II-5.5: The Swiss Federal Administrative Tribunal ruled on July 8th, 2010, that ElCom, the Swiss energy regulator, had overridden its powers in its decision of March 6th 2009

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MAIN INFORMATION

In a decision of July 8th 2010, the *Bundesverwaltungsgericht* (the Swiss Federal Administrative Tribunal) partially amended a decision of the *Eidgenössiche Elektrizitätskommission* (ElCom, the Swiss Federal Electricity Commission), stating that it is unconstitutional and illegal for power-plant operators to bear the price of "system-services".

CONTEXT AND SUMMARY

Legislative power in Switzerland belongs to the Parliament, called the *Schweizer Parlament*, which is elected by every Swiss citizen of voting age. The Parliament is composed of two Chambers: the National Council, which represents the population of the country as a whole, each canton being represented proportionately to its population, and the Council of States represents the 26 cantons, Switzerland being a confederation.

The Parliament elects the executive power. The Swiss Government is composed of one Chancellor, who assists the Federal Council, and the Federal Council, the *Schweizerische Bundesrat*. The Federal Council is composed of seven members, and every year, one of these members assumes the Presidency of the Swiss Confederation, on a rotating basis. The others are in charge of ministerial portfolios. This title should not be understood as meaning that the President of the Confederation is the chief of the State such as the German Chancellor, or the French President can be, since the executive power belongs to the Federal Council as a whole. The Presidency of the Confederation is more an honorary title, and helps in representing the Federal Council outside the country.

The Parliament also elects the Federal Supreme Court, seated in Lausanne.

The Swiss energy market is experiencing the first stage of its opening to competition. Indeed, in 2007, the *Stromverordnungsgesetz* (*StromVG)*, the Federal Supply Act, was voted by the Swiss Parliament. This Act set up the conditions for the liberalization of the Swiss energy market, and established a new Swiss energy regulator, the ElCom, short for *Eidgenössische Elektrizitätskommission* (the Federal Electricity Commission). The opening of the market should follow two phases: from 2009 to 2013, freedom of supplier choice is only accessible for end users with an annual consumption over 100.000 kWh. Not until 2014 will households be able to choose their electricity supplier. Full market-liberalisation would then be submitted to a referendum. In this framework, the ElCom has the duty to supervise tariffs for network access.

According to article 22 § 1 and 2 of the *StromVG*, the ElCom is competent to take any decision relating to the implementation of this Act. This includes the surveillance of the prices of network use. The decisions handed down by the ElCom can be contested before the *Bundesverwaltungsgericht* (the Swiss Federal Administrative Tribunal). Then, the decision of the Federal Administrative Tribunal can be appealed to the *Bundesgericht*, the Swiss Federal Tribunal, the country's highest judicial authority.

The European movement towards liberalization was determinate for the opening of the Swiss market. Being highly interconnected, the Swiss market was under pressure from European market operators. Indeed, the opening of the market was a prerequisite for the signature of a bilateral agreement between the EU and Switzerland on energy trade. The *StromVG,* the Federal Supply Act, was adopted

in this context. However, the opening of this market to competition remained highly controversial in the country, for end consumers do not believe in its benefits.

The Federal Supply Act, the *StromVG,* was then modified by an executive order, the *Stromversorgungsverordnung*, *StromVV*, taken on March 14th, 2008, by the Federal Council after proposal by Moritz Leuenberger, at that time Minister for Energy, who wanted to avoid significant increases in energy prices. Amongst other things, the *StromVV* introduced a disposition, article 31b, in the Federal Supply Act. Under the provisions of this article, the cost of supplying backup energy services (the "system-services"), had to be shifted from the final consumer to power plant operators. These "system-services" are the backup energy sources that must be ready in case of system-wide failures or significant peaks in energy consumption. This modification was highly political, these services representing an important part of the annual cost of electricity.

In 2009, over 2.500 complaints had been sent to the Federal Energy Commission, ElCom, challenging the validity of the prices. The only Swiss high-voltage operator, Swissgrid, was, of course, the first subject of these complaints.

At the beginning of the year 2009, right after the modification of the Federal Supply Act by the executive order (the *StromVV*), the ElCom decided to investigate electricity prices. The Federal Electricity Commission handed down its first ruling on March 6th, 2009. It reviewed the calculation methods for the cost of electricity supply, and concluded that Swissgrid had set the price for network access too high for the year 2009. Consequently, the ElCom made use of its powers to reduce the tariff for network access. End consumers saw their share of the price reduced by 425 million Swiss Francs (332 million Euros).

This was the first decision ever handed down by the ElCom and resulted in an almost 40% reduction in the price of electricity, and sent a very strong political message to end users, and also to market operators, who were given notice that the ElCom would not hesitate to make a strong use of its powers.

More specifically, included in this sum were 200 million Swiss Francs of "system-services" that had been charged to end users, even though due to *StromVV*, article 31b of the *StromVG* specifiesthatpower plant operators solely should pay for those services.

Logically, these operators contested the ElCom's decision, and appealed before the *Bundesverwaltungsgericht* (the Swiss Federal Administrative Tribunal). This tribunal stated on July 8th, 2010, that the sole attribution of the price of backup power services to power-plant operators, as authorised by article 31b of the modified Federal Supply Act, was illegal and unconstitutional. The cost of these services should be treated in the same manner as the tariff for network access.

Thus, if no appeal is made of this decision before the Federal Tribunal, Swiss end users will be obliged to pay these 200 millions Swiss Francs back. Furthermore, the validity of 2010 electricity tariffs is also dependent upon this decision, since again, in this calculation the price of backup systems is borne by power-plant operators.

BRIEF COMMENTARY

This decision is a first in Switzerland. The decision of the ElCom of March 6th, 2009 was the result of a political intervention, since the ordinance modifying the Federal Supply Act was the result of a very active stance of Moritz Leuenberger, at that time Federal Councillor and Minister for Energy, who wanted to avoid significant increases in energy prices. This would result in a better acceptance by the Swiss population, whose vote is still needed to fully open the market in 2014.

Thus, the decision of the ElCom of March 6th, 2009, was a logical consequence of this political climate. The Swiss Federal Administrative Tribunal, in July 8th, 2010, stated that the Federal Council had overridden its competences in introducing article 31b in the *StromVG*, since these provisions created a new category of cost-bearers: the power-plant operators whose firms produce more than 50MW of power. As such, this provision represented an important modification to the Federal Supply

Act, by creating legal rules in the sense of article 164§1 of the Swiss Constitution, according to which, legal rules can only be implemented by a law - and the Parliament, and not by an ordinance - that is to say the Federal Council.

This backlash against the Federal Council creates important uncertainty in Switzerland, for if this decision is upheld, the prices for backup power services in 2009 and 2010 will be borne again by the end consumers, which would represent a significant increase of the price of electricity in the country. The political motivations behind the ElCom's decision create a very troubling uncertainty for Swiss consumers.

Interestingly, the ElCom, which took a very political decision to establish its authority and publicly demonstrate its autonomy from the energy market, saw its credibility deeply undermined by the decision of the Federal Administrative Tribunal. Even though Elcom's review of the tariffs was not invalidated, the Federal Administrative Tribunal deemed the application of the new dispositions of the Federal Supply Act unconstitutional. This first setback illustrates the fragility of regulator, because of the control that applies on it – control necessary because it reinforces the legitimacy of the regulator.

Indeed, there is, at first sight, an aporia: the regulator can only be legitimate if its decisions are controlled by *ex post* organisms, especially judges, who have the power to cancel the regulator's decisions if they are in contradiction with the judicial system; otherwise, the regulator blatantly lacks legitimacy. Thus, the strong—legitimate—regulator is necessarily weak, for it is supervised by the judiciary.

In this case, the ElCom handed down its very first decision. However, in regulatory matters, the regulator is not in the same position when it takes its first decisions as when it is an established, old authority. For the new regulator, there are only two options: either it takes a very audacious decision, anticipating that the controlling authorities will not cancel the decision, but remind the authority that such decisions may not be approved in the future, or it begins with soft decisions out of fear of the severity of the judicial review to come, knowing that the more it establishes its authority, the more daring its decisions may become, thereby progressively testing the breadth of its power.

The choice of one or the other attitude highly depends on the sector in which the regulator intervenes. Generally speaking, the relationship between the regulator and the sector is not violently hierarchical, but has a higher horizontal dimension, through mechanisms of co-regulation, exchange of information, etc. This specific relationship also contributes to reinforcing the perception of the regulator's legitimacy by the sector. Therefore, a newly established regulator should not adopt a violent, political decision towards the sector, for it invites review by higher authorities. On the contrary, the signal that should be transmitted to the sector is that of a soft exercise of power, a preference for discourse rather than decision. Thus, the control exercised in this particular case by the Federal Administrative Tribunal sends another signal, which is that a violent use of regulatory power by a young regulator triggers a violent use of the judge's power to control such decisions. It appears that a soft exercise of decision-making powers by the newly established regulator is more likely to be seen benevolently by the controlling authorities, who are more likely to uphold violent decisions when they come from old, long-established regulators.