced by the 2019 Gas Directive.

⁷¹ 2019 Electricity Directive (n 5), Article 14 and annex I, 1.2(i).

⁷² See also recital 34, which also states that by the year 2026 the technical switching process should be completed within 24 hours on any working day.

⁷³ 2019 Electricity Directive (n 5), Article 10(8); 2009 Gas Directive (n 7), annex I, 1(e).

⁷⁴ Ibid., Article 10(12); *ibid.*, annex I, 1(j).

household consumers for electricity was reported by Norway (18.8 per cent) and the lowest was in Bulgaria (0.002 per cent). Within the gas market, the highest switching rate could be found in the United Kingdom (18.6 per cent), while Luxembourg had the lowest switching rate (0.18 per cent).⁷⁵ With more people being removed from regulated tariffs (as detailed in III.A) and the additional requirements in the 2019 Electricity Directive, it can be expected that the number of customers switching suppliers may begin to increase.

B. Extended Market Participation: ‘Active Customer’ and ‘Citizen Energy Communities’

One of the most prominent (and more novel) approaches taken by the 2019 Electricity Directive to foster consumer empowerment is by enabling their participation in the market not only as consumers, but also as ‘active customers’ or via ‘citizen energy communities’ (CEC).⁷⁶ Neither concept existed before in EU legislation. Their emergence in the reform of 2019 can not only be explained by the aim to further empower consumers, but also by the need to find new solutions to integrate increasing amounts of variable RES in the system. Matching variable RES with consumption requires demand flexibility. Demand flexibility can be defined as the ability to adjust consumption according to a specific signal, for example a financial incentive to consume or not consume electricity at a specific time.⁷⁷ The 2019 Electricity Directive combines the aim of furthering liberalization by empowering consumers via, for example, demand-response schemes and CECs, and the aim to accelerate energy transition by integrating RES efficiently in the system.

Incentivizing demand-flexibility also of small (household) customers is one of the objectives of the 2019 Electricity Directive⁷⁸ and reflected in the potential activities of ‘active customers’ and CECs. One of the possible activities of ‘active customers’ is explicitly mentioned as *‘participat[ing] in flexibility or energy efficiency schemes’*. While this is not explicitly mentioned for CECs, the potential activities, atop of generation, distribution, supply, and consumption, are very broad, that is, *‘[...] aggregation, energy storage, energy efficiency services or charging services for electric vehicles or provide other energy services’*. This opens new dimensions for consumers to participate in the market, and thus to gain potential empowerment beyond the possibility of switching supplier.

However, both ‘active customers’ and CECs are not defined as being purely commercially driven actors. ‘Active customers’ are not allowed to have their activities as *‘primary commercial or professional activity’* and a CEC is, inter alia, defined as an entity which:

⁷⁵ CEER, ‘Performance of European Retail Markets in 2017’ (CEER 2018) 31–3.

⁷⁶ 2019 Electricity Directive (n 5), Article 2(8) and 2(11). For ‘active customers’ see section II.C of this chapter, and for energy communities see Annalisa Savaresi, Chapter 5 of this book.

⁷⁷ Smart Grid Task Force—Expert Group 3—Regulatory Recommendations for Smart Grids Deployment, ‘Regulatory Recommendations for the Deployment of Flexibility’ (2015), 12.

⁷⁸ 2019 Electricity Directive (n 5), recital 39.

[...] *has for its primary purpose to provide environmental, economic or social community benefits to its members or shareholders or to the local areas where it operates rather than to generate financial profits; [...]*⁷⁹

While the exact implementation is again left to MS, it is clear that CECs may prove vital not only as regards electricity generation and supply, but as a vehicle for fulfilling a broader purpose—one which may also very well relate to ‘environmental, economic or social community benefits’. This relates the dimension of empowerment to that of potential protection via communities. The next section focuses on the relation between empowerment and protection.

C. Relation between Empowerment and Protection

The 2019 Electricity Directive includes potential new drivers for consumer empowerment beyond switching suppliers. However, it also creates further distinctions within the group of customers, ‘active’ and ‘passive’ customers; and members of a CEC, and those who are not members. Subsequently, this might result in new challenges regarding the appropriate protection level for these different categories.

The 2019 Electricity Directive clearly strives to ensure that ‘*all customer groups (industrial, commercial and households) [...] have access to the electricity markets to trade their flexibility and self-generated electricity*’.⁸⁰ However, even if all customers had access to the market, their ability to trade their flexibility depends on the technologies at their disposal or CEC membership. As such, participation in demand-response schemes and CEC membership presupposes an investment of time, expertise, and money from the consumer. This raises the question whether the provisions for ‘activating’ consumers and CECs are promoting an inclusive approach or whether vulnerable customers might be excluded from these new forms of participation.

It is clear that a customer, or ‘active customer’ with more flexibility technologies (for example an electric vehicle, a home battery, different ‘smart home devices’, and own generation) has a higher-quality flexibility profile than a customer who does not have access to such technologies. In an electricity sector which implements dynamic prices for household customers (and where regulated retail prices are abolished), customers with a low-quality flexibility profile might thus be placed at a considerable disadvantage in benefitting from the ‘activating’ aspirations of the 2019 Directive. Indeed, they may even increasingly suffer from peak pricing, which they are unable to escape due to an inability to vary demand in the same manner as other final customers. As a consequence, a fragmented market may emerge, with different tiers correlating with the range of technologies at final customers’ disposal. In such a system, customers can be distinguished based on their ability to engage in demand-response schemes, determined by

⁷⁹ 2019 Electricity Directive (n 5), Article 2(11).

⁸⁰ 2019 Electricity Directive (n 5), recital 39.

their ‘flexibility profile’. The question then is whether the existing categorization of customers is in fact useful in an electricity sector which steers towards the integration of demand flexibility. This question is especially relevant for guaranteeing the protection of vulnerable customers and the prevention of energy poverty, as the need for protection might be considerably different among the different categories.

Yet, as the 2019 Electricity Directive phases out the option for MS to protect consumers by implementing regulated retail prices (see section IV.B) it also opens another possible approach to protection via empowerment, that is, a community energy approach:

*[...] Community energy can also advance energy efficiency at household level and help fight energy poverty through reduced consumption and lower supply tariffs. Community energy also enables certain groups of household customers to participate in the electricity markets, who otherwise might not have been able to do so. Where they have been successfully operated such initiatives have delivered economic, social and environmental benefits to the community that go beyond the mere benefits derived from the provision of energy services. [...]*⁸¹

There is a distinct possibility that this could include the protection of vulnerable customers and the prevention of energy poverty. However, as this is not enshrined in the definition (but left as an option at the discretion of the MS) there is no guarantee that MS will take this approach. Against the background of these new developments, the following section discusses whether the energy market reform in the EU also requires a new focus on energy poverty and (in)justice).

VI. Conclusion—A New Focus on Energy Poverty and Energy (in)Justice?

This chapter has analysed the roles of small (household) consumers in a liberalized EU energy market. Consumer rights and protections vary across MS. Similarly, the concept of vulnerable customers differs per MS. Finally, it has been noted that the phenomenon of ‘prosumers’ has found its way into EU energy law. These prosumers may, however, still be classified as vulnerable customers, and so there is a potential conflict between consumer participation and protection of small consumers in the energy sector. This twofold role also suggests that consumers, in particular small consumers (which generally includes households), might develop in two categories, one which is able to ‘take ownership of and benefit from new technologies’ and another category which is not able to do so and remains vulnerable to or even suffers from energy poverty. The question is whether the renewed focus on energy poverty and injustice in the 2019 Electricity Directive sufficiently addresses this issue. Follow-up issues are, for example, whether

⁸¹ 2019 Electricity Directive (n 5), recital 43.

‘active’ and thus ‘fully empowered’ customers are in need of the same protections as consumers who remain passive; or whether members of a CEC can rely on protection beyond the community, for example through a SoLR. Essentially, the opening of new categories of ‘empowered’ consumers also requires rethinking the relevant protection regime. It remains to be seen how the MS implement the new provisions and whether emerging realities result in adequate legal responses.