Notes and Comments

THE INTERNAL ENERGY MARKET*

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In my discussion of the development of the European Community's Internal Energy Market, I intend to combine the policy and legal aspects of this subject in what I hope will be a judicious mixture. The legal aspects are of course particularly of interest for this forum, but energy is an intensely practical subject of interest to all of us, ordinary citizens as well as lawyers. I will try, therefore, to show how the policy has been conceived as well as how it has been, or is being, embodied in Community law.

Unlike, say, coal and steel, energy as such has not always clearly been a Community competence. There has been a development of energy consciousness in the Community and its institutions over a number of years. The need to undertake what we now call the internal energy market is the result of some facts of economic life and of political necessity.

The Community's energy dependence, particularly oil dependence, was marked for decades by its spectacular economic growth, based on cheap energy from outside. The choice was made for this cheap imported energy as opposed to indigenous resources, notably coal. By 1973 dependence on it had reached almost two thirds of energy consumption.

It took the two oil shocks of 1973 and 1979 to bring energy into Community activity. As a result of these shocks, the Community set itself a series of 10-year energy objectives, involving the adoption of measures such as energy research and demonstration projects and common rules on such matters as oil refining, oil prices and strategic oil stocks. By 1986 energy intensity had improved by almost twenty per cent. and external energy dependency had fallen to less than forty-five per cent.

These are, however, average figures. The individual Member States of the Community have varying resources of energy dependence, from Greece and Portugal at one end of the scale — heavily dependent — to the UK and Netherlands at the other. The price of energy, especially electricity, also varies considerably from one country to another.

It was clearly necessary to study the advantages of increased energy

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exchanges. A study carried out by the Commission on the "cost of non-Europe" in the energy field put the benefits of integrating the market at up to 30,000 million ECU per year.[1]

For these gains to be realised, energy had to cease to be mainly the preserve of the Member States and had to become part of the great Internal Market for other goods and services which the Commission envisaged in its White Paper of June 1985.[2] This was all the more necessary since energy is an almost universal economic motor and enters into the costs of almost all other economic activity.

The Commission, instructed by the Council, adopted an overall approach to this process which would ensure not only increased trade but also increased solidarity between Member States and increasingly optimal allocation of resources.

Gas and electricity imports and exports. To take the opening up of the market first, the key is the abolition of national frontiers and the free circulation referred to in the EEC Treaty. In other words, this implies the removal of obstacles to trade and the creation of healthy competition both between products and between undertakings.

The Commission has chosen to give priority in this area of increased trade to the cases of gas and electricity, which, being carried by networks, have up till now enjoyed a considerable amount of national protection.

The Commission therefore put forward proposals[3] for gas and electricity transit based upon the new Article 100A brought in by the Single Act.[4] This provides the legal base for progressively establishing the internal market of Article 8A by the end of 1992. Article 100A, as is well known, offers the great advantage for progress that the proposals based on it need a qualified majority of the Council, rather than unanimity, to reach the status of Directives.

As regards the Commission' proposal, its draft Directive for a right of transit on electricity networks was adopted in October 1990 by the Energy Council and will come into force on July 1, 1991.[5] The Directive on gas transit was adopted at the next Energy Council of 31 May, 1991.[6]

Both these texts provide for Member States to respect the right of transit through networks on their territory. Networks under this obligation are to negotiate the terms of contracts of at least one year's duration in the case of electricity and without any limit for gas. Bodies representing network operators will both advise the Commission on how to implement the right of transit and will also provide conciliation facilities between networks on matters such as prices for transit.

These proposals represent a good beginning for gas and electricity liberalisation, but transit is not the end of the story. The Commission has set up

[1] Cecchini Report "The European Challenge — 1992: The Benefits of a Single Market".

[2] The White Paper "Completing the Internal Market", June 1985.

[3] Council Directive of 24 October 1990 on competition in the transit of electricity through transmission grids (Com (90), 510 final — Syn 207).

[4] Single European Act, signed on February 17, 1986 in Luxemburg and on February 28, 1986 in The Hague.

[5] Council Directive of October 1990 on the transit of electricity through grids (90/547/EEC, OJ 1990 L 313/30).

[6] Council Directive of May 1991 on the transit of natural gas through grids (91/296/EEC OJ 1991 L 147/37).

Consultative Committees on Third Party Access representing gas and electricity interests and the national authorities of the Member States. Their reports are about to be published.[7] The Commission's services are simultaneously considering other liberalisation measures connected with the gas and electricity scene as a whole and not just the networks.[8]

The Commission is free to make its own proposals and it has a wide range of options to choose from. Whatever approach the Commission favours is expected to be made public within the next two or three months.[9]

What is interesting here, particularly for lawyers, is the way in which the great questions of competition are enshrined in Community law right across the whole range of industry and commerce. This implies that in energy matters we must frequently be attuned to what is proving legally possible in other sectors, where jurisprudence is accumulating and giving ever more positive signals for future action by the Commission.

Our interest in the jurisprudence of Community competition law is all the more marked because our approach to the Internal Energy Market is only partly reliant upon bringing in new legislation. Where obstacles to competition exist, we naturally look to see whether these can be abolished by reference to the existing law before we try to frame new legislation to deal with them. Apart from the correctness of principle in using the existing Treaty powers to the full, this is normally much more efficient than seeking new legislation.

A recent case outside the energy sector has given us particular food for thought. This is the telecommunications case, in which the French and other governments sought the annulment of a Commission Directive concerning exclusive rights to install and maintain telecommunications equipment.[10] The Directive in question[11] is based upon Article 90(3) of the EEC Treaty which enables the Commission to make Directives where such exclusive rights granted by Member States are working against the Treaty. The Court held that the Commission was fully entitled to make a 90(3) Directive because exclusive rights to import and market telecom equipment were liable to contravene Article 30 of the Treaty, concerning intra-Community trade. However, it made the points that:

- where Article 90(3) is applied, it must be in a general manner, so as to determine the obligations of Member States under Article 90(1). Individual infringements must be dealt with case by case under Article 169;
- Article 90(3) can only be applied to state measures *vis-à-vis* enterprises, whereas anti-competitive behaviour has to be dealt with case by case in application of Article 85 and 86.

The scope of the judgement is further limited by the fact that it deals only with telecom equipment and not with the provision of public services. However, a pending judgement on public communications services may take us

[7] Reports on the Proceedings of the Consultative Committees on Third Party Access with regard to gas and electricity, May 1991, European Commission, Directorate-General for Energy.

[8] Liberalisation measures on gas and electricity include, for example, the abolition of statutory restrictions on imports and exports of gas and electricity within the Community.

[9] For example, apart from its power to propose new Directives, the Commission is entrusted with the implementation of key provisions of the Treaty, such as Articles 30–37 and 85–90.

[10] Case C-202/88, France v. Commission, OJ 1991 C 96/6.

[11] Commission Directive of 16 May on competition in the markets in telecommunications terminal equipment (88/301/EEC, OJ 1988 L 131/73).

further. The point for those of us concerned to see a more liberal energy market is that we, the Commission, now feel able to prepare Directives of a general nature directed at telling Member States how they should allow exclusive rights to be exercised so as not to constitute measures contrary to the Treaty.

It is not the case that, as some Member States have claimed, the Commission is unable to affect such matters other than by new Directives made under Article 100A with Council agreement.

In this crucial area, we are of course working in cooperation with our competition services, while making our own contribution on the more purely energy aspects. In this line, the Commission most recently took action to cause Member States to cease maintaining exclusive rights for gas and electricity imports and exports. The principal legal basis for these proceedings is Article 37 of the Rome Treaty, which provides that Member States shall adjust State monopolies of a commercial character so as to ensure that there is no discrimination in the conditions under which goods are procured and marketed. The Commission stated the need for such action to give effect to the Internal Energy Market. The Member States concerned will be given just over two months to tell the Commission that they are taking action to repeal laws granting monopoly rights to import and export electricity and gas.

Other issues on energy networks. You will appreciate that, while rights for importing and exporting energy are of great importance, they are not the end of the story. We must recognise the importance of monopolies to transmit and to distribute energy as well.

However, importation and exportation are of sufficient importance to make us pay particular attention not only to the exclusive rights granted by Member States, but also to contracts and other agreements between the undertakings themselves.

It was thus that in the recent "SEP" decision[12] the Commission condemned an agreement — the "OVS" agreement — under which the Dutch SEP company prohibited *inter alia* industrial consumers from importing and distributors from exporting electricity, both legal possibilities enshrined in the new Electricity Act of the Netherlands.[13] The Commission, in its decision, took the view that Article 21 of the agreement between SEP and the electricity generators, as applied in conjunction with the control and influence which SEP in fact exercised over the use of the grid, constituted an infraction of Article 85(1) of the EEC Treaty "insofar as it had as its object or effect:

(a) the restriction of imports by private industrial consumers, and
(b) the restriction of exports, by distributors and industrial consumers, including autogenerators".

Both of these practices, in the Commission's view, were liable adversely to affect trade between Member States. The Commission further found that the agreement did not satisfy the tests of Article 90(2) of the Treaty, which would allow these practices provided they were required in order for the

[12] Commission Decision of January 16, 1991 relating to a proceeding under Article 85 of the EEC Treaty (IV./32.732 — Case 91/50/EEC, Usselcentrale and others, OJ 1991 L 28/32).
[13] Electriciteitswet 1989, Staatsblad 1989 (535).

SEP to perform the tasks assigned to it. The Commission then allowed three months for the infringement to be ceased.

An interesting feature of this decision is that Dutch law itself, through the Electricity Act 1989, has the effect of increasing competition by allowing large industrial consumers to import electricity for their own consumption via the grid.[14] These positive effects are, however, in the view of the Commission frustrated by the existing contractual arrangements which have still to be amended so as to allow imports via the grid to become a reality. It is a good example of how the Commission is applying existing Community law to import and export practices where these are the result of restrictive commercial arrangements.

Pricing. So far I have spoken about policies and the law relating to gas and electricity supply. But this is not the sole extent of the Commission's action on the Internal Energy Market. Among our aims is to increase competition not only between undertakings which supply the same energy product, but also between the various energy sources. To contribute towards this, the Commission put forward proposals which were adopted last year in the form of a Council Directive[15] for increasing the transparency of gas and electricity prices. The Directive is based on Article 213 of the Treaty of Rome, which gives the Commission powers to collect information of this kind. The Directive obliges gas and electricity producers to make available to the Commission statistics concerning gas and electricity prices to industrial consumers. Commercial secrecy is protected, but the information is to be published by the Commission twice-yearly. This measure should contribute to even up the differing situations regarding price transparency in the Member States and should enable the industrial consumer to make a better informed choice as to his energy inputs, which are of course a major factor in the competitivity of the Community's industries.

To accompany transparency of prices we really need transparency of costs to achieve workable competition. The Commission has undertaken to seek such cost transparency with a view to revealing such factors as hidden aids, subsidies and concealed taxes, and thus to making the integration of the Internal Energy Market more homogeneous and dynamic.

Procurement. In the area of public procurement, too, progress has been made. Public procurement has been the subject of the Commission's attention and of Community legislation for some years now. There has been a feeling that the influence of the State tends to be exercised so as to favour national goods and services at the expense of Community-wide tendering, which would favour the best the Community's industries have to offer. The exercise of such influence against other countries' products is in fact considered to be the equivalent of a quantitative restriction, which is prohibited under Article 30 of the Rome Treaty. Since the late seventies, there have been Community rules requiring the publication of offers to tender in the Official Journal of the European Communities.[16] Until recently, however,

[14] Electricity Act, Section 6, Articles 34–37.

[15] Council Directive of June 29, 1990 concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users (90/377/EEC, OJ 1990 L 185/16).

[16] Council Directives 71/3-5 and 77/62.

these did not apply to the sectors of water, energy, transport and telecommunications. These very sizeable markets, largely subject to national influence, were brought within Community rules by the adoption in October 1990 by the Council of the so-called "Utilities" Directive.[17] This lays down that all supply and work contracts above a certain amount[18] are subject to detailed procurement rules which should ensure equal treatment of all potential suppliers. A similar Directive is being prepared for services and a draft should be issued at the end of this half-year.[19] The legal control of how the rules are implemented is to be ensured by the coordination of national rules. This does not affect the general competence of the Commission to ensure respect for Community law for which a specific procedure is provided. These matters are dealt with by a draft Directive adopted by the Commission in July 1990.[20] It is intended that all public procurement Directives, whether at present adopted by the Council or not, should come into effect on January 1, 1993 at the latest.

Technical standards. From public procurement we pass to normalisation. Clearly, if there is to be fair and free trade in products there is a need for mutually agreed and recognised norms and specifications. Here there is continuing progress. We are convinced that norms have a vital part to play in opening up the Internal Energy Market and this was the theme of the Green Paper which the Commission published on this subject.[21]

Since then, considerable progress has been achieved in the areas of oil products, electricity, and gas and oil equipment. For oil products, we have given five mandates to CEN[22] which are to result, by the end of 1992, in European Norms for fuel products including lead-free petrol. For other oil products, we are awaiting a reply from Europia[23] on the need for normalisation, while we are also scrutinising existing specifications for oil products. In the case of electricity, CENELEC[24] is about to be given a mandate to prepare European Norms on physical characteristics and quality of electricity by the end of 1992.

In this context, gas and oil equipment are being studied. European Norms for gas equipment and for machine safety standards in the solid fuel sector have also been made the subject of mandates to CEN. Our approach is that normalisation work should go ahead wherever this is indicated by consultations with the industries concerned. Before leaving the oil sector, two areas of interest to us should be noted by lawyers: firstly, the legal action under Article 37 of the Treaty to oblige two Member States to change their practices regarding exclusive rights for the import and export of oil products and, secondly, the present thinking in the Energy Directorate to ensure greater transparency and less discrimination in the granting of licences for oil exploration and production.

[17] Council Directive of September 17, 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (90/531/EEC, OJ 1990 L 297/1).

[18] The limits are: supply 400,000 ECU and works 5,000,000 ECU.

[19] By mid 1991, this was still under discussion.

[20] Com (90) 297 final, July 30, 1990.

[21] Communication from the Commission on Energy and Environment, November 28, 1989.

[22] CEN: Comité Européen de Normalisation.

[23] European Petroleum Industry Association.

[24] CENELEC: Comité Européen de Normalisation Electrotechnique.

We are obviously conscious of the need for policies to flank or accompany the Internal Market. These range from general strengthening of energy infrastructures in the framework of trans-European networks, to more specific items like energy in cities, on peripheral islands or in rural areas.

Environmental issues. It would not be possible to leave the subject of the Internal Market without at least a mention of a subject which we all know to be of fundamental, indeed vital importance: the environment.

The Treaty itself, in Article 100A added by the Single European Act, recognises that the internal market must be the subject of proposals for health, safety, environmental and consumer protection. It lays upon the Commission the obligation to "take as a base a high level of protection" when making such proposals. Not so long ago, I stressed the Commission's viewpoint at the World Energy Conference in Montreal regarding the tremendous importance of environmental factors in the overall energy policy. This is reflected in specific activities such as the Community's SAVE programme,[25] which involves action particularly in the field of energy economies. As regards the major issue, global warming, the Community certainly intends to play its part. The situation is serious. Whereas means and resources — sometimes costly — were found to deal with the problems of sulphur and nitrous emissions from combustion installations, there are no such readily available means for dealing with methane or carbon dioxide. The Community and its Member States agreed at the Joint Energy and Environment Council in October 1990 on a common climate change policy which supports the view of the Intergovernmental Panel on Climate Change with regard to the natural greenhouse effect, increasing emissions of greenhouse gases and global warming. Assuming that other leading countries undertake similar commitments, the Community is willing to take action to reach stabilisation of carbon dioxide emission by the year 2000 at 1990 levels in the Community as a whole. Member States starting from lower levels of emissions are entitled to have CO_2 targets and/or strategies corresponding to their economic and social development, while improving the energy efficiency of their economic activities. The main means of achieving these targets are measures of energy conservation and energy efficiency and reducing the amount of carbon in fuels. The Commission has drawn up policy options to achieve the reduction of CO_2 emissions by technological means; research and development into renewable energy sources; and by the use of fiscal measures such as excise duties on mineral oils and a combination of a carbon tax and a general energy tax. The Commission will present, in good time before the 1992 World Conference on Environment and Development, a proposal for establishing global Community emissions reduction dates separately for CO_2 and other greenhouse gases, including possible strategy options aimed at progressive reductions to years 2005 and 2010. Whatever the strategy, the completion of the Internal Market and industrial competitiveness must be given due consideration in the evaluation process: this is particularly the case with new energy taxes. However, the Community's internal competitiveness could go hand in hand with the protection of the

[25] "Specific Actions for Vigorous Energy efficiency" Council Decision of June 5, 1989 on a Community programme for improving the efficiency of electricity use (89/364/EEC, OJ 1989 L 157/32).

environment and could result, through advanced research, development and marketing methods, in a lead for European companies on world markets.

The above is an outline of the Commission's work as regards the integration of the Internal Energy Market. However, the Commission is involved in other initiatives within the energy sector. I shall now turn to these.

Other initiatives. Firstly, the inclusion of energy in a Community legal framework, to which I referred at the beginning of this note, is due to take a step further with the drafting of an energy chapter to add to the Treaty of Rome. This has been presented by the Commission for discussion within the framework of the Intergovernmental Conference on political union. It has received the support of a large majority of the Member States. If adopted, it will form a sound basis for the development of a comprehensive energy policy at Community level, around broad objectives and with the support of an efficient decision-making process. Its main objectives will be: security of supply; stability and integration of energy markets; energy measures for every energy source; the rational use of energy and the promotion of new and renewable energy sources. A high level of environmental protection, health and safety will constitute a permanent reference. The Community as such will have the competence to cooperate with third countries and international organisations where appropriate. At the same time, it will be responsible for consistency between national and Community policies and programmes.

The necessary measures would be decided by the Council of Ministers on the basis of proposals prepared by the Commission and (very probably) in co-operation with the European Parliament.

This is, of course a highly important legal framework. One other point is of an eminently practical nature and constitutes a series of proposals in itself. I have in mind the European Energy Charter. This idea was put forward by the Dutch Prime Minister, Mr Lubbers, in the summer of 1990 and developed by President Delors at the CSCE Summit in Paris in October. The drafting of the European Energy Charter has still to be completed.[26] But the basic idea is already defined as the establishment of a European Energy Community to capitalise on the energy complementarity between the European Community and the countries of Central and Eastern Europe. The Charter would provide a framework for discussing, and secondly deciding on, specific forms of cooperation in Europe which would be covered by separate protocols on each issue. It would be perfectly in keeping with the Community's energy policy of ensuring security of energy supply with a view to completing the Internal Energy Market and providing an external relations policy to back it up. It would help the expansion of trade and would allow the countries of Central and Eastern Europe to obtain the assistance they need for economic recovery and for obtaining energy supplies under conditions of cleaner environment, better balance between different energy sources and the more efficient use of energy. Institutionally, it would provide for a form of code of conduct which the signatories would agree to observe and enforce. They would agree to allow access to energy resources by operators; to allow energy exploitation for profit; to promote free trade; to promote the free movement of energy products according to agreed speci-

[26] Communication from the Commission on European Energy Charter (COM (91) 36 final, February 14, 1991).

fications of health and safety; and to carry out research, technological development and innovatory projects. Specific agreements would give priority among other things to nuclear energy; the technology of coal mining and use; the transmission of gas and electricity via networks, and transfers of technology and innovation.

The Energy Charter is not the only activity by which the Community is showing its will to be of assistance in the reconstruction of Central and Eastern Europe. As well as its own bilateral assistance programme, the Community is coordinating the assistance effort of the Group of 24 industrialised countries of the OECD. We have been coordinating assistance in the so-called PHARE programmes.[27] This has been a massive and impressive effort. Total commitments within the G-24,[28] excluding grants for balance of payments assistance, and excluding help by way of debt reduction, now amount to some 23,000 million dollars, of which almost two-thirds is from the Community and its Member States. Of course this aid covers many areas other than that of energy. We have also helped to establish the European Bank for Economic Reconstruction and Development which opened in London in April 1991. The Bank is not intended to undertake the whole burden of economic transformation in Eastern and Central Europe, but can have a vital role in stimulating commercially viable private investment there. And on top of all this we have started to negotiate European Agreements with each of the emerging democracies, to impose structure upon our relations, not only at the level of trade but in everything from political contacts to scientific cooperation.

My aim in this lecture has been to provide a fairly wide-ranging survey of areas which I feel are of interest to a legal audience, some of which go outside the framework of European law with which we began. For energy, as for other subjects law provides this necessary framework and we cannot forget that the essence of EEC is the respect for law and the acceptance of a supreme court. Legal work is at the top of EEC activities. I am happy to express my deep respect, as a part of the Executive Institution, for the fundamental contribution which lawyers are making to the construction of Europe.

[27] PHARE — "Poland Hungary — Aid for Economic Restructuring" programme, of which the task of cooperation is given to the European Commission.

[28] G 24 comprises the 24 main industrial States, who cooperate on industrial and economic matters.