4th Workshop on
EU Energy Law and Regulation

Making the Internal Market a Reality: Are Further Rules Required or Is a More Rigorous Application of Existing Rules the Answer?

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Report on Proceedings

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The 4th Workshop on EU Energy Law

Making the Internal Energy Market a Reality: Are Further Rules Required or Is a More Rigorous Application of Existing Rules the Answer?

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by

Peter D Cameron

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Robert Schuman Centre for Advanced Studies
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Florence, Italy

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EU Energy Law and Regulation Workshop

The objective of the Annual EU Energy Law and Regulation Workshop, hosted by the Robert Schuman Centre for Advanced Studies at the European University Institute in Florence, and under the direction of Prof. Peter Cameron, Professor at the University of Dundee, is to contribute to the ongoing debate about the creation of an EU internal market for energy by offering to the actors involved – market players, energy regulators, specialised law practitioners and authorities charged with implementing policies that have a bearing on the energy sector – an alternative and informal forum for the discussion of critical issues in EU energy policy.

This Annual Workshop receives sponsorship from several leading European law firms and benefits from close cooperation with the Council of European Energy Regulators, and associations of stakeholders in the EU, as well as the main EU institutions. The agenda of the Workshop is planned in close cooperation with the Florence School of Regulation. A volume edited by Peter Cameron on *Legal Aspects of EU Energy Regulation: Implementing the New Directives on Electricity and Gas Across Europe* was published by Oxford University Press in 2005, bringing together and building on papers presented at the Workshops in 2002 and 2003.

Report on Proceedings of the Workshop

22-23 September 2005

Executive Summary

1. Fresh momentum will be injected into the liberalisation process

The issue of whether an internal market can be built on the basis of existing European law or requires further legislation is a central one at the present time. As the speech from the UK Presidency showed, liberalisation is the key topic, with strong efforts now being made to inject fresh momentum into the process. Two reports from the European Commission will be decisive in setting the agenda for the next steps: the interim report from DG COMP's Energy Sector Review, addressing structural issues in the markets and the benchmarking report from DG TREN on the impact of the 2003 directives and regulation. From the discussion at the Workshop the possibility emerged that BOTH a tougher application of existing competition law will be evident from the end of this year AND further legislation may be proposed at a later stage, perhaps end-2006. A key element in any such legislation is likely to be an enhancement of the powers of national regulatory authorities to promote a consistency of approach in decision-making and coordination.

2. Making the Rules Work – through the courts

Although the jurisprudence of the European courts on energy matters is still quite thin, the recent judgment of the European Court of Justice in a Dutch case on network access (C-17/03) is interesting addition to the case law. From time to time case law can act as a catalyst in moving liberalisation forward, as in the telecommunications and aviation sectors, so the participants grappled with its consequences. The discussion noted the long period of time that had passed since the case was commenced in the national court and that it continues there after the ECJ decision. The wider European implications of the judgment are perhaps unclear but there are many elements in it that make it worthy of examination (access issues, exemptions, legacy contracts, maximisation of transmission capacity, for example). Nonetheless, the outcome was that there appeared to be few long-term implications for consumers. It was noted that large consumers were reluctant to enter into the market for wholesale electricity purchase, being satisfied with the role of retail buyers.

3. Making the Rules Work – the Electricity Regulation

This session focussed on trade in electricity between countries. There is much concern about the inconsistent application of Regulation 1228/2003, non-enforcement of measures in the Regulation and non-implementation of corresponding provisions in the Electricity Directive. A main issue that emerged was how to maximise the existing capacity of TSOs, and exploring ways of encouraging TSOs to make more available. This involved a discussion of unbundling, firm and non-firm access rights, incentives and the role of system integrity considerations. There was a sense that some national regulators were not doing enough to deal with this problem.

4. Making the Rules Work – Long Term Contracts

This session focussed more on gas than on electricity. It was noted that competition authorities had had some success in this area, which turned on the long-term reservation of capacity. The efforts by them at addressing the foreclosure effects of such contracts were crucial if new entrants were to be encouraged into the market. The role of exemptions, access and incentives for building new infrastructure were discussed, with the case of the Belgian Zeebrugge project examined in some detail.

5. The Commission will initiate legal action in parallel with the Energy Sector Review

The Review provoked a robust debate among regulators and industry participants. Industry representatives had concerns about the confidentiality of data submitted to the Commission as part of the exercise, especially since the data is to be shared with other parts of the Commission where the Competition Directorate considers this appropriate. A number of participants had concerns about the challenge of processing the large volume of data with sufficient rigour to generate sound findings within the timetable the Commission had set itself. It emerged that one of the purposes of the exercise is to contribute to the development of competition cases, and that legal actions may be initiated by the Commission in parallel with the investigation itself, which is not expected to be concluded before the second half of 2006.

Structure of the Workshop

Day One: Applying the Sector-Specific Legislation

Session 1: The Consumer and the Internal Energy Market
Case study – the ECJ Judgment C-17/03 [2005]

The Dutch consumers association – the VEMW – brought a case against the Dutch regulator that a priority position was in violation of EC law and this was referred to the ECJ for a preliminary ruling. It raised issues concerning the nature and role of public service obligations as a justification for the allocation of exclusive access rights; the scope of the prohibition of discrimination and the allocation of cross-border capacity. Questions arising include the following:

- Does the judgment have a wider European significance or does it have merely local implications?
- Was this procedure the only approach open to Dutch consumers to challenge the market?
- Does it tell us anything about recourse to the courts as a way forward in promoting competitive markets?

Session 2: Cross-Border Trade

There is widespread non-compliance with the Electricity Regulation on this subject: what can be done here? Are there *legal* solutions or is it a matter of inadequate regulatory action?

- What are the `regulatory gaps' in this area left by the Regulation and the Guidelines in the Annex? Can they be filled by co-operation among the national regulators?
- Is a regional approach more practical to the solution of the problems (as has been attempted in the recent mini-forums? If so, what legal implications does this have?
- How do the issues differ in gas and how might the new Gas Regulation help?
- What impact will C-17/03 of the European Court of Justice have on these matters?

Session 3: Long Term Contracts

The existence of long-term contracts is assured under the new legislation, but their significance will change as the Internal Energy Market develops: in this climate, what actions should national regulators take to promote competition? Will their actions have a negative impact upon security of supply, and should gas be treated differently from electricity? Among the other questions are:

- Should the new members expect special treatment?
- Should the oil price coupling be encouraged in gas contracts?
- What issues arise concerning the relationship between long-term agreements and short-term end-consumer agreements?

Day Two: The Future of Competition in the Energy Sector

Session 4: The Energy Sector Review

This session considered the potential impact of the European Commission's Sector Review of Competition in the Electricity and Gas Markets. How can it clarify and sharpen the role of competition law instruments in this sector? Among the topics discussed were:

- What issues do the competition authorities in the European Competition Network consider priority ones for them to address in the near future?
- How will they deal with them in conjunction with the sector regulatory authorities?
- Where liberalisation affects non-EU suppliers (mostly in gas) what can be done?

Setting the Scene

In the past year the legal landscape has been dramatically changed as Member States have introduced laws to implement the 2003 directives on common rules in the EU electricity and gas sectors, in most cases after the official deadline of 1 July 2004. In several countries this process has yet to be completed, and the European Commission has begun infringement proceedings against them. At the same time, the Electricity Regulation has proved to be unevenly implemented and a counterpart Regulation on Gas has yet to become operational.

Of equal importance are developments in the application of the Treaty rules on competition. The recently established European Competition Network has become active in the EU electricity and gas sectors, with a major review of these sectors now being undertaken under the leadership of the European Commission Competition Directorate. The last benchmarking report on the progress of liberalisation (from DG TREN) showed that much has still to be done to create competitive energy markets in the EU. The interim results of this investigation might provide an indication of the priorities of the ECN in this area in the coming years.

So, the debate on the liberalisation of energy markets in the EU is shifting towards issues of application of the existing rules, especially in ways that involve national authorities (regulators, competition authorities and courts). And, as the number of bodies responsible for interpreting and applying those rules has grown, how will they interact with each other so as to produce a coherent body of legal and regulatory decisions?

This is a challenging environment for the energy companies themselves, who face overlapping regulatory competences, an uneven playing field, laws that are adopted but not yet operational, and the need to negotiate a multi-level structure of governance for authorisations and approvals for cross-border infrastructure projects.

The 4th Workshop on Energy Law will review several problem areas and ask whether the legal instruments are there to deal with them. If not, what can be done?

* * *

The UK holds the Presidency of the Council of the EU until December 31. This is likely to be a key period for the re-establishment of momentum. The UK representative made an opening speech at the workshop in which the priorities and events were outlined that lie ahead for the EU energy sector in 2005. Four of them are especially important:

- Liberalisation. Two key reports will be presented and discussed at the meeting of the Council of Energy Ministers on 1 December. They concern progress in establishing an internal energy market (a benchmarking report from DG Transport and Energy) and distortions of competition in the electricity and gas markets (a report from DG Competition based on an ongoing sector enquiry). This subject is a major plank in the Lisbon Agenda and a key priority for the UK. The aim is to revitalise the liberalisation effort, to focus on how to make the market structure more competitive and to discuss whether further legislation is required.

- The EU and Russia. The EU plans to hold a meeting of the EU-Russia Permanent Partnership Council on 3 October, which will for the first time specifically focus on energy issues. The idea is to give political direction to the work of four thematic groups, as well as providing recommendations for action to promote closer collaboration between the EU and Russia. Given the EU's growing dependence on Russian gas, this relationship has an obvious importance.

- The Balkans. A key date is 25 October when the Energy Community South East Europe Treaty is to be signed. This Treaty has been concluded with all the relevant South East European countries and is intended to extend the single market in energy to SE Europe, but just as important is designed to provide stability for investment and encourage cooperation within the region. It should also enhance security of supply for the EU and for SE Europe.

- Climate change and sustainability. Two initiatives on energy efficiency are to be discussed at the Council of Energy Ministers on 1 December. One is a new directive on end-use efficiency and energy services. Agreement will be sought on a second reading text with the European Parliament. The other is an energy efficiency green paper. There will be a debate to inform the Commission follow-up action plan and to promote linkages between environmental and energy policy agendas.

The Consumer and the Internal Energy Market (Session 1)

The subject of this session was a judgment by the European Court of Justice (ECJ) that was handed down in June 2005 and concerned access to cross-border transmission (Case C-17/03). The case had been referred to the ECJ by a Dutch Court for a *preliminary ruling*.

What is a Preliminary Ruling?
Many disputes involving Community law are commenced in the courts and tribunals of the Member States. They have jurisdiction to review the administrative implementation of Community law and many provisions of the Treaties and of secondary legislation which confer rights on nationals and which national courts must uphold. If doubt arises about the interpretation and validity of such law, the national court or tribunal may seek a preliminary ruling from the ECJ on the relevant question. Within two months the parties, the Member States, and the Community institutions must submit their written observations to the ECJ. After this, the procedure is the same as that applicable to direct action. The ruling by the ECJ is sent back to the national court or tribunal, which is bound by the result in deciding the case in which the question has risen. Preliminary rulings have played an important role in the development of Community law, especially in the cases of Van Gend en Loos (Community law has direct effect in the Member States) and Costa v ENEL (Community law has primacy over national law).

The Facts – in Brief
The Dutch consumers association – the VEMW – brought a case against the Dutch regulator that a priority position granted to several generating companies in long term import contracts was in violation of EC law. This situation arose during the transition from a pre-liberalised market to one in which there is a measure of competition among the generators and the grid operator has been separated out. This issue of the priority reservation was the subject of a complaint. The matter was referred by the Dutch court to the ECJ for a preliminary ruling. The case raised issues concerning the nature and role of public service obligations as a justification for the allocation of exclusive access rights, as well as the scope of the prohibition of discrimination and the allocation of cross-border capacity. The ECJ ruled that:

- prohibition of discrimination under Articles 7(5) and 16 of the first Electricity Directive applies to technical rules and all other measures derived from decisions by the system operator, the regulator and the legislature;
- priority access to cross-border transmission of electricity without compliance with the procedure of Article 24 (Member States can apply for derogations from prohibition of discrimination) is in violation of prohibition of discrimination.

Essentially, the preferential treatment had to be terminated but the long term contracts had to be honoured. The case continues in the Netherlands.

The Wider Consequences of the Case
A number of points were made in the discussion about the potential significance of the case in the context of the EU Single Market in Energy. They were:

- The length of time from the commencement of the case in the Netherlands to its current (still uncompleted) stage: this long duration was criticised by many of the participants. The time taken by the ECJ to reach its judgment within this total period was also quite long. For commercial transactions this duration (and related cost) was a major disincentive.
- It was also claimed that the ECJ had not apparently understood certain points about the operation of the energy markets in question, highlighting the risks of relying on courts located well away from the Member State, and dealing with issues that contained a great deal of historical data.
- Who was to blame? The Dutch government was thought to have erred in not asking for an exemption for its priority access approach.
- The beneficiaries of the case: It is not likely that industrial consumers will benefit from the ruling (through lower prices), but traders may. However, these days many generators are also traders, including those active in the Netherlands.
- The role of the consumers: perhaps more entry into the market by the large consumers would contribute to competition. At present, wholesale activity is being conducted by generators and some banks but some consumers are absent from wholesale activity and instead are present as retail buyers asking for the lowest prices for one year contracts, instead of engaging in risk management, long term trades or actually trading day-to-day.
- The wider policy implications of the case: the discussion suggested that there were few of these. However, there was an element of wider significance with respect to the maximisation of capacity. The industrial consumers might have pursued a case based on the failure of the relevant TSOs (the Dutch and neighbouring ones) to make available to the whole market capacity they could have made available. Estimates of available capacity are very large, although these estimates are contested.
- The role of the European Commission: this was ambivalent, according to some. It was reluctant to support the case against the Dutch Government, but now showed some interest in the ECJ decision as a source of possible guidance on other issues.

Cross-Border Trade (Session 2)

The very modest amount of trade in electricity between Member States in the EU has been a continuing source of concern to those concerned with liberalisation and the establishment of an internal energy market. With the introduction of Regulation 1228/2003 (the Electricity Regulation), it seemed that progress could be made, not least because of the guidelines on, among other things, congestion management that could be made under it. However, the current situation is a highly unsatisfactory one, resembling patchwork: there is a lot of non-enforcement of measures in the Regulation and non-implementation of corresponding provisions in the Electricity Directive.

Where We Are
Most of the speakers appeared to think that the current instruments were unlikely to prove sufficient to speed up the process of change, either in the direction of a regional market or a single European market. There seemed to be an assumption that directives, regulations and guidelines would remove barriers to competition and the markets would spring into life as a result. In Scandinavia success had been hastened by the creation of institutions at an early stage to promote liberalisation.

Among the concerns about the current situation were the following:

- The recent holding of a mini-forum on electricity regulation in several regions did not seem to indicate that co-ordination among the sector regulators was well managed.
- Reciprocity is not working and much more of this is required.
- The national champion approach still has a lot of supporters in certain Member States;
- There is a strong need for regulatory coordination – but how can this work in practice?
- Unbundling is not sufficiently embedded or enforced in the EU electricity markets.

Moving Ahead
Two key themes that figured in the critical comments were:

- The role of the TSOs is central to making further progress in developing regional markets, by maximising allocations of capacity, and that to do so, the provision of incentives is crucial, and
- In the longer term a greater measure of unbundling will be essential.

Regarding the first, the question arose of why TSOs do not make capacity existing available. Their obligations under the Directive were noted, along with the words, `according to proper calculation'. Some thought that TSOs had incentives not to cooperate, and there appeared to be agreement that currently the incentives were inadequate. In this context there was a discussion of `carrots and sticks'. As a way of moving ahead, there was support for ownership unbundling as a prerequisite, but

nevertheless there was also a sense that in the short term this might not be practical. Greater information transparency about available capacity is also an important goal.

Some regulatory incentives for TSOs – for `doing the right thing' - might be to provide them with more revenue from forward allocations and the secondary market, improved returns for efficient maintenance and operations to manage congestion and for efficient investment in increasing capacity.

Long Term Contracts in Gas and Electricity (Session 3)

This session was concerned mostly with long term reservation of capacity in gas, and had only a little overlap with issues in the electricity sector. In this field both regulators and competition authorities have had a strong interest in certain Member States and have taken action to prevent foreclosure effects in the market. This is a problem area which needs to be addressed if new entrants need to be attracted into the market at all.

There were three national presentations of experiences in addressing the above issues: from Belgium, Germany and the United Kingdom. Each of them had the character of an interim report since the regulatory authorities concerned were still in the process of tackling these complex issues.

Belgium
The Belgian approach was designed to address access to infrastructure issues. The example of the Zeebrugge project was presented as a case study of the balancing of regulated TPA versus the grant of exemptions. The Belgian regulator has been active in designing a regulated TPA regime for the LNG terminal, setting out specific requirements on capacity allowed, depreciation period, open season for capacity booking, facilitating secondary market for capacities and anti-hoarding and use-it-or-lose-it mechanisms. A long term tariff regulation has been introduced to protect the interests of the system operator and the shippers. The conclusions that were reached from the Belgian experience were that:

- Significant infrastructure could be built without requiring a TPA exemption because of the use of multi-annual tariffs; and
- Regulated TPA aims to optimise the use of infrastructure by promoting the secondary market in capacities (especially useful in improving security of supply in crisis situations).

As a result, this approach has succeeded in concluding three long term contracts with Distrigaz, Tractebel Global LNG and ExxonMobil/Qatar Petroleum.

Germany
The Bundeskartellamt has been active in developing principles that may allow it to assess long term gas supply contracts under the competition law. A summary of its views on this subject in English was circulated to all participants in the Workshop Materials. An interesting aspect of their approach is the way it has kept the European Commission informed of its work and has discussed with the Commission its legal evaluation of the evidence found and the further course of action. The Commission has expressed its support for the Bundeskartellamt's efforts in this area. This is part of an ongoing exercise at reviewing the terms of contracts which at present are tying up large parts of the market in Germany.

The United Kingdom
Like the Belgian experience the UK's has focussed on attracting new investment into LNG terminals. The energy regulator had proved successful in its efforts to address

this issue, utilising the system of exemptions under the Gas Directive. Its conclusions were that the gas regulatory framework does not deal with cost recovery and allocation of extra-TSO network infrastructure investments, but long term contracts do fill the gap and are therefore necessary to secure investment. The contract conditions have to be tailored to the local competitive conditions.

There was much discussion of the different approaches to the role of long term contracts, with comments also from traders to the effect that:

- Long term capacity reservations are an integral part of the EU gas market;
- Non-discriminatory TPA must be provided for all users regardless of their legacy;
- Secondary markets have to be established with the use-it-or-lose-it principles as the key, and
- Transparency is a key ingredient for improved competition.

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The Energy Sector Review (Session 4)

The Investigation

On 13 June 2005 the European Commission announced an investigation into the operation of competition in the EU electricity and gas markets, using its powers under Article 17 of Regulation 1/2003. This review is being carried out by the Competition Directorate, in close cooperation with the Energy Directorate (DG TREN), the national regulatory authorities and the national competition authorities. The CEER had asked the Commission for such a review some time ago and has strongly supported it since it began. The main driver for the enquiry was the rising prices for electricity and gas combined with little trust in the mechanisms by which the prices are formed. Other drivers were the effects of a high level of market concentration, and a limited development of cross-border trade in electricity.

Data Collection, Scope & Compliance

The first phase began with the design and sending of questionnaires to all the major companies during the summer – more than 3000 of them, split unevenly between electricity (about 1900) and gas (about 1300), and translated into all of the EU languages - as a data-collection exercise. The recipients of questionnaires were producers, generators, suppliers, traders, importers, power exchanges, brokers, storage operators, transmission and distribution system operators, customers and regulatory authorities. Failure to complete this form could result in a legal penalty (fines), but in fact the compliance was so high that this has not been necessary. This large quantity of data is now being analysed at the Commission's Competition Directorate and will provide the basis for the findings set out in an interim report for discussion with national regulators and national competition authorities in November. The council of EU energy ministers will discuss it on December 1, 2005.

The Content of the Report

The interim report will contain separate chapters on electricity and gas. In each part, there will be two main parts: a description of markets, followed by the competition concerns identified for these markets in a second chapter. It will identify both competition and concerns. The main topics to be considered in the enquiry are:

- in electricity – price formation mechanisms on wholesale markets and factors determining bidding strategy of generators; barriers to entry such as long term contracts; legal and operational regimes for interconnectors and relationships between network operators and their affiliates;
- There is some overlap with gas – long term contracts (upstream) and swap agreements and their interaction with hub liquidity; unbundling questions; legal and operational regime for transit pipelines; barriers to entry – long term contracts in downstream markets; the relationship between network operators and their affiliates and the legal and operational regime for storage and balancing.

Next Steps

This is only phase 1 of the investigation however. A further more detailed phase will commence in 2006 with further questionnaires sent to and interviews held with selected companies. A final report is unlikely to be available before the second half of the year. However, its effects are likely to be felt long before the exercise is completed. While the investigation is ongoing, the Commission may launch anti-trust actions against specific companies and early indications are that it has every intention of doing so, especially if it gets a supportive response from the council of energy ministers in December.

Significance

Why does the investigation matter? The answer lies in both content and context.

- Content. The enquiry focuses on the core problem facing the establishment of a liberalised energy market in the EU: the structure of the market rather than the behaviour of the participants. In the past ten years the incumbents have become stronger and more consolidated than before liberalisation was started. A more consistent and rigorous application of competition law is the main instrument to deal with this.
- Context. This is one of two reports that will be presented to the EU energy ministers. The other report is being produced by the Commission's energy directorate, DG TREN, and is a progress report on the functioning of legislation introduced in 2003 to accelerate liberalisation. The main source of data for this is derived from the national energy regulators, but it will also benefit from information sharing with the Commission's competition arm. It is likely to be highly critical of the current market structure and – perhaps – set the scene for further proposals for legislation.

The Discussion

It was pointed out that the sheer volume of data that the Commission was trying to process with fairly limited human resources at its disposal meant that it would take most of 2006 before any clear results emerged. The question arose as to how the Commission would deal with the data in the meantime: would it launch actions on the basis of initial assessments of the data or would it wait?

While the investigation is ongoing, the Commission may launch anti-trust actions against specific companies. Early indications from the Commission are that it has every intention of doing so, especially if it gets a supportive response from the council of energy ministers in December. Essentially, at least some of the initial conclusions have been reached, suspect company practices targeted and priorities for policing action sketched out. It will not wait until the mountain of data has been exhaustively analysed by its staff. The effects of this enquiry are going to be felt long before the exercise is completed.

What kind of legal actions might the Commission initiate? There were three kinds of actions possible in connection with the sector enquiry: firstly, there are possible actions against companies refusing to cooperate properly (an unwillingness to answer questionnaires or giving inappropriate or late answers); secondly, formal proceedings against individual companies (based on information gathered in sector enquiries or by

the Commission or national competition authorities), and thirdly, further legislative initiatives of the Commission. In the latter case, a sector specific competition law should be avoided, some argued, and others saw another legislative package as a possibility.

The importance of regulatory cooperation was noted by many participants. There were five key relationships in making this cooperation possible (the NRAs and the national competition authorities; the NRAs and the courts; the NRAs and the Commission; the NRAs among themselves and the NRAs and industry). At the moment the most pressing of these seemed to be the relationship between the NRAs and the NCAs. Much effort has gone into ensuring that this takes place, but tensions in the multi-level structure appear inevitable.

Industry Concerns

There were responses from several companies and from Eurelectric, the association of electricity companies. The latter has produced a study that sets out a road map for the creation of a pan European electricity market. It takes the view that the development of regional energy markets is a proper response to the challenge of creating a harmonised market framework. The Commission strategy paper proposes eight regions. There are developments within the regions and attempts at coordination between the regions.

There were also concerns about the sector enquiry being used as a political lever, that the Commission lacked the necessary manpower, that the data might be assessed hastily with sloppy or misleading conclusions following as a result. In particular, industry has concerns about a possible lack of confidentiality. The data submitted by companies might be shared with EC consultants as well as with other parts of the Commission itself. In addition, there is – especially from a German point of view – the argument that new laws that implement the acceleration package should be given time to settle before further initiatives are taken. Germany has only recently adopted a new Energy Law and has set up a sector regulator. Transparency about the Commission's expectations and actions was also requested by the industry representatives.

The discussion suggested that industry concerns about confidentiality of data had some basis in reality. Articles 17 and 18 of the Regulation allow the Commission to ask for confidential documents since they require facts. There are confidentiality obligations upon the Commission about the use of the data.

Energy Pricing

A driver for action from the national competition authorities has been the significant increase in wholesale prices for electricity recently. This concern has developed independently of the sector review, following complaints from large industrial users. The difficulties of moving ahead were outlined to participants with the example of the French situation. The rise in prices was thought to result more from the market structure than in any anti-competitive practices by energy companies. There was also an intrusion of political decisions, made at national level, into competition policy

issues. The Sector Review may produce additional data or evidence that makes it easier for the national competition authority to move ahead with these complaints.

Conclusions

1. There was a sense that the powers of national energy regulators were not yet optimal for the tasks they were required to address under the 2003 legislation. This conclusion may not apply with the same vigour to every NRA, but that is also part of the problem. At present a risk of inconsistent application of the Directives and Regulation seems highly probable. Related to this is the need for greater cooperation among the NRAs, as well as between the NRAs and the national competition authorities. In this context, a distinction may be made between regulatory cooperation and regulatory coordination: there was a sense that the latter implied a degree of interaction that might be too ambitious. There was widespread agreement that the NRAs would play a crucial role in determining the success or otherwise of the internal energy market project.

2. There was much support for the idea that the next step forward, especially in electricity, is to promote the creation of regional integrated markets. This was seen by many as a necessary step towards the establishment of a truly operational internal market in energy. In this respect, the experience of the Mini-Forums in 2004-2005 was educational, even if it did not yield quick solutions. However, much work needed to be done to make any such regional integration experiments operational, especially since Germany (and Switzerland) were not yet fully participating in such efforts.

3. Many participants supported the idea of a wider use of unbundling, and especially ownership unbundling. However, in the discussion it was pointed out that this was only one instrument, and that others (…..) should not be neglected. In particular, the situation in Germany in which sweeping new legislation and institutional changes were only now being absorbed meant that it was probably unrealistic to expect a new approach to unbundling to attract much support in that geographical sector at the present time.

4. In contrast to previous workshops, there was a relative lack of interest in the subject of further legislation (a third set of directives, for example). It is clear that member states are still very much in the process of making the recently adopted legislation work. However, from some participants there was a sense that the approach adopted in the two previous sets of Directives on Electricity and Gas – the enactment of common rules – was in need of re-examination. A problem in practice is that the `common' rules were not very `common' in the 25 Member States, which required a stricter use of enforcement instruments. There was also a sense that much work was now in progress at the national and EU levels that would yield a much improved database and that – while this in itself would not yield any solutions – it would provide a more informed basis on which to propose measures for the next steps.

5. The presentations and ensuing discussions on long term contracts had the character of a review of progress reports on actions being taken in particular Member States. Participants noted the approaches adopted in Belgium, Germany and the UK to the design of regimes that provided incentives to new investment but also sought to promote competition. Gas has a number of well-known features that create difficulties not felt in the electricity sector, not least the geo-political factor. The approaches that were explained served to underline the fact that sector regulators and competition authorities are very active in this area, and they were examined with keen interest by the participants.

6. A major concern of participants was how to maximise the capacity made available by the TSOs. The idea that TSOs should cooperate more seemed to be adopted by their association, ETSO, but in practice TSOs seemed to prefer more limited forms of cooperation, involving bilateral deals. Their concern for system reliability or integrity meant that some incentives had to be provided. There were a number of voices that found the guidelines on congestion management (under the Electricity Regulation) an unsatisfactory instrument.

7. Some participants noted that the recent adoption of new legislation in Germany and the establishment of a sector regulator for the first time meant that some time was required for these dramatic changes to be absorbed. This factor had an influence on a number of topics at the workshop, given the central geographical location of Germany in the EU, and its importance in cross-border issues concerning both electricity and gas. In the short term at least this domestic factor might act as a brake on the more ambitious regional or EU-wide initiatives.

8. Although there was little discussion on environmental issues, the importance of the topic was emphasised by the Eurelectric representative, as cutting across a number of policy areas, including the internal energy market. The role of subsidies for renewables, especially wind power, also figured in several presentations.

9. The ongoing Energy Sector Review that is being carried out by the Competition Directorate was a matter of great interest to the participants. However, at this stage not even the interim conclusions are available. Participants noted that competition cases may be launched even while the enquiry was ongoing, and that data collected from company questionnaires by DG COMP would be shared with other directorates when considered appropriate, especially with DG TREN.

10. Finally, there was some comment on the very latest legal development in connection with the single energy market. Immediately prior to the Workshop, on 21 September, the European Court of First Instance handed down its judgment in the appeal case concerning the proposed purchase of GDP (Portugal) by EDP and Eni (Press Release No. 80/05, Case T-87/05). An interesting part of the decision involved remarks on situations in the EU where competition in energy markets is simply absent. Participants were encouraged to note this and appreciate that at the

present time the reality is that in other parts of the EU a very great deal needs to be done to get competition started at all, another reminder of just how far off the reality of a single energy market is.