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V. How can Regulators Benefit from Independent Ombudsmen and ADR Provide Expertise?

By Marine Cornelis

1. INTRODUCTION

Alternative Dispute Resolution (ADR) is as an out-of-court procedure which aims at enabling consumers to resolve a dispute and obtain a reimbursement and/or compensation for the harm suffered as a consequence of a commercial transaction or practice. This does not cover the direct settlement between a trader and a buyer or internal customer complaint handling mechanisms.[1] EU Directives make clear that the access to such an independent body shall be inexpensive, prompt and fair. Suppliers have to provide consumers with information on how to file a complaint.

The energy sector is a pioneer in the alternative dispute settlement of consumer disputes. The 2009 Third Energy package states that “*Member States shall ensure that an independent mechanism such as an energy ombudsman or a consumer body is in place in order to ensure efficient treatment of complaints and out-of-court dispute settlements.*” Furthermore, the Directive 2013/11/EU, due for implementation in 2015, requires ADR entities, the wider group to which ombudsman schemes belong, to be available for all business-to-consumer disputes. The Directive will allow for a greater visibility of the functioning of the free (energy) market, and so for better regulatory action and business practice.

Across the EU there are great variations in the dispute resolution environment.[2] In the energy sector, there are 5 independent ADR bodies, 11 schemes as part a body with a larger ADR remit and 14 ADR bodies within a national regulatory authority.[3] In 2010, several of those independent energy ADR bodies established NEON, the National Energy Ombudsmen Network, to promote their activities and analyse their findings at EU level. NEON is an independent European network made up of ombudsmen and mediation services active in the energy sector, which are recognised as independent providers of Alternative Dispute Resolution in their respective countries and regions.

National and regional (regulatory) authorities (NRA) have a duty to help ensure that consumer rights are respected, and that consumers are protected in line with EU law. Here, the question arises as to how independent ombudsmen and ADR entities can work with regulators to enhance consumer’s rights?

2. WHAT DO INDEPENDENT OMBUDSMEN AND ADR ENTITIES DO?

ADR helps consumers resolve disputes with traders when they encounter a problem with a product or service that they bought. ADR entities are out-of-court (non-judicial) entities. They involve a neutral party (e.g. a conciliator, mediator, arbitrator, ombudsman, complaints board etc.) who proposes or imposes a solution or brings the parties together to help them find a solution. Some of these entities operate fully online and are called online dispute resolution (ODR) bodies. ADR and ODR are usually low-cost, simple and fast procedures and are therefore beneficial to both consumers and traders, who can avoid court costs and procedures. ADR and ODR are not internal customer complaint services run by traders.[4]

Policy makers acknowledge that consumers and citizens need to feel safe to engage in any market. Trust implies a high level of protection through transparent, efficient, and fair procedures followed by all stakeholders. Without the full enforcement of energy consumers’ rights, including the right to send a complaint to an independent body for an out-of-court dispute settlement, such as an energy ombudsman, consumer engagement remains limited. In the energy sector, this right is ensured by the Third Energy Package (2009), and also by the cross-sectoral Directive 2013/11/EU on alternative dispute resolution for consumer disputes.

Active in the energy sector, independent ombudsmen and ADR bodies, members of NEON, the

National Energy Ombudsmen Network, are impartial. They are not consumer organisation, but their operations lend the voice of the consumer equal weight when resolving disputes between energy companies and consumers, resulting in decisions which are not biased in either direction.

Members of NEON are independent ADR bodies that respect principles of fairness, with no discrimination, focus on the right to good administration, and pay special attention to vulnerable customers.^[5] Further, ombudsmen promote and guarantee human and fundamental rights. Hence, they have the flexibility to use a wider number of [legal] tools to help consumers. NEON members can highlight malpractice and significant breaches of business ethics, for example.

Independent ombudsmen build their moral authority on formulating recommendations towards for companies, regulators and policy-makers. They can provide feedback through their expertise and complaint data gathered about the market. Some ombudsmen have the possibility to launch investigations on their own-initiative. They can identify systemic problems and propose solutions to improve the service provided to all citizens, all consumers, not just to those who turn to the ombudsman for help.

3. BUILDING TRUST IN THE MARKET: WORKING TOGETHER TO (RE)BALANCE THE ENERGY MARKET

EU legislation, especially through the Third Energy Package, requests national regulatory authorities (NRAs) to be wholly independent from the interests of the energy industry and their job is to ensure the thriving and efficient functioning of the market. NRAs are independent market watchdogs, and some are also entitled to act as a dispute settlement authority in certain cases.

Even though this article does not aim to discuss the choice to deliver ADR through a national regulatory authority or through an independent scheme, it is important to highlight some conclusions of academic examination. Research from the University of Oxford (Creutzfeldt and Hodges) ^[6] highlighted that ADR delivered through an independent body deliver better outcomes than when it is done by the regulator itself. The focus, public profile and public understanding of a regulator are simplified where the roles of regulation and dispute resolution are kept separate. Creutzfeldt and Hodges both point to the experience of the German energy ombudsman. ^[7] Their research found that consumers feel more confident to approach an ADR body that is clearly separate from both the company complained about and from the regulator. Nevertheless, delivering ADR through a national regulatory authority might facilitate flows of information and market insight to underpin effective regulation. It would also tend to promote consistency between regulatory direction and redress, affording the regulator with another lever to measure and, where necessary, to challenge and correct behaviours within the sector.

The work of independent ombudsman schemes, such as NEON members, goes beyond dispute resolution and beyond regulation. Ombudsmen are autonomous observers and through complaints and dispute data management, they act not only as whistle-blowers but as advisory supports for policy makers and regulators.

On the one hand, the compiling of disputes and complaints data gives the individual consumers' voice weight in a situation where it would usually be drowned out by large energy companies. The individual consumer benefits from an ADR body by being heard in the imbalance of powers between the consumer and the business. Ombudsmen are enabled to provide strong and trustworthy sources of information for consumers. In France for instance, the Ombudsman manages an information point for consumers. In Great Britain consumers can introduce a dispute by phone and a written transcription is sent to the company.

On the other hand, regulators need ombudsmen's feedback in order to understand the market better, its systemic failures and the main challenges consumers face. NEON members publish annual reports with detailed data about the complaints they receive. However, this is only part of the picture, as research shows that only a fraction of potential complaints get to the independent redress body. ^[8] Ombudsmen have the ability to empower consumers through the provision of information to the stakeholders.

An ombudsman has a specialized appreciation of the energy market thanks to his power of investigation, and takes into account all regulations and legislative framework. The ombudsman also takes market practices, contractual terms, and the respect of consumer protection into consideration. In general, a regulator will look at the organisation of the market, the legal and technical control of Distribution System Operators (DSOs), the monitoring of prices, while an ombudsman looks at individual situations. The work of ombudsmen is more than conciliation, as they try to find a solution or an arrangement that satisfies equally both parties.

It is also important to note that the ombudsman's work is considered as reliable from the companies' point of view. Data on complaints and dispute resolved may highlight their good or poor performances. Ombudsmen and ADR bodies provide them with feedback on the types and numbers of complaints received and handled, which gives companies the opportunity to improve their services and offers. Suppliers and DSOs do trust the ombudsman's processes and tend to show more involvement toward consumers.

Last but not least, ombudsmen also receive and provide important inputs to regulators, especially regarding market practices of the suppliers and DSOs and regular meetings are held to discuss and improve the organisation of the energy market.

Energy Union's New Deal for Energy consumers is accompanied by innovative energy services (bundled offers, smart technologies, self-generation and consumption, and collective actions etc.), which need specific knowledge of consumer activity. Ombudsmen and independent ADR providers, with the help of consumer associations and NRAs, seem best placed to provide this and will establish a strategy to anticipate those challenges.

Ombudsmen and independent ADR providers should be empowered all across Europe to address cross-sectoral challenges and enable stakeholders, including consumer and welfare organisations, suppliers, DSOs, regulators and policy makers, to get a clear understanding and to take the necessary measures to protect and empower consumers.

4. BETTER UNDERSTANDING OF THE MARKET MEANS BETTER REGULATION: EXAMPLES OF POLICY MEASURES

A. BELGIUM

In Belgium, the energy ombudsman acts as the single point of contact for energy-related complaints. An agreement has been signed with the federal administration and all the Belgian regulators to define the dispute handling processes and the diffusion of information. The energy ombudsman receives and provides regulators with important inputs, especially regarding market practices of the suppliers and DSOs and hold regular meetings to discuss and improve the organisation of the energy market. Regulators, the ombudsman and other public services gather twice a year for the permanent consultation group.

The Energy Ombudsman Service has advisory powers towards the government. Hence, he has been involved in the drafting of the New Consumer Agreement protecting "The consumer in the liberalised electricity and gas market". [9] This Agreement protects (residential) ends-consumers, and compliance with the provisions of this agreement constitutes fair trade practices towards consumers.

Some new provisions of the Consumer Agreement are based on suggestions and recommendations from the Belgian energy ombudsman. Hence, each year, the supplier has to propose the cheapest tariff option; the extension of contracts can't be at the consumer's disadvantage; otherwise the consumer has the right to terminate their energy contract without termination fee or preliminary notice; the supplier can no longer ask for termination fee when switching supplier, even when the change takes place after moving; price simulators are becoming more transparent; the moving process is improved; customer can decide to exclude the annual bill from the direct debit plan; and suppliers have to pay interests in case of late credit repayment.

At the end of 2014, the ombudsman provided the federal Minister of Energy with a memorandum containing several proposals, identified by shortcomings in the energy market observed by the ombudsman since its establishment in 2010. The ombudsman recommended a wider access to the right to the social tariff for electricity and natural gas. This would enable 1 million vulnerable families to benefit from an affordable energy price, which corresponds to the number of families living below the poverty line in Belgium (20% of families in Belgium). It also recommended an improvement of the Consumer agreement and its extension to SMEs (end users with an annual consumption of max. 100.000 kWh gas and max. 50.000 kWh electricity); while doorstep selling of energy contracts to residential customers and SMEs should be banned. The ombudsman called for uniform, legible energy bills so that the residential or business consumer might be even better able to evaluate and compare prices, tariffs and agreed invoiced reductions. The safety net regulation mechanism for variable energy prices to energy products with a fixed energy component was also asked to be extended.

B. CATALONIA

Every year, the Síndic (ombudsman) informs the Parliament on his work. He also presents special reports on important or urgent specific issues. These public reports also contain recommendations regarding consumer protection. In 2013, the Catalan ombudsman decided to take an ex officio action to report on energy poverty. The report, issued in October 2013, identifies energy poverty, defined as the difficulty to afford basic utility bills (electricity, gas and water) as a growing social phenomenon, albeit difficult to quantify. In this report, the ombudsman sees shortcomings in public energy poverty policy, to allow the Generalitat (Catalan autonomous community) to approach this growing problem in a holistic, multidisciplinary and coordinated way.

One of the proposals was to set up a “winter truce” consisting of the non-interruption of supplies for non-payment during the winter period for those people in a situation of poverty. Furthermore, the ombudsman encourages the supplying companies to reach agreements with affected people so that they can make the total annual payment or only those invoices corresponding to the winter period in instalments throughout the rest of the year. In addition, the Catalan ombudsman proposes that the interruption of supplies be limited to persons or families with an income below the IRSC (indicator of sufficiency of income).

Following the issuing of the report, the Catalan Government approved a decree in December 2013 to avoid cutting off energy supplies to families in need during winter months. The task of the Síndic, together with other stakeholders, played an important role in this innovative legislation, as was the first time that any authority in Spain passed such a regulation.

In addition to this, in December 2014, the Síndic published a Report on the Right to Basic Utilities (Electricity, Water and Gas). [10] This report analyses current shortcomings in the field of energy poverty and basic utilities and contains a number of proposals to reduce the vulnerability an increasing number of persons face.

C. FRANCE

In 2014, the review of the Draft Energy Transition Law was an opportunity for the ombudsman to put forward proposals that he had been advocating for a long time, in order to make the “right to energy” a reality for every French inhabitant. [11] This right involves the need to simplify and expand assistance for the payment of bills. Acknowledging that social tariffs did not work well (poor number of households reached despite automation, lack of support for users of domestic fuel or wood), the ombudsman argued in favour of an energy voucher (Chèque énergie). This voucher will benefit all domestic energy sources, and replace the current social tariffs for electricity and natural gas.

Other proposals of the ombudsman received a good response from the Parliament, such as the establishment of a supplier of last resort, limit back billing to one year (14 months in the final version), align leasehold winter truces and energy or to equip households with a remote display to help them manage their energy consumption. Alongside consumer associations, the ombudsman was able to influence a text on technical measures, aimed at achieving the broad objectives of the energy transition. Thanks to the ombudsman, Article 1 of the draft law makes the fight against fuel poverty a goal. A universal right of access to energy was affirmed. Consumers, who will be one of

the pillars of the success of the energy transition, are better taken into account. Nevertheless, the proposal to get a supplier of last resort, the guarantor of the right of access to energy, has not seen the light of day.

D. GREAT BRITAIN

In Great Britain, the Gas and Electricity markets authority, acting through the NRA Ofgem, operates a licencing regime for suppliers. Its 2012 Guidelines include sanctioning for breaches of licences or licence conditions. Customer complaints are required to be handled by companies under strict standards within eight weeks and shall then be referred to the ombudsman. [12] Furthermore, the watchdog Consumer Futures can investigate complaints from consumers if they are of wider public interest, even though it has no legal powers to secure redress on their behalf.

In 2015 [13] Ofgem made the decision to refer the energy market to the Competition and Markets Authority for full investigation. Ombudsman Services offered their assistance by providing evidence at the hearing and received thanks for the information provided. Ombudsman Services are also regular participants in Ofgem led events and have contributed to Smart Energy GB events, providing an insight to current complaints and expectations for the smart meter roll out. In addition to this, Ombudsman Services continually work with suppliers on an individual basis to drive improvements within the industry.

Ombudsman Services also works with Energy UK, the trade association for the energy industry, and other industry bodies to share knowledge about consumer complaints and encourage improvements. Ombudsman Services engage with consumer groups and they attended the National Energy Action (NEA) Fuel Poverty for England event to discuss the consultation on a new fuel poverty strategy and how to help support fuel poor households. Ombudsman Services has ongoing meetings with the Extra Help Unit and Citizens Advice to look at the ways suppliers support vulnerable energy customers.

E. CZECH REPUBLIC

In Czech Republic, a central authority of state administration has been appointed as the alternative dispute resolution body for energy, called the Energy Regulatory Office. It carries out this activity on the basis of an authorisation given under the Energy Act. Furthermore, the Energy Regulatory Office has also been appointed as the alternative dispute resolution entity for consumer disputes on the basis of a bill on consumer protection. This bill is currently being debated in the Parliament of the Czech Republic. However, no separate law provides for the position of an independent energy ombudsman.

Nevertheless, from 1 February 2014, the Energy Regulatory Office set up the position of an energy ombudsman as an alternative dispute resolution entity for consumer disputes in the energy sector and as a sort of a stepping stone towards an ADR entity for consumer disputes, appointed under Directive 2013/11/EU on alternative dispute resolution. Despite the Energy Regulatory Office's efforts, the position of an independent energy ombudsman as an entity for out-of-court resolution of consumer disputes in the energy industries has not been provided for in any amendment to the Energy Act or the bill to amend the law on consumer protection.

Since the internal energy ombudsman was appointed, the cooperation between the regulator, i.e. the Energy Regulatory Office, and the ombudsman has been exemplary. The Energy Regulatory Office has put in place for the ombudsman all the prerequisites for the performance of the ombudsman's work, including the deployment and financing of additional employees in the ombudsman's department, who work on out-of-court dispute resolution. However, without support provided for in a law, the Energy Regulatory Office's internal energy ombudsman has no decision-making competences, and he has been resolving disputes through negotiation, i.e. conciliation. It is true, though, that in a number of cases, energy suppliers have accommodated the ombudsman's opinion although it is not their duty.

5. CONCLUSION

Independent energy ombudsmen give advice to their respective governments, parliaments, regulators, consumer organisations and markets operators to improve the consumers' understanding of the energy market. This covers consumer protection, social measures and energy efficiency improvements. They work in close partnership with consumer and social welfare organisations in order to create and encourage synergies.

Dr Naomi Creutzfeldt (University of Oxford) discussed, in a report published in March 2015 on the state of play of ADR in the energy sector, that all Member States (at national or regional level) have a body that is responsible for dealing with energy complaints, but there are great variations in the set-up of these bodies. Member States are at different stages of the implementation of the Third Energy Package and the consumer ADR directive.

To achieve the goals of the Energy Union, the EC should ensure the full completion of the Third Energy Package, and carefully monitor the implementation of the ADR directive. Consumers, policy-makers and regulators alike will benefit from the enforcement of the ADR directive. Consumer rights will be more respected, trust in the market will increase and therefore consumers across Europe will be more likely to engage.

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