

The Active Energy Consumer in EU Law

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Abstract

With the availability of cheaper technology and the rise of digitalisation, consumers can actively participate in markets and also offer their own services or self/co-produce products and services. Active consumers are fundamental building-blocks of the European Union's goal to achieve smart, sustainable and inclusive growth in Europe. In the energy sector active consumers play a key role in promoting competition, ensuring affordable energy prices and security of supply, as well as contributing to the EU's environmental and climate goals. By engaging in more efficient energy use, consumers are crucial actors to manage the energy transition. However, the present legal framework does not fully facilitate this active role. The aim of this article is to answer the question how EU law conceptualises and supports the active role of consumers in the regulation of energy markets.

I. INTRODUCTION

Consumers' economic and social roles have fundamentally changed as a result of globalisation, demographic shifts, technological developments and regulatory reforms. Internationalisation of trade expanded consumer markets and liberalisation of key consumer sectors introduced market mechanisms and enabled consumer choice. With the availability of cheaper technology and the rise of digital markets, consumers can actively participate in markets and also offer their own services or self/co-produce products and services. Active consumers are fundamental building-blocks of the European Union's 21st century strategy to achieve smart, sustainable and inclusive growth in Europe on the basis of a social market economy.¹

The energy sector is a prime example of these developments. Renewable energy sources are a catalyst to a clean energy transition. At the same time, technological developments such as smart meters, solar panels and decentralised energy storage enable a proactive role for energy consumers.

The EU's energy regulation has gradually opened up national energy markets in order to promote competition and to secure energy consumers the right to choose freely.

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¹ Communication from the Commission, "EUROPE 2020 A Strategy for smart, sustainable and inclusive growth" (03.03.2010) COM(2010) 2020 final, para. 3.1; Communication from the Commission, "Single Market Act Twelve levers to boost growth and strengthen confidence 'Working together to create new growth'" (13.04.2011) COM(2011) 206 final, para. 2.4; "Boosting confidence and growth by putting consumers at the heart of the Single Market" 22 May 2012, COM(2012) 225 final.

The internal electricity market has been progressively implemented through three packages of Directives from 1999 onwards, with the aim to deliver real choice for all consumers of the EU, more cross-border trade, efficiency gains, competitive prices, and higher standards of service, and to contribute to security of supply and sustainability. Throughout the three legislative stages the rules of consumer protection have been strengthened and in the Third Package currently in force, rules for activating consumers have been implemented.

In November 2016, the Commission published its proposal for a Fourth Package, which focuses on “consumer centred clean energy transition”. This new market design is based on the active participation of consumers. Instead of being dependent on a top-down energy model, consumers can now actively manage their own consumption and even (co-) produce their own energy. Accordingly, active consumers are crucial to realise energy efficiency, sustainability and thus manage the energy transition in a cost-effective way. However, the present legal framework does not yet enable this active consumer role.

In view of that, the aim of this article is to answer the question how EU law conceptualises consumers’ role in the regulation of energy markets and how it supports consumers to become active energy market actors. Answering this question is relevant because if consumers are to play a central role in achieving the goals of the energy markets, this needs to be reflected in the legal rules. If their potential active role is not facilitated by legal provisions, the incongruity between legal rules and consumers’ concrete role in the energy market may lead to regulatory ineffectiveness and legal uncertainty. At the same time, technical, psychological and economic factors create consumer inertia in energy markets, which also need to be analysed when the legal framework is assessed.

In order to answer this question, section II investigates how EU law conceptualises the role consumers play in the internal market and in the liberalised network sectors. The article then continues with assessing the role consumers play in the current and newly-proposed design of energy market and more specifically the role of the active consumers and so-called prosumers. On the basis of these two sections, section IV critically analyses the legal position of the consumer in EU energy law. It first examines the relationship between EU energy law and consumer protection and then how the current Energy Directives and the proposed Fourth Package conceptualises the active consumer. This section investigates the definitions and the normative concept of the (energy) consumer as well as other legal rules having a bearing on the consumer’s legal position. The article closes with conclusions.

II. THE ROLE OF THE CONSUMER IN THE LAW OF THE INTERNAL MARKET AND THE LIBERALISATION PROCESS

The role of the consumer in the internal market has been conceptualised in EU law as an instrument to achieve market integration. As the EU is a project of market integration, all EU law is drafted and used as a tool to achieve the objectives of market integration.²

² CU Schmid, “The Instrumentalist Conception of the *Acquis Communautaire* in Consumer Law and its Implications on A European Contract Law Code” (2005) 1(2) *European Review of Contract Law* 211, doi <<https://doi.org/10.1515/ercl.2005.1.2.211>>.

Consequently, the role of the consumer goes beyond individual transactions with suppliers and is sub-ordered to the public law objectives of market integration and the regulation of the internal market.³ Therefore, the consumer is not conceived as a weak market actor in need of social protection but rather as an assertive market actor who contributes to the well-functioning of markets. Consequently, the consumer in EU law is a legal instrument to build, support, and expand the Single European Market.

The instrumentalist concept of the consumer is reflected in the fact that consumer law did not develop as an autonomous area of EU law but on the legal basis of the internal market, Article 114 TFEU. Accordingly, the harmonisation of consumer rules was not an end in itself, and consumers were merely regarded as the passive beneficiaries of free trade and market integration.⁴

Moreover, the instrumentalist view of the consumer is also mirrored in the way the normative concept of the consumer developed in EU law. It was developed by the CJEU through its free movement jurisprudence, and therefore its primary goal was to complete the internal market and to facilitate the functioning of free movement and competition rules.⁵ As a result, EU law relies on the benchmark of the “average” consumer who is a well-informed, reasonable and circumspect market actor.⁶

The current definition of the normative concept is based on *Gut Springheide*, where the Court explained that “... an average consumer is reasonably well informed and reasonably observant and circumspect”⁷. According to this jurisprudence, the consumer is a well-informed and confident market actor, who is able to use information and participate actively in the market by making informed choices rather than their choices being defined by governmental regulation and corrective legal measures. The average consumer is granted mandatory rights⁸ in order to participate in markets and to realise the EU goal of market integration.

This instrumentalist link between the consumer and the internal market has also been the underlying idea behind EU law adopted in regulated markets. From the end of the 1990s the sectors of public utilities became subject to market liberalisation⁹ and accelerated EU integration. In these sectors the EU adopted a market-oriented approach

³ M Bartl, “Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political” (2015) 21 *European Law Journal* 572 at 582.

⁴ Most of the directives were based on Art 114 TFEU and thus their stated rationale was to combat market fragmentation. Early directives regulated misleading advertising, doorstep selling, consumer credit, package travel, distance selling. See S Weatherill, “After KECK: Some Thoughts on How to Clarify the Clarification” (1996) 33(5) *Common Market Law Review* 887.

⁵ H-M Micklitz, “The Consumer: Marketised, Fragmentised, Constitutionalised” in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law* (Oxford, Hart Publishing 2016) p 21 at p 23; H-W Micklitz, “An expanded and systemized Community Consumer Law as alternative or complement?” (2002) 13(6) *EBLR* 583.

⁶ In cases such as C-238/89, *Pall Corp.*, C-315/92 *Clinique*, C-470/93 *Mars* and C-373/90, *Procureur de la Republique v X* the ECJ condemned national rules allegedly promoting consumer protection as being over-regulatory and relied on the “reasonably circumspect consumer” who is capable of processing information and making informed choices: Case C-373/90 *Procureur de la Republique v X*, ECLI:EU:C:1992:17 (C-126/91 *Yves Rocher*, para. 17).

⁷ C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung*, ECLI:EU:C:1998:369, paras. 31, 32. See also C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, ECLI:EU:C:2010:660, para. 103.

⁸ Micklitz (2002), *supra*, note 5, 588.

⁹ After the failures of state interventions of the 1970s to handle the energy crisis, the idea emerged that market forces were better at managing energy markets efficiently to achieve lower prices and economic growth: A Duterque, “The liberalisation of EU energy markets: A consumer’s perspective” (2013) 2 *Journal of European Consumer and Market Law* 80, 80.

in order to deliver public goods and services by restructuring the sector, activating competition and introducing customer choice of suppliers. The role of the nation states were “rolled back” and public utilities became integral part of the internal market. The (de)regulatory approach strongly focused on supply side market failures and on creating a competitive market structure by introducing specific regulatory frameworks that complemented existing competition rules and institutions. Consequently, the emerging sectoral consumer rules were based on public law goals of competition, market regulation and EU integration, and consumers were given responsibilities to steer competition through enforcing their rights in markets where previously they were dependent on the state.¹⁰

From the 2000s on, market opening and guarantee of market access has been firmly established and other policy objectives emerged, such as competitiveness, innovation, sustainability and climate change. Regulated markets were moving from a single focus on market access and market opening to a more complex policy setting – which Hancher and Larouche termed “managed competition”.¹¹ The focus on competition and market access is on the one hand the reason why sector-specific consumer rules were adopted only in a later stage of the EU liberalisation process.¹² On the other hand, it also explains why the main consumer interests in the energy markets were first laid down in legal rules focusing on customer choice and from the Second Package on, focusing on the switching of providers.¹³

However, while consumer benefit has always been the main objective of market opening,¹⁴ concrete consumer interests have not been directly addressed.¹⁵ EU consumer protection has a “market-promoting objective”.¹⁶ The consumer law of the regulated markets consists of “regulatory law” to complete the internal market and strengthen competition building a new “horizontal” regime of consumer contract law.¹⁷ It is the competitive market theory which forms the underlying idea for provisions protecting consumers, mostly expressed as customer choice and switching. This raises the question

¹⁰ KJ Cseres, “What Has Competition Done for Consumers in Liberalised Markets?” (2008) 4 (2) Competition Law Review 77.

¹¹ P Larouche and L Hancher, “The coming of age of EU regulation of network industries and services of general economic interest” in P Craig and G de Búrca (eds), *The Evolution of EU Law*, 2nd edn (Oxford, Oxford University Press 2010).

¹² LA Reisch and HW Micklitz, “Consumers and deregulation of the electricity market in Germany” (2006) 29(4) Journal of Consumer Policy 399.

¹³ Initially issues connected to consumer protection remained at national level of legislation as the energy systems were still state owned and public service obligations were also determined by Member States: A Johnston, “Seeking the EU ‘Consumer’ in Services of General Economic Interest” in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law* (Oxford, Hart Publishing 2016) 112, 114.

¹⁴ The purpose of liberalising the EU’s electricity and gas sector was to “ensure that EU consumers receive the full benefits of market opening in terms of lower domestic bills for electricity and gas through the introduction of competition and the freeing of all electricity and gas consumers to choose their supplier”. Proposal for Directive of the European Parliament and of the Council amending Directives 96/92/EC and 98/30/EC concerning common rules for internal market in electricity and natural gas. Brussel: European Commission. COM (2001) 125 final, p 33.

¹⁵ Cseres, supra, note 10.

¹⁶ I Benöhr, *EU Consumer Law and Human Rights* (Oxford, Oxford University Press 2013) 36.

¹⁷ While this regulatory law addresses consumers, it in fact transcends the internal relationship between producers or service providers and consumers to the external dimension of the well-functioning of markets. See N Reich, “Harmonisation of European contract law: with special emphasis on consumer law” (2011) 1(1–2) China-EU Law Journal 55, 71.

whether EU law is only connected to the internal market paradigm or also to the economic and social reality of active consumers as well as technological developments.¹⁸ Duterque questions whether it was constitutionally correct to advertise energy market liberalisation as a consumer-oriented policy.¹⁹ He argues that since the energy legislation is based on Article 114 TFEU, this legal basis is constitutionally bound to give precedence to the imperatives of the internal market. Consequently, the interests of consumers will only be concerned insofar as the internal market is considered to be a consumer policy.²⁰

III. THE ROLE OF CONSUMERS IN THE NEW ENERGY MARKET DESIGN

European energy markets are in transition from a centralised and largely fossil-fuel based, highly monopolistic and vertically-integrated system delivering electricity to passive consumers towards a more decentralised power system, which relies to a larger extent on small-scale generation from renewable energy sources requiring active participation of consumers by smarter demand response management of their own energy use and/or by becoming producers themselves.

The consumer has always been at the centre of the liberalisation and (de)regulation of energy markets. However, the consumer's role changed over time. First, the consumer's role was based on active search behaviour by looking for the cheapest energy supplier, which, in fact, functions as a way to steer markets towards more efficiency. The European directives that implemented the liberalisation focused on breaking up national markets, to promote fair competition between energy companies in the EU and to guarantee energy users the right to freely choose their suppliers. The underlying public interest of the Directives and regulations in the Third Energy Package was to safeguard affordability, reliability and safety and sustainability of the energy supply for energy consumers.²¹ The European legislation was based on the idea that the promotion of competition and freedom of choice for consumers would lead to improved efficiency among energy companies, which in turn results in qualitatively higher standards of service at more affordable energy prices. The energy consumer was therefore regarded as a driver of competition.

1. Consumers as active market participants

However, over time the objectives of energy market design changed fundamentally due to newly-set environmental and climate policy goals. Accordingly, the relevance and the

¹⁸ Where the legal rules do not comply with the pace of market development as a result of eg technologic innovation, regulatory disconnection could result in stifling innovation: L Bennett Moses, "How to Think about Law, Regulation and Technology: Problems with 'Technology' as a Regulatory Target" (2013) 5(1) *Law, Innovation and Technology* 1; R Brownsword and M Goodwin, *Law and Technologies of the Twenty-First Century* (Cambridge University Press 2012); R Brownsword and H Somsen, "Law, Innovation and Technology: Before We Fast Forward – A Forum for Debate" (2009) 1 *Law, Innovation and Technology* 1.

¹⁹ A Duterque, "The liberalisation of EU energy markets: A consumer's perspective" (2013) 2 *Journal of European Consumer and Market Law* 80

²⁰ *ibid.*

²¹ Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy. COM(2015) 80 final, 25 February 2015.

share of electricity generated from renewable energy sources has increased. The physical nature of renewable energy sources means that the generation of energy becomes more variable, less predictable and decentralised compared to traditional generation.²² With the adoption of the Renewable Energy Directive²³ and the Energy Efficiency Directive²⁴ requirements of environmental and climate policy have been set formulating the idea that consumers need to be encouraged to be more efficient in their energy use.²⁵ Thus consumers are not only to steer competition but they also play an active role in achieving the environmental and climate targets of European energy policy.

In order to realise the shift to a smart and sustainable energy system, more flexibility is necessary in the distribution grid. The proper integration of renewable energy sources into the market requires short-term electricity markets that allow trading renewable energy sources across borders.²⁶ This market design enables consumers' participation in all forms of demand response²⁷ and allows them to adjust their consumption according to real time price signals that reflect the value and cost of electricity or transportation in different time periods. With demand response, consumers are individually responsible for their decisions and they can manage their consumption by using smart meters and thus using energy when the price is lower or selling energy when the price is higher.²⁸

Consumers' roles have also been affected by fundamental technological developments. The availability of technological devices at lower costs means that more consumers are able to use technologies such as rooftop solar panels and batteries and reduce their energy bills. The wider use of smart meters enables consumers to directly control and manage their individual consumption patterns and provides strong incentives for efficient energy use if combined with time-dependent electricity prices.²⁹ Furthermore, digitalisation and the fast development of internet-based metering and

²² While liberalisation pushed energy markets towards centralisation and market integration, the emergence of renewable energy sources created the opposite trend of decentralisation and small-scale energy production. Proposal for a Directive of the European Parliament and of the Council on common rules for the internal market in electricity, COM(2016) 864 final/2, 2016/0380(COD).

²³ Directive 2009/28/EC of the European Parliament and the Council of 23 April 2009 on the promotion of the use of energy from renewable sources OJ L140/16 2009.

²⁴ Directive 2012/27/EU of the European Parliament and the Council of 25 October 2012 regarding energy efficiency, OJ ECL 3152012, pp 1–56.

²⁵ Recitals 6 and 50 of Directive 2009/72/EC.

²⁶ Due to uncertain weather conditions, generation from renewables can only be correctly forecast just before the actual production. Proposal for a Directive of European Parliament and of the Council on common rules for the internal market in electricity, COM(2016) 864 final/2, 2016/0380 (COD).

²⁷ Demand side response (DSR) is a voluntary reduction in electricity consumption taken from the grid by retail customers to react to an increase in the power price, or to some form of incentive payment.

²⁸ Upon receiving a scarcity message, in particular a very high day-ahead price at a specified hour, they can decrease their consumption at that hour by disconnecting specific appliances, or use distributed generation equipment and/or rely on storage capabilities. To incentivise demand response, energy prices should vary between peak and off-peak periods according to supply and demand ("dynamic pricing"). CERRE Report, C Crampes, C Waddams, "Empowering electricity consumers in retail and wholesale markets" (19 March 2017), available at <http://www.cerre.eu/sites/cerre/files/170309_CERRE_EnergyConsumers_Final.pdf>.

²⁹ Smart energy technology can automatically follow price fluctuations and offer accurate and frequent information to consumers on their consumption and it enables them to adjust their behaviour accordingly to the price signals: SG Rodrigo, "Changing the Energy Model: Step Back on the Europe 2050 Strategy?" (2016) 25(2) *European Energy and Environmental Law Review*, 65, 66–67. Smart metering stimulates awareness and ultimately bring about efficient energy use and energy savings: S Pront-van Bommel, "A reasonable price for electricity" (2016) 39 *Journal of Consumer Policy* 141, 154.

trading solutions enable even households to generate and store electricity.³⁰ Accordingly, market realities today enable consumers to manage their consumption and thus reduce their energy bills while participating actively in the shift from fossil fuels to renewable sources. Activating consumer participation is seen as an absolute prerequisite for managing the energy transition successfully and in a cost-effective way.³¹

However, the current market design is not adequately interconnected and is not market-based, in which prices follow market signals.³² In order to realise active consumer participation specific regulatory and technological improvements are necessary that safeguard consumers' legal position. Technological improvements are being realised through smart metering systems, smart appliances and home automation; however, the regulatory changes are lagging behind.

Accordingly, specific legal rules need to define consumers' new role in energy markets.³³ Consumers, for example, need to have access to electricity supply contracts with dynamic prices linked to the spot market. These are new contract forms that energy production and distribution companies have to conclude with those consumers who want to generate energy for themselves and supply it flexibly into the network.³⁴ Moreover, new market players, such as prosumers, have to be legally enabled to operate on the energy markets.

2. Energy prosumers

The term "prosumer" was first introduced by Alvin Toffler in his 1980 book, *The Third Wave*,³⁵ where he explores the idea that as society shifts towards the post-industrial age, the producer and the consumer have amalgamated into the prosumer. Prosumers are individuals who are both able to "produce" as well as "consume" products or services.³⁶ Prosumers in the energy markets are energy consumers who produce or co-produce their energy demand individually or through collective organisations.³⁷ There are various types of prosumers: residential prosumers who produce electricity at home – mainly through solar panels on their rooftops, citizen-led energy cooperatives or housing

³⁰ Proposal for a Directive of European Parliament and of the Council on common rules for the internal market in electricity, COM(2016) 864 final/2, 2016/0380(COD).

³¹ Proposal for a Directive of European Parliament and of the Council on common rules for the internal market in electricity, COM(2016) 864 final/2, 2016/0380(COD).

³² National price regulation and state interventions currently hinder prices from reflecting when electricity is scarce.

³³ SG Rodrigo, "Changing the Energy Model: Step Back on the Europe 2050 Strategy?" (2016) 25(2) European Energy and Environmental Law Review 65, 66–67.

³⁴ To incentivise demand response, energy prices should vary between peak and off-peak periods according to supply and demand ("dynamic pricing"). European Parliament, ThinkTank, "New Deal for energy consumers" January 2016, <[www.europarl.europa.eu/RegData/etudes/BRIE/2016/573896/EPRS_BRI\(2016\)573896_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573896/EPRS_BRI(2016)573896_EN.pdf)>. However, in most Member States, consumers have little or no incentive to change their consumption in response to changing prices in the markets, as real-time price signals are not passed on to final consumers. The obstacles to consumer participation can include a lack of detailed information on costs and consumption; growing charges and levies in energy bills; insufficient competition in many retail markets; obstacles for energy self-generation; and high entry barriers for new competitors in retail markets. Proposal for a Directive of European Parliament and of the Council on common rules for the internal market in electricity, COM(2016) 864 final/2, 2016/0380(COD), p.5

³⁵ A Toffler, *The Third Wave* (William Morrow 1980).

³⁶ *ibid.*

³⁷ Client Earth, "Prosumer Rights: Options for a legal framework post-2020" (May 2016) p 10. Available at <www.documents.clientearth.org/wp-content/uploads/library/2016-06-03-prosumer-rights-options-for-an-eu-legal-framework-post-2020-coll-en.pdf>.

associations, commercial prosumers whose main business activity is not electricity production, and public institutions like schools or hospitals.³⁸ It has been argued that the role of prosumers is essential in the new market design for energy as they could significantly help to change the electricity system,³⁹ through participating in flexibility and balancing markets and trading energy, both on national market and among themselves (local energy market).⁴⁰ Prosumers who invest in renewable energy technologies could help the EU finance the energy transition, increase the share of renewable energy sources and under certain conditions, reduce the costs for the system. At the same time, by generating their own electricity, they could lower their bills and benefit from a sense of empowerment.⁴¹

However, the question is whether they have access to the energy markets in legal terms.⁴² Prosumers are neither defined in current EU law, nor is it clear what legal provisions apply to their position. More specifically, in which capacity does a person act (consumer or producer) and which rights and obligations apply? In other words, at which point do individuals turn into producers and lose the protection of consumer laws and have to respect these rules as businesses? Energy prosumers can be individuals, small businesses or local communities and as such they may engage in so-called mixed transactions, where they adopt various roles at the same time in the energy markets.⁴³

IV. THE EU REGULATORY FRAMEWORK OF ELECTRICITY AND CONSUMER PROTECTION

1. The relationship between EU energy law and EU consumer law

While Article 12 TFEU⁴⁴ forms a constitutional basis to weigh the interests of consumers in the assessment of other EU policies,⁴⁵ the relationship between EU energy law and EU

³⁸ See <[www.europarl.europa.eu/RegData/etudes/BRIE/2016/593518/EPRS_BRI\(2016\)593518_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593518/EPRS_BRI(2016)593518_EN.pdf)>.

³⁹ European Parliament, ThinkTank, “Energy prosumers” (November 2016), available at <[www.europarl.europa.eu/RegData/etudes/BRIE/2016/593518/EPRS_BRI\(2016\)593518_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593518/EPRS_BRI(2016)593518_EN.pdf)>.

⁴⁰ They are connected to the distribution network with small to medium installed capacity. National legislation in the various European countries differentiates between different sizes of prosumers, and services provided to prosumers by utilities are also specified based on the scale of activity. Eurelectric, “Prosumers – an integral part of the power system and the market” 2015, p 5.

⁴¹ Prosumers help introduce elements of “energy democracy” (which is why they are sometimes referred to as “energy citizens”). However, prosumers also bring challenges, notably for incumbent players such as electricity producers and grid operators, who might lose revenue as prosumers start buying less energy from the grid because they are producing their own. This could result in lower levels of investment in the grid and could affect consumer bills for those not producing their own power. “Energy prosumers”, supra, note 39.

⁴² Presently, prosumers’ participation in energy markets is hampered by a number of (practical) entry barriers such as low income, and building for end-users or costs, minimum bid size and dependence on aggregators for small businesses. “Prosumer Rights: Options for a legal framework post-2020”, supra, note 37, pp 11–13.

⁴³ Existing energy legislation does include some provisions, such as the 2009 Renewable Energy Directive, which requires Member States to provide either priority or guaranteed access to the grid system for all renewable electricity production, big and small. Similar provisions are included in the 2009 Electricity Directive. The Energy Efficiency Directive introduces a similar requirement for small scale and micro-combined heat and power and requires Member States to encourage participation of demand response in wholesale and retail markets and, when necessary, to include aggregators.

⁴⁴ Art 12 TFEU reads “Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities”.

⁴⁵ For example, it was invoked by the General Court in *Test-Achats*, to stress that consumer protection is an interest that, by force of the Treaty, necessarily ought to be taken into account in the implementation of any EU policy and

consumer law has only been explained in case law of the CJEU. The CJEU acknowledged in C-92/11 *RWE Vertrieb*,⁴⁶ that the consumer-related rules of the Energy Directives function as *lex specialis* in addition to the general EU consumer rules, such the Consumer Rights Directive 2011/83/EU, Directive 97/7/EC on distance contracts, Directive 93/13 on unfair contract terms. In *Schulz* the CJEU argued that “consumer protection concerns underpin the provisions of Directives 2003/54 and 2003/55 [...]. Those concerns are closely linked both to the liberalisation of the markets in question and to the objective, also pursued by those directives, of ensuring a stable electricity and gas supply.”⁴⁷

Article 12 TFEU functions as a horizontal clause and it is echoed in Article 38 of the Charter of Fundamental Rights.⁴⁸ Article 38 is placed under the same chapter on “solidarity” with Article 36 on access to services of general economic interest. Reading these two provisions together confirms what Advocate General Trstenjak has already argued in *RWE Vertrieb*, namely that “there are many interconnections between the individual acts of European Union acts in the field of consumer-protection law. They must therefore be regarded as parts of a uniform comprehensive legislative code which complement one another.”⁴⁹

2. The Energy Directives

Liberalisation of the energy markets took place gradually in phases starting in 1988 and resulting in three subsequent packages of Directives. The first phase was introduced by the First Energy Directives⁵⁰ in 1996 and it started to open up national markets in order to accommodate the supply of energy first to large-scale, industrial end-users⁵¹ by 1 July 2004, and from 1 July 2004 to non-household customers as well. The Second Energy Directives⁵² opened up the energy market for all end-users, including households. This goal had to be realised by 1 July 2007. The Third Package⁵³ further facilitated market opening and free customer choice

(*F*'note continued)

activity, including therefore competition law: Case T-224/10, *Association belge des consommateurs test-achats ASBL v Commission*, judgment of 12 October 2011, para. 43.

⁴⁶ Case C-92/11 *RWE Vertrieb* ECLI:EU:C:2013:180 and see also the Opinion of AG Trstenjak, 13 September 2012, paras. 62-69, where she analyses the relationship between Directive 93/13 on unfair contract terms and Directive 2003/55 on the internal market in natural gas.

⁴⁷ Joined Cases C-359/11 and C-400/11, *Schulz*, ECLI:EU:C:2014:2317.

⁴⁸ Art 38 of the Charter of Fundamental Rights of the European Union: Union policies shall ensure a high level of consumer protection. Art 38 determines that EU policies ought to ensure a high level of consumer protection, equally invoked by the Court.

⁴⁹ She continued that “The fragmentation that still persists in the Union’s consumer-protection law is the consequence of historical development, in the course of which the Union legislature has gradually regulated individual spheres of life, in line with the *acquis*, with a view to establishing a genuine internal market for transactions between businesses and consumers”: AG Trstenjak Opinion, 13 September 2012, para. 69 footnote 50.

⁵⁰ See Art 19 of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules of the internal market in electricity, OJ L 27/20 and Art 18 of Directive 98/30/EC of the European Parliament and the Council of 22 June 1998 concerning common rules for the internal market in natural gas, OJ L 204/1.

⁵¹ *ibid.*

⁵² Arts 2(12) and 21 of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and Arts 2(28) and 23 of Directive 2003/55/EC of the European Parliament and the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ L 176/57.

⁵³ Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211/55 and Directive 2009/73/EC of the

in the sector.⁵⁴ In November 2016 the EU Commission proposed a new package for the internal electricity market.⁵⁵ As the European electricity markets have fundamentally changed both in terms of the increased share of renewable energy sources⁵⁶ and digitalisation,⁵⁷ the new market design rules are targeted at adapting the existing market rules to new market realities among others by way of empowering consumers.⁵⁸

3. Definition of energy consumer

In line with the rationality of the liberalisation process, consumers were defined as customers buying electricity for their own use (Article 1 Directive 96/92/EC) and were eligible to choose between suppliers (Article 19 of Directive 92/96/EC). This functioned as a measure of market opening under the First and Second Package Directives and formed part of the regulatory design to bring competition and choice to energy customers. The Second Electricity Directive⁵⁹ continued to use the term “customer” and defined final customers as “customers purchasing electricity for their own use”,⁶⁰ but it also distinguished between household and non-household customers.⁶¹

In the Third Package Directive 2009/72/EC a household customer is defined as a “customer purchasing electricity for his own household consumption, excluding commercial or professional activities” (Article 2 (10)). The notion of the commercial consumer refers to the non-household customer, since he consumes as well, but not for private purposes.

(Footnote continued)

European Parliament and the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211/94.

⁵⁴ Pront-van Bommel, supra, note 29; Reisch and Micklitz, supra, note 12.

⁵⁵ Proposal for a Directive on common rules for the internal market in electricity, COM(2016) 864 (Electricity Directive) and COM(2016) 861 (Electricity Regulation).

⁵⁶ According to recent statistics (June 2017 available at <ec.europa.eu/eurostat/statistics-explained/index.php/Renewable_energy_statistics>) renewable energy in the EU has grown strongly in recent years. The share of energy from renewable sources in gross final energy consumption has almost doubled in the last years, from around 8.5% in 2004 up to 16.7% in 2015. This increase has been the result of mandatory targets set by the Commission in its “Renewable Energy Road Map”, for using renewable energy sources to meet 20% of EU energy consumption needs by 2020, a mandatory target of 10% of transport fuel consumption coming from biofuels by 2020, and the creation of a new legislative framework. The present Renewable Energy Directive (Directive 2009/28/EC) also mapped out various mechanisms that Member States can apply in order to reach their targets (support schemes, guarantees of origin, joint projects, cooperation between Member States and third countries), as well as sustainability criteria for biofuels. On 30 November 2016, the Commission published a legislative package entitled “Clean energy for all Europeans”, which includes a proposal for a revised Renewable Energy Directive to make the EU a global leader in renewable energy and to ensure that the target of at least a 27% share of renewables in the total amount of energy consumed in the EU by 2030 is met.

⁵⁷ Digitalisation affects the energy sector at all levels of the value chain, from virtual power generation, digital grid management, and smart metering, to new ways of marketing and selling new products and services. It changes patterns of consumption, introduces new ways of optimising assets, cross-industry partnerships and the greater use of industrial platforms. These technologies are putting data and intelligence at the centre of new business models.

⁵⁸ Proposal for a Directive on common rules for the internal market in electricity, COM(2016) pp 3–4.

⁵⁹ Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity.

⁶⁰ Directive 2003/54/EC, Art 2, para. 9.

⁶¹ Household customers are “customers purchasing electricity for their own household consumption, excluding commercial or professional activities”, whereas non-household customers include “any natural or legal persons purchasing electricity which is not for their own household use and shall include producers and wholesale customers”: Directive 2003/54/EC Art 2, paras. 10–11.

A “customer” can be both a wholesale or final customer, as laid down in Article 2 (7) of the Electricity Directive 2009/72/EC. The definition of the final customer is characterised by the fact that he does not sell gas or electricity, but uses it himself. The final customer can be either household customers or non-household customers. The household customer is, according to the definitions of the Directives, the “classical” consumer. Furthermore, on the basis of Article 3(3), Member States have the competence to extend the scope of this definition concerning universal service obligation⁶² to include small and medium-sized enterprises (namely enterprises with fewer than 50 occupied persons and an annual turnover or balance sheet not exceeding €10 million) and organisations.⁶³

While the proposal for the new Directive preserved the definitions of the Third Directive, it adds the definition of the active customer. Under Article 2 an “active customer” means “a customer or a group of jointly acting customers who consume, store or sell electricity generated on their premises, including through aggregators, or participate in demand response or energy efficiency schemes provided that these activities do not constitute their primary commercial or professional activity.” This definition is the first time EU legislation has departed from the definition of the consumer adopted in EU consumer law. The existing EU law definition of the consumer relies on persons acting “outside [their] trade, business, craft or profession”. In light of the sparse case law of the CJEU (C-464/01 *Gruber*, C-110/14 *Costae*), there have been alternative ways in legal scholarship to define the consumer and rethink the underlying criteria of the definition.⁶⁴

The CJEU has consistently held⁶⁵ that the definition of the consumer should be narrowly interpreted. The Consumer Rights Directive also contains a narrow definition in Article 2(1).⁶⁶ However, the narrow definition is problematic in so-called mixed transactions or dual purpose contracts, where the contracting party acts both for professional and personal purposes, for example self-employed persons buy objects for both professional and personal use such as a computer.⁶⁷ While the CJEU first held that

⁶² The Third Electricity Directive contains both universal service and public service obligations in Article 3. The universal service obligation is laid down in Art 3(3) of Directive 2009/72/EC and created the right to be supplied with energy of a specific quality at a reasonable price, which can be imposed on a supplier of last resort.

⁶³ Pront-van Bommel, *supra*, note 29, 149.

⁶⁴ H-W Micklitz, “Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought-Provoking Impulse” (2013) 32(1) *Yearbook of European Law* 266; S Grundmann, “Targeted Consumer Protection” in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Oxford Hart Publishing 2016) 223; C Mak and others, “Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts. - Final report: Comparative analysis, law – economics analysis, assessment and development of recommendations for possible future rules on digital content contracts” (2011) University of Amsterdam, Centre for the Study of European Contract Law.

⁶⁵ In *Di Pinto* the ECJ interpreted, for the purposes of the Directive on doorstep selling, the notion of consumer in a narrower sense, noting that a trader canvassed with a view to the sale of his business is not to be regarded as a consumer protected by the Directive and explained that the Directive does not afford protection to legal persons even if they are in a position similar to that of a consumer. Case C-361/89, *Di Pinto* (judgment of 14 March 1991).

⁶⁶ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

⁶⁷ K Tonner and K Fangerow, “Directive 2011/83/EU on consumer rights: a new approach to European consumer law?” (2012) *EUVR* 02/2012, pp 67–81.

even a minor connection with a person's profession⁶⁸ excludes the transaction from the scope of the Doorstep Selling Directive's consumer protection rules, later in *Gruber*⁶⁹ the Court ruled that if the business purpose of the transaction was negligible in the overall context of the supply, the person could rely on consumer protection rules.⁷⁰ It is only the preamble to the Consumer Rights Directive that indicates that if the trade purpose "is so limited as not to be predominant in the overall context", a dual-purpose transaction should count as a consumer contract.⁷¹ Previously the Draft Common Frame of Reference (DCFR)⁷² opted for a wider concept of consumer.⁷³ Accordingly, the DCFR (I.-1:106(1)) includes mixed transactions in the consumer protection rules if they are concluded "primarily" for non-professional purposes. This is the approach the proposed Directive may implement.

The definition of the consumer is relevant, as it provides who can rely on consumer protection rules and thus it represents the underlying regulatory model of the energy sector. The newly proposed rules may align EU law with market realities and recognise the fact that consumers assume various roles in markets. This new definition can also help to remedy the legislative gap concerning prosumers and answer the question in which capacity does a person act (consumer or producer) and which rights and obligations apply.

Presently prosumers do not fit into the definition of household customer and the EU consumer rules do not seem to apply to them either as they are also acting outside of their business or profession. Prosumers produce electricity primarily for their own needs, but can also sell the excess electricity.⁷⁴

Energy prosumers engage in so-called mixed transactions, where they adopt various roles at the same time in the energy markets. Accordingly, prosumers turn into producers and lose the protection of consumer laws when they act *primarily* for professional and commercial interests and have to respect consumer rules as businesses.

A recent study argued that the definition of the prosumer has to take account of three main issues. First, it has to ensure that prosumers maintain their status as consumers and enjoy their rights as consumers. Second, the definition of prosumers has to be sufficiently clear, yet flexible enough to encompass different activities and actors, particularly as the market develops. Third, the definition needs to take account of the implications of

⁶⁸ C-45/96, *Bayerische Hypotheken* (judgment of 17 March 1998).

⁶⁹ Case C-464/01, *Gruber* (judgment of 20 January 2005).

⁷⁰ However, it stressed that the predominance of the private element is by itself irrelevant. According to the same ruling, a person cannot claim the status of consumer if they have negligently created the impression that they were acting in the course of a business (eg by using a company letterhead or address).

⁷¹ Directive 2011/83/EU.

⁷² The DCFR contains principles, definitions and model rules of European private law as distilled from the *acquis communautaire* of contract law and the private laws of the Member States. It covers both general contract law rules as well as specific ones such as rules of consumer contracts. DCFR is available at <ec.europa.eu/justice/contract/files/european-private-law_en.pdf>.

⁷³ "Any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession". Definitions are given in Annex 1, which is referred to in Art I.-1:103(1) of the DCFR.

⁷⁴ The Council of European Energy Regulators (CEER) has defined the prosumer as "a consumer who is equipped with self-generation and /or batteries". CEER, 2015, "Position paper on well-functioning retail energy markets", C15-SC-36-03, 14 October 2015. The European Commission has defined prosumers as "producers and consumers of RES". European Commission, Staff Working Document, "Best Practices on Renewable Energy Self-consumption" COM(2015) 339 final.

prosumers as undertakings for the purpose of competition, and the State aid guidelines in particular.⁷⁵

Perhaps the most important basic right prosumers need is their right to access energy markets, their right to have access to the grid and to trade flexibility and sell excess electricity.

They also need incentives in the form of reflective pricing to ensure cost-effective balancing and security.⁷⁶ Energy prosumers also need access to and participation in demand side response,⁷⁷ access to independent aggregators and the simplification of administrative authorisation procedures.⁷⁸ The Energy Efficiency Directive⁷⁹ has started to introduce provisions that stimulate active consumer behaviour by providing them information on their actual consumption, bills contracts and energy efficiency measures as well as demand response (Article 16). The newly-proposed rules could further remedy the present legislative gap by adopting the active customer definition and corresponding rights in Article 15, as well as various other provisions which will be analysed below.

4. Consumer related provisions

There are general EU consumer rules that apply in the energy sector, most notably Directive 2011/83/EU on Consumer Rights, Directive 97/7 on distance contract terms and Directive 93/13 on unfair contract terms. As explained above, the provisions of the Energy Directives are considered *lex specialis*. Such specific consumer rules were first laid down in the Second Electricity Directive, in the Annex, which referred primarily to the provision of clear and accessible information.⁸⁰

The specific consumer protection measures were laid down in Article 3 of Directive 2009/72/EC. Article 3(5) a, underlined switching as a key role in empowering customers to realise the beneficial effects of competition. This suggested that EU energy legislation began to acknowledge the role of customers mostly in their capacity as market participants and agents of liberalisation.⁸¹ Article 3(9) concerns information disclosure, for example about the contribution of each energy source to the overall fuel mix of the electricity supplier, and that information is reliable and is provided, at a national level, in a clearly comparable manner. Article 3(12) and (13) require Member States to create so-called single points of contact to provide information concerning consumer rights, legislation and dispute settlements as well as creating an independent mechanism

⁷⁵ The evolution of the “consumer” to “prosumer” has the potential to make State aid laws applicable to a large group of new market participants. Considering that the successful integration of prosumers into the energy market will probably also depend on Member State policies to incentivise them, it is likely that some of these policies will entail subsidies or other financial advantages. Given that the core of the prosumer concept is that they participate in the market and thus engage in an economic activity, they will most certainly be considered as an undertaking and all subsidies and financial advantages they receive will be scrutinised under State aid law. “Prosumer Rights: Options for a legal framework post-2020”, supra, note 37, pp 14–16.

⁷⁶ “Prosumer Rights: Options for a legal framework post-2020”, supra, note 37, p 24.

⁷⁷ See supra, note 27 for a definition of demand side response.

⁷⁸ “Prosumer Rights: Options for a legal framework post-2020”, supra, note 37, pp 25–28.

⁷⁹ Art 15(8) of the Energy Efficiency Directive stipulates that Member States must ensure that national energy regulatory authorities encourage DSR to participate alongside supply in wholesale and retail markets. Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency.

⁸⁰ Directive 2003/54/EC Annex A.

⁸¹ Johnston, supra, note 13, 114–115.

(energy ombudsman or consumer body) to deal with consumer complaints and out-of-court dispute settlements.

Moreover, Article 36 also obliges national regulatory authorities to achieve high standards of universal and public services in electricity supply contributing to the protection of vulnerable customers and contributing to the compatibility of necessary data exchange processes for customer switching.

There is also an Annex I to Directive 72/2009, which lists specific consumer-related obligations for electricity providers such as transparency of contractual terms, general information, switching and dispute settlement mechanisms by setting up transparent, simple and inexpensive procedures. The Third Directive also encourages consumers to participate in energy markets by ensuring that consumers have access to data on their energy bills and consumption patterns⁸² and thus encourages Member States to introduce smart metering systems.⁸³

While these measures clearly indicate a certain recognition of the active responsible energy consumer, facilitative rules have not yet been implemented. Such facilitative rules are now drafted in the proposed Directive, such as dynamic price contracts, demand response, comparison tools and far-reaching information requirements.

5. Fourth Package Proposal

Chapter III of the proposed Directive is titled “consumer empowerment and protection” and it reinforces existing consumer rights, but also introduces important new consumer rights as well. It lays down rules ensuring that consumers are able to freely choose suppliers (Article 4) as well as change suppliers (Article 12) or aggregators⁸⁴ (Article 13). Basic contractual rights are renewed in Article 10. Consumers are entitled to a dynamic price contract (Article 11), that is an electricity supply contract between a supplier and a final customer that reflects the price at the spot market. Article 14 guarantees consumers access, free of charge to at least one certified price comparison tool and reinstates the obligation to provide consumers with frequent billing and billing information which are correct, clear, concise and presented in a manner that facilitates comparison (Article 18).

Consumers can engage in demand response (Article 17), self-generation and self-consumption of electricity (Article 15). Moreover, Article 19 entitles every consumer to request a smart meter equipped with a minimum set of functionalities. Article 16 defines a framework for local energy communities which may engage in local energy generation, distribution, aggregation, storage, supply or energy efficiency services. The Directive also provides clarifications to pre-existing provisions on smart meters, single points of contacts, and rights to out-of-court settlement (Article 26), universal service and vulnerable consumers.

⁸² Recital 50 Directive 2009/72/EC.

⁸³ Recital 55 Directive 2009/72/EC, Art 3(11).

⁸⁴ An aggregator is any organisation or individual that brings retail energy customers together as a group in order to obtain better prices, service, or other benefits when acquiring energy or related services. An aggregator is a market participant that combines multiple customer loads or generated electricity for sale, for purchase or auction in any organised energy market. They play an important role as intermediaries between customer groups and the market.

These provisions aim at facilitating the active engagement of the energy consumer in energy markets by providing them with comprehensive, transparent and detailed information concerning new forms of contracts and new technological possibilities. The underlying idea of these new or renewed provisions is that active consumers can bring down their own energy costs, can offer flexibility services in energy markets and have better access to renewable energy sources. At the same time, the consumer's behaviour contributes to flexibility in balancing demand and supply, to more efficient use of the network and ultimately contributes to a sustainable energy supply.

Whether consumers can fully benefit from these new legal provisions depends on a number of different issues. First of all, it depends on the consumer's own behaviour. Secondly, it also depends on broader institutional and technical issues that Member States have to decide on, such as the active managing role of DSO's and tariff regulations.⁸⁵ The next section will analyse the normative concept of the consumer in regulated markets and specifically in the energy markets with the aim of discussing how the proposed new rules could indeed facilitate consumers in achieving smart, sustainable and efficient energy markets.

6. The normative concept of the consumer in regulated markets

The legislation adopted in the course of liberalisation was the legislative product of the specific technicalities of the economic activity regulated. As the provision of services has been subject to privatisation and de-regulation the vertical relationship between State and citizens was transformed into a triangular relationship between public regulator, private service provider and citizens in a consumer role. The contractual partner of a company in regulated markets is not the consumer but an electricity customer, a telephone customer or a banking customer. Consequently, the EU provisions used the term "customer".⁸⁶ Moreover, the relations between companies and customers were established on a lasting basis and are governed by long-term contracts that differ fundamentally from one-off market transactions.⁸⁷

The notion of a customer is wider than that of the classic "consumer", as it encompasses not only final consumers but all customers of the product or service. It refers to both household and business consumers, ie SMEs and even conglomerates.⁸⁸ The confusion of the two terms, and the legal rules associated with them, reflect a conceptual uncertainty linked to the fact that regulated markets are in transition.⁸⁹ The difference between consumers and customers is relevant at least for two reasons. First, sector-specific regulators were often created precisely to protect consumers, given

⁸⁵ DSO is the abbreviation for distribution system operator, which means a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the distribution system in a given area and, where applicable, its interconnections with other systems and for ensuring the long-term ability of the system to meet reasonable demands for the distribution of electricity, Art 2(6) of Directive 2009/72; SACM Lavrijssen, "Power to the energy consumer" (2017) TILEC Papers, 2017(12).

⁸⁶ In the telecommunications sector, end-user, subscriber is also used. In postal sector the term user is applied.

⁸⁷ Micklitz, *supra*, note 64.

⁸⁸ S Pront-van Bommel, "Smart Energy Grids within the Framework of the Third Energy Package" (2011) 20(2) *European Energy and Environmental Law Review* 32, 36.

⁸⁹ Micklitz argued that this conceptual uncertainty is related to the fact that the process of liberalisation has been advancing in small steps and while markets exist, they are not really completely developed: Micklitz, *supra*, note 64.

consumers' weaker market position in terms of information and power asymmetries. For large corporate customers these justifications for regulatory protection are absent.⁹⁰ Second, the distinction between consumers and customers is crucial in assessing the performance of the Regulatory State.⁹¹ Consumers not only have a role in steering the objectives of regulation, but the way their behaviour is conceived determines the extent to which regulation is required and the form that regulation should take. It is now accepted that if liberalised markets are to succeed, understanding consumer behaviour is critical.⁹² The benefits of competition and the liberalisation of wholesale markets may be clearer for corporate customers⁹³ than for final consumers.⁹⁴ Accordingly, realising policy objectives may be dependent on particular behaviours by consumers.⁹⁵

The normative concept of the consumer in regulated markets has historically been based on the concept used in industrial economic theory. Accordingly, the behaviour and responsiveness of consumers is captured through the neoclassical model of the consumer, which assumes that they behave in ways that maximise utility subject to a specific budget constraint: respond in predictable ways to changes in price and other relevant variables; have stable and consistent preferences; engage in optimal search activity; select the lowest price and highest quality products including by switching suppliers when it is optimal to do so and have certain abilities when it comes to processing information. On the basis of this concept, behavioural change will be induced by policies that intensify competition, constrain the ability of existing suppliers with significant market power, increase quality, or facilitate innovation.⁹⁶ This is the consumer concept that has been applied in EU energy legislation as well.⁹⁷

However, retail energy markets are characterised by consumer behaviour deviating from the above standard in various jurisdictions around the world.⁹⁸ Empirical research shows that final consumers are disconnected from the technical reality of energy, which results in energy inefficiency, as consumers do not adapt their behaviour to upstream scarcity signals in real time. Evidence shows that consumers do not participate in energy markets for a variety of reasons, and that removing one barrier does not guarantee high

⁹⁰ D Deller and F Vantaggiato, "Revisiting the Regulatory State: A Multidisciplinary Review Establishing a New Research Agenda", CCP Working Paper 14-9, p 8.

⁹¹ *ibid.*

⁹² M Waterson, "The role of consumers in competition and competition policy" (2003) 21 (1) *International Journal of Industrial Organization* 129.

⁹³ S Littlechild, "Spot pricing of electricity: Arguments and prospects" (1988) 16 (4) *Energy Policy* 398; DM Newbery and MG Pollitt, "The Restructuring and Privatisation of Britain's CEBG—Was It Worth It?" (1997) 45 (3) *The Journal of Industrial Economics* 269.

⁹⁴ D Deller and F Vantaggiato, "Revisiting the Regulatory State: A Multidisciplinary Review Establishing a New Research Agenda", CCP Working Paper 14-9, p 8.

⁹⁵ Deller and Vantaggiato argue that the balance between the interests of customers and consumers in the Regulatory State should be further investigated: *ibid.*

⁹⁶ C Decker, "Concepts of the consumer in competition, regulatory and consumer protection policies" (2017) 13(1) *Journal of Competition Law and Economics* 151.

⁹⁷ However, unlike competition policy, there has typically been a greater awareness of the needs of specific groups of consumers to be protected, such as those on low incomes or who are otherwise "vulnerable".

⁹⁸ C Waddams Price and M Zhu, "Empirical Evidence of Consumer Response in Regulated Markets" (2016) 12(1) *Journal of Competition Law & Economics* 113; M Hviid and C Waddams Price, "Well-functioning markets in retail energy" (2014) 10(1) *European Competition Journal* 167.

consumer engagement.⁹⁹ This indicates a sub-optimal functioning of markets and thus provides crucial input for formulating new regulatory tools.

Energy markets have been also coined as “problem markets”, ie markets that do not deliver optimal outcomes. In the energy markets there are low levels of consumer engagement or even disengagement. Energy markets have the inherent feature of being essential component of people’s daily life. At the same time, consumers gain access to this essential good only through complex offers. Energy consumers are inactive, often disengaged from energy markets, which results in low levels of switching and ultimately also low levels of competition.¹⁰⁰

Even though energy is an homogenous product, consumers have are generally uninterested in the market. Moreover, consumers find it difficult to assess the amount and complexity of information they need when making a specific decision in energy markets. Tariff information and the variety of energy products not only increased but have become more complex, partly due to bundling of products. While digitalisation has enabled new forms of services as well as dynamic pricing contracts, it also poses new challenges for consumers, requiring digital skills and literacy to engage in digitally-enabled transactions.¹⁰¹ Price comparison tools may help to remedy some of these difficulties.

V. CONCLUSIONS

The energy sector is presently witnessing fundamental changes in the way markets are designed in order to achieve smarter, more efficient and more sustainable energy. Consumers have been given a central role in this energy transition in general and in the realisation of sustainable, renewable energy sources in particular. This article has assessed how this fundamental role of the consumer is being conceptualised in EU law. In EU law the consumer has predominantly been considered as a market actor who contributes to building markets and keeping them well-functioning. In fact, the consumer assumed a broader definition and function in regulated markets, was addressed as the “customer” and was granted responsibilities in the process of market opening and restructuring, mostly in the form of exercising free customer choice and switching. By engaging in more efficient energy use and using or even generating renewable energy sources, consumers are seen as crucial actors to manage the energy transition. Yet the current legal framework does not foster this active role of the energy consumer, nor does consumers’ behaviour live up to the concept and image of the active consumer. While the Third Electricity Directive does contain a significant number of consumer-related

⁹⁹ Therefore, consumers leave a considerable amount of money on the table. Consumers’ inaction has especially policy relevance when it is those who are vulnerable, who society may feel are in need of some protection or assistance, who are failing to benefit from better deals available in the market. Crampes and Waddams, *supra*, note 28.

¹⁰⁰ According to the CEER Report on barriers to switching (2016) the average switching rates (to a different supplier) in the EU Member States were 6.3% for electricity and 5.5% for gas. The CEER Report suggested that there are four main reasons for consumer inactivity. There are insufficient gains available (or anticipated by consumers); lack of trust in the process or the players in the market; a complex process of switching (or that consumers expect such complexity); and loyalty to existing suppliers. Council of European Energy Regulators (2016), Commercial Barriers to Council of European report on commercial barriers to supplier switching in EU retail energy markets, C15-CEM-80-04 CEER Report on commercial barriers to supplier switching in EU retail energy markets pp 11–12.

¹⁰¹ Lavrijssen, *supra*, note 85, ACER Monitoring Report 2014, CERRE 2017.

provisions, it still fails to fill the gap between the possibilities energy consumers have today, offered by market changes and technological developments. The recently-proposed new market design of the energy market design proposes far-reaching rules that could activate consumers to more actively participate in the energy markets. Most of these rules are based on increased levels of transparent, comparable and simple information about billing, switching and new forms of contracts and services. However, empirical studies show that most energy consumers remain inactive, uninterested and disengaged in energy markets. It seems that merely recasting the EU rules of the energy market design will not achieve the goal of activating and engaging consumers. There need to be broader social and economic approaches that incentivise and support a more active role for consumers in energy markets.