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**Haber Hanan**

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# **Liberalizing markets, liberalizing welfare?:**

## **Economic reform and social regulation in the EU's electricity regime**

**Hanan Haber**

School of Public Policy and Government, Hebrew University, Jerusalem, Israel;

Department of Government and Centre for Analysis of Risk and Regulation, London

School of Economics and Political Science, London, UK

### **ABSTRACT**

This paper argues that the European Union (EU) is promoting a liberal model of welfare through social regulation. Focusing on the liberalization and regulation of the electricity sector, the paper asks how and for what reasons social protection of vulnerable consumers was introduced into this sector, and what kind of welfare policy this represents. This paper shows that social measures grew substantially between the second and third directives on electricity sector liberalization (2005-2009), advanced by the European Parliament and reluctantly adopted by the Commission. This development runs counter to our understanding of electricity sector reform as focused primarily on liberalization, competition and efficiency. It is argued that the introduction of social protection advanced the process of economic reform, even when the measures introduced were in themselves inefficient. This social regulation, however, not only reflects a liberal, targeted and minimal understanding of welfare, but also pushes social policy in member states in this same direction.

**KEYWORDS:**

Electricity, Liberalization, Regulation, Utilities, Welfare

## **Introduction**

What are the dynamics of social policy and regulation at the European Union (EU) level? The common wisdom on the subject understands social issues as a matter for the member states, rather than for the EU. Lacking the ability and legitimacy to engage in social policy, the EU has been argued to focus instead on Pareto efficiency enhancing economic regulation (Majone 1993; Majone 1997). In other words, “market-making to the ... [European Community], market correcting to the member states” (Ferrera 2006: 114; Cram 1993). More recent literature has outlined two conflicting views of the social role of the EU: a constructive role, through social regulation, and a destructive role, undermining the bases for generous welfare states through negative integration, leading to convergence on a liberal model.

Conversely, this paper argues that the social role of the EU has increased through the use of social regulation in the context of economic reform, which has taken on a liberal welfare nature. This was done by the EU requiring that member states adopt a liberal understanding of welfare issues via social regulation, thus pushing generous types of welfare states closer to the liberal model. Thus, convergence on a liberal welfare model may occur through positive integration as well.

This dynamic is discussed with regards to EU electricity sector reform between 1996 and 2009. This paper asks how and for what reasons social measures were introduced into the process of electricity sector reform, and what kind of welfare policy this represents. The findings show regulation has been increasingly used to protect vulnerable consumers, going from very little social protection in the first directive (1996) to introducing the concept of energy poverty and requiring member states to adopt

national action plans to tackling this issue by the third directive (2009). This is social regulation of a liberal type, limited in scope, targeted at the most vulnerable consumers and citizens, and similar to provisions used in the UK context.

The research traces the policy process through which social regulation was introduced, focusing on the period of significant growth in the protection of vulnerable consumers leading up to the third directives (2005-2009). The method used is the collection and analysis of texts (including calls and responses for consultations, reports and legislation), published by EU level actors (the Commission, the European Parliament, the European Economic and Social Committee [EESC]), member states and other stakeholders.

This paper will progress in five parts. The first offers a theoretical framework while the second section includes a short review of electricity sector reform in the EU and the social measures introduced in the three directives. The third focuses on the policy process through which social regulation was strengthened between the second and third electricity directives. The fourth discusses these findings, their causes and their influence on European welfare states. The fifth section concludes.

## **1. Theoretical Framework**

Recent literature on European integration offers two conflicting views on the social role of the EU: a creative force, through a widening interpretation of social regulation (Majone 1993; Caporaso and Tarrow 2009), and a destructive force, reducing the capacities of generous welfare states, pushing them to converge on a liberal model (Scharpf 2010).

Social policy is often seen as too politically sensitive and historically entrenched to be addressed at the EU level. From an intergovernmental perspective, there is little incentive for member states to give up their competencies in this area (Moravcsik 1998), just as there is little room for agreement due to widely divergent models of national welfare states. As a result, “examples of EU social legislation have been few and far between” (Hix 2005: 256).

Similarly, a regulatory perspective on the EU (Majone 1993; 1997) precludes the development of EU level social policy, instead envisioning the EU as an “almost pure type of regulatory state”, lacking the ability to tax and spend and limited in terms of democratic legitimacy, engaging primarily in market making regulation, correcting for market failures (Majone 1997: 150).

However, Majone suggests a way forward in understanding social content at the EU level, distinguishing between social policy and social regulation. Social policy is fiscal welfare: taxing and spending and social insurance in the core sectors of the welfare state, such as health, old age and unemployment. Social regulation addresses issues such as health and safety, the environment and consumer protection. Majone limits the goals of social regulation to supporting economic efficiency and the functioning of the market. For example, consumer protection regulation might minimize information asymmetries between consumers and service providers, enhancing both consumer protection and economic efficiency. Majone argues that the EU may always be laggard on social policy, but it may become a leader in social regulation.

However, recent research has contested both the limited role of the EU in fiscal policy, and the limited role of social regulation. First, research has highlighted the

manner in which the EU is involved in areas considered the sole purview of member states, such as taxation, redistribution and service provision. the EU closely monitors and disciplines member states deficits through non majoritarian regulatory bodies (Schelkle 2009), and regulates member state's taxation more tightly than the United States (US) federal government regulates taxation by US states (Genschel and Jachtenfuchs 2011).

Second, the idea that social regulation only enhances efficiency has been contested, showing how regulation supporting economic activity (for example, regarding free movement of workers), has been expanded to include significant social content, which goes beyond the 'market failure' justification. This makes markets "work not only more efficiently but also more equitably" (Caporaso and Tarrow 2009: 598). For example, social regulation has expanded to include cross border social minimum benefits, facilitating the free movement of retired citizens, 'exporting' with them welfare benefits from their home country to other member states. Social regulation has thus expanded the transnational dimension of national welfare states, often despite the explicit political will of member states to the contrary (Martinsen 2005; Martinsen and Falkner 2013).

A different view on how the EU is affecting European social policy is offered by Scharpf (2010), arguing that economic liberalization is undermining the tenants of generous national welfare states. The starting point for this argument is the observation that "the EU is a powerful engine for liberalization" which "is not as good at making counteracting laws" that would create "compensating welfare programs, or protecting country-specific institutions that enhance welfare ..." (Greer 2011: 188). This is due to the institutional asymmetries between judicial and legislative policy making in the EU, and between negative and positive integration (Scharpf 2010). First, although the member

states control the legislative process, the court (and subsequently the Commission) can advance liberalization via running “roughshod over their preferences through case law” (Mabbett, 2013, p. 187). Second, the Court’s decisions are skewed towards promoting negative integration: removing barriers to cross border economic activity, with a focus on individuals’ rights.

As a result, there is an attrition of national institutional arrangements and national solidarity which form the basis for funding the more generous national welfare states. At the same time, there is little in the way of EU level policy which would counteract this trend. Scharpf argues the result will be a convergence of conservative and Scandinavian welfare states towards a liberal model (Scharpf 2010).

Similarly, negative integration constrains and transforms (‘straightjackets’) member state provision of social protection (Clifton 2014). For example, both the Dutch and Swedish models of public housing historically aimed at a wide range of recipients, but have had to modify provision in order to comply with EU pressures regarding competition with private housing providers. In the Netherlands this meant transforming public housing into more narrowly defined social housing aimed at low income households, while in Sweden this meant municipal housing companies were to act more ‘businesslike’ (Elsinga and Lind 2013: 969).

The above discussion leaves us with two images of the EU as a social policy maker. The first is the creative force of social regulation, and the other is the destructive force of economic liberalization. In the first image EU social regulation embeds markets in a social contexts, making them more efficient and more equitable. In the second image



it is destroying the institutions underlying generous continental welfare states, pushing them towards a residual, liberal model.

This paper argues for a synthesis of both views. It argues that EU social regulation has gone beyond (and in some cases against) market efficiency. However, as will be shown in the case below, the content of social regulation is that of a liberal, residual nature. In other words, the EU is pushing European welfare states towards a liberal welfare state model not only via negative integration, but through positive integration as well.

The above discussion also highlights conditions for the development of social regulation in the EU. First, the above leads to an expectation for social regulation as a response to a lack of capacity for social policy making, due either to political deadlock, lack of legal competence or legitimacy issues. Second, we might expect social regulation as a result of the drive towards economic liberalization. However, this regulation is not expected to be limited to instances of market failure, as social regulation has been shown to support liberalization in a wider sense (Caporaso and Tarrow 2009; Martinsen 2005).

This means that we still lack specific guidance on when social regulation may occur, as both a lack of capacity for social policy and a drive towards economic liberalization are fairly constant conditions found in the EU. We now turn to the case of social regulation in the electricity directives in order to determine the conditions under which this occurred in a specific policy sector.

## **2. Electricity sector reform in the EU**

In 1996, the European parliament passed the first electricity directive, beginning the liberalization the EU electricity markets (Levi-Faur 2004; Jakobsen 2010). An initial proposal of the directive was intended to undermine the monopoly structure of the sector and introduce competition, was met with opposition and skepticism by the majority of the member states, as these steps were incompatible with their local arrangements. After negotiations, the European parliament passed the directive, mandating liberalization of 25-33% of national markets between 1999 and 2003 (Eising 2002).

The first directive failed to deliver the expected results in terms of competition and integration of markets. Following informal negotiations in the European electricity regulators forum, a second directive was approved in 2003. This offered more detailed rules, reduced room for interpretation by national governments, regulation of access to infrastructure, the mandatory establishment of regulatory authorities, and the regulation of cross border trade (Vasconcelos 2009). The 2003 directive mandated full retail market opening by the end of 2007 (Pollitt 2009).

When the 2003 directive was approved, “[t]wo major sets of events created discomfort among consumers, regulators and policy-makers”. First, energy prices rose substantially: while this can be related to a rise in oil prices, the rise in energy prices was seen as a failure of liberalization, especially since the profits of privatized utilities also increased. Second, in 2003 millions of Europeans experienced blackouts, raising concerns regarding security of supply (Vasconcelos 2009: 330–331).

Consumer dissatisfaction is reflected in consumer survey data collected by the Commission, reflecting the Commission’s concern over consumer engagement and satisfaction from with the reform. For example, survey data from 2006-2008 indicates

high levels of consumer spending on electricity. The data also indicated that consumers were not taking on an active role in the market, as only 8% switched an electricity supplier (European Commission 2009).

Following a comprehensive review of the energy sector launched in 2005, DG TREN proposed a third legislative package on electricity and gas market reform in September 2007, strengthening existing measures, such as “the legislative support for unbundling”, and an increased role for regulation (Pollitt 2009: 25). Despite these changes, Pollitt argues that “[t]he theoretical basis of EU electricity reforms remains the theory of competitive markets” (2009: 3).

### **Adding a social dimension to the electricity directives**

The addition of social concerns to the EU directives followed several stages. The 1996 electricity directive asserts that member states “may” impose public service obligations, which can regard “security, including security of supply, regularity, quality and price of supplies and to environmental protection”. Such provisions may be enacted, “Having full regard to the relevant provisions of the Treaty, in particular Article 90”: that is, as long as they do not hinder the creation of an open competitive market.

The 2003 directive not only expanded the possibility for member states to impose public service obligations, but also “provides for the universal right to be supplied with electricity” (Dubois and Saplacan 2010: 343), and requires that member states file reports detailing their progress in this respect. The 2009 directive goes even further by requiring all member states to define the concept of “vulnerable customers ... which may refer to energy poverty and, inter alia, to the prohibition of disconnection of electricity to such

customers in critical times.” (Ibid). In other words, free (if limited) electricity for certain consumers. The third directive also requires that member states develop national action plans to tackle energy poverty, and charges national regulators with a role in protecting vulnerable consumers.

Table 1 below depicts the development of social measures in the three directives, and the key terms capturing the nature of social protection in each directive.

\*table 1 about here\*

### **3. Introducing social measures into the third electricity directive**

This section focuses on the introduction and strengthening of social measures in the third electricity directive, in which the ‘social dimension’ of the electricity directives was significantly expanded, moving from the protection of ‘vulnerable consumers’ to ‘combating’ energy poverty. The terms ‘energy poverty’ and ‘fuel poverty’ themselves only entered the discourse on energy sector reform in 2007 – 2008, surrounding the discussion of the third electricity (and gas) directives (Thomson 2014).

The transition towards ‘combating’ energy poverty occurred in several steps, detailed below. After the Commission’s initial framing of energy sector reform was criticized for a lack of a social dimension, the Commission proposed a non-binding charter on the rights of energy consumers. Following further criticism by both the European Parliament and the EESC, social protection was made binding through inclusion in the 2009 directive itself.

### **The Commission's initial framing: an economic focus**

A 2005 summit of EU heads in Hampton court called for “the development of a common approach to energy policy” (European Commission 2006a: 2). In response, the Commission published a green paper detailing six priority areas posing a challenge in energy policy. While these concerns ranged from the economic to the geopolitical to the environmental, the protection of vulnerable consumers was not among them (European Commission 2006b).

The Commission raised several questions for discussion following these challenges through an online multiple choice questionnaire. The issue of vulnerable consumers was not raised. The question “How can it be ensured that all Europeans enjoy access to energy at reasonable prices”, was followed by answers such as “[u]se more renewable energies”, or “[e]stablish integrated and competitive electricity and gas markets” (European Commission 2006a).

### **Critical responses to the Commission's framing**

Responses to the green paper came from private and public sector actors, from the EU, national and regional levels. Despite the Commission's framing, analysis of these responses by the Commission staff showed that some respondents (without specifying which) felt that “What the EU had failed to address adequately was the issue of energy poverty” (European Commission 2006a: 3)

Several of the respondents to the Commission's questionnaire included an additional written portion (European Commission n.d.). A notable (and seemingly singular) response by a member state which mentioned this issue came from Belgium,

arguing that energy is a “means of prime necessity within a totally liberalised market”, arguing that energy providers need to meet “obligations of public service” (N.A 2006: 2).

Other responses regarding vulnerable consumers came from the UK context, although not from the official government response. This issue was raised by an energy policy researcher (Prof. Gordon Mackerron), who had previously written on the subject of efficiency and equity in the electricity sector in England and Wales (Mackerron 1998). Mackerron’s response voiced surprise over the lack of “equity issues” and “protective measures ... such as ... regulated "lifeline" tariffs for low income energy users” (Sussex Energy Group 2006: 2–3).

Similarly, in the UK House of Lords European Union Committee, the “terrible problem of fuel poverty”, was stressed by the UK Energy Minister, MP Malcom Wicks (Labour). The role the minister saw for the EU in addressing energy poverty was in encouraging research and sharing of information on energy efficiency, rather than seeking an increase of “cheap energy”, or suggesting that the Commission should decide “how fuel poverty should be tackled in all 25 Member States” (House of Lords European Union Committee 2006: 48–49). This view was shared by the UK Department of Trade and Industry, stressing that specific measures reducing fuel poverty “lay at Member State measures” (ibid, pp. 44).

An EU level response, related to the UK, came from a motion for an EP resolution on the green paper, drafted by Member of the European Parliament (MEP) Eluned Morgan (Wales, Labour). The motion states “... that energy poverty should feature more clearly in the Commission's proposals”, and “calls on the Council and the Commission to propose measures which help low income households to achieve energy

savings in their homes” (Eluned Morgan 2006: 103). The final resolution of the Parliament adds a call to national energy regulators to ensure that universal service obligations are followed, and that “vulnerable and poor consumers are adequately protected” (European Parliament 2006: 108).

### **Adding energy poverty to the policy agenda**

Following the green paper and subsequent discussion, the Commission published a communication to the Council and the Parliament (European Commission 2007), which includes energy poverty on the policy agenda, arguing that although existing legislation requires regard for public service obligations, “the EU needs to go further in tackling energy poverty” (p. 10).

This includes the Commission’s proposal of an Energy Customers' Charter, a non-binding document, in which the first of four goals is to “assist in establishing schemes to help the most EU vulnerable citizens (sic) deal with increases in energy prices” (P. 10). The idea of a charter on consumer rights as a tool of “better consumer protection” was welcomed by the Council, in its meeting in March of 2007 (Council of the European Union 2007: 17). In addition, the Commission established the London citizens’ energy forum, which convenes several times a year to discuss consumer related issues (European Commission n.d.).

In July of 2007, the Commission published “Towards a European Charter on the Rights of Energy Consumers” (European Commission 2007), together with a call for a public consultation. The responses were mixed, criticized one the one hand for

undermining economic efficiency, but for not providing enough social protection, on the other.

First, the ‘common wisdom’ on social policy in the EU was represented. A market-oriented think tank (CEP N.A) interpreted the charter as providing free electricity for vulnerable consumers, a goal it objected to for three reasons: first, the Commission’s lack of legal competence, both because “energy supply issues lack ‘a relevant transnational aspect’”, and because the Commission does not have competence in the field of social policy. Second, free energy for consumers would burden energy providers unless compensated by the state, and would tamper with competition and the price mechanism. Third, cross subsidization between different kinds of consumers will drive up prices, potentially hampering growth and jobs (Euractiv 2007).

This view was institutionally represented by the European Regulators Group for Electricity and Gas [ERGEG], an advisory body comprised of the national energy regulatory authorities, arguing the protection of vulnerable consumers is the role of national welfare states, not energy providers. Energy poverty should be seen as a part of household’s “total welfare situation”, rather than a separate social issue to be dealt with by providers (ERGEG 2007: 19).

Conversely, the proposed charter was also met with criticism for not going far enough in protecting consumers. At the request of the Commission, the EESC published an opinion which encouraged the introduction of “binding legal measures” for the protection of citizens in the electricity sector, since “soft law measures do not fully achieve their aims” (EESC 2008: 1). The non-binding nature of the charter would make it a “directory, rather than a strengthening, of rights” (p. 9). The opinion likened the



protection of energy consumers to that of air passengers, protected in EU level binding regulation, arguing that protecting consumers in the energy sector should be done in a similarly binding manner.

The opinion suggested harmonizing both “the definition of vulnerable consumers and the measures adopted to support them”, as well as “avoiding the interruption of supply through a minimum service guarantee but also through the free provision of energy”. In addition, “cutting off supplies in the case of arrears should be outlawed”, the costs of which should be addressed via national taxation systems (p. 15).

A similar view of the charter came, again, from the European Parliament. A report (and a motion for a Parliamentary resolution) to the committee on the Internal Market and Consumer Protection by rapporteur MEP Mia De Vits (Belgium, Party of European Socialists), again disagrees with the proposed non-binding nature of the charter, arguing it should be added to “a legislative instrument”, such as the directive (ibid p.10).<sup>1</sup>

The report argues for a targeted, limited approach focused on vulnerable consumers “(with special needs caused by impairments or in a poor financial situation)”, offering them “essential energy services ... to maintain their physical and mental health and well-being, at reasonable prices or, where necessary, free of charge” (p. 13).

The report makes several specific points, later adopted either as-is, or in a softened manner as part of the 2009 directive (see online appendix for a wider comparison of the positions of different institutions and the final form of the directive). For example, the report stresses the need to consider disconnection due to non-payment a last resort, especially when “vulnerable consumers and holiday periods are concerned”

(p. 6), later echoed in the directive's wording regarding the possible prohibition of disconnection during 'critical times'.

More directly, the report suggests that member states adopt and publish a definition of vulnerable consumers, and that the Commission start infringement proceedings against "Member States omitting to adopt and to apply this definition" (13). The 2009 directive adopted the requirement for national definitions, and required member states to report these definitions to the Commission. The Parliament also calls on "Member States to set up National Energy Action Plans addressing energy poverty", a requirement which later appeared in the directive as well.

After this round of consultation however, the idea of a charter on the rights of energy consumers did not materialize. As a later EESC report notes, the Commission "withdrew this charter and included some of the points in its Third Package, on the grounds that this would have a greater impact" (EESC 2010: 7).<sup>2</sup>

The result of the discussion of the protection of vulnerable consumers and energy poverty is reflected in the 2009 directive. These measures reflect a change in the position of the Commission over time, from a position which did not include the protection of vulnerable consumers on the agenda for the third directive, to a position which puts this topic in a prominent position. This change, it can be argued, was influenced by the specific contributions made by MEP's and by the EESC, and against the opposition of those who represented the voice of economic efficiency: e.g. the energy regulators.

#### **4. Discussion**

This paper asks how and for what reasons social provisions were added to electricity sector reform, and what kind of welfare policy this represents. These questions will be discussed below. Three main institutions were influential in shaping the social elements of the third directive: the Commission, the Parliament, and the EESC. This occurred even over the opposition of energy sector regulators. The discussion of these measures centered around the definition of energy poverty, the identification of vulnerable consumers, the measures to be used and the institutions to carry them out.

Early responses to the Commission's 2006 green paper represented a preference towards non-binding, member state level approach to addressing energy poverty. Both the UK Energy minister and the department of trade and industry maintained that the EU should assume a mainly advisory role, and measures be decided at the member state level. Conversely, positions from the EP and the EESC called for a much more binding approach on defining, addressing and monitoring energy poverty. However, while the EESC advanced the notion of an EU wide approach, the EP promoted social protection developed by the member states but overseen by the EU.

The position of the Commission was a reluctant adoption of a binding nature of measures of social protection, which would be determined primarily by the member states, but overseen at the EU level. Thus, the Commission went from no mention of energy poverty (in the 2006 green paper), to a proposal of a non-binding charter (in 2008), to a binding approach, including most of the charter in the directive itself (2009).

In this case, it would seem that the Parliament had a direct and significant impact on the approach taken by the Commission, as many of the specific suggestions made in

the Parliament's documents were adopted by the Commission, even when the Commission had initially suggested a different or even opposite approach.

This leads to a discussion of why these measures were adopted. Above, two general conditions leading to the development of social regulation were highlighted: a lack of capacity for social policy, and the drive towards economic liberalization. This case exemplifies the first condition, qualifies the second condition, and suggests that policy transfer explains the choice of the specific set of measures used in this case.

First, regarding the lack of capacity for social policy, opponents of social regulation in the electricity sector suggested that social issues be addressed via fiscal social policy. However, social regulation and 'free electricity' were adopted instead. While fiscal social policy represents a more economically efficient choice, it can be argued to have been inhibited by the same reasons preventing EU level social policy at a more general level. In this case, social regulation acted as a substitute for social policy.

Second, it may be argued that social regulation in this case was indeed the result of a drive towards further economic liberalization. However, this occurred after the reform was met with difficulties, such as a rise in prices, blackouts and consumer dissatisfaction. Social regulation served to overcome these difficulties and enhance the legitimacy of liberalizing reform. It is notable that furthering economic reform was in this case carried out by adopting measures which were in themselves economically inefficient ('free electricity').

This is a similar explanation to that given by scholars of both EU telecommunications reform and that of public services of general interest [SGEI] to the addition of a social dimension to reform in these fields. In telecommunications reform,

“[t]he Commission itself deliberately used the development of universal-service principles as a means of achieving the widest possible support for the policies of liberalization in the Parliament” (Héritier 2001: 839; for the same point see Scott 1995: 212). Regarding SGEI, Clifton Comín, & Fuentes similarly argue that “[t]he EU’s response to these concerns about the future of public services must be contextualized as part of its broader effort to bolster its own legitimacy” (2005: 412).

Third, aiming to explain why this set of policies was chosen, the findings point towards policy transfer (Dolowitz and Marsh 2000) from similar measures already applied in the UK. This is supported both by the type of social measures adopted, and through examining the policy process. First, these policies are of a residual, targeted nature. For example, the third directive limits its suggestion of prohibiting electricity disconnection to vulnerable consumers, and to specific, ‘critical’ times. In-kind, limited and targeted assistance correspond most closely to a liberal type of welfare, rather than the Social Democratic or Continental types.

At the same time, this kind of social protection in the electricity sector is a manner in which vulnerable consumers have been addressed in practice in the UK, but not in other cases. The term ‘energy poverty’ itself originated as a social concern and object for policy in the UK (Boardman 2010). Social protection of vulnerable consumers developed in the UK electricity sector since the mid 1990’s, a decade after electricity sector reform began in this country. Conversely, similar protection did not develop in the Swedish context, despite undergoing similar economic reform during the same period (Haber 2011).

The notion of transfer is supported by the similarity in tools and in language (e.g. ‘energy poverty’) between the measures adopted in the EU and in the UK, but also complemented by the advocates of this issue from the UK (an academic, a minister, an MEP), which played a role in bringing it to the agenda of electricity sector reform following the initial consultation on energy policy. Alternatives, such as the language of ‘universal service’ suggested in the Belgian response, did not gain similar prominence.

Thus, this case suggests three conditions for the development of social regulation in the EU: first, a lack of capacity for social policy in the sector, second, difficulties preventing further sector liberalization, and third, the availability of policies and policy-advocates, allowing for policy transfer.

This explanation for the emergence of social regulation in the electricity sector should be qualified in two ways. First, this phenomenon can be seen as part of wider trends in EU policy making: the construction of ‘social Europe’ through alternative forms of policy making (Heritier 2001); The inclusion of a social dimension in the reform of other related sectors, such as telecommunications (Héritier 2001; Thatcher 2004); and the Commission’s interest, which developed during the mid 2000’s, in the question of how the insights of behavioural economics can be relevant to the design of reforming infrastructure services: making markets work for those consumers who face difficulties in either attaining or processing the relevant information for full participation in the market (Clifton *et al.* 2011).

This last point denotes an alternative reading of the paper’s findings: in this light the Commission is not a social legislator at all. Rather, it is giving with one hand and taking with the other: ‘acknowledging’ the right of member states to carry out domestic

social policy, while at the same time placing this ‘permission’ within the boundaries of community competition law (Clifton 2014). At most, the Commission is adopting social measures in order to address the concrete problems it identified in the sector’s reform (i.e through consumer surveys). This would also explain the ‘reluctant’ stance by the Commission, which opted to regulate the social aspects only after these issues became clear. This explanation, however, is still faced with the manner in which the third directive not only allows member states to address vulnerable consumers, but requires that they do so, through engaging in the definition and protection of vulnerable consumers, and requiring they report how they have done so, including devising their own “national action plans”.

Furthermore, even if member states will determine the details of social regulation, they are still required to address what the EU has mandated to be a social issue. The implications of this last point are discussed below, regarding the expected impact of this issue on national welfare states.

### **Impact on national welfare states**

What does the introduction of the concept of energy poverty at the EU level mean for national welfare states? In adopting the concept of energy poverty, the EU has essentially taken a social issue which has been problematized, framed and addressed in the context of a liberal welfare state, and required other kinds of welfare states to recognize, define and address it within their own national contexts. This is done even when this issue and the manner in which the EU has suggested to address it are not

compatible with the way in which social issues are usually addressed in these welfare states, or even if this social issue does not exist within these contexts.

An indication of the prevalence (or lack there-of) of the social issue of energy poverty in different national contexts can be seen in a study of its most extreme outcome. Thus, a study of excess winter mortality in Europe found that “relative excess winter mortality is found to be highest in southern Europe, Ireland, and the UK ... while “Scandinavian and other northern European countries are relatively unaffected by the problem” (Healy 2003: 785). This means that the EU is pushing member states towards a specific, liberal framing of policy problems and policy solutions, focusing on providing limited, targeted assistance in the electricity sector, as has been done in the UK. That is, the EU is actively promoting social policy of a liberal nature.

The claim for influence on national welfare states is strengthened when the impact and cost of this kind of policies in practice is considered. While these policies will vary between different member states, this cost may be estimated based on the UK, in which policies regarding energy poverty are probably most developed. Thus, certain vulnerable consumers, mainly pensioners on low incomes are eligible to at least three related state subsidy schemes. The Warm House Discount (£140 annually, 2 million households, £320 spending target for 2015/16), Winter Fuel Payment (£100-£300 annually, 12 million recipients, £2.1 billion in 2014/15) (Department for work and pensions 2015), and Cold Weather Payment (roughly £30 million, Nov 2011-Feb 2012) (Gov.uk 2014), as well as (recently cancelled) schemes for home insulation. At the same time, there are also costs usually (but not necessarily) borne by service providers, such as the cost of non-disconnection of vulnerable consumers. Thus, if an annual average electricity bill for a



medium sized home in the UK is just under £1100, the costs of not disconnecting consumers for all or part of the year might quickly add up to substantial sums, even if only a fraction of several million vulnerable consumers were not to be disconnected.

If the UK is any indication of the possible impact of social protection in the electricity sector, it can be argued that costs are not as high as those relating to the core aspects of the welfare state, but are certainly not trivial. Indirect costs, such as those borne by service providers are at the same time also non-transparent and poorly understood (Levi-Faur 2014). Finally, both direct and indirect costs can be expected to impact on national welfare states: adding new costs and new social problems and solutions alongside or at the expense of existing social policies, changes not only the allocation of resources but perhaps also the manner in which social problems are understood and addressed.

## **5. Conclusions**

This paper brings together the view of the EU as a creative and destructive force in European social policy. As Majone (1993) argued, the EU creates social regulation to support economic reform, in this case the continued reform of the electricity sector. This support was in this case carried out through measures which are not in themselves economically efficient. Conversely, as Scharpf (2010) argues, the EU is undermining generous models of welfare provision. However, this is done in this case through introducing liberal welfare problems and solutions into other types of welfare states.

Thus, the EU is promoting a liberal model of welfare through social regulation, pushing member states towards this type of welfare.

Building on recent literature on the manner in which the social dimension in the EU is growing both within and beyond the market (Caporaso and Tarrow 2009; Greer 2011; Martinsen 2005), and the relation between enforcing market competition and change in public services (Clifton 2014), this paper highlights the development of social protection of vulnerable consumers as part of electricity sector reform. This process, led by the European Parliament and reluctantly adopted by the Commission, introduced targeted, limited social protection through regulation. This type of policies, which can be seen as a substitute for fiscal social policy, served to enhance the legitimacy of reform in the electricity sector over the backdrop of consumer dissatisfaction and rising prices, and drew on similar policy from the UK.

This research highlights the connection between economic efficiency and compensatory social institutions, in which even inefficient social measures support economic liberalization. Furthermore, the research highlights the manner in which the neat theoretical separations in the roles of the EU and the member states, regulators and social services, the market and the state have been increasingly blurred.

While this may reflect political compromise in the complex, multi-actor setting of the EU, or simply represent pragmatic problem solving, it may also highlight the limits of the attempt to pursue liberalization separated from its social context (Polanyi 1970). That is, Majone's model of a technocratic regulatory state, legitimized through efficiency gains, can only go so far before a resurgence of the social and the political occurs.

This case thus has wider implications for the literature on the regulatory state more generally, and specifically on what has been termed the regulatory welfare state. This literature contests the separation between the economic and the social spheres, and focuses on regulation not only on as a tool for governing markets, but for social policy as well (see for example Haber 2011; Leisering and Mabbett 2011; Levi-Faur 2014; Pflieger 2014; Haber 2015). If the EU is indeed an ‘almost pure’ example of the regulatory state, and the electricity sector a prime example of liberalization and regulation, then the (re)introduction of social protection through regulation should be seen as an expected outcome of liberalization and reform in the regulatory state.

## Notes on contributor

Hanan Haber is a fellow in the Department of Government and Centre for Analysis of Risk and Regulation, London School of Economics and Political Science

## CONTACT

Email: h.y.haber@lse.ac.uk

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<sup>1</sup> It should be noted, however, that a different opinion, that of the committee on industry, research and energy, welcomed the charter as an information tool, rather than a binding legal one.

<sup>2</sup> The withdrawal of the charter is reminiscent of the failure of an earlier Charter for Services of General Interest emphasizing the importance of universal access to these services. The charter was to be appended to the treaties at the 2001 Nice Intergovernmental Conference (Clifton, Comín, & Fuentes, 2005).

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**Table 1: the development of social measures in EU electricity directives, 1996-2009**

	1996	2003	2009
<b>Main aspects of social protection</b>	Member states may impose universal service obligations in order “to ensure security of supply and consumer and environmental protection ...”	Requirements for universal service enhanced, including a duty to protect vulnerable consumers and help them “avoid disconnection”. Member states required to report on the measures they have taken in this regard	Directive requires member states define vulnerable consumers and ‘energy poverty’, devise national action plans, including a possible ban on disconnection from service during ‘critical times’. National energy regulators tasked with a role in consumer and vulnerable consumer protection
<b>Key terms</b>	Universal service	Vulnerable consumers; ‘avoid disconnection’	Energy Poverty; National action plans; Disconnection ban during critical times

**Online Appendix: Institutional positions and final measures of social protection in the third electricity directive**

<b>Measures in the directive</b>	<b>Institutions' positions</b>
National definitions of energy poverty; implementation should be reported to the commission	<b>EESC:</b> Commission should apply uniform definition <b>EP:</b> Calls on the commission to define energy poverty, suggests that member states define vulnerable consumers and that the Commission enforce definition through infringement procedures
National action plans	<b>EP:</b> National action plans should be implemented
Role for national regulators in protection of vulnerable consumers	<b>EESC:</b> assign role for the EU level regulator in protection of vulnerable consumers <b>EP:</b> Role for national energy regulators, together with EU level regulator
Possible prohibition of disconnection during critical times	<b>EESC:</b> disconnection due to nonpayment should be banned <b>EP:</b> disconnection as last resort, especially regarding “vulnerable consumers and holiday periods”
Energy checklist	Suggested by the Commission <b>EP:</b> welcomes checklist, but it should not replace charter
Parts of the charter on the rights of Energy customers included in the directive	<b>Commission (2007):</b> Suggested as a non-binding document <b>EESC:</b> Charter must be binding <b>EP:</b> Charter must be binding (committee on consumer protection) Charter should be an information tool (Committee on trade and industry) <b>Commission (2009):</b> Parts of the charter included in the third directive, making them more binding