

Consumer Protection in the Energy Market – Lessons from Germany

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Regulation of the energy market

- Division into suppliers of last resort and other suppliers
- Strong competition but a certain laziness of consumers
- Customers who cannot get a contract elsewhere are usually with suppliers of last resort
- Differences in private law regulation:
 - Basic Supply Regulations for supply of last resort with defined (although not very strong) consumer protection
 - Otherwise mainly protection by unfair contract terms law, with strict rules on price increase terms
- Supervisory control by the Federal Network Agency (Bundesnetzagentur) but largely passive in the past
- Reliance on private law enforcement, mainly by consumer organisations

Different types of players

- Municipal suppliers
 - Often suppliers of last resort
 - Normally significantly more expensive than other suppliers
 - Usually with own production long-term planning
- Big private suppliers, e.g. E.ON, Vattenfall
 - Own production facilities
- Energy traders
 - often small
 - no production
 - cheapest offers in the market, sometimes with dubious elements
 - buying on the spot market when energy is cheap

Twofold crisis

- Price shock on the world market (November 2021)

- Russian invasion of Ukraine (February 2022)

General problems

- Massive price increases under a variety of breaches of the law
 - No announcement or disregard of 1 month announcement period
 - Unlawful: LG Verden, 10/10/2022 – 3 O 194/22
 - No mentioning of the extraordinary right of termination
 - Creation of obstacles to the termination of the contract
 - **Price increase despite of 24 months price guarantees**
 - Unlawful, LG Berlin, 1/9/2022 – 52 O 117/22
- Isolated massive increases of monthly lump sum payments (normally based on the expected annual consumption price)
 - Unlawful: LG Berlin, 1/9/2022 – 52 O 117/22

Specific problems with spot market buyers

- High insolvency risk due to lack of reserves
 - Insolvency of a number of small energy suppliers
- Abusive strategies to maintain liquidity
 - Short-term price increases (while breaching the law, see below)
 - Isolated increase of lump-sum monthly advance payment (by up to 1,000% and more)
 - Immediate termination of supply contracts in order to get rid of customers (gas.de, stromio)
 - „Pausing“ supply (Jura Power GmbH & Co. KG)

Follow-on problems with suppliers of last resort

- Customers of insolvent suppliers have a right to be supplied by the supplier of last resort
- In case of a mass phenomenon, suppliers of last resort do not have enough spare energy and need to buy on the spot market
- Consequence at the time (2021/2022):
 - Substitute supply (*Ersatzversorgung*) by the supplier of last resort but often much higher tariffs than for contractual supply
 - Lawfulness until 28 July 2022 is disputed, then the practice was legalised by the legislator (new § 38 Energy Act)
 - Collective action against GASAG (Berlin) is pending
 - Dual price system for regular customers and new customers
 - Sometimes more than double of the regular price (lawfulness disputed), prohibited with effect from 29 July 2022 (new § 36 para. 1 Energy Act)

Reaction of the State

- Subsidies for energy suppliers and customers
 - State paid the bill for December 2022
 - Price cap for all customers from March to December 2023 while the State pays the difference to the contract price
 - Limited for consumers to 80% of last year's consumption so as to create an incentive for saving energy
 - Huge price differences between neighbouring municipalities: Windfall gains? - Cartel authorities have started examinations
 - Additional measures for low-income households (social law)
- Logical consequence: Prices should remain stable or decrease but
 - Attempts to increase the monthly lump-sum payment anyway (e.g. from 280 to 875 Euros
 - LG Frankfurt, 30/5/2023 - 3-06 O 13/23: prohibited as the lump-sum payment must be based on the expected consumption

Lessons learned? - Suppliers

- Prices on the world market have dropped, short term buyers are back and advertising cheap offers again
- More cautious approach of some suppliers
 - No more long-term contracts or price guarantees
 - Long-term contract combined with right to termination in the case of price increases on the supply market

Lessons learned? – The regulator

- Tighter control by the *Bundesnetzagentur*.
 - Feb. 2022: Prohibition of increased monthly lump-sum payments without valid increase of the supply price (*Rheinische Elektrizitäts- und Gasversorgungsgesellschaft mbH*)
 - „Pausing“ energy supply (see *Jura Power* above) is equated with termination and must be announced 3 months in advance
 - Rejection of re-entry into the market of *gas.de* due to unreliability (for the first time ever)

Lessons learned? – Legislator and government?

- Macro-level: Strengthening overall resilience through increase of domestic production and new trading partners
- No new measures preventing hazards in the energy market
- New measures to protect suppliers of last resort – at the expenses of consumers

Conclusion

- The energy market is not a market like any other but is meant to provide essential services (services of general interest)
- It does not only need competition but reliability and resilience
- What we need is
 - No hazards in the electricity market
 - Minimum capital requirements, reserve requirements?
 - Severe sanctions for blatant breaches of the law
 - A reliable back-up system of suppliers of last resort
 - Without excessive tariffs for new customers, which undermines competition due to fear of insolvency
 - And, of course, sustainable own production or reliable suppliers on the EU or world market, and this in line with climate protection goals