

organisations. This would also enable the priorities for Community intervention to be identified. The inquiry

should be carried out quickly and should not be allowed to delay a decision on immediate action.

Brussels, 31 October 1996.

The President
of the Economic and Social Committee
Tom JENKINS

Opinion of the Economic and Social Committee on 'Public service obligations in the internal energy market'

(97/C 56/16)

On 25 April 1996 the Economic and Social Committee, acting under the third paragraph of Rule 23 of its Rules of Procedure, decided to draw up an opinion on 'Public service obligations in the internal energy market'.

The Section for Energy, Nuclear Questions and Research, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 13 September 1996. The Rapporteur was Mr Hernández Bataller.

At its 339th plenary session (meeting of 31 October 1996), the Economic and Social Committee adopted the following Opinion by 45 votes to 10 with 5 abstentions.

1. Introduction

1.1. Some public interest needs require special provisions because of their particular features and the natural limits to the effectiveness of market forces. Each Member State has come up with different solutions reflecting their geography, history and traditions. Nevertheless, despite appearances, the solutions in reality embrace common or similar concerns.

1.1.1. In the electricity sector especially, regulation by the public authorities is necessary for the following reasons, among others:

- a) electricity is a basic and essential service, a primary necessity, the supply of which should be permanently guaranteed;
- b) some segments of the electricity system constitute a natural monopoly.

1.1.2. Essential services such as energy frequently involve costly investment which is only profitable in the medium- or long-term and is subject to economies of scale. These factors, which are typical of network infrastructures, warrant the granting of special or exclusive rights in certain cases; to offset the lack of free

competition, companies must undertake to fulfil some specific obligations.

1.2. The creation of an internal energy market is the Community's key objective. The introduction of such an internal market in the electricity sector is especially important for rationalizing production, transmission and distribution, for bolstering the Community's security of supply, and for ensuring that all users can buy on equal terms, thus avoiding distortions of competition between industrial consumers.

1.2.1. Heat and light are basic human necessities which must be permanently guaranteed by the market at reasonable prices for the whole of society.

1.3. The electricity sector is a prime example of a situation in which the market is not able to allocate resources in an efficient manner. Here it should be pointed out that some of the activities associated with the supply of electricity (distribution and transport) constitute natural monopolies on account of the increasing economies of scale where levels of demand are high.

1.3.1. It would therefore be advisable to differentiate between those segments of the electricity system which

can be subject to competition and those which cannot. Thus, with the ultimate objective of providing consumers with services as efficiently as possible, a market-based solution may be found by introducing competition into the generation and sale of energy through regulation of access to the electricity network on non-discriminatory terms, while transport and distribution would be controlled under a natural monopoly regime.

1.4. The current opinion is thus being drafted in order to lay down a number of minimal guidelines which will guarantee, as far as possible, a balance between:

- a greater degree of competition in the energy sector in those segments where this is possible;
- the observance of public service obligations in some Member States; this includes, among other things, the need to provide a basic universal service, the need to protect social rights, and the need to pursue the goal of economic and social cohesion; the provision of public services to users is an integral part of a citizen's rights.

1.4.1. In certain circumstances the fulfilment of public service obligations will involve the exercise of special or exclusive rights, and companies providing services will be subject to the competition rules insofar as this does not prevent them, *de facto* or *de jure*, from fulfilling the specific tasks conferred upon them, in accordance with Article 90(2) of the Treaty.

1.5. In its opinion on Community energy policy⁽¹⁾ the Committee recognizes that:

'The common definition of public service obligations in the electricity and natural gas sectors should embrace the universal supply obligation as far as practicable and appropriate and a system of proportional distribution of prices, covering a specific territory, for groups of consumers who have not renounced this right.'

The Committee elsewhere states that:

'The Committee would like to see all the member states establish such public service obligations.'

1.6. The Cannes European Council itself declared that: 'The Union must guarantee, in particular, the proper functioning of tasks of general economic interest in Europe, with a view to ensuring equality of treatment between citizens in Europe, including equal rights and

equal opportunities for men and women, balanced town and country planning, the quality, continuity and adaptability of services, and the safeguarding of long-term strategic interests.'

1.7. It should also be pointed out that the amended draft directive concerning common rules for the internal market in electricity (on which the Council has unanimously reached a political agreement reflected in its recent common position), contains a reference to public service obligations.

1.7.1. Article 3 of this proposal stipulates that the Member States may, in accordance with Treaty provisions in general and Article 90 in particular, impose public service obligations in the general interest on electricity companies; such obligations may concern security, including security of supply, regularity, quality and price of supplies, and protection of the environment. They must be transparent, non-discriminatory, verifiable and subject to notification to the European Commission.

1.7.2. The Member States, acting under Treaty Article 90, may also refuse to apply Articles 5, 6, 17, 18 and 20 of this directive (concerning arrangements for generation, access to networks and the construction of direct lines) if their application might, *de facto* or *de jure*, obstruct compliance with the obligations incumbent on electricity companies in the general interest, provided that this does not affect the development of trade in a manner contrary to the interests of the Community.

1.7.3. The Member States are also entitled to impose on distribution companies an obligation to supply electricity to customers located in a given area at a tariff which may be regulated to ensure equal treatment of the customers concerned.

1.7.4. The proposed directive, while respecting the subsidiarity principle, authorizes the Member States to include long-term planning as a means of fulfilling the public service obligations.

1.7.5. The common position reached on the proposed directive involves a major step forward in establishing the internal electricity market because it contains rules which will gradually open up the sector, specifically: opening-up to competition in generation, introduction of an independent network manager, co-existence of a single purchaser system and a system of negotiated third party access to the network, uniform and gradual opening-up of the market to final consumers from a

⁽¹⁾ OJ No C 393, 31. 12. 1994, p. 95.

given level of consumption, possible opening-up to distributors and unbundling of accounts for electricity production, transport and distribution activities.

2. The protection of the public interest

2.1. All the Member States have rules governing the public utilities aimed at regulating, to a greater or lesser degree, such activities; in most cases these rules place one or more companies in strategic sectors or supplying 'essential' goods under the control of the public authorities. The purpose of this intervention is to protect the public interest, in particular that of the service users (thus the concept of 'Daseinsvorsorge' in the regulations of the Germanic countries, of 'public utility' in the regulations of the Anglo-Saxon countries and of 'servicio publico' in the regulations of the Latin countries).

2.1.1. At both national and Community level, the distinct concepts of public services, services of general economic interest and universal service are lumped together indiscriminately; as this leads to confusion on occasion, the Commission should clarify and delimit these three concepts.

2.2. At all events, the following features are, to a greater or lesser extent, characteristic of public utility services in the member states:

- a) The needs which they satisfy. Such needs are recognized by society, but cannot always be satisfied by private initiatives. These needs may be associated with fundamental liberties or stem from community solidarity.
- b) The prerogatives which users or customers enjoy. Users have rights which cannot be met spontaneously by the market.
- c) The objectives which they are assigned. These are: to meet the social needs of all members of the community concerned — no one may be excluded for physical, economic or other reasons; to promote the effective and balanced utilization of the land-area and natural resources; to offer a service in the public interest which cannot be provided by market forces.
- d) The authorities which organize them; where necessary they guarantee the conditions in which the service is to be provided.

2.3. A number of common general working principles apply to all public utility services; these are proportionality, continuity, equal access (equity), adaptability (or flexibility), universality, participation of users or customers, and setting of minimum standards for service quality.

2.4. The market is largely indifferent to the objectives of solidarity, cohesion and equity, even though compensatory tariff fixing can help to achieve such objectives. The marginalization or exclusion of certain social groups from various services essential to everyday life can create difficulties. Providing adequate public utility services at reasonable prices will promote the social integration of disadvantaged persons.

2.4.1. To be precise, in the gas and electricity sectors the public authorities should endeavour to reconcile as far as possible the objectives of competition with security of supply and social objectives; they may intervene in particular areas of these sectors in order to regulate the companies concerned so as to ensure that certain guarantees regarding the protection of the public interest are met, especially those connected with supply or the operation of the transport and distribution networks. However, under the common rules for the internal market in electricity, the principles of transparency and unbundling of accounts must apply.

2.5. The EU's economic system matches the model of a free market not governed completely by the free play of its own spontaneous mechanisms, since it is an economic system set up by law and tightly regulated by secondary legislation administered in some instances by the Community authorities themselves.

2.6. The traditional concept of public service associated with monopolies or mandatory public authority ownership of certain services, along with their management and administration, needs to be brought into line with Community law and, in particular, rendered compatible, wherever possible, with the rules on competition.

2.7. This concept of public service should in no way affect the specific legal system governing the companies which provide services in each Member State, since it would otherwise contravene Article 222 of the Treaty. Each Member State thus remains responsible, in accordance with the principle of subsidiarity and Treaty provisions, for deciding how such services are to be organized.

3. Public service obligations in the electricity and natural gas sectors

3.1. Henceforward the term 'public service obligations' will be used for the sake of consistency with the

concepts used in the proposed directive on common rules for the internal electricity market.

3.2. Bearing in mind the differing rules in the Member States governing gas and electricity supplies, and the reasons why national governments organize their public services along different lines, the Committee considers that a number of minimum criteria should be established at Community level, on the basis of which the Member States would impose certain public service obligations on companies providing gas and electricity supply services.

3.3. This need for harmonization flows from the establishment of an internal market in these energy sectors. What is needed is an adequate framework enabling companies which provide such services to integrate into the market without infringing the legitimate obligations imposed by each Member State to ensure that the companies fulfil their public interest duties.

3.3.1. The aim — which could also be achieved by tightening up Article 3 of the internal market directive — should be to avoid 'elastic' interpretations of certain principles possibly leading to the introduction of constraints and obstacles which call into question the 'openness' guaranteed in the proposed directive.

3.4. The main obligation to which electricity and gas companies are subject, and their *raison d'être*, is the provision of electricity and natural gas respectively. From this obligation a number of other obligations stem:

3.4.1. Safeguarding regularity and reliability of supply; this means maintaining the distribution networks in an appropriate technical state of repair and ensuring a permanent balance between supply and demand;

3.4.2. Maintaining specified quality levels; this means that, in line with the principle of subsidiarity, each Member State will have to establish its own specific national objectives which will have to be monitored in order to ensure transparency. Each Member State will also have to report on the operation of the service and compliance with these quality objectives. Although this will ensure transparency, it will only be effective if compliance is monitored and supervised — and sanctions imposed if necessary — by the competent administrative authority in each Member State;

3.4.3. Providing a universal service in the electricity sector; this means expanding distribution facilities when

this is necessary to meet new requests for supply, in keeping with the obligation to supply even if a particular operation is not profitable;

3.4.3.1. As regards the provision of the service in less developed and less populated areas, national networks should be developed in harmony with regional policies and the Structural Funds.

3.4.4. Establishing reasonable and comparable tariffs for users, according to category; uniform tariffs may be maintained in sectors which have not been opened up to competition; insofar as competition is introduced, prices will be fixed taking into account market trends; however, this will not prevent — by Member States which so decide — the establishment of a maximum price or the possible introduction of a social tariff, under the control of the national public authorities;

3.4.5. Protecting the environment; establishing competitive markets should not mean an end to national policies for environmental protection, energy efficiency, rational planning of resources, diversity of resources and technological innovation. Safeguarding environmental protection and energy efficiency must form an essential part of this regulatory framework.

3.5. Within the limits of these criteria the Member States will have to define the public service obligations to be imposed on companies providing such services, without prejudice to long-term planning. Such measures will in any event have to be proportionate, eschew arbitrary discrimination and as far as possible avoid restrictions on competition.

3.5.1. To guarantee transparency and legal certainty, the Member States will notify the Commission of these obligations and the latter will be able to verify whether the national provisions are compatible with Treaty provisions.

3.5.2. The Committee is aware of other requirements in certain Member States which have to be met by companies operating in these sectors and which affect other stages prior to the supply of electricity and gas; these requirements, which may also distort free competition, include obligations deriving from national energy planning regarding the use of national energy sources, renewable energy sources, R & D investment, economic and social cohesion, etc.

4. Creation of a basic legal framework

4.1. The future approval of the amended proposal for a directive on common rules for the internal electricity

market will entail the need to combine and balance the rules of free competition with respect for public service obligations; it would therefore be sensible to introduce a basic legal framework which lays down the rules of play, is open to all economic operators insofar as is possible, and is the responsibility of the Member States in accordance with the subsidiarity principle.

4.1.1. These rules should be designed to ensure the proper operation of the market through free competition, the technical efficiency of the system and the protection of consumers, whilst maintaining, at the very least, the present level of basic social rights and economic and social cohesion.

4.1.2. The objectives of this basic legal framework should be:

4.1.2.1. The development of a competitive industrial structure, accompanied by price cuts for consumers, covering their energy service requirements at reasonable cost, in a non-discriminatory manner, whilst maintaining security and reliability of service provision with a minimum impact on the environment.

4.1.2.2. The promotion of new jobs, the improvement of living standards and working conditions, adequate social protection, social dialogue involving all partners, the development of human resources to achieve a high, sustained level of employment, and steps to combat exclusion.

4.1.3. Furthermore it is up to the Member States to introduce additional public service obligations and to lay down the targets for geographical coverage within their national territory, provided that these are proportionate, non-discriminatory, transparent and compatible with Treaty provisions.

4.2. This 'basic legal framework' will have to be based on the following principles.

4.2.1. Firstly, it will have to respect the rules of the Community Treaties, which means *inter alia* respect for:

- the principle of non-discrimination;
- the competition rules;
- the completion of the internal market;
- the principle of transparency;
- the strengthening of social and interregional cohesion;
- a high level of employment and social protection;
- and, finally, improving the quality of life and living standards of all citizens.

4.2.2. Certain basic freedoms must also be respected:

- a) free movement of energy products, abolishing as far as possible exclusive import and export rights;
- b) freedom of access to the activity: the sector must be open to private initiative and exclusive rights must be abolished as far as possible, allowing a plurality of offers in the provision of services. Access for operators may be regulated by tendering or authorization systems designed to ensure that a number of transparent and objective requirements are met, including compliance with public service obligations;
- c) free access to the networks: the allocation of access rights and the conditions attaching thereto must be laid down precisely by the Member States in accordance with the principle of subsidiarity, either through the negotiated access to the network formula or the single purchaser formula;
- d) freedom to enter into contracts (in line with the opening-up of the market) and competitive pricing, without prejudice to the exercise by the authorities in each Member State of their powers to govern and to control prices for the purpose of regulating the market and pursuing an economic policy;
- e) freedom to invest: the investment decisions of firms in a competitive environment will have to be taken by the firms themselves and they will consequently have to accept the commercial risks associated with such investments. The Member States will be able to choose between an authorization and a tendering system, which must comply with objective, transparent and non-discriminatory criteria.

4.2.3. The public service obligations referred to in the above section will have to be guaranteed.

4.2.4. Protection of consumer rights

4.2.4.1. The legal framework will have to protect the rights of consumers, including clear and adequate information on the service being provided, conditions of supply, most suitable tariffs, technical specifications, and a high-quality customer service.

4.2.4.2. Provision should be made for consumer representation *vis-à-vis* the competent administrative authority, the participation of consumers in decisions affecting them (via their representatives), and rapid, inexpensive procedures for resolving disputes.

4.2.4.3. In keeping with the general aims of guaranteeing affordable services for everyone, it would be advis-

able to apply 'special tariff regimes or tariffs for specific users'. This will make the universal service more accessible to certain users or groups of users with specific needs. Adequate social arrangements must be guaranteed for persons with low incomes, as well as for the elderly and handicapped, with any necessary extra financial support provided by the social security or tax system of each Member State.

4.3. The following instruments will be required to implement the aforementioned principles:

4.3.1. Unbundling: to this end it will be necessary to keep separate accounts for generation, transport, distribution and supply to the final customer.

4.3.2. Prices: at all events, transparency in price setting is necessary; to this end, an official model for energy consumption bills should be drawn up in each member state.

4.3.3. Separation of regulatory and operational functions. In compliance with the principle of subsidiarity, each Member State will be able — in accordance with its own constitutional provisions — to monitor activities in the sector; this must be done objectively and transparently and by means which include: surveillance to ensure that operators do not behave in such a way as to distort competition; enforcing specific provisions affecting operators in the market; monitoring compliance by companies with public service obligations; ensuring the protection of service users, especially with regard to tariffs and quality of service; establishing contacts with national and regional consumer representatives and with representative socio-occupational organizations to enable users to lodge complaints about services, tariffs and service obligations, and to resolve possible conflicts.

5. Conclusions

5.1. The ESC reiterates the need to create an Internal Energy Market as one of the basic pillars of Community energy policy.

5.2. The ESC recognizes that the supply of gas and electricity is crucial to all citizens and that economic efficiency therefore needs to be tempered by respect for the public interest, namely the regular and continuous supply of these products as an indispensable social objective.

5.3. Consequently the ESC would point out the need to establish minimum criteria at Community level to serve as a reference for all companies providing these services; this will make for more competition, thus enabling the economic and social objectives of the internal electricity and gas markets to be achieved.

5.4. The Committee would likewise reiterate the need for this regulatory framework to focus as far as possible on striking a balance between the competition rules and the fulfilment of public service obligations.

5.5. This observance of public service obligations within a competitive environment requires the establishment of some minimum criteria enabling the Member States to define these obligations in the energy sector, with the aim of providing operators with a basic legal framework. The Member States will have to impose these obligations in a clear, non-discriminatory manner in accordance with Community rules and notify them to the Commission.

5.6. Without prejudice to the above comments, and given that public services are the guarantors of fundamental social rights and economic and social cohesion, the ESC urges the Commission to support the position of the European Parliament and either (a) to incorporate the concept of public service and its underlying principles in the Treaties as part of the revision procedure at the Intergovernmental Conference, or (b) to adopt a 'Public Services' Charter' to be incorporated in the new Treaty as an Appendix. Such a charter, with its valuable interpretative function, would make Community regulations more transparent and more secure.

Brussels, 31 October 1996.

*The President
of the Economic and Social Committee*
Tom JENKINS

APPENDIX

to the Opinion of the Economic and Social Committee

The following amendments to the ESC Opinion were defeated in the debate:

Amendments proposed by Mr Beale and Mr Walker**Page 4 — point 2.4.1**

Replace 'gas and electricity sectors' by 'electricity sector'.

Page 5, point 3

Replace 'and natural gas sectors' by 'sector'.

Page 5, point 3.2

Delete 'gas and' in both cases.

Page 5, point 3.4.

Delete 'and gas' and 'and natural gas respectively'.

Page 9 — point 5.2

Delete 'gas and'.

Reason

The opinion and appendix are relevant to electricity alone, as is the draft directive mentioned in point 1.7 of the opinion. The public supply of natural gas merits separate consideration, for practical and legal reasons.

Result of the vote

For: 14, against: 34, abstentions 3.

Amendment proposed by Mr Aspinall**Page 10 — point 5.6**

Delete the whole paragraph.

Reason

This approach has nothing to do with the concept of public service obligations in the internal market for electricity. It is certainly not an issue for debate within the current file. It goes well beyond the terms of reference for this own-initiative opinion and needs to be debated in greater depth to fully understand what the implications of such a policy will have, not only on the electricity sector, but also in respect of gas, oil, coal, renewables, telecoms, rail, air transport, etc.

Result of the vote

For: 21, against: 41, abstentions: 2.

Amendment proposed by Mr Panero Florez**Page 10 — point 5.6**

Delete.

Reason

The European Commission has just presented a communication on services of general interest in Europe on which the Committee is probably going to issue an opinion.

Under these circumstances it would seem prudent to wait for the subcommittee which may be set up to deal with this important communication to finish its work — which involves not only the energy sector but others too, such as post, transport and telecommunications — before deciding on the legal formula to be adopted for these general interest services in the Treaty.

Result of the vote

For: 21, against: 41, abstentions: 2.

Amendment proposed by Mrs Sirkeinen**Point 5.6**

Replace with the following text:

'The energy sector is one of the sectors which is the subject of the current basic debate on the fulfilment of social obligations incumbent on services of general interest in an open market economy. The question of what action could be taken in this regard at the Intergovernmental Conference will be dealt with by the Committee at a later date, when it takes a stand on the Commission document on services of general interest in Europe.'

Reason

5.6 refers to public services in general, not just the energy sector. As the opinion deals with the energy sector only, the Committee should not take a stand on public services as a whole in this context.

Result of the vote

For: 27, against: 35, abstentions 3.
