8 NOVEMBER 2018

COMPLAINT

TO THE EUROPEAN COMMISSION CONCERNING FAILURE BY THE KINGDOM OF SWEDEN

TO FULFIL ITS OBLIGATIONS UNDER THE THIRD ELECTRICITY DIRECTIVE (2009/72) ON COMMON RULES FOR THE INTERNAL MARKET IN ELECTRICITY, THE INDEPENDENCE OF THE NATIONAL REGULATORY AUTHORITY, THE REQUIREMENT OF A FULL JUDICIAL REVIEW AND THE PRINCIPLES OF LEGAL CERTAINTY AND LEGITIMATE EXPECTATIONS

VINGE

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1 Short summary

Introduction

- The Swedish electricity market is mainly regulated by the Electricity Act (Sw*: Ellagen 1997:857*), which implements Directive 2009/72 on common rules for the internal market in electricity (the Third Electricity Directive).
- The revenue cap for each network operator shall cover reasonable costs in order to conduct network operations during the regulatory period and provide a reasonable return on the capital required in order to conduct the operations. What constitutes a reasonable level of return, which determines the cost of capital, has been subject to a thorough judicial review by the Swedish courts.
- In 2016, the Administrative Court in Linköping reviewed the Energy Markets Inspectorate's (Sw: *Energimarknadsinspektionen*; *"EI"*) decisions regarding the regulatory period 2016–2019 and adjusted the following six parameters: cost of debt, risk-free rate of return, market risk premium, beta coefficient, specific risk premium, credit risk premium and inflation rate. Based on these adjusted parameters, the courts established a reasonable level of return.
- In response to these judgments, the Swedish Government assigned EI to "review" the current system. The Government claimed that the former legislation had led to "*lengthy court proceedings and it has made possible unreasonably high revenue increases for network operators."*
- On 24 October 2017, EI presented a proposal for new rules concerning electricity network undertakings. The proposal was to a very large extent similar to what EI, unsuccessfully, had been arguing before the courts and concerned the same parameters that had been subject to review.
- Based on EI's proposal, the Government issued the new "Ordinance concerning a revenue cap for electricity network operations" (Sw: *Förordning (2018:1520*) *om intäktsram för elnätsverksamhet*, the "2018 Ordinance").
- The 2018 Ordinance is in breach of EU law since it (i) sets out detailed provisions for the calculation of the revenue cap and therefore encroaches on the independence of the regulatory authority; (ii) substantially restricts the possibility of judicial review; and (iii) results in further regulatory uncertainty.

Background

- The Swedish electricity networks are currently at maximum (or close to maximum) of their capacity. In the meantime, the Swedish population is growing rapidly and economic growth, technological development and digitalisation creates additional strains on the networks.

- In order to meet this increasing demand and to manage the energy transition, long-term and comprehensive investments are vital.
- The lack of capacity in the electricity networks is currently estimated to cost the Swedish society around SEK 80 billion (approximately EUR 7.75 billion) per year.
- Although reinvestments in the Swedish electricity networks are essential, the costs for such investments have historically not been fully matched by the level of tariffs.

The national measures in breach of EU law

- EI's proposal received criticism during the formal consultations, *inter alia* from the Administrative Court in Linköping, the Administrative Court of Appeal in Jönköping, the Swedish Bar Association and Swedenergy (Sw*: Energiföretagen Sverige AB*).
- For example, the Administrative Court of Appeal in Jönköping, Swedenergy and the Swedish Bar Association questioned whether an ordinance setting out detailed provisions regarding the revenue caps would not be contrary to the case law of the Court of Justice of the European Union (CJEU), according to which national governments shall not regulate the calculation of or the methods for the calculation of tariffs, since that is for the competent regulatory authority to determine independently.
- Despite this criticism, the Government based the 2018 Ordinance on EI's proposal, with only a few alterations and the main issues remaining.
- Swedenergy is aware of the ongoing infringement procedures against Germany and Hungary. In this regard, it should be noted that the 2018 Ordinance eliminates almost all of the discretion available to EI, while the German legislation would seem to leave some room for discretion to the regulatory authority.
- The provisions of the 2018 Ordinance regarding the return on capital for network operators will be applied for the first time for the regulatory period starting 1January 2020. According to Swedish legislation, EI shall adopt its decision on 31 October 2019 at the latest. However, for practical reasons, EI can be expected to take its decisions much earlier. Accordingly, the time frame for legislative actions is very narrow and this complaint is consequently urgent.

The relevant EU law

- The EU law of primary relevance is the Third Electricity Directive, Article 4(3) and Article 19(1) of the Treaty of the European Union, article 47(1) of the EU Charter of Fundamental Rights, case law from the CJEU (Case C-274/08, *The*

Commission v Sweden and Case C-474/08, *The Commission v Belgium*) and the general principles of EU law of legal certainty and legitimate expectations.

Description of the problem, with facts and reasons for the complaint

- By adopting the 2018 Ordinance, the Swedish Government has transferred the method to calculate a "reasonable level of return", the parameters to be used and their calculation from the discretion of the regulatory authority to a legislative act.
- The 2018 Ordinance significantly limits EI's mandate to decide the tariffs to be adopted by the network undertakings and the method for calculating the revenue cap. According to the Third Electricity Directive, it is clearly within the sole duty of the national regulatory authority to decide the tariffs to be adopted by the electricity undertakings.
- Moreover, since the parameters and the method for calculating the revenue cap are regulated in a legislative act, the "reasonable level of return" will no longer be set by a decision subject to full judicial review as required by EU law.
- In addition, during the last decade the Swedish rules applicable to the calculation of the network tariffs have repeatedly been subject to substantial changes which has resulted in regulatory uncertainty for the network operators. These constant changes breach the principle of legal certainty and the right to legitimate expectations and makes it very difficult for the network operators to plan for and to carry out the necessary investments in the networks.

2 The Complainant

2.1 Contact information

The Complainant:

Swedenergy (Sw: *Energiföretagen Sverige AB*)

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Sweden

2.2 Description of the complainant

1. Swedenergy is a non-profit industry and special interest organisation for companies involved in the supply, distribution, selling and storage of energy, mainly electricity, heating, and cooling. As the voice of the Swedish energy sector, the organisation

monitors and promotes the interests of its members and the energy sector in general. Swedenergy has a total of 400 members, which includes state-owned, municipal, and private companies.

3 Introduction

2. The Swedish legislation regarding electricity network tariffs has been subject to several substantial changes over the last 15 years.

3. One of the main considerations when setting the network tariffs is to establish what constitutes a reasonable level of return, which determines the cost of capital. This issue has been subject to a thorough judicial review by the Swedish courts, both for the regulatory period 2012–2015 and the regulatory period 2016–2019. The courts reviewed the Energy Markets Inspectorate's (Sw: *Energimarknadsinspektionen; "EI"*) decisions and adjusted the following six parameters: cost of debt, risk-free rate of return, market risk premium, beta coefficient, specific risk premium, credit risk premium and inflation rate. Based on these adjusted parameters, the courts established a reasonable level of return.

4. With regard to the regulatory period 2016–2019, on 14 December 2016, the Administrative Court in Linköping delivered three judgments. The Court referred to precedents set by the Administrative Court of Appeal in respect of the previous regulatory period,[1] dismissed EI's line of reasoning, repealed EI's decisions regarding the parameters and the reasonable level of return and adjusted the parameters and reasonable level of return.[2]

5. On 15 December 2016, the day after the Administrative Court in Linköping had delivered its judgements, the Swedish Minister for Energy Ibrahim Baylan announced at a press conference that the Government shall ensure that there is a "balance" between the network operators' need of reasonable returns and the consumer need to receive electricity in a safe and secure manner, but at a reasonable cost. The Swedish Government also stated that EI would be given the task to "review" the current system.[3] Subsequently, on 20 December 2016, the Swedish Government assigned EI to draft a proposal for a new ordinance concerning the calculation of a reasonable level of return for electricity undertakings on the Swedish electricity market.

6. On 24 October 2017, EI presented a proposal for new rules concerning electricity network undertakings, "EI's proposal for the period 2020–2023" (Sw*: Nya regler för*

[1] Judgments of the Administrative Court of Appeal in Jönköping of 10 November 2014 in cases no. 61-14, no. 101-14 and no. 129-14.
[2] Judgments of the Administrative Court in Linköping of 14 December 2016 in case no. 4711-15 et al.
[3] For example, see the articles on the web edition of the journals "Svenska Dagbladet" and "Dagens Industri", available at: https://www.svd.se/regeringen-vill-begransa-elnatsavgifter and https://www.di.se/nyheter/regeringen-vill-begransa-elnatsavgifter/.

elnätsföretagen inför perioden 2020–2023).[4] The proposal was to a very large extent similar to what EI, unsuccessfully, had been arguing before the courts. The parameters EI proposed to be regulated had already been subject to review and determined by the courts.

7. EI's proposal received criticism during the formal consultations. The Administrative Court in Linköping and the Administrative Court of Appeal in Jönköping referred to the fact that several of the issues regulated in the proposed ordinance were subject to on-going judicial proceedings or already decided cases. Furthermore, the proposal was criticised for being in breach of EU law since it essentially eliminated the role of the regulatory authority to determine the revenue caps and the possibility of a full judicial review by the courts. Despite this criticism, the Swedish Government issued a new ordinance concerning a revenue cap for electricity network operations (Sw: *Förordning (2018:1520) om intäktsram för elnätsverksamhet*, the "2018 Ordinance") which included most of EI's proposal, with only a few alterations.

8. The 2018 Ordinance sets out detailed instructions for the calculation of the revenue cap and specifies the parameters to such an extent that it severely reduces EI's role as the national regulatory authority. Consequently, it violates the EU law requirements regarding the regulatory authority's independence. This is *inter alia* illustrated by the fact that the Swedish Government has been able to calculate that the 2018 Ordinance will result in a price reduction of approximately SEK 60 billion for the period 2020–2023, equivalent to SEK15 billion per year.[5] On the basis of the 2018 Ordinance, the return rate for the network operators will be approximately 3% according to calculations made by the Swedish Government. This can be compared to 5.8% based on the judgments delivered by the Swedish courts.

9. Moreover, by setting the method for calculating and fixing the parameters of the formula in an ordinance, the method and the parameters as such will not be possible to appeal. In turn, this legislative action jeopardises the right of network operators to a full judicial review of the national regulatory authority´s decisions on network tariffs. It is apparent that this limitation of the judicial review was the very intention of the Government as the 2018 Ordinance, according to the Swedish Government, provides for "simpler and faster court proceedings". [6]

10. In view of the above, the 2018 Ordinance is in breach of EU law, which is explained in further detail in this complaint.

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[4] "New rules for the electricity network operators for the period 2020-2023" (Sw: *"Nya regler för elnätsföretagen inför perioden 2020–2023"* EI R2017:07).

[5] Article on the web edition of journal "Dagens Instrustri", 15 August 2018, https://www.di.se/nyheter/regeringen-vill-ha-tak-for-elavgifter/. It should be noted that the SEK 60 billion includes deficit from 2012-2015 as set by the courts.

[6] Memorandum from the Swedish Ministry of the Environment and Energy, *"Miljö- och energidepartementet, Fakta-PM elnätsavgifter"*, 2018-08-15, p. 2.

4 Background

4.1 The Electricity Act

11. The Swedish electricity market is mainly regulated by the Electricity Act (Sw: *Ellagen 1997:857*), which implements Directive 2009/72 on common rules for the internal market in electricity (the Third Electricity Directive).[7]

12. Pursuant to Chapter 4, Section 1 of the Electricity Act, the Swedish Government, , or the national regulatory authority upon the authorisation of the Swedish Government, may adopt regulations on the calculation of network tariffs.

13. Chapter 5, Section 8 of the Electricity Act provides that the Swedish Government, or the national regulatory authority upon the authorisation of the Swedish Government, shall be entitled to adopt additional legally binding instructions concerning the calculation of reasonable costs for the provision of network operations.

14. Moreover, according to Chapter 5, Section 9 of the Electricity Act, the Swedish Government, or the national regulatory authority upon the authorisation of the Swedish Government, may adopt additional legally binding instructions regarding the calculation of what constitutes a reasonable level of return.

4.2 The Regulatory Authority

15. EI is the national regulatory authority in Sweden and as such responsible for the supervision of the Swedish electricity market, adoption of regulatory decisions and licensing in accordance with the Electricity Act.[8]

16. Actions against the decisions adopted by EI may be brought before the Administrative Court in Linköping (Sw: *Förvaltningsrätten i Linköping*). Leave to appeal is required in connection with appeals to the Administrative Court of Appeal in Jönköping (Sw: *Kammarrätten i Jönköping*). The last instance is the Supreme Administrative Court (Sw: *Högsta förvaltningsdomstolen*), which also requires leave to appeal.

4.3 The Swedish market for electricity network operations

17. The Swedish electricity networks are extensive; they stretch approximately 14 laps around the planet. Combined, the networks have a tied-up capital worth around SEK 170 billion (approximately EUR 16.27 billion).

[7] 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, 14.8.2009, p. 55–93.
[8] Chapter 12, Section 1, of the Electricity Act and Section 1 of the Instruction for the Energy Market Inspectorate (Förordning 2007:1118 med instruktion för Energimarknadsinspektionen).

18. The Swedish electricity network consists of three kinds of grids; a transmission grid, regional distribution grids and distribution grids. The transmission grid is transferring electricity of 220 000 V or higher, while the regional distribution grids and distribution grids transport electricity with lower voltage. The transmission grid is owned by the Swedish State and managed by the State authority Svenska kraftnät, which is thus responsible for the general nation-wide electricity distribution system.

19. The regional distribution grids and distribution grids on the other hand are owned by approximately 170 different companies. The three largest companies, Ellevio, E.ON and Vattenfall, distribute electricity for more than half of the national market.

20. In Sweden, every customer using electricity must be a customer of two companies; the supplier that purchases and subsequently sells the electricity and the supplier that distributes the electricity. The customers can to that end choose their electricity provider freely, but the distribution of electricity is carried out by the companies who own the distribution grid where the customers reside.

21. The networks were largely expanded during the 1970s but, as will be further explained below, there is a substantial and urgent need for reinvestments in order to modernise them and increase their capacity.[9]

4.4 Urgent need for investments in increased capacity

22. A recent study conducted by the international consulting and engineering company Pöyry during spring 2018 concluded that the rapid growth of electricity consumption as well as electricity production, in combination with increased interconnections with other countries, have resulted in higher usage of the networks.[10]

23. In addition, the Swedish population is growing rapidly and as a result there is an urgent need for investments in order to increase the capacity of the electricity networks. Within the next ten years the population in Sweden is estimated to grow from 10 million to over 11 million.[11] Particularly in the big cities the population is increasing and, as a consequence, new housing is being built at an unprecedented rate. At the same time, the electricity networks are currently at maximum (or close to maximum) of their capacity.[12] According to Svenska kraftnät, which manages the Swedish national grid, the electricity networks are already lacking in capacity in Sweden's four largest cities.[13]

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[9] Consultation response from Swedenergy regarding M2017/02561/Ee "New rules for the electrical network companies for the regulatory period 2020 – 2023", 10 January 2018, p. 16.
[10] Report from Pöyry – "Cramped in the electric network – an obstacle for adaptation and economic growth? Final report, (Sw: "*Trångt i elnäten – ett hinder för omställning och tillväxt? Slutrapport*").
[11] Report from the Swedish Government's statistics agency (SCB) – "Demographic Reports 2018:1, The future of population of Sweden 2018 2070", p. 9.
[12] Report from Pöyry – "Cramped in the electric network – an obstacle for adaptation and economic growth? Final report (Sw: "*Trångt i elnäten – ett hinder för omställning och tillväxt? Slutrapport*"), p. 9.
[13] https://www.nyteknik.se/energi/experterna-om-trenderna-2018-mer-el-lagring-och-fornybart-6892676.

24. Moreover, economic growth, technological development and digitalisation creates additional strains on the electricity networks. In the near future the networks have to accommodate for example, electrical cars and power stations, data centres and new electrical processes in the basic industry.[14]

25. The electricity networks must also be expanded in order to meet the ambitious goals set out in the so called Energy Agreement (Sw: *"Energiöverenskommelsen"*) reached in 2016 between the Swedish Government and three political opposition parties regarding the national Swedish long-term energy policy.[15] According to this agreement, Sweden's energy production shall consist of 100% renewable energy by 2040 and Sweden's net sum of greenhouse gas emissions shall be reduced to zero by 2045.

26. In order to meet the increasing demand and to manage the energy transition, long-term and comprehensive investments are vital. If not, it will not be possible to maintain and continuously establish new networks at the required level and pace.[16] According to a report by The Royal Swedish Academy of Engineering Sciences (Sw: *Ingenjörsvetenskapsakademien"), ("IVA"*) one of the main challenges the coming years is the aging networks and that big reinvestments are required.[17]

27. The lack of capacity in the electricity networks is currently estimated to cost the Swedish society around SEK 80 billion (approximately EUR 7.75 billion) per year.[18] In view of what has been presented above, if the necessary investments are not carried out, this figure is likely to increase due to loss of business and job opportunities in regions that cannot offer sufficient network capacity.[19] If the networks are not expanded, it is estimated that by 2030 the socioeconomic cost caused by lack of electricity networks capacity will reach SEK 150 billion per year.[20]

4.5 Low levels of return

28. Although reinvestments in the Swedish electricity networks are essential, the costs for such investments have historically not been fully matched by the level of tariffs. As a

[14] Report from Pöyry – "Cramped in the electric network – an obstacle for adaptation and economic growth? Final report, (Sw: "*Trångt i elnäten – ett hinder för omställning och tillväxt? Slutrapport*"), p. 16 and Swedenergy's Consultation response from Swedenergy (Swe: Energiföretagens remissvar, "Remissvar avseende M2017/02561/Ee Nya regler för elnätsföretagen inför perioden 2020–2023") p. 2.
[15] The agreement can be found here: https://www.regeringen.se/artiklar/2016/06/overenskommelse-om-den-svenska-energipolitiken/.
[16] Report from Pöyry – "Cramped in the electric network – an obstacle for adaptation and economic growth? Final report, (Sw: "*Trångt i elnäten – ett hinder för omställning och tillväxt? Slutrapport*"), p. 24.
[17] Report from IVA – "Delivery dependability within the electricity supply", (Sw: *Leveranssäkerhet inom elförsörjningen – En delrapport*), 7 April 2017, p. 29
[18] Report from Pöyry – "Cramped in the electric network – an obstacle for adaptation and economic growth? Final report, (Sw: "*Trångt i elnäten – ett hinder för omställning och tillväxt? Slutrapport*"), p. 4.
[19] A clear example of the fact that the infrastructure for electricity is insufficient for the future society is the decision of the battery producer Northvolt not to establish themselves in Norrköping. For more info, see here: http://elbilsnytt.se/darfor-fick-norrkoping-nej/.
[20] Report from Pöyry – "Cramped in the electric network – an obstacle for adaptation and economic growth? Final report, (Sw: "*Trångt i elnäten – ett hinder för omställning och tillväxt? Slutrapport*"), p. 4.

result, the Swedish electricity network operators' businesses were not sustainable. As explained in 2011 by Yvonne Fredriksson, the then Director General of EI:

> *"We have examined all 173 electricity undertakings and it has so far not been shown that any of them have made profits that are too high. A majority of the electricity undertakings, or 143 of them, had revenues that fall below the calculated revenue cap, even though, in many cases, they would need to adopt higher tariffs to cover their investments." (in house translation).*[21]

29. Accordingly, it was necessary to increase the companies' revenues substantially in order to cover the costs for investments already made and to carry out investments in the future. As stated by EI:

> *"Many undertakings need to make significant adjustments to their operations in the following years due to the changes of the energy system, says Yvonne Fredriksson, Director General at the Energy Market Inspectorate. The electricity networks constitute an important infrastructure in the society. It is important that there is a reasonable level of return for electricity network operations, so that the owners are ready to contribute the capital needed for the substantial investments that will be required in the future.*
>
> *[…]*
>
> *Most of the undertakings have still chosen to heavily reduce their return in relation to what the economic regulation permits. The average level of return was 5.6 per cent (of the book value) and 43 per cent of the undertakings' return was lower than 4 per cent.*
>
> *We recognise that the undertakings are adjusting to more normal levels of return, but, despite the rise in tariffs over the last few years, the level of return is still weak, says Yvonne Fredriksson. The great risk of the electricity undertakings' low levels of return is that necessary investments will not be made. This will in that case lead to more and longer power failures with increased costs instead." (in house translation).*[22]

5 The national measures in breach of EU law

5.1 Introduction

30. In Case C-274/08, *Commission v Sweden*,[23] the Court of Justice of the European Union (the "CJEU") concluded that the Swedish electricity legislation was in breach of Directive 2003/54/EC concerning common rules for the internal market in electricity

[21] Yvonne Fredriksson, then Director General of EI, at a seminar with the industry, 11 February 2011.
[22] Press release from EI – "Electric network operators profitability is increasing but is still weak" (Sw: Elnätsföretagens lönsamhet ökar men är fortfarande svag), 28 October 2010.
[23] Case C-274/08, *Commission v Sweden* [2009] ECLI:EU:C:2009:673.

(the "Second Electricity Directive").[24] The CJEU found that a sufficiently high degree of predictability is necessary regarding tariffs, or the methodologies for calculating the tariffs, and that these tariffs or methodologies have to be precise enough for the economic actors to evaluate their costs. In order to achieve this predictability, an *ex ante* approval system must be provided for. Such a system did not exist in Sweden in 2009.

31. As a result of this judgment, Sweden altered its legislation by introducing a new chapter on tariffs in the Electricity Act. According to this chapter (presently Chapter 5), a revenue cap must be determined prior to each regulatory period. The decision on the revenue cap is required to be taken a minimum of two months before the regulatory period begins and the regulatory period is set to four years. Moreover, the revenue cap shall cover reasonable costs and allow for a reasonable return. Following the changes to the Electricity Act the Swedish Government, on 29 April 2010, issued the Ordinance 2010:304 on the establishment of allowed revenue under the Electricity Act, which was applied for the regulatory period 2012–2015 (the "2010 Ordinance").[25]

32. As mentioned above, the decisions adopted by EI based on this legislation regarding the revenue caps for the periods 2012–2015 and 2016–2019 have been subject to review by the Swedish courts.

33. In 2014, the Administrative Court of Appeal in Jönköping delivered three pilot judgments, concerning the regulatory period 2012–2015, on the determination of the revenue cap.[26] Referring to the Third Electricity Directive, the Court held that the overall aim with an *ex ante* regulation for the calculation of revenue caps is to ensure predictability for consumers and network operators.[27] The Court concluded that it is reasonable and in line with purpose of an *ex ante* regulation to enforce a long-term perspective when calculating the reasonable level of return, as this has a positive effect on the network operators' incentives and ability to carry out the necessary investments.[28] The risks associated with a short-term perspective can result in significantly fluctuating revenue caps.

34. Regarding the regulatory period of 2016–2019, following decisions adopted by EI in this regard, the question of what constitutes a reasonable return was tried by the Administrative Court in Linköping. In three judgments delivered in 2016,[29] the Court referred to the precedents set by the Administrative Court of Appeal, dismissed EI's line of reasoning, repealed EI's decisions regarding the parameters and the reasonable

[24] 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 repealing Directive 96/92/EC, OJ L 176, 15.7.2003, p. 37–56.
[25] Förordning (2010:304) om fastställande av intäktsram enligt ellagen (1997:857).
[26] Judgments of the Administrative Court of Appeal in Jönköping of 10 November 2014 in Cases no 61-14, no. 101-14 and no 129-14.
[27] Judgements of the Administrative Court of Appeal in Jönköping of 10 November 2014 in Cases no. 61-14, no. 101-14 and no. 129-14., p. 48.
[28] Judgements of the Administrative Court in Linköping of 14 December 2016 in Cases no. 4711-15 et al., p. 49.
[29] Judgments of the Administrative Court in Linköping of 14 December 2016 in Cases no. 4711-15 et al.

level of return and adjusted these.[30] EI appealed the judgments delivered by the Administrative Court in Linköping, but was not granted leave to appeal.[31]

35. The judgments were accordingly different from EI's reasoning and calculation of the revenue cap. Only six days after the judgments were delivered by the Administrative Court in Linköping, the Swedish Government assigned EI to draft a proposal for a new ordinance concerning the calculation of a reasonable level of return for electricity undertakings on the Swedish electricity market.[32] The Government claimed that the former legislation had led to "lengthy court proceedings and it has made possible unreasonably high revenue increases for network operators ".[33]

36. With complete disregard of the case law of the Swedish courts and existing EU law, EI's proposal set out a short-term perspective and laid down detailed provisions for the calculation of the revenue cap. The parameters set out in EI's proposal were very similar to the parameters which had been subject to the thorough review by the Swedish courts referred to above, where the Courts had found the adopted parameters to be incompatible with both Swedish and EU law. In addition, the suggested regulation of the parameters used for calculation left virtually no discretion to EI, which in turn drastically limited the possibility of a judicial review of any decision adopted by the authority.

37. EI's proposal received criticism during the formal consultations, *inter alia* from the Administrative Court in Linköping, the Administrative Court of Appeal in Jönköping, the Swedish Bar Association and Swedenergy.[34] The Administrative Court in Linköping[35] and the Administrative Court of Appeal in Jönköping[36] referred to the fact

[30] In the judgments cited in footnote 27 above, the Administrative Court of Appeal in Jönköping stated that the calculation of the cost of capital shall be based on a long-term perspective since this will encourage electricity undertakings to make necessary investments in the electricity networks and thereby ensure the networks' operating ability, p. 49.
[31] Decision by the Administrative Court of Appeal in Jönköping, 17 November 2017, in case no. 7-17 et.al.
[32] Instruction from the Swedish Government to EI, "Uppdrag att se över regleringen av intäkter från elnätsverksamhet", M2016/03027/Ee, M2016/02275/Ee, M2016/02483/Ee, 20 December 2016, available at: https://www.regeringen.se/4b0f49/globalassets/regeringen/dokument/miljo--och-energidepartementet/uppdrag-att-se-over-regleringen-av-intakter-fran-elnatsverksamhet-m2016-0327-ee.pdf.
[33] Memorandum from the Swedish Ministry of the Environment and Energy, "Miljö- och energidepartementet, Fakta-PM elnätsavgifter", 2018-08-15, p. 2. Notably, although the network prices have increased, the previous price level was very low and, in a European perspective, the network prices in Sweden are still low. VaasaETT and two leading European energy market authorities collaborate to track monthly energy prices in 32 European countries. Each month they publish a household energy price index that makes a comparison of energy prices in European capitals. When the electricity distribution prices are adjusted to purchasing power standards, which eliminates general price level differences between countries, Stockholm has distribution prices well below the average (Household Energy Price Index for Europe, 28 September 2018, available at: https://static1.squarespace.com/static/59c39dd2b07869ebd1d205ba/t/5bb369dce4966bfaef3c0392/1538484712384/HEPI_Press_Release_September_2018.pdf).
[34] All consultation reponses (Sw: "Remiss av Energimarknadsinspektionens rapport Nya regler för elnätsföretagen inför perioden 2020-2023", M2017/02561/Ee, 24 October 2017) are available here: https://www.regeringen.se/remisser/2017/10/remiss-av-energimarknadsinspektionens-rapport-nya-regler-for-elnatsforetagen-infor-perioden-2020-2023/.
[35] Consultation response from the Administrative Court in Linköping (Sw: Remissvar från förvaltningsrätten i Linköping, "Yttrande avseende Energimarknadsinspektionens rapport 'Nya regler för elnätsföretagen period 2020-2023 Ei R2017:07'"), p. 1.
[36] Consultation response from the Administrative Court of Appeal in Jönköping (Sw: Remissvar från kammarrätten i Jönköping, "Remissyttrande över Energimarknadsinspektionens rapport Ei R2017:07, Nya regler för elnätsföretagen period 2020-2023"), p. 1.

that several of the questions discussed in the proposal were subject to ongoing judicial proceedings or already decided cases. The Administrative Court in Linköping also pointed out that EI's arguments for the proposed changes were in principle the same as the arguments EI had put forward during the judicial proceedings, which had not been accepted by the courts. [37] In addition, the Administrative Court in Linköping, the Swedish Bar Association and Swedenergy emphasised that electricity undertakings must be able to appeal all parts of the decisions on the revenue caps. [38]

38. Further, the Administrative Court of Appeal in Jönköping, [39] Swedenergy[40] and the Swedish Bar Association[41] questioned whether an ordinance setting out detailed provisions regarding the revenue caps would not be contrary to the case law of the CJEU, according to which national governments shall not regulate the calculation of or the methods for the calculation of tariffs since that is for the competent regulatory authority to determine independently.

39. In addition, the proposal received criticism from the political opposition. A member of the opposition sent a written question to the Swedish Minister for Energy Ibrahim Baylan and asked whether he considered EI's proposal to be in accordance with EU law and the Swedish constitution.[42] The answer given by the Swedish Government was vague and did not respond to the concerns put forward.[43]

40. Further, in their opinion in an official report from the Parliamentary Committee on Industry and Trade (Sw: "*Näringsutskottet*"), the political opposition emphasised the importance of a long-term perspective when regulating the electricity market:

> *"Large parts of the electricity grid were built in the 1960s and 1970s. As existing networks age, new needs have also emerged that require new investments. An increased proportion of intermittent electricity production generates entirely new demands on the electricity networks. It also increases the need for a more stable and more predictable regulatory framework. Equally important is to ensure that electricity network undertakings continue to have good investment incentives to enable the adjustment of the Swedish electricity network."* (in house translation)[44]

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[37] Consultation response from the Administrative Court in Linköping (Sw: Remissvar från förvaltningsrätten i Linköping, "Yttrande avseende Energimarknadsinspektionens rapport 'Nya regler för elnätsföretagen period 2020-2023 Ei R2017:07'"), p. 1.
[38] Consultation response from the Swedish Bar Association (Sw: *Advokatssamfundets remissvar, "R-2017/1946, till Miljö- och energidepartementet, M2017/02561/Ee"*), p. 2.
[39] Consultation response from the Administrative Court of Appeal in Jönköping (Sw: *Remissvar från kammarrätten i Jönköping, "Remissyttrande över Energimarknadsinspektionens rapport Ei R2017:07, Nya regler för elnätsföretagen period 2020-2023"*), p. 1.
[40] Consultation response from Swedenergy (Sw: *Remissvar från Energiföretagen, "Remissyttrande över Energimarknadsinspektionens rapport Ei R2017:07, Nya regler för elnätsföretagen period 2020-2023"*),, p. 6, 8, 10.
[41] Consultation response from the Swedish Bar Association (Sw: *Advokatssamfundets remissvar, "R-2017/1946, till Miljö- och energidepartementet, M2017/02561/Ee"*), p. 2.
[42] See the question at "Skriftlig fråga 2017/18:697 av Lars Hjälmered (M) till Statsrådet Ibrahim Baylan (S), *Regleringen av Sveriges elnät"*, 31 January 2018.
[43] See the answer at "Svar på fråga 2017/18:697 av Lars Hjälmered (M), *Regleringen av Sveriges elnät"*, 14 February 2018.
[44] The opposition´s opinion in the government report *"Näringsutskottets betänkande 2017/18:NU23 Elmarknadsfreågor"*, 19 June 2018, p. 13.

41. Despite this criticism, the Government based the Ordinance 2018 on EI's proposal, with only a few alterations and the main issues remaining.

5.2 Question to the Commission from a Member of the European Parliament

42. On 9 July 2018, the Swedish Member of the European Parliament, Christofer Fjellner, addressed the following written question to the Commission:

> *"If the Swedish Government goes ahead with its regulation establishing the rate of return of electricity network companies, contrary to the judgment in Case C-474/08, will the Commission take action to ensure that the Treaty and the case-law of the Court of Justice are respected?*
>
> *Bearing in mind the difficulties encountered by Sweden in respecting the division of responsibilities laid down by the Energy Market Directive, might it be appropriate for the Commission to obtain information about the matter before it receives a formal notification?"*

43. The following answer was given by Commissioner Miguel Arias Cañete on behalf of the Commission on 27 August 2018:

> *"The independence and powers of national regulatory authorities are a core element of Directive 2009/72/EC, as was also confirmed by the European Court of Justice in case C-474/08 (on the basis of the predecessor to the current Directive). The Commission has, in its enforcement practice, paid particular attention to safeguarding the independent role of the national regulatory authorities, including on tariff setting. On 19 July 2018, the Commission decided to refer Germany and Hungary to the European Court of Justice in order to ensure correct implementation of the directive also in respect of tariff setting by the national regulatory authority. The Commission is currently considering how best to follow this up with the Swedish authorities."*[45]

5.3 The 2018 Ordinance

44. Section 17 of the 2018 Ordinance stipulates that in order to calculate the return on capital base which is required to attract capital for the necessary investments, the return on capital should be calculated according to the WACC-formula (Weighted Average Cost of Capital). WACC requires a definition of several different parameters that are used in the calculation, including risk free interest rate, capital structure, beta coefficient, market premium, special risk premium, credit risk premium and inflation.

[45] Parliamentary question E-003728/2018, 27 August 2018.

45. The 2018 Ordinance includes a figure which sets out the formula for the calculation of the return on capital, on the basis of the different parameters (Annex 2 of the 2018 Ordinance):

Cost of Capital, W

$$W = \left(\frac{1 + \left(\frac{\left((RD \times (1 - T)) \times S \right) + (RE \times (1 - S))}{1 - T} \right)}{1 + I} - 1 \right)$$

$$RD = RF + CR$$

$$RE = RF + (\beta E \times MRP)$$

$$\beta E = \beta A \times L$$

$$L = 1 + (1 - T) \times \left(\frac{S}{(1 - S)} \right)$$

$$S = \frac{D}{(D + E)}$$

RD = Cost of debt before taxes
RF = Risk-free interest rate
CR = Credit risk premium
T = State income tax
S = Net debt ratio
D = Net debt
E = Equity
RE = Cost of equity
I = Inflation rate
βE = Equity beta
βA = Asset beta
MRP = Market risk premium

46. The Swedish Government has fixed the individual parameters through the 2018 Ordinance as explained below.

47. Section 19 of the 2018 Ordinance provides that 10-year government bonds shall be used for the calculation with regard to the risk-free interest rate. The risk-free interest rate shall be calculated as the average annual return of Swedish 10-year government bonds

during the past 4 calendar years prior to EI's decision on the revenue cap and a market based forecast of returns of Swedish 10-year bonds during the regulatory period concerned.

48. Pursuant to Section 20 of the 2018 Ordinance, the credit risk premium shall be calculated as the difference in return between peer companies' corporate 10-year bonds (which "should have been issued in Europe" in order to mirror the same market) and 10-year government bonds during the eight calendar years preceding EI's decision on the allowed revenue cap. A peer company is defined in Section 18 of the 2018 Ordinance as a company having distribution of electricity as its main operation, being listed on a European exchange and having its seat in Europe.

49. Section 21 of the 2018 Ordinance sets out that the state income tax during the regulatory period shall be presumed to be that which follows from Chapter 65, Section 10 of the Income Tax Act (1999:1229).[46]

50. It is stipulated in Section 22 of the 2018 Ordinance that net debt shall be calculated as the average of the peer companies' respective net debt during the 10-year period prior to EI's decision on the revenue cap.

51. Section 23 of the 2018 Ordinance sets out that equity shall be calculated as the average of the peer companies' respective market capitalisation for the same ten-year period.

52. The inflation rate is, according to Section 24 of the 2018 Ordinance, to be calculated as the average of the annual change in a consumer price index based on fixed mortgage rates during the four-year period preceding the decision of EI and a four-year market based prognosis of the same index.

53. Pursuant to Section 25 of the 2018 Ordinance, the asset beta shall be calculated as an average of the share price development for the peer companies in relation to a global share price index for the ten calendar years preceding EI's decision. The calculation shall be based on published weekly values and applicable tax rates for the peer companies.

54. Section 26 provides that a market risk premium shall be calculated as the return needed in addition to the risk-free return under Section 19 in order to attract investments in equity.

5.4 The ongoing infringement procedures against Germany and Hungary

55. Swedenergy is aware of the ongoing infringement procedures against Germany and Hungary. Although Swedenergy has not carried out a legal analysis of the German or

[46] Chapter 65, Section 10 of the Income Tax Act (Sw. *Inkomstskattelagen 1999:1229*).

Hungarian legislation, certain aspects of these legislations deserve to be underlined as relevant also for this complaint.

56. In Hungary, applicable tariffs are fixed by legislative acts and the availability of judicial review of adopted decisions is severely limited.

57. In Germany, the regulatory authority does not enjoy full discretion in its duty to fix tariffs and other terms and conditions for access to networks and balancing services. However, its decisions are permitted to deviate to some extent from the methods of calculation of tariffs established in the legislative acts. Rather than setting out a detailed method for calculating return on capital, the German legislation uses an *ex ante* abstract general method as opposed to a detailed methodology regulation.[47] The German legislation sets out material principles for determining network charges, reflecting those of article 23(2) of the Second Electricity Directive (now Article 37(6) of the Third Electricity Directive), which form a normative starting point for the regulation of charges.[48] Additionally, charges are required to be approved on a case-by-case inspection, by an abstract control of the method.

58. In this regard, it should be noted that the 2018 Ordinance eliminates almost all of the discretion otherwise available to EI, while the German legislation would seem to leave some room for discretion to the national regulatory authority. The 2018 Ordinance has even allowed the Swedish Government to calculate in advance that the 2018 Ordinance will reduce the tariffs up to 21 per cent, or up to SEK 60 million. Accordingly, the Swedish legislation seems to be even more detailed than the German. As described above, it should also be noted that the 2018 Ordinance was issued in "direct response" to the judgments delivered by the Swedish courts.

5.5 Urgency of the complaint

59. The 2018 Ordinance will enter into force on 1 January 2019. The provisions in Section 17-26 will be applied for the first time for the regulatory period 2020–2023.

60. Consequently, the provisions in Sections 17–26 of the 2018 Ordinance regarding the return for network operators will be applied for the first time for the regulatory period starting 1 January 2020. According to the Electricity Act, EI must issue decisions regarding revenue caps for network operators no later than two months before the start of the next regulatory period, i.e. 31 October 2019. However, for practical reasons, EI can be expected to adopt decisions much earlier. For example, concerning the current period, 2016–2019, EI issued decisions in June 2015, i.e. six and a half months prior to their entry into force.[49]

[47] Judgment from the German Federal Constitutional Court, BVerfG, of 21 December 2009 - 1 BvR 2738/08 -, juris p. 35.
[48] Judgment from the German Federal Constitutional Court, BVerfG, of 21 December 2009 - 1 BvR 2738/08 -, juris p. 36.
[49] EI's decision on regulatory period 2016-2019 was released in June 2015, see https://www.ei.se/sv/for-energiforetag/el/Elnat-och-natprisreglering/forhandsreglering-av-elnatstariffer-ar-2016-20191/elnatsforetagens-intaktsramar-2016-2019/.

61. Notably, EI does not have the legal mandate to disapply or change the rules contained in the 2018 Ordinance. Therefore, in order to avoid a scenario where the network operators would be subject to decisions regarding the regulatory period of 2020–2023 based on rules that are contrary to EU law, the 2018 Ordinance would need to be repealed or amended by the Swedish Government prior to EI's adoption of those decisions. Thus, the time frame for legislative actions is very narrow and this complaint is consequently urgent.

6 The relevant EU law

6.1 The third electricity directive

Recitals 6, 33, 34, 35, 36, 37 and 56

Article 35(4)

Article 35(5)

Article 37(1)

Article 37(4)

Article 37(6)

Article 37(8)

Article 37(12)

Article 37(15)

Article 37(16)

Article 37(17)

6.2 Treaty on the European Union (TEU)

Article 4(3)

Article 19(1)

6.3 EU Charter of Fundamental Rights

Article 47(1)

6.4 Case law from the CJEU

Case C-274/08, *The Commission v Sweden*

Case C-474/08, *The Commission v Belgium*

6.5 Case law from the ECtHR

Case of Terra Woningen B.V. v. The Netherlands (Application no. 20641/92)

Case of Bryan v. The United Kingdom (Application no. 19178/91)

Case of Obermeier v. Austria (Application no. 11761/85)

6.6 Soft Law

62. Commission staff working paper - Interpretative note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas - The regulatory authorities, Brussels 22 January 2010 (the "Interpretative Note").

63. Communication from the Commission, Making the internal energy market work, COM (2012) 663 final, 15.11.2012 (the "Communication on making the internal energy market work").

64. Communication from the Commission, Delivering the internal electricity market and making the most of public intervention, COM (2013) 7243 final, 5.11.2013 (the "Communication on public intervention in electricity").

6.7 General principles of EU law

65. The principle of legal certainty

66. The principle of legitimate expectations

7 Description of the problem, with facts and reasons for the complaint

7.1 Introduction

67. Through the 2018 Ordinance, the Swedish Government has transferred the method to calculate a "reasonable level of return" and what parameters to be used from the discretion of the regulatory authority to a legislative act.

68. The 2018 Ordinance is in breach of EU law since it:

(i) sets out detailed provisions for the calculation of the revenue cap and therefore encroaches on the independence of the regulatory authority (see section 7.2 below);

(ii) substantially restricts the possibility of judicial review (see section 7.3 below); and

(iii) results in regulatory uncertainty (see section 7.4 below)

7.2 The 2018 Ordinance sets out detailed provisions for the calculation of the revenue cap and therefore encroaches on the independence of the regulatory authority

7.2.1 Introduction

69. The 2018 Ordinance sets out detailed provisions for the calculation of the revenue cap and determines the parameters of the WACC-formula. Thereby, the Swedish Government has effectively overruled the analysis of the Swedish administrative courts based on EU law concerning the parameters of the WACC-formula and the reasonable level of return, as set for the regulatory periods 2012–2015 and 2016–2019 respectively.

70. The 2018 Ordinance even completely eliminates the special risk premium, which the Swedish courts held should be set at 0.5%. Further, the depreciation times are fixed in detail in the Annex to the 2018 Ordinance.[50]

71. By specifying the parameters in detail, the 2018 Ordinance essentially eliminates the discretion available to EI to decide on the revenue cap. Therefore, the 2018 Ordinance breaches EU law requirements regarding the independence of the regulatory authority. These breaches of EU law are further explained below.

7.2.2 The independence of the regulatory authority

72. The independence of the regulatory authority is an essential aspect of the Third Electricity Directive and a precondition for the internal market in electricity to function properly. The required independence is underlined specifically in Article 35 of the Third Electricity Directive. As stated in Article 35(4): *"Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently"*.

73. Concerning the relationship between the regulatory authority and any government or other public authority, it is specifically stated in Article 35(4)(a) of the Third Electricity

[50] It could be noted that depreciation times were already regulated in detail in the 2014 Ordinance.

Directive that the Member States shall ensure that the authority *"is legally distinct and functionally independent from any other public or private entity"*. Moreover, in Article 35(4)(b)(ii) it is stressed that the staff and management of the authority *"do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks"*. In addition, Article 35(5) stipulates that in order to protect the independence of the authority, Member States shall in particular ensure that *"the regulatory authority can take autonomous decisions, independently from any political body"*.

74. The duties and powers of the regulatory authority provided for in Article 37 of the Third Electricity Directive must be read in the context of the required independence of the authority as examined above. Accordingly, the duty of the authority to fix or approve transmission or distribution tariffs or methodologies must be carried out independently from any political body.[51]

75. That it is the responsibility of the regulatory authority to fix the tariffs or methodologies is also evident from Article 37(6)(a) of the Third Electricity Directive, according to which *"[t]he regulatory authorities shall be responsible for fixing or approving sufficiently in advance of their entry into force at least the methodologies used to calculate or establish the terms and conditions for connection and access to national networks, including transmission and distribution tariffs or their methodologies."* (emphasis added)

76. Moreover, in Case C-474/08, Commission v Belgium,[52] the CJEU dealt with Article 23(2) of the Second Electricity Directive where the duty of the regulatory authority to fix or approve the methodologies used to calculate or establish the terms and conditions for transmission and distribution tariffs was previously provided for. Notably, the CJEU confirmed that the interference of a Member State government in the determination of important criteria related to the calculation of tariffs represents an infringement of the national regulatory authority's powers.[53]

> *"Against this background, the interference by the Kingdom of Belgium in determining essential factors for setting tariffs, such as the profit margin, constitutes a restriction on GREG's regulatory authority, which belongs to the regulatory authority according to article 23.2 of the directive." (inhouse translation, emphasis added)*[54]

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[51] See also for example Recital 34 of the Third Electricity Directive which states that "*Energy regulators need to be able to take decisions in relation to all relevant regulatory issues if the internal market in electricity is to function properly, and to be fully independent from any other public or private interests.*"

[52] Case C-474/08, *Commission v Belgium* [2009] ECLI:EU:C:2009:681.

[53] Case C-474/08, *Commission v Belgium* [2009] ECLI:EU:C:2009:681, para. 29.

[54] Case C-474/08, *Commission v Belgium* [2009] ECLI:EU:C:2009:681, para. 29: "*Il convient de constater que, dans un tel contexte, l'intervention du Roi dans la détermination d'éléments importants pour la fixation des tarifs, tels que la marge bénéficiaire, soustrait à la CREG les compétences de réglementation qui, en vertu de l'article 23, paragraphe 2, sous a), de la directive, devraient lui revenir.*" (emphasis added).

77. The Commission's Interpretative Note on the Third Electricity Directive further underlines the required independence of the regulatory authority:

> *"The NRA [the national regulatory authority] must be able to take autonomous decisions, independently from any political, public or private body. This has consequences ex ante (before a decision is taken) and ex post (after a decision is taken). From an ex ante perspective, this requirement excludes any interference from the government or any other public or private entity prior to an NRA decision."*[55] *(emphasis added)*

78. The only action available to a government of a Member State is to issue general policy guidelines concerning overarching policy concerns. However, it is made clear in the Commission's interpretative note that such policy guidelines must not encroach on the independence and autonomy of the regulatory authority.[56]

79. In conclusion, it is obvious that the 2018 Ordinance encroaches on the independence of the Swedish regulatory authority, EI, by setting out detailed provisions regarding the calculation of the revenue cap. Indeed, as already discussed above, this is the very purpose of the 2018 Ordinance. As stated by the Swedish Government:

> *"The new rules concerning the revenue means that the Swedish Government fixes certain parameters for the calculation of the return from the electricity undertakings' network operations."*[57] *(in house translation, emphasis added)*

80. In view of the stringent requirements concerning the independence of the regulatory authority, it should further be noted that it follows from the judgment in Case C-474/08, *Commission v Belgium*, that already the mere authorisation in the Electricity Act granted to the Swedish Government to adopt legally binding instructions concerning the calculation of reasonable costs is in breach of EU law.[58]

81. Consequently, it follows from the analysis above that the 2018 Ordinance infringes the Third Electricity Directive as well as the judgment delivered by the CJEU in Case C-474/08, *Commission v Belgium* since it clearly limits the discretion available to the regulatory authority. Through the 2018 Ordinance, the Swedish Government determines both the method and the parameters for the calculation of the revenue cap, a power that according to EU law clearly belongs to the national regulatory authority. Accordingly, the measures taken by the Swedish Government in the 2018 Ordinance is in breach of EU law.

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[55] Commission staff working paper, Interpretative note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas – the regulatory authorities, 22.01.2010 ("the Commission's interpretative note"), p. 9.

[56] The Commission's interpretative note, p. 7 and 14.

[57] Memorandum from the Swedish Ministry of the Environment and Energy, *"Miljö- och energidepartementet, Fakta-PM elnätsavgifter*", 2018-08-15, p. 1.

[58] Case C-474/08, *Commission v Belgium* [2009] ECLI:EU:C:2009:681, para. 31.

7.3 Restricted judicial review

7.3.1 Introduction

82. As explained above, the revenue cap for each network operator shall cover reasonable costs in order to conduct network operations during the regulatory period and provide a reasonable return on the capital required in order to conduct the operations. The reasonable return is calculated by the regulatory authority in accordance with the WACC-formula, which provides the average after-tax cost of a company's various capital sources. WACC requires a definition of several different parameters that are used in the calculation.

83. The parameters to be used by EI to calculate the cost of capital are set out in detail by the Swedish Government in the 2018 Ordinance. This significant limitation of the Swedish regulatory authority's discretion also has consequences for the judicial review of decisions adopted by that authority.

7.3.2 Judicial review by Swedish administrative courts

84. A decision taken by EI concerning the revenue cap to be applied by the network undertaking may be appealed under Chapter 13, Section 7, subparagraph (i) of the Electricity Act to the Administrative Court in Linköping. Such an appeal is limited to a review of the legality of the regulatory authority's decision. Accordingly, the judicial review conducted by the administrative court regarding a decision adopted by EI will be restricted to a control of whether the decision taken was adopted in accordance with the 2018 Ordinance.

85. This limitation of the judicial review conducted by an administrative court of the decision taken by EI regarding the revenue caps is explicitly what the Government is trying to achieve with the 2018 Ordinance:

> *"The new provisions on the level of return mean that the Government fixes certain parameters for the calculation of the return from electricity undertakings' network operations.*
>
> *[…]*
>
> *The new regulations will mean simpler and faster court proceedings, which benefits both customers and electricity undertakings.*
>
> *[…]*
>
> *The Government considers that the current legislation in certain aspects has functioned less well with lengthy court proceedings and it has made possible*

unreasonably high revenue increases for network operators." (emphasis added)[59]

86. That this is the objective of the Government is also evident from the terms of reference of the assignment to EI to propose legislative measures, which EI has summarised as follows:

> *"The assignment concerning a reasonable level of return was given by the Government in connection with the judgments delivered by the Administrative Court in Linköping in December 2016. It is evident from these judgments that the Administrative Court has made a different evaluation regarding some issues concerning the manner in which [the regulatory authority or EI] has calculated what constitutes a reasonable level of return for electricity undertakings when establishing the return from their network activities during the period 2016-2019. […] It is made clear in the description of the assignment that the Government considers that there are reasons to further legislate the level of return in order to ensure that it is reasonable."*[60] *(emphasis added)*

87. In summary, the judicial review of a decision taken by EI concerning the revenue cap to be applied by the network undertaking concerned is limited to a review of whether the decision has been taken in accordance with the Electricity Act and Sections 1 and 17-26 of the 2018 Ordinance. Since the parameters to be applied by EI, and their calculation, when setting the revenue caps applicable to the network undertakings are predetermined by the 2018 Ordinance, the judicial review of the decisions taken is effectively very limited. As such, it does not allow for full scrutiny of the calculation of the revenue cap.

7.3.3 EU law requirements of full judicial review

88. As mentioned above, the independence of the national regulatory authority is an essential aspect of the Third Electricity Directive and a precondition for the internal market in electricity to function properly. At the same time, the extensive power granted to the authority to independently issue binding decisions requires that this body is accountable for its decisions. Thus, the independence of the national regulatory authority must function in tandem with its accountability to the public.

89. The necessary accountability of the regulatory authority is ensured by the possibility for an affected party to appeal its decisions. Thus, according to Article 37(16) of the Third Electricity Directive, decisions taken by regulatory authorities *"shall be fully reasoned and justified to allow for judicial review"*. Moreover, as stated in Article 37(17), *"Member States shall ensure that suitable mechanisms exist at national level under*

[59] Memorandum from the Swedish Ministry of the Environment and Energy, "Miljö- och energidepartementet, Fakta-PM elnätsavgifter", 2018-08-15, p.1.
[60] The statement can be found on EI's website: https://www.ei.se/sv/Projekt/Projekt/Utvecklad-reglering-for-framtidens-elnat/om-uppdraget/.

which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government".

90. The Commission has emphasised this connection between independence of the regulatory authority and its accountability as well as the need to ensure the rights of defence of any concerned company:

> *"[…] it is important to recognise the clear link, in the new Electricity and Gas Directives, between increased NRA independence and NRA accountability."* [61]

> *"Since all decisions of the NRA have to be subject to judicial review or appeal mechanisms before any other bodies independent of the parties involved and of any government […], the same holds true for the powers given to the NRA under Article 37(4) of the Electricity Directive and Article 41(4) of the Gas Directive. By the same token, the NRA will have to apply stringent procedures respecting the rights of defence of the companies concerned."* [62]

91. Notably, Article 37(4) of the Third Electricity Directive includes a reference to Article 37(1) where the national regulatory authority's duty to fix or approve tariffs or their methodologies is provided for. In addition, Article 37(4)(a) refers specifically to binding decisions on electricity undertakings. Accordingly, such decisions must be subject to a full judicial review of all aspects, including the criteria used to fix the tariffs or their methodologies.

92. Further, the possibility for an electricity undertaking to appeal a decision adopted by the regulatory authority and ensure a full review of its decision also follows from the requirements of effective judicial protection under EU law. According to well established case law of the CJEU, under the principle of sincere cooperation laid down in Article 4(3) TEU it is for the courts of the Member States to ensure judicial protection of a person's rights under EU law. In addition, Article 19(1) TEU requires Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. [63]

93. The duty of the Member States to ensure effective judicial protection is far reaching. In Factortame,[64] the CJEU held:

> *"any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of [Union] law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set*

[61] Commission Staff Working Paper, p. 20.
[62] Commission Staff Working Paper, p. 18.
[63] Case C-243/15, *Lesoochranárske zoskupenie VLK* [2016] ECLI:EU:C:2016:838, para. 50.
[64] Case C-213/89, *The Queen v Secretary of State for Transport, ex parte Factortame* [1990] ECLI:EU:C:1990:257.

> *aside national legislative provisions which might prevent, even temporarily, [Union] rules from having full force and effect are incompatible with those requirements, which are the very essence of [Union] law".* [65]

94. Additionally, according to Article 51(1) of the Charter of Fundamental Rights of the European Union ("the Charter"), the provisions of the Charter are applicable when the Member States are implementing EU law. The right to a fair and public hearing is provided for in Article 47(2) of the Charter and its requirements must accordingly be observed when the Third Electricity Directive is implemented.

95. Moreover, Article 52(3) of the Charter requires that rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR. As explained by the CJEU in Case C-396/11, *Radu*, [66] Articles 47 and 48 generally correspond to Article 6 ECHR. It is also set out in the Explanations Relating to the Charter concerning its Article 52 that Article 47(2) and (3) of the Charter corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation.[67]

96. As set out in Article 6(1) of the ECHR, in the determination of his or her civil rights and obligations, everyone is entitled to a hearing by an independent and impartial tribunal established by law. Article 6(1) of the Charter in principle requires that a court or tribunal should have jurisdiction to examine all questions of fact and law that are relevant to the dispute before it. [68] This means, in particular, that the court must have the power to examine point by point each of the litigant's grounds on the merits, without refusing to examine any of them, and must give clear reasons for their rejection. As to the facts, the court must be able to re-examine those that are central to the litigant's case. [69]

97. In this regard, it should be emphasised that an administrative court which is empowered only to determine whether the discretion enjoyed by the administrative authorities has been used in a manner compatible with the object and purpose of the law is not considered to have "full jurisdiction". [70]

98. Thus, the necessary judicial review of the regulatory authority's decisions on revenue caps requires a review of all aspects of the decisions, including the criteria used to fix the tariffs or their methodologies. A review which is confined to questions of law does not satisfy this requirement.

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[65] Case C-213/89, *The Queen v Secretary of State for Transport, ex parte Factortame* [1990] ECLI:EU:C:1990:257, para. 20.
[66] Case C-396/11, *Radu* [2013] ECLI:EU:C:2013:39, para. 32.
[67] Explanations Relating to the Charter of Fundamental Rights (OJ C 303, 14.12.2007, p. 17–35).
[68] Case of Terra Woningen B.V. v. The Netherlands (Application no. 20641/92), para. 52.
[69] Case of Bryan v. The United Kingdom (Application no. 19178/91), paras. 44-45.
[70] Case of Obermeier v. Austria (Application no. 11761/85), para. 70.

7.3.4 Breach of EU law requirements of full judicial review

99. Consequently, by establishing in detail the parameters to be applied by EI to calculate the level of return used to set the revenue cap for the network operators, the 2018 Ordinance essentially eliminates EI's discretion to decide the tariffs to be adopted by the network undertakings. This elimination of EI's discretion also curtails any judicial review of its decisions on the revenue caps, which are binding on electricity undertakings. Thus, due to the 2018 Ordinance, the method for calculating the revenue cap will no longer be set by a decision subject to the necessary full judicial review. To not allow for a full judicial review of the regulatory authority's decision, including the parameters used to fix the tariffs or their methodologies, is contrary to the Third Electricity Directive, to Articles 4(3) and 19(1) TEU and to Articles 47(2) and (3) of the Charter.

7.4 Regulatory uncertainty

7.4.1 Introduction

100. The principle of the protection of legitimate expectations is a fundamental principle of EU law.[71] According to the case law of the CJEU, the principles of legal certainty and protection of legitimate expectations must be observed not only by the EU institutions, but also by the Member States in their exercise of powers conferred on them under the EU directives.[72]

101. It follows from these principles that legislation needs to be certain and its application foreseeable by those who are subject to it. The requirement of legal certainty must be observed even more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which those rules impose on them.[73]

102. Article 37(6)(a) of the Third Electricity Directive stipulates that the national regulatory authority is responsible for fixing or approving methodologies in advance in order to allow the necessary investments to be carried out in a manner allowing those investments to ensure the viability of the networks. As stated by the CJEU in case C-274/08, *Commission v Sweden, "[s]uch investments can be expected from economic operators only if those tariffs or methodologies are sufficiently precise and give a satisfactory level of predictability"*.[74]

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[71] Case C-17/03 *VEMW and Others* [2005] ECLI:EU:C:2005:362, para. 73, Case C-104/97P *Atlanta AG and others v Commission and Council* [1999] ECLI:EU:C:1999:498, para. 52 and Joined Cases C-37/02 and C-38/02 *Di Lenardo and Dilexport* [2004] ECLI:EU:C:2004:443, para. 70.

[72] Case C-183/14 *Salomie and Oltean* [2015] ECLI:EU:C:2015:454, para. 30.

[73] Case C-183/14 *Salomie and Oltean* [2015] ECLI:EU:C:2015:454,para. 31, and Case C-325/85 *Ireland v Commission* [1987] ECLI:EU:C:1987:546, para. 18.

[74] Case C-274/08 *Commission v Sweden* [2009] ECLI:EU:C:2009:673, para. 29.

103. In this regard, it should be noted that the Commission, in its "Communication on making the internal energy market work", under the heading "Let the market work to encourage the appropriate investments", points out that:

> *"Public intervention that discourages private investments and undermines the internal market must be avoided."*[75]

104. Moreover, in its Communication setting out Guidance for public intervention in electricity (the "Communication on public intervention in electricity") the Commission states that:

> *"In order to achieve their objectives, public interventions need to represent stable, long-term, transparent, predictable, and credible commitments to investors and consumers. A need to make changes in regulatory conditions in response to developments in the market does not justify applying such changes retroactively to investments already made in situations where the need arises because of failures on the part of the public authorities to correctly predict or adapt to such developments in a timely manner. Applying retroactive changes in such situations will seriously undermine investor confidence and should, to the extent possible, be avoided."*[76]

105. The 2018 Ordinance constitutes yet another fundamental change of the rules applicable to the calculation of the network tariffs and is therefore contrary to the general principles of EU law of legal certainty and legitimate expectations. In fact, this is the sixth time since 1996 that the rules have been changed, which is explained in further detail in the section below.

7.4.2 Overview of the legislative changes in Sweden for the calculation of network tariffs

106. Between 1996 and 2002 the Swedish electricity market was deregulated, bound only by general guidelines stipulating that the tariffs should be *"reasonable and objective"*.[77] During this period, singular and sporadic audits were performed on the network companies, but in 1998, in practice, a price-freeze was imposed.

107. Since performing the audits was considered to require too much resources, the Network Performance Assessment Model was introduced. This model remained in place from 2003 to 2007. The Network Performance Assessment Model consisted of objective criteria (factors that could not be affected, such as the number of customers and their

[75] Communication from the Commission *"Making the internal energy market work"* COM(2012) 663 final, 15.11.2012, p. 12.
[76] Communication from the Commission *"Delivering the internal electricity market and making the most of public intervention"* C(2013) 7243 final, 5.11.2013 p. 12.
[77] Legislative proposal 2008/09:141 On ex-ante approval of network tariffs, (Sw: *Regeringens proposition om förhandsprövning av nättariffer*"), 5 March 2009, p. 23.

geographical location) as well as subjective criteria (factors deemed possible to affect, such as quality of transmission, rate of interruptions and voltage quality).[78]

108. Between the years 2008 and 2011, there was an "interim regulation"; one for 2008–2009 and another for 2010–2011. As described above, in 2009 the CJEU found the Swedish legislation to be in breach of the Second Electricity Directive. In order to correct this, the legislation was modified. Following the changes made to the Electricity Act, the Swedish Government issued the 2010 Ordinance. Based on this legislation, EI issued decisions regarding the revenue cap, which were appealed by the network operators, giving the Swedish courts the opportunity to examine the method for calculating the revenue cap and determine what should be considered a reasonable level of return.

109. In 2014, the rules were changed once again as the 2014 Ordinance concerning a revenue cap for electricity network operations (Sw: *"Förordning (2014:1064) om intäktsram för elnätsföretag"* the "2014 Ordinance") introduced the RL-method (real linear) for the calculation of capital costs. Up until then, the use of method for calculating the capital costs had previously not been regulated and EI had used the RA-method (real annuity). When using the RA-method, the yearly capital cost is consistently the same during the economic life of the asset concerned. The RL-method on the other hand provides higher capital costs at the beginning of the economic life of the asset, but those costs decrease regularly until the asset has been completely depreciated.

110. The change of method meant that for the period starting 1 January 2015, the network operators had to switch to the RL-method, not only with regard to investments in new assets, but also with regard to already existing assets i.e. in the middle of the depreciation period of the latter investments. This change of method during the economic life of the assets concerned means that the network operators would not be able to recover the investments made in these assets. As the change of method led to a 15% decrease of the revenue cap for the regulatory period 2016–2019 (est. SEK 30 billion), a transitional rule was implemented in the 2014 Ordinance to smoothen the transitional. The rule stipulated that for assets older than 38 years, or for which there was no information about the age, the assigned age would be 38 years in order to give the companies compensation for capital costs in the shape of revenue and interest. The rule was supposed to apply for three regulatory periods, i.e. twelve years.

7.4.3 The 2018 Ordinance – another fundamental change of the rules

111. In 2018, despite the clear case law regarding the interpretation of the Swedish legislation in light of the Third Electricity Directive, the Swedish Government has yet again fundamentally changed the rules for the network operators by adopting the 2018

[78] Legislative proposal 2008/09:141 On ex-ante approval of network tariffs, (Sw: *Regeringens proposition om förhandsprövning av nättariffer*"), 5 March 2009, p. 24.

Ordinance. For example, the Swedish courts had underlined the importance of a long-term perspective. Still, the 2018 Ordinance adopts a short-term perspective, which in turn renders it difficult for the network operators to issue investment analyses in order to attract new investors. As a result, both previously made and future investments will be affected negatively.

112. Although it was shown in EI's report that the framework suggested therein for the period of 2020–2023 would put in place a significantly lower revenue cap, the effect on the capacity for the network operators to carry out the necessary investments was not analysed in the report.

113. In addition to putting in place new detailed parameters replacing those that already had been subject to review by the Swedish courts, the 38-years transitional rule described above, has been removed after only being applied for one regulatory period. In that regard, it should be noted that eliminating the transition rule will also have a retroactive effect, meaning that it violates the prohibition against retroactive legislation.

114. In conclusion, during the last decade the Swedish rules applicable to the calculation of the network tariffs have repeatedly been subject to substantial changes, resulting in regulatory uncertainty for the network operators. This line of action breaches the principle of legal certainty and the right to legitimate expectations. This regulatory uncertainty makes it very difficult for the network operators to plan for and to carry out the necessary investments in the networks.

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