

A SINGLE EUROPEAN ENERGY MARKET — RHETORIC OR REALITY?

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INTRODUCTION

As December 31, 1992, the appointed day for the completion of the single European market, draws closer, a review of the European Community's efforts to secure a liberalization of trade in the energy sector appears apposite. As the European Commission's (Commission) own background studies on the "Cost of Non-Europe" revealed, the total cost of twelve separate compartmentalized energy markets amounted to some 0.5 per cent of the Community's GNP in 1987. The promised benefits of "more Europe" for the energy sector include production and distribution cost reductions as a result of greater competition, and a reduction in certain unit costs as a result of the effects of economies of scale. The optimization of investment and management on a European-wide, as opposed to a national scale, is a third promised benefit.¹ This article aims to assess the Commission's attempts to create a single European energy market from a legal perspective.

For the benefit of those readers who are unfamiliar with European Community law and policy, this article begins with a brief description of the aims and objectives of the single or internal market exercise, and the legal framework within which it is presently being realized. It will then proceed to describe the belated emergence of energy policy on the single market agenda.

The second section analyzes the internal energy exercise from a legal perspective.² It begins with an assessment of the various objectives laid down in the Commission's Working Document (Document) on the Internal Energy Market. This document is significant because it spelled out the various methods by which the Commission hoped to pursue the goal of greater energy market integration. At the same time, however, the 1988 Document reveals a number of inconsistencies and contradictions in approach. These are of considerable significance for two reasons.

First, given the present structure and organization of the European energy market, the potential application of the core legal instruments from the Treaties of Rome,³ which are being used to construct the internal market as a

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1. *The Internal Energy Market*, 1987-1988 EUR. PARL. DOC. (COM. No. 239) 8 (1988) (information of the Commission of the EC).

2. For a critique of the policy-related aspects of the single energy market exercise, see *A Single European Market in Energy*, A Joint Report by the Royal Institute of International Affairs and the Science Policy Research Unit, University of Sussex (Chatham House, 1989).

3. Establishment of European Economic Community, Mar. 24, 1957, 298 U.N.T.S. 3; Establishment of European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167.

whole, is far from straightforward. These instruments are the rules on free movement of goods and services and competition or anti-trust. Problems of application are particularly acute in the so-called network bound sectors, that is electricity and gas transmission and distribution. Yet, these same sectors are key areas for Community action. It is argued that the Commission's most recent initiatives and legislative proposals, for the promotion of competition and free trade in these two sectors, do not resolve a number of basic legal questions.

Second, it is now increasingly clear that Community action on energy cannot be limited to market integration and the removal of national obstacles to free movement of energy goods alone. A number of these same obstacles may be justified on either environmental protection or security of supply grounds. In other words, the Commission has gradually been forced to abandon its purely market-driven approach to creating a single energy market. The Commission is now grappling with the task of developing a more coherent energy policy framework within which more efficient competition can flourish. It has now released two further policy documents on two additional key aspects of its energy policy: the environmental dimension of energy production and use,⁴ and security of supply.⁵ Although these two documents suggest a shift in focus towards a more interventionist approach, it is suggested that the present Community law framework is not ideally suited to the simultaneous realization of the complex task of reconciling energy market integration with other objectives.⁶ The paradox of increased competition in energy markets is that it can only be achieved by close regulation, which in turn requires stricter regulatory controls, and the adoption of suitable mechanisms and instruments. These themes are developed in the third section. The fourth section offers some short conclusions.

I. THE SINGLE MARKET EXERCISE

The single market exercise and the amendments to the Treaty of Rome introduced by the Single European Act (SEA)⁷ were the result of several concurrent efforts to revive the process of European political and economic integration. In 1984, the European Parliament drew up and adopted a Draft Treaty establishing the European Union.⁸ This Draft Treaty envisaged, *inter alia*, a substantial transfer of sovereign powers from the Member States to the Community institutions, and in particular, a strengthened role for the European Parliament in the legislative process. This document, although never adopted, inspired the creation of an *ad hoc* committee — the Dooge Commit-

4. *Communication to the Council on Energy and Environment*, 1988-1989 EUR. PARL. DOC. (COM. No. 369) (1989) (information of the Commission of the EC).

5. *The Internal Energy Market and Energy Policy*, 1989-1990 EUR. PARL. DOC. (Com. No. —) (1990) (information of the Commission of the EC).

6. This article will only discuss the application of the Treaty of Rome to the energy sector. In fact the other two Treaties — the Treaty establishing the European Coal and Steel Community (ECSC) and the Treaty establishing the European Atomic Community (Euratom) are also of some importance for the internal energy market exercise. So far, however, priority has been given to the electricity and gas markets.

7. Single European Act, *reprinted in* 23 COMMON MKT. L. REV. 813 (1986).

8. — O.J. EUR. COMM. (No. C 77) 33 (1984).

tee (Dooge). The Dooge was requested by the Heads of State to make suggestions for improving European co-operation. This in turn led the European Council to convene an inter-governmental conference within the meaning of Article 236 EEC. This conference then went on to consider the recommendations of the Dooge and the decisions of the Milan Summit on the realization of a single market by 1992. These decisions were in turn based on a report prepared by the Commission in 1985 entitled *Completing the Internal Market*.⁹ This report included a program that advocated the adoption of some 300 legislative measures considered necessary to ensure greater market integration by the end of 1992. The SEA, signed in early 1986, was therefore a result of a drive to intensify both economic and political co-operation between the Member States. The SEA introduced a number of important modifications to the Treaty establishing the European Economic Community (EEC)¹⁰, even if it did not bring about the fundamental reform which the European Parliament's Draft Treaty had proposed.

Its main objective is limited to closer economic co-operation. It is espoused in what is now Article 8A of the Treaty of Rome. This is the creation of an internal market over a period expiring on December 31, 1992. An internal market is defined as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty." To achieve this aim, the Community legislative procedure has been amended to allow for more, but by no means all, decisions on the completion of the internal market to be taken on the basis of a qualified majority, as opposed to a unanimous vote. The powers of the Community institutions in certain fields have been codified. A new Court of Instance has been created. The Parliament's role has been strengthened to allow for its co-operation, but not its co-decision on Community legislation.

The nature and importance of these various amendments cannot be discussed in full here, but three comments on the new institutional and policy framework within which the internal market exercise is to be realized are in order. First, energy policy is not expressly referred to in the SEA. Indeed the Member States had expressed their determination that the Community should not assume additional powers on energy policy matters under the SEA. Article 130R(1)(iii) of the new Title on Environment states that action by the Community relating to the environment shall have as one of its objectives "the prudent and rational utilization of natural resources." In its Declaration on Article 130R, adopted on September 9, 1985, and annexed to the SEA, "the [inter-governmental] Conference confirms that the Community's activities in the sphere of the environment may not interfere with national policies regarding the exploitation of energy resources." The legal effect of this Declaration is doubtful.¹¹ In any event, it cannot apply to the regulation of the utilization

9. 1984-1985 EUR. PARL. DOC. 9 (COM. No. 310) (1985) presented to the Milan meeting of the European Council on June 28-29, 1985.

10. The other two Treaties are only marginally affected by the SEA.

11. Toth, *The Legal Status of the Declarations Annexed to the Single European Act*. 23 COMMON MKT. L. REV. 803, 811-12 (1986).

or supply of energy resources¹² which continue to be subject to treaty rules which have been in force for over thirty years. Nevertheless, the mere existence of the Declaration confirms the continuing political sensitivity of the Member States towards energy policy matters. At various stages of the negotiation on the adoption of the new electricity and gas transit directives, discussed below, several governments continued to make the argument that energy should be treated as a special case and should effectively be exempted from the single market exercise.

Second, the SEA is frequently criticized as a poorly drafted document which does not properly take into account the case law of the Court of Justice. This gives rise to difficulties of interpretation, particularly with the new Articles, 100A and 100B. Article 100A (4) provides that in certain circumstances, Member States may continue to apply national rules even after a Community harmonizing measure has been adopted, thus restricting intra-Community trade. Article 100B, however, appears to imply that the Council can, after the expiration of the 1992 deadline, declare that national rules must be recognized as automatically equivalent thereby disallowing any restrictions on trade. These provisions are not without relevance for the energy sector.

Third, the legal framework for decision-making on the internal market has become more, not less, complex. Separate voting procedures apply to separate policy fields. On the one hand, this has generated substantial confusion over the proper legal basis for Community legislative proposals. On the other hand, the new Titles on the environment,¹³ economic and social cohesion,¹⁴ and research and technological development¹⁵ combine to produce a complex array of subsidiary considerations which the Community must take into account in formulating policy on energy-related matters. Some of the implications of these problems will be discussed in greater detail below.

A. Energy — A Late Starter?

1. Energy and the 1992 Agenda

Despite the central importance of the energy sector and the ostensibly far-reaching economic effects of free trade, energy had not been dealt with in the White Paper on *Completing the Internal Market*. This report's two chapters on fiscal harmonization and on the extension of the Community public procurement regime have had important implications for the energy sector. As already indicated, the SEA itself made no provision for energy.

A renewed impetus to realize a single market for energy, however, was to come from three other sources. First, the general internal market exercise highlighted the relative absence of Community action. In particular, a failure to apply the basic rules on free movement and competition, in a number of key economic sectors where public utilities or private firms vested with certain

12. Vandermeersch, *The Single European Act and the Environmental Policy of the European Economic Community*, 12 E. L. REV 407, 415 (1987).

13. Single European Act, *supra* note 7, at art. 130R-T.

14. *Id.* at art. 130A-E.

15. *Id.* at art. 130F-Q.

monopoly privileges, predominate. These included telecommunications, transport, and water as well as the network bound energy sectors — electricity and gas transmission and distribution.

Second, in 1980, the Commission began a re-assessment of the Community's existing energy objectives for 1990. On the basis of its 1984 review of Member States' energy policies, the Commission concluded that new longer-term objectives were required.¹⁶ In particular, it suggested that "not enough attention has been paid in the past to the advantages which would result from a more integrated common market in energy."¹⁷ Finally, the falling oil prices of 1986 and their 'knock-on' effect on prices for other fuels, created pressure for competition at the national level. Large energy consumers began to question the allegedly large price differentials for similar fuels in the different Member States. They looked to the American experience of deregulation of natural gas markets as evidence of the alleged benefits of greater competition.

2. A Legacy of Non-intervention — Energy as a Non-Starter?

The general reluctance of the national governments to transfer any sovereignty to the Community institutions, in the thirty years since the EEC Treaty came into force, has undoubtedly contributed to the continued failure on the part of the Commission to make meaningful progress on energy questions. In the period between 1968 and 1981, it tried repeatedly without success, to convince the Council to formulate a common policy on energy supply issues.¹⁸ At the same time, however, the Commission also failed to realize a more complete integration of the Community's energy markets through a determined removal of obstacles to free trade. The former strategy, which involved centralizing the power to regulate certain aspects of the Community energy market, would have required the adoption of detailed secondary legislation. It was highly unlikely that a unanimous vote in Council could ever have been secured for such measures.

The latter strategy — the promotion of market integration — could have been realized by ostensibly less radical methods. A consistent application of the Treaty rules on free movement and competition, reviewed below, might have served to remove some of the Member States' more blatantly protectionist measures. Yet, the Commission remained hesitant to initiate enforcement actions under the Treaty¹⁹ against Member States whose legislation or administrative practice were in possible breach of these rules.²⁰

16. A view supported by the European Parliament. See its resolution of Mar. 11, 1983, — O.J. EUR. COMM. (No. C 96) (1983).

17. *New Community Energy Objectives*, 1984-1985 EUR. PARL. DOC. (COM. No. 245) 16 (1985) (information of the Commission of the EC).

18. See generally DAINTITH & HANCHER, *ENERGY STRATEGY IN EUROPE: THE LEGAL FRAMEWORK* (1986).

19. Article 169 provides that "If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned an opportunity to submit its observations." If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

20. See also DAINTITH & HANCHER, *supra* note 18, at ch. 6.

II. TOWARDS AN INTERNAL ENERGY MARKET

Against this background of relative inaction on energy policy, the adoption by the EC Council of its 1995 energy objectives in September, 1986, followed by the publication, in May, 1988, of the Commission's Working Document on the Internal Energy Market, appeared to mark a radical departure in approach. The energy objectives adopted in September, 1986²¹ for the period 1987-1995, expressly recognized the need for "greater integration, free from barriers to trade, of the internal energy market with a view to improving security of supply, reducing costs, and improving economic competitiveness."

This is not to say that long-standing Community objectives, including diversification of supplies and the promotion of overall security, were abandoned. The Community, as a whole, is still dependent on imports for some forty-nine per cent of its energy needs. Only the United Kingdom would be completely self-sufficient if there was a crisis. The 1986 resolution further stipulated that, in achieving the 1995 energy objectives, the Commission must ensure that a proper balance is to be struck between these and environmental objectives "taking into account the desire to limit distortions of competition in the energy markets by a more co-ordinated approach to environmental affairs in the Community."

The task bestowed upon the Commission is by no means a straightforward one. Indeed critics have pointed out that these objectives are potentially conflicting, and that greater competition might weaken the Community's overall security of supply.²² Nevertheless, market integration was given the greatest initial priority. The Commission requested the Energy Council Ministers, meeting in June, 1987, to support its desire to draw up an inventory of existing obstacles and in due course to submit to the Council appropriate proposals for the progressive elimination of such obstacles before the end of 1992.²³ It was in the context of this initiative that the Commission's Working Document on the Internal Market was published in May, 1988. This document has now been followed by a package of legislative proposals designed to secure the first stage of the completion of the internal energy market. In the summer of 1990, the Council adopted a common position on several of the Commission's proposals. It was not until late 1989, that the Commission turned its attention to the environmental dimension of energy use,²⁴ and in July, 1990 to security of supply issues.²⁵

In the remainder of this section, I shall examine the legal implications of the Commission's approach to promoting energy market integration. I shall begin with an examination of a number of issues raised in the 1988 Document, in the context of the Commission's stated determination to ensure the application of Community law to the energy sector. In this context, I shall examine the two new proposed directives on gas and electricity transit. The progress which has since been made on public procurement and fiscal policy will then

21. — O.J. EUR. COMM. (No. C 241) 25.9 (1986).

22. See *A Single European Market in Energy*, RIIA/SPRU, *supra* note 2.

23. 1987-1988 EUR. PARL. DOC. (COM No. 238) (1988).

24. *Communication to the Council*, *supra* note 4 (information of the Commission of the EC).

25. *The Internal Energy Market and Energy Policy*, *supra* note 5.

be briefly outlined. The security of supply and environmental aspects, in the single energy market exercise, are discussed in the next section.

A. The 1988 Working Document

As its name suggests, the 1988 Working Document (Document) does not purport to provide a comprehensive program or blue print for the creation of a single energy market. It begins in Part I, by examining the general problems regarding the inclusion of energy in the single market concept. Part II then identifies four sets of actions for the achievement of the internal market. These include first, the carrying out of the provisions concerning the energy sector in the 1985 White Book; that is, the opening up of public procurement, harmonization of technical standards and norms, and approximation of indirect taxation. Second, and most importantly, the Commission commits itself to a determined application of the provisions of Community law.²⁶ Third, there is an express commitment to the attainment of a satisfactory equilibrium between energy and environmental objectives. Finally, the Document outlines two specific priority areas in which concrete Community action is envisaged — energy pricing and infrastructural development for the poorer regions of the Community — in particular Spain, Greece, and Portugal.

Two aspects of the Document's treatment of the single market concept must be emphasized. Both are highly relevant to understanding certain difficulties implicit in the realization of the Commission's intention to ensure a determined application of Community Law in the energy sector. First, there is considerable equivocation over whether it is possible to conceive of a single energy market as such. Indeed, the Commission appears to suggest that the concept of a single energy market is misleading and "could give the impression that energy is a comparatively homogeneous sector."²⁷ It goes on to identify the special features of the sector which make for its peculiar diversity: (1) variations in energy endowment; (2) the physical distinctions between the different energy sources; (3) the different end-uses of energy sources; (4) the relative openness of some energy end-uses and markets as compared to others; (5) the diversity as regards energy market operators; and (6) political traditions and taxation habits. Unfortunately, no clear commitment to a truly unified energy market emerges. It would seem that the integration of the separate markets for individual types of energy may suffice.

There seems to be confusion as to the type of competition to be pursued. Is the desired goal the promotion of inter-fuel, for example, gas versus electricity, or merely intra-fuel competition, that is increased competition within the separate fuel sectors? To treat energy sources as entirely separate markets may be misconceived. The fact that they are inter-connected and inter-dependent at least in terms of the substitutability of one fuel for another in many end uses is self-evident. As the Document recognized however, the conditions under which the different energy sources are produced, distributed, and used

26. The relevant provisions considered are Articles 30-36 EEC and Article 4a ECSC on free movement of goods; Article 37 EEC on state monopolies; Articles 85 and 86 and 90 EEC and Articles 65 and 66 ECSC on competition, and Articles 92 and 93 EEC and Article 4 ECSC on state aids.

27. 1987-1988 EUR. PARL. DOC. (COM. No. 238) (1988), *supra* note 1, at 7.

vary between sectors and countries. Yet, it makes no attempt to assess the impact of increased competition in one market, such as gas supply, on the use of solid fuels in electricity generation.²⁸ Its treatment of nuclear power is separate from that of electricity. This failure to specify the type of competition has important implications not only for Commission policy towards energy market integration, but also, for the development of policy on security of supply and environmental issues.

Second, the Document repeatedly shifts its emphasis between cooperation and competition, as alternative strategies to promote market integration, particularly in the network bound gas and electricity sectors. This is especially evident in the various annexes to the Document. On the one hand, for example, there is a commitment to the decompartmentalization of natural gas markets and the promotion of competition in gas supply. On the other hand, the Commission stresses the need for greater European-wide interconnection of gas pipeline networks and recognizes that cooperation between the major national utilities is particularly important here. Is it feasible to expect these companies to collaborate to extend the present European network to the United Kingdom, Ireland, Spain, and eventually Portugal and Greece? What if the Commission were then to introduce some form of common carriage or open access provision, compelling these same companies to allow third parties to use their facilities? Similar observations may be applied to the analysis of the electricity sector.

If there appears to be an absence of clear objectives, there is also further confusion over the scope of the instruments available for their attainment. In the Document, the Commission recognizes that the legal instruments available to the Community for the attainment of the internal energy market are no different from those which allow the realization of Europe without frontiers. "[T]here are, however, particular constraints which apply to the attainment of the internal market in the energy area." These include "the specific problem of energy security and the strategic aspects of energy products."²⁹ The Document gives no indication of how these constraints are to be dealt with. It merely suggests that "the energy policy of the Community rests on an appropriate combination of the play of market forces, observed in particular by the internal market provisions and the political measures guaranteeing or providing for Community supplies."³⁰

Once again, however, important questions are side-stepped. What combination of competition and intervention is to be deemed appropriate, and by whom? Are the aforementioned political measures to be adopted by the Member States alone? Or, will the Community legislator finally step in? The Commission's commitment to securing a determined application of Community

28. The International Energy Agency has projected that, in the period up to 2000, gas sales to the power generation sector in the countries of OECD Europe are likely to increase in the range of 10-30 BCM, compared with the levels currently foreseen by governments. D. Jones, *Use of natural gas in power generation in IEA countries*, Paris, IEA, Aug., 1988.

29. 1987-1988 EUR. PARL. DOC. (COM No. 238) *Working Document on the Internal Energy Market*, (1988) (information of the Commission of the EC).

30. *Id.* at 8.

law must in turn be seen in the context of its former policy of non-intervention, particularly in the electricity and gas sectors.³¹

Those measures which were enacted dealt with relatively marginal issues.³² Member States remained essentially free to organize and regulate their energy markets in whatever manner they chose. Hence, the Commission is left with the basic Treaty rules on free movement and competition as its principal instruments. Unfortunately, however, the application of those rules to public sector monopolies, the predominant legal form for energy utilities in Europe, and to the energy sector, has remained virtually untested in the Court of Justice. This absence of precedent also poses problems for private parties who might wish to invoke their rights in Community law independently. The Court of Justice has ruled that a number of the Treaty's provisions have direct effect, in the sense that they can be relied upon in proceedings before national courts.³³

B. The Application of Community Law

In order to present a concise assessment of these legal uncertainties, I shall consider two major sets of obstacles to energy market integration as illustrative examples: restrictions on the importation and transportation of gas and electricity.

1. Restrictions on Importation

Article 30 EEC prohibits quantitative restrictions on imports and all measures having equivalent effect. This Article has been the subject of considerable jurisprudence. It has been interpreted by the Court of Justice to include all national measures and rules capable of hindering trade, irrespective of their intended result.³⁴ Where a state monopoly enjoys an exclusive right of import, however, Article 37 will apply.³⁵ This Article also applies to any body through which a Member State in law or in fact, either directly or indirectly, supervises, determines, or appreciably influences imports or exports between Member States. Moreover, the provisions shall likewise apply to monopolies delegated by the State to others.³⁶ In *Manghera*,³⁷ the Court ruled that Arti-

31. Only two legally binding measures were in fact enacted prior to 1990. These were Regulation 1056/72 on notifying the Commission of investment projects of interest to the Community in the petroleum, natural gas, and electricity sectors, and Council Directive 75/404 limiting the use of natural gas in electricity generation (___ O.J. EUR. COMM. (No. L 178) 26 (1975). This latter Directive is now likely to be abolished.

32. For a full overview see VAUGHAN, LAW OF THE EUROPEAN COMMUNITIES ch. 10 (1986).

33. *Algemene Transport v. Van Genden Loos*, 1963 E. Comm. Ct. J. Rep. 1.

34. *Benoit v. Dassonville* 1974 E. Comm. Ct. J. Rep. 837.

35. Both Articles 30 and 37 only apply to goods and not to services. *Bodson v. Pompes Lunebres*, 1988 E. Comm. Ct. J. Rep. 2449 NYR. The Court has not yet ruled on whether electricity is a good, although in *Costa v. E.R.N.E.L.*, 1964 E. Comm. Ct. J. Rep. 614, 1964 ECR 585, it seemed to assume that it could be treated as such.

36. *Comm. v. France*, 1983 E. Comm. Ct. J. Rep. 2091; *Openbaar Ministerie v. Nertsvoederfabriek Nederland B. V.*, 1989 E. Comm. Ct. J. Rep. 3583. In *France* the Court held that Article 37 did not apply where a license system does not confer absolute monopoly rights but only limited, exclusive privileges.

37. *Publica Ministero v. Manghera*, 1976 E. Comm. Ct. J. Rep. 91; 1 COMM. MKT. L. REV. 557 (1976).

cle 37 must be interpreted as meaning that every national monopoly of a commercial character must be adjusted so as to eliminate the exclusive right to import from other Member States.³⁸ Does this mean that national rules conferring the right to import electricity or gas on a single utility or group of utilities are automatically contrary to Community law?

a. Electricity

Presently only two Member States expressly allow importation of electricity by parties other than the owners of the transmission grid.³⁹ The Community law rights of competing utilities or of large users to import electricity directly are not easy to ascertain, however, given that these rules have rarely been applied in the energy sector.

In *Campus Oil*,⁴⁰ an action was brought, by a group of oil companies marketing petroleum in Ireland, against an order of the Irish government requiring that they purchase approximately thirty-five per cent of their supplies from Ireland's only state-owned refinery. The oil companies contended that this order amounted to a measure having equivalent effect to a quantitative restriction on imports which was prohibited by Article 30 of the EEC Treaty. The Irish government claimed that the restriction was justified under Article 36 EEC which allows Member States to derogate from the rules on free movement of goods, *inter alia*, on grounds of public security. The Court ruled that where a Member State was almost totally dependent on imported supplies of petroleum, it may rely on the public security exemption in order to ensure the continued functioning of certain essential institutions of the State, including hospital, police, army, and other public services. It is important to note that although the Court acknowledged that a number of measures had been adopted at the Community level to deal with oil shortages, these did not give the Member State concerned the "unconditional assurance that supplies will in any event be maintained at least at a level sufficient to meet minimum needs." Hence the possibility that a Member State could continue to rely on Article 36 to justify "appropriate complementary measures" to safeguard against future shortages could not be excluded, even where there were harmonized Community rules in place. This is a particularly high standard by which to judge Community measures, and would appear to leave substantial scope for unilateral action by the Member States.⁴¹

Nevertheless certain specific features of that case must be borne in mind. Ireland is almost totally dependent on imported oil products, and the Court

38. *Manghera*, 1976 E. Comm. Ct. J. Rep. at 100-01.

39. In the United Kingdom it would appear that any person who obtains the requisite supply license under the Electricity Act 1989 may import. While in the Netherlands, the new *Electriciteitswet* 1989 allows large consumers, but not distribution companies, to import electricity via the public supply system.

40. *Campus Oil Ltd. v. Minister for Industry and Energy*, 1984 E. Comm. Ct. J. Rep. 2727, 3 COMMON MKT. L. REV. 544 (1984).

41. All derogations from the principles of free movement must, however, be judged on the twin tests of objective necessity and proportionality, with the ends sought, if a derogation is to be upheld.

went to some length to stress that petroleum products were not substitutable for certain purposes; in particular, as fuels necessary for maintaining the functioning of certain vital institutions of the state necessary to maintain public security. The permitted restrictions were only justified in so far as they guaranteed the minimum level of supply necessary to allow those institutions to function.

It is not presently clear whether the public security exemption could be invoked to justify, for example, a ban on electricity importation by potential competitors in the interest of ensuring the proper and efficient functioning, as well as, the overall integrity of a national grid system. The application of Article 36 is always subject to the twin tests of objectivity and proportionality.⁴² It may, therefore, be argued that an absolute ban on importation is excessive. And that national legislation conferring exclusive importation rights should be modified to allow a restriction on imports only when there is insufficient system capacity to transport for third parties.⁴³

b. Gas

Restrictions on the importation of gas raise slightly different questions as to the application of Articles 30-37. Firstly, at least in the absence of a common commercial policy,⁴⁴ these provisions only apply to intra-EEC trade and not to goods coming from third countries. Some thirty-five per cent of the Community's gas supply is in fact imported from non-EC sources. The Commission successfully relied upon Article 37, however, to persuade the Belgium Government to remove Distrigaz's statutory exclusive right to import gas.⁴⁵

Secondly, the scope of the public security exemption may take on a slightly different perspective in the gas sector, especially where the country concerned is a producer of gas. It may be conceivably argued that restrictions on imports of cheaper foreign gas are necessary to ensure the development and exploitation of more expensive national resources. The economics and technicalities of gas exploration and production are such, that long-range planning and investment commitments are required. It could be argued that a restric-

42. The question of the application of the exemptions contained in Article 36 to state monopolies has yet to be confirmed by the Court of Justice. Article 37 only expressly refers to Articles 30-34, but some commentators have argued that state monopolies subject to Article 37 are subject to the narrow grounds for exemption specified in Article 36, and cannot obtain wider privileges; see A. G. Roemer, *Public Prosecutor v. SAIL*, 1972 E. Comm. Ct. J. Rep. 119. This would seem to reflect the grammatical sense of Article 37(2), i.e. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in para. 1 or which restricts the scope of the Articles dealing with the abolition of customs, duties and quantitative measures between the Member States.

43. The Commission is presently examining the legality under Article 83 of an agreement between the former parties to the *Overeenkomst van Samenwerking* - an agreement between the Dutch electricity producers and distributors which confined the right to import electricity to the SEP - Complaint no. IV/32.732 *Iisselcentrale*, formally lodged on May 26, 1988.

44. *Bulk Oil v Sun Int. Ltd.*, 1986 E. Comm. Ct. J. Rep. 559, 2 COMMON MKT. L. REV. 732 (1986).

45. Royal Act of 29 July 1983; see also EC Commission, 12th and 13th Competition Rep., pts. 221 and 291 respectively.

tion on imports is fundamental to the exploitation of a national resource. This action not only contributes to the security of a country's energy supply, but may also, especially in the case of an environmentally clean fuel such as natural gas, ensure a prudent and rational utilization of a natural resource. This is a Community environmental objective, now specified in Article 130 R(1)(iii) of the Treaty. The legality of national measures to conserve existing resources is an area of Community law which has yet to be fully developed by the Court.⁴⁶

2. Transit Rights

The question of whether Community law confers an automatic right of transit of gas or electricity for the benefit of third parties through national networks is equally difficult to answer. Article 36 expressly refers to goods in transit. The European Court has also affirmed a right of transit in the *SIOT* case.⁴⁷

Once more, with the exception of the United Kingdom, and to a more limited extent the Netherlands, an exclusive right to transport electricity is usually conferred on national utilities, as for example, in the case of France, Italy, or Spain, or regional firms. These national utilities enjoy a monopoly to transport and distribute electricity within a defined geographical area, as is the case in West Germany. A similar pattern prevails in the gas sector, with only the British legislation making express provision for any form of carrier obligation.⁴⁸ These exclusive rights are usually a form of *quid pro quo* for the imposition of a duty to supply electricity on demand to certain classes of consumer, the so called public service duty.

Two questions remain to be given a definitive answer by the Court of Justice. Firstly, is the conferral of an exclusive right to transport either gas or electricity illegal *per se*; and therefore, prohibited under Articles 37 and 90(1). Secondly, to what extent may a Member State or a utility rely on the exemption from the Treaty rules provided in Article 90(2) for undertakings entrusted with the operation of services of general economic interest to justify the conferral of an exclusive right? This, in turn, raises questions of the application of the rules on competition to public and entrusted undertakings.

As to the *per se* illegality of certain exclusive rights, the Court has so far only ruled that exclusive rights of import and export are *per se* illegal.⁴⁹ The issue of whether other forms of exclusive rights relating to what might be termed the commercialization or marketing of certain products could also be considered *per se* illegal has been raised in two recent cases. Case 202/88 *France*⁵⁰ concerns a challenge by the French government to a directive issued

46. See Kramer, 1976 E. Comm. Ct. J. Rep. 1279, 2 COMMON MKT. L. REV. 440 (1976).

47. *SIOT v. Minister of Finance*, 1983 E. Comm. Ct. J. Rep. 731.

48. For a detailed review of the position in each of the Member States, see EC Commission, *National Laws and Regulations Relating to the Natural Gas Industry*, Brussels, 1988.

49. *Manghera*, 1976 E. Comm. Ct. J. Rep. 91.

50. *Comm. v. France*, 19__ E. Comm. Ct. J. Rep. (case 202/88) (A.G. opinion issued Feb. 13, 1990, decision pending).

by the Commission, based on its powers under Article 90(3). This Directive prohibits, *inter alia*, Member States from conferring on their telecommunications monopolies certain exclusive rights with respect to the commercialization of terminal equipment. In Case 18/88 *RTT v. GB INNO-BM*,⁵¹ the Belgian telecommunication authority's exclusive right to approve terminal equipment for connection to its services has been challenged by a firm wishing to import this equipment. The Advocates General have now issued Opinions in both cases,⁵² but the Court is not expected to hand down a decision for either case until late 1990.

Article 90(1) would seem to clearly imply that the conferral of special or exclusive rights upon an undertaking does not, in itself, constitute an infringement of any treaty rule.⁵³ It states that "[i]n the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measures contrary to the rules contained in this Treaty. In Case 202/88 *France*, The Advocate General has argued that Articles 90(1) and 222⁵⁴ read together indicate a strong presumption of the legality of certain exclusive rights for public and private 'entrusted' undertakings.⁵⁵ To interpret Article 90(1) otherwise would deprive it of its *effet utile*.⁵⁶ Article 37, as we have seen, requires that Member States must *adjust* their State monopolies of a commercial character, but not necessarily abolish them.⁵⁷ The Advocate General, therefore, warned against a wider reading of Article 37. In *Manghera* the Court was careful to specify that it was only import/export rights which had to be abolished and only those ancillary rights where were directly connected to those rights.

In Case 18/88 *RTT*, Advocate General Darmon cited, *inter alia*, the safeguarding of the integrity and security of the public telecommunications network, public security, and public order as possible justifications for the existence of certain exclusive rights conferred on national telecommunications monopolies. These same exclusive rights would not necessarily fall *per se* under Article 30, but may be justified under the so-called 'rule of reason'.⁵⁸ An electricity or gas transmission and distribution undertaking might, therefore, be endowed with certain exclusive rights and privileges, as long as, the exercise of those privileges does not run counter to the general Treaty rules.⁵⁹

51. 19__ E. Comm. Ct. J. Rep. __ (Case 18/88) (A.G. opinion issued Mar. 15, 1989, decision pending).

52. See *supra* notes 50 and 51.

53. Centre Belge d'Etudes du Marché-Télé-marketing v. Compagnie Luxembourgeoise de Telediffusdia, 1985 E. Comm. Ct. J. Rep. 3261, 2 COMMON MKT. L. REV. 588 (1986).

54. Article 222 provides that "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership."

55. *Id.* at ¶ 29.

56. This is an important term of art in Community law.

57. See Sacchi, 1974 E. Comm. Ct. J. Rep. 409; *Manghera*, 1976 E. Comm. Ct. J. Rep. 91.

58. *RTT*, Case 18/88 at ¶ 18.

59. See also *Id.* at ¶ 20; Hansen v. Hauptzollamt Flensburg, 1979 E. Comm. Ct. J. Rep. 935, 1 COMMON MKT. L. REV. 162 (1980).

3. Article 90 and the Rules on Competition

If it is the exercise, and not the existence, of exclusive rights of transit which may fall foul of the Treaty rules, the potential application of the competition rules to the activities of these undertakings must be considered. This requires further investigation into the complexities of Article 90, including its structure and possible interpretation.

Article 90(1) is a rule addressed to the Member States. It is a specific application of the duties set out in Article 5.⁶⁰ Article 90(2) provides for a limited exemption from all the Treaty rules for undertakings "entrusted with the operation of services of general economic interest". It is also addressed to the Member States. It is they who can entrust enterprises with the operation of services of a general economic interest or endow them with the character of a revenue producing monopoly. They must do so explicitly, by an act of public authority.⁶¹ Finally, Article 90(3) allows the Commission to issue directives and decisions to Member States themselves. Anti-competitive behavior on the part of those undertakings subject to Article 90, however, would be caught by Articles 85 and 86, the application of which is governed by Regulation 17/62.⁶²

Article 90, like Article 37, has given rise to difficulties of interpretation, some of which might be addressed by the Court in Cases 202/88 and 18/88, discussed above. It has already been noted that the scope of the exclusive rights which may be validly conferred on an undertaking by a Member State under Article 90(1) is unclear. Once more, with the exception of exclusive rights to import and export, it is probably the exercise, not the existence, of these exclusive rights that attract the Treaty prohibitions on anti-competitive behavior. Thus, in *Sacchi*⁶³ the Court ruled that Articles 86 and 90, when read in conjunction, lead to the conclusion that the existence of a monopoly, resulting from the conferral of exclusive rights by the State, is not in itself incompatible with Article 86. A direct link between the exclusive right and an *abuse* of the dominant position it creates must be established.⁶⁴ In *British Leyland* the Court ruled that where an undertaking had been delegated certain exclusive powers by a Member State, it was certain *use* or *exercise* of those powers which constituted an abuse.⁶⁵

Another problem is that the exact scope of the Article 90(2) exemption has yet to be fully determined by the Court.⁶⁶ The phrase 'operation of serv-

60. Article 5 provides that "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty".

61. *Saad v. Zentrale Zur Bekämpfung unlauteren Wettbewerbs*, Case 66/86, 4 COMMON MKT. L. REV. 102 (1990), judgment of 11 Apr. 1989, not yet reported.

62. *Sacchi*, 1974 E. Comm. Ct. J. Rep. 409.

63. *Id.*

64. *See also RTT*, Case 18/88, at ¶ 32.

65. *British Leyland v. EEC Comm'n*, 1986 E. Comm. Ct. J. Rep. 3263, 1 COMMON MKT. L. REV. 185 (1987).

66. Article 90(2) will only apply where the service has been entrusted by an act of public authority; i.e. the Member State must have taken legal steps to secure the provision of the service. This would appear to

ices' indicates the organization or regular performance of a service in the general public interest. Electricity and gas have so far not been expressly considered by either the Commission or the Court. But, it is probable that they would fall into this category.⁶⁷ In order to benefit from the exception, it must be shown that the application of any of the Treaty rules would 'obstruct' the performance of its tasks. It is clear from the case law that the test is a strict one. In *Sacchi*⁶⁸ and *Télémarketing*⁶⁹ the Court indicated that the Treaty rules continue to apply as long as they are not incompatible with the performance of the undertakings task. In *Italy v. Commission*⁷⁰ it held that British Telecommunication's behavior would only be exempt if it could be shown that the application of Article 86 would prejudice the accomplishment of the company's specific tasks. A mere decline in profits was insufficient. Given that certain Member States now require some form of access for third parties to transmission networks, albeit under specified conditions, it might be difficult to support the contention that utilities would be obstructed from the performance of their tasks of the operation of electricity transmission and distribution if their exclusive rights were removed.

Furthermore, even if the cumulative conditions of the operation of general economic interest and obstruction of performance are satisfied, the proviso that the development of trade in the Community must not be affected to an extent contrary to the interests of the Community should also be taken into account. Where there is a risk of interference with the development of the internal market, the interests of the Member States and the undertakings concerned must be subordinated to those of the Community.⁷¹

In conclusion, it can be argued that the application of the basic principles of Community law to two key sectors — electricity and gas transmission — is a complex matter. It would seem uncertain whether the objective of market integration can be achieved by relying only on the basic rules of free movement and competition. On the one hand, the structure and organization of the European utilities is such that Member States appear to retain considerable scope of authority to confer certain monopoly privileges and exclusive rights upon them. On the other hand, the principles of free movement of goods and free competition are not absolute. Exceptions are tolerated. But the scope of those exceptions is by no means clear in the energy sector. In July, 1989, the

imply that where an undertaking has de facto assumed certain public service obligations, such as the obligation to supply electricity or gas on demand, but has not been legally required to assume these obligations, then it cannot qualify for exemption. Gasunie, for example, has not been entrusted by any express provision of law with a public service duty.

67. Water supply and telecommunications have been recognized by the Commission as services of general economic interest. The Court, in turn, has recognized port authorities, television companies, State-owned oil refineries and airlines which are obliged to operate on unprofitable routes as services of general economic interest.

68. *Sacchi*, 1974 E. Comm. Ct. J. Rep. 409.

69. *Télémarketing*, 1985 E. Comm. Ct. J. Rep. 3261.

70. *Italy v. EEC Comm'n*, 19 E. Comm. Ct. J. Rep. 510, 2 COMMON MKT. L. REV. 368 (1985).

71. It is of interest to note that in *Case 202/88 France*, the Advocate General relied on this proviso to reinforce his argument that the Commission's powers under Article 90 (3) should be interpreted narrowly, in as much as the Member State's interests in safeguarding certain privileges for their public utilities must be balanced in *each case* against the Community interest.

Commission, therefore, proposed to supplement these rules with a package of secondary legislation, designed as a first step towards the completion of the internal energy market.

C. The July, 1989 Draft Legislative Measures

The July, 1989 draft proposals are comprised of four measures. The four measures are: (1) a draft directive on a procedures to improve price transparency of gas and electricity charged to industrial end-users⁷²; (2) a draft regulation on the notification of investment projects in the petroleum, natural gas, and electricity sectors;⁷³ (3) a draft directive on the transit of natural gas through major systems;⁷⁴ and (4) a draft directive on the transit of electricity through transmission grids.⁷⁵

The proposed Directive on price transparency for electricity and gas supplies, a measure which was foreshadowed in the Document, is designed to ensure greater transparency in the price of fuels for commercial or off tariff customers. It is a relatively cautious measure. An initial proposal requiring Member States to submit detailed information on input costs was abandoned. The Commission has only partially circumvented industry objections to revealing what the latter considered to be confidential information on individual contract prices. The information to be transmitted will not, therefore, reflect actual prices, but standard or market prices. These national prices must be communicated twice-yearly to the Commission, which is then obliged to publish them within five months.⁷⁶ The Energy Council reached agreement on this draft in May, 1990.⁷⁷

The proposed regulation on the notification of investment projects has met with considerable opposition, and has not been adopted.⁷⁸ It required information to be transmitted as soon as the feasibility study for a major project is completed. The Commission would communicate this data to other Member States and invite comments on it, then deliver its own opinion. All information supplied would be regarded as confidential. The Commission had argued that a more coordinated approach was necessary to meet the much-voiced concern that increased competition might have adverse consequences

72. 1988-1989 EUR. PARL. DOC. 72 (COM. No. 332) (1989).

73. 1988-1989 EUR. PARL. DOC. 73 (COM. No. 335) (1989).

74. 1988-1989 EUR. PARL. DOC. 74 (COM. No. 334) (1989).

75. 1988-1989 EUR. PARL. DOC. 75 (COM. No. 336) (1989).

76. Nevertheless, as the Draft's preamble states, if there is a complaint of alleged abuse of monopoly powers on the part of a utility, or indeed large consumers, or any evidence of an anti-competitive agreement between them, the Commission can use its existing powers under the EEC Treaty's competition rules to obtain all the information it needs from both utility and customer.

77. A common position was not formally adopted, however. Portugal had insisted that agreement on electricity transit must be a prerequisite to its agreement on price transparency. Formal agreement on the transparency directive was therefore postponed until the next Council meeting.

78. In fact it did greatly add to the Commission's existing powers. Article 41 of the Euratom Treaty already requires notification of all investment projects in the nuclear sector, while the earlier Regulation of 1972, as amended, required information on electricity, gas, and petroleum projects planned or in progress to be communicated to the Commission. Article 54 ECSC empowers the Commission to encourage the coordinated development of investment and require undertakings to inform it of individual programs in advance.

for long-term investment, and therefore, for the Community's overall long-term supply security.

The electricity and the gas transit directives are also cautious measures. Both are confined to intra-fuel promoting competition at the wholesale stage. Rights of access are only available to existing utilities.⁷⁹ Third parties, such as large consumers are not given any express rights under either Directive. The terms of the proposed Directive on natural gas effectively confine competition to inter-fuel competition. Article 2(b) provides that a right of transit will only be available where the transport is carried out between Member States' gas companies. Finally, both documents place a heavy emphasis on cooperation, with a reliance on the existing competition rules as reserve powers. They do not endow the Commission with any new substantive powers.

Article 3(1) of each directive, stipulates that the conditions of transit should be freely negotiated and agreed by the bodies responsible for the grids concerned. Article 3(2) then provides that Member States must take the measures deemed necessary to ensure that all requests for transit are dealt with speedily and fairly. Requests must be communicated to the appropriate national authority and to the Commission within eight days by the requesting entity or entities. In the case of electricity this procedure only applies to requests for transit corresponding to a sales contract with duration of one year. The responsible entities shall be obliged within one month to open negotiations on the conditions of transit. The transit conditions must be equitable for all parties concerned and should not include unfair clauses or unjustified restrictions. If agreement is not reached within twelve months, the Commission and the competent national authorities must be informed within eight days by the interested parties who shall indicate their reasons. Article 4 stipulates that where the absence of agreement is not duly or sufficiently motivated, the Commission, either acting on a complaint or on its own initiative, "shall put in hand the procedures provided for by the Treaty".

Finally, and although these are not specifically mentioned in the actual texts of the Draft Directives, the Communications which accompanied their publication, make provision for the creation of a variety of advisory committees. The Communications had indicated that transit rights may be extended to third parties sometime in the future. The possible extension is pending further discussions in two newly created consultative committees — one comprising Member State representatives, and the other composed of interested parties, including: producers, transporters and distributors, and industrial and domestic consumers. In addition, however, the Communications envisage that separate bodies representing the entities responsible for the grids in the case of electricity and for the high pressure networks in the case of gas, will be consulted on the various technical, financial, and legal aspects of electricity and gas transit, infrastructural improvements, and cooperation either in joint ventures or with third countries. They will also advise the Commission in

79. The Draft Electricity Transit Directive includes supplies from outside the Community to a Member State, but the opposite situation (from an EEC Member State to a third Country) is not covered.

cases where a request for transit has been refused by a national utility or grid owner.

At the time of writing (August, 1990) the Commission is now in the process of constituting the various advisory committees envisaged in the two Communications on gas and electricity transit. The European Parliament has now delivered its opinion on the gas transit directive, but the Commission has acknowledged that Member States' opposition to the gas transit directive is substantial. Only Portugal, Ireland, and the United Kingdom appear to support it. The remaining Member States contend that the natural gas transmission market is already exposed to market forces, so that a transit directive is unnecessary.⁸⁰ It is not yet certain, therefore, that there is sufficient support to ensure a qualified majority vote in favor of the measure, as required by Article 100A.

In conclusion it would appear that the two new transit directives, one of which is yet to be adopted, are cautious measures. On the one hand, they only introduce a restricted form of intra-fuel as opposed to inter-fuel competition. Furthermore, both place an emphasis on cooperation between the existing national utilities as the best method of securing electricity and gas market integration. On the other hand, the new directives do little more than create a procedural framework within which the basic principles of Community law on free movement of goods and competition can be applied. They do not confer any new substantive powers on the Community institutions. As we have seen in the preceding sections, the potential application of these principles to the energy sector raises a number of problems. The new directives do not contribute to the removal of these problems. Finally, the Commission's initial characterization of these directives as only an initial step towards the creation of an internal energy market would seem to require revision. It is interesting to note that earlier versions of the draft proposals implicitly acknowledged the Commission's own powers and duties, under the controversial Article 90(3), to introduce some form of open access obligation for third parties.⁸¹ Later drafts, however, provided that the Council would decide "in conformity with Article 100A principles and complementary conditions governing the modalities of transit."⁸² In arriving at a common position on the electricity transit draft, the Council has now dropped this provision completely.

80. It has also been argued that, given the fact that over thirty-five per cent of the Community's gas supplies are imported, the gas transit directive should be based on Article 113 as well as Article 100A.

81. Article 90(3) empowers the Commission to address directives and decisions to the Member States with the aim of ensuring the application of Article 90. These powers are controversial in as much as they enable the Commission to adopt directives without the involvement of the Council. The scope of the Commission's powers to issue directives is currently under review in *France*, Case 202/88. See *supra* note 50.

82. In connection with gas transit by pipeline, however, it might be noted that in a Communication of 1972 on transfrontier transport by pipeline the Commission selected Article 75 as a legal basis for a measure giving third parties rights of access. 1971-1972 EUR. PARL. DOC. (COM. No. 1204) (1972). More recently the European Parliament advocated Article 235 as the legal basis for a recent resolution on promoting transport by pipeline in the Community. (___ O.J. EUR. COMM. (No. C 262) 65 (1988).

D. *The Remaining Priorities*

1. Public Procurement

As to the remaining priorities outlined in the Document, the energy sector has now been brought within the Community's rules on public procurement.⁸³ In March, 1990, the Council adopted a common position on the Commission's Draft Directive extending the Community's procurement rules to the so-called excluded sectors: water, energy, telecommunications, and transport.⁸⁴

A controversial feature of this Directive has been that it is not limited to public procurement proper, i.e., by the various levels of government or by state-owned firms. It also regulates the purchasing activities of a large number of privately-owned utilities. The Commission justified their inclusion on two grounds. On the one hand, there is no uniformity throughout the Community as to what is and what is not a publicly owned company.⁸⁵ Therefore, a directive which only applied to public sector utilities would have been both partial and ineffective. On the other hand, the Commission stressed that its main aim was to strike at the underlying, objective conditions which lead utilities to "pursue procurement policies that are uneconomic in the sense that they do not ensure that the best offer from any supplier or contractor in the Community is systematically preferred, but privilege national suppliers."

These procurement policies include special or exclusive rights or authorizations granted by national authorities concerning the supply or management of networks for providing the service concerned, and exclusive rights to exploit a given geographical area. The aim of the Directive is not to remove these exclusive rights. Rather, the aim is to prevent governments from using the occasion of their conferral as a means of requiring the recipient firm to use nationally produced goods. The Directive, therefore, requires contracting entities to follow certain procedural rules when they award contracts. The original Article 2 provided that the Directive would apply to contracting entities which were either: (a) public authorities; or (b) entities which had as a principal activity either the supply or management of networks providing a service to the public in connection with the production, transport, or distribution of electricity, gas, and heat or the exploration or extraction of oil, gas, coal, and other solid fuels on the basis of a license.⁸⁶ Article 3 of the text adopted by the Council in March, however, provides that contracting entities

83. The energy, transport, water and telecommunications sectors were originally excluded from the scope of Council Directive 71/305/EEC on public works contracts, — O.J. EUR. COMM. (No. L 185) 5 (1971), as amended, — O.J. EUR. COMM. (No. L 225) 41 (1978) —; and from Council Directive 77/62/EEC on public supply contracts, as amended O.J. EUR. COMM. (No. L 13) 1 (1971).

84. *Re-examined Proposal for a Council Directive on the Procurement Procedures of Entities Operating in the Water, Energy, Transport, and Telecommunication Sectors*. 1989-1990 EUR. PARL. DOC. (COM. No. 302) (1990).

85. See EC Commission, *Proposal for a Council Directive on the Procurement Procedures of Entities Providing Water, Energy, and Transport Services*, 1987-1988 EUR. PARL. DOC. (COM. No. 377) 5 (1988) (information of the Commission of the EC).

86. See the version published in Aug. 1989. 1988-1989 EUR. PARL. DOC. (COM. No. 380) (1989) (information of the Commission of the EC).

engaged in the exploration or extraction of these same fuels may be exempted from the provisions of the Directive provided that certain conditions are followed. These conditions essentially relate to the terms under which the Member States themselves grant hydrocarbon exploration and production licenses. If exemption from the Directive is requested, the Member State must convince the Commission that the terms of its licenses and concessions, as well as the method of awarding these licenses, do not operate to discriminate against other Community nationals. Thus, at the time a license or concession is granted, other entities must be also free to apply under the same conditions as the contracting entity. Further, the technical and financial capacity of the applicants must be established prior to any evaluation of the merits of competing applications for authorization. If a Member State chooses to opt for the exemption procedure, then the procedures for granting exclusive licenses may therefore require modification. The exemption procedure is limited, however, to hydrocarbon exploration and production activities and does not extend to transmission or distribution. It is important to know that Article 9 of the Procurement Directive expressly excludes contracts for the purchase or supply of energy, or of fuels for the production of energy from the scope of the Directive. The French government had pressed, unsuccessfully, for the inclusion of fuel as a way of introducing a type of back-door transit obligation.

Although the new Directive is similar in scope to the recently amended Public Supplies⁸⁷ and Public Works Directives⁸⁸, it is more flexible in a number of important aspects. First, the thresholds for supplies contract are higher — at 400,000 ECUS — as opposed to 200,000 ECUS.⁸⁹ Second, whereas the Public Supplies and Public Works Directives provide that open tendering procedures should be preferred to negotiated or selective tender procedures, the Directive for the excluded sectors allows the contracting entities more leverage in choosing the procedures most suited to their own requirements. Finally, the provisions of the new Council Directive on application of review procedures to the award of public supply and public works contracts⁹⁰ will not apply to the excluded sectors, where as we have seen private utilities are also involved. A separate draft surveillance measure for the award of contracts in these sectors has now been published.⁹¹

Energy is not yet covered by the GATT Agreement on Government Procurement, which is itself further restricted to the purchasing activities of central government bodies.⁹² The Commission, anxious to maintain its bargaining strength in future negotiations over the extension of the Code, insisted on the insertion of Article 29 in the new Directive. Under the terms

87. Council Directive — O.J. EUR. COMM. (No. L 127) 1 (1989).

88. Council Directive 89/440/EEC, — O.J. EUR. COMM. (No. L 210) 1 (1989).

89. ECUS: a monetary unit for the Member States.

90. Council Directive 90/665/EEC, — O.J. EUR. COMM. (No. L 393) 33 (1990).

91. *Proposal for a Council Directive* co-ordinating the laws, regulations, and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport, and telecommunications sectors, (information of the Commission of the EC). 1989-1990 EUR. PARL. DOC. (COM. No. 297) (1990).

92. See generally VAN BAEL, PUBLIC PROCUREMENT AND THE COMPLETION OF THE INTERNAL MARKET, LEGAL ISSUES OF EUROPEAN INTEGRATION 21-48 (1989).

of this Article, a contracting entity can reject an offer if more than half the price offered represents the value of products manufactured or services performed outside the Community.

2. Fiscal Harmonization

The priority of fiscal harmonization, which was stipulated in the White Book of 1985,⁹³ has proved much more elusive. The latter had stipulated that all fiscal barriers to trade in the EC should be removed through the approximation of indirect taxation by 1992. The large differences in the way energy is taxed in the Member States, and the varying rationales for the adoption of these taxes is widely considered to be a major obstacle to the completion of the internal energy market. In 1987, the Commission issued a number of proposals on energy taxes as part of its global package for the approximation of indirect taxation, the removal of fiscal frontiers, and the setting up of an internal market.⁹⁴ A separate proposal on the approximation of the rates of excise duty on mineral oils was published at the same time.⁹⁵ These proposals met with substantial opposition and are currently under revision.

The Commission has only now begun to deal with the numerous para-fiscal taxes which certain Member States impose on certain fuels, particularly on heavy fuel oils and on natural gas consumption. It is of interest to note that in its recent energy projections, published as *Major Themes in Energy to 2010*,⁹⁶ the Commission has based its forecasts on the assumption that energy taxes will not be harmonized before that date.

III. RECONCILING MARKET INTEGRATION WITH ENVIRONMENTAL AND SECURITY OF SUPPLY OBJECTIVES — TOWARDS A COMMUNITY ENERGY POLICY?

The gradual shift in focus to a more cautious approach to energy market integration, based more on cooperation than competition, appears to have resulted from the opposition of the Member States and their utilities to the threat of Community interference in their affairs and as a consequence of the Commission's own efforts to reconcile market integration with security of supply and environmental objectives. In September, 1989, the Commission published *Major Themes in Energy to 2010*, a document outlining its thinking on the Community's energy objectives for the period 1995-2010.⁹⁷ It examines various scenarios for energy use and production and concludes by suggesting that the Community must meet three objectives of sustaining economic growth having a clean environment with secure and moderately priced energy supply. It goes on to suggest that these goals "are not incompatible, but matching them does need an energy policy."⁹⁸ Although there is no attempt

93. 1984-1985 EUR. PARL. DOC. (COM. No. 310) (1985), *supra* note 9.

94. 1986-1987 EUR. PARL. DOC. (COM. No. 320) (1987).

95. *Proposal for a Council Directive on the Approximation of the Rates of Excise Duty on Mineral Oils*, 1986-1987 EUR. PARL. DOC. (COM. No. 327) (1987) (information of the Commission of the EC).

96. *See Energy in Europe*, Special Supplement, Sept., 1989.

97. Published as a special issue of *Energy in Europe*, Sept., 1989.

98. *Id.* at 46.

to spell out the content of such a policy in the September, 1989 study, two more recent Commission Communications provide a more concrete indication of the Commission's general orientation. This is not to say, however, that the various legal problems which the Community is likely to encounter in realizing these three potentially conflicting objectives have all been reconciled.

A. The Commission Communication on Energy and the Environment

In November, 1989, the Commission forwarded a Communication to the Council which was widely expected to address directly the question of the interaction of energy and environmental objectives. In fact this document does little more than outline a series of rather loosely-defined priorities for future action. It begins by repeating the various scenarios for economic development, energy use, and environmental pollution control developed in *Energy to 2010*. It then outlines several horizontal orientations aimed at the better integration of the environmental dimension into both Community and national energy policy. These include four concrete initiatives:

the promotion of the application of energy technology throughout Europe by means of a package of Community aid (the Thermie programme); the launching of a Special Action Programme for Vigorous Energy Efficiency (SAVE) to counterbalance low energy prices; the development of industry 'codes of good conduct' on rational energy use; the creation of a committee of experts to review the use of taxation regimes as incentives to energy efficiency.⁹⁹

The document also suggests that national energy policies should reflect a number of goals which include: the wider use of environmental impact analysis; concerted action on energy and efficiency and conservation, with an emphasis on the integration of environmental costs into prices; and a more sustained effort to promote the use of low emitting fuels such as gas, nuclear, and renewables, thus reducing CO₂ emissions.

Laudable as these various objectives might be, the Energy and Environment Communication is a vague document, which is perhaps more remarkable for the issues it does not address. In fact it expressly avoids tackling the "specific environmental problems relevant to the realization of the internal market." Although these complex issues cannot be discussed in detail here, two sets of potential distortions to intra-Community competition may be mentioned by way of illustration. Firstly, there are substantial national variations in the emission control standards applied to stationary polluters, such as electricity generators and oil refineries. A study undertaken for the Commission, for example, suggested that these differences would result in significant discrepancies between the Member States in the compliance costs to be born by refiners.¹⁰⁰

In late 1988, the Energy Council failed to reach agreement on a proposed recommendation on the future of the Community's refining industry. Certain Member States, (Germany, the Netherlands, and Denmark) wished to pursue

99. This program has now been adopted as Council Regulation 2008/90, — O.J. EUR. COMM. (No. L 185) 1 (1990).

100. *The Oil Market and the Refining Industry in the Community until 1995*, 1987-1988 EUR. PARL. DOC. (COM. No. 491) 52 (1988) (information of the Commission of the EC).

a policy of uniform environmental protection norms while, the remainder firmly opposed such an approach. Similar problems may also arise in the electricity sector. Council Directive 88/609¹⁰¹ sets emission standards for SO₂, NO₂ and dust covering *new* plants.¹⁰² It also specifies target reductions in aggregate national emission of SO₂ and NO₂ from existing plants. Each Member State has different emission reduction targets for various dates, reflecting the energy programs and the technical capabilities for each country. This Directive does not appear to guarantee that there is any real equivalence of effort at the national level in the implementation of emission controls. This means that the electricity sector in certain Member States may be required to bear much higher costs than in those States where environmental priorities are not so rigorously pursued. Thus placing it at a competitive disadvantage in a more open or integrated electricity market.

Secondly, there is substantial variation in the extent, as well as in the mechanisms, of support which Member States make available for the introduction of pollution reduction technologies or for the promotion of environmentally-friendly fuels. Thus for example, in West Germany, DM 648.6 million was awarded out of public funds for environmental protection measures in 1985 alone. High levels of subsidy may put national firms at an unfair advantage, in possible contravention of Article 92,¹⁰³ while taxes and charges, which put imported fuels at a disadvantage, may be contrary to Articles 9 and 12¹⁰⁴ or alternatively, Article 95¹⁰⁵.

In seeking to strike an adequate balance between environmental and market integration objectives, the Commission is faced with a number of problems.¹⁰⁶ In particular, the extent to which Member States retain competence to introduce or maintain environmental protection must be considered in light of the amendments to the EEC Treaty introduced by the SEA. As already mentioned in Section 1 above, the new Articles 130R and 130S explicitly grant to the Community competencies in environmental policy which it did not expressly enjoy before. Community competence is limited in several ways, however. Firstly, in accordance with Article 130R(4)(i), the Community may only take action to the extent to which the environmental objectives specified in Article 130R(1) can be attained better at Community level than at the level of the individual Member States. Secondly, the Member States may maintain or introduce more stringent protective measures even where Community measures have been adopted pursuant to Article 130S. Furthermore,

101. — O.J. EUR. COMM. (No. L 335) 31 (1988).

102. Defined as plant which received a construction or operation license on or after July 1, 1987.

103. Article 92 provides that "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or production of certain goods shall in so far as it affects trade between Member States be incompatible with the common market".

104. Article 12 prohibits the introduction of new customs duties on imports or exports or any charges having equivalent effect.

105. Article 95 prohibits Member States from discriminating against imported products in the manner in which they impose internal systems of taxation.

106. For a fuller discussion, see Hancher, *Energy and the Environment: Striking a Balance?* 26 C. L. REV. 475-512 (1989).

even where Community harmonizing measures are based on Article 100A, Article 100A(4) expressly allows a Member State to apply national provisions on the grounds, *inter alia*, of environmental protection. These could theoretically include divergent technical standards or emission controls.

At the same time, as far as state subsidies and environmental charges are concerned, the new Articles 130R-T do not displace the Member States general duties under Articles 92, 9, 12, or 95. Article 130R(2)(i) elevates the principle of the polluter-pays to a Treaty provision, so that all subsidies which failed to reflect this principle are, in theory, illegal. Nevertheless, the Commission has stated that it will allow derogations from that principle in certain rather loosely defined cases at least for a transitional period.¹⁰⁷

B. *Security of Supply*

In Section II of this article it was noted that while a commitment to supply security has remained a Community objective, the problem of reconciling it with increased competition was not squarely addressed in the Document. It was also observed, that the existing jurisprudence of the Court of Justice continues to leave the Member States substantial, if yet ill-defined, discretion to continue to impose restrictions on free movement of goods and services in the interests of public security. Initially, the Commission maintained that a balance between these two objectives could be struck — more integrated markets should lead to greater flexibility of supply.¹⁰⁸ Even prior to the recent events in the Gulf, it became clear that the security issues required reappraisal. The Working Document on Security of Supply, the Internal Energy Market and Energy Policy, published on July 4, 1990, addresses some of these issues. This Document affirms that a completely free market cannot safeguard energy supplies sufficiently. But at the same time, the Commission declares its determination to reduce to a minimum, national intervention in the form of state aids and subsidies. To achieve this goal, this Document advocates a two-stage approach to developing an EC-wide policy. The first stage will be to use existing legal instruments to incorporate national systems within a common framework. The Commission intends to draw up an overall framework for national aid, with the emphasis lying on Community as opposed to national benefit. Member States are to be given an opportunity to indicate which measures they regard as indispensable to security of supply in their region, and to determine the type of instruments needed, e.g. subsidies etc.

Once a suitable framework has been developed, each additional national measure taken to safeguard supplies will be judged separately to ensure com-

107. See Commissions of the EC, *Tenth Report on Competition Policy*, 1989, points 225-26, extending the transitional period for favoring aids on environmental protection to Dec. 31, 1986. Although the Commission has suggested that the adoption of Articles 130R-T "calls into question the concept of a purely transitional approach [to environmental aids], it is clear that improvements in the environment will remain a major task for an indefinite period. Pending a review of the application of the 'polluter pays' principle, the Commission has decided to continue to apply, for the period covered by the Fourth EAP, the existing framework on State aids (Commission of the EC, *Sixteenth Report on Competition Policy*, 1987, point 259).

108. See the statement of the Director-General for Energy, *Energy in Europe*, reproduced in *ENERGY AND THE INTERNAL MARKET* 10 (1989).

patibility with Community laws on, for example, competition and free movement. Furthermore, the Commission has indicated its intention to impose a limitation on the share of national electricity markets retained for national companies. The electricity sector appears to have been singled out because it is the least integrated of the energy sectors.

It is too early to assess the likely impact of this Working Document. Its emphasis on cooperation between the Member States and the Commission over the selection of those instruments which the former consider necessary to maintaining national security would appear to indicate a desire to continue the essentially pragmatic approach to state aids and subsidies which the Commission has adopted in the past twelve months.¹⁰⁹ In several instances, it has preferred to negotiate informally with Member States to secure minor adjustments to potentially restrictive national measures which have been justified as necessary to guarantee security.¹¹⁰ This is perhaps to be regretted. In the absence of a formal decision from the Commission, more precise legal definitions of the meaning of the security of supply, in the sense of the exemption provided for by Article 36 and in the sense of system security or system integrity implicit in Article 90(2), are unlikely to be forthcoming in the near future.

IV. CONCLUSION

The realization of the internal energy market by 1992 has presented the Community institutions with a complex task. The emphasis which has been placed on the creation of a common energy market through closer market integration has caused the Commission to re-direct its thinking towards the formulation of a common energy policy. This article has argued that the basic Treaty principles on the free movement of goods and on the promotion of effective competition cannot be easily applied in the pursuit of the more straightforward goal of market integration. The structure and organization of the European energy sector, especially that of the network bound sectors, raises a number of legal questions which have yet to be answered definitively by the Court of Justice. The two new directives on electricity and gas transit do not add to the Commission's substantive powers. I have argued that the preferred approach to enhanced market integration is now the promotion of cooperation as opposed to competition between national utilities.

Now that the Commission has begun its efforts to reconcile the goals of market integration with environmental and security of supply objectives within the framework of a common energy policy, the suitability of these same basic principles to the realization of this difficult, but vitally important, task

109. The Commission has however, adopted a more rigorous approach to state aids for the coal sector within the framework of Decision 2064/86/ECSC.

110. The most noteworthy case being the informal decision reached on the so-called non-fossil fuel quota, introduced in the United Kingdom's Electricity Act 1989. The Commission received a complaint that this quota, which is imposed on all public electricity suppliers in the United Kingdom, amounted to a restriction on the free movement of goods in as much as it obliged them to purchase nationally-produced nuclear fuel. The Commission reached an informal agreement with the British government that the non-fossil fuel quota could be justified as a measure designed to secure diversity in fuel supply. See Commission Press Release, Mar. 28, 1990.

becomes even more questionable. Yet, neither in its Communication on Energy and the Environment, nor on Energy Security and the Internal Market, has the Commission indicated any desire to propose new and more refined legal instruments for the attainment of its proposed goals. Once more the emphasis is on pragmatic cooperation and negotiation between the Community institutions and the Member States. In this context, the Commission's commitment to a determined application of Community law seems somewhat misplaced. It is likely that it will continue to prefer informal or negotiated settlements with national governments which seek to justify restrictions on trade for environmental or security ends. Although such a strategy may be a consequence of the political realities which the Commission must confront, it is a strategy which is unlikely to lead to the creation of a true internal energy market in the near future.