

Third Party Access (TPA) in the Electricity Sector:
EC Competition Law and Sector-Specific Regulation

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by

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1 Introduction

This article is essentially about the role of EC competition law and sector-specific regulation in the internal market in electricity. It does not seek to cover exhaustively the subject of “EC electricity law”². The article rather constitutes an attempt to provide an analytical framework focusing on one particular aspect, namely the issue of Third Party Access (TPA) to the electricity grid.

As a regulatory tool, TPA constitutes the key of the liberalisation of the electricity market in Europe. The concept broadly refers to the possibility for electricity suppliers (e.g. Independent Power Producers, trading companies) and/or customers (e.g. domestic or industrial purchasers) to make use of electricity grids they do not

² M.M. Roggenkamp *et al.* (ed.), *Energy Law in Europe*, Oxford 2001 [**not yet published**]. See previously E. Pfrang, *Towards Liberalisation of the European Electricity Markets*, Frankfurt am Main *etc.*, 1999; B. Briche, *Die Elektrizitätswirtschaft in der Europäischen Union*, Baden-Baden 1997.

own or control in order to sell or buy electricity. Thus, TPA is concerned with the “transportation” of electricity over network facilities at transmission and distribution level³. From a legal point of view, TPA is an issue in sector specific regulation (Dir. 96/92/EC⁴) as well as general competition law (Art. 81-82 EC).

Access to network facilities is regulated by Community law in other sectors of the economy. Telecommunications/communications is obviously the field where regulation is the most developed. Experiences made in sectors sharing common features can be very valuable⁵. Accordingly, when appropriate, reference will be made to the regulatory framework in telecommunications. Particularly important in the context of the present article is the Telecom Access Notice the Commission issued in 1998 to clarify the relationship between competition law and sector-

³ Transmission and distribution are two stages of the supply chain of electricity which consists of:

- *Generation* is the conversion in power stations of primary energy sources (e.g. coal, natural gas, fuel oil) and renewable energy sources (e.g. hydropower) into electricity;
- *Transmission* is the transportation of this energy along high voltage cables constituting the main electricity grid. The distribution companies tap from this grid via substations and transformers that lower the voltage level to distribution levels;
- *Distribution* is the transport of electricity from the transmission network to individual customers over the medium and low voltage lines;
- *Retailing (or supply)* is the process of buying electricity in bulk and selling it to final customers. Suppliers deal with customers, issue bills and process payments. For some customers, retailing will include metering.

⁴ Directive 96/92/EC of 19 December 1996 concerning common rules for the internal market in electricity, OJ L 27 of 30.1.1997, p. 20.

⁵ P.J. Slot/A. Skudder, *Common Features of Community Law Regulation in the Network-Bound Sectors*, in CMLR 2001, p. 87-129.

specific legislation⁶. Equally instructive are the proposals recently submitted by the Commission to meet the challenges of convergence⁷.

Both sector-specific legislation and competition law ultimately serve the purpose of creating and ensuring the proper functioning of an internal market in electricity. The article therefore starts with a general overview of the provisions concerning electricity and the internal market. The second part is more specifically about the rules deriving from Directive 96/92/EC and the changes that have been proposed by the Commission in March 2001, whereas the third part deals with general EC competition law. In both parts, the focus is on substantive law, although procedural issues are also touched on. In a last part before the conclusion, the topical issue of whether the Commission may intervene on the basis of Article 86(3) EC to foster market liberalisation is briefly discussed.

2 The Internal Market in Electricity

2.1 Introduction

With the adoption of Directive 96/92/EC, the Member States of the EU have committed themselves to progressively establish an internal market in electricity. According to the EC Treaty, the internal market can be characterized as an area without internal frontiers in which the free movement of electricity is ensured across the Community (Art. 14(2)). Most importantly for the subject, to comply with the requirements of the Treaty concerning the internal market, the Community must not merely pursue the abolition of obstacles to trade between Member States (Art. 3(1)(c) EC), but also ensure that competition is not distorted (Art. 3(1)(g) EC).

The regulation of the internal market in electricity primarily rests on sector-specific rules embodied in secondary Community legislation. However, the general rules of the Treaty, e.g. the provisions on competition and the free movement of goods, remain applicable. As will be seen, this can become highly relevant for regulators and undertakings involved in TPA cases.

⁶ *Notice on the application of the competition rules to access agreements in the telecommunication sector*, OJ C 265 of 22.8.1998, p. 2.

⁷ In July 2000, the Commission published a regulatory package consisting of six draft directives and one regulation aimed at replacing the current regulatory framework, see http://www.europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm. These proposals constitute the follow-up of the “1999 Communications Review”, COM(1999) 539.

2.2 Internal Market legislation

The centre-piece of the relevant legislation is Directive 96/92/EC. Since its adoption, the directive has not been amended. This may change since in March 2001 the Commission submitted a regulatory package proposing substantial modifications to the existing directive⁸.

The relevant instruments are all essentially based on Article 95 (ex 100a) EC, a provision giving the Community the power to adopt measures for the approximation of the laws of the Member States in order to improve the conditions for the establishment and functioning of the internal market.

As in the telecommunications and other sectors, the choice of the appropriate legal basis for the opening of the market has been controversial⁹, although no legal challenge has been initiated. After the introduction of Article 3(1)(u) by the Maastricht Treaty, the existence of a competence to take measures in the energy sector is as such undisputed. However, since the Treaty does not provide for any *special* legal basis, as for example for the transport sector (see Art. 71 EC), the Community had to act on the basis of existing, more general, provisions.

2.2.1 Directive 96/92/EC on the internal market in electricity

Directive 96/92/EC was adopted on 19 December 1996. It follows a directive of 1990 on the transit of electricity¹⁰ whose market impact has been negligible. The new directive had to be implemented by most Member States by 19 February 1999, which marks the official start of the Europe wide opening of the electricity sector.

⁸ Other relevant measures are in preparation, like the Directive on the promotion of electricity from renewable energy sources, see amended proposal, COM(2000) 884 final, Brussels 28.12.2000.

⁹ Various provisions were envisaged: Art. 86(3) (ex 90(3)) EC, Art. 83 (ex 87) EC, Art. 308 (ex 235) EC. See S. Beeston/N. Charbit, *Third Party Access in the Energy Sector in EC Law*, OGLTR 1995, p. 5-10; C.D. Ehlermann, *Quelles règles de fonctionnement pour le marché intérieur de l'énergie ?*, in RMC 1994, p. 450-459.

¹⁰ Directive 90/547/EEC of 29 October 1990 on the transit of electricity through transmission grids, OJ L 313 of 13.11.1990, p. 30. As part of its new regulatory package, the Commission has proposed to repeal the directive from 1 January 2003.

In Article 1 of the directive, the scope is held to be the establishment of common rules for the production, transmission and distribution of electricity. It is based on three main elements:

- Liberalisation of electricity generation and transport. The directive requires the adoption of a transparent and non-discriminatory framework for granting licences for the construction of new generating capacities (Art. 4 *et seq.*). Although network competition does obviously not constitute a priority, the directive also provides for the liberalisation of this field (Art. 21(2)).
- Unbundling of vertically integrated utilities. The directive requires integrated utilities to keep separate accounts for their various activities (Art. 14 – *unbundling of accounts*). In addition, transmission system operators shall be independent at least in managerial terms (Art. 7(6) - *management unbundling*). The directive does not require management unbundling at distribution level. On the other hand transmission and distribution system operators are obliged to preserve the confidentiality of commercially sensitive information (Art. 9; Art. 12 – *Chinese Walls*).
- Rules on access to the electricity grid. Member States have the choice between three different models of access: (i) Negotiated TPA (Art. 17(1-3) - nTPA); (ii) Regulated TPA (Art. 17(4) - rTPA); and (iii) Single Buyer (Art. 18). Besides, the directive foresees several instances in which access may be legitimately denied by the network operator.

The three above-mentioned points are all linked and constitute important instruments for the creation of an internal market in electricity. Another important feature of the directive is the step-by-step approach in the market opening (Art. 19) which appears to echo Article 15 of the Treaty. Currently Member States are required to open 30% of their domestic consumption to competition. Accordingly, network access may be denied to (small) customers whose consumption does not reach a specified level.

To date the directive has been formally implemented by all the 15 Member States¹¹. Many of them have already a degree of market opening going far beyond the schedule set by the directive (e.g. Germany, Sweden), the EU average being 66%. A minority of states stick to the minimum (e.g. France, Portugal). As to the system of grid access, no Member State has opted for the Single Buyer. Only Germany has adopted nTPA. The other 14 Member States chose rTPA.

¹¹ See European Commission, *State of implementation of the EU Electricity Directive 96/92/EC. Country by country overview. State of play by the end of May 2000.*

2.2.2 Regulatory package of 13 March 2001

On 13 March 2001, the Commission adopted a set of proposals to open up the electricity and gas markets fully and improve the existing regulatory framework¹². The new regulatory package for the electricity sector consists of two instruments¹³: (i) a directive amending the existing Directive 96/92/EC; and (ii) a new regulation on “*conditions for access to the network for cross-border exchanges in electricity*”. Both instruments are based essentially on Article 95 EC, thus constitute genuine internal market measures.

Aside from “qualitative proposals” concerning issues like unbundling and network access some of which will be reviewed below, the draft directive sets a binding timetable for a full opening of the market in two steps. It is proposed that by 1 January 2003 all non-domestic electricity customers (e.g. factories) should be free to choose their supplier, and this be extended to all customers (i.e. 100% market opening) by 1 January 2005.

The proposed regulation is an attempt to respond to the concern of the Commission over the slow development of cross-border trade in Europe (cross-border trade represents only 8% of EU consumption). The problem has been attributed to two main causes that are addressed by the draft, namely the tariffication of grid access (risk of “pancaking”, i.e. addition of fees of different Member States)¹⁴ and the limited capacity of interconnectors (capacity management in “bottlenecks”).

The package, which is now examined by the Council and the European Parliament, was opposed by France and Germany at the EU summit of Stockholm on 23 and 24 March 2001¹⁵. Whereas the French opposition concerned the timetable for the full

¹² *Towards a single energy market in 2005*, press release of 13.3.2001 (IP/01/356). A public hearing, in which 117 organisations and companies participated, took place on 14 September 2000 in Brussels on the initiative of the DG for Energy and Transport. The contributions of the participants may be found under http://www.europa.eu.int/comm/energy/en/elec_single_market/hearing/index_en.htm.

¹³ See <http://www.europa.eu.int/comm/energy/en/internal-market/int-market.html>.

¹⁴ The draft (Art. 3) is based on a system where compensations are paid *among transmission system operators*. The charge is cost reflective and established on the basis of *forward looking long-run average incremental costs (LRAIC)*.

¹⁵ *EU plan hits setback at Stockholm summit*, FT Energy and utilities review, 30 April 2001, p. III. The proposals received a rather positive echo from the

liberalisation, Germany objected to the Commission's insistence that each state should have a national regulator to set network tariffs.

2.2.3 Law of the Member States

It is important to stress that the competence of the Community for the regulation of electricity markets is not an exclusive one. In other words, it is shared with the Member States and therefore subject to the principles of subsidiarity and proportionality (Art. 5 EC)¹⁶.

This means that the Community has not a general and unlimited power to regulate the internal market in electricity. The power of the Community seems in particular limited concerning the use of primary fuels used in the Member States for electricity generation (see Art. 175(2)(1), third indent EC). On the other hand, it is important to stress that following the Maastricht Treaty Member States are expected to have domestic economic policies that are consistent with the principle of an open market economy with free competition (Art. 4(1) EC). This is also relevant for the regulation of the electricity markets¹⁷.

Of course, another (politically highly sensitive) issue is whether the creation of a true internal market in Europe would actually require to amend the Treaty so as to provide the Community with a "genuine" competence in energy policy as suggested by the Commission in its recent Green Paper on security of energy supply¹⁸.

2.3 General Community Law

Beside secondary internal market legislation, the general rules of the Treaty, i.e. primary Community law, are applicable to the electricity industry. Of particular relevance are the provisions on competition and free movement of goods since they are directly effective, meaning that they confer rights that individuals or companies

electricity industry, see position papers of EURELECTRIC (<http://www.eurelectric.org/Docs/2001-2511-0009-1.pdf>) and ETSO (http://www.etsonet.org/media/download/ETSO_Position_paper_on_the_European_Commission's_proposals.pdf).

¹⁶ Briche [1997], p. 40-43 and p. 52.

¹⁷ R. Pritchard/Ph. Andrews-Speed, *Eight principles of electricity industry reform*, in IELTR 2001, p. 11-17.

¹⁸ *Towards a European strategy for the security of energy supply*, COM(2000) 769 final, p. 76; Briche [1997], p. 43-46.

may directly invoke before a national court against the state or other individuals or companies.

2.3.1 Free movement of goods (Art. 23 et seq. EC)

In *Costa/Enel* (1964)¹⁹, the ECJ established that electricity constitutes a good within the meaning of Article 23 et seq. EC.

Member States are therefore in particular prohibited from taking measures constituting quantitative restrictions on imports or exports of electricity, and measures having equivalent effect (Art. 28; Art. 29 EC). Such restrictions are only accepted if they constitute admissible derogations pursuant to Article 30 EC or “mandatory requirements” directly deriving from Article 28 or 29 following the ECJ ruling in *Cassis de Dijon*²⁰.

In addition, the Treaty requires Member States to adjust State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which electricity is procured and marketed exists between Member States (Art. 31 EC). In a line of cases decided in 1997²¹, the ECJ declared that exclusive rights to import and export electricity granted to electricity utilities in several Member States were at odds with Article 31. However, it also made clear that they may benefit from a derogation based on Article 86(2) EC as far as the conditions set in this provision are fulfilled.

2.3.2 Competition rules (Art. 81 et seq. EC)

a) Rules addressed to undertakings (Art. 81-82 EC; Reg. No 4064/89)

¹⁹ Case 6/64 *Costa v ENEL* [1964] ECR 1141. This was later confirmed by case C-393/92 *Almelo* [1994] ECR I-1477, para. 28. In Community law, it was disputed whether electricity is to be treated as a “good” (Art. 23 et seq. EC) or a “service” (Art. 49 et seq. EC). The same question arises in WTO law.

²⁰ C-120/78, para. 8.

²¹ C-157/94 *Commission v Netherlands* [1997] ECR I-5699; C-158/94 *Commission v Italy* [1997] ECR I-5789; C-159/94 *Commission v France* [1997] ECR I-5815 ; C-160/94 *Commission v Spain* [1997] ECR I-5851. See the case notes by R. Dohms/Ch. Levasseur, *Commentaire des arrêts de la Cour du 23.10.97 relatifs aux monopoles d'importation et d'exportation de gaz et d'électricité*, in *Comp.Pol.News*. 1998, p. 18-25 ; P. Blanchard, *French Electricity Sector: ECJ Decision on Monopolies for the Import and Export of Electricity*, in *JERL* 1999, p. 265-280.

In *Almelo*²² the ECJ also recognized that Article 81 and 82 EC were in principle applicable to the electricity sector. Article 81 prohibits agreements restricting competition, whereas Article 82 prohibits the abuse of a single or joint dominant position. The provisions are directed to private as well as public undertakings.

Pursuant to Article 83(2)(c) EC, the Community has the power to adopt special competition rules to regulate specific branches of the economy. Since this competence has not been used in the energy sector, the industry is subject to the general rules, including the procedural framework set by Regulation 17/62. The merger control regulation (Reg. No 4064/89²³) has become particularly important since the opening of the energy markets has triggered a wave of international mergers and joint ventures between electricity utilities. Many deals have been critical²⁴. The emergence of oligopolistic market structures on the supply side (generation) is considered to constitute a serious risk for effective competition²⁵. The electricity industry has features (e.g. product homogeneity) making it “fit” for situations of collective dominance²⁶.

b) State aid (Art. 87-89 EC)

The Treaty contains in Article 87(1) a general prohibition of any form of aid granted by Member States or through state resources to public or private undertakings²⁷. This

²² Case C-393/92 [1994] ECR I-1477. The Commission had already issued formal decisions in the electricity sector before *Almelo*, see *Ijsselcentrale*, OJ L 28 of 2.2.1991, p. 32; *Jahrhundertvertrag*, OJ L 50 of 2.3.1993, p. 14.

²³ OJ L 395 of 30.12.1989, p. 1, *corrigendum* OJ L 257 of 21.9.1990, p. 13. The regulation was amended by Regulation No 1310/97, OJ L 180 of 9.7.1997, p. 1, *corrigendum* OJ L 40 of 13.2.1998, p. 17. It is worth noting that electricity is a sector where the derogation set in Art. 21(3) of the Reg. is likely to apply, see case No IV/M.1346 EDF/LE [1999].

²⁴ A. Palasthy, *Zusammenschlusskontrolle in der Stromwirtschaft: EG- und Schweizer Wettbewerbsrecht*, in *Jusletter* of 19 June 2000 (www.weblaw.ch).

²⁵ F.P. Sioshansi, *Opportunities and perils of the newly liberalized European Electricity markets*, in *Energy Policy* 2001, p. 419-427.

²⁶ See case No M.1673 VEBA/VIAG of 13.6.2000. Concerning collective dominance, see R. Whish, *Collective dominance*, in D.O’Keeffe (ed.), *Liber Amicorum in Honour of Lord Slynn of Hadley*, ..., p. 581-609.

²⁷ It is noteworthy that the concept of aid has been clarified in a recent case concerning electricity utilities, see case C-379/98 *PreussenElektra AG v. Schleswag* [2001] ECR I-2099.

general principle is qualified by a limited number of derogations (Art. 87(2-3); Art. 86(2) EC).

A topical subject in the ongoing liberalisation process is the compensation for so-called stranded-costs²⁸. In many cases, the opening up of the energy markets has left electricity utilities with costs they will not be able to amortize in the open market, i.e. without special protection and/or external aid. Directive 96/92/EC provides in Article 24 Member States with a possibility to defer application of certain liberalization measures (see below 3.3.2). Alternatively, Member States may grant state aids that will be reviewed according to the principles laid down by the Commission in its Communication of 25 July 2001²⁹.

2.3.3 Duties of Member States (Art. 10; Art. 86(1) EC)

According to Article 10 EC, Member States shall take all appropriate measures to ensure fulfilment of the obligations arising out of primary and secondary Community law, and abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. The importance of this provision in the legal order has been recently stressed at the last FIDE congress held in Helsinki³⁰.

All national authorities, including judicial or administrative authorities entrusted with the regulation of the electricity markets, have therefore a duty to ensure that their actions are consistent with Community law. Aside from sector-specific rules (Dir. 96/92/EC), they have to duly consider primary Community law, in particular the rules on competition and the free movement of goods. As underlined by the Commission in the Telecom Access Notice, Article 10 EC implies in particular that national authorities entrusted with the application of sector-specific rules have to refrain from any action that would undermine the effective protection of Community law rights under the competition rules³¹.

²⁸ Cs. Markus, *Stranded costs of former electricity monopolies under E.U. law*, in IELTR 2000, Issue 6, p. 144-150 (part I), IELTR 2000, Issue 7, p. 167-172 (part II).

²⁹ European Commission, *Communication relating to the methodology for analysing State aid linked to stranded costs*, ... (press release of 25 July 2001, IP/01/1077). Aid granted by Spain, Austria and The Netherlands have already been approved under Art. 87(3)(c) EC, see press release of 25 July 2001 (IP/01/1079).

³⁰ Useful contributions have been published in the internet, see [www...](#)

³¹ See Telecom Access Notice, para. 19. The Commission relies mainly on case 66/86 Ahmed Saeed [1989] ECR 838.

Article 86(1) EC is seen as a specific expression of the general principle found in Article 10. The provision, which is more specifically directed to the domestic lawmaker, is concerned with the relationship between Member States and public undertakings as well as undertakings to which they have granted special or exclusive rights³². The Treaty makes clear that, even in respect of those undertakings, Member States shall neither enact nor maintain in force any measures contrary to the Community law, in particular the rules on competition.

2.4 Interactions between the various rules

As it appears from the presentation, the electricity sector is regulated by a complex web of Community primary and secondary law as well as domestic legislation the application of which involves a variety of administrative and judicial authorities. This variety finds an echo in the multiple possibilities an electricity supplier facing a TPA refusal will often have to enforce his claim:

- Enforcement of access before a national authority under sector-specific regulation within an EU harmonisation framework (Dir. 96/92/EC).
- Enforcement of access under national competition law applied either by the national competition authority or by a national court.
- Enforcement of access under EC competition law (Art. 82 EC) applied by the EC Commission, a national competition authority or a national court.

The relationship between the various rules involved is governed by certain basic principles, like the primacy of Community over domestic law and the hierarchy of sources, that have to be considered by the authorities involved. The action of domestic authorities is also constrained by the aforementioned general duty of loyal co-operation (Art. 10 EC).

As far as the electricity sector is concerned, the interactions between the various rules is a subject that has so far not attracted much attention³³. On the other hand, the relationship between sector-specific regulation and competition rules is becoming a fashionable subject in the telecommunications sector, especially since the

³² A useful definition of the concepts of « special » or « exclusive rights » may be found in Commission Directive 94/46, O.J. 1994 L 268/15, amending Directive 88/301 (the “Telecom Equipment Directive”) and Directive 90/388 (the “Telecom Service Directive”).

³³ An exception is L. Hancher, *Delimitation of Energy Law Jurisdiction : the EU and its Member States : From Organisational to Regulatory Conflicts*, in JERL 1998, p. 42-67.

publication of the Telecom Access Notice³⁴. In its Notice, the Commission expresses several ideas that seem to be transposable to the electricity sector:

- First, it declares that EC competition law and sector-specific regulation represent different sets of rules, which apply independently of each other, with specific objectives and enforcement methods³⁵.
- However, at the same time, it is made clear that the two sets of rules are linked. Indeed, the Commission states that in making an assessment under competition rules, it will seek to build as far as possible on the principles established in the harmonisation legislation³⁶. Besides, the Commission states that Community acts adopted in the telecommunications sector are to be interpreted in a way consistent with competition rules³⁷.

3 TPA according to Sector-Specific rules

3.1 Introduction

Directive 96/92/EC is based on the basic idea of open access to the electricity grid at transmission and distribution level. This principle of open access to the electricity grid is not an absolute one. Indeed, Directive 96/92/EC foresees more or less explicitly various instances in which Member States may allow network operators to refuse access to their facilities.

In the following sections we shall examine some issues related to the principle of TPA and the extent to which derogations from the principle are allowed or prohibited under Community law. Reference is also made to the changes the Commission submitted in its proposals of March 2001.

³⁴ P. Larouche, *Competition Law and Regulation in European Telecommunications*, Oxford-Portland, 2000, p. 284-316; L. Garzaniti, *Telecommunications, Broadcasting and the Internet: E.U. Competition Law and Regulation*, London 2000, paras 10-01 to 10-15.

³⁵ Telecom Access Notice, para. 13.

³⁶ Telecom Access Notice, para. 58.

³⁷ Telecom Access Notice, para. 59.

3.2 Open Access to the grid

3.2.1 Legal nature of TPA rules

Directive 96/92/EC, including the provisions on TPA, is not directly aimed at ensuring compliance with Community competition law (Art. 81-82 EC). If it were the case, the measure would be based on Article 83(2)(c) EC or Article 86(3) EC, not on Article 95 EC. The object of the directive is the approximation of domestic law for the purpose of creating an internal market in electricity.

A link with competition law does however exist, albeit at another level. Considering their regulatory goal, the domestic provisions the approximation of which is required by the provisions of the directive on TPA do systematically constitute competition law: provisions on TPA are essentially about enabling competition between electricity suppliers in a context where the industry is usually vertically integrated and power transportation is deemed to constitute a natural monopoly. As a rule, the corresponding implementing measures will constitute sector-specific competition law.

The rationale for requiring the adoption of domestic rules on TPA (or the adaptation of existing ones) in an Article 95 directive has probably more to do with the idea of removing distortions of competition arising from disparities between national regimes in the electricity sector than with the elimination of genuine obstacles on the free movement of electricity³⁸. Indeed, it is doubtful that the mere absence in most Member States of special rules on network access before the entry into force of Directive 92/96/EC constituted a breach of the Treaty rules on free movement (Art. 28) or competition (Art. 81-82)³⁹.

As a legal instrument directed to Member States (Art. 249 EC), a directive does normally not directly confer rights to or impose obligations on individuals or companies. Put in other words, an electricity supplier or customer should not be able to base a claim for network access directly on the directive. It is however noteworthy that, in the context of the delayed liberalisation of the French market, it has also

³⁸ Concerning the purpose of internal market directives based on Art. 95 EC and the limits of this provision as a legal basis, see case C-376/98 Tobacco Advertising Directive [2000] ECR I-2247, paras 76 *et seq.*

³⁹ For the (few) Member States that had special provisions (e.g. Netherlands), the only duty arising from Community law was to apply them on a non-discriminatory way, i.e. basically not to favour domestic suppliers. Whether special or exclusive rights granted to electricity utilities by Member State constituted a breach of Community law is another issue the Commission addressed in a line of Art. 226 EC proceedings, see *supra* 2.3.1.

been suggested that the provisions of the directive on TPA fulfil the conditions set by the ECJ to be directly effective (clarity, unconditional character *etc.*)⁴⁰.

3.2.2 Duties of network operators

To comply with the directive, Member States have to impose certain basic duties on the operators of transmission and distribution networks relating to requests for TPA made in respect of eligible customers:

- *Duty to respond to requests and/or to negotiate in good faith* (Art. 17(1 and 4)). This should logically include an obligation to submit offers for network use and provision of ancillary services. The difference between the two types of TPA concerns the way of fixing the level of the access charges. In nTPA, access charges are entirely left to negotiations between the parties. In rTPA, consumers must have a right of access on the basis of published tariffs.
- *Duty not to discriminate between system users* (Art. 7(5) and 11(2)). The obligation not to discriminate also entails a prohibition for vertically integrated network operators to unduly favour their own supply arm. The duty does not only concern the “how” of the access (i.e. conditions and terms) but also the “whether” of the access (i.e. allocation of capacity).
- *Duty to avoid any abuse of a dominant position* (Art. 22). Since Article 22 expressly refers to Article 82 EC, a system of *ex post* general competition law is apparently sufficient to ensure compliance with the provision (in contrast, the duties referred to in the two points above arguably imply *ex ante* sector-specific regulation). That behaviours like anti-competitive tying, cross-subsidization, excessive or predatory pricing as well as price squeeze should be made illegal seems obvious. The extent to which domestic law has to follow the model of Article 82 EC and the practice of the ECJ remains nevertheless unclear.

Two important issues the directive is remarkably silent about are the *level of access charges* and the *provision of balancing power*. Of course, both problems may be an issue of general competition law⁴¹: The application of excessive charges for network access and the provision of balancing power may constitute an abuse of market

⁴⁰ N. Charbit *et al.*, *L'Europe de l'électricité : transposition comparée de la directive CE 96/92 au 15 mars 1999*, in *Gaz. Pal.* du 12 juin 1999, p. 789-803.

⁴¹ Concerning transmission pricing, see A. Tradacete, *The role of EC Competition Policy in the Liberalisation of EU Energy markets*, Brussels April 2000, p. 7-9. Both issues are covered in the recent guidelines of the German competition authorities of 19.4.2001 (<http://www.bundeskartellamt.de/Abschlussbericht.pdf>).

power according to Article 82 EC or domestic competition law. However, it was felt that this was not sufficient and Community law should be more explicit.

The proposals submitted by the Commission in March 2001 consider these and other criticisms and introduce a number of changes:

- First, regulated TPA should become the only system available to Member States⁴². The system of Single Buyer and nTPA no longer appear in the draft directive as possible alternatives.
- Secondly, the tariffs for grid access will have to be formally approved by a genuine national regulatory authority (NRA) prior to their entry into force.
- Further and perhaps most interestingly, the new regulation seeks to harmonize the tariffs through the adoption of certain common principles, including cost-orientation⁴³. A complete harmonisation of the level of the charges is not envisaged. Similarly, tariffs for the use of distribution networks are not concerned.
- Finally, the draft directive addresses the issue of balancing power by requiring the adoption of binding tariffs⁴⁴.

3.3 Derogations

3.3.1 Introduction

The possibility for Member States to depart from the TPA rules, i.e. to allow network operators to refuse TPA, is expressed more or less explicitly in various provisions of Directive 96/92/EC.

Derogations foreseen in domestic legislations and/or recognized by national courts or regulatory authorities must not only be in line with the directive, but also with

⁴² See Art. 16 of the draft directive.

⁴³ See Art. 4(1) of the draft regulation. According to the provision, charges must reflect the actual costs incurred, be transparent, approximated to those of an efficient network operator and applied in a non-discriminatory manner. Besides, they must be non-distance related (so called “postage stamp”).

⁴⁴ See Art. 8(6) of the draft directive.

primary Community law. In case of doubt a question can be referred to the ECJ (Art. 234 EC)⁴⁵. The assessment essentially involves a two-point test:

- Is the relevant state measure in breach of one of the prohibitions laid down in the Treaty? Particularly relevant are the prohibitions of Article 28 and 81-82 EC, possibly combined with Article 10 or 86(1) EC.

The first point is essentially limited to determining a threat to *Community* interests. Derogations in domestic law may threaten the goals of market integration as well as undistorted competition.

- Can said measure benefit from a derogation foreseen in the Treaty (e.g. Art. 30, Art. 86(2) EC)? As a general rule, derogations from the relevant prohibitions must have a non-economic justification⁴⁶ and comply with the principle of proportionality.

The second point is essentially about the recognition of legitimate *national* as opposed to *Community* interests. Derogations may have a positive as well as negative aspect. Negatively, they may constitute an exception to the basic goals of domestic competition law⁴⁷. Positively, they may pursue other interests of an economic nature (e.g. industrial policy) or non-economic nature (e.g. social policy, security of supply).

As will be seen, the directive is very generous with derogations and does not specify any precise limits to their scope. The draft directive submitted by the Commission does not substantially change this unfortunate situation. Besides, the freedom of Member States is not substantially limited by other specific Community measures. This situation obviously represents a serious threat to the goal of market integration.

3.3.2 Derogations referred to in Directive 96/92/EC

a) Lack of agreement

A network operator should be entitled to refuse TPA when the access seeker sticks to price and/or non price conditions that are objectively unfair or unjustified, i.e. when the parties are not able to reach an agreement on essential points. The defence

⁴⁵ Joined cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen* [1991] ECR I-415.

⁴⁶ J.L. Buendia Sierra, *Exclusive Rights and State Monopolies under EC Law*, Oxford 2000, para. 8.125.

⁴⁷ As we have seen, the directive seeks to integrate the electricity markets of the Member States through a limited harmonisation of domestic competition laws.

is not expressly referred to in the directive, but it seemed to be inherent to a system of TPA based on a contractual relationship with the network operator.

That network operators have themselves to offer price and non-price conditions that are compatible with sector-specific rules (incl. the tariffs approved by the competent authority in the case of rTPA) and, more generally, with the principle of domestic and, where applicable, EC competition law, is another issue.

b) Lack of capacity

Pursuant to Article 17(5) of the directive, requests for network access may legitimately be refused on grounds of lack of network capacity. Lack of capacity can affect the transmission as well as the downstream distribution network. A topic of particular interest for the Community is the regulation of the use of cross-border interconnectors. Interconnectors linking national grids at transmission level may indeed constitute bottlenecks facilities hindering the development of effective trade between Member States.

Aside from several interventions on the basis of competition law (Art. 81-82 EC; Reg. No 4064/89)⁴⁸ and its action within the Trans-European Networks policy (TEN, Art. 154 *et seq.* EC)⁴⁹, the regulatory action of the Commission has been twofold: (i) defining the duties of network operators within the current framework; (ii) proposing a specific regulation on congestion management:

(i) *Current regulatory framework* – Directive 96/92/EC does obviously not say much about the concept of lack of capacity and capacity management (see Art. 8(2)). The Commission nevertheless felt that the directive embodies a certain number of basic principles⁵⁰:

- First, the Commission made clear that the concept of lack of capacity of the directive refers to lack of physical capacity. Unjustified contractual blocking, by which it refers to agreements caught by Article 81-82 EC, do not justify a refusal of access.

⁴⁸ See below 4.2.4.3. b).

⁴⁹ The principal instruments of the policy are *guidelines* (see Decision No 1254/96/EC, OJ L 161 of 29.6.1996, p. 147, amended by Decision No 1047/EC, OJ L152 of 11.6.1997, p. 12) and *financial support* (see Reg. No 2236/95, OJ L 228 of 23.9.1995, p. ...).

⁵⁰ Second Harmonization Report, p. 7. See also ETSO, *Evaluation of congestion management methods for cross-border transmission*, 1999.

- Secondly, it made clear that network operators are required to maximise the available capacity through various means. This requirement obviously implies a certain level of co-operation between the operators concerned, which in turn raises the question of the compatibility of the corresponding mechanisms with Article 81-82 EC.
- Thirdly, if capacity is still insufficient, the scarce capacity should be allocated on a fair and non-discriminatory manner⁵¹. This last idea has been expressly recognised by the German *Bundeskartellamt* in its Bewag decision of August 1999 in which it held that the principle of non-discrimination referred to in Art. 7(5) and 11(2) of the directive extends to capacity allocation, which means that a network operator may not favour its own operations⁵².

(ii) *Proposed regulation* – The regulation proposed in March 2001, which only concerns interconnectors, thus excluding the distribution level and the rest of the transmission system, sets several important principles (Art. 6):

- Network congestion problems shall be addressed with non-discriminatory solutions giving efficient economic signals. For the short term, the Commission favours auctions system and cross-border coordinated redispatching.
- Any allocated but unused capacity must be reattributed to the market (so-called “use-it-or-lose-it” rule).
- Any rents should be spent on network investments.

The statements and proposals of the Commission focus on interconnectors, thus, the *transmission* level. It is questionable whether the same principles should also apply to the *distribution* level.

c) Lack of eligibility

The directive expressly limits the benefit of the TPA rules to “eligible customers”. In other words, network operators are entitled under sector-specific rules to refuse TPA

⁵¹ A derogation from the principle of non-discrimination seems admissible as far as “green electricity” and, to a lesser extent, power generated with indigenous fuels are concerned. Indeed, Member States may foresee a “priority dispatch” (Art. 8(3-4); Art. 11(4)), see however the qualifications brought by the European Commission in its *First Harmonization Report*, p. 4-7. It is noteworthy that the draft directive on the promotion of electricity from renewables goes further by requiring the adoption of a “priority access” (Art. 7(1) draft).

⁵² Decision of 30.8.1999, see <http://www.bundeskartellamt.de/BEWAG.pdf>.

to third-party suppliers when the customers targeted are not eligible (i.e. are too small) pursuant to domestic legislation.

Limiting the circle of eligible customers does not as such constitute a breach of the rules on free movement by Member States, provided the relevant law is applied in a non-discriminatory manner to foreign and domestic third-party suppliers (concerning the legality of the reciprocity clause, see below d)). As far as secondary Community law is concerned, the possibility left to Member States to open their domestic market at a slower pace is basically in line with Article 15 EC. Another issue is whether differences between the laws of Member States may lead to distortions of the conditions of competition possibly requiring an intervention on the basis of Article 96 EC.

A statutory exclusion of small customers under sector-specific law may become problematic under EC and, possibly, domestic competition law. As far as EC competition law is concerned (Art. 82 EC), the only way to escape the prohibition would be to benefit from the derogation laid down in Article 86(2) EC.

d) Reciprocity clause (Art. 19(5))

The directive contains a provision permitting Member States going further than the legal requirement in the opening of their market (e.g. Germany) to limit the access to their domestic market by excluding suppliers located in Member States pursuing lower levels of liberalisation (e.g. France). The relevant criterion is whether the customer to be supplied in the importing country would also be eligible in the exporting country.

The compatibility of the clause with EC law has been questioned with reference to ECJ judgements whereby, under the legal order established by the Treaty, the implementation of Community law by Member States cannot be made subject to a condition of reciprocity⁵³. Corresponding state measures will in principle be caught by Article 28 EC as measures discriminating foreign suppliers. Thus, any Member State which seeks to impose such import restrictions will normally have to find a way of justifying them under the EC Treaty, i.e. essentially under Articles 30 and 86(2) EC⁵⁴.

⁵³ Case 52/75 *Commission v. Italy* [1976] ECR 277; case C-146/89 *Commission v. United Kingdom* [1991] ECR I-3533.

⁵⁴ A. Johnston, *Maintaining the Balance of Power: Liberalisation, reciprocity and Electricity in the European Community*, in JERL 1999, p. 143-145; E. Pfrang [1999], p. 94-95. A. Klemm, *Strom aus dem Ausland. Ein Beitrag zu Art. 4 § 2 des Gesetzes zur Neuregelung des Energiewirtschaftsrechts*, in EuZW 2000, p. 71, suggests that national measures deriving from Art. 19(5) Dir. are

e) PSOs (Art. 3)

According to Article 3(2), Member States may impose on electricity utilities public service obligations (PSOs) on the basis of which they may decide not to apply certain provisions of the directive, including Article 17 concerning TPA (Art. 3(3)).

The provision is essentially a reminder of Article 86(2) EC. Considering the case law concerning this provision⁵⁵, Member States have a relatively broad scope for interfering with the basic goals of the directive. They are in particular not limited by the three broad categories of PSOs identified by the Commission, namely universal service, protection of the environment and security of supply. The only additional requirement set by the directive is the obligation to notify the Commission.

In March 2001, the Commission, proposed to amend Article 3 so as to impose on Member States *positive* obligations relating to PSOs (Art. 3(3) draft), including the obligation to provide universal service. This can be welcomed as an initiative echoing Article 16 EC. On the other hand, the proposed regulation still does not limit in any way Member States in their ability to escape the provisions of the directive. This has been already heavily criticised by Hancher⁵⁶ who had wished a solution more in line with the path followed in telecommunications sector where sector-specific rules do not allow Member States to depart from the rules on access and interconnection to finance the provision of the universal service.

f) Regime for stranded costs (Art. 24)

According to Article 24, Member States may benefit from transitional regimes aimed at compensating their electricity utilities for “stranded costs” resulting from the opening of their market to domestic and foreign competition. What the directive provides is basically delayed application of certain liberalisation measures, including the obligation to grant TPA (Art. 24(2)).

Application for derogations based on Article 24 had to be notified by Member States within one year from the entry into force of the directive (i.e. by February 1998) and, unlike derogations based on PSOs (see Art. 3), be backed by a formal decision issued by the Commission. So far, the only derogation from Article 17 of the

basically compatible with Community law since this provision has been agreed between the Member States. This view simply ignores the principles of hierarchy of sources and primacy.

⁵⁵ See below 4.3.2.

⁵⁶ L. Hancher, *European Electricity Deregulation Will Not Level the Playing Field*, in IEEE Spectrum Online, <http://www.spectrum.ieee.org/WEBONLY/resource/jul01/speak.html>.

directive was granted to Germany on 8 July 1999 to protect lignite-based electricity production in the Eastern part of the country (the so-called “*Braunkohleschutzklausel*”, Art. 4 § 3 EnWG)⁵⁷.

As far as substantive requirements are concerned, Article 24 does not refer to the protection of any interests of a non-economic nature. Thus, the mere existence of (real) stranded costs is apparently sufficient to justify any derogation⁵⁸. The Commission seems to have been aware of the legal problem by additionally requiring in the above-mentioned German case that the scheme applied for must “*achieve [...] objectives, which themselves must be legitimate*”. Accordingly, it noted that the objective was not only the amortization of past investments, but also “*the need for a socially and environmentally acceptable restructuring of the energy sector*” in East Germany as well as “*long term security of supply*”⁵⁹.

The draft directive, while requiring a further opening of the market, does not in parallel revive the possibility for Member States to apply for a derogation based on Article 24⁶⁰. It is therefore likely that the only available possibility to compensate stranded-costs could be through private means or state aid.

g) Sudden crisis (Art. 23)

According to Article 23 of the Directive, a Member State may take appropriate measures in the event of a sudden crisis in the energy market and where the physical safety or security of persons, apparatus or installations or system integrity is threatened.

⁵⁷ OJ L 319 of 11.12.1999, p. 18.

⁵⁸ Put in other words, following the wording of the directive, a measure purely motivated by consideration of industrial policy could be backed, which seems at odds with basic principles of Community law.

⁵⁹ It is noteworthy that German civil courts denied the applicability of the defence in two domestic TPA cases, see LG Potsdam (judgement of 2.2.2000; WuW/E DE-R 464), LG Berlin (judgement of 27.6.2000; WuW/DE-R 533). The reasoning of both courts was based on considerations of domestic rather than Community law.

⁶⁰ This has been criticised by EURELECTRIC, see position paper, p. 6.

This provision does not directly confer the right to refuse TPA, nevertheless it seems that Article 23 may justify a suspension of rights to TPA as *ultima ratio*⁶¹. The provision seems to echo Article 95(10) EC.

3.3.3 Other derogations?

That other derogations than those foreseen in harmonisation measures may be maintained or introduced by Member States following the adoption of an internal market directive is expressly recognized in Article 95(4) and (5) EC. However, it is also clear from this provision that those derogations also have to be consistent with the relevant Treaty rules.

An interesting question is whether grounds traditionally linked to an assessment under competition law, e.g. lack of market power or legitimate business reasons, but not expressly mentioned in Directive 96/92/EC may be invoked by a network operator under sector-specific legislation to justify a refusal to grant TPA. The answer is not obvious.

On the one hand, it can be argued that since the directive is basically about the harmonization of domestic (sector-specific) competition law, a defence based on principles generally recognised in European competition law should be admissible⁶².

On the other hand, Directive 96/92/EC could also be interpreted as intentionally restricting the scope of arguments available to network operators, even if they would be in theory admissible in competition proceedings. Put in other words, derogations going beyond the directive would constitute a breach of the directive.

In our opinion, it is doubtful that a vertically integrated network operator may legitimately refuse TPA on the ground he actually lacks market power⁶³. Similarly, a

⁶¹ See European Commission, *Staff Working Paper-Completing the internal energy market*, Brussels 12 March 2001, SEC(2001) 438, p. 43: “[...], in the event of unforeseeable difficulties, Article 23 [...] permits Member States to take appropriate measures and, if necessary, suspend rights to TPA. For example, in the event of a storm such as that which took place in France in late 1999, it is possible, in a competitive market scenario, that emergency measures would be necessary regarding supply arrangements that would require the suspension of market access for a limited time”.

⁶² This has been suggested regarding the telecommunications sector by the European Commission, Information Society DG, *Access to fixed and mobile network infrastructures owned by operators designated as having significant market power* [explanatory note], Brussels, 17 September 1999, p. 6.

vertically integrated network operator should not be able to argue that the customer targeted by the third party supplier has committed himself to source entirely from his own supply arm. Acknowledging a right of refusal in this case would be at odds with the obligation of confidentiality and independence imposed on network operators by Directive 96/92/EC (Art. 7(6), Art. 9, Art. 12)⁶⁴.

3.4 Procedural issues

As in the telecommunications sector, there is no genuine “super regulator” at Community level⁶⁵. Pursuant to the directive, the enforcement of the sector-specific rules is clearly the task of the Member States that are required to designate an authority independent from the parties to settle disputes, including disputes relating to TPA (Art. 20(3) Dir.).

Neither Directive 96/92/EC nor the new draft directive addresses the issue of the right to appeal against decisions of the national authority. It is interesting to note that the new framework directive submitted by the Commission in the telecommunications sector not only requires the appeal body to be fully independent, but also that the appeal shall be deprived of its suspensory effect⁶⁶.

Aside from an action before the body designated by Member States, injured parties may also initiate proceedings before national courts that may have the right or obligation to refer to the ECJ (Art. 234 EC). It is noteworthy that a German court has acknowledged that TPA may be ordered by way of interim measure⁶⁷.

⁶³ In contrast to Art. 16 Voice Telephony Directive (98/10/EC) and Art. 4 Interconnection Directive (97/33/EC), Dir. 96/92/EC, far from permitting Member States to limit the obligations of network operators in cases where there are “*technically and commercially viable alternatives*” to the access requested, declares that a duty to grant TPA is not affected by the possibility to build a dedicated line, see Art. 21(3).

⁶⁴ This view is shared in Germany where this case has been dealt with by the competition authority and courts, see LG Hamburg, judgement of 3.2.2000 (RdE Nr. 6/2000, p. 231).

⁶⁵ The only decisional competence conferred to the European Commission within the framework of Directive 96/92/EC is the approval of regimes for stranded-costs (Art. 24(2)).

⁶⁶ Art. 4(1).

⁶⁷ Judgement of the LG Magdeburg 14.4.2000 (WuW/E DE-R 542).

Whereas the European Commission is not entitled to enforce sector-specific rules, it retains its general competence of “guardian of the Treaties” (Art. 211 EC) and may as such intervene against Member States on the basis of Article 226 EC, e.g. in case Directive 96/92/EC is not properly implemented or complied with. The Commission may of course also intervene on the basis of Article 86(3) EC and exercise its competence of “competition watchdog” on the basis of Regulation 17/62 (see below 4.4).

4 TPA according to EC Competition Law

4.1 Introduction

Aside from sector-specific legislation, TPA is also an issue of general competition law (Art. 81 *et seq.* EC). The applicability of the relevant Treaty rules and regulations has namely not been affected by the entry into force of Directive 96/92/EC⁶⁸.

Thus, Article 81 EC is basically applicable to horizontal and vertical agreements involving electricity utilities, including supply and access agreements⁶⁹. Similarly, Article 82 EC might be applicable when a network operator unilaterally refuses to grant TPA or grants it to unfair conditions. Lastly, the likeliness that electricity utilities involved in a merger or joint-venture will or will not grant TPA will be duly considered by the Commission when assessing the deal under the Merger Control

⁶⁸ See recital 3 of Dir. 96/92/EC. As ruled in *Almelo*, a reduction of the scope of the Treaty rules would suppose a modification of the Treaty itself. See also Telecom Access Notice, para. 58.

⁶⁹ B. Devlin/Ch. Levasseur, *Energy*, in J. Faull/A. Nikpay (ed.), *The EC Law of Competition*, Oxford 1999, para. 10.61-10.101. *Supply* contracts can benefit from the new block exemption regulation for vertical agreements (Reg. No 2790/1999, OJ L 336 of 29.12.1999, p. 21), see J.F.Baur, *Energielieferverträge unter Europäischem Kartellrecht*, RdE 2001, p. 81-120. It has been argued that even *access* contracts constitute vertical agreements within the meaning of the new regulation, see R. Whish, *Regulation 2790/99: The Commission's “new style” block exemption for vertical agreements*, in CMLR, p. 887-924, see p. 901.

Regulation (Reg. No 4064/89, Art. 2) and could lead the Commission to attach specific conditions and obligations to its final decision (Art. 8(2))⁷⁰.

In this part, we will focus on Article 82 EC and the refusal by a network operator to grant access to its infrastructure facilities.

4.2 TPA pursuant to Article 82 EC

4.2.1 Introduction

According to Article 82 EC any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. This rule of law imposes direct duties on private and public companies as well as on Member States in their regulatory activity (Art. 86(1) EC; Art. 10 EC).

To date neither the Commission nor the Community courts have issued a formal decision ruling that Article 82 EC applies to the refusal by the operator of an electricity network to grant TPA⁷¹. However, various commentators and sources indicate that the prohibition is applicable. Due to the very specific nature of the subject, it appears useful to list sources providing guidance on the subject:

- case law of the Community courts and the Commission linked to the so-called “Essential Facilities Doctrine” (EFD);
- practice of the Commission in merger cases in the electricity sector⁷²;
- Telecom Access Notice⁷³ and draft guidelines on determination of significant market power in the telecommunications sector⁷⁴;

⁷⁰ Decision VEBA/VIAG of 13.6.2000 (COMP/M.1673), para. 109. See also A. Palasthy, *Zusammenschlusskontrolle in der Stromwirtschaft: EG- und Schweizer Wettbewerbsrecht*, in Jusletter of 19 June 2000 (www.weblaw.ch).

⁷¹ The Commission mentioned Art. 82 EC in its press release concerning its intervention to open up the UK-French electricity interconnector, see press release of 12 March 2001 (IP/01/341). This intervention did not lead to a *formal* decision.

⁷² See http://www.europa.eu.int/comm/competition/mergers/cases/index/by_nace_e_.html.

⁷³ Telecom Access Notice, paras 63-130.

- last but not least, TPA cases dealt with by national competition authorities and courts inside and outside the Community⁷⁵.

In the following sections, we review the conditions that must be fulfilled for Article 82 EC to apply.

4.2.2 Relevant Markets

Market definition is the preliminary step in every competition analysis. In TPA cases, national courts and competition authorities have referred to two interrelated, but nevertheless separated markets, which can be broadly defined as: (i) the (upstream) electricity “transportation” market; and (ii) the (downstream) energy supply market.

(i) *Electricity “transportation”* – As a service market, electricity transportation is defined by the network infrastructures used for the delivery of power. It is obviously distinct from the transportation of other energy sources, e.g. natural gas or fuel oil, and other goods. The levels of transmission and distribution arguably constitute separate markets. Defining the geographic scope of the market can be delicate: Should the market be limited to the “contractual path” or extended to whole or parts of the grid of the network operator? The question may be relevant for the question of discrimination (see below section ...[abuse]) as well as the size of the relevant market (see below section ... [dominance]).

(ii) *Energy supply* – It has been argued that other (primary) energy sources, e.g. natural gas or fuel oil, may constitute adequate substitutes to electricity. Competition agencies tend to see power as a separate market. The competitive pressure stemming from suppliers of alternative energy sources is rather to be considered at the stage of

⁷⁴ Commission working document of 28.3.2001, COM(2001) 175.

⁷⁵ Formal rulings based on domestic competition law concerning TPA cases in the gas and/or electricity sector were issued *inter alia* in Germany (see review by Chr. Theobald/I. Zenke, *Der Zugang zu Strom- und Gasnetzen: Eine Rechtsprechungsübersicht*, in WuW 2001, p. 19-36 and the aforementioned guidelines issued on 19.4.2001 by the German competition authorities), Switzerland (see review by A. Palasthy, *Die Verweigerung der Durchleitung von Strom nach dem Kartellgesetz (KG)*, in AJP 2000, p. 298-307; an appeal is pending against the first formal decision of the Swiss Competition Commission which was adopted on 5.3.2001, see <http://www.wettbewerbskommission.ch/site/g/medien/Medienmitteilungen.Par.0014.Pic0.pdf>), The Netherlands (decision of 26.8.1999, *Hydro Energy B.V. v Sep*, see <http://www.nma-org.nl/>), USA (*Otter Tail Power Co. v United States*, 410 U.S. 366) and Italy (decision of 25.2.1999, SNAM, ...).

the dominance-test (inter-fuel competition). Electricity supply is usually divided into sub-markets. Besides distinguishing between eligible and non-eligible customers, the Commission has indicated that the supply of large customers could remain distinct from the supply of small customers⁷⁶. As far as the geographical dimension is concerned, electricity markets in continental Europe are currently not larger than national.

4.2.3 Dominance

Pursuant to Article 82 EC, the network operator must alone or with other firms enjoy a dominant position (i). In addition, the law requires the dominant position to be held in the Common Market as a whole or at least in a substantial part thereof (ii):

(i) *Single or collective dominance* – For the purpose of the dominance-test, the relevant market is the upstream transportation market. The downstream supply market may become relevant within the framework of the abuse-test (see below...). Network operators are generally deemed to be dominant, since it is usually assumed that electricity transportation constitutes a natural monopoly where network competition is excluded⁷⁷. There are indeed often high economic and regulatory barriers to entry. As far as the latter are concerned, Directive 96/92/EC leaves Member States with broad possibilities to limit the building of dedicated lines (see Art. 21(4-5)). Nonetheless, the assessment should be made on a case-by-case basis.

(ii) *Size of the market* – Following the doubts expressed by the ECJ in *Almelo*⁷⁸, it is questionable whether a regional or local distribution company automatically holds a dominant position in a substantial part of the Common Market. Whereas the doubts of *AG Darmon* can be shared, it is important to bear in mind that in cases involving infrastructure facilities Commission and Court do not merely consider their geographical coverage, but also their economic importance⁷⁹. Thus, one cannot

⁷⁶ Case No COMP/JV.36 TXU Europe/EDF-London Investments [2000], para. 27. A distinction is also sometimes made between peak and off-peak energy, see OFT, *Market Definition*, March 1999, para. 5.1.

⁷⁷ Certain voices have tried to challenge this opinion, see R.H.Künneke, *Electricity networks: how “natural” is the monopoly?*, in *Utilities Policy 1999*, p. 99-108. In a recent notice based on Art. 19(3) Reg. No 17/62 concerning an interconnector to be built between Norway and Germany, the Commission did not exclude that various existing transmission cables constituted alternatives to the planned “Viking Cable”, see OJ C 247 of 5.9.2001, p. 11.

⁷⁸ Case C-393/92 [1994] ECR I-1477, para. 41.

⁷⁹ Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, para. 15.

exclude that the legal condition might be fulfilled in the case of a relatively small network. Number and consumption of the consumers connected to the relevant network seems to constitute appropriate indicators.

4.2.4 Abuse

4.2.4.1 Introduction

The concept of abuse, as opposed to legitimate business conduct, is one of the most difficult in competition law. It is nevertheless now established that it is an objective one and that it can cover conducts affecting competitors (anti-competitive abuse), sellers and/or buyers (exploitative abuse) as well as the market structure as such (structural abuse)⁸⁰.

A refusal by a network operator to grant access to a third party supplier and/or a consumer of power is obviously a form of refusal to deal. The refusal to deal is not expressly mentioned among the prohibited conducts listed in Article 82(2). Nonetheless, it has been dealt with extensively in the case law of Commission and the Community Courts and it can be said that it has become a category of abuse on its own.

A review of the relevant case-law, including the seminal *Sea Containers* and *Bronner* cases⁸¹, is beyond the scope of this article⁸². Two basic points deriving from the relevant case law can nevertheless be highlighted straightaway:

- First, the case law consistently indicates that a refusal to deal by a dominant undertaking is not abusive “per se”. Put in other words, the freedom to contract normally also benefits dominant undertakings. Therefore, for Article 82 to apply, special circumstances must be met.
- Secondly, a network operator must be entitled to invoke objective grounds to justify its refusal to deal. The defence must be clearly distinguished from the so-called “public service” derogation (below 4.3), since the former is conducted under Article 82 whereas the latter derives from Article 86(2) EC.

⁸⁰ This last idea which appeared in case 6/72 *Continental Can* [1973] ECR 215 has been recently confirmed in cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge* [2000] ECR I-...

⁸¹ *Sea Containers v Stena Sealink*, OJ L 15 of 18.1.1994, p. 8; case C-7/97 *Oscar Bronner v Mediaprint* [1998] ECR I-7791.

⁸² We refer to the exhaustive literature on the subjects, see for example B. Doherty, *Just What are Essential Facilities?*, in CMLR 2001, p. 397-436.

4.2.4.2 Essential Facilities and other constellations

A refusal to deal by a network operator can be more or less straightforward, from an explicit denial to dilatory measures in negotiations or sticking to dissuasive contractual terms for the provision of the network or ancillary services, including the provision of so-called balancing power⁸³.

In order to provide some guidance concerning the special circumstances that must be met in order for Article 82 EC to apply to a refusal to grant access, the Commission has distinguished three basic scenarios where the prohibition is likely to apply⁸⁴:

- a) *Discrimination* – A refusal to grant access for the purposes of a service where another operator has been given access by the access provider to operate on that service market;
- b) *Essential Facilities* – A refusal to grant access for the purposes of a service where no other operator has been given access by the access provider to operate on that services market;
- c) *Withdrawal of access* – A withdrawal of access from an existing customer.

Discrimination (lit. a) and withdrawal (lit. c) are special circumstances that are rather easy to understand and well supported in the case law of the ECJ. Additional comments are therefore not necessary. The same cannot be said of the “essential facilities doctrine” (EFD) which seems to have attracted the sympathy of the CFI, albeit in an Article 81 case⁸⁵, whereas the position of the ECJ is less clear.

As far as the position of the ECJ is concerned, the leading case is the seminal Bronner judgement. In this case, which concerned the access of a daily newspaper to the home-delivery system run by a competitor, the Court has indicated that for Article 82 to apply three conditions had to be met⁸⁶:

- the refusal of the service is likely to eliminate all competition in the daily newspaper market on the part of the access seeker;

⁸³ Concerning the latter issue, see merger cases No COMP/M.1853 EDF/EnBW [2001], paras 41-42; No COMP/M.1673 VEBA/Viag [2000], para. 246. See also the aforementioned guidelines of the German competition authorities (...), p. 56.

⁸⁴ Telecom Access Notice, para. 84.

⁸⁵ Joined cases T-374, 375, 384, 388/94 European Night Services [1998] ECR II-3141, para. 209.

⁸⁶ Case C-7/97 Oscar Bronner v Mediaprint [1998] ECR I-7791, para. 41.

- such refusal is incapable of being objectively justified;
- the service itself is indispensable to carrying on the applicant's business inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme.

Without entering into the (often rather sterile) debate as to whether the ECJ has acknowledged the existence of an EFD in Community competition law, one would agree with the idea that, due to the economic features of electricity transportation (natural monopoly, see above ...) and the downstream supply market, it is rather likely that the first and third conditions will be met in a TPA case. What about the second condition?

4.2.4.3 Objective justifications

a) Introduction

It is consistent with the case law of the Court that a refusal to deal by a dominant undertaking may be justified by objective reasons⁸⁷. Another (related) question is whether in a given case the denial of access constitutes an adequate and proportionate reaction to the “problem” raised by the request for access.

Broadly, two categories of reasons may be distinguished: (1) reasons of a rather “technical” nature, e.g. lack of network capacity, (2) business related reasons, e.g. lack of solvability of the access seeker.

b) Lack of network capacity

Lack of distribution or transmission capacity is obviously a legitimate reason to refuse TPA under Article 82 EC. However, to constitute a valid defence, any alleged congestion must be real. What is a “real” congestion depends in turn on the legal duties of the network operator concerning capacity allocation as deriving from sector-specific rules and general competition law (i). Another related question is the status of agreements that have the object or effect to block capacity (ii):

(i) *Capacity allocation* – Whether expressly regulated or backed by the State or based on purely private conducts or arrangements, capacity allocation can become a matter of EC competition law. The Commission has endorsed the idea whereby Article 82 EC requires a dominant undertaking to maximise the capacity available⁸⁸.

⁸⁷ Case C-7/97 Oscar Bronner v Mediaprint [1998] ECR I-7791, para. 41.

⁸⁸ Flughafen Frankfurt/Main AG, OJ L 72 of 11.3.1988, p. 30, paras. 75-88. Another question is whether the duty deriving from general competition law has

Similarly, the general idea whereby available capacity should be allocated on a non-discriminatory basis seems to reflect competition law. Yet it remains difficult to make an abstract assessment of the various methods generally referred to (e.g. auctioning systems, pro rata rationing)⁸⁹.

(ii) *Capacity reservation agreements* – A network operator can obviously not validly “hide” behind a capacity reservation agreement that is incompatible with Article 81-82 EC⁹⁰. The Commission has recently stepped against such agreements. In a first case it has intervened against long-term capacity reservation agreements concerning the interconnectors linking Germany and Denmark and Denmark and Norway⁹¹. In a second case settled in March 2001 as a result of the intervention of the Commission the operators of the submarine interconnector between the UK and France (the National Grid and a subsidiary of EDF) agreed to open up access to the infrastructure⁹². A third case concerning a new interconnector to be built between Germany and Norway (“Viking Cable”) is pending⁹³.

c) Legitimate business reasons

The possibility to invoke business as opposed to technical reasons under Article 82 is in line with the general idea whereby an undertaking, even if it is dominant, cannot be disentitled from protecting its business interests provided they are legitimate⁹⁴.

The defence raises particular problems in the case of vertically integrated network operators, since their business interests are not limited to the provision of network

necessarily the same intensity when the infrastructure controlled by the (in any case dominant) network operator is not a genuine „essential facility“.

⁸⁹ A. Tradacete, *The role of EC competition policy in the liberalisation of EU energy markets*, Brussels April 2000, p. 10-12.

⁹⁰ A. Tradacete, *The role of EC competition policy in the liberalisation of EU energy markets*, Brussels April 2000, p. 12; European Commission, *Second Harmonization Report*, p. 9-10.

⁹¹ Commission, press release of 11 January 2001 (IP/01/30). The measures follow a first intervention within the framework of the merger control procedure VEBA/VIAG, see decision paras 224 and 247.

⁹² Commission, press release of 12 March 2001 (IP/01/341).

⁹³ OJ C 247 of 5.9.2001, p. 11.

⁹⁴ Case 27/76 *United Brands* [1978] ECR 207, para. 189.

services, but extend to selling electricity. It does not seem that Article 82 does itself require undertakings that are dominant in a certain field to completely ignore the interests they may have in upstream, downstream or neighbouring fields of activity. On the other hand, it is questionable whether the requirements of Directive 96/92/EC as to the independence of network operators (unbundling) and confidentiality imply that reasons directly or indirectly related to a supply activity may as a principle *not* be invoked in proceedings where EC competition rules (Art. 82) are invoked.

Can a vertically integrated network operator refuse TPA on the ground its supply arm has a contract covering 100% of the requirements of the customer targeted by the third party supplier? Similarly, can TPA be refused on the ground the third party supplier has committed himself not to compete with the supply arm of the vertically integrated network operator? We argue that, whether or not the corresponding contracts are compatible with Article 81-82 EC or domestic competition law, these grounds do not as a rule constitute a valid defence before a national jurisdiction since they are at odds with the requirements of secondary Community law⁹⁵. We also argue that this rule apply irrespective of whether the customer targeted is actually eligible pursuant the law of the jurisdiction concerned.

On the other hand, a network operator should be able to invoke grounds related to its interests in ... network operation. Thus, Article 82 EC cannot force him to grant access to the price and non-price conditions required by the access seeker, when they are unfair or unjustified.

4.2.5 Effect on trade

For Article 82 to apply, the abuse must have some effect on the trade between member states. It is doubtful in this respect that Article 82 applies in a case where the network operator, the supplier seeking access to the grid and the customer(s) to be supplied are all located in the same member state. In this case, aside from sector-specific rules on TPA, domestic competition law is likely to apply exclusively.

4.3 The Article 86(2) EC derogation

4.3.1 Introduction

Once the conditions of Article 82 are fulfilled, the *only* way to escape the prohibition laid down in this provision is to benefit from the derogation of Article 86(2) EC (so-

⁹⁵ The question has been dealt with as a matter of domestic legislation by a German court, LG Hamburg, judgement of 3.2.2000 (RdE 2000, p. 231). See comments of H.A.Giermann, *Der diskriminierungsfreie Durchleitungsanspruch gemäss § 6 Abs. 1 EnWG und die Verweigerung der Durchleitung in der Praxis*, in RdE 2000, p. 222-231.

called “public service defence”). The Commission has once indicated that Article 86(2) is a provision that permits a balance to be struck between national objectives of general interest with Community objectives through the operation of the principle of proportionality⁹⁶.

Other provisions that are sometimes mentioned in the context of public service activities, e.g. Article 16⁹⁷ or 6 EC, do not appear to constitute a valid legal basis for a derogation from the rules on competition. Similarly, the mere fact that the defence of a network operator appears to be “covered” by a derogation foreseen in Directive 96/92/EC is as such irrelevant. To constitute a valid defence, any argument brought forward must fit into the conditions of Article 86(2) EC. This is especially relevant regarding the eligibility thresholds, the reciprocity clause (Art. 19(5) Dir.) and the schemes linked to stranded costs (Art. 24(2) Dir.)⁹⁸.

Of course, another question is whether, as suggested by two officials of the DGcomp, secondary law could “in an informal way” lead to a restrictive interpretation of primary law by the administrative authorities and the courts⁹⁹.

4.3.2 Specific issues

Article 86(2) EC is obviously relevant in the electricity sector since energy utilities have traditionally been entrusted with public service obligations by the State and both the Commission and the ECJ have acknowledged that electricity supply constitutes a service of general economic interest¹⁰⁰.

As far as entrustment is concerned, the ECJ has made clear that the concept necessarily involves an act of public authority. However, that does not mean that a

⁹⁶ European Commission, *Communication on services of general interest in Europe*, OJ C ..., paras 14 *et seq.*

⁹⁷ M. Ross, *Article 16 E.C. and services of general interest: from derogation to obligation?*, in ELR 2000, p. 22-38.

⁹⁸ Thus, the decision granted to Germany does not confer an immunity against EC competition law.

⁹⁹ A. Schaub/R. Dohms, *Der wettbewerbliche Binnenmarkt für Strom und Gas. Zur Rolle von Art. 90 Abs. 2 EGV*, in *Die Aktiengesellschaft (AG)* 1998, p. 566-575

¹⁰⁰ Case C-393/92 *Almelo* [1994] ECR I-1477; decision *Ijsselcentrale*, OJ L 28 of 2.2.1991, p. 32.

legislative measure or a regulation is required. The ECJ has namely acknowledged that the grant of a concession governed by public law is sufficient¹⁰¹.

Various tasks linked to the public interest and to goals that are ultimately of a non-economic nature may potentially justify a derogation from the competition rules. Considering electricity utilities, the ECJ has indicated that exclusive rights may benefit from Article 86(2) as far as they are necessary for the provision of a *universal service* as well as ensuring *security of supply*. Another value often mentioned in connection with Article 86(2) and the energy business is the *protection of the environment*. The list is not exhaustive.

So far, case-law and commentators have mainly dealt with the issue of universal service, that is guaranteeing the access of all citizens, wherever their place of residence, to certain essential services at a reasonable price, possibly at a uniform tariff. In the leading case brought by the Commission against several national “monopolies” for the import and export of gas and electricity (Art. 226 EC)¹⁰², the ECJ has notoriously been quite generous towards the interests of incumbent suppliers. Rejecting the argument of the Commission whereby, for the derogation in Article 86(2) to apply, it is necessary for the Member States to prove that the survival of the undertaking would be threatened by the removal of exclusive rights, the ECJ held that it is sufficient to show that the performance of the specific tasks under economically acceptable conditions would be jeopardized. Moreover, the ECJ considered that Member States have not to prove positively that alternative means could enable the tasks to be performed under the same conditions¹⁰³.

In contrast to the situation prevailing in the telecommunications sector¹⁰⁴, secondary Community law in the electricity sector does not regulate the way Member States have to finance universal service obligations. The amendments to Directive 96/92/EC proposed by the Commission also fail to address that issue. Thus, Member States and their electricity utilities will keep extensive possibilities to use or abuse Article 86(2) to block competition from third-party suppliers.

¹⁰¹ Case C-159/94 Commission v. France [1997] ECR I-5815, paras 65-66.

¹⁰² Case C-157/94 Commission v. Netherlands [1997] ECR I-5699, para. 58.

¹⁰³ Concerning the standard of proof, see also joined cases C-147/97 and C-148/97 Deutsche Post ECR I-..., paras 53-54, and the case note of A. Bartosch in CMLR 2001, p. 195-210.

¹⁰⁴ Art. 5 of Interconnection Directive (97/33/EC), OJ L 199 of 26.7.1997, p. 32. See also L. Garzaniti, *Telecommunications, Broadcasting and the Internet: Competition Law and Regulation*, London 2000, para. 7-44.

The same considerations apply to a defence based on security of supply¹⁰⁵, the protection of the environment and other possible motives. Arguably, the creation of an internal market of energy without distortions of competition would require a minimum harmonization of these fields through primary or secondary Community law.

As far as the second sentence of Article 86(2) is concerned, we do not agree with the opinion whereby the degree of market opening required by the directive necessarily represents the concept of Community interest referred to by the provision¹⁰⁶. Put in other words, this provision does not prevent an application of Article 82 EC to the benefit of non-eligible customers.

4.4 Procedural issues

Since Article 82 EC is directly effective, the provision may not only be applied by the *European Commission* (Art. 85(1) EC) according to the procedural rules laid down in Regulation 17/62, but also by the *courts* of the Member States. Furthermore, it may be applied by national *administrative authorities* (competition authorities), provided the domestic law has conferred the necessary powers on them. As far as national authorities are concerned, the relevant procedural rules are of course to be found in national law. The same principles apply to the derogation laid down in Article 86(2) EC, since the provision is also directly effective.

In case a refusal to grant TPA by an electricity utility is actually attributable to a Member State and not the undertaking itself, the European Commission may intervene on the basis of Article 86(3) EC¹⁰⁷. The procedure applicable is not directly regulated by the Treaty or secondary legislation (Reg. 17/62 is not directly applicable). Thus, analogies with other procedures become relevant. Three sources have been mentioned¹⁰⁸: analogy with the procedure under Regulation 17/62, analogy with the procedure regarding State aids, and analogy with Article 226 EC.

¹⁰⁵ See case 72/83 *Campus Oil* [1984] ECR 2727. Security of supply (maintaining a basis of primary fuel for electricity generation) was also considered by the Commission in its decision of 8 July 1999 under Art. 24 Dir. 96/92/EC regarding Germany, OJ L 319 of 11.12.1999, p. 18 (para. 43).

¹⁰⁶ As suggested by B. Devlin/Ch. Levasseur [1999], paras 10.104 and 10.129.

¹⁰⁷ See for example decision of 21 December 1993 (port of Rødby), OJ 1994 L 55/52.

¹⁰⁸ J.L. Buendia Sierra, *Exclusive Rights and State Monopolies under EC Law*, Oxford 2000, para. 10-31.

5 Intervention based on Article 86(3) EC

Following the submission of the regulatory package of March 2001 and the rather negative reaction of some Member States, the Commission has expressed its readiness to make use of Article 86(3) EC to further liberalise energy markets¹⁰⁹. The corresponding measures are, in the words of the Commission, intended to address possible distortions of competition resulting from different levels of liberalisation.

The possibility to use Article 86(3) as a tool of market opening is obviously in line with a strategy that, as a senior Commission official has recently reminded of¹¹⁰, has been successfully applied in the telecommunications sector and could be extended to other sectors. However, it is questionable whether the electricity sector could be effectively opened on the sole basis of decisions and/or directives based on this provision. Put in other words, can the rights and obligations relating to TPA be extended so as to benefit all electricity customers through a measure based on Article 86(3)?

Within the framework of Article 86(3), the Commission is not only able to bring an end to specific infringements of Community law, but also to adopt preventive measures designed to specify the scope of the obligations under Article 86(1) and also Article 86(2) EC. Measures based on Article 86(3) EC, either decisions or directives, have two important features that also mark the limits of the provision¹¹¹:

- First, they are concerned with measures of the State as opposed to conducts adopted by private entities on their own initiative. Besides, the measures referred to must concern public undertakings or undertakings enjoying exclusive or special rights granted by the State.

¹⁰⁹ *Commission confirms need to tackle cross-border investment restrictions and energy market distortions*, press release of 20.6.2001 (IP/01/872). See also address by Ms Loyola de Palacio at the EURELECTRIC conference of 11.6.2001 in Madrid.

¹¹⁰ H. Ungerer, *Use of EC Competition Rules in the Liberalisation of the European Union's Telecommunications Sector. Assessment of Past Experience and Conclusions for Use in other Utility Sectors*, Brussels 6 May 2001 (...). A shortened version was published in *EC Competition Policy Newsletter* June 2001, p. 16-23.

¹¹¹ J.L. Buendia Sierra, *Exclusive Rights and State Monopolies under EC Law*, Oxford 2000, paras 10.04 *et seq.*

- Secondly, a measure based on Article 86(3), unlike measures based on Article 95 EC, is always related to an actual or potential infringement of other Treaty rules, e.g. free movement of goods or competition rules.

The Commission could very easily require the removal of any “reciprocity clause” implemented in domestic law. They are namely clearly based on State measures that infringe Article 28 EC by discriminating foreign electricity suppliers. Using Article 86(3) to remove the eligibility thresholds and give a TPA right in respect of all customers is less obvious.

As we have seen, in a context of natural monopoly and vertical integration of the industry, a refusal to grant TPA is likely even without any corresponding state measure. It is questionable whether the mere absence in a Member States of special TPA rules extending to all customers constitute a State measure within the meaning of Article 86(3). Of course, as in the case of the Telecom Equipment and Services directives, the Commission could in principle require Member States to abolish any remaining exclusive and special rights affecting electricity supply¹¹², the idea being that these rights would lead electricity utilities to abuse their dominant position (Art. 82 EC). In any case, a measure based on Article 86(3) as opposed to a directive based on Article 95 could probably not catch purely domestic TPA cases.

Another issue is the possibility for the Commission to specify the obligations deriving from Article 86(2) EC, e.g. relating to universal service obligations.

6 Conclusion

An undertaking operating an electricity grid may have a duty to grant TPA under both Article 82 EC and sector-specific legislation implementing Directive 96/92/EC. As in the telecommunications sector, while it cannot be excluded that EC competition law and domestic law on TPA will apply to one and the same case, each set of rules has clearly its own scope and the defence available to the network operator may not be the same under one or the other set of rules.

The applicability of Article 82 seems to be limited to network operators of a certain size or economic importance as well as supply deals with a cross-border element. On the other hand, the size of the customer targeted by the third party supplier is in principle irrelevant. By way of contrast, TPA rules implementing Directive 96/92/EC have to apply irrespective of the size or economic importance of the network operator and the purely domestic or cross-border nature of the supply deal

¹¹² Case C-202/88 France v Commission [1991] ECR I-1223; case C-271, 281 and 289/90 Spain and others v Commission [1992] ECR I-5833.

involved. On the other hand, at the current stage of the liberalisation process, the size of the customer targeted by the third party supplier can matter, not only in Member States that have only partially liberalized (e.g. France), but also in Member States that, while having completely liberalized, have adopted a reciprocity clause (e.g. Germany).

As far as the defence of the network operator is concerned, it is important to bear in mind that the duty deriving from Article 82 EC may not be reduced by secondary Community law. Thus, the lack of “eligibility” of the customer, the applicability of a “reciprocity clause” or the benefit of a scheme to compensate stranded-costs, whether or not formally backed by the Commission under Directive 96/92/EC, are as such irrelevant for the applicability of EC competition law. Whether in a given case a refusal may benefit from a derogation based on Article 86(2) is of course another question. On the other hand, it would be incorrect to assume that the directive has absolutely no impact in cases where Article 82 is invoked. As a result of the directive, network operators are absolutely precluded from invoking business reasons linked to interests they may possibly have at production or supply level.

The internal market in electricity will only be achieved if, beside the national sector-specific rules, primary Community law, including the rules on competition, is fully applied in the electricity sector. In this respect, the liberalisation of the telecommunications sector constitutes a useful benchmark. The extent to which the liberalisation of the various network industries should be based on similar principles (“regulatory convergence”) is however unclear. In any case, at this stage of the liberalisation process, a clarification of the relationship between EC competition law and sector-specific legislation by way of a communication of the Commission outlining the duties of undertakings and domestic regulators would probably be welcomed in several Member States.