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**The European Union as a Social Actor?
An Analysis of Social Protection in the
EU's Electricity Sector**

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Abstract

Social regulation at the EU level is on the increase at least when it comes to the electricity sector and following the gradual liberalization of the sector. This paper asks how and for what reasons social protection of vulnerable consumers has been introduced into the process, focusing on the period between the second and third directives on electricity sector liberalization (2005-2009). In this period these protections grew substantially, gaining a more binding and a more transnational nature, a process led by the Commission and the European Parliament. This development runs counter to our understanding of the electricity sector reform in the EU as focused primarily on the creation of open competitive markets. The paper argues that the introduction of protection of vulnerable consumers in the electricity sector reform facilitates (rather than hinders) the process of economic reform, by adding political and democratic legitimacy to the liberalization process. It asserts that adding social protection to economic reform in this case is instructive regarding the development of the EU as a regulatory state and the regulatory state more generally. Economic reform and economic regulation create the conditions for, and require, more social protection and social regulation. Separating the social and economic spheres may seem like an economically efficient strategy, but may ultimately have the opposite effect.

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Preface

This paper brings together two different yet related themes. First, what is the role of social policy at the European Union (EU) level? Second, what is the role of regulation in social protection, and what is the relation between social and economic policy more generally? The paper argues that social policy is growing and becoming more binding and transnational at the EU level. However, this is done through regulation, as part of the process of economic liberalization. Regulation is being used to protect vulnerable consumers in light of the social needs created by reform, but also facilitating further economic liberalization, by legitimizing this process in political and democratic terms.

The common wisdom on social policy in the EU, especially from an intergovernmental approach, argues that social issues are left primarily to the member states, as these issues are too politically sensitive and historically entrenched to be dealt with at the EU level. As a result, “examples of EU social legislation have been few and far between” (Hix 2005, 256). “In other policy areas, particularly social policy, the role of the EU seems much less significant, secondary at best, insignificant at worst” (Geyer 2000).

From a regulatory perspective, a similar expectation arises regarding limited development of social policy in the EU, but for a different reason. In this view, the EU, which can be seen as an “almost pure” example of a regulatory state, lacks the ability to engage in social policy and taxing and spending, and the democratic legitimacy to do so. As a result, it will focus mainly on Pareto efficiency enhancing economic regulation (Majone 1993, 1997, 2011). In this regard, the EU is an example of Majone’s thesis on the rise of the regulatory state. While some regulation on social issues does exist, it is limited to several specific areas. From both an EU-specific perspective and a more general regulatory-state perspective, then, the introduction of social policy at the EU level is theoretically unlikely.

My findings suggest that social policy plays a larger role at the EU level than either of these perspectives assumes. This is done, however, with regulation, rather than through social spending, beyond the areas that are usually considered part of the welfare state and beyond the areas that are considered the core of the EU’s competence. Rather, this paper demonstrates how social policy has become part of the process of economic reform, both following the process of reform and facilitating the continued process of liberalization, through adding political and democratic legitimacy.

To substantiate this claim, this paper examines a critical case of economic liberalization in the EU: electricity sector reform. The development of the three EU electricity directives from 1996 to 2009 demonstrates a shift in the regulatory agenda over time. Whereas the first directive focuses on the economic aspects of liberalization, the second and third directives introduce extensive and detailed regulatory provisions on social issues, specifically those regarding the protection of vulnerable consumers, the ‘energy poor.’

Specifically, this paper asks how and for what reasons social provisions were introduced into the process of electricity sector reform from 2005 to 2009? The focus is on the period during which the third directive was being prepared, in which there was significant growth in the protection of vulnerable consumers, adding binding regulation at the EU level.

In order to answer this question, this paper traces the policy process through which social policy measures were introduced. This includes the collection and analysis of documents published by the different actors, including calls and responses for consultations, reports, legislation and media coverage.

The findings show a growth in the regulation aimed at protecting vulnerable consumers in the three electricity directives. The liberalization and privatization of the electricity sectors in the EU, prompted by the EU electricity directives (the first of which was published in 1996), emphasized competition and freedom of choice. Social aspects, that is, issues of service disconnection due to debt and arrears, and social protection of vulnerable consumers, went largely unaddressed in the initial path of liberalization. Over time, however, this gap was increasingly filled. While the earliest directive asserts that member states are allowed to impose public service obligations, as long as this does not hinder the process of liberalization, the later directives explicitly address social issues regarding vulnerable consumers and energy poverty requiring member states to acknowledge these issues, define the consumers affected and devise action plans to address the social issues in this sector.

Analysis of the policy process between the second and third electricity directives reveals a change in the policy agenda during this period. Although social protection had been part of the second directive, the discussion leading up to the third directive was initially framed by the Commission with a focus on competitiveness, security of supply and sustainability, but not on protection of vulnerable consumers. This changed over

time, in a process led by the European Parliament and other actors, such as the European Economic and Social Committee (EESC), and adopted by the Commission.

The findings of this paper highlight the relation between social and economic regulation. The expansion of economic liberalization, and with it, economic regulation, fostered the conditions for the creation of further social policy and social protection through regulation. These conditions include a rise in the social needs of consumers after reform, and the need for political and democratic legitimacy for the process of economic liberalization itself.

The prominent role played by the European Parliament in this regard may be seen as indicative of the importance of democratic and political legitimacy in this process. While in the regulatory perspective, legitimacy is based on professional expertise, and possibly also on successful outputs, this case highlights the insufficiency of this kind of legitimacy for areas in which citizens and consumers are directly affected, especially when reform has not delivered the promised results in terms of consumer or citizen welfare.

This paper will progress in five parts. The first section is a theoretical framework, of theories of policy change in the EU and the EU as a social actor, and on the regulatory perspective on the EU as a regulatory state. The second section offers a short review of the electricity sector reform in the EU, and then of the social measures as they were introduced in the three electricity directives. The third part presents the policy process itself, the institutions and actors influential in effecting the social 'turn' in the electricity directives between the second and third of these directives. The fourth section discusses these results and the relative impact of different institutions and forces on the policy process and the directive. A final section concludes.

1. Theoretical framework

In order to understand the role of social policy in the electricity sector reform in the EU, it is useful to begin from the two basic perspectives which have been dominant in explaining the development of the EU. One focuses on the member states and their interests (intergovernmentalism), while the other focuses on the inner workings of the EU: institutions, actors, coalitions and the policy process (transnationalism). While both perspectives have been criticized for being too 'grand' or general to be useful, or conversely as too specific to the European context (as there is no theory specific to regional integration in other areas), their central role in the literature still makes them a good starting point to understand the established wisdom regarding the role of social policy in the EU.

From an intergovernmentalist approach, policy at the EU level is derived from predetermined national interests, and is the result of bargaining between the member states (Moravcsik 1998). In this view, national governments have been opposed to the development of social policy at the EU level, and have been able to suppress such efforts (Cram 1993). This perspective then offers a simple explanation for why social policy has played the secondary, even insignificant role quoted from Geyer (2000) above.

The critics of intergovernmentalism have focused on the inner workings of the EU: institutions, actors and coalitions which shape policy independently of and sometimes despite their formal subordination to member states. As Pierson argues, intergovernmentalism is a snapshot of the EU, usually focused on a moment of grand bargaining and treaty signing between the member states. A supranational focus, on the other hand, views EU policy making as a process, led and shaped by the actors and institutions appointed (but not fully controlled) by the member states (Pierson 1996).

Different mechanisms have been suggested to explain these inner workings of EU policy making. A neofunctionalist approach suggests that growth in transnational rulemaking is triggered by expanding transnational economic activity (Stone Sweet 2010). This is policy 'spillover' in which political cooperation in one field "leads to the adoption of new goals, which require a further adoption of political co-operation" (Strøby Jensen 2000, 73). At the same time, the actors and institutions involved in the implementation of this cooperation (specifically the Commission) acquire a "supranational orientation in attitudes and viewpoint" (Strøby Jensen 2000, 75), while

also seeking to protect and advance their own position and autonomy. Advancing the agenda of a European social policy promotes both the interests arising from bureaucratic politics and those stemming from supranational ideals, even if this is not something the member states themselves are interested in. An additional important player in this respect are business interests, which advance further policy making in order to harmonize international trade (Cram 1993).

A related critique of the intergovernmentalist approach, which builds on the neofunctionalist ideas is a historical institutionalist perspective, in which institutions may develop over time in a way unforeseen by their original designers, and become entrenched in a way which does not allow them to be easily changed, even if they no longer follow their original purpose (Pierson 1996). This results, for example, from the different timescales according to which policy makers at the national level and at the EU level operate. National politicians seek political success in the short run, while the often unintended consequences of the institutional rules they created at the supranational level only become apparent over time.

Following this argument, in the case discussed in this paper, it may be argued that while member states agreed on liberalization of the electricity sector, the institutions in charge of implementing this reform in practice took the reform in a direction unforeseen by the member states. The question is then which of the influences discussed above was most meaningful in introducing social protection into the regulatory agenda.

Was this a case of spillover, in which the need to regulate social protection arose out of furthering liberalization? In this case one might expect this process to be led by business interests, seeking to develop clear (and uniform) rules regarding social protection across European markets.

Alternatively, was this a case of bureaucratic politics, in which actors and institutions within the EU pushed to expand their autonomy and areas of responsibility? In this case we would expect actors or institutions such as the Commission to push for the introduction of social measures, as well as an expansion or growth in the responsibilities, autonomy or influence of the actors or institutions involved.

Finally, could the expansion of the regulatory agenda to include social issues reflect an attempt to further the process of integration itself? As Majone (1993, 168) aptly put it: "It is certainly true that the creation of a 'common market' is not a goal capable of eliciting the loyalty and attachment of the people of Europe to their supranational institutions. A social dimension is also needed". In this view, actors or institutions with

a set of supranational values and beliefs would advance the cause of social protection in the electricity sector as a way of advancing the integration project as a whole. In this view we would again expect an institution like the Commission, the European Parliament or other EU institutions to play a key role, but not an expansion of their bureaucratic role or responsibilities.

To sum this section up, different hypotheses can be generated to reflect our theoretical expectations from each perspective mentioned above (Schimmelfennig 2003, 2014). While the intergovernmental approach may be a dominant one in understanding policy in the EU generally, in this case it seems like an unlikely candidate for explaining the development of this kind of social policy. The assumption here is that member states would be opposed to the expansion of social policy at the EU level.

The critics of the intergovernmental perspective offer approaches which may be more useful in this regard, with a hypothesis corresponding to each of the approaches detailed above: the spillover hypothesis, the bureaucratic politics hypothesis and the supranational hypothesis. In each case, specific actors can be expected to be involved in the process of reform, aiming for specific outcomes.

H1. Reform was driven by business interests, aiming to allow for and expedite further future reform in the electricity sector (spillover hypothesis).

H2. Reform was driven by the Commission, leading to an expansion of its competencies and autonomy (bureaucratic politics hypothesis).

H3. Reform was driven by the Commission, aiming to further the process of European integration, but not for a growth in its competencies and autonomy (supranational/historical institutionalist hypothesis).

A regulatory perspective on social protection in the electricity sector

A second argument of this paper concerns the nature of the EU as a regulatory state, and the implications of introducing social protection through regulation on our understanding of the regulatory state more generally. Majone's (1997) thesis on the rise of the regulatory state depicts a shift in the mode of governance in Europe: from direct intervention in the economy through state ownership (as in the public utilities), to intervention through regulation of liberalized markets. This was also accompanied by a shift in the major goals of state involvement in the economy: from income redistribution and macroeconomic stabilization towards the regulation of markets.

Majone's model of the regulatory state is applicable to European member states, arguing that the process of European integration itself is one of the reasons for the growth in the importance of regulation at the national level. At the same time, the EU can be thought of as a regulatory state in its own right: "since the EC lacks an independent power to tax and spend, it could increase its competencies only by developing as an almost pure type of regulatory state" (Majone 1997, 150).

Majone was also clear about the content of regulation in the regulatory state in general and in the European context in particular. The transition from direct intervention in the economy to market regulation envisioned a focus on economic regulation, rather than social issues, aiming to reach the Pareto optimum. In the European context, Majone argued that while the EU is a "welfare laggard" in terms of spending, it is a leader in terms of increasingly sophisticated social regulation, relating to issues such as working conditions, environmental regulation and consumer protection, justified predominantly on the basis of welfare economics and the correction of market failures. Thus, environmental regulation is justified as it corrects externalities, and consumer protection regulation corrects for information asymmetries between consumers and producers.

Majone uses the term social regulation as distinct from the term social policy. Whereas social regulation addresses social issues through correcting market failures, social policy "uses political power to supersede, supplement or modify operations of the economic system in order to achieve results which the economic system would not achieve on its own" (T.H. Marshall, quoted in Majone 1993, 156). That is, social regulation follows the market logic, while social policy prioritizes other values in its stead.

Majone is clear on the role of redistribution in the EU as well, arguing that a European-wide welfare state is neither justifiable on theoretical grounds nor feasible in practical terms, as the EU lacks both the capacity and the legitimacy and popular support to redistribute on a wide scale. He concludes that "the 'Social Europe' of the future...will be, not a supranational welfare state, but an increasingly rich space of social-regulatory policies and institutions" (Majone 1993, 168). That is, in the EU we can expect to find social regulation but not social policy.

The basic argument is, then, that regulation is becoming the dominant form of state intervention in the economy both at the national and the EU level. This regulation focuses mainly on achieving Pareto efficiency, and addresses economic but also social

issues. Redistributive issues and social policy, however, can be expected to remain at the national level, for both theoretical and practical reasons.

Majone's regulatory perspective thus assumes several strong dichotomies, between different policy tools, policy aims and levels of governance. It separates between different policy tools: regulation on the one hand, taxing and spending on the other. It separates between policy aims: economic efficiency on the one hand, equality on the other; regulation of markets on the one hand, redistribution on the other. It separates between different kinds of actors: political on the one hand, bureaucratic (or regulocratic) on the other. In the case of the EU, it separates between the national and the supranational level, and assigns different aims and policy tools to each level.

Majone's approach can be criticized both with regards to the EU level and with regards to the theory of the regulatory state more generally. At the level of the EU, Scharpf (1997) argues that social policy making at the EU level can be expected to be limited due to problems of democratic legitimacy. Scharpf argues that Majone's regulatory state argument assumes democratic legitimacy which relies on the rule of law and on the authority of technical expertise. However, in areas in which technical expertise is disputed (or perhaps irrelevant), and where there is ideological disagreement, the expansion of regulatory policy making is unlikely.

Scharpf argues, however, that leaving distributional policy making to the member states, as Majone suggests, would be frustrated by economic competition between member states, which has led to a race-to-bottom between national welfare regimes. The solution here would be to hand over these decisions to a centralized decision maker at the EU level, as has happened in other federal systems. This solution is unlikely, however, due to the issues of democratic legitimacy mentioned above, and the inability of member states to reach an agreement over their conflicting national interests. Thus, "the European Union is capable of effective action only in areas in which the major interests affected are either convergent or complementary": the areas covered by Majone's regulatory state, but not social policy (Scharpf 1997, 25). Hence, Scharpf criticized Majone's model of social regulation for not going far enough in protecting citizens, and not being a feasible model for social protection in areas in which technical expertise is the source of regulators' authority. At the same time, Scharpf argued that the alternative model of social policy is not applicable at the European level either.

Recent work, however, has not only argued that European social policy "is already 'here' in the EU" (Caporaso and Tarrow 2009, 614), but also focused on the specific

areas in which such policies have developed, such as labour mobility and insurance, and on the specific institutions which enable and shape the development of this policy at the EU level. Two such institutions whose role has been discussed in this regard are the Court of Justice of the European Union (CJEU) and the European Commission.

Caporaso and Tarrow focus on the Court, which “has emerged as a regulatory arbiter of compromises between international openness and social concerns”, and has “gone beyond market-making” in order to promote the protection of the rights of workers and their families (Caporaso and Tarrow 2009, 595). This optimistic view of the Court’s role has been criticized by Scharpf (2010) as “individual liberties in another guise” which “undermine collective institutions of social solidarity” (Mabbett 2014, 14).

In this regard, Mabbett distinguishes between the manner in which the Commission and the Court approached the issue of gender discrimination in European insurance. Whereas the Commission saw the prevention of gender discrimination as a means to a distributive goal of promoting gender equality, the Court upheld non-discrimination in a “less instrumental way”, as a norm for governing markets rather than a tool to achieve specific policy goals. That is, the court upheld non-discrimination even when the distributive impact on women was ambiguous.²

Regarding the level of the regulatory state more generally, recent research has contested the dichotomies Majone drew between the social and the economic, and the theoretical expectations they generate. The separation of efficiency and equality has been contested as an unrealistic view of the regulatory state (Chng 2012; Dubash and Morgan 2012; Haber 2011; Leisering and Mabbett 2011; Urueña 2012; Levi-Faur 2013, 2014; Pflieger 2014). In this view regulation faces both social and economic challenges, and is used in practice in order to address both kinds of issues. Regulation has intended and unintended distributional effects, and can be used as an instrument of social policy in its own right.

For example, Haber (2011) compares the use of regulation aimed at preventing service disconnection in the electricity sectors in the UK, Sweden and Israel, and finds that regulation is being used to address the social needs of vulnerable consumers, in

² Caporaso and Tarrow use the term “European Court of Justice” (ECJ), while Mabbett uses the term Court of Justice of the European Union (CJEU). The term ECJ was used to denote either the upper tier (of three courts) of the EU’s judicial arm, or as a collective term for the court as a whole. CJEU is currently used as the collective term for the court. Following Mabbett I use this more general term (CJEU) to denote the Court as a whole.

some cases not only preventing disconnection but also using the electricity sector to redistribute to certain groups of vulnerable consumers.

While this criticism has focused on Majone's model of the regulatory state at the national level, the current research addresses it at the level of the EU. By doing so, it raises a question about the distinctions Majone drew between regulation and distribution both in the EU as a case in its own right, and in the regulatory state more generally. If the EU is indeed an "almost pure type" of the regulatory state, this makes it a critical case for our understanding of the regulatory state more generally, and for the relation between regulation and redistribution in other settings as well.

2. Electricity sector reform in the EU

In 1996, the European Parliament passed the first electricity directive, liberalizing the EU electricity markets. An initial proposal of the directive included three core elements, intended to undermine the monopoly structure of the sector and introduce competition. These were third-party access (meaning distributors and large industrial firms would no longer be bound to their area's supplier), cancelling the exclusive rights for the construction of power lines and power plants, and the 'unbundling' of vertically integrated utilities (in order to prevent cross-subsidization). This proposal was met with "opposition" and "skepticism" (Eising 2002, 93) by the majority of the member states, as these steps were incompatible with their local arrangements, while only a few supported it, notably the UK which had already reformed its sector along these lines. After negotiations, the European Parliament passed the directive, mandating "progressive market opening": from 1999 to 2003 "the member states must liberalize 25-33 percent of their national markets" (Eising 2002, 95).

The first directive failed to deliver the expected results in terms of competition and integration of markets. Vasconcelos (2009) attributed this to three main causes. First, national champions were still protected by domestic governments, allowing them to acquire smaller utilities abroad and consolidate their European position while keeping their domestic market share. Second, the lack of detailed rules, beyond the general, vague principles set out by the 1996 directive, lead to non-harmonized national laws. Third, the directive lacked guidance for the development of further regulation (Vasconcelos 2009).

Following informal negotiations in the European electricity regulators forum (the Florence Forum), including regulators and representatives from member states, a second directive was drafted and approved in 2003. This directive filled gaps in terms of more detailed rules, reducing the room for interpretation by national governments, regulating access to the infrastructure and the mandatory establishment of regulatory authorities, and the regulation of cross-border trade (Vasconcelos 2009, 330). The 2003 directive mandated full retail market opening by the end of 2007 (Pollitt 2009, 6).

However, when the 2003 directive was approved, "Two major sets of events created discomfort among consumers, regulators and policy-makers" regarding the liberalization project. Thus, energy prices rose substantially. While this price hike can be attributed to a rise in oil prices at the time, the rise in energy prices was seen as a

failure of liberalization, especially since the profits of privatized utilities also increased substantially. Second, in 2003 millions of Europeans experienced blackouts, raising concerns about security of supply (Vasconcelos 2009, 330–31).

In 2005, a comprehensive review of the energy sector was launched. Following this inquiry, “DG TREN proposed a third legislative package on electricity and gas market reform in September 2007”. This package strengthened several of the existing measures, such as “the legislative support for unbundling”, restricting sale of assets “to parties outside the EU” (limiting Russian “purchases of EU electricity and gas assets”). The third package gives an increased role to regulation, including founding “A European wide regulatory agency... with binding decision making powers”, along with “requirements for increased independence of national regulators” (Pollitt 2009, 25). Despite these changes, Pollitt argues that the basic theory behind the liberalization process remains the same: “The theoretical basis of EU electricity reforms remains the theory of competitive markets” (Pollitt 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 may relate to “security, including security of supply, regularity, quality and price of supplies and to [sic] 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 (Chapter II, article 3, paragraphs. 2-3).

This is quite different from the 2003 directive, which not only further enabled 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). The third directive requires that member states develop national action plans to tackle energy poverty, and assigns national regulators a role in protecting vulnerable consumers.

Table 1 depicts the development of social measures in the three directives, along with the development of these directives as a whole.

Table 1: The development of social reform in the EU electricity directives, 1996-2009

	1996	2003	2009
Main aspects of social protection	Member states may impose universal service obligations in order “to ensure security of supply and consumer and environmental protection...” as long as this does not interfere with the creation of a competitive market	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 that member states clearly define both the groups requiring special protection (defining “energy poverty”) and the measures designed to help them, including a possible ban on disconnection from service during “critical times”; member states required to draft national action plans to tackle energy poverty; national energy regulators tasked with a role in consumer and vulnerable consumer protection
Key terms added	Universal service	Vulnerable consumers; “avoid disconnection”	Energy poverty; national action plans; disconnection ban during critical times

3. The policy process: how and why were social measures introduced into the third electricity directive?

This section focuses on the introduction of social measures, specifically those aimed at the protection of vulnerable consumers, into the third electricity directive. While social measures were already introduced into the 2003 directive, these measures were enhanced in the 2009 directive, moving from the protection of vulnerable consumers to tackling energy poverty (2009 directive, paragraph 53). Thus, the third electricity directive takes a step closer to not only social regulation, but indeed the realm of social policy.

This step is evident in the introduction of the term ‘energy poverty’ itself into the discourse surrounding the third electricity directive. This is demonstrated in a study which conducted a search for the terms ‘energy poverty’ and ‘fuel poverty’ in “all official policy documents ever produced by legislative and consultative institutions and bodies of the European Union” (Thomson 2014), which found that the terms had been used in 187 documents from 2001 to 2014. Thomson reports that the terms had gained popularity circa 2007-2008, during the preparation of the third electricity (and gas) directives. Before this period the terms had been used only rarely, for instance regarding poverty in the developing world. The institutions which produced the most documents using these terms were the Commission (54 documents) and the Parliament (42 documents), but perhaps more interestingly, the terms also appeared frequently in parliamentary questions (27) and in documents of the EESC (37), as well as the Committee of the Regions (Thomson 2014).

How, then, did the transition towards tackling energy poverty occur, and what kinds of policy issues did it entail in practice? 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 defined six priority areas in which action was “necessary to address the challenges we face” (p. 4), in a green paper entitled “A European Strategy for Sustainable, Competitive and Secure Energy” (European Commission 2006b).

While these priority areas range from the economic to the geopolitical to the environmental, the protection of vulnerable consumers was not among them. The Commission raised several questions for discussion following these challenges, including whether and how the competitiveness of the Single Market could be

improved, how Europe's energy supply should be diversified, how to manage energy supply crises, how to address the challenge of climate change, how to advance technological innovation, and how and whether a common foreign energy policy should be developed.

The impact of these challenges on consumers is mentioned, but no specific reference is made to vulnerable consumers or to any measures needed for their protection. Instead, the need for economic competitiveness is stressed:

The effects of this landscape are felt directly by everyone. Access to energy is fundamental to the daily lives of every European. Our citizens are affected by higher prices, threats to the security of energy supply and changes to Europe's climate. Sustainable, competitive and secure energy is one of the basic pillars of our daily life. (European Commission 2006b, 4)

The questions raised in the green paper were to be answered through a closed online questionnaire. Responses came from the regional, state and EU levels, and included responses from business, third-sector and private actors. Some of these provided a written reply. An analysis of the responses to the green paper carried out by the Commission staff identified strong support for the development of a "common European energy policy", as well as for existing objectives mentioned above (European Commission 2006a). The analysis showed that responses ranked sustainability as significantly more important than security of supply and competitiveness. At the same time, the analysis notes that there were many calls for the new policy to be "better centred on individual citizens" (pp. 2-3).

The issue of energy poverty was not mentioned in the green paper, nor was it referenced in the closed, multiple-choice questionnaire put forward by the Commission. For example, the question "How can it be ensured that all Europeans enjoy access to energy at reasonable prices", was followed by answers such as "Use more renewable energies", "Decrease dependency on imported fuels" or "Establish integrated and competitive electricity and gas markets" (European Commission 2006a).

Despite this manner in which the Commission framed the green paper and the subsequent discussion, the Commission staff's analysis of responses to the green paper showed that some respondents (without specifying which) felt that "What the EU had failed to address adequately was the issue of energy poverty, which could become a more pressing issue if higher global prices for fuel, higher carbon prices or costly investment in new infrastructure led to higher energy prices" (p. 3).

While the responses to the green paper were given mainly through the closed online questionnaire, some responses were accompanied by a written portion. Delving deeper into these responses, available on the Commission website, reveals that the different sources voice concern about the issue of energy poverty. At the national level, a notable (and seemingly singular) response came from Belgium, which argued that energy is a “means of prime necessity within a totally liberalised market”, and highlighted the importance of energy providers’ need to meet “obligations of public service” (N.A 2006, 2).

Another source of concern regarding vulnerable consumers was from the UK context. While the official UK government responses to the green paper do not mention the issue of energy poverty, 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 argued that high energy prices pose a “challenge for both energy and social policy in the EU”, and expressed surprise over the lack of “equity issues” and “protective measures...such as...regulated ‘lifeline’ tariffs for low income energy users”. The response noted the disparity between the lack of concern in the green paper for vulnerable consumers, and the concern it voices for “energy intensive European businesses” (Sussex Energy Group 2006, 2–3).

A similar response can be found in the House of Lords European Union Committee response on the green paper, in which energy poverty was mentioned in a memorandum by Centrica, an energy efficiency firm (p. 2). Energy poverty was again stressed more strongly by the energy minister, MP Malcom Wicks (Labour). While stating that “competition works”, as it has for years brought UK consumers lower prices “than in much of continental Europe”, Wicks stressed the “terrible problem of fuel poverty”, arguing that “There is no point in us talking about global warming theoretically if we still have a situation where some of our citizens, not least the eldest, can still be cold in winter in Britain” (House of Lords European Union Committee 2006, 48).

When asked by the chairman of the committee whether he was seeking an increase of “cheap energy” as an answer to the problem of fuel poverty, the minister replied that this was an unrealistic goal, and that it would “foolish” to second-guess the market price of energy. Instead, “When it comes to elderly people, and others who are vulnerable to the cold, some of those with disabilities for example, we have got to focus on energy efficiency”.

Noting the distinction between the UK and the European level, the chairman asked whether the minister was “suggesting the European Union Commission should get involved in deciding how fuel poverty should be tackled in all 25 Member States, or is that not a matter for the UK?”. The minister’s reply again focused on energy efficiency, stressing the role the EU could play in encouraging research and sharing of information on energy efficiency (House of Lords European Union Committee 2006, 48–49).

A similar point regarding the distinction between the EU and the UK level was made in a memorandum by the Department of Trade and Industry. It asserted that “specific measures to achieve reductions in the number of fuel poor should lay at Member State measures” (ibid, pp. 44), again suggesting that the EU may play a role in achieving competitive markets which would have a positive impact in this regard.

A third, similar response related to the UK context comes from a motion for a European Parliament resolution on the green paper, drafted by MEP Eluned Morgan (Wales, Labour). The motion states that “consumers must be placed at the centre of all future energy policies and 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”, including smart metering and billing (Eluned Morgan 2006, para. 103). The final resolution of the Parliament reiterates these points, but also calls on the national energy regulators in the EU to “ensure that universal service obligations are honoured and that vulnerable and poor consumers are adequately protected” (European Parliament 2006, para. 108).

In January 2007, after the green paper and subsequent consultation, the Commission published a communication to the Council and the Parliament entitled “An energy policy for Europe” (European Commission 2007). This document includes energy poverty on the policy agenda, asserting 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 announcing its intention to develop an Energy Customers’ Charter, a nonbinding document with four main goals. The first of these is most relevant to the current discussion: “assist in establishing schemes to help the most EU vulnerable citizens deal with increases in energy prices”, along with three additional goals which focus on consumer switching (improving the level of consumer information, reducing “paper work when customers change supplier”, and protecting

consumers from “unfair selling practices” (p. 10). The idea of a charter on consumer rights as a tool for “better consumer protection” was welcomed by the Council in its meeting in March 2007 (Council of the European Union 2007, 17). The proposal for a charter was accompanied by the Commission establishing the London citizens’ energy forum, which convenes several times a year to discuss consumer-related issues, including vulnerable consumers (European Commission n.d.).

In July 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 on the charter. Several responses may be noted, illustrating different approaches to this issue. First, a negative reaction to the idea of social protection within the energy sector came from the Centre for European Policy (CEP), a German think tank, which bases its analyses on “The ordo-liberal free market principles”. The CEP interpreted the charter in terms of providing free electricity for vulnerable consumers, and argued against such a proposal for three reasons: first, that the Commission lacks legal competence to carry out such measures, 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 if they were not 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 harming growth and jobs (Euractiv 2007).

A second critical view of the Commission’s proposed charter came from the European Regulators Group for Electricity and Gas (ERGEG), an advisory body set up by the Commission in 2003, comprised of the national energy regulatory authorities. The ERGEG’s critique stressed that an “open energy market...” would be “the best possible market for consumers”.

The ERGEG argued against the approach proposed in the charter, claiming that energy poverty is not necessarily related to energy prices but rather to the income situation of the household more generally. Consequently:

To take care of a vulnerable household is not the core business of a distributor or supplier. It could be more comfortable and effective for the vulnerable household not to have to deal with a business actor (or several business actors), but with an independent institution (social security system etc.) who can take care of the household’s total welfare situation, of which energy is only a part. (ERGEG 2007, 19)

The ERGEG stressed two further points. First, assistance for “European energy consumers with special needs caused by impairments or in a poor financial situation” must be carried out through the “general social assistance framework of each member state”. Second, and related to this point, the ERGEG argued against a uniform, binding European-wide strategy for protecting vulnerable consumers, leaving this issue to member states “according to their welfare policy and approaches to state subsidies” (ibid).

A similarly critical approach to the charter, but from an opposite point of view, came from the European Economic and Social Committee (EESC). 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 nonbinding nature of the charter would make it a “directory, rather than a strengthening, of rights” (p. 9). The opinion likens the protection of energy consumers to that of air passengers’ rights, protected in binding regulation, asserting that protecting consumers in the energy sector should be done in a similarly binding manner.

The EESC also suggested that the protection of consumer rights and particularly those of vulnerable consumers become part of the remit of the European energy regulator (the European Agency for the Cooperation of Energy Regulators: ACER). Contrary to the separation between the national and EU levels suggested above in the discussion in the House of Lords, the EESC opinion argues that “The subsidiarity principle...so often mistakenly quoted to oppose Community initiatives, should in this instance apply in support of decisions that benefit consumers, in the absence of effective national legislation” (p. 7). That is, the absence of adequate protection at the national level invites intervention from the EU.

The opinion also suggests several concrete steps in order to protect vulnerable consumers. Arguing that “Fuel poverty means exclusion from a dignified life”, the opinion suggests 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”. However, rather than proposing “free energy”, the opinion suggests this should be addressed through the taxation system. In addition, “Public service contracts should provide for the provision of a reserve of electricity and gas at cost price, in order to meet the needs

of the most vulnerable consumers, to be sold to them in sufficient quantities at affordable prices” (p. 15).

A similar view of the charter came, again, from the European Parliament. A report (and a motion for a Parliament resolution) to the Committee on the Internal Market and Consumer Protection by rapporteur MEP Mia De Vits (Belgium, Party of European Socialists), stresses the importance of affordable energy for participation in “social and economic life”, and for “the principles of social inclusion, equal opportunities for all and fair access to knowledge in the digital era” (De Vits 2008, 3). This report again disagrees with the approach taken by the Commission regarding the charter on consumer rights, arguing that “this Charter should have a legally binding nature, or must at least be incorporated and annexed to a legislative instrument”, such as the third directive (ibid, p. 10).

It can also be noted, however, that the opinion of the Committee on Industry, Research and Energy differed from MEP De Vits’s report on this issue, welcoming the charter as an information tool rather than as a new binding legal tool.

Contrary to the EESC’s approach, De Vits’s report stresses that “the future protection of energy consumers must continue to be based on joint action by the European Union and Member States.... Consistent application of the principle of subsidiarity is therefore vital” (p. 5). However, at the same time, the report calls on “the Commission to provide guidance on a common definition of public service obligations”, and to “define the notion of energy poverty” (p. 7).

The report makes several specific points about the protection of vulnerable consumers and energy poverty. First, the report stresses that in order to prevent disconnections, member states must appoint a supplier of last resort in national legislation. Second, it asserts that disconnection due to non-payment should be considered a last resort, especially when “vulnerable consumers and holiday periods are concerned; providers ought to apply the principle of proportionality, as well as make an individual notification to the consumer, before proceeding with such an action” (p. 6).

Third, beyond having the Commission define energy poverty, the report defines this term in several ways:

Energy poverty means a household which is not able to afford to heat the home to an acceptable standard – this is based on the levels recommended by the World Health Organization: 18 °C for all living areas when occupied. It also includes the

ability to purchase other energy services in the home at a reasonable cost. A household is energy poor if its share of energy expenditure within total household expenditure exceeds twice the national median energy expenditure.

Such consumers, “(with special needs caused by impairments or in a poor financial situation) should benefit from essential energy services specific prices for vulnerable consumers[sic] to maintain their physical and mental health and well-being, at reasonable prices or, where necessary, free of charge” (p. 13). 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).

Fourth, the report “deplores” the fact that “vulnerable energy consumers have serious problems”, and stresses that these “need to be explicitly addressed in national social security systems or other equivalent measures”. The extent to which such measures take account of the risks of energy poverty should be monitored by the national energy regulators, together with the European Agency for the Cooperation of Energy Regulators (ACER). Furthermore, “regulators should also take responsibility by monitoring the progress of Member States and communicating successful measures by Member States to deal with energy poverty”.

The report also welcomes the Commission’s intention to create an energy checklist, providing consumers with useful information, but cautions against making the checklist a replacement for the proposed charter on the rights of energy consumers (p. 10). Finally, the report suggests that “Member States shall take appropriate measures to address energy poverty in National Energy Action Plans”, and report on these plans to the ACER.

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, emphasis added).

Table 2 indicates the relation between the positions of influential institutions regarding the protection of vulnerable consumers and the final provisions of the third electricity directive. The table shows the positions taken by the main institutions involved in the policy process, alongside the final measures taken.

Table 2: Relating institutional position to measures of social protection in the third electricity directive

Final measures in the directive	Institutions' positions
National definitions of energy poverty: implementation should be reported to the Commission	EESC: The Commission should apply a uniform definition European Parliament (EP): Calls on the Commission to define energy poverty (proposes a definition of its own), suggests that member states define vulnerable consumers and that the Commission should enforce definition through infringement procedures
National action plans	EP: National action plans should be implemented
Role for national regulators in protection of vulnerable consumers	EESC: Assign a role to the EU-level regulator in protecting vulnerable consumers EP: Role for national energy regulators, together with EU-level regulator
Possible prohibition of disconnection during critical times (national level)	EESC: Disconnection due to non-payment should be banned altogether EP: Disconnection due to non-payment should be considered a last resort, especially when regarding vulnerable consumers and holiday periods
Energy checklist	Proposed by the Commission EP: Welcomes checklist, but it should not replace charter
Parts of the charter on the rights of energy customers included in the directive	Commission (2007): Suggested as a nonbinding document EESC: Charter must be binding EP: Charter must be binding (Committee on Consumer Protection) Charter should be an information tool (Committee on Trade and Industry) Commission (2009): Parts of the charter are included in the third directive, making them more binding

4. Comparative discussion

How does the policy process depicted above relate to the research hypotheses above? The first hypothesis (the spillover hypothesis), tying the development of social protection to business interests, was not corroborated as practically no influence by business groups was evident. The second hypothesis, tying the development of social protection to bureaucratic politics, hypothesizing that the development of social policy would be led by the Commission with the aim of expanding its competencies, seems to be very partially supported. While it can be argued that the Commission did take a leading position in developing some of the aspects of social protection, and that this expands the areas in which it is involved, it can alternatively be argued that the Commission was pushed into this position by other actors, most notably the Parliament, and that the Commission expanded its own competencies to a lesser extent than other actors suggested that it should. For instance, while the EESC suggested that the Commission define the concept of vulnerable consumer at the EU level, the Commission opted to leave this definition to the member states.

The third hypothesis, the supranational hypothesis, was that the Commission would advance the issue of social protection – not, however, in order to promote its own position, but in order to advance the Europeanization project. This hypothesis may have been drawn in overly general terms, but may still explain the development of social protection in the electricity directives. Thus, while the Commission may not have led the development of social protections on its own, it was joined by other, transnational institutions: the Parliament and the EESC. Although it is difficult to demonstrate that advancing social protection is related to the Europeanization process as a whole, it would be easier to link this to the problems faced by electricity sector reform: the rises in energy prices, energy supply issues and the notion that the consumer was not currently at the centre of the reform agenda. Under these conditions, advancing the agenda of consumer protection and the protection of vulnerable consumers can be said to advance the liberalization process more generally.

That does not mean this was all the actors involved were interested in, or that all of them were interested in this goal to the same extent. The reports and opinions by the EESC and the Parliament show concern for, and interest in, the issues of energy poverty, vulnerable consumers and consumer protection. At the same time, however,

the involvement of these bodies in the process could in itself also have served to advance the liberalization process more generally.

What does the above-described policy process teach us about the nature of the EU as a social policy maker? Two dimensions of policy making, taken from the theoretical frameworks discussed above, may be useful in addressing this question. The first of these is the extent to which policy is transnational or left at the national level. This concerns the debate about the nature of Europeanization as an intergovernmental or transnational process. The second suggested dimension is the extent to which policy is binding or voluntary; this concerns the nature of social and regulatory policy. The more binding policy is, the farther it is from Majone’s market-compatible social regulation, and closer to the logic of social policy making.

What kind of social policy maker, then, is the EU, and what position did the main actors take on this issue? It can be argued that the EESC took a position which was both transnational and binding – that is, a position favouring a view of the EU as a social policy maker. The European Parliament took a position which was binding but somewhat less transnational – in which the EU serves an effective coordination role. The Commission initially favoured a position of symbolic coordination, advancing a nonbinding, transnational approach (for instance, through the charter on the rights of energy consumers). However, the final directive takes a position most similar to that favoured by the Parliament: a binding, national approach in which EU social policy assumes an effective coordinating role.

These initial characterizations of the nature of social policy in the EU and of the EU as a social policy maker are presented in Table 3.

Table 3: Different possible roles of the EU as a social policy maker

Is policy binding? / Is policy transnational?	Voluntary	Binding
National level	No impact	Effective coordination
EU level	Symbolic coordination	Social policy maker

5. Conclusions

The introduction of social protection into the electricity directives in the EU may demonstrate the occurrence of more economic liberalization, together with greater social regulation. That is, the liberalization of the electricity market in Europe fostered the conditions for the creation of greater social protection and social policy through regulation. Reform created problems for vulnerable consumers, faced with market prices in a world of rising energy prices. It also created political and legitimacy problems for those aiming to advance the reform process. Contrary to Sharpf's view, which precludes the development of social protection in areas in which legitimacy is based on professional knowledge and standards, in this case social protection developed because social policy was needed in order to serve as a source of legitimacy for reform itself. In this regard, bringing in the Parliament and the EESC lent the liberalization process political and democratic legitimacy.

This case demonstrates another facet of the development of social policy in the EU: it accompanies and in fact advances the liberalization process, even when the very idea of adding a social dimension to the electricity sector defies the principles of economic efficiency upon which this reform is built. This case demonstrated the important actors in this field, highlighting the role of the European Parliament, which played a major part in shaping the final provisions in the directive. This adds to the literature which has already highlighted the role of the Commission and the Court in this regard.

Finally, this case has wider implications for the literature on the regulatory state. If the EU is indeed an 'almost pure' example of the regulatory state, and electricity sector reform is a paradigmatic example of the wave of economic liberalizations of publicly operated sectors which began in the 1990s, then the (re)introduction of social protection through regulation should be seen as an expected outcome not only in the EU but in the regulatory state more generally. The project of not only liberalizing these sectors, but also separating the social and political spheres from the economic sphere can be seen in this case as an unrealistic goal, perhaps even harmful to the very process of liberalization it is trying to advance. In order to advance the goal of freer markets, these markets need to be re-embedded into the social sphere, not detached from it.

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