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Angelika Hamacher

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**Title:** An Internal Market for Electricity and the  
European Competition Rules

**Subtitle:** Study on the Application of Articles 85-90 EEC  
Treaty to the Electricity Supply Industry with  
Emphasis on the Legal Situation in England and  
Germany

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**Submitted for the qualification:** M Jur

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An Internal Market for Electricity and the  
European Competition Rules

- Study on the Application of Articles 85-90 EEC Treaty  
to the Electricity Supply Industry with Emphasis on the  
Legal Situation in England and Germany -

The thesis examines which legal instruments the European Community has to support the establishment of an internal electricity market. The main emphasis lies on the application of the EEC Treaty rules on competition (Articles 85-90) to the electricity supply industry. The paper in particular assesses to what extent the European competition law is a suitable instrument to support the completion of an internal electricity market in relation to the present level of integration.

The thesis comes to the conclusion that Art. 85 (1) as well as Art. 86 EEC Treaty can be applied and indeed have to be applied to all anticompetitive measures on the electricity market. In doing so, special consideration has to be given to the technical and economic peculiarities of this branch.

Moreover it will be shown that the commercial arrangements made in connection with the privatisation of the ESI in England and Wales do not infringe Art. 85 (1) or 86 EEC Treaty while some of the agreements on the German electricity market contradict these provisions.

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## Abbreviations

### Periodical publications

CMLR	Common Market Law Report
CMLRev	Common Market Law Review
DB	Der Betrieb
ECLR	European Competition Law Review
ECR	European Court Reports
ET	Energiewirtschaftliche Tagesfragen
EuLRev	European Law Review
EuR	Europarecht
NJW	Neue Juristische Wochenschrift
RdE	Recht der Elektrizitätswirtschaft
RIW	Recht der Internationalen Wirtschaft
VIK-Mitt.	Mitteilungen der Vereinigung Industrieller Kraftwirtschaft
WRP	Wettbewerb in Recht und Praxis

### Other abbreviations

EC	European Communities
ECJ	European Court of Justice
EEC	European Economic Communities
EdF	Electricité de France
EnWG	Energiewirtschaftsgesetz
ESI	Electricity Supply Industry
OJ	Official Journal of the European Communities
REC	Regional Electricity Companies
UCPTE	Union pour la Coordination de la Production et du Transport de l'Electricité

## Declaration

The present thesis contains no material which previously has been submitted for a degree in this or any other university.

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**An Internal Market for Electricity and the**  
**European Competition Rules**

- Study on the Application of Articles 85-90 EEC Treaty to the Electricity Supply Industry with Emphasis on the Legal Situation in England and Germany -

## Chapter 1 Introduction

The goal of the Single European Act is to establish by January 1, 1993 a single market, an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.

According to the President of the European Commission, M. Jacques Delors, "[...] the energy sector will form an essential part of the single market which we are building"<sup>1</sup>.

This statement is typical of the importance now attached to the energy sector by the European Commission. Though it has been mentioned neither in the Single European Act nor in the Commission's White Paper *On Completing The Internal Market* (COM (85) 310 final, 14.6.1985), there is agreement that energy is an essential element of the challenging single market exercise. The existence of a modern industrial nation depends on a sufficient energy supply. Technical, economic, and cultural developments are impossible without a secure and reliable power supply; a power shortage would affect the entire economy.

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<sup>1</sup> (1988) Energy in Europe, no. 11 p. 7 as cited in P. Cameron, "An Internal Energy Market in Europe?" in W. Harms (ed) Konturen eines EG-Energiemarktes, pp. 13-32, p. 13.



Being an important element of the internal market the Community is building, energy has received quite a lot of attention lately.

A number of Directives have been issued within the last months that are meant to support the integration of the energy markets. The Commission has proposed several additional provisions and plans to put forward more proposals. Some of the provisions suggested not only concern the Member States but the whole of Europe including the USSR.

In particular, the Directorate General for Competition has become very active towards the energy markets. It intends to attack the monopolistic structures that exist on the electricity and gas markets within the Community, in order to support the free flow of those energies across borders. In this connection the Commission has recently started several proceedings against a number of Member States. The crucial question for the Commission is why "[...] a company, town or another large consumer [can] not freely buy electricity or gas supplies in the next door country in the same way as we can buy other goods and services without let or hindrance anywhere in the European Community [?]"<sup>2</sup>

The present thesis examines which legal instruments the European Community has, to support the establishment of an internal electricity market. The main emphasis lies on the application of the EEC Treaty rules on competition (Articles 85-90) to the electricity supply industry. The paper in particular assesses to what extent the European competition law is a suitable instrument to support the completion of an internal electricity market in relation to the present level of integration, and how Articles 85-90 EEC Treaty accommodate the peculiarities of this branch.

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<sup>2</sup> "Competition in the European Community's Electricity and Gas Markets", Speech by Sir Leon Brittan, Vice-President of the Commission of the European Communities, *Europe-Documents*, No 1708, 25.4.1991, p. 2.

In connection with the application of Articles 85-90 EEC Treaty to the electricity market, the legal situation in England and Wales as well as in Germany are of particular interest.

The electricity supply industry in England and Wales has recently been privatized with the aim to transform the formerly monopolistic electricity market into a competitive one.

The German electricity supply industry on the other hand still is characterized by supply monopolies rooting in commercial agreements between the utilities. Germany, at the same time, is one of the strongest opponents of the introduction of competition to the electricity market.

The main body of this paper begins with an examination of the aims of an internal energy market (Chapter 2). This is followed by an evaluation of the status electricity has on the European energy market. The next part scrutinizes the electricity market as it shows itself today. Special attention will thereby be paid to existing trade barriers and other obstacles for the completion of an internal electricity market. Following on, the legal instruments of the European Community to support a further integration will be discussed, and the steps taken already, will be evaluated. It also has to be examined which Treaty rules are relevant for the introduction of competition to the electricity market, and what the relationship between them is. This includes an assessment of the status the European Competition Law (Articles 85-90 EEC Treaty) has in connection with the completion of an internal electricity market. Other questions that will be discussed are; for which groups of customers can competition become relevant and what are conceivable models of competition?

Chapter 3 looks at the legal problems linked with the application of Articles 85-90 EEC Treaty to the electricity supply industry. In doing so, it is necessary to examine whether the application of Articles 85 and 86 EEC Treaty to anticompetitive measures on the electricity market, is subject to any kind of restriction. The argument, for example, has been raised that the approximation of national energy laws must be given priority over the application of Articles 85 and 86 EEC Treaty

to the electricity supply industry. It also will be discussed what implications the lack of measures under Art. 87 (2) (c) EEC Treaty has for the application of those provisions. The main emphasis of this part, however, lies on the question whether the English and Welsh as well as the German electricity utilities are covered by Art. 90 (2) EEC Treaty, and whether those undertakings thus are excluded from the certain Treaty rules. In this connection, it will be instructive to analyse the Commission's approach to Art. 90 (2) EEC Treaty, which can be deduced from its recent Decision concerning Dutch electricity supply undertakings. It also is of interest to scrutinize whether different outcomes in the interpretation of Art. 90 (2) EEC Treaty lead to different overall results in the application of the European Competition Law to the electricity market.

In Chapter 3 G the discussion turns to the interpretation of Articles 85 and 86 EEC Treaty with respect to the electricity supply industry. It will be examined whether, and how, those provisions provide for the opportunity to take the peculiarities of the electricity market into account. In connection with Art. 85 (1) EEC Treaty, this leads to the question whether that rule contains a "rule of reason". Following on, chapter 3 H discusses which Treaty objectives other than competition are of particular importance for the electricity market. In this part it will be established which anticompetitive measures in general are compatible with Community values, and thus do not infringe Art. 85 (1) or 86 EEC Treaty.

Finally, Chapter 4 deals with anticompetitive agreements and conducts that exist on the electricity markets in England and Wales as well as in Germany. This chapter examines whether those measures contradict Articles 85 (1) or 86 EEC Treaty, or whether they find compensatory justification under higher Treaty objectives relevant for the electricity market. As far as certain restraints are justified, the question arises whether they are inevitable and thus always will find justification, or whether a further integration of the electricity market will lead to a cessation of their justification.

The paper considers the legal situation as on July 1, 1991.  
EC documents have been taken into account as far as they were  
published in the Official Journals before July 1, 1991.

## Chapter 2 The European Dimension of the Energy Market

### A. The Aim of an Internal Market for Energy

#### I. The European Energy Policy Towards the Completion of the Internal Market

Recognizing the importance of the energy sector<sup>3</sup> in connection with the single market programme, the EC Council of Ministers in September 1986 adopted a resolution<sup>4</sup> concerning *New Community Energy Policy Objectives for 1995*. This resolution emphasizes the necessity of a greater integration of the energy market, which should be free from barriers, to trade "with a view to improving security of supply, reducing costs and improving economic competitiveness"<sup>5</sup>.

On the basis of this resolution the EC Commission in June 1987 started an initiative to promote the completion of a single market for energy. This step by the Commission was welcomed by all Member States.<sup>6</sup> Thereupon the Commission published a paper on the feasibility of an internal energy market.<sup>7</sup> In this document the Commission listed up both existing trade restrictions and other obstacles to energy trade in the EC. The Commission also presented a political strategy for the removal of these obstacles.

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<sup>3</sup> For the development of the European Energy Policy see P.J.G Kapteyn, P. VerLoren van Themaat, Introduction to the Law of the European Communities, pp. 755-764.

<sup>4</sup> *Council Resolution of 16 September 1986 concerning new Community energy policy objectives for 1995 and convergence of the policies of the Member States*, OJ No C 241, 25.9.1986, p. 1.

<sup>5</sup> *Ibid.*, p. 2.

<sup>6</sup> T. Damm, "Plädoyer für einen Binnenmarkt auch im Energiesektor", (1988) EG-Magazin No 10 supplement p. II.

<sup>7</sup> *The Internal Energy Market (Commission Working Document)*, COM (88) 238 final, 2. May 1988.

Starting out from that working document the Commission made several proposals for reasonable steps towards the completion of an internal market for energy.<sup>8</sup> On the basis of these proposals the EC Council recently has passed three new Directives<sup>9</sup>.

In addition to that, the Commission has made two proposals in connection with the energy market during the present Intergovernmental Conferences. One was a proposal for a *Energy Charter* to be adopted by all European countries, including the USSR.<sup>10</sup> This charter should, in the Commission's view, cover access and exploitation of energy resources, investment rules, freer trade in energy products, safety norms and research and development.

The Commission also proposed that the revised Treaty should specifically consider an internal energy market and mention the security of supply.<sup>11</sup>

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<sup>8</sup> See for example: *Proposal for a Regulation amending Regulation (EEC) No 1056/72 on notifying the Commission of investment projects of interest to the Community in the petroleum, natural gas and electricity sectors*, COM (89) 335 final, 15. September 1989.

<sup>9</sup> *Council Directive of 29. June 1990 concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users*, OJ No L 185, 17.7.1990, p. 16; *Council Directive of 29. October 1990 on the transit of electricity through transmission grids*, OJ No L 313, 13.11.1990, p. 30; *Council Directive of 31. May 1991 on the transit of natural gas through grids*, OJ No L 147, 12.6.1991, p. 37.

<sup>10</sup> Communication from the Commission on the European Energy Charter, COM (91) 36 final, 14.2.1991; if the proposal gets approval from EC governments, it will be the basis on which the Community calls an international conference in the second half of 1991.

<sup>11</sup> *Europe-Documents*, No. 5440, 27.2.1991, p. 9.

## II. Benefits of an Internal Energy Market

The fact that there is no common energy market in Europe yet, causes, according to the *Cecchini Study*<sup>12</sup>, expenses of 20-30 billion ECU a year. In other words, the establishment of an internal market for energy could lead to costsavings that correspond to 0,5 - 1,0 % of the Community Gross Domestic Product (GDP).<sup>13</sup> This is equivalent to around the whole of Ireland's GDP.

The economical benefits of a better integrated energy sector are obvious. The removal of obstacles for the exchange of energy would advance the development of a more competitive market. As a result energy resources would be better allocated<sup>14</sup>, which would lead to a decrease of energy prices. Lower prices benefit individual customers. They also make the power using industries more efficient<sup>15</sup> and thereby enhance their competitiveness in the world markets.

The Community's energy industry itself would also benefit from a common energy market. More integration would enhance the rationalization of production, transmission and distribution of energy.<sup>16</sup> This in turn leads to lower production prices which would support the competitiveness of European power supply enterprises in international markets.

Last but not least, an internal energy market would also improve the security of supply in all Member States. More interconnections in the energy industry would raise the flexibility of the energy companies as well as the solidarity between the Member States.

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<sup>12</sup> P. Cecchini, The European Challenge 1992 - The Benefits of a Single Market.

<sup>13</sup> P. Faross, "The Internal Energy Market" in W. Harms (ed) Konturen eines EG-Energiemarktes, pp. 3-12 (p. 4); see also COM (88) 238 final, p. 6.

<sup>14</sup> Faross, *op. cit.* n. 13, p. 4.

<sup>15</sup> In some industry sectors like steel and glass energy presents 25 - 30 % of the production cost; see COM (88) 238 final, p. 5.

<sup>16</sup> *Ibid.*, p. 5.

## B. Electricity as Part of the Energy Market

Electricity is an exceedingly important element of the energy supply in the European Community. There are several reasons for this.

The electricity share of the community's final energy consumption amounts to 16,4 %<sup>17</sup> and experts expect that, by the end of the century, electricity will account for well over 20 % of the final energy demand.<sup>18</sup>

This demonstrates how essential electricity is for the standard of living, the productivity of the industries and the security of energy supply.

Other reasons for the importance of electricity are connected with the fact that electricity is the principal area for the use of primary energies<sup>19</sup>; in 1986, 33 % of all primary energies were used to generate electricity.<sup>20</sup>

The production of electricity is the only significant area for the use of renewable, non-polluting sources of energy like wind and water.<sup>21</sup> The importance of those energy sources will further increase with the growing awareness of people for the necessity to protect the environment.

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<sup>17</sup> *Ibid.*, Annex VI Table 5.

<sup>18</sup> (1988) Energy in Europe, "Improving the efficiency of electricity use", No 10 pp. 53-55, p. 53.

<sup>19</sup> **Primary energy** is the content of energy in natural energy carriers for example coal, oil, gas etc.

Energy that is obtained by the transformation of primary energy into heat, mechanical work or electricity is called **secondary energy**; Brockhaus, Naturwissenschaften und Technik, vol. 4, p. 124.

<sup>20</sup> COM (88) 238 final, p. 68.

<sup>21</sup> H. Steeg, "Elektrizitätserzeugung und -versorgung aus internationaler Sicht" in R. Lukes (ed) Ein Binnenmarkt für Elektrizität, pp. 117-131 (p. 120).

The fact that one can use several primary energies to generate electricity raises the political significance of this type of energy. Nearly every Member State has its own favourite source of energy for the generation of electricity. Germany for example prefers coal, Great Britain wants to use its oil and coal, the Netherlands rely on gas and France and Belgium favour nuclear power.<sup>22</sup>

The possibility of using several energy sources also, makes a contribution to the security of supply.

Firstly, it causes a certain amount of flexibility in case of supply bottleneck for a particular primary energy.

Secondly, the pushed deployment of energy sources other than oil enables the dependence on oil to be reduced. The importance of this aspect was proven once again in the Gulf crises. Though it is true that oil today is less important to the industrial world's economy than it was during the two oil crises of 1973 and 1979<sup>23</sup>, the rise in oil prices during the Gulf crisis nevertheless has affected the world economy considerably.

How much the European economy is influenced by any kind of crisis concerning oil is illustrated by the fact that the crude oil imports from Iraq and Kuwait together only account for 11 % of the overall Community imports of crude oil.<sup>24</sup>

The great significance of electricity for the energy balance of the Community shows its importance in the establishment of an internal energy market in Europe. The aims of a single energy market, such as

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<sup>22</sup> R. Schavoir, "Energie-Binnenmarkt verlangt Opfer", (1988) EG-Magazin no. 10 supplement p. VI.

<sup>23</sup> "Global shadow lengthens", Financial Times 12.12.1990.

<sup>24</sup> 1990 Rapid Reports, Energy and Industry, no. 11 p. 1;

In answer to the Community's proneness to oil crises the Commission has proposed that the Member States should build up strategic oil stocks to help to ensure price stability and security of supply at times of crises; "Brussels urges EC strategic oil reserves", Financial Times 29.5. 1991.

lower costs and better security of supply, can in particular be achieved through the promotion of an internal market for electricity. The EC Commission expects that a greater integration of the national grids, as well as a better planning and operation of the generation and transmission systems, would bring remarkable economic benefits.<sup>25</sup>

It follows that there is every economic justification for the Member States to create an internal electricity market.

### C. Survey of the Present Situation on the Electricity Market

#### I. Introduction

The European Community has several opportunities to promote the establishment of an internal market for electricity in Europe, the details of which will be discussed below<sup>26</sup>.

In order to evaluate the pros and cons of the individual solutions it will first be necessary to scrutinize the present structure of the European Electricity Supply Industry (ESI) as well as to analyse the existing trade barriers and other obstacles to the completion of an internal electricity market.

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<sup>25</sup> The potential annual savings between 1992 and 2000 are estimated to be ECU 55 billion; see *Communication from the Commission: Increased intra-Community electricity exchanges: a fundamental step towards completing the internal energy market*, COM (89) 336 final 29. September 1989, p. 10; see also the calculations in M. Emeron, "The economics of 1992" (1988) European Economy no. 35 pp. 84-85.

<sup>26</sup> *Infra*, chapter 2 part D; see also the Commission's strategy for action, set out in COM (88) 238 final, pp. 13-29.

## II. Structure and Ownership of the Electricity Industry

The first feature of the electricity market is a substantial governmental control over the electricity utilities everywhere in the EC<sup>27</sup>. It is true for all Member States that the ESI is highly influenced by public interventions and restrictive regulations. The German state, for example, defines aims of the electricity supply as well as its framework in a number of statutes.<sup>28</sup>

Apart from the omnipresent governmental control, however, the Member States of the European Community have, related to their historic, social and economic development, adopted different structures for their ESIs.

These structures can be divided into three main groups and they range from public monopolies, as in France, through diversified systems with public as well as private ownership, as in Germany, to a system in Great Britain which recently has been entirely privatised.<sup>29</sup>

It would go beyond the scope of this thesis to give a detailed description of the structure and ownership of the ESI in all twelve Member States. As the ownership structure in the Member States is

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<sup>27</sup> *Communication from the Commission on the Community regime for procurement in the excluded sectors: water, energy, transport and telecommunications*, COM (88) 376 final, 11. October 1988, p. 34.

<sup>28</sup> Examples for those laws are: *Energiewirtschaftsgesetz* = Law on Energy Industries, *Gesetz gegen Wettbewerbsbeschränkungen* = Anti-Cartel-Law, *Bundesimmissionsschutzgesetz* = Law on Environmental Protection against Obnoxious Substances, *Atomgesetz* = Atomic Energy Law.

<sup>29</sup> This statement up to now is only correct for England, Wales and Scotland. The ESI in Northern Ireland has not been privatised yet. The only utility, *Northern Ireland Electricity*, still is a public undertaking. The present government, however, plans to privatise the Irish ESI in the foreseeable future; see "Government plans to split utility in two for privatisation", Financial Times 21.3.1991.

either similar to the French model or else contains elements of the German structure, it is possible to confine the survey to those two countries which are typical proponents of their respective groups. Great Britain is at present the only country with a totally privatised ESI and must thus be dealt with separately.

### 1. Public Monopolies

In some EC-Member States<sup>30</sup> the electricity supply is nationalized. The vertically integrated public monopolies cover generation, transmission and distribution of electricity. Sometimes, for example in Italy, not only the national electricity utility but also local government bodies have the right to supply their areas with electricity.<sup>31</sup>

### 2. The German Diversified System

#### a. Former Federal Territory

The ESI in the former federal territory is an example for a decentralised system.<sup>32</sup>

There are eight so called "Verbundunternehmen" that generate most of

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<sup>30</sup> France, Greece, Italy, Ireland, Portugal and up to now Northern Ireland.

<sup>31</sup> H.P. Hermann, "Ordnungsgrundlagen der Elektrizitätswirtschaft in den Mitgliedsstaaten der Europäischen Gemeinschaft", (1986) 49 RdE pp. 110-119 (p. 112).

<sup>32</sup> Spain, Denmark, Belgium, Luxembourg and the Netherlands as well have more or less decentralized ESIs. For details see: Hermann, "Ordnungsgrundlagen", *op. cit.* n. 31, pp. 112-115; H.W. Arndt, "Common Carrier bei Strom und Gas", 1989 RIW supplement to No 10, pp. 5-6; J. Grawe, "Ein gemeinsamer Strommarkt in der EG - Aus der Sicht der Elt-VU", (1987) 48 RdE pp. 242-244 (p. 242); COM (88) 376 final, pp. 29-31; for the Dutch ESI in particular see: M. Deriks, "Das Recht der Elektrizitätsversorgung in den Niederlanden", (1988) 48 RdE pp. 66-91.

the high voltage electricity. Most of these enterprises have mixed capital, the majority being public sector and the remainder being private capital.<sup>33</sup>

In addition, there are 41 "Regionalunternehmen" that transport the electricity generated by the "Verbundunternehmen" together with their own production to the local distribution boards. Some large consumers receive their electricity directly from the "Verbundunternehmen" or the "Regionalunternehmen".

The 1000 or so local distribution boards supply their customers via their own grids. These companies predominantly are in the hands of the local government bodies.<sup>34</sup>

#### b. Territory of the Former GDR

The power industry of the former East Germany, like the entire economy, passes through a period of radical change. The central guided planned economy has to be transformed into a competitive profit system.

The ESI of East Germany consisted of 18 "Kombinaten"<sup>35</sup>, two of which were responsible for the generation of electricity and one for the maintenance of the high voltage grid. In addition there was one regional energy company in each of the 15 districts supplying electricity to the customers.<sup>36</sup>

From July 1, 1990 all energy-"Kombinate" were transformed into private

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<sup>33</sup> A. Sykes/C. Robinson, Current Choices - good ways and bad to privatise electricity, Centre for Policy Studies, (1988) Study No 87 p. 29.

<sup>34</sup> Arndt, *op. cit.* n. 32, p. 3.

<sup>35</sup> A "Kombinat" is a combination of industrial manufacturing plants that usually can be found in countries with a planned economy.

<sup>36</sup> M. Geberding, "Das Energierecht der DDR", (1990) 51 RdE, pp. 70-73 (71).

stock corporations.<sup>37</sup> The two entities generating electricity and the one responsible for the high voltage grid were combined to a single "Verbundunternehmen". There are now also 15 "Regionalunternehmen". These will enter into contracts with the "Verbundunternehmen" stipulating that for the next 20 years they obtain 70 % of their demand from the "Verbundunternehmen".

The electricity utilities already have started to plan and construct new high voltage grids in order to reconnect the West German with the East German grid. Sometimes it is only necessary to revitalize old communications that existed until the nineteen fifties.<sup>38</sup>

### 3. The Privatised ESI in Great Britain<sup>39</sup>

#### a. England and Wales

Until recently the ESI in England and Wales was nationalized. The Central Electricity Board (CEGB) was responsible for generation and transmission of electricity, while the twelve Area Boards had to deal with distribution and supply. All these enterprises were public companies.

This structure of the ESI was changed fundamentally on March 31, 1990 by the 1989 Electricity Act. The British ESI now appears as follows.

The CEGB is split into four companies.

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<sup>37</sup> E. Hoffmann, "Zur Energieversorgung der neuen Bundesländer", (1990) 51 RdE, pp. 215-219 (p.216); see also H. Heck, "DDR: Strom- und Erd- gasverträge" (1990) 40 ET pp. 612-613 (p. 613).

<sup>38</sup> A. Höh, "Deutsche Versorgungsnetze wachsen zusammen", (1990) 40 ET pp. 377-378 (378).

<sup>39</sup> This account does not concern Northern Ireland. It is based on the White Paper, *Privatising Electricity* CM 322 (London: HMSO, 1988), the 1989 Electricity Act; B. Sas, "Regulation and the Privatised Electricity Supply Industry" (1990) 53 The Modern Law Review pp. 485-498; and a prospectus "The Regional Electricity Companies Share Offers" from November 21, 1990.

Firstly, there is the *National Grid Company*. This enterprise has several tasks such as operating the national transmission system and the two pumped storage power stations of the former CEGB, and coordinating the operation of all major power stations.

Secondly, there are *National Power* and *PowerGen*. These companies now own and operate the CEGB's fossil fuelled power stations, which have been divided between them.<sup>40</sup>

Thirdly, *Nuclear Electric* runs the thirteen nuclear power stations of the CEGB.

The businesses of the twelve Area Boards were transferred to the twelve *Regional Electricity Companies* (REC). The RECs essentially serve the same regional areas as their predecessor Area Boards and they are responsible for their local distribution networks.

*National Power*, *PowerGen* and the twelve *Regional Electricity Companies* have been transformed into private companies by floating them on the stock market.<sup>41</sup> The *National Grid Company* is owned by a holding company which in turn is jointly owned by the 12 RECs. *Nuclear Electric* will remain within the public sector.

#### **b. Scotland**

Until March 31, 1990 two publicly owned utilities generated, transmitted and distributed electricity in Scotland. The North of Scotland Hydro-Electric Board was the vertically integrated company responsible for northern Scotland. The South of Scotland Electricity Board supplied the south.

Under the 1989 Electricity Act this structure was changed. There are now two separated companies, *Scottish Power* and *Scottish Hydro-Elec-*

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<sup>40</sup> PowerGen is the smaller company with 20 fossil fuel generation stations and 1 hydro station. National Power owns 34 fossil fuel and 4 hydro stations.

<sup>41</sup> The shares of the twelve Regional Electricity Boards have first been traded on the London stockmarket on December 11, 1990. The shares of National Power and Power Gen were first traded on March 19, 1991.

tric. These companies have taken over the businesses of the old publicly owned enterprises. Both are still vertically integrated but they are now private undertakings.<sup>42</sup> The two Scottish nuclear stations that belonged to the South of Scotland Electricity Board now are owned by *Scottish Nuclear Ltd.* a company which will remain in public ownership.

### III. Economical and Technical Framework

Apart from the differences in ownership and structure of electricity utilities in the twelve Member States, the European electricity market is characterized by considerable similarities that concern the technical and economical framework.

#### 1. Three-Part Structure

The first common feature is the three-part structure of the electricity industry which corresponds to its main tasks: generation, transmission and distribution.

Generation is the production of electricity.

Transmission is the bulk transfer of electricity at higher voltages across the transmission grids<sup>43</sup>.

Distribution is the transfer from the high voltage grid and the delivery on local distribution networks to the customers.<sup>44</sup>

These three elements can be found in the ESI of any Member State.

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<sup>42</sup> Dealings with the shares of the two Scottish electricity companies began on June 18, 1991.

<sup>43</sup> High voltage grids transport electricity of 5-220 kV, extra high voltage grids transport electricity from 220 kV; see Brockhaus, *op cit* n. 19, vol. 2, p. 6.

<sup>44</sup> See prospectus "The Regional Electricity Companies Share Offers" from November 21, 1990.

## 2. Technical Peculiarities

Apart from this general characteristic, the ESI in all Member States is marked by its technical peculiarities.

The supply with electricity can only take place by the transport through a grid from the generator to the customer. A supply without a grid is impossible.

The amount, as well as the time, of electricity consumption are solely determined by the customers. They switch their electrical appliances on or off whenever they want, and hence determine the amount of electricity their premise is supplied with. The electricity utilities therefore have no influence on the amount of consumption. As opposed to the supply with other goods or services the electricity supplier can not wait until he is able or ready to supply. There is no such a thing as an engaged tone if one switches on the light.

The fact that the electricity utilities have no influence on the consumption, makes their task particularly difficult, because a safe supply with electricity depends on a balance between the total production and the total consumption at any given time. If the amount generated is larger than the consumption the mains frequency rises. Under reversed conditions the mains frequency falls. In both cases the electricity supply collapses if the frequency allowance exceeds narrow limits.<sup>45</sup>

The next fact that demonstrates the peculiarities of the electricity supply is that it is almost impossible to store electricity. The poor storage capability of electricity leads to a simultaneity of production and consumption.<sup>46</sup>

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<sup>45</sup> E.h.G. Klätte, "Wettbewerb und EG-Binnenmarkt", (1988) 38 ET pp. 412-421 (p. 414).

<sup>46</sup> H. Magerl, "Abkehr vom Gebietsschutz", (1989) 50 RdE pp. 154-158 (p. 154).

Therefore it is necessary at any given time to keep generation and distribution capacities ready that meet the highest imaginable demand.<sup>47</sup> This results in the need to run generation and distribution facilities that normally are not working to capacity but that are needed in times of peak demand. The running of those facilities is inevitable to avoid an overloading of the whole system in peak times.

To buy extra power in other European countries is often difficult as the reasons for high demands, like a cold winter, are basically the same, and therefore times of peak load coincide. The effect is that hardly any generator has surplus capacities.<sup>48</sup> Because of the dependence on the grid it is also impossible to buy extra power from markets like the USA that are not interconnected with the European grid. Therefore it is up to the electricity utilities themselves to make sure that sufficient spare capacities are available at all times.

### 3. Economical Peculiarities

These technical peculiarities also cause an exceptional economic situation for the ESI.

In order to have enough generation, transmission and distribution capacities available at any time, the electricity utilities are forced to plan new power plants and grids in the long term. To build or modernize power stations or construct networks takes several years<sup>49</sup>

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<sup>47</sup> H. Heltzer, "Das System leitungsgebundener Energieversorgung in der Bundesrepublik Deutschland" in J. Baur (ed.) Neue Strukturen in der Energieversorgung, pp. 99-109 (p.102).

<sup>48</sup> G. Klätte, "Mehr Wettbewerb in der Elektrizitätsversorgung durch Aufhebung der Demarkationen und Verpflichtung zur Durchleitung", (1979) 29 ET pp. 131-134 (p. 132).

<sup>49</sup> The new British gas power plants for example which are right now in their planning or first construction phase ("A new generation of power stations", Financial Times 6.12.1990) are not expected to be connected to the grid before 1993/4 ("Power groups dim long-view", Financial Times 2.2.1991).

and extremely large investments.

Therefore the ESI is a very capital-intensive economic area that requires detailed long-time planning.<sup>50</sup> It also depends on the foreseeability of developments in order to ensure the profitability of investments.<sup>51</sup>

#### IV. Supply Monopolies

The structure of the electricity market in the European Community today is characterized by another important feature that is very much connected with the technical and economical peculiarities of the ESI. There are *electricity supply monopolies* nearly everywhere in Europe.<sup>52</sup>

##### 1. Description of the Feature

In a system of supply monopolies every small customer has to buy his electricity from the local electricity supply company. Big customers too are either tied to their local distributors or in case of them being directly connected to the high voltage grid they have to obtain their electricity from a certain generation utility.<sup>53</sup>

Thus, no customer can choose his supplier. That means that the distributors do not enter into competition with each other for customers, but every distributor has a constant number of electricity consumers.

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<sup>50</sup> C. Stewing, Gasdurchleitungen nach europäischem Recht, p. 104; Arndt, *op. cit.* n. 32, p. 8.

<sup>51</sup> Stewing, *op. cit.* n. 50, p. 104.

<sup>52</sup> COM (88) 238 final, p. 74. Great Britain constitutes to a certain extent an exception from this rule; for details see *infra*, chapter 2 part C.IV.3.

<sup>53</sup> COM (89) 336 final, p. 6. This only is different when large industrial end users generate their own electricity. In this case they usually sell their surplus capacities to the public grid.

In addition, local distributors too usually cannot shop around for the electricity they then supply to their customers. Generally they are forced to buy electricity from the generator responsible for their region.<sup>54</sup>

One could ask whether there is a connection between the existence of supply monopolies on the electricity market and the respective ownership structure.

In those countries where the ESI is organized as a vertically integrated monopoly and the national electricity undertaking is responsible for all tasks concerning the supply with electricity, the organizational structure alone stipulates supply monopolies.<sup>55</sup>

However, supply monopolies also exist in countries where the ESI has a more pluralistic structure.<sup>56</sup> The exclusion of competition for electricity customers in those Member States is either based on laws or on agreements between undertakings.

The existence of supply monopolies, thus does not depend on a certain structure of ownership in the ESI.<sup>57</sup>

Exemplary for the establishment of supply monopolies by the means of private agreements is the German ESI.

## 2. Legal Position in Germany

In Germany two types of contracts are utilized to safeguard supply monopolies: the *Demarcation Contracts* and the *Concession Agreements*, both of them having a maximum duration of twenty years.

*Concession Agreements* are concluded between the electricity supply companies and the local government bodies. The agreements stipulate

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<sup>54</sup> *Ibid.*

<sup>55</sup> D. Kuhnt, "Atomstrom aus Frankreich" (1987) 37 *ET*, pp. 761-765 (p. 763).

<sup>56</sup> See enumeration in: Hermann, "Ordnungsgrundlagen", *op. cit.* n 31, pp. 112-115.

<sup>57</sup> COM (88) 238 final, p. 4.

that the municipality permits the electricity company the use of all public paths and roads belonging to the municipality to lay cables.<sup>58</sup> The local bodies also commit themselves to not granting similar usufructs to other electricity supply companies in return for an annual concessionary payment by the electricity undertaking.<sup>59</sup>

Parallel to the *Concession Agreements*, the electricity supply companies agree *Demarcation Contracts* between themselves.

In *Demarcation Contracts* the companies mutually recognize each others supply areas. They agree not to supply customers located in the service area of their contract partners.

These contracts exist between electricity supply undertakings on the same level, for example between two or more "Verbundunternehmen" or between "Regionalunternehmen". But there are also *Demarcation Contracts* for example between companies generating electricity and companies distributing electricity, containing a mutual recognition of the respective tasks.<sup>60</sup> Generating companies for instance, commit themselves to not supplying endusers other than certain big industrial consumers within the area of the distribution company directly. In return the distribution utilities agree to buy a certain percentage of their consumption from that generator.

This complementary system of *Demarcation* and *Concession Contracts* ensures that the German electricity supply companies enjoy supply monopolies. Neither end users nor local distributors can choose their suppliers.<sup>61</sup>

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<sup>58</sup> Arndt, *op. cit.* n. 32, p. 4.

<sup>59</sup> Cameron, *op.cit.* n.1, p. 21.

<sup>60</sup> Arndt, *op. cit.* n. 32, p. 4.

<sup>61</sup> H. Recknagel, "Mehr Wettbewerb in der Energiewirtschaft", (1990) 4 ET pp. 220-225 (p. 222).

### 3. Legal Position in England and Wales

The statement that there are closed systems of electricity supply everywhere in Europe is no longer entirely true for England and Wales.<sup>62</sup>

Premises having an average monthly demand<sup>63</sup> above 1 MW are free to choose their supplier.<sup>64</sup> This means that large consumers are no longer automatically customers of a Regional Electricity Board (REC) but that others, including National Power, PowerGen and certain non-local RECs, can enter into competition with the local REC for the supply of those consumers. When the Electricity Act 1989 will have been in force for four years, customers using more than 0.1 MW will be also allowed to shop around for an electricity supplier. After a period of eight years, these restrictions are expected to disappear altogether and there will no longer be supply monopolies for the RECs.

In addition, the 12 RECs are no longer forced to buy their entire demand from one particular generator. For specified quantities of their consumption, they can choose to contract with National Power or PowerGen or to receive their electricity from private generators including generators from abroad.

Summing up, large customers in England and Wales in principle can choose their suppliers and, in turn, suppliers can choose the generators from which they purchase their electricity.<sup>65</sup>

This does not mean, however, that there are no restraints to competi-

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<sup>62</sup> The same applies to Scotland.

<sup>63</sup> The average monthly demand is estimated on the basis the of the figures from the three months of highest demand over the last year; for details see J. Capel, The New Electricity Utilities in England and Wales, *passim*.

<sup>64</sup> The restriction to customers with a demand of 1 MW (called "1 MW-Club") results from the licences that have been issued for suppliers and generators in connection with the restructuring of the ESI.

<sup>65</sup> For details see Capel, *op. cit.* n. 63, *passim*.

tion on the electricity market in England and Wales at all. A number of commercial agreements have been entered into by various parties in the ESI which have repercussions on the possibility of competing for the supply of customers.<sup>66</sup>

#### 4. Summary

Apart from the English example the electricity enterprises, within the Community at present, usually enjoy a monopoly of supply in their geographic areas. This is true for the distribution to individual customers of all sizes as well as for the supply of the local distribution boards. This situation results in a relative lack of electricity trade between regional networks, as well as across frontiers.<sup>67</sup>

#### V. Legal and Administrative Framework

Apart from the ownership structures, the technical and economical peculiarities and the supply monopolies, the ESI is also very much influenced by the respective national framework governing the energy policy.

This framework has evolved over a long period of time and reflects the economic, political and social history of each Member State. Therefore, the national conditions for the electricity supply differ substantially. Those differences result in considerable variations as to electricity production costs.

Above all, the following aspects have a decisive influence on the production expenses for electricity.

The costs of electricity generation depend on the standards and strictness of environmental protection measures. These requirements are significant in the costs of building and running a power plant.

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<sup>66</sup> For details as to these agreements see *infra*, chapter 4 part B.

<sup>67</sup> "The economics of 1992" (1988) European Economy no. 35, p. 84.

The legal framework concerning the planning and construction of power plants is also important. Protected consent and appellate procedures cause an enormous rise in building costs. This in turn affects the realization of investment programmes.

Another factor of importance for the production costs of electricity is the choice of fuels.

Since nearly all Member States favour different sources of energy for electricity generation, there are significant differences as to production costs within the European Community. A comparison between Germany and France can serve as an example for this fact.

It was part of the political programs of all West German governments since 1965 to make sure that the ESI uses a certain quantity of German mineral coal for the electricity production.<sup>68</sup> This is why the so called *Jahrhundertvertrag* was agreed between the ESI and the coal mining industry. This contract determines delivery and purchase commitments for a term of 15 years and ends in 1995. Parallel to the *Jahrhundertvertrag*, the 3. *Verstromungsgesetz*<sup>69</sup> was issued, providing for a subsidy to the purchase of German mineral coal until 1995. Nevertheless, German mineral coal still is more expensive than imported coal or, for that matter, most other fuels. Therefore the German production costs for electricity are quite high.

As opposed to that, France has built an entire depot of nuclear power stations since 1975. At the same time there is no obligation to use high-cost indigenous coal for generating electricity.

This, combined with other factors is the reason for 30-40 % lower electricity prices in France than in Germany.<sup>70</sup>

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<sup>68</sup> J. Seelinger, "Gemeinsamer Strommarkt aus der Sicht der deutschen Steinkohlebergbaus" in R. Lukes (ed) Ein EWG-Binnenmarkt für Elektrizität, pp. 186-194 (p. 191).

<sup>69</sup> Law on the Transformation of Coal into Electricity.

<sup>70</sup> F. Braun, "Der Binnenmarkt in der Gemeinschaft", in R. Lukes (ed) Ein EWG-Binnenmarkt für Elektrizität, pp. 43-52 (p. 50).

Finally electricity production costs depend on the fiscal treatment of the enterprises, because this factor also influences the revenue required by utilities. Again a comparison between Germany and France is informative.

The French electricity enterprise *Electricité de France* (EdF) is, as a public company, obliged to run its business without making profits.<sup>71</sup> Therefore the French taxlaws applied to EdF do not provide for any taxes on profits.

In contrast to this, a German electricity supply enterprise is taxable like every other company, without any exceptions. For the output produced by EdF, a German utility would therefore have to pay a considerable amount of corporation tax, commercial tax, general property tax etc. This example shows that the fiscal treatment of the electricity supply enterprises also influences the financial situation of these companies.

All the above named factors influence the electricity production expenses and consequently the electricity price payable by consumers. Because of the great differences in these factors which are part of the respective national energy policies, there are considerable price variations in the electricity sector.<sup>72</sup>

These variations are further intensified by different rates of Value Added Tax (VAT) and other specific taxes<sup>73</sup> imposed on electricity in some Member States.

Denmark has, with 22 %, the highest VAT rate on electricity. Other Member States like Great Britain and Ireland don't levy VAT for electricity at all.<sup>74</sup>

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<sup>71</sup> H. Michaelis, "Gesamtwirtschaftliche Aspekte eines gemeinsamen Marktes" in R. Lukes (ed.) Ein EWG-Binnenmarkt für Elektrizität, pp. 195-210 (p. 203).

<sup>72</sup> COM (88) 238 final, p. 71.

<sup>73</sup> For details about specific taxes on electricity *ibid.*, Annex VI Table 4.

<sup>74</sup> See list of VAT-rates *ibid.*, Annex VI Table 4.

## VI. Lack of Price Transparency

Another characteristic of today's electricity market in Europe is a lack of price transparency.

Although the prices charged for electricity have reached a high degree of transparency there are still quite a number of price and cost factors that are not transparent: electricity transfer prices, fuel prices for electricity production and production costs from individual production units.<sup>75</sup>

The missing information about these price and cost factors complicates a comparison of prices and research into the reasons for differences, as well as an assessment of the possibilities to increase the electricity transfer.<sup>76</sup>

## VII. Existing Exchange of Electricity among the Member States

The present situation on the electricity market is not just characterized by supply monopolies, differences in the national frameworks for the ESI and a lack of price transparency. It is also characterized by the fact that there has been a well working electricity exchange between the electricity utilities of the Member States for many years.

This electricity exchange across the borders is managed by bodies that function as a forum for the co-operation of the national electricity utilities.<sup>77</sup> The most important organization of this kind is the *Union pour la Coordination de la Production et du Transport de l'Electricité* (UCPTE), which was founded in 1951 on recommendation of the OECD.<sup>78</sup> In this body, the electricity utilities of twelve west

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<sup>75</sup> COM (88) 238 final, p. 75.

<sup>76</sup> *Ibid.*, p. 75.

<sup>77</sup> *Ibid.*, p. 69.

<sup>78</sup> H. Lichtenberg, "Der Europäische Stromverbund" in R. Lukes (ed) Ein EWG-Binnenmarkt für Elektrizität, pp. 86-108 (p. 90).

European countries are joined together.<sup>79</sup> Nine out of these twelve countries are Members of the European Community.

However, there are still two Member States of the European Community that have no direct interconnections with any other Member State, Ireland and Greece<sup>80</sup>.

UCPTE has neither executive powers<sup>81</sup> nor a financial budget<sup>82</sup>. It only deals with technical questions like load dispatchment; all economic details are arranged on a bilateral basis between the individual co-operation partners. Accordingly the actual exchange of electricity is solely based on voluntary agreements between the electricity enterprises.

The economic and technical advantages of interconnected grids, are a more efficient use of production facilities and greater safety of supply. The latter is achieved due to the fact that the partner utilities put electricity reserves at each others disposal. This system is especially helpful in case of a failure in a generation facility and in times of peak demand.

But inspite of these advantages, the level of exchange only amounts to less than 4 % of the electricity consumption in the European Community.<sup>83</sup>

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<sup>79</sup> Austria, Belgium, France, Germany, Italy, Luxembourg, Netherlands, Switzerland, Greece, Portugal, Spain and Yugoslavia.

<sup>80</sup> Greece though is interconnected with Yugoslavia, Albania and Bulgaria; see COM (89) 336 final, p. 5.

<sup>81</sup> For details as to UCPTE's powers see: COM (88) 238 final, p. 69.

<sup>82</sup> Lichtenberg, *op. cit.* n.78, p. 105.

<sup>83</sup> COM (89) 336 final, p. 12; see also COM (88) 238 final, Annex VI Table 6.

## D. Instruments of the European Community to achieve an Internal Electricity Market

Corresponding to the variety of characteristics of today's electricity market, the European Community has several legal instruments to support a further integration of the European electricity market.

These instruments are not strictly separated but sometimes are conditional to one another or simply overlap.

The legal framework for the promotion of an internal electricity market is the EEC Treaty. It does not matter in this connection which fuel has been used to generate electricity. Even if coal or atomic energy have been deployed neither the ECS Contract nor the Euratom Treaty are relevant but electricity solely is subject to the EEC Treaty.<sup>84</sup>

### I. Harmonization of National Frameworks

The national frameworks for the ESI and the energy policies in the Member States differ considerably and therefore form obstacles for the completion of a single electricity market.<sup>85</sup>

As long as different national frameworks lead to price variations, market forces on the electricity market cannot work normally and the electricity markets in the Community will stay fragmented.

Because of that, one way to promote the establishment of an internal electricity market is to approximate these frameworks and policies.

The competence for the European Community to harmonize the legal systems of the Member States follows principally from Articles 100-102 EEC Treaty. There are, however, some more articles within the Treaty

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<sup>84</sup> C.D. Ehlermann, "Die rechtlichen Instrumentarien zur Verwirklichung eines gemeinsamen Marktes nach dem EWG-Vertrag" in R. Lukes (ed) Ein EWG-Binnenmarkt für Elektrizität, pp. 28-42 (p. 28).

<sup>85</sup> *Supra*, chapter 2 part C.V.

providing authorization to harmonize special areas.<sup>86</sup>

The subject of approximation are all provisions that form part of the legal system of the Member States. This includes written and unwritten law, state law, laws of political subdivisions and self-governing bodies etc.<sup>87</sup>

### 1. Harmonization of Environmental Protection Measures

The harmonization of environmental protection measures would be of considerable significance for the integration of the electricity market.

Some progress has been made by the means of a new Directive on the limitation of emissions of certain pollutants into the air from large combustion plants.<sup>88</sup>

This Directive fixes the limit values for the emission of sulphur dioxides, oxides of nitrogen and dust for existing and new plants.

The Council has also issued a Directive on the assessment of effects of certain projects on the environment.<sup>89</sup> According to this Directive, the Member States have to adopt measures which ensure that projects, likely to have significant effect on the environment, are made subject to an assessment, with regard to these effects before consent is given. Power stations are covered by this requirement.<sup>90</sup> This Directive thus supports the harmonization of national frameworks concerning the

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<sup>86</sup> For example Articles 27, 57 (1), 69, 70, 99, 118a EEC Treaty.

<sup>87</sup> J. Pipkorn, in B. Beutler et. al., Die Europäische Gemeinschaft - Rechtsordnung und Politik -, p. 375.

<sup>88</sup> *Council Directive of 24 November 1988 on the limitation of emissions of certain pollutants into the air from large combustion plants*, OJ No L 336, 7.12.1988, p. 1.

<sup>89</sup> *Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment*, OJ No L 175, 5.7.1985, p. 40.

<sup>90</sup> *Ibid.*, Annex I.

environmental aspect of consent procedures for new power plants.

But in spite of these Directives the approximation of technical and environmental protection standards in the Member States is still in its initial stages. Much more will have to be done within the next few years. The safety regulations for nuclear power stations, for example, urgently need to be harmonized because they considerably influence the construction and the operating costs of these plants.<sup>91</sup>

Harmonizing measures in the field of environmental protection can not only be based on Art. 100a EEC Treaty but also on Art. 130S EEC Treaty which was inserted by the Single European Act. The Directive on large combustion plants in its preamble refers expressly to Art. 130s EEC Treaty.

In connection with the harmonization of environmental protection laws Art. 100 a (4) EEC Treaty is also important. According to this rule each Member State that deems it necessary to apply national provisions relating to protection of the environment shall notify the Commission of these provisions and, after confirmation by the Commission, is entitled to keep them in force.

## 2. Harmonization of Taxes

For the electricity market the approximation of VAT rates as well would be of great importance.

Being a turnover tax VAT is covered by the area of application of Art. 99 EEC Treaty. Provisions of harmonization in accordance with this rule only can be passed unanimously by the Council.

VAT has been the object of several harmonization measures. The sixth Council Directive on the harmonization of the laws relating to turnover taxes introduced a common system of VAT by fixing a uniform

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<sup>91</sup> Michaelis, *op. cit.* n. 71, p. 205.

basis of assessment.<sup>92</sup> This Directive has been amended several times<sup>93</sup> and many areas were harmonized.

Not yet approximated are the rates of VAT.<sup>94</sup>

While the VAT rates on electricity vary between 0 % in Great Britain and Ireland and 22 % in Denmark<sup>95</sup>, the standard VAT rates in the EC range between 12 % in Luxembourg and Spain and 22 % in Denmark. The reason why VAT rates have not been subject to harmonization yet is that corresponding measures would constitute a severe intervention in the tax structure and hence in the sovereignty of the Member States. Nevertheless, significant progress in negotiations to reach an outline agreement on minimum VAT rates has been made during presidency of Luxembourg in spring 1991. All EC Finance Ministers, with exception of the UK, agreed on a 15 % minimum standard rate of Value Added Tax for the Community from 1 January 1993. However, the crucial decision will only come when the Council has to adopt a formal legal regulation giving effect to the agreement on VAT.<sup>96</sup>

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<sup>92</sup> *Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes*, OJ No L 145, 13.6.1977, p. 1.

<sup>93</sup> It was last amended by the Eighteenth Directive, OJ No L 226, 3.8.1989, p. 21.

<sup>94</sup> The Commission made several proposals for a Directive containing a standstill clause with a ban of altering the number as well as the level of VAT rates; see for example: *Proposal for a Council Directive imposing a standstill on VAT and excise duties*, OJ No C 313, 4.12.1985, p. 5.

<sup>95</sup> At 1.1.1987, see COM 88 (238) final, p. 88.

<sup>96</sup> This is, according to the Commission, unlikely before winter 1991/92.

### 3. Harmonizing Administrative and Procedural Law

To support the further development of an internal electricity market, it also would be helpful to approximate the consent procedures for the authorization of construction of new power plants and grids. For that purpose it will be necessary to harmonize the administrative law as well as the procedural law and again the environmental protection law. With regard to the approximation of administrative law some progress has been made within the last few years.<sup>97</sup>

This progress, however, concerns, apart from the Directive on the assessment of environmental aspects<sup>98</sup>, no legal provisions particularly dealing with the authorization of new plants or grids.

### II. Increasing Price Transparency

In order to promote a more integrated market for electricity in Europe, it also will be necessary to improve cost and price transparency. This factor too reinforces the conditions ensuring that competition is not distorted in a common market.

A lack of price transparency, for example, could lead to a discrimination of certain industrial end-users that do not know how much a supplier charges other customers. Price discrimination in turn constitutes distortion of competition. This is why the EC-Council has passed a new Directive "concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial

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<sup>97</sup> Pipkorn, *op. cit.* n. 87, p. 387; for the development of general principles of administrative law see J. Schwarze, "Tendencies towards a Common Administrative Law in Europe" (1991) 16 EuLRev pp. 3-19; see also M. Hilf, "Möglichkeiten und Grenzen des Rückgriffs auf nationale verwaltungsrechtliche Regeln bei der Durchführung von Gemeinschaftsrecht" in J. Schwarze (ed.) Europäisches Verwaltungsrecht im Werden, pp. 67-92.

<sup>98</sup> *Supra*, n. 88.

end-users".<sup>99</sup>

This Directive requires companies supplying gas or electricity to industrial end users to inform the *Statistical Office of the European Community* (SOEC) about prices and conditions of sale as well as about price systems in use.

But despite the progress that has been made through this Directive the EC will still have to introduce more price transparency to the electricity market.<sup>100</sup>

The EC's ability to make the price structures on the electricity market more transparent follows from Art. 213 EEC-Treaty.<sup>101</sup> This rule provides for the right of the Commission to collect information and carry out checks within the limits detailed by the Council.

### III. Intensifying the Electricity Transit on Large Networks

Although there has been an exchange of electricity between the electricity utilities for nearly forty years now, this exchange only amounts to 4 % of the total electricity consumption in the Community. Therefore it is necessary to support an increase in the wholesale trade with electricity.

Such an increase would have several advantages which promote the completion of an internal electricity market, such as a more efficient use of the entire infrastructure. Besides more exchange of electricity could lead to a better cooperation between the companies concerning the construction of new grids or power plants. Those developments would help to reduce costs and could lead to lower electricity prices as well as to an improvement in the security of supply.

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<sup>99</sup> Council Directive of 29 June 1990 concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users, OJ No L 185, 17.7.1990, p. 16.

<sup>100</sup> *Supra*, chapter 2 part C.VI.

<sup>101</sup> The new Directive also was based on Art. 213 EEC Treaty.

Since a greater transit through transmission grids would be advantageous for the electricity market it is one of the most important tasks of the EC to press for the establishment of a high-tension interconnection between Ireland and the continent, as well as between Greece and the rest of the Member States.

The advantages of an increase in the electricity exchange through transmission grids also led to a new Council Directive concerning the exchange of electricity between the electricity utilities.<sup>102</sup>

The term *electricity transit* according to Art. 2 of the Directive stands for the transport of electricity through high voltage grids, involving the crossing of at least one intra-Community frontier. Entitled and committed to join this kind of electricity transit are the entities in the Member States which are listed in the Annex.

The Directive provides for contracts involving the transit of electricity to be "negotiated between the entities responsible for the grids concerned..." (Art. 3 para. 1). The entities are compelled to give notice of "any request for transit in connection with contracts for the sale of electricity..." to the European Commission and to national authorities (Art. 3 para. 3). The utilities also have to inform these bodies about the progress being made in the compulsory negotiations concerning the electricity transit. Furthermore all entities involved have the right to make the conditions of transit subject to a conciliation which is carried out by a body the Commission will set up.

Finally the Commission is entitled to implement procedures provided for by Community Law if the reasons for the failure of the negotiations appear to be "unjustified and insufficient" (Art. 4).

With the new directive the EC creates a controlling body to supervise the conclusion, as well as the conditions of transit contracts. The declared intention of these means is to make the transfer of electricity through grids compulsory and hence to reduce obstacles to this

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<sup>102</sup> Council Directive of 29 October 1990 on the transit of electricity through transmission grids, OJ No L 313, 13.11.1990, p. 30.

kind of trade<sup>103</sup>. This in turn is supposed to result in an increase in electricity transfer on large networks.<sup>104</sup>

The new Transit-Directive introduces no competition for the supply of customers. The transit through transmission grid only concerns the exchange of electricity between utilities. The Directive does not enable customers to choose a non-local supplier. It therefore leaves the existing supply monopolies on the electricity markets untouched.<sup>105</sup>

#### IV. Applying the Principle of Competition to the Electricity Market

Another instrument to support the further development of an internal electricity market could be the introduction of more competition to this economic area.

More competition would lead to a greater exchange of electricity between the local and international networks and hence result in a better integrated electricity market.

When talking about the introduction of more competition it is useful to have a look at conceivable models of competition.

##### 1. Conceivable Models of Competition on the Electricity Market

What is meant when the introduction of competition to the electricity market is discussed, is the competitive supply of large industrial consumers and local electricity distributors. A competitive electricity market would thus be a market situation in which generators, as well as suppliers have to enter into competition with each other to

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<sup>103</sup> *Ibid.*, Preamble.

<sup>104</sup> L. Eckert, "Die Gesetzgebungsvorschläge der EG-Kommission vom Juli 1989 für den Gassektor" in J.F. Baur (ed) Leitungsgebundene Energie und der gemeinsame Markt, pp. 11-18 (p. 12).

<sup>105</sup> R. Dehmer, "Europa auf dem Weg zu einem europäischen Energierecht" (1989) 39 ET, pp. 651-654 (p. 651); H. Ellasmöller, "Der Energie-Binnenmarkt" (1990) 40 ET, pp. 754-757.

supply large end users and local distributors.<sup>106</sup> Those customers would no longer be tied to a local distributor, but could shop around for their supplier.

Apart from competition in the supply of those customers, one could also think of a competitive supply of domestic consumers as a conceivable model of competition. This model, however, is bound to remain a theoretical one for the time being. Due to considerable fixed costs and technical shortcomings that are rooted in the technical peculiarities of the electricity supply, it is still uneconomical to supply small customers on a competitive basis.<sup>107</sup> This is even more true as far as competition on the European level is concerned. It is hardly thinkable for example, that the French electricity utility EdF would be interested to enter into competition with a Spanish undertaking for the supply of individual domestic customers in Spain. The supply of domestic customers hence will probably remain a so-called

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<sup>106</sup> COM (89) 336 final, p. 14; M. Seidel "Die Elektrizitätswirtschaft im System des Gemeinschaftsrechts" (1988) 23 EuR, pp. 129-143 (p. 136); W. Engels et al, Mehr Markt in der Energiewirtschaft, p. 39.

<sup>107</sup> In place of many J. Buderath, "Strom im Wettbewerb" (1989) 19 ET, pp. 138-140 (p. 139).

This fact also is acknowledged by the English ESI, though every customer in England, Wales and Scotland from 1998 onwards in theory will be able to choose a supplier. This possibility is not expected to change the fact that all domestic customers are supplied by their local distribution board. The other utilities are not interested to enter into competition as far as that supply is concerned. As one executive put it: "It is not our intention totally to integrate vertically and sell to Granny Smith" ("Why price will be the ultimate determinant", Financial Times 30.1.1991); see also "National Grid Company tops risk rating", Financial Times, 15.2.1991 in this article it says: "Local electricity distribution is likely to remain a natural monopoly [...]"

*natural monopoly*<sup>108</sup>.

"Competition on the electricity market" as used in this thesis therefore means competition for large industrial consumers<sup>109</sup> and local distributors.<sup>110</sup>

There are two ways to introduce competition for the supply of local distributors and large end users, and hence to break up the existing supply monopolies.

The first way is to build new grids in addition to the existing ones, in order to connect customers with a non-local electricity undertakings.

The other model of competition that has been discussed a lot recently is called "common carrier" system. "Common carrier" stands for a system where customers and non-local suppliers have access to the existing transport networks.<sup>111</sup> Customers can choose their suppliers

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<sup>108</sup> The phenomenon of natural monopoly was first described by John Stuart Mill (Principles of Political Economy, p. 143) in connection with the London gas and water supply. *Natural monopoly* describes a situation in which operating costs and prices to the consumer would be higher if competition were permitted, and where, moreover, utility firms cannot compete because they are monopolistic by nature; see W.J. Primeaux, "Electricity Supply: An End To Natural Monopoly", in C. Veljanovski, Privatisation and Competition, pp. 129-134 (p. 129) and M. Prohaska, Effizienz der Energiewirtschaft, p. 89.

<sup>109</sup> The monthly electricity consumption above which somebody is considered a *large* end user cannot exactly be determined here. In England, however, the supply of customers with a demand of at least 1 MW per month is regarded worthwhile to be handled on a competitive basis. This figure thus shall serve as guide line for what is meant by a *large* end user.

<sup>110</sup> This circumscription coincides with the one made by the European Commission, see COM (89) 336 final, p. 14.

<sup>111</sup> COM (88) 238 final, p. 22.

and are allowed to use the existing grids to transport the electricity they bought from non-local utilities.

Apart from the expression "common carrier", another wording turns up in this connection. Whilst the term "common carrier" can be found in about every comment on the internal electricity market written in English, the German literature prefers the expression "Durchleitung"<sup>112</sup> that has to be translated as "through transport".<sup>113</sup>

These different terms nevertheless describe the same structure of electricity supply. The expression "Durchleitung" is used in cases concerning the transport of electricity from a third party, to a customer relying, on the networks of the local distributor.<sup>114</sup> As "common carrier", the expression "Durchleitung" thus describes the phenomenon of third party access to transport networks. Thus "common carrier" and "Durchleitung" deal with the same problem.

It has to be borne in mind, though, that the expression "through-transport" is not accurate as it gives a wrong impression about technical facts as they are. In reality there is no such thing as a "through-transport" of electricity through a grid.<sup>115</sup> Actually, all power stations are interconnected through the transmission and distribution systems. Therefore, it is impossible to distinguish electricity generated by one station, from those fed into the system by an other plant. Thus, electricity cannot be transported through a grid without being mingled. Hence no "through-transport" but an exchange of certain amounts of electricity, takes place.<sup>116</sup>

It is technically possible, however, to measure the amounts of electricity involved in the exchange very accurately. Thus, the grid

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<sup>112</sup> In place of many G. Klätte, "Mehr Wettbewerb", *op.cit.* n. 48, p. 131.

<sup>113</sup> Cameron, *op.cit.* n. 1, p. 21.

<sup>114</sup> H. Fischerhof, "Stromdurchleitung" über fremde Netze als Rechtsproblem, p. 17.

<sup>115</sup> See for example E.h.G. Klätte, *op.cit.* n. 45, p 414.

<sup>116</sup> G. Klätte, "Mehr Wettbewerb", *op.cit.* n. 48, p. 132; Fischerhof, "Stromdurchleitungen", *op.cit.*, n. 114, p. 19.

operator can make a precise invoice about the amounts of electricity fed into his system, as well as about the costs of services he has performed to provide system stability<sup>117</sup>.

Therefore, the term "through-transport", although not accurate in a technical-physical sense, may be used to describe this sort of co-operation between electricity utilities, as the outcome is the same.<sup>118</sup>

## 2. Treaty Provisions Relevant for the Introduction of Competition to the Electricity Market

The question arises, which legal instruments the European Community possesses to promote the introduction of competition to the electricity market.

The availability of legal instruments depends on the way in which competition on the electricity market is obstructed.

Hardly anywhere in the European Community is the market order for the ESI based on competition. Irrespective of structure and ownership, nearly all Member States have adopted a structure providing practically no place for competitive elements.

The prevention of competition takes place in different ways.

Firstly, the laws of some Member States provide rules that obstruct the trade with electricity, and thus prevent competition.<sup>119</sup>

Secondly, competition is distorted by state monopolies providing for exclusive rights of import and export, or transport and distribution

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<sup>117</sup> Engels, *op.cit.* n. 106, p. 40.

<sup>118</sup> For the use of this term see in place of many D. Kuhnt, "Übertragung von Strom nach deutschem und europäischem Recht", in H. Leßmann et al. (eds.) Festschrift für Rudolf Lukes, pp. 411-424, *passim*.

<sup>119</sup> This applies for example for the Netherlands; see the recent Commission Decision concerning the Dutch ESI (*Commission Decision of 16. January 1991 relating to a proceeding under Article 85 of the EEC Treaty*), OJ No L 28, 2.2.1991, p. 32.

of electricity.<sup>120</sup>

Finally, barriers to competition on the electricity market are caused by certain agreements and conducts of undertakings, whether public or private.

This shows that impairments of competition in general may stem from three distinct sources or directions. The EEC Treaty has taken this into consideration, and provides different sets of rules to protect competition from undue interference.

The following provisions are particularly relevant for the introduction of competition to the electricity market: the rules ensuring the free circulation of goods (Articles 30-36 EEC Treaty), those in respect of state monopolies (Art. 37 EEC Treaty) and the rules of competition (Articles 85-90 EEC Treaty).

### **3. Excursus: Electricity as "Good" or "Service" within the EEC Treaty**

The application of Articles 30-36 EEC Treaty and hence the classification of electricity as "good" and not as "service" within the system of the EEC-Treaty is the outcome of the following considerations.

A conceivable categorization of electricity as "service" is supported by the fact that power supply depends on a grid, the provision and maintenance of which is a service anyway. Besides, the ESI not only produces electricity but it also is concerned with tasks like the provision of sufficient capacities at any given time. These tasks can also be considered as "services". This is why some authors classify the whole electricity supply as "service" within the meaning of Articles 59-66 EEC Treaty.<sup>121</sup>

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<sup>120</sup> See enumeration in COM (88) 238 final, p. 21.

<sup>121</sup> Seidel, *op.cit.* n. 106, p. 185; B. Börner, "Rechtsfragen zu Art. 90 II" in *idem*, Studien zum Deutschen und Europäischen Wirtschaftsrecht, p. 254.

The European Court of Justice (ECJ), however, in a case dealing with the nationalization of the Italian ESI incidentally treated electricity as a "good".<sup>122</sup>

This position is perfectly justifiable.

Any other kind of energy, such as coal, oil and gas, is classified as a "good". An equal treatment of electricity and the other energies is reasonable.

Another argument for the classification of electricity as good is that one can commercialize and trade electricity in the same way as any other good. It is for example possible to sell specified quantities of the product electricity. The supply with electricity thus is, considered from an economic point of view, equal to the supply with a good.<sup>123</sup> The ECJ is also geared to the possibility to trade the asset in question, if it comes to the distinction between goods and services. In *Sacchi*<sup>124</sup> it regarded a television signal, by reason of its nature, as provision of services. The trade in all products connected with a television signal (sound recordings etc.) however, is, according to the ECJ, subject to the rules relating to freedom of movement for goods.

It follows that, in conformity with the prevailing view,<sup>125</sup> electricity has to be treated as a "good" within the system of the EEC Treaty and hence is subject to the application of Articles 30-36.

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<sup>122</sup> Case 6/64 *Costa v ENEL* [1964] ECR 585.

<sup>123</sup> U. Everling, "Der Binnenmarkt nach der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften" in R. Lukes (ed.) Ein EWG-Binnenmarkt für Elektrizität, pp. 132-154 (p. 142).

<sup>124</sup> Case 155/73 ECR [1974] 409 (427, considerations 6-7); for the distinction between goods and services see also case 62/79 *Coditel v Ciné Vog Films* ECR [1980], 881 and case 262/81 *Coditel v Ciné Vog Films II* ECR [1982], 3381.

<sup>125</sup> See for example: Arndt, *op.cit.* n. 32, p. 13; Hermann, "Ordnungsgrundlagen", *op.cit.* n. 31, p. 116; Everling, "Binnenmarkt nach der Rechtsprechung des Gerichtshofs", *op.cit.* n. 123, p. 142 and R. Linkohr, "Versorgungssicherheit geht vor Geschäft" (1988) EG-Magazin No 10 p. IV.

#### 4. The Present State of Application of the Relevant Provisions

It has been established that Articles 30-36, Art. 37 and Articles 85-90 EEC Treaty are the relevant Treaty provisions if it comes to the introduction of competition to the electricity market. The question arises what the present state of developments in the application of these provision by the institutions of the European Community is.

The first calls for the breaking up of supply monopolies, and hence for the introduction of more competition to the electricity market, were voiced in about 1983<sup>126</sup>. They came especially from the German power intensive industry, which wanted to import cheap electricity, and, understandably, from the French public electricity undertaking *Electricité de France* (EdF) which was able to sell electricity at almost unbeatable prices.<sup>127</sup> Until that time, the electricity industry and the European Competition Policy had existed peacefully side by side without paying much attention to each other.

To the great dismay of some executives in the electricity industry, the "sleeping dog" embodied by the Directorate General for Competition was awoken by these demands and started making threatening gestures towards the de facto exception area ESI.<sup>128</sup>

In its working document "The Internal Energy Market", the Commission announced its plan to apply the rules of competition strictly to the electricity market forthwith.<sup>129</sup>

Recently, there has been one Commission Decision concerning the electricity market. Making use of its power under Art. 3 of Regulation

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<sup>126</sup> R. Lukes, "Eröffnung und Einführung" in Lukes (ed.) Ein Binnenmarkt für Elektrizität, pp. 1-11 (p. 4).

<sup>127</sup> See P. Montagnon, "Regulating the Utilities", in *idem*, European Competition Policy, pp. 52-75 (p. 59).

<sup>128</sup> W. Harms, "Deutsches und Europäisches Wettbewerbsrecht" (1989) 39 ET, pp. 82-89 (p. 84).

<sup>129</sup> COM (88) 238 final, p. 18-24.

17/62 the Commission scrutinized the consistency of certain agreements in the Dutch ESI with the European Rules on competition<sup>130</sup>. It also at present examines the compatibility English, Welsh and Scottish agreements with Articles 85 and 86 EEC Treaty.<sup>131</sup>

In addition, the Commission has opened proceedings against a number of Member States, contesting the lawfulness of their electricity monopolies in relation to Art. 37 EEC Treaty.<sup>132</sup>

These activities reflect the intention of the EC Commission to apply the rules on competition vigorously to the electricity market. The Commission, according to its own statement, will not "hesitate to take whatever action necessary to enforce the treaty rules".<sup>133</sup>

It has also set up special committees of energy suppliers, consumers and national governments which have just reported on whether, and how, to introduce more competition to the European energy market. Following on these reports the Commission will now draft proposals and put them to the energy ministers in the next few months.<sup>134</sup>

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<sup>130</sup> *Commission Decision of 16. January 1991 relating to a proceeding under Article 85 of the EEC Treaty*, OJ No L 28, 2.2.1991, p. 32.

<sup>131</sup> See notices pursuant to Art. 19 (3) of Regulation 17/62 (JO 1962, 13/204 OJ 1959-62, 87) in OJ No C 191, 31.7.1990, p. 9 concerning the reorganization of the electricity industry in England and Wales and OJ No C 245, 29.9.1990, p. 9 concerning the reorganization of the electricity industry in Scotland.

<sup>132</sup> The countries involved are: Denmark, France, Greece, Ireland, Italy, Netherlands, Portugal, Spain and the United Kingdom; see *Europe-Documents*, 22.3.1991, p. 8 and "EC Nails Energy Monopolies", *International Herald Tribune* 22.3.1991.

<sup>133</sup> "Power Monopolies are Threatened by EC Dutch Ruling", *International Herald Tribune*, 19/20.1.1991, see also Commission of the European Community, (1989) Nineteenth Report on Competition Policy, pp. 49-50.

<sup>134</sup> "EC divided over energy competition", *Financial Times*, 28.5.1991; see also *Europe-Documents*, No. 5498, 25.5.1991, p. 13 and No. 5499, 27./28.5.1991, p. 10.

During the present Intergovernmental Conferences, the Commission, moreover has proposed that the revised Treaty should specifically envisage an internal energy market and mention the security of supply.<sup>135</sup>

The European Court of Justice (ECJ) has not yet decided a case dealing with the application of the rules on competition to the electricity market. Since the Dutch electricity utilities, however, have brought action against the recent Commission Decision before the ECJ<sup>136</sup>, the first judgement on the application of Articles 85-90 EEC Treaty to the electricity industry can be expected in the foreseeable future.

Summing up, the institutions of the European Community have only just started to apply the relevant Treaty provisions to the ESI. A clearly defined, detailed European competition policy for the electricity market has not been formulated yet.

#### **5. Relationship between the Relevant Provisions**

It now has to be examined what relationship exists, between the Treaty rules that are relevant for the introduction of competition to the electricity market.

Dealing with the ESI it is necessary to take Articles 30-36, Art. 37 and Articles 85 - 90 EEC Treaty into consideration.

All these provisions form part of the general principle of competition within the EEC Treaty<sup>137</sup> because they all are designed to protect competition against distortion in accordance with Art. 3 f EEC Treaty. But the respective directions of protection of these provisions are different.

Articles 30-36 EEC Treaty prohibit any measures by the Member States which constitute a barrier to the trade within the Community, no

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<sup>135</sup> *Europe-Documents*, No. 5440, 27.2.1991, p. 9.

<sup>136</sup> OJ No C 101, 18.4.1991, p. 10.

<sup>137</sup> Hermann, "Ordnungsgrundlagen", *op.cit.* n. 31, p. 115.

matter whether these measures obstruct the trade "directly or indirectly, actually or potentially".<sup>138</sup> Thus, Articles 30-36 EEC Treaty protect against obstacles to free trade that have been build up by states.

The same is true for Art. 37 EEC Treaty, which relates to state monopolies and to trade restrictions forming part of, or linked to, the former. Those restrictions too, have their origin in certain measures by Member States.

Articles 85-90 EEC Treaty, on the other hand, protect the intra-community trade against barriers caused by the conduct of enterprises. The direction of protection of these provisions are not rules made by States but measures that have been taken up by undertakings, regardless whether they are public or private.

The difference in the scope of protection results in the two types of provisions complementing one another.

It would be of little use to prohibit public measures that affect the free movement of goods, if undertakings were allowed to fix prices or share markets and thereby infringed the trade between the Member States.<sup>139</sup>

The same is true the other way round. Rules that prohibit the distortion of competition caused by undertakings, would be rather useless if the States were allowed to build up trade barriers.

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<sup>138</sup> Case 8/74 *Procureur de Roi v Dasonville* [1974] ECR 837 (852).

<sup>139</sup> J. Steiner, Textbook on EEC-Law, p. 102; see also V. Korah, Competition Law of Britain and the Common Market, p. 15 and D. Vaughan et al., in Halsbury's Laws of England, vol. 52, European Communities, para. 19.02.

## 6. Consequences for the Interpretation of the Provisions

Since Articles 30-37 as well as Articles 85-90 EEC Treaty, all form part of the general principle of competition within the EEC Treaty, they must all follow the same lines of interpretation.<sup>140</sup>

This interlocking of the two groups of provisions in the principle of competition, makes it necessary to consider all of these regulations when dealing with a certain problem. The interpretation of Articles 85-90 EEC Treaty for example, also has to pay attention to the provisions relating to the free movement of goods.<sup>141</sup> The ECJ thus uses certain principles and formulas which were originally developed in connection with the free movement of goods also in relation to the rules on competition.<sup>142</sup>

The close connection between the rules relating to the free movement of goods and to state monopolies, and those relating to competition, therefore leads to the conclusion that there can be no substantial difference, when one applies them to a certain economic branch. The circumstances under which trade obstacles arising from state interference or state monopolies are considered as being inconsistent with Treaty objectives, must be the same as those applying to measures by undertakings.<sup>143</sup>

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<sup>140</sup> For the relationship between Articles 30-36 and the Treaty rules on competition see also L.W. Gormley, Prohibiting Restrictions on Trade within the EEC, pp. 228-233.

<sup>141</sup> C.W. Bellamy / G.D. Child, Common Market Law in Competition, p. 27; see also Vaughan, *op.cit.* n. 139, para. 19.02.

<sup>142</sup> The formula of the basis principle in *Procureur de Roi v Dassonville* (case 8/74 [1974] ECR 837 (852)) is extremely similar to that which the ECJ uses in relation to Art. 85 (1). (see for example case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235 (249) In both cases the ECJ refers to *actual or potential, direct or indirect* attempts to interfere with the free flow of trade within the Community; see Gormley, *op.cit.* n. 140, p. 231.

<sup>143</sup> Hermann, "Ordnungsgrundlagen", *op.cit.* n. 31, p. 118.

## 7. Treaty Provisions Relevant for the Electricity Markets in England and Germany

The rule that there are no substantial differences in applying the provisions on the free movement of goods, on state monopolies or on competition to a certain branch of the economy also applies to the electricity market. This fact apparently allows us to concentrate on one kind of these provisions in the further considerations.

In practice, most barriers to the exchange of electricity within the European Community are caused by activities from undertakings, or result from the existence of state monopolies, while there are only very few trade restrictions in the electricity market that fall under Art. 30 EEC Treaty.<sup>144</sup>

The legal situation in England and Wales as well as in Germany in particular, is not characterized by state monopolies but rather by commercial arrangements. The provisions of the EEC Treaty relating to trade restrictions caused by state monopolies therefore play no role for the further development of the ESI in these countries.

This also is the reason why Germany was not amongst those Member States against which the Commission has recently started legal proceedings, in connection with Art. 37 EEC Treaty.<sup>145</sup> The same applies to the ESI in England and Wales<sup>146</sup>. The proceeding started against the United Kingdom concerns, according to the Commission, merely the public electricity monopoly that still exists in Northern Ireland. This proceeding, however, becomes invalid as soon as the imminent

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<sup>144</sup> H. Görner, "Fortbestand geschlossener Versorgungsgebiete im EG-Energiemarkt" in W. Harms (ed) Konturen eines EG-Energiemarktes, pp. 65-76 (p. 72).

<sup>145</sup> *Supra*, n. 132.

<sup>146</sup> And Scotland.

privatisation leads to the abolition of the public monopoly there.

The main emphasis of the further examinations therefore will lie on the application of the rules of competition in the narrow sense of the expression (Articles 85-90 EEC Treaty) to the ESI in Germany and England and Wales.

### E. Summary and Conclusion of Chapter 2

It has been established that electricity is an important element of the energy balance in Europe and thus, plays a significant role in the establishment of an internal energy market.

The present situation on the electricity market is characterized by: three main ownership structures of the electricity utilities, the technical and economical peculiarities of the supply with electricity, supply monopolies nearly everywhere, different national energy policies, a lack of price transparency, and a small, but well working, power exchange between the electricity utilities of the Member States. Corresponding to the variety of characteristics of today's electricity market, and to the resulting trade barriers, the European Community has several instruments to support the further integration of the electricity market.

In some aspects like, the transport of electricity through high voltage grids, progress has been made. Others, such as the harmonization of the national laws and the introduction of competition, are still in its initial stages.

The prospects of future success of the two last-named instruments are quite different.

As far as the approximation of laws is concerned, progress depends on the willingness of the Member States to pass Directives or Regulations in the EC-Council. Therefore, the prospect of further advances as to the harmonization of energy laws and policies are determined by political factors rather than legal ones.

In contrast to that, the Commission has autonomous powers if it comes to the application of the European competition law. Articles 85-90 EEC

Treaty are the only Treaty rules of importance concerning which the Community not only legislates, but also is in charge of administration and execution of the Directives and Regulations. The progress of integration on the electricity market thus lies, as far as the European competition law is concerned, in the hand of the Commission. Articles 85-90 EEC Treaty therefore are important legal instruments when it comes to the promotion of an internal electricity market in Europe.

A. Introduction

In the preceding chapter it has been established that the application of the European Rules on competition is an important instrument in the hands of the Commission to support the further integration of the electricity markets.

This chapter deals with legal problems that are connected with application of Articles 85-90 EEC Treaty to the ESI.

It starts by looking at the individual Treaty provisions on competition (part B).

After having examined what kind of agreements and conducts on the electricity markets could possibly infringe Articles 85 or 86 EEC Treaty (part C), the discussion turns to the arguments that are raised against the introduction of competition to the ESI (part D).

Following on from these arguments, it will be scrutinized whether the application of Articles 85 and 86 EEC Treaty to the ESI is subject to any kind of restriction (part E). The main focus of this examination lies on the question whether the German and English electricity utilities are covered by Art. 90 (2) EEC Treaty, and whether those undertakings are thus excluded from the application certain Treaty provisions.

In the next step, it will be examined whether Art. 85 (1) and Art. 86 EEC Treaty contain inherent limitations, that is, whether they provide for sufficient scope of interpretation to take the peculiarities of an economic branch into account. An affirmative answer to this question means that certain distortions to competition do not infringe Articles 85 (1) or 86 EEC Treaty since they are necessary to secure objectives compatible with Community values, other than competition (part F).

Finally, it will be necessary to examine which Community objectives are capable of supplying a compensatory justification for restraints to competition on the electricity market (part G).

## B. The European Rules on Competition

The European rules on competition can be found in Articles 85 - 90 EEC Treaty.

Of particular importance for the ESI are Articles 85 and 86 EEC Treaty because these provisions determine whether certain anticompetitive agreements or practices on the electricity market are compatible with the EEC Treaty.

### I. Articles 85 and 86 EEC Treaty

Art. 85 (1) EEC Treaty prohibits "[...] agreements between undertakings, decisions of associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market [...]" as incompatible with the common market.

According to Art. 85 (2) EEC Treaty "[a]ny agreements or decisions prohibited pursuant to this Article shall be automatically void."

Para. 3 of Art. 85 EEC Treaty provides for the exemption of those cartels from the general prohibition in Art. 85 (1) EEC Treaty which contribute "[...] to improving the production and distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit [...]"

Art. 86 EEC Treaty concerns the abuse of a dominant position. According to this provision "[a]ny 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 in so far as it may affect trade between Member States. [...]"

The ECJ has consistently held Articles 85 (1) and 86 EEC Treaty to be of immediate and direct effect<sup>147</sup>.

Whether or not a Treaty provision is directly effective is not regulated in the Treaty itself. The whole concept of direct effect is

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<sup>147</sup> See case 13/61 *Kledingverkoopbedrijf de Geusen Uitdenbogerd v Bosch* [1962] ECR 45 (p. 71); case 37/79 *Marty v Lauder* [1980] ECR 2481 (p. 2500, consideration 13); case 155/73 *Sacchi* [1974] ECR 409 (p. 430, consideration 18).

a product of the case-law of the ECJ.<sup>148</sup>

A rule of Community Law is said to be directly effective if it creates rights for individuals which have to be protected by municipal courts.<sup>149</sup> A precondition for direct effect is the 'direct applicability'<sup>150</sup> of a law. Directly applicable means that a Community provision becomes automatically part of a domestic legal system without the necessity of further national measures of incorporation.

As Articles 85 and 86 EEC Treaty are directly applicable and also directly effective any activities or agreements which are covered by these provisions are automatically void. Everybody can rely on this invalidity before a national court.<sup>151</sup> As far as agreements between undertakings are concerned this effect also follows from Art. 85 (2) EEC Treaty.

However, in opposition, Art. 85 (3), has no direct effect and national courts thus can not decide whether Art. 85 (1) is inapplicable to a certain agreement.<sup>152</sup> Art. 9 of Regulation 17<sup>153</sup> rather reserves the power to grant exemptions from Art. 85 (1) exclusively to the European Commission.

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<sup>148</sup> It was first pronounced in the famous case 26/62 *Van Gend and Loos v Nederlands Administratie der Belastingen* [1963] ECR 1.

<sup>149</sup> Steiner, *op.cit.* n. 139, p. 20.

<sup>150</sup> For the relation of the two concepts see J.A. Winter, "Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law", (1972) 9 *CMLRev* pp. 425-438.

<sup>151</sup> Steiner, *op.cit.* n. 139, p. 105.

<sup>152</sup> See in place of many: E. Steindorff, "Article 85, Para. 3: No Case For Application by National Courts" (1983) 20 *CMLRev* pp. 125-130 (p. 125); see also S. Kon who has proposed that national courts should be permitted to apply Art. 85 (3) EEC Treaty in "Article 85, Para. 3: A Case For Application by National Courts" (1982) 19 *CMLRev* pp. 541-560.

<sup>153</sup> JO 1962, 13/204 OJ 1959-62, 87.

## II. Articles 87 - 90 EEC Treaty<sup>154</sup>

Art. 87 EEC Treaty provides for a competence of the European Council to "[...] adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86 EEC Treaty....]"

Until the entry into force of provisions according to Art. 87 EEC Treaty, Art. 88 EEC Treaty allows the authorities of the Member States to rule on the admissibility of anticompetitive behaviour.

Notwithstanding Art. 88, Art. 89 EEC Treaty establishes the competence of the European Commission to ensure the application of the principles laid down in Articles 85 and 86 EEC-Treaty.

Art. 90 EEC Treaty finally deals with public undertakings and undertakings to which the Member States have granted certain rights or tasks. Art. 90 (1) EEC Treaty bans in the case of these undertakings the enactment or maintenance of "[...] any measure contrary to the rules contained in this Treaty [...]". Art. 90 (2) EEC-Treaty provides for the possibility to restrict the application of Treaty rules to undertakings entrusted with a service of general economic interest.

### C. Agreements and Conducts in the ESI that could come into conflict with the Articles 85 and 86 EEC Treaty

The agreements and conducts on the electricity market that are at risk of coming into conflict with Articles 85 and 86 EEC Treaty, can be divided into two categories.

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<sup>154</sup> Articles 87 -89 EEC Treaty are by their nature not capable of conferring individual rights and thus are not direct effective (L. Collins, European Law in the United Kingdom, p. 125.) Art. 90 (1) EEC Treaty is was held directly effective in conjunction with Art. 86 EEC Treaty (case 155/73 *Sacchi* [1974] ECR 409 (p. 430, consideration 18). Art. 90 (2) EEC Treaty was held not to be of direct effect (case 10/71 *Ministère Public of Luxembourg v Muller* [1971] ECR 723 (p. 730).

Firstly, there are conducts of, and contracts between, electricity utilities according to which they, for example, buy specified amounts of electricity from certain generators<sup>155</sup>, or refrain from supplying customers in each others supply areas etc.

Those, and similar agreements and conducts, affect competition on the electricity market directly since they have repercussions on the possibility to compete for big industrial end users, or local distributors.<sup>156</sup>

Secondly, there are agreements like the German *Jahrhundertvertrag* that require electricity producers to consume a specified quantity of indigenous coal, and hence promote the use of certain sources of energy in power stations.<sup>157</sup>

The second group of agreements does not directly affect the possibility to import electricity from other Member States.

As far as the the *Jahrhundertvertrag* is concerned, it is up to each customer to buy electricity wherever he wants. All the *Jahrhundertvertrag* says, is that the German electricity producers have to generate a certain amount of their capacity from coal mined in Germany. Thus, regulations promoting the use of certain primary energies do not directly affect the possibility to compete for the

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<sup>155</sup> See for example the German *Demarcation and Concession Agreements* described above. Agreements with similar effects exist in the English ESI. See details *infra*, chapter 4 parts B and C.

<sup>156</sup> This statement in no way implies that those agreements and conducts actually infringe Articles 85 or 86 EEC Treaty. Whether or not this is the case will be the subject of chapter 4 *infra*.

<sup>157</sup> There are similar agreements between English generators and British Coal.

supply of large customers and local distributors.<sup>158</sup>

Agreements like the *Jahrhundertvertrag* pose different kind of problems than the agreements of the first category, which require detailed examination. The present thesis will therefore concentrate on those contracts and conducts that have direct effect on competition for the supply of customers on the electricity market.

#### D. Technical and Economic Difficulties connected with the Introduction of Competition to the Electricity Supply Industry

Since the beginning of the discussion about the introduction of more competition to the electricity market, there constantly have been publications dealing with details of the application of EC competition rules to the ESI.<sup>159</sup> Some authors<sup>160</sup> speak up for an at least temporary complete exclusion of the electricity sector from the application of Articles 85-90 EEC Treaty. Others<sup>161</sup> try to define concrete terms for

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<sup>158</sup> C. Schalast, "Der Binnenmarkt für Energie und das System zur Förderung der Kohleverstromung in der Bundesrepublik Deutschland" (1991) 52 *RdE*, pp. 2-5 (p. 3); those agreements, however, do have effect on competition on the energy market as a whole and hence can contradict Art. 85 (1) EEC Treaty. This is why the Commission at present examines the compatibility of the German *Jahrhundertvertrag* (see Notice pursuant to Art. 19 (3) of Regulation 17/62 OJ No C 159, 29.6.1990, p. 7 and OJ No C 116, 30.4.1991, p. 6.) and of the *British Coal Contracts* (see Notice pursuant to Art. 19 (3) of Regulation 17/62 OJ No C 191, 31.7.1990, p. 9) with the EEC Treaty.

<sup>159</sup> See for example conference reports R. Lukes (ed.) Ein EWG-Binnenmarkt für Elektrizität - Realität oder Utopie, W. Harms (ed.) "Konturen eines EG-Energiemarktes; idem Atomstrom aus Frankreich.

<sup>160</sup> This is for example the essence of P. Speich, "Rechtsfragen eines Strommarktes aus Frankreich" (1984) 45 *RdE*, pp. 122-127; E. Schwark "Struktur der deutschen Elektrizitätswirtschaft im Lichte der Art. 30 ff., Art. 85 ff. EWGV" in U. Hüffner et al. (eds.) Berg- und Energierecht vor den Fragen der Gegenwart, Festschrift für Fritz Fabricius, pp. 203-217.

<sup>161</sup> For example Hermann, *op.cit.* n. 31, *passim*; Kuhnt, "Übertragung von Strom" *op.cit.* n. 118, *passim*.

the application of competition rules, in order to come to terms with the characteristics of this economic area.

The starting point of all considerations concerning the "if" and "how" of the inclusion of the ESI to the EC competition law, are the technical and economical peculiarities of the electricity supply described above.<sup>162</sup>

Following on these peculiarities, it is usual to refer to some economical and technical problems<sup>163</sup> that could occur if competition for the supply of big industrial end users and local distributors were introduced everywhere in the European Community.

Whether or not these difficulties would actually arise, and how they could be solved, is highly controversial.

This also is the result of the reports by special committees which have just been submitted to the European Commission. These reports talk of "major differences of view over the advantages and disadvantages of allowing third parties access to EC [...] electricity networks"<sup>164</sup>

It has to be borne in mind, though, that most of the arguments against competition are put forward by the electricity industry itself. Therefore they often emphasize the disadvantages of competition in a very one-sided way.

The content of this point solely is an enumeration of possible problems that could occur if it comes to the introduction of competition to the electricity market. Whether and how these difficulties, caused by the peculiarities of the ESI, justify a restriction of the principle of undistorted competition layed down in Art. 3 f EEC Treaty, will have to be discussed at a later stage.<sup>165</sup>

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<sup>162</sup> *Supra*, chapter 2 part C.III.2.

<sup>163</sup> These problems are the same in all European Countries and also were taken into consideration in the discussion about privatisation in Great Britain; see J.W. Cotterell, "Strukturveränderungen in der britischen Elektrizitätsversorgung" in J.F. Baur (ed.) Neue Strukturen in der Energieversorgung, pp. 53-63 (p. 61).

<sup>164</sup> "EC divided over energy competition" Financial Times 28.5.1991; *Europe-Documents*, No. 5498, 25.2.1991, and No. 5499, 27./28.2.1991.

<sup>165</sup> *Infra*, chapter 3 parts F and G.

Some of the problems that are discussed with regard to the application of Articles 85-90 EEC Treaty to the electricity market, have special names.

### I. "Cherrypicking"

The first problem is known under the keyword "cherry-picking".<sup>166</sup>

The electricity utilities fear that the introduction of competition could result in some of their most attractive industrial end users ("cherries") being supplied by non local suppliers, especially from France.

Through that, the electricity undertakings would lose consumers whose consumption they had taken into account in their calculation of future demands.

The grid, as well as the production capacities, have been geared to the foreseeable amount of consumption in an area with a supply monopoly.<sup>167</sup> The loss of big consumers could therefore result in economic difficulties for the electricity companies whose facilities run less to capacity than usual. In addition the basis for calculation of prices and investments, changes. While the non-local supplier only picks the "cherries", the local electricity utility has to continue the cost-intensive supply of small customers.<sup>168</sup>

### II. "Prodigal Son"

The second problem is referred to under the expression "prodigal son".<sup>169</sup> and concerns difficulties that could arise if a customer insists on being supplied by his local distributor (which has the duty to supply everybody within its area), after having terminated a contract with a non-local supplier.

The local distribution boards could have difficulties to provide sufficient capacity for those returning customers, since it is necessary for them to make demand assessments several years in advance in

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<sup>166</sup> In place of many H. Recknagel, "Versorgungswirtschaft und Wettbewerb" (1988) 38 ET pp. 385-392 (p. 391); the Commission deploys the term "creaming-off", COM (88) 238 final, p. 73.

<sup>167</sup> Seidel, *op.cit.* n. 106, p. 136.

<sup>168</sup> Arndt, *op.cit.* n. 32, p. 9.

<sup>169</sup> Cotterell, *op.cit.* n. 163, p. 61.

order to plan and construct the required facilities. Therefore they might not be able to meet unexpected increases of demand.

The danger of having to supply "prodigal sons" therefore makes the future planning of the local distribution boards much more difficult.<sup>170</sup>

### III. Services Performed by Gridowners

Another problem that could occur if it comes to the introduction of competition, is connected with the fact that in reality there is no such thing as a through transport of electricity through a grid, but that, in fact, simply an exchange of electricity takes place.

The customer that signs a supply contract with a non local company is not directly supplied by that utility. In fact, the new supplier only feeds the amount of electricity his customer consumes into the grid of the local distributor. There the electricity flows irrespective of the supplier's or the customer's intention. The feeding in of electricity by the supplier, and the taking out by the customer are events that have nothing to do with each other.<sup>171</sup> Therefore it is the local distributor and not the non local utility who actually supplies the customer with electricity.

At the same time the local distributor has to compensate the voltage fluctuation that comes into being if electricity is fed into the grid.<sup>172</sup>

Thus the local distributor not only puts his network at the non local supplier's disposal, but he also provides other services just to make the requested through transport of electricity possible. These services cause costs that need to be considered if it comes to the calculation of the transmission charges.

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<sup>170</sup> G. Klätte, "Mehr Wettbewerb", *op.cit.* n.48, p. 132.

<sup>171</sup> Grawe, "Ein Gemeinsamer Strommarkt" *op.cit.* n. 32, p. 243.

<sup>172</sup> Fischerhof, "Stromdurchleitung", *op.cit.* n. 114, p. 19.

## E. Arguments against the Application of Articles 85 and 86 EEC Treaty to the Electricity Supply Industry

### I. Introduction

Proceeding from the technical and economical difficulties that might arise from the introduction of competition to the ESI several arguments have been developed to restrict or exclude the application of Articles 85 and 86 EEC Treaty to the electricity market.

The aim of these arguments is to "save" the existing supply monopolies and other distortions to competition on the electricity market from the verdict of invalidity that could perhaps result from an unrestricted application of Articles 85 (1) and 86 EEC Treaty to them.

Some authors want to give priority to the approximation of national energy policies, over the application of Articles 85 and 86 to the ESI (part II).

Others deduce arguments against the application of those rules to the electricity market from the absence of provisions under Art. 87 (2) (c) EEC Treaty (part III).

A restriction to the deployment of Articles 85 and 86 EEC Treaty in respect to the ESI could finally derive from Art. 90 (2) EEC Treaty (part IV).

It is, however, not possible in this connection to refer to express Treaty provisions that unambiguously exempt the ESI from the application of the European rules on competition.

As far as certain activities shall not at all be subject to Articles 85-90, the EEC Treaty provides for corresponding express provisions. Art. 42 EEC Treaty determines such an exemption of the competition rules for the production of, and the trade with, agricultural products. A provision concerning the electricity market that follows the example of Art. 42 EEC Treaty, cannot be found within the Treaty.

Thus, there is no doubt that Articles 85-90 EEC-Treaty in principle, can be applied to the agreements and conducts on the electricity market.<sup>173</sup>

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<sup>173</sup> In place of many see E. Niederleithinger, "Strommarktproblematik nach deutschem und europäischem Wettbewerbsrecht" in R. Lukes (ed.) Ein EWG-Binnenmarkt für Elektrizität, pp. 63-85, (p. 66).

Moreover, the Commission has, until now, not issued any block exemptions under Art. 85 (3) according to which Art. 85 (1) EEC Treaty would be declared inapplicable to a category of agreements on the electricity market. Hence, no group of contracts in the ESI in general, is excluded from the application of Art. 85 (1) EEC Treaty.

## II. Priority of Approximation of National Laws?

The national frameworks for the electricity industry differ, considerably.<sup>174</sup> The variations concern fiscal treatment, environmental protection standards, use of certain primary energies, state aids etc. and cause considerable differences in the production costs for electricity. This in turn results in very unequal starting conditions for competition on the European Market. Whilst the utilities of some Member States will be able to offer very low prices, and thus will pick a lot of "cherries", the utilities of other European countries find themselves in a disadvantageous position to compete.

The different national frameworks therefore lead some authors<sup>175</sup> to suggest that the application of the Articles 85 and 86 EEC Treaty to the anticompetitive conducts on the electricity markets should be made subject to prior harmonization of the national energy politics. In other words; the approximation of national laws should take precedence over the implementation of the prohibitory provisions of the European competition law.

If a single market is desired, it is not possible to agree with this opinion.

Approximation of national laws as a rule has no priority over the application of Community law. Otherwise, the application of the Treaty rules and hence the creation of a single market would be put off for

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<sup>174</sup> *Supra*, chapter 2 part C.V.

<sup>175</sup> See for example Recknagel, "Versorgungswirtschaft", *op.cit.* n. 166, p. 387.

an indefinite period.<sup>176</sup> If it was necessary to wait until all Member States have agreed to harmonize their national laws concerning a certain economic branch before one could apply prohibitory Treaty rules like Articles 85 and 86 EEC Treaty, the progress in establishing a common market would be very slow.

In addition, the multitude of legal provisions makes it nearly impossible to reach a stage at which all national rules significant for a certain area are harmonized. The energy sector for example, is directly or indirectly influenced by a variety of different regulations. This leads to the problem that one would have to define at which point the law is "sufficiently approximated", so that it is suitable to apply prohibitory Treaty provisions.

For these reasons, approximation of national provisions and implementation of primary European law have to run parallel instead of giving priority to harmonization.<sup>177</sup>

This is why the ECJ constantly has held that Treaty provisions such as Articles 9, 30, 48, 52, 59, 85 and 86 are applicable irrespective of prior approximation of national laws.<sup>178</sup> In *Commission v Italy* for example, it stated "The fundamental principle of a unified market and its corollary, the free movement of goods, may not under any circumstances be made subject to the condition that there first be an approximation of national laws for if that condition had to be fulfilled the principle would be reduced to a mere cipher."<sup>179</sup> According to Advocate General Darmon this statement of the law, which was made in connection with the relationship between Articles 30 and 100 EEC Treaty, can be

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<sup>176</sup> L. Ritter, "Der Fortbestand geschlossener Versorgungsgebiete im EG-Energiemarkt" in W. Harms (ed.) Konturen eines EG-Energiemarktes, pp. 77-82 (p. 78); *idem*, "Die Anwendung der EG-Wettbewerbsregeln auf den zwischenstaatlichen Handel mit Elektrizität" in W. Harms (ed.) Atomstrom aus Frankreich pp.45-52 (46-47); Ehlermann, *op.cit.* n. 84, p. 36.

<sup>177</sup> Ritter, "Fortbestand geschlossener Versorgungsgebiete", *op.cit.* n. 176, p. 78.

<sup>178</sup> Case 2/74 *Reyners v Belgium* [1974] ECR 631 (p. 652); case 33/74 *van Binsbergen v Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299 (pp. 1311-1312).

<sup>179</sup> Case 193/80 *Commission v Italy* [1981] ECR 3019 (p.3033 consideration 17).

transposed to the European rules on competition.<sup>180</sup>

From the above, it follows that the application of Articles 85 and 86 EEC Treaty to the European electricity industry is not subject to prior approximation of the national energy policies.<sup>181</sup> This does not mean, however, that approximation of national laws is not desirable, nor does it mean that the differences in the national frameworks receive no attention at all. It rather is necessary to take the differences into account, in interpreting the Treaty rules on competition.<sup>182</sup>

### III. Lack of Provisions under Art. 87 (2) (c) EEC Treaty

An exemption of the anticompetitive conducts on the electricity markets from the application of Articles 85 (1) or 86 EEC Treaty could perhaps be inferred from Art. 87 (2)(c) EEC Treaty.

#### 1. Introduction

Articles 85 (1) and 86 EEC Treaty are generally directly effective.<sup>183</sup> Thus, agreements and conducts infringing these provisions are void. A possible exception from this rule for certain economic branches including the ESI, however, could perhaps follow from Art. 87 (2)(c) EEC Treaty.

Art. 87 (2)(c) EEC Treaty empowers the Council to pass Regulations that "define, if need be, in the various branches of the economy the scope of the provisions of Articles 85 and 86".

Such a provision regulating the situation of competition in the electricity market has not been passed yet.

Thus Art. 87 (2)(c) EEC Treaty at first sight seems to offer no possibility to substantiate a restriction, let alone an exclusion of

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<sup>180</sup> See his opinion in case 45/85 *Verband der Sachversicherer v Commission* [1987] ECR 405 (p. 433).

<sup>181</sup> Like here Ritter, "Fortbestand geschlossener Versorgungsgebiete", *op.cit.* n. 176, p. 78; *idem*, "Anwendung der EG-Wettbewerbsregeln" *op.cit.* n. 176. pp. 46-47; Ehlermann, *op.cit.* n. 84, p. 36.

<sup>182</sup> *Infra*, chapter 3 part G and chapter 4.

<sup>183</sup> *Supra*, chapter 3 part B.I.

the rules on competition with regard to the electricity market.

Nevertheless, a few authors base their legal concerns about the application of Articles 85 (1) and 86 EEC Treaty to the ESI on the absence of Council Regulations under Art. 87 (2)(c) EEC Treaty.<sup>184</sup>

## 2. Implication of a Lack of Measures under Art. 87 (2)(c) EEC Treaty

Starting point of their argument is the fact that Regulations under Art. 87 (2)(c) EEC Treaty must aim at giving effect to the principles set out in Articles 85 and 86 EEC-Treaty (Art. 87 (1) EEC Treaty). Thus, these Regulations also have to take the principles that found expression in Art. 85 (3) EEC Treaty into account. This provision allows those cartels that contribute to the achievement of certain goals like "improving the production and distribution of goods" to be exempt from the general prohibition in Art. 85 (1) EEC Treaty .

From this rule the principle is deduced that the prohibition of cartels must be set aside where free competition does not yield optimum economic performance. Therefore Art. 87 (2)(c) EEC Treaty is interpreted as requiring a Council Regulation in cases where, due to certain peculiarities, sectors of the economy show poorer results under the unrestricted application of competition rules than under a custom-tailored system.

As a result of this interpretation, the EC Council in these cases is obliged to pass a Regulation under Art. 87 (2) (c) EEC Treaty.<sup>185</sup> Until the adoption of such a provision, the prohibitions contained in Art. 85 (1) and 86 EEC Treaty do not apply to the economic branch in question.<sup>186</sup>

This line of reasoning was first put forward in connection with the

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<sup>184</sup> In particular B. Börner, "Die vorläufige Nichtanwendbarkeit des Art. 85 EWGV auf die Assekuranz" in Kölner Schriften zum Europa-recht, pp. 66-104.

<sup>185</sup> Börner, "Assekuranz", *op.cit.* n. 184, p. 104.

<sup>186</sup> *Ibid.*, p. 74.

application of competition rules to the insurance sector<sup>187</sup>, and is now also being used for the ESI.<sup>188</sup>

The ESI, according to this opinion, is a sector where free competition leads to poorer results than a system allowing several restraints of competition.<sup>189</sup> This statement is usually backed up by a reference to the possible consequences competition for customers might have on the electricity market.<sup>190</sup>

Therefore, these authors come to the conclusion that the European rules on competition cannot be applied to the ESI until the EC Council has passed a Regulation under Art. 87 (2)(c) EEC Treaty.

In other words, it is claimed that Articles 85 and 86 EEC Treaty are not directly effective for the ESI.

### 3. Direct Effect of Articles 85 (1) and 86 EEC Treaty for all Economic Branches

In order to assess whether this claim could be justified it is useful to look closer at the concept of direct effect.

The EJC has developed a number of criteria<sup>191</sup> as to when a Community provision produces direct effect:

- a) The provision must not by its nature indicate that it concerns the Member States only in their relations inter se.
- b) The provision must be clear and precise.
- c) It must not leave any discretion to Member States.
- d) It must be either unconditional or the conditions must have been fulfilled.
  
- e) No further measures on the part of the Member States or of the Community Institutions, must be required.

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<sup>187</sup> Again see Börner, "Assekuranz", *op.cit.* n. 184, pp. 66-104; see also Commission Decision 5.12.1984, OJ No L 35, 7.2.1985, p. 20, upheld in case 45/85 *Verband der Sachversicherer v Commission* [1987] ECR 405.

<sup>188</sup> Lukes, "Einführung", *op.cit.* n. 126, p. 2.

<sup>189</sup> Schwark, *op.cit.* n. 160, p. 209.

<sup>190</sup> *Supra*, chapter 3 part D.

<sup>191</sup> H.G. Schermers, D. Waelbroeck Judicial Protection in the European Communities, § 247; Collins, *op.cit.* n. 154, p. 48.

Conditions a) to d) are obviously met by Articles 85 (1) and 86 EEC Treaty. The case against the direct effect of the two provisions aims at the last requirement. The question is, whether Art. 87 (2)(c) EEC Treaty is to be understood as making the applicability of Articles 85 (1) and 86 EEC Treaty for certain branches of the economy subject to implementing measures of the Council.

This would only be the case if the two provisions could only be made *workable* by prior action of the Council. But, if Art. 87 (2)(c) is only meant to *facilitate* the application of the competition rules, then an action by the Council is not absolutely 'required': it is convenient, but not a precondition for the application of Articles 85 (1) and 86. The latter interpretation is supported by the wording of Art. 87 (1) EEC Treaty (on which para 2 builds up), which shows that measures under (2)(c) have the function to ease the practical difficulties in the application of the competition rules to different kinds of undertakings: "The Council shall [...] adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86."

The view that measures under Art. 87 (2)(c) are not required, but merely facilitate the application of Articles 85 and 86, is also supported by the judgement of the ECJ in *Verband der Sachversicherer v Commission*<sup>192</sup>. Here, the ECJ as well, was confronted with the "Art. 87-argument" and rejected it outright. The Court, however, did not give detailed reasons, but the decisive objection had been formulated by Advocate-General Darmon<sup>193</sup>: "The enabling power granted by Article 87 (2) (c) cannot determine the applicability of the principles set out in Articles 85 and 86 [...]. In fact, Article 85 contains all the machinery necessary for encompassing, by means of Article 85 (3), the particular characteristics of cooperation in a specific economic sector in accordance with the objective of Article 2 EEC Treaty. [...] the effectiveness of Treaty rules which have direct effect cannot be impaired by delay on the part of the institutions or the Member States in adopting implementing measures *which are solely intended to make it easier to give effect to the rules and not to be the condition on which implementation depends* [italics supplied]".

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<sup>192</sup> Case 45/85 [1987] ECR 405.

<sup>193</sup> [1987] ECR 405 (p. 432).

#### 4. Conclusion

Thus the initial question must be answered as follows:

Art. 87 (2)(c) EEC Treaty does not make the applicability of Articles 85 (1) and 86 EEC Treaty for certain branches of the economy, such as the electricity market, subject to prior measures of the Council.<sup>194</sup>

Details of the application of these provisions to anticompetitive conducts in the electricity industry are not thereby anticipated.<sup>195</sup>

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<sup>194</sup> Everling, "Der Binnenmarkt nach der Rechtsprechung des Gerichtshofs", *op.cit.* n. 123, p. 146.

<sup>195</sup> Concerning the question whether and how Articles 85 (1) and 86 EEC Treaty take the peculiarities of the electricity market into account see *infra* chapter 3 part F and G.

#### IV. The Controversy on Art. 90 (2) EEC Treaty

A limited exemption of Articles 85 and 86 EEC Treaty with regard to agreements and conducts on the electricity market, could finally derive from Art. 90 (2) EEC Treaty.

##### 1. Scope of the Provision

Art. 90 (2) EEC Treaty provides that "undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them".

Despite this positive formulation of the provision, its importance lies in the fact that it excludes the application of the normal rules, to the extent that they would prevent the accomplishment of the tasks of those enterprises.<sup>196</sup>

The possibility of exempting undertakings from the application of the Treaty rules<sup>197</sup> is subject to a two-stage reservation.<sup>198</sup>

Firstly, the unrestricted application of the EEC Treaty would have to make the performance of the task of the undertaking in question actually or legally, impracticable. Secondly, a deviation from the Treaty is only possible if this does not affect the development of trade to such an extent as would be contrary to the interests of the Community.

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<sup>196</sup> P. Schindler, "Public Enterprises and the EEC Treaty", (1970) 7 CMLRev pp. 57-71 (p. 67).

<sup>197</sup> It is generally agreed that Art. 90 (2) EEC Treaty represents a legal exception from all provisions of the Treaty and not just from the rules on competition; see A. Deringer, "The Interpretation of Article 90 (2) Of The E.E.C. Treaty", (1964/65) 2 CMLRev pp. 129-138 (136).

<sup>198</sup> I. Pernice in E. Grabitz, Kommentar zum EWG-Vertrag, Art. 90 no. 51.

## 2. Necessity to Decide Each Case Separately

Looking at the comments to Art. 90 (2) EEC Treaty one often finds the electricity industry mentioned as an example for an economic branch that carries out services of general economic interest.<sup>199</sup>

However, it cannot be concluded from these comments, that all electricity undertakings in every Member State fall within the scope of that provision. It is, on the contrary, necessary to check with every Member State whether its electricity utilities are undertakings entrusted with services of general economic interest within the meaning of Art. 90 (2) EEC Treaty. This means that it is not possible to examine the European ESI as a whole.

There is, however, one objection that could be raised against a separate examination and decision for each Member State.

It is conceivable that a Member State intentionally, and unilaterally creates electricity utilities that fall within the scope of Art. 90 (2) EEC Treaty.<sup>200</sup> Thus, Member States could, by the means of an interventional and planned policy, exempt their electricity undertakings from the application of the European competition law while the power utilities of other Member States are entirely covered by these

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<sup>199</sup> I. Hochbaum in H. von der Groeben et.al. Kommentar zum EWG-Vertrag, Art. 90 no. 31; R. Bieber in B. Beutler et.al., Die europäische Gemeinschaft - Rechtsordnung und Politik, p. 355; Pernice *op.cit.* n. 198 Art. 90 no. 90; critical V. Emmerich, Das Wirtschaftsrecht der öffentlichen Unternehmen, p. 452.

<sup>200</sup> Possible example: the foundation of the electricity-company ENEL by the Italian state. In 1962 private Italian electricity undertakings were nationalized by statutes and their assets transferred to the *Ente Nazionale per l'Energia Elettrica*, ENEL.

rules.<sup>201</sup> This could result in prejudices against those undertakings that do not fall under Art. 90 (2) EEC Treaty.

Such fears are unjustified.

Even if it is conceded that certain undertakings are covered by Art. 90 (2) EEC Treaty, they have not won the day yet. The reason for this lies mainly in the wording of Art. 90 (2) sentence 2 EEC Treaty, according to which an exemption from the competition rules is only possible to the extent to which this would not "be contrary to the interests of the Community".

What these interests of the Community are, has to be inferred from the principles and goals of the EEC Treaty, and leaves considerable scope of interpretation for the community institutions.<sup>202</sup>

The details of an exemption from the Treaty rules under Art. 90 (2) EEC Treaty are thus subject to careful considerations evaluating all circumstances of the individual case.<sup>203</sup>

Part of the circumstances that thereby are taken into account, is the question whether similar undertakings in other Member States also have the opportunity to exclude the application of the European competition law.<sup>204</sup>

The European Community thus has sufficient instruments at hand to avoid injustices that could be caused by an individual classification of each national ESI with regard to Art. 90 (2) EEC Treaty.

The question whether Art. 90 (2) EEC Treaty covers the electricity

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<sup>201</sup> The relationship between national public authorities and public undertakings tends to be very complex and unfathomable. For that reason the Commission has, in accordance with Art. 90 (3) EEC Treaty, issued a Directive of 25. June 1980 on the transparency of financial relations between Member States and public undertakings (OJ No L 195, 29.7.1980, p. 35).

<sup>202</sup> Pernice, *op.cit.* n. 198, Art. 90 no 58; see also D. Birkenmaier, "Gemeinsamer Markt, nationales Interesse und Art. 90 EWGV" (1988) 23 *EuR* pp. 144-157 (p. 148).

<sup>203</sup> See for example case 41/83 *Italy v Commission* [1985] ECR 873 (pp. 887 et. seq.).

<sup>204</sup> D. Birkenmaier, *op.cit.* n. 202, p. 148.

utilities of one Member State, therefore has to be answered irrespective of its application to the ESI of other Member States.<sup>205</sup>

Since it is necessary to check the applicability of Art. 90 (2) EEC Treaty with regard to the specific characteristics of the national ESIs, an examination including all twelve Member States would go beyond the scope of this paper. The present thesis therefore concentrates on the English and Welsh as well as the German electricity utilities.

### 3. Interpretation of "Undertakings"

The first question that arises is whether the English, Welsh and German electricity utilities are "undertakings" in the meaning of Art. 90 (2) EEC Treaty.

The EEC Treaty does not provide a definition of the term "undertaking". Since Art. 90 EEC Treaty is part of the chapter "Rules on Competition", it is appropriate to refer to the interpretation of "undertaking" developed in connection with Articles 85 and 86 EEC Treaty.<sup>206</sup>

Apart from some minor differences of opinion, it is commonly agreed that "undertaking" in the meaning of those provisions is *any natural person or association engaged in commercial activities*.<sup>207</sup>

The English and Welsh, as well as the German electricity utilities are covered by that definition, because they are engaged in the generation of / or trade with, electricity.

It nevertheless is questionable though, whether the electricity companies in England and Germany qualify as "undertakings" in the meaning

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<sup>205</sup> Birkenmaier, *op.cit.* n. 202, p. 148; Stewing, *op.cit.* n. 50, p. 150.

<sup>206</sup> H. Smit/P. Herzog, The Law of the EEC: A Commentary on the Treaty vol. 3, para. 90.08 b.

<sup>207</sup> U. Everling in E. Wohlfarth et al. Europäische Wirtschaftsgemeinschaft; Kommentar zum Vertrag, Art. 85 no. 1.

of Art. 90 EEC Treaty.

According to the wording of its para. (1), this provision concerns "public undertakings", whereas the English and German electricity utilities are mainly privately owned.<sup>208</sup> In contrast to Art. 90 (1) EEC Treaty, Art. 90 (2) EEC Treaty however, is not addressed expressly to "public undertakings" but to "undertakings", albeit of a particular kind. This is why it is generally agreed that Art. 90 (2) EEC Treaty applies not only to public, but also to private undertakings.<sup>209</sup> The ECJ has stated that explicitly in *BRT v SABAM*.<sup>210</sup> Referring to Art. 90 (2) EEC Treaty it held: "Private undertakings may come under that provision [...]"<sup>211</sup>.

It follows that the English and German electricity utilities, despite their private status, are "undertakings" within the meaning of Art. 90 (2) EEC Treaty.<sup>212</sup>

#### 4. Interpretation of "Operation of Services"

The next question that arises is whether the electricity companies in England and Germany perform the "operation of services" within the meaning of Art. 90 (2) EEC Treaty.

In the system of the EEC Treaty, the supply with electricity has to be classified as supply with a "good" and not as "service" in the meaning of Articles 59-66 EEC Treaty.<sup>213</sup>

The tasks of the electricity undertakings therefore could not be regarded as a "service" in the meaning of Art. 90 (2) EEC Treaty, if

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<sup>208</sup> *Supra*, chapter 2 part C.II.2.-3.

<sup>209</sup> Bellamy/Child, *op.cit.* n. 141, p. 573; Hochbaum, *op.cit.* n. 199, Art. 90 (2) no. 28.

<sup>210</sup> Case 127/73 [1974] ECR 313.

<sup>211</sup> *Ibid.*, p. 318 consideration 20.

<sup>212</sup> For the German electricity undertakings see in place of many: Arndt, *op.cit.* n. 32, p. 21.

<sup>213</sup> *Supra*, chapter 2 part D.IV.3.

the expression "operation of services" in this provision had the same meaning as "services" in Articles 59-66 EEC Treaty.

The main argument in favour of the view that only "services" according to the definition in Art. 60 EEC Treaty, fall under Art. 90 (2) EEC Treaty, is that this interpretation would narrow the scope of Art. 90 (2) EEC Treaty.<sup>214</sup> This outcome is welcome, because Art. 90 (2) EEC Treaty provides for an exception to the application of Treaty rules and therefore must not be given a wide construction.<sup>215</sup>

At this point it has to be asked though, whether that narrow interpretation of "services" corresponds to the function of Art. 90 (2) EEC Treaty.

The goal of this provision is to enable the Member States to perform certain tasks of public interest in a way that might contradict the achievement of Community objectives.<sup>216</sup> These tasks of public interest can be services within the meaning of Art. 60 EEC Treaty but they also can concern goods, capital or persons. Whether the undertakings in question are dealing with services, goods or capital, therefore cannot make a difference for the question whether they are covered by Art. 90 (2) EEC Treaty.<sup>217</sup> An exemption of undertakings dealing with goods or capital would be arbitrary.<sup>218</sup>

Thus, it is generally maintained that "operation of services" in Art. 90 (2) EEC Treaty has to be interpreted in a much wider way than

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<sup>214</sup> Smit/Herzog, *op.cit.* no. 206, vol. 3 para. 90.12 b.

<sup>215</sup> Vaughan, *op.cit.* n. 139, para. 19.109; C.S. Kerse, EEC-Antitrust Procedure, p. 20; Smit/Herzog, *op.cit.* n. 206, vol. 3 paras. 90.11-90.12.

<sup>216</sup> E.J. Mestmäcker, Europäisches Wettbewerbsrecht, p. 653.

<sup>217</sup> Smit/Herzog, *op.cit.* n. 206, vol. 3 para. 90.12 b; Hochbaum, *op.cit.* n. 199, Art. 90 no. 31.

<sup>218</sup> Börner, "Artikel 90 II EWGV", *op.cit.* n. 121, p. 255.

"service" in Art. 60 EEC-Treaty.<sup>219</sup> Apart from services in the narrow sense of the word, it covers the providing, maintenance and distribution of goods.

Therefore "service" in the meaning of Art. 90 (2) EEC Treaty, covers all tasks that are connected with the supply of electricity although electricity as such, has to be regarded as "good".<sup>220</sup>

It follows that in England and Wales as well as in Germany, the ESI as a whole performs the operation of a service within the meaning of Art. 90 (2) EEC Treaty.

#### **5. Interpretation of "entrusted" with a Service of "general economic interest"**

The last requirement of Art. 90 (2) EEC Treaty is that the undertakings in question are "entrusted" with a service of "general economic interest".

#### **a. Advantages of a joint Application of "entrusted" and "general economic interest"**

The final decision of the question whether the German and English electricity utilities are covered by Art. 90 (2) EEC Treaty requires a joint examination of the term "entrusted" and "general economic interest".

An isolated examination of those elements is hardly reasonable since

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<sup>219</sup> Hochbaum, *op.cit.* n. 199, Art. 90 no. 31; Smit/ Herzog, *op.cit.* n. 206, vol.3 para. 90.12 b; Pernice, *op.cit.* n. 198, Art. 90 no. 35 et seq; R. Lukes "Energiewirtschaftliche Demarkationsverträge und EWG-Wettbewerbsrecht" (1987) 40 DB pp. 1925-1929 (p. 1926); H.P. Ipsen, Europäisches Gemeinschaftsrecht, p. 908; Mestmäcker, *op.cit.* n. 216, pp. 661 et seq.; A.A. Schweitzer, Der grenzüberschreitende Stromverbund in Europa, p. 133; Arndt, *op.cit.* n. 32, p. 21.

<sup>220</sup> Hochbaum, *op.cit.* n. 199, Art. 90 no. 31.

an entrusting cannot take place without a task and a task cannot be conferred upon someone without an act of conferring.<sup>221</sup>

Moreover, the formal act, although a necessary part, cannot be decisive for the existence of an entrusting. Crucial for the classification of an entrusting rather is the substantive quality of the task conferred.<sup>222</sup>

Therefore it will be necessary to examine in a first step the interpretation of the terms "entrusted" (part b.) and "general economic interest" (part c.) and in a second step to jointly apply the findings to the German and English ESIs (parts d. and e.).

### **b. The Meaning of "entrusted"**

The ECJ did not have to decide many cases yet, in which the interpretation of "entrusted" was at issue.<sup>223</sup> Thus, it has not developed a concise definition of that term. But, one nevertheless can derive certain rules from the decisions so far.

#### **aa. Act of Public Authority**

Until now, the European Court always has given the act of entrusting a narrow construction.

Fundamental for this interpretation was the case *BRT v SABAM*<sup>224</sup>. Here the ECJ held that an undertaking can only be regarded as entrusted, if a task is conferred upon it by virtue of "an act of public authority". The Court substantiated its restriction of permissible national legal

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<sup>221</sup> C. Stewing *op cit* n. 50 at p. 148.

<sup>222</sup> Emmerich, *op.cit.* n. 199, p. 446; Stewing, *op.cit.* n. 50, p.148, see also Mestmäcker, *op.cit.* n. 216, p. 661 and Schindler, *op.cit.* n. 196, pp. 68-69.

<sup>223</sup> See for example case 10/71 *Ministère Public of Luxembourg v Muller* [1971] ECR 723; case 127/73 *BRT v SABAM and NV Fonior* [1974] ECR 313.

<sup>224</sup> Case 127/73 *BRT v SABAM and NV Fonior* [1974] ECR 313 (p. 318 considerations 19-21).

institutions for an entrusting, with the argument that the reference in Art. 90 (2) EEC Treaty "particular tasks assigned to them" also applies to undertakings having the character of a revenue-producing monopoly.

In other words; since the assignment of certain tasks to revenue-producing monopolies requires a special form, the entrusting of undertakings has to meet the same requirements.

With this judgement, the Court rules out a contract under private law being sufficient for an entrusting. The ECJ in any case, requires an act of public authority which either could be a statute<sup>225</sup>, or an individual act<sup>226</sup>.

#### **bb. Conferring of Obligations**

The second requirement for an entrusting, is that specific responsibilities and obligations are conferred upon the undertakings in question.<sup>227</sup>

Therefore, a public allowance to carry out a certain business that does not provide for some kind of obligation, does not meet the requirements.<sup>228</sup>

Neither is an obligation sufficient which merely repeats legal duties that exist anyway. This was the reason why the European Commission refused to regard GEMA, the German performing right society as "entrusted".<sup>229</sup> GEMA claimed to be "entrusted" by the provisions of the

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<sup>225</sup> In case 10/71 *Ministère Public of Luxembourg v Muller* [1971] ECR 723 the Court regarded an undertaking as entrusted whose obligation was conferred upon it by law.

<sup>226</sup> In case 172/80 *Züchner v Bayerische Vereinsbank* [1981] ECR 2021 the Court simply referred to "an act"; see Vaughan, *op.cit.* n. 139, para. 19.110 note 10.

<sup>227</sup> Case 127/73 *BRT v SABAM and NV Fonior* [1974] ECR 313 (p. 318).

<sup>228</sup> Lukes, "Demarkationsverträge", *op.cit.* n. 219, p. 1927.

<sup>229</sup> *Décision de la commission du 2 juin 1971 relative à une procédure d'application de l'article 86 du traité CEE (GEMA)*, JO 1971, L 134, 20.6.1971, p. 15.

Federal Law relating to the management of copyrights. It was true that GEMA had been granted authorization in accordance with § 1 of that law. The European Commission nevertheless rejected the plea that GEMA was "entrusted", because its obligation under the Copyright Law to contract, corresponded to a general rule of German law, according to which all monopoly enterprises are under a legal compulsion to enter into a contract.<sup>230</sup>

#### cc. Summary of Part b.

Summing up, the following formal conditions have to be met in order to regard the undertaking in question as "entrusted" in the meaning of Art. 90 (2) EEC Treaty: There must be an act of a public authority that grants the right to carry out a certain task and imposes obligations which go beyond normal responsibilities under the general laws.

#### c. The Meaning of "General Economic Interest"

##### aa. Necessity to find a "European Interpretation"

The expression "general economic interest" cannot be found in the law of any Member State.<sup>231</sup>

Moreover, Art. 90 (2) EEC Treaty gives little guidance as to the interpretation of the term and the ECJ has not yet clearly defined the scope of "general economic interest"<sup>232</sup>.

This is why some authors suggest that it should be up to the Member States to define what their "general economic interests" are.<sup>233</sup>

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<sup>230</sup> This obligation finds its roots in several rules like §§ 134, 138, 242, 862 BGB (German Civil Code) and § 26 GWB (German Anti-Cartel Law).

<sup>231</sup> Hochbaum, *op.cit.* n. 199, Art. 90 no. 33.

<sup>232</sup> Vaughan, *op.cit.* n. 139, para. 19.111 note 7.

<sup>233</sup> See Smit/Herzog, *op.cit.* n. 206, vol. 3 para. 90.12 b; Deringer, *op.cit.* n. 197, p. 136.

This approach has to be rejected.

Leaving the definition of their "general economic interest" completely to the Member States would result in a considerable lack of uniformity, since every task, apart from those conferred upon the European Community, could be classified as being of "general economic interest".<sup>234</sup> In this case, the application of Treaty provisions and thus the scope of integration, would be subject to the discretion of the Member States.

Therefore, it cannot be left completely to the Member States to define "general economic interest". Rather, it is necessary to interpret the term uniformly.

#### **bb. "General Economic Interest" as Public Interest**

Following on the need to find a uniform interpretation it is necessary to examine in which context "general economic interest" is used.

Though "general economic interest" cannot be found in the law of any Member State, it is of interest to notice that the expressions "general" and "general public" are often used in conjunction with definitions of public interest.<sup>235</sup>

Therefore, some authors come to the conclusion that "general economic interest" has to be equated with *public interest*.<sup>236</sup> This opinion can be supported especially because the ECJ, in interpreting the term "general economic interest", also takes the purposes of public economy interests into account.<sup>237</sup>

Thus, "general economic interest" within the meaning of Art. 90 (2)

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<sup>234</sup> Mestmäcker, *op.cit.* n. 216, at p. 661.

<sup>235</sup> Stewing, *op.cit.* n. 50, p. 159.

<sup>236</sup> Mestmäcker, *op.cit.* n. 216, p. 660; H.P. Ipsen, "Öffentliche Unternehmen und gemeinsamer Markt" (1964) NJW p. 2336; K. Vygen Öffentliche Unternehmen im Wettbewerbsrecht der EWG, pp. 97 et seq; C. Stewing *op cit* n. 50 at p. 160; Pernice, *op.cit.* n. 198, Art. 90 no. 36.

<sup>237</sup> Mestmäcker, *op.cit.* n. 216, p. 660; see for example case 10/71 *Ministère Public of Luxembourg v Müller* [1971] ECR 723 (p. 730).

EEC Treaty, has to be understood as corresponding to the public interest of the Member States.<sup>238</sup>

The economic-political concepts of the individual Member States have hence to be taken into consideration after all.

This is because the Member States, in determining what tasks are of public interest, cannot orient themselves at the goals of the Community, but have to take their respective needs and special problems into account.

The standards, however, according to which a public interest of a Member States can be accepted by the Community as a "general economic interest" within the meaning of Art. 90 (2) EEC Treaty, have to be uniform and identical for all Member States.<sup>239</sup>

The question arises as to what these standards are.

#### cc. Standards for the Acceptance by Community Law

Art. 90 (2) EEC Treaty excludes undertakings that perform special tasks from the application of Treaty provisions. The reason for that exclusion lies in the assumption that those undertakings would have difficulties to continue the performance of their tasks, if all Treaty rules were applied to them.

But why does Art. 90 (2) EEC Treaty try to protect these undertakings against difficulties?

Obviously, the underlying idea behind Art. 90 (2) EEC Treaty is that the tasks in question shall be performed in any case, even if this, due to the market conditions, is not profitable.<sup>240</sup> The goal of Art. 90 (2) EEC Treaty thus is the maintenance of those services despite their possible uneconomicalness.

Therefore a "general economic interest" in the meaning of Art. 90 (2)

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<sup>238</sup> A. Page, "Member States, Public Undertakings and Art. 90", (1982) 7 *EuLRev*, pp. 19-35 (p. 29); Schindler, *op.cit.* n. 196, p. 70.

<sup>239</sup> Pernice, *op.cit.* n. 198, Art. 90 no. 35; Emmerich, *op.cit.* n. 199, p. 454; critical Page, *op.cit.* n. 238, pp. 29-30.

<sup>240</sup> Mestmäcker, *op.cit.* n. 216, p. 662.

EEC Treaty exists, if an undertaking has the obligation to carry out the task conferred upon it, even in cases where it is not worthwhile to do so.<sup>241</sup>

If a Member State values the public interest in the performance of a certain task, as more important than the interests of the undertaking in making and maximizing profit, this public interest is a "general economic interest" within the meaning of Art. 90 (2) EEC Treaty.<sup>242</sup>

The planning and interests of the undertaking have to be completely subordinated to the public interest. This requirement is only met if the business has to be carried on, even if this were not economically worthwhile from a profit orientated entrepreneur's point of view. It is not sufficient that the scope for profits is not quite as large as without the obligations conferred upon the undertaking in question.<sup>243</sup>

#### dd. Summary of Part c.

It follows that an undertaking carries out services of "general economic interest" according to Art. 90 (2) EEC Treaty if:

- the service lies within the public interest of the respective Member State and
- the state interferes with the interests of the undertaking to such an extent that its (the undertakings) interests are subordinated to the public interests in the performance of the task.

#### d. Application to the Electricity Undertakings in Germany

##### aa. Introduction

In order to be regarded as undertakings "entrusted" with a service of "general economic interest", the electricity utilities have to meet

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<sup>241</sup> Stewing, *op.cit.* n. 50, p. 166; Mestmäcker, *op.cit.* n. 216, pp. 662-663.

<sup>242</sup> Mestmäcker, *op.cit.* n. 216, pp. 662-663; Stewing, *op.cit.* n. 50, p. 166; Emmerich, *op.cit.* n. 199, pp. 449 et seq.

<sup>243</sup> Mestmäcker, *op.cit.* n. 216, pp. 662-663.

the following conditions:

A task has to be conferred upon them by an act of public authority providing for obligations that go beyond normal responsibilities, under the general law.

There must be a public interest in the performance of the task, and the undertaking must be obliged to continue it, irrespective of a possible infringement of its own economic interests.

#### bb. Electricity Supply as Task of Public Interest

The first question that arises is, whether the supply with electricity is regarded as a task of public interest by the German state.

Fundamental for the legal framework of the electricity supply in Germany is the *Energiewirtschaftsgesetz*<sup>244</sup>. In its preamble, this statute declares that electricity must be utilized in a way that takes the public interest into account and guarantees an essential public influence upon its utilization. Thus, the electricity supply in Germany obviously is of public interest.<sup>245</sup>

The next question is whether the German electricity supply undertakings are "entrusted" with their task.

The first condition for an entrusting is that the task has been conferred upon the electricity utilities by an act of public authority.

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<sup>244</sup> Law on the Energy Industries (referred to as EnWG) from December 13, 1935.

<sup>245</sup> Schwark, *op.cit.* n. 160, p. 206; Stewing, *op.cit.* n. 50, p. 160.

### cc. Act of Public Authority

§ 5 EnWG<sup>246</sup> states that an undertaking taking up the supply of others with electricity, needs an authorization by the Minister of Economics. Thus, power supply in Germany is subject to approval. The authorization by the Minister of Economics is an act of public authority, and therefore satisfies the conditions for the existence of an entrusting set up by the ECJ.<sup>247</sup>

But such an act of public authority alone is not sufficient. The second condition is the conferring of an obligation or responsibility upon the undertakings.<sup>248</sup>

### dd. Conferring of Obligations

#### - Obligations conferred by § 6 EnWG

The required obligation of the electricity undertakings could ensue from § 6 EnWG, according to which the distribution utilities have the duty to connect all premises to their network, and to supply them.

The function of § 6 EnWG, however, is mainly a clarifying one. In imposing an obligation to provide and maintain services for everybody this provision merely repeats a general concept of German law according to which any monopolistic supply utility is under an obligation to enter into contract.<sup>249</sup> Thus, the electricity utilities had to

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<sup>246</sup> § 5 EnWG does not have much practical relevance. This is because this provision only concerns the commencement of power supply and when the EnWG entered into force in 1935 nearly all utilities that today are engaged in the supply of electricity existed already; Niederleithinger, *op.cit.* n. 173, p. 75.

<sup>247</sup> With the same result Lukes, "Demarkationsverträge", *op.cit.* n. 219, p. 1927.

<sup>248</sup> Börner, "Art. 90 II", *op.cit.* n. 121, p. 258; Everling, "Der Binnenmarkt nach der Rechtsprechung des Gerichtshofs", *op.cit.* n. 123, p. 152.

<sup>249</sup> *Supra*, chapter 3 part E.IV.5.b.bb.

supply everybody, even before the EnWG came into force.<sup>250</sup>

The responsibilities conferred upon the electricity utilities by § 6 EnWG hence do not go beyond the legal obligations under normal law, and therefore are not sufficient to regard the undertakings as "entrusted" in the sense of Art. 90 (2) EEC Treaty.<sup>251</sup>

In addition, there is another argument which supports the view that the obligation under § 6 EnWG cannot justify the assumption of an entrusting.

An undertaking can only be regarded as "entrusted" with a service of "general economic interest", if it is obliged to continue its task even where and when this contradicts the economic interests of the company.

This condition is not met by the German electricity utilities. It is true that they have to supply every customer even those that live in rural areas. In some cases the costs for providing the necessary lines or plants are much higher than the profit the utility ever can make by selling electricity to a certain customer. But this obligation does not interfere with the economical interests of the electricity undertaking. This is because the electricity utilities are allowed to calculate the tariffs for domestic supply on the basis of a mean-calculation which takes those "loss-producing" customers into account. Thus the tariff-prices always are high enough to ensure that inspite the "problem" customers, the electricity undertakings make profits on aggregate.

Summing up, the obligation conferred upon the German electricity utilities by § 6 EnWG, does not allow for several reasons, the conclusion that they are entrusted in the sense of Art. 90 (2) EEC Treaty.<sup>252</sup>

The question arises whether an entrusting can be inferred from other

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<sup>250</sup> Niederleithinger, *op.cit.* n. 173, p. 77; Stewing, *op.cit.* n. 50, p. 184.

<sup>251</sup> Arndt, *op.cit.* n. 32, p. 21.

<sup>252</sup> Like here Börner, "Art. 90 II", *op.cit.* n. 121, p. 263; Niederleithinger, *op.cit.* n. 176, p. 77; Stewing, *op.cit.* n. 50, p. 185.

provisions of the German EnWG that provide for obligations of the electricity utilities.

- Obligations conferred by § 7 EnWG

§ 7 EnWG enables a regulatory authority to influence the tariffs and conditions of domestic supply. The question arises whether the state, by the means of that competence, can subordinate the economical interests of the electricity undertakings to the interests of the general public.

The tariffs have, according to § 7 EnWG, to be calculated in an economical way. It is generally maintained<sup>253</sup> that this goal is achieved if the tariff-calculation balances operational and economical interests of the undertakings with the customers interests. In spite of lots of differences of opinion concerning the details of this calculation<sup>254</sup>, there is agreement that at the end of the day, the interests of neither side should be set aside to an unacceptable extent. No party may be exposed to conditions which are economically unreasonable.<sup>255</sup> Thus, the state cannot dictate tariffs that endanger the economic existence of the electricity undertakings.

From the above, it follows that the obligation conferred upon the electricity utilities by virtue of § 7 EnWG are not of such nature as to regard the undertakings as "entrusted".<sup>256</sup>

Neither are there any other obligations conferred upon the electricity utilities by the EnWG that would justify to regard them as "entrus-

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<sup>253</sup> H. Fischerhof, "Von der alten zur neuen Tarifordnung für Elektrizität", (1972) 22 ET, p. 84.

<sup>254</sup> See the enumeration in Stewing, *op.cit.* n. 50, pp. 180-181.

<sup>255</sup> H. Fischerhof, "Stromdurchleitungen", *op cit* n. 114 at p. 84.

<sup>256</sup> Stewing, *op.cit.* n. 50, p. 182.

ted".<sup>257</sup>

#### ee. Summary to Part d.

It follows that the German electricity undertakings are not "entrusted" with a "service of general economic interest" within the meaning of Art. 90 (2) EEC Treaty.<sup>258</sup>

#### e. Application to the Electricity Undertakings in England

##### aa. Introduction

The same conditions<sup>259</sup> under which the German ESI would be regarded as "entrusted" with a service of "general economic interest" apply to the English electricity undertakings.

##### bb. Electricity Supply as Task of Public Interest

Again, the first step of the analysis is the question of whether the English electricity utilities perform a task of public interest.

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<sup>257</sup> In this connection some authors examine §§ 3,4,8,9 and 11 EnWG but they don't reach an other outcome, see for example Stewing, *op.cit.* n. 50, pp. 174-186 and Börner, "Art. 90 II", *op.cit.* n. 121, pp. 258-266.

<sup>258</sup> Like here Börner, "Art. 90 II", *op.cit.* n. 121, p. 266; Klaue, "Der Strombezug industrieller Sonderabnehmer nach deutschem und europäischem Kartellrecht", (1986) VIK-Mitt. pp. 150-154 (p. 154); Birkenmaier, *op.cit.* n. 202, pp. 150 et seq; Stewing, *op.cit.* n. 50, p. 188; Niederleithinger, *op.cit.* n. 173, p. 78; Lukes, "Demarkationsverträge", *op.cit.* n. 219, p. 1927; unlike here Schwark, *op.cit.* n. 160, p. 216; Speich, *op.cit.* n.160, p. 127; Schweitzer, *op.cit.* n. 219 pp. 134 et seq; Hermann, "Ordnungsgrundlagen", *op.cit.* n. 31, p. 21.

<sup>259</sup> *Supra*, chapter 3 part E.IV.5.d.aa.

Sec. 3 of the Electricity Act 1989 lays down general duties of the Secretary of State and the Director General of Electricity Supply. Amongst a number of other obligations, they have to exercise their function in a way that "secures that all reasonable demands for electricity are satisfied" (sec. 3 (1)(a)) and "protects the interests of the customers..." (sec. 3(3)(a)). These duties conferred upon the bodies responsible for the supervision of the ESI, signifies the importance the legislator attributes to the electricity supply.

Moreover, a whole chapter of the Electricity Act (sections 32-38) has the headline "Protection of Public Interest".

These provisions demonstrate that the power supply in England and Wales is considered as a task of public interest.

It now has to be examined whether the electricity utilities are "entrusted" with that task.

One condition for that is the existence of an act of public authority.

#### cc. Act of Public Authority

According to sec. 4 Electricity Act, it is an offence to generate, transmit or supply electricity unless the person is "authorized to do so by licence or exemption".

An exemption is granted by the Secretary of State under sec. 5 Electricity Act and can be considered, for example, in cases of very small amounts of generation.<sup>260</sup> People generating, transmitting or supplying electricity normally need a licence issued under sec. 6 Electricity Act, by the Secretary of State or the Director General of Electricity Supply.

Licensing is an administrative procedure by which the carrying out of a trade or business is authorized. which is not allowed to be carried

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<sup>260</sup> Sas, *op.cit.* n. 39, p. 493.

out without such a licence.<sup>261</sup> This public procedure can, for example, be used by the State in order to enforce or maintain technical standards or restrict the number of persons engaged in a certain activity.<sup>262</sup>

The granting of a licence under sec. 6 Electricity Act is thus an act of public authority.

However, just as an allowance under § 5 EnWG is not sufficient to create a case of entrusting, the licence according to sec. 6 Electricity Act alone cannot justify the assumption that the English electricity utilities are entrusted in the sense of Art. 90 (2) EEC Treaty.

Rather it is necessary that obligations and responsibilities are conferred upon the undertakings which subordinate their own economical interests, to the interests of the general public.

#### dd. Conferring of Obligations

The Electricity Act contains far-reaching powers of intervention for the Secretary of State as well as for the Director General of Electricity Supply. Some of these powers of intervention flow directly from the Electricity Act.<sup>263</sup> With regard to others, the Electricity Act empowers the Secretary of State and the Director General of Electricity Supply to build them into the licences by imposing conditions and

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<sup>261</sup> For details see J.F. Garner/B.L. Jones, Administrative Law, pp. 26 et. seq.; D. Foulkes, Administrative Law, pp. 93 et. seq.; J.A.G. Griffith/H. Street, Principles of Administrative Law, pp. 148-149, 184-187.

<sup>262</sup> Garner/Jones, *op.cit.* n. 261, p. 26.

<sup>263</sup> See for example: sec. 9 Electricity Act concerning the general duties of all licence holders;  
sec. 25 Electricity Act giving the Director General of Electricity Supply the power to issue final orders to secure that a licence holder complies with all conditions and requirements;  
sec. 28 Electricity Act providing for a power of the Director General of Electricity Supply to require information etc.

obligations on the licensees.<sup>264</sup>

Duties of the electricity utilities that might justify the assumption of an entrusting could above all ensue from sec. 7 or sec. 16 Electricity Act.

The question is whether those obligations imposed on the undertakings disregard their economical interests.

#### - Obligations conferred by Sec. 7 Electricity Act

Sec. 7 Electricity Act deals with conditions licences may contain.

Firstly, licences can impose conditions that seem requisite with regard to the duties of the Secretary of State and the Director General of Electricity Supply laid down in sec. 3 Electricity Act.

Sec. 3 Electricity Act obliges the Secretary of State and the Director General of Electricity Supply for example to exercise their functions in a manner which they consider is best calculated:

"to secure that all reasonable demands for electricity are satisfied" (sec. 3 (1)(a));

"to secure that license holders are able to finance the carrying on of the activities which they are authorised [...] to carry on" (sec. 3 (1)(b));

"[...] to promote competition in the generation and supply of electricity" (sec. 3 (1)(c)).

The question arises whether the legislator does subordinate the economical interests of the electricity utilities to the public interest by allowing the imposing of those conditions on the licensees. The provisions cited above demonstrate that the legislator tries to find a reasonable compromise between the interests of the electricity undertakings in making profits and the interests of the general

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<sup>264</sup> See for example sec. 7 (2) (a) Electricity Act stating apart from other things that a licence can include conditions that require "[...] the licence holder to enter into agreements with other persons for the use of any electric lines and electrical plants of his".

public in a cheap and reliable power supply.

This can be substantiated by looking at certain phrases like "[...] all *reasonable* demands for electricity shall be satisfied [italics supplied]" (sec. 3 (1)(a)) or "[...] to promote efficiency and economy [...]" (sec. 3 (3)(b)).

Secondly, sec. 7 (2) Electricity Act states that a licence "[...] may require the licence holder to enter into agreements with other persons for the use of any electric lines and electrical plants of his". This condition, too, does not supersede the economical interests of the electricity undertakings because they are entitled to charge the person for the use of their lines and plants.

Thus none of the conditions enumerated in sec. 7 Electricity Act justify the assumption that the English electricity utilities are "entrusted" with a task of "general economic interest".

#### - Obligations conferred by Sec. 16 Electricity Act

Sec. 16 Electricity Act contains the general duty of the Public Electricity Suppliers (PES) <sup>265</sup> to supply every premise within their area on request (sec. 16 (1)(a)). Where necessary, electric lines and electrical plants have to be provided (sec. 16 (1)(b)).

Thus, sec. 16 Electricity Act contains a general obligation to provide and maintain services similar to § 6 EnWG. Also similar to § 6 EnWG, the scope of application of sec. 16 Electricity Act is restricted to tariff customers. This can be inferred from sec. 18 (1) Electricity Act which states that supply with electricity in pursuance of sec. 16 (1) Electricity Act, shall be in accordance with tariffs fixed by the PES.

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<sup>265</sup> According to sec. 6 (9) the Public Electricity Suppliers are the Regional Electricity Companies.

Customers can also enter into special agreements with PES, different<sup>266</sup> from those normal tariffs; customers with a demand exceeding 10 MW "shall" enter in such an agreement (sec. 22 (1) Electricity Act).

Since the normal tariffs for domestic supply will not be attractive for big end users, they will make use of the possibility to enter into special agreements under sec. 22 Electricity Act. Thus, the obligation in sec. 16 (1) Electricity Act in practice only concerns tariff customers<sup>267</sup>.

The general obligation under sec. 16 (1) Electricity Act to provide and maintain services would justify the assumption of an entrusting if the electricity utilities were forced to continue their task even where and when that contradicts their interests in making profits.

This is not the case. As in Germany, the English electricity tariffs are calculated on the basis of a mean calculation taking the fact that there always are some loss-producing customers into account.<sup>268</sup>

Thus, the electricity utilities at the end of the day make no loss in supplying every customer and charging the normal tariffs even if there are some "dead losses" among the customers.

Moreover, sec. 19 (1) Electricity Act states "[w]here any electric line or electrical plant is provided by a public electricity supplier in pursuance of section 16 (1) above, the supplier may require any expenses reasonably incurred in providing it to be defrayed by the person requiring the supply [...]". Hence the PES can shift at least part of the expenses that arise if it supplies a customer in a rural area, to that customer.

In addition, sec. 17 Electricity Act provides for exceptions from the

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<sup>266</sup> The fact that the special agreements are different from the tariffs according to sec. 18 (1) Electricity Act follows from sec. 22 (3) Electricity Act stating that the rights and liabilities of the parties of the agreement shall be those arising from the agreement and not those provided for by sections 16-21 Electricity Act.

<sup>267</sup> For a definition of "tariff customer" see sec. 22 (4) Electricity Act.

<sup>268</sup> For the new regime see Capel, *op.cit.* n. 63, p. 9.

duty to supply. A PES for example is not obliged to supply if "[...] it is not reasonable in all circumstances for him to do so".

Thus, the legislator, although imposing a general duty to supply, has also taken reasonable interests of the PESs into account. Therefore the duty conferred upon the PESs in sec. 16 Electricity Act does not fulfill the conditions that are necessary to regard the PES as entrusted. It is true that the utilities do make less profit if they have to supply unprofitable customers. However, undertakings only can be considered as entrusted if their interests are completely subordinated to the public interest.<sup>269</sup>

#### - Obligations conferred by Sections 32-38 Electricity Act

Obligations of electricity utilities are also contained in the sections 32-38 Electricity Act that form the chapter "Protection of Public Interest".

Sec. 32 Electricity Act empowers the Secretary of State, after consultation with the Director General of Electricity Supply, to require each PES to produce evidence showing that it has made arrangements to take a certain percentage of his capacity from non-fossil fuel sources.

Assuming that fossil fuel generated electricity is cheaper than power generated from non-fossil fuels, the obligation to take a certain capacity from non fossil fuel sources could interfere with the economical interests of the PESs. Sec. 33 Electricity Act therefore provides for the competence of the Secretary of State to make regulations imposing a fossil fuel levy on all persons holding any type of supply licence. This way, the costs can be balanced out amongst all suppliers and not just PESs<sup>270</sup>. Thus, the legislator takes the financial interests of the PESs into account and does not totally ignore them.

Therefore, the obligation to take a certain percentage of their

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<sup>269</sup> *Supra*, chapter 3 part E.IV.5.c.

<sup>270</sup> *Sas*, *op.cit.* n. 39, p 492; *Capel*, *op.cit.* n. 63, p. 22.

capacity from non fossil fuel sources does not result in the PESS being entrusted with the task they perform.

**ee. Summary of Part e.**

None of the obligations conferred upon the English electricity undertakings by the 1989 Electricity Act interferes with their economical interests in a way that would justify the assumption that they are entrusted with a task of general economic interest, in the sense of Art. 90 (2) EEC Treaty.<sup>271</sup>

**f. Summary of Part 5.**

Taking the narrow interpretation of the elements of Art. 90 (2) EEC Treaty by the ECJ into account, the better reasons support the view that neither the German nor the English and Welsh electricity utilities are entrusted with services of general economic interest in the meaning of that provision.

**6. The Commission's Approach to Article 90 (2) EEC Treaty and Differences in the Overall Result**

**a. The Commission's View**

In its recent Decision<sup>272</sup> on the compatibility of agreements concluded between the Dutch electricity undertakings with Art. 85 (1) EEC Treaty the European Commission also applied Art. 90 (2) EEC Treaty. It found that the undertakings in question are entrusted with a service of general economic interest in the meaning of that provision. The Commission substantiated this result as follows.

First it stated that the main task of the undertakings in question "is

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<sup>271</sup> Like here Birkenmaier, *op.cit.* n. 202, p. 147 note 16; left undecided Sas, *op.cit.* n. 39, p 498 note 89.

<sup>272</sup> OL L No 28, 2.2.1991, p. 32 (pp. 43 et seq).

to ensure a reliable and efficient operation of the national electricity supply at costs which are as low as possible and in a socially reasonable fashion"<sup>273</sup>.

Because of that, the Commission accepted that the utilities are engaged in the *operation of services of general economic interest*.

The Commission moreover, considered the undertakings concerned as being *entrusted* in the meaning of Art. 90 (2) EEC Treaty since these tasks had been assigned to them by an act of public law.

According to the European Commission, an electricity undertaking thus is entrusted with a service of general economic interest if the task to ensure a reliable and efficient public supply has been assigned to it by an act of public law. There are no requirements apart from that.

The question arises whether the German and English electricity utilities do meet the requirements set up by the Commission. In other words; can it be assumed that the Commission would regard the German and English electricity utilities as entrusted with a service of general economic interest in the meaning of Art. 90 (2) EEC Treaty?<sup>274</sup>

The German as well as the English electricity undertakings are under the obligation to uphold an efficient and reliable electricity supply for all customers.<sup>275</sup> These tasks have been conferred upon them by acts of public authority.

Since the German and English electricity utilities therefore fulfill

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<sup>273</sup> *Ibid.*, p. 43.

<sup>274</sup> It should be pointed out here, though, that no Commission decisions concerning the application of Art. 90 (2) EEC Treaty to the German and English ESI are to be expected in the foreseeable future. The Commission has up to now not taken proceedings against the German electricity utilities. As far as the English ESI is concerned the Commission probably will not deploy Art. 90 (2) as the agreements in question do not infringe Art. 85 (1) EEC Treaty in the first place; *infra* chapter 4 part B.I.

<sup>275</sup> *Supra*, chapter 3 part E.IV.5.d.and e.

the Commission's conditions set up in connection with the Dutch ESI, it can be assumed that the Commission would regard them as being entrusted with the operation of a service of general economic interest in the meaning of Art. 90 (2) EEC Treaty.

#### **b. Critical Commentary**

It is respectfully submitted that this opinion cannot be followed.

The examination carried out by the Commission in the Dutch case seems to have been rather short. It did not consider what results the tasks conferred upon the undertakings have on their economical situation. Nor did the Commission take into account whether the state does subordinate the interests of the undertakings in making and maximizing profits completely to the public interest in the performance of that task. Thus, the Commission failed to consider aspects which, for reasons elaborated above<sup>276</sup>, are indispensable ingredients.

Furthermore, the superficial approach demonstrated by the Commission in the Dutch case leads to a broad application of Art. 90 (2) EEC Treaty which contradicts the endeavour of the Court of Justice to give this provision a narrow interpretation.

#### **c. Possible Differences in the Overall Result**

In the next step, it has to be examined whether the diverging approach adopted by the European Commission in connection with Art. 90 (2) EEC Treaty leads to differences in the overall result.

If one assumes that the electricity undertakings in England and Germany are indeed entrusted with a service of general economic interest, it becomes necessary to examine whether the application of the Treaty rules does obstruct the performance of the task assigned to them.

That is what the Commission did in respect of the Dutch electricity

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<sup>276</sup> *Supra*, chapter 3 part E.IV.5.c.

undertakings.<sup>277</sup> In doing so, it considered the results competition has on the electricity market. The Commission, for example, scrutinized whether electricity imports by industrial endusers would interfere with the tasks of the public electricity suppliers and hence endanger the security of supply.<sup>278</sup>

Thus, in applying Art. 90 (2) EEC Treaty, one has to take the effects competition has on a certain branch and their compatibility with the goals and purposes of the Community into account.

In this respect, the application of Art. 90 (2) EEC Treaty does not differ from the application of the other Treaty rules on competition, because, as will be shown below<sup>279</sup>, the same aspects have to be considered in applying Articles 85 and 86 EEC Treaty to the ESI. In order to establish whether certain agreements or conducts infringe these provisions, it has to be scrutinized whether they are necessary to ensure the achievement of Community goals and purposes.<sup>280</sup>

The application of Art. 90 (2) EEC Treaty to the ESI therefore has to deal with the same problems as the application of Articles 85 and 86 EEC Treaty to this branch.<sup>281</sup>

From this it follows that it makes no decisive difference whether one classifies the electricity undertakings as being covered by Art. 90 (2) EEC Treaty and then restricts to the application of Articles 85 and 86, or whether one applies these provisions directly to the undertakings in question. In both cases it is necessary to consider the practical results competition has on the electricity market.<sup>282</sup>

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<sup>277</sup> OJ No L 28, 2.2.1991, p. 32 (pp. 43 et seq).

<sup>278</sup> OL No L 28, 2.2.1991, p. 32 (p. 43).

<sup>279</sup> *Infra*, chapter 3 parts F and G.

<sup>280</sup> Lukes, "Demarkationsverträge", *op.cit.* n. 219, p. 1927.

<sup>281</sup> Hermann, "Ordnungsgrundlagen", *op.cit.* n. 31, p. 119; see also C. Schalast, Die deutsche Elektrizitätswirtschaft und der EG-Binnenmarkt für Energie, p. 48; Niederleithinger, *op.cit.* n. 173, pp. 79, 83-84; Ritter, "Anwendung der EG-Wettbewerbsregel", *op.cit.* n. 176, p. 51.

<sup>282</sup> Schalast, "Kohleverstromung" *op.cit.* n. 158, p. 3.

Therefore, different outcomes in the interpretation of Art. 90 (2) EEC Treaty cannot lead to fundamental divergences in the overall result of applying the European competition rules to the electricity market.<sup>283</sup>

The argument against the Commission's point of view therefore is not that it makes an error in factual apprehension, but that there is a flaw in the inherent logic. Although this should not affect the outcome, it is preferable to ask the important question within Articles 85 (1) and 86 EEC Treaty rather than in Art. 90 (2) EEC Treaty.

#### V. Conclusion to Part E.

The application of Articles 85 and 86 EEC Treaty to the ESI is not subject to prior harmonization of national energy laws or policies.

Besides, the fact that the Council did not issue provisions provided for by Art. 87 (2)(c) EEC Treaty with regard to the ESI does not exclude the application of Articles 85 and 86 EEC Treaty from this economic branch.

Finally, the electricity undertakings in Germany as well as in England and Wales are not "entrusted with the operation of a service of general economic interest" in the sense of Art. 90 (2) EEC Treaty. Thus, this provision offers no possibility either to exclude the electricity industry from the area of application of the European rules on competition.

From this, it follows that there is no way to restrict the application of Articles 85 or 86 EEC Treaty to the electricity markets in England and Germany.

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<sup>283</sup> Hermann, *op.cit.* n. 31, p. 119; Niederleithinger, *op.cit.* n. 173, pp. 79, 83-84.

## F. The Inherent Limitations of Competition Rules

### I. Introduction

In the preceding parts, two important points have been established.

The first point is that there are agreements and contracts on the electricity market that restrict the possibility to enter into competition for the supply of big end users and local distributors.

Second, it has been shown that it is not possible to exempt the electricity sector from the application of Articles 85 and 86 EEC Treaty.

At a first glance, the conclusion to be drawn from these two observations seems to be obvious: Articles 85 (1) and 86 EEC Treaty provide that agreements restricting competition, and conducts abusing a dominant position, are prohibited. Thus, the anticompetitive agreements and conducts on the electricity market are, according to these provisions, automatically void.

This conclusion would be right if neither Art. 85 (1) nor Art. 86 EEC Treaty had any scope for interpretation which allows additional circumstances to be taken into consideration.

In the opposite case, that is, if there were scope for interpretation in Articles 85 (1) and 86 EEC Treaty, the general applicability of competition rules would not automatically entail the verdict of invalidity for anticompetitive conducts on the electricity market. In order to test restrictive measures against the competition rules, one would have to take the concrete circumstances of each individual case, and their exact effects on the market situation, into account. Thus, the agreements and practices which restrict competition or change the position to compete of undertakings otherwise would not be prohibited *per se*. In effect, this would amount to inherent limitations of the competition rules.<sup>284</sup>

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<sup>284</sup> Hermann, "Ordnungsgrundlagen", *op.cit.* n.31, p. 115; Kuhnt, "Übertragung von Strom", *op.cit.* n. 118, pp. 418-419; Schwark, *op.cit.* n. 160, pp. 214-215.

Whether or not there is such scope for interpretation in Articles 85 (1) and 86 EEC Treaty can be deduced from the function of the provisions and their interpretation by the ECJ.

## II. Inherent Limitations in Art. 85 (1) EEC Treaty

### 1. Important Questions

According Art. 85 (1) EEC Treaty, agreements that have as their "[...] object or effect the prevention, restriction or distortion of competition within the common market" are prohibited.

With some agreements, it is obvious and easy to decide that they aim at restricting competition in the common market. However, there are many cases in which it is very doubtful whether the agreement in question actually has that object or effect. The reason for this lies mainly in it being difficult to define what a "restriction of competition" is.<sup>285</sup>

One can think of hardly any commercial contract that does not cause some kind of restriction to competition.<sup>286</sup> Thus, *Neale and Goyder* say: "There is a sense in which any one bargain excludes others: when a bargain is sealed, the competition for that particular portion of trade is at an end. It would be a *reductio ad absurdum* to call trade itself restraint of trade."<sup>287</sup>

In addition, there might be desirable restraints on competition that should not be prohibited. This could for example, be true for agreements that clearly restrict competition but at the same time promote it as well. Such a situation exists in cases in which two undertakings agree to work together (restriction of competition) in order to develop new technologies (promotion of competition) which

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<sup>285</sup> Bellamy/Child, *op.cit.* n. 141, p. 62.

<sup>286</sup> Smit/Herzog, *op.cit.* n. 206, vol. 2, Art. 85 para. 85.27.

<sup>287</sup> A.D. Neale and D.G. Goyder, The Antitrust Laws of the USA, p. 25.

neither of them could develop on their own.<sup>288</sup>

The important question in connection with the definition of "restrictions of competition" therefore is whether Art. 85 (1) has to be understood as prohibiting every agreement between undertakings that has a restricting effect on competition, or whether there are some restraints that do not restrict competition *within the meaning of Art. 85 (1) EEC Treaty*.<sup>289</sup> In other words; are there agreements that de facto restrict competition but nevertheless do not conflict with Art. 85 (1) EEC Treaty? In the case of an affirmative answer, the subsequent question arises as to where to draw the line between restrictive measures that are and those that are not covered by Art. 85 (1).<sup>290</sup>

To answer these questions, one has to decide whether the term "restrictions of competition" is to be interpreted in a wide or in a narrow way.

This problem is very much connected with the relationship of Art. 85 (1) to Art. 85 (3) EEC Treaty.<sup>291</sup> In case of a wide interpretation every restraint of competition will be prohibited under Art. 85 (1) and the only way to avoid the verdict of invalidity is via Art. 85 (3) EEC Treaty. In contrast to that, the narrow interpretation does not consider every restraint on competition as falling under Art. 85 (1)

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<sup>288</sup> See case 258/78 *Nungesser v Commission* [1982] ECR 2015; in this case exclusive distribution rights for seeds were at issue. The ECJ accepted that certain exclusive licences are necessary to encourage agricultural innovations (see p. 2069).

<sup>289</sup> Bellamy/Child, *op.cit.* n. 141, p. 63; P. Ulmer, "Rule of Reason im Rahmen von Art. 85 EWGV" (1985) 31 *RIW* pp. 517-524 (518).

<sup>290</sup> Bellamy/Child, *op.cit.* n. 141, p. 63.

<sup>291</sup> I. Forrester, Ch. Norall, "The Laicization of Community Law: Self-Help and the Rule of Reason: How Competition Law is and could be applied" (1984) 21 *CMLRev.* pp. 11-51, p. 20, see also M.C. Schlechter, "The Rule of Reason in European Competition Law" (1982) 8 *Legal Issues of European Integration* no. 2 pp. 1-20 (p.3).

EEC Treaty and hence in some cases avoids the need for exemption under Article 85 (3).<sup>292</sup>

The second interpretation involves a kind of "rule of reason".<sup>293</sup> The concept of "rule of reason" originates from US anti-trust law, where it is applied in interpreting section 1 of the Antitrust Act of 1890. Under this provision "[...] every contract [...] in restraint of trade or commerce among several States [...]" is illegal. Since sec. 1 Sherman Act does not contain any definition of "restraints of trade", it was up to the courts to decide whether a measure is, or is not caught by this rule.

In *US v American Tobacco*<sup>294</sup>, the US Supreme Court held that not all restraints are illegal but only those that are unreasonable in that they are "[...] operated to the prejudice of the public interest by unduly restricting competition [...]". This "rule of reason" was very succinctly defined in *Continental T.V. INC v GTE Sylvania INC*<sup>295</sup>. The Court held: "Under this rule the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."

However, the American "rule of reason"-concept is different from the European one.<sup>296</sup> The main difference derives from the fact that Art. 85 EEC Treaty has its para. (3). Section (1) of the Sherman Act, in contrast to that, contains no rule according to which certain restrictions to competition are not prohibited.<sup>297</sup>

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<sup>292</sup> Bellamy/Child, *op.cit.* n. 141, p. 67.

<sup>293</sup> Steiner, *op.cit.* n. 139, p. 123.

<sup>294</sup> 221 U.S. 106, 55 L Ed at 179.

<sup>295</sup> 433 U.S. 36, 53 L Ed 2d 568.

<sup>296</sup> Bellamy/Child, *op.cit.* n. 141, p. 66; Forrester/Norall, *op.cit.* n. 291, p. 21.

<sup>297</sup> In addition, there are differences in the application of that rule, see *infra* chapter 3 part F.II.3.

Clear answers to the questions concerning the interpretation of "restrictions of competition" in Art. 85 (1) EEC Treaty have not yet been developed, but both approaches mentioned above can be found under Community Law.<sup>298</sup>

While it is the Commission's philosophy to interpret the term "restrictions of competition" in a wide way<sup>299</sup>, only permitting them under Art. 85 (3), it will be demonstrated that the ECJ has elaborated a more flexible approach, that is to say it has developed a "rule of reason".

## 2. Important Decisions by the European Court of Justice

### a. An Introductory Remark

A very important characteristic of the interpretation of Article 85 by the Court is that this provision is read in the context of the preamble, and of Article 2 and 3 of the Treaty.<sup>300</sup>

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<sup>298</sup> Bellamy/Child, *op.cit.* n. 141, p. 64.

<sup>299</sup> S.B. Hornsby, "Competition Policy in the 80's: More Policy Less Competition?" (1987) 12 EuLRev pp. 79-101 (p. 99); Forrester/Norall, *op.cit.* n. 291, p. 23; V. Korah "Comfort Letters - Reflections on the Parfum Cases" (1982) 7 EuLRev pp. 14-39 (p. 34) and J. Faull, "Joint Ventures under EEC Competition Rules" (1984) 4 ECLR pp. 358-374 (p. 362); for details concerning the Commission's approach towards the ESI see *infra*, chapter 3 part G. VI.

<sup>300</sup> For a recent example see case 339/89 *Alstom Atlantique SA v Compagnie de Construction Mecanique Sulzer SA*, Judgement of 24.1.1991, OJ No C 50, 26.2.1991; see also case 32/65 *Italy v Council and Commission* [1966] ECR 389 (p. 405); case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215 (pp. 244-245 consideration 25); case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 (p. 520 consideration 38); case 26/76 *Metro v Commission* [1977] ECR 1875 ( p. 1904 consideration 20).



In *Europemballage and Continental Can v Commission*<sup>301</sup> the Court held: "With a view to safeguarding the principles and attaining the objectives set out in Articles 2 and 3 of the Treaty, Articles 85 to 90 have laid down general rules applicable to undertakings".

In *Italy v Commission*<sup>302</sup> the Court said: "Art. 85 as a whole should be read in the context of the provisions of the preamble to the Treaty which clarify it [...]"

This characteristic also can be found in connection with the interpretation of the term "restriction of competition" in Art. 85 (1) EEC Treaty.<sup>303</sup>

#### **b. Société Technique Minière v Maschinenbau Ulm**<sup>304</sup>

The first case of significance<sup>305</sup> concerning the interpretation of "restriction" was *Société Technique Minière v Maschinenbau Ulm*.

A French firm had the exclusive right to sell in France the products of a German company.

The ECJ held: "[...] it may be doubted whether there is an interference with competition if the said agreement seems really necessary for the penetration of a new area by an undertaking. Therefore, in order

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<sup>301</sup> Case 6/72 [1973] ECR 215 (pp. 244-245 consideration 25).

<sup>302</sup> Case 32/65 [1966] ECR 389 (p. 405).

<sup>303</sup> See for example in case 26/76 *Metro v Commission* [1977] ECR 1875 (p. 1904 consideration 20).

<sup>304</sup> Case 56/65 [1966] ECR 235.

<sup>305</sup> There are a lot of decisions of the ECJ that are important for the interpretation of "restrictions of competition", but it would go beyond the scope of this work to deal with each one of them separately.

Also important in this connection but not separately dealt with here, for example are: cases 56,58/64 *Consten and Grundig v Commission* [1966] ECR 299; case 32/65 *Italy v Commission* [1966] ECR 389; case 23/67 *Brasserie de Hecht v Wilkin* [1967] ECR 407; case 42/84 *Remia v Commission* [1985] ECR 2545; case 65/86 *Bayer and Hennecke v Süllhöfer* [1988] ECR 5249.

to decide whether an agreement containing a clause "granting an exclusive right of sale" is to be considered as prohibited by reason of its object or of its effect, it is appropriate to take into account in particular the nature and quantity, [...] the position and importance of the grantor and the concessionaire on the market for the products concerned, the isolated nature of the disputed agreement [...]"<sup>306</sup>.

Thus, the Court held that agreements which merely grant an exclusive right of sale "do not of their very nature" restrict competition within the meaning of Art. 85 (1) EEC Treaty.<sup>307</sup>

In this decision the Court included aspects like the nature of the products covered, and the significance of the measures on the concrete market situation, in its assessment of whether there was a restriction of competition in the sense of Art. 85 (1) EEC Treaty.<sup>308</sup> According to the Court's view, one has to look at the severity of the restrictive element in the clauses granting exclusive rights.<sup>309</sup>

#### c. Metro v Commission<sup>310</sup>

In 1977, the ECJ had to decide the case *Metro v Commission*.

Metro was a self service wholesaler, running a "cash and carry" business for retailers. SABA, a German company specializing in electrical and electronical equipment, refused to supply Metro. The refusal had been made because SABA operated a system of selective distribution. It was part of that system that SABA distributors had agreed to sell only to "appointed" SABA wholesalers and retailers. There were two kinds of criteria for these appointments, which Metro

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<sup>306</sup> Case 56/65 [1966] ECR 235 (p. 250).

<sup>307</sup> *Ibid.*, p. 251.

<sup>308</sup> U. Everling, "Der Beitrag des Europäischen Gerichtshofs zur Weiterentwicklung des Wettbewerbsrechts der Gemeinschaft", in Wettbewerbspolitik an der Schwelle zum europäischen Binnenmarkt, 22 FIW-Symposium, 1989, pp. 103-121 (p. 114).

<sup>309</sup> D.G. Goyder, EEC-Competition Law, p. 62.

<sup>310</sup> Case 26/76 [1977] ECR 1875.

did not meet, technical conditions and commercial conditions. Selective distribution systems like this make it very difficult for discount stores to obtain supply of certain products and hence restrict price competition at retail level.<sup>311</sup>

The case before the ECJ arose because Metro challenged<sup>312</sup> the Commission Decision<sup>313</sup> in which SABA was granted an exemption for the selective distribution system under Art. 85 (3) EEC Treaty.

The Court upheld the Commission's Decision. The relevant part of the judgement is:

"The requirements contained in Articles 3 and 85 of the EEC Treaty that competition shall not be distorted implies the existence of a market of *workable competition*, that is to say the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market.<sup>314</sup> [...] the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and that to this end certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives [...]"<sup>315</sup> (Emphasis added).

Summing up, *Metro* had two important results<sup>316</sup>:

Firstly, the Court established that agreements which serve desirable goals other than competition are *objectively justified* and do not fall under Art. 85 (1) EEC Treaty.

In deciding whether agreements are justified under Art. 85 (1) EEC Treaty, the Court had to balance negative effects against effects

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<sup>311</sup> Bellamy/Child, *op.cit.* n. 141, p. 75; Goyder, *op.cit.* n. 309, p. 211.

<sup>312</sup> Under Art. 173 EEC Treaty.

<sup>313</sup> OJ No. L 28, 3.2.1976, p. 19.

<sup>314</sup> Case 26/76 [1977] ECR 1875 (p. 1904 consideration 20).

<sup>315</sup> *Ibid.*, p. 1905 consideration 21.

<sup>316</sup> See Bellamy/Child, *op.cit.* n. 141, p. 78 and Ulmer, *op.cit.* n. 289 p. 522.

improving competition. Thus, the second outcome of the *Metro* case is that the ECJ introduced a *balancing operation* into Art. 85 (1) EEC Treaty.<sup>317</sup>

The same approach can be found in *AEG v Commission*<sup>318</sup>. The ECJ held: "A restriction of price competition must however be regarded as being inherent in any selective distribution system [...] That restriction is *counterbalanced* by competition as regards the quality of services supplied to customers [...]"<sup>319</sup> (Emphasis added).

#### d. Nungesser v Commission<sup>320</sup>

Another important case concerning the definition of "restrictions of competition" was *Nungesser v Commission*. The agreements in question were made between the French State agency for agricultural research (INRA) and Mr. Eisele, a German resident, who was trading under the name "Nungesser". Mr. Eisele obtained certain plant breeders' rights relating to maize seeds developed by INRA. Later INRA and Mr. Eisele also concluded an agreement under which Mr. Eisele received the exclusive right to distribute INRA seeds in Germany.

The Commission held that those agreements for several reasons infringed Art. 85 (1) EEC Treaty and refused to grant an exemption under Art. 85 (3) EEC Treaty.<sup>321</sup>

The ECJ disagreed and did not regard the exclusive rights granted to Nungesser as *per se* restricting competition within the meaning of Art. 85 (1) EEC Treaty. An important distinction was made between so-called "open" and "protected" exclusive licences. The first category concerns licences whereby the "[...] owner merely undertakes not to grant other licences in respect of the same territory and not to

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<sup>317</sup> Bellamy/Child, *op.cit.* n. 141, p. 78; see also Goyder, *op.cit.* n. 309, p. 215.

<sup>318</sup> Case 107/82 [1983] ECR 3151.

<sup>319</sup> *Ibid* pp. 3196-3197 consideration 42.

<sup>320</sup> Case 258/78 [1982] ECR 2015.

<sup>321</sup> Commission Decision of 21.9.1978, OJ No L 286, 12.10.1978, p.23.

compete himself with the licensee on that territory."<sup>322</sup> The second case involves a license with absolute territorial protection, preventing all competition from parallel importers or licensees from other territories.<sup>323</sup>

Absolute territorial protection always infringes Art. 85 (1) EEC Treaty.

However, in the case of the open licences granted by INRA, the Court accepted that they were necessary to encourage agricultural innovations. Therefore it held: "From that it infers that a total prohibition of every exclusive licence, even an open one, would cause the interest of undertakings in licences to fall away, which would be prejudicial to the dissemination of knowledge and techniques in the Community."<sup>324</sup> [...] Taking the specific nature of the products in question into consideration, the Court concludes that, in a case as the present, the grant of an open exclusive licences [...] is not in itself incompatible with Art. 85 (1) of the Treaty."<sup>325</sup>

Thus, in *Nungesser* the ECJ again took additional circumstances such as the *specific nature of the products in question, the novelty and importance of the relevant technology, or the investment risk assumed by the licensee* into account in answering the question whether an agreement restricts competition in the sense of Art. 85 (1) EEC Treaty.<sup>326</sup>

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<sup>322</sup> Case 258/78 [1982] ECR 2015 (p. 2068 consideration 53).

<sup>323</sup> *Ibid.*, p. 2068 consideration 53.

<sup>324</sup> *Ibid.*, p. 2069 consideration 55.

<sup>325</sup> *Ibid.*, p. 2069 consideration 58.

<sup>326</sup> See the comment on *Nungesser* by U. Everling "Der Binnenmarkt nach der Rechtsprechung des Gerichtshofs", *op.cit.* n. 123, pp. 147-148; *idem*, "Zur neueren EuGH Rechtsprechung zum Wettbewerbsrecht" (1982) 17 EuR pp 301-314 (p. 310).

e. Pronuptia de Paris v Schillgalls<sup>327</sup>

Finally, in *Pronuptia de Paris v Schillgalls* the ECJ had to decide whether the franchise contract between Pronuptia de Paris and Mrs Schillgalls, the franchisee of the French firm in Hamburg, contained clauses that infringed Art. 85 (1) EEC Treaty.

Under three franchise agreements Pronuptia had granted the franchisee the exclusive right to use the trademark "Pronuptia de Paris" in the Hamburg, Oldenburg and Hannover area, and was obliged not to open a shop itself in that area.

The ECJ, after holding that franchise systems do not *in themselves* restrict competition, examined what conditions are necessary for a successful functioning of such a system.

The outcome of that examination was:

"(1) The compatibility of franchise agreements for the distribution of goods with Article 85 (1) depends on the provisions contained therein and on their economic context.

(2) Provisions which are strictly necessary in order to ensure that know-how and assistance provided by the franchisor do not benefit competitors do not constitute restrictions of competition for the purposes of Art. 85 (1).

(3) Provisions which establish the control strictly necessary for maintaining identity and reputation of the network identified by the common name and symbol do not constitute restrictions of competition for the purposes of Article 85 (1). [...]"<sup>328</sup>

The Court's approach in *Pronuptia* can be analysed as follows.

First, it considers whether the agreement in question is conflicting generally with the aim of the Treaty to abolish distortion of competition.

If this is not the case, all restraints on competition necessary to make the underlying agreement work support a legitimate objective and

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<sup>327</sup> Case 161/84 [1986] ECR 353.

<sup>328</sup> *Ibid.*, pp. 384-385 consideration 27.

thus do not infringe Art. 85 (1) EEC Treaty.<sup>329</sup>

### 3. Critical Analysis of the Case-Law

From the foregoing decisions of the Court, a number of rules can be inferred.

Firstly, the ECR is balancing negative effects on competition against positive effects. It accepts that there are restraints which are justified under Art. 85 (1) EEC Treaty.

In order to come to a conclusion, the ECJ takes a careful look at the nature and peculiarities of the product and market in question. Thus, the Court makes a market analysis before holding that a restraint is caught by Art. 85 (1) EEC Treaty. The result of this approach is that the ECJ comes to a pragmatic solution that can be different for each individual case.<sup>330</sup>

There are various types of restraints on competition that, according to the ECJ, are justified under Art. 85 (1) EEC Treaty.

In most cases, the justifying circumstances are themselves inferred from the idea of competition.<sup>331</sup> The Court looks beyond the immediate restricting effects of a measure, and asks if they are counterbalanced by the promotion of competition on a different (higher) level.

But over and above that, the Court also seems prepared to take into account the accomplishment of other Treaty objectives which are not directly connected with competition.

In *Europemballage and Continental Can v Commission* it expressly referred to "[...] the restraints on competition which the Treaty allows under certain conditions because of the need to harmonize the various objectives of the Treaty [...]"<sup>332</sup>.

In *Nungesser v Commission*, the Court took into account the fact that the agreement in question does facilitate "[...] the dissemination of

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<sup>329</sup> Bellamy/Child, *op.cit.* n. 141, p. 85.

<sup>330</sup> Everling, "Zur neueren EuGH-Rechtsprechung", *op.cit.* n. 326, p. 311.

<sup>331</sup> For a detailed list see Bellamy/Child, *op.cit.* n. 141, pp. 86-105.

<sup>332</sup> Case 6/72 [1973] ECR 215 (p. 244 consideration 24).

knowledge and techniques in the Community".<sup>333</sup>

From that it follows that according to the ECJ, certain "restrictive" agreements may not fall within Art. 85(1) EEC Treaty if they are consistent with, and intended to facilitate, the achievement of Treaty objectives.<sup>334</sup>

This attitude of the ECJ is perfectly reasonable and appropriate. Although competition is one of the most important means to achieve the ultimate objective of a single market, it must not be misconceived as an end in itself. The Court therefore is right in not applying the competition rules indiscriminately and inflexibly, but to evaluate the repercussions of other Treaty objectives in each individual case. However, the Court has to perform a tightrope walk because the paramount significance of competition for the Community means that restraints on competition can only be tolerated if they serve equally important purposes.<sup>335</sup> Not just any interest can be taken into account, but only those that are necessary to ensure objectives compatible with Community values.

Since the ECJ takes additional circumstances in Art. 85 (1) EEC Treaty into account instead of considering them exclusively under Art. 85 (3) EEC Treaty, it favours the "rule of reason" approach, although it has never acknowledged the rule as such.<sup>336</sup>

The "European" rule of reason, however, is narrower than its American progenitor<sup>337</sup>. The American courts can take all kinds of aspects into account in order to decide whether the restraint on competition is reasonable, while the ECJ only takes the aims of the Treaty, and in

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<sup>333</sup> Case 258/78 [1982] ECR 2015 (p. 2069 consideration 55).

<sup>334</sup> For example an effective mechanism for the settlement of accident claims, see case 90/76 *Van Ameyde v UCI* [1977] ECR 1091. Bellamy/Child, *op.cit.* n. 141, p. 102.

<sup>335</sup> H. Schröter, in H. von der Groeben et.al. (eds.), *op.cit.* n. 199, "Vorbemerkung zu den Artikeln 85 bis 94", no. 11.

<sup>336</sup> Steiner, *op.cit.* n. 139, pp. 124.125; Ulmer, *op.cit.* n. 289, p 522.

<sup>337</sup> Steiner, *op.cit.* n. 139, p. 123; see also Schlechter, *op.cit.* n. 291, p. 14.

particular those laid down in Articles 2 and 3, into consideration.<sup>338</sup> Thus, only restraints to competition which do not threaten the creation of a single market, but promote it, can be hold valid under Art. 85 (1) EEC Treaty.

Critics of the rule of reason approach in Art. 85 (1) EEC Treaty accuse the ECJ of blurring the respective areas of application of paragraphs (1) and (3) of Article 85. If agreements that contain restraints on competition are not caught by Art. 85 (1) EEC Treaty in the first place, the scope of application of Art. 85 (3) diminishes and it becomes difficult to draw the dividing line between what is "justified" under Art. 85 (1) EEC Treaty, and what is not. Although this agrument does not lack a certain justification, there is a strong case for the application of a rule of reason in Art. 85 (1) EEC Treaty.<sup>339</sup>

Firstly, the exemptions which the Commission may grant under Art. 85 (3) EEC Treaty, are subject to a number of very strict conditions.

Secondly, the need to notify agreements in order to obtain an exemption, results in the Commission being overburdened by the volume of notifications which have been submitted to it, while its resources in the field of enforcement are limited. Thus, the Commission turned out to be incapable of issuing exemption decisions in quantity and

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<sup>338</sup> Everling, "Der Beitrag des Europäischen Gerichtshofs", *op.cit.* n. 308, p. 115.

<sup>339</sup> For literature on this discussion see: R. Joliet, The Rule of Reason in Anitrust Law: American, German and Common Market Laws in Comparative Perspective, *passim*; Schlechter, *op.cit.* n. 291, *passim*; Korah, "Comfort Letters", *op.cit.* n. 299, *passim*; Kon, *op.cit.* n. 152, *passim*; Steindorff, "Art. 85, Para.3", *op.cit.* n. 152; *idem*, "Article 85 and the Rule of Reason" (1984) 21 CMLRev pp. 639-646; Faull, *op.cit.* n. 299, *passim*; Forrester, Norall, *op.cit.* n. 291, *passim*; Ulmer, *op.cit.* n. 289, *passim*; Steiner, *op.cit.* n. 139, pp. 124-125.

rapidly.<sup>340</sup> The emerging long delays cause a considerable amount of uncertainty. Because of the delays many lawyers and businessmen even take the risk of not notifying agreements at all.

The created uncertainty becomes even bigger because the national courts are not entitled to apply Art. 85 (3) EEC Treaty directly and thus to issue exemptions themselves. Art. 85 (3) and Art. 9 of Regulation No. 17 reserve for the Commission exclusively the power to grant exemptions from Article 85 (1) EEC Treaty.<sup>341</sup>

The ECJ cannot help either in this situation because it has no power to declare an agreement exempt under Art. 85 (3) EEC Treaty in response to a reference under Art. 177 EEC Treaty.

It follows that a rigid handling of Art. 85 (1) EEC Treaty results in a dissatisfactory situation.

The alternative to this dilemma is to replace the automatic application of Art. 85 (1) EEC Treaty by an economic analysis as the Court does. Such an analysis is much more flexible and thus leads to a more realistic view of the economic relevance of the agreement in question. Greater flexibility in the operation of Art. 85 (1) EEC Treaty therefore makes the administration of EEC competition rules more efficient.

The ECJ therefore is right in deploying a rule of reason analysis in Art. 85 (1) EEC Treaty. However, there are still narrow limits to this approach following from the structure of Art. 85 EEC Treaty as a whole. The operation of the rule of reason must not lead to Art. 85 (3) becoming superfluous altogether. In practice this danger does not materialize though, because the Court has, up to now, adopted a very cautious and reasonable approach to the "rule of reason" in Art. 85 (1) EEC Treaty.<sup>342</sup>

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<sup>340</sup> Faull, *op.cit.* n. 299, p. 362; it has to be acknowledged, though, that the introduction of block exemptions has, as far as waiting periods are concerned, led to an improvement for those agreements covered by the block exemptions.

<sup>341</sup> Steindorff, "Article 85, Para. 3", *op.cit.* n. 152.

<sup>342</sup> Everling, "Der Binnenmarkt nach der Rechtsprechung der Gerichtshofs", *op.cit.* n. 123, p. 149.

#### 4. Summary of Part II

The answer to the initial questions is:

Art. 85 (1) has to be understood as not prohibiting every restraint to competition but only those that jeopardize the achievement of Treaty objectives.

This at the same time answers the subsequent question, as to where to draw the line between permitted and not permitted restrictions.

Only those restraints to competition do not infringe Art. 85 (1) EEC Treaty that are necessary to secure objectives compatible with Treaty values.

#### III. Inherent Limitations in Art. 86 EEC Treaty

The question arises whether Art. 86 EEC Treaty also provides for sufficient scope of interpretation to take additional circumstances into account.

A general characteristic of the interpretation of Article 86 Treaty is, that the Court reads this provision (just like Art. 85 EEC Treaty) in the context of the preamble and of Article 2 and 3 of the Treaty.<sup>343</sup>

Particular scope for the observance of the Treaty objectives can be found in the element "abuse".

Art. 86 EEC Treaty does not define "abuse" but it gives a list of examples of types of abuses in paragraph (2). This list of abuses is

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<sup>343</sup> For example case 32/65 *Italy v Commission* [1966] ECR 389 (p. 405); case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215 (p. 244 consideration 25); case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 (p. 520 consideration 38); case 26/76 *Metro v Commission* [1977] ECR 1875 (p. 1904 consideration 20).

not exhaustive.<sup>344</sup> An abuse that is not covered by one of these examples may still fall under the prohibition of Art. 86 EEC Treaty.

The concept of "abuse" in Art. 86 EEC Treaty is an objective concept that covers practices which relate "[...] to the behaviour of an undertaking in a dominant position which is such as to influence the structure of the market where [...] the degree of competition is weakened and which [...] has the effect of hindering the maintenance of the degree of competition still existing in the market [...]"<sup>345</sup>.

The market behaviour of a dominant firm only can amount to an "abuse" if there is no objective justification for it. In *Sirena Srl v EDA Srl*<sup>346</sup> the Court held that the price level of a product may be abusive "[...] if unjustified by any objective criteria [...]". For the existence of an "abuse" it is thus decisive whether the exploitation of a dominant position is improper.<sup>347</sup>

In order to establish whether an otherwise prohibited behaviour is objectively justified, the ECJ weighs up all the interests involved.<sup>348</sup> In one instance, the Court explicitly set forth this approach: "For this appraisal account must be taken of all relevant interests [...]"<sup>349</sup>

In weighing up the relevant interests, the Court pays particular attention to the *public interest*.<sup>350</sup> In *Italy v Commission*<sup>351</sup> it held:

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<sup>344</sup> Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215 (p. 245 consideration 26).

<sup>345</sup> Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 (p. 541 consideration 91).

<sup>346</sup> Case 40/70 [1971] ECR 69 (p. 84 consideration 17).

<sup>347</sup> Vaughan, *op.cit.* n. 139, para. 19.78.

<sup>348</sup> See for example case 7/82 *Gesellschaft zur Verwertung von Leistungsrechten v Commission* [1983] ECR 483 (pp. 506 et seq).

<sup>349</sup> Case 127/73 *BRT v Sabam* [1974] 313 (p. 316 consideration 8); see also case 51/89 *Tetra Pak Rausing SA v Commission* 1991 CMLR 5, p. 334 (p. 384).

<sup>350</sup> Stewing, *op.cit.* n. 50, p. 65.

<sup>351</sup> Case 41/83 [1985] ECR 873 (p. 887 consideration 26).

"[...] the employment of new technologies [...] constitutes progress in conformity with the public interest and cannot be regarded *per se* as an abuse."

It follows that for the purpose of interpreting "abuse" in Art. 86 EEC Treaty, the circumstances surrounding the acquisition, and in particular the effects on the structure of competition in the relevant market, must be taken into account.

The element "abuse" hence provides scope of interpretation in order to take aspects such as the public interest, into account.<sup>352</sup>

Thus, Art. 86 like Art. 85 EEC Treaty contains inherent limitations.

#### IV. The Court's Concept of Competition

The question arises whether the case-law analysed above can be understood as corresponding to a particular economic concept of competition.

Only seldom does the Court use expressions that could give information about the underlying concept of competition. It sometimes speaks of "effective"<sup>353</sup> or "imperfect"<sup>354</sup> competition. The most instructive case in this connection probably was *Metro v Commission*<sup>355</sup>. Here the ECJ employed the term "workable competition" and defined it as "[...] the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market."

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<sup>352</sup> Everling, "Der Binnenmarkt nach der Rechtsprechung des Gerichtshof", *op.cit.* n. 123, pp. 150-151; Arndt, *op.cit.* n. 32, p. 18; Speich, *op.cit.* n. 160, p. 126.

<sup>353</sup> Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215 (p. 245 consideration 26).

<sup>354</sup> Case 13/60 *Geitling v High Authority* [1962] ECR 83.

<sup>355</sup> Case 26/76 [1977] ECR 1875 (p. 1904 consideration 20).

The phrase "workable competition" is sometimes used in contradiction to the economist's model of perfect competition. The latter is an idealised concept based on a number of assumptions<sup>356</sup>. It assumes that there are absolutely homogeneous products on a large market of buyers and sellers; that consumers have perfect information, and no personal, factual or time preferences; that consumers always act to maximize utility and that there are no barriers of entry.<sup>357</sup>

Under these conditions of perfect competition it is impossible to fix the market price unilaterally. This is because there are so many producers on the market and each firm's share of the market is so small that no one individually has the power to affect the price by altering his output. This, in highly simplified form, is the way "perfect (or atomistic) competition" functions.

Because in reality markets meeting those conditions hardly exist<sup>358</sup>, the concept of "workable competition" was developed.

It describes a market situation of imperfect competition with enough buyers and sellers acting independently of each other and without significant barriers of entry. Such a market will produce an outcome which approaches the optimum sufficiently closely and hence yields optimum results.<sup>359</sup>

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<sup>356</sup> For the development of these assumptions see: W.St. Jevons, Die Theorie vom natürlichen Monopol; L. Walras, Elements of Pure Economics or the Theory of Social Wealth.

<sup>357</sup> See A. Våth, Die Wettbewerbskonzeption des Europäischen Gerichtshofs, p. 13; Steiner, *op.cit.* n. 139, p. 93; M. Hall, "EEC: Competition or Policy? An Economist's Enquiry" (1980) 1 ECLR pp. 287-296 (p. 290).

<sup>358</sup> R. Wish, "The Impact of EEC Competition Law in the United Kingdom", in M.P. Furmston et al., (eds.) The Effect on the English Domestic Law of the Membership of the European Communities and of the Ratification of the European Convention of Human Rights, pp. 108-144 (p. 110); D.G. Goyder, *op.cit.* n. 309, pp. 11-12.

<sup>359</sup> J.P. Cunningham, J. Tinnion, The Competition Act 1980, p. 13; F.M. Scherer, Industrial Market Structure and Economic Performance, pp. 41-44.

Since the ECJ uses expressions like workable, effective or imperfect competition, it obviously assumes that in reality there is practically no market that meets the requirements of perfect competition but that in most cases it is realistic to strive for "workable competition".<sup>360</sup> This *a fortiori* is true if one has to bring competition and the other objectives of the EEC Treaty into accord.<sup>361</sup>

In *Geitling v High Authority*<sup>362</sup> the Court therefore held that seeing the markets in question "[...] as perfectly competitive atomistic markets would be to ignore realities."

It follows that the ECJ, when using the term "workable competition", seeks to achieve a market structure which is efficient, responsive to customer demand, has no significant barriers to entry and in which the various objects of the Treaty are harmonized in the best possible way.<sup>363</sup> This is the sense in which the term "workable competition" will be used in this thesis.

#### V. Conclusion of Part F.

In the foregoing parts it has been established that both Art. 85 (1) and Art. 86 EEC Treaty allow considerable scope for interpretation. Whereas for Art. 85 (1) EEC Treaty this scope can be found in the expression "restriction of competition", Art. 86 EEC Treaty provides it in the term "abuse". In utilizing these scopes for interpretation one has to take other Treaty objectives into account and find a reasonable balance between the different, sometimes conflicting, goals.

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<sup>360</sup> Koch in Grabitz *op cit* n 198 vor Art. 85 no 4.

<sup>361</sup> K. Markert, "Wettbewerb und Wettbewerbspolitik in der EWG" (1970) 5 *EuR* pp. 348-366 (p. 349 and pp. 352-353).

<sup>362</sup> Case 13/60 [1962] ECR 83 at p. 108.

<sup>363</sup> Like here Koch in Grabitz, *op.cit.* n. 199, before Art. 85 no. 4; critical about the use of the term "workable competition" Bellamy/Child, *op.cit.* n. 141, p. 77 note 3.

The reason for this is that competition, in the sense of workable competition, is no end in itself but rather a means to an end. This end is the realization of the objectives formulated in Article 2 of the Treaty. Thus, competition is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of public interest. The appearance of the reasonable balance sought after, depends on the concrete circumstances of each individual case.

Summing up, one can say that not every restraint to competition establishes a "restriction of competition" in the meaning of Art. 85 (1) EEC Treaty or an "abuse" in the meaning of Art. 86 EEC Treaty. Some agreements and conducts are "justified" by the inherent limitations of these rules which have to be deduced from the Treaty objectives. As far as such a "justification" can be found the measures in question are not prohibited by Articles 85 (1) or 86 EEC Treaty.<sup>364</sup>

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<sup>364</sup> Like here Schwark, *op.cit.* n. 160, p. 214; Kuhnt, "Übertragung von Strom", *op.cit.* n.118, pp. 418-419; Hermann, "Ordnungsgrundlagen", *op.cit.* n. 31; Everling, "Der Binnenmarkt nach der Rechtsprechung des Gerichtshofs", *op.cit.* n. 123, pp. 147-151.

## G. Utilizing the Concept of Competition for the ESI

### I. Introduction

In the preceeding section it was established that not every restraint on competition is caught by Art. 85 (1) or Art. 86 EEC Treaty, but that in general some restrictive practices are "justified" because they facilitate the achievement of higher Treaty objectives.

In this part, it has to be examined which particular aspects out of the many objectives of the Treaty contained in Articles 2 and 3 are relevant for the electricity market. (part II.)

It then will be examined to what extent anticompetitive measures on the electricity market are justified under the relevant Treaty objectives. (parts III.-IV.)

### II. Treaty Objectives Relevant for the Electricity Market

Up to today, the ECJ did not have to decide any case concerning the application of Articles 85 and 86 to the ESI. Thus, the question of which Treaty objectives are important enough for the ESI to justify the restriction of the concept of competition (which according to Art. 3 of EEC Treaty is also an important objective of the Community) has not been finally decided yet.

It is, however, possible to deduce information as to which aspects are of particular importance for the development of the electricity industry within the common market from the provisions and proposals that have been issued in connection with the completion of an internal energy market.<sup>365</sup>

Examining those proposals, resolutions and decisions, it becomes obvious that there are four points that constantly receive particular attention. These aspects are: *security of supply, price of supply,*

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<sup>365</sup> *Supra*, chapter 2 part A.I.

*environmental protection and use of certain primary energies.*<sup>366</sup>

Two sentences from the preamble of the proposed *Energy Charter* may serve as example for the importance of these points: "Convinced that all countries of Europe share a common interest in the problems of energy supply, safety of industrial plants, particularly nuclear plants, and environmental protection; concerned to do more to attain the objectives of security of supply, optimum management of resources and efficient use of resources."<sup>367</sup> Similar sentences, that also emphasize the significance of those aspects, can be found in most of the other documents concerning the energy market as well. In the Decision concerning the Dutch ESI, the Commission paid foremost attention to the security of supply aspect.<sup>368</sup>

The question arises whether security of supply at reasonable prices, environmental protection and the use of certain primary energies are objectives compatible with Treaty values and hence can justify a restriction of the principle of undistorted competition.

The general principles of the European Community are formulated in Article 2 of the Treaty.

According to this provision, it is the task of the Community to promote "a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability and accelerated raising in the standard of living". The key goal of the European Community thus is a secured and high quality of life for all European citizen.

For the achievement of that goal it is essential to have a secure and reliable power supply. In case of power shortage the entire infrastructure of a modern state breaks down and the society as a whole is paralysed.

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<sup>366</sup> About the importance of these aspects see also P. Montagnon *op.cit.* n. 127, pp. 58-59; Hermann, "Ordnungsgrundlagen", *op.cit.* n. 31, p. 111.

<sup>367</sup> COM (91) 36 final, 14. February 1991, p. 8.

<sup>368</sup> See for example OJ No. 28, 2.2.1991, p. 32 (44) concerning the application of Art. 90 (2) EEC Treaty.

The security of supply depends, to a great extent, on the kind of primary energy sources that are deployed. In connection with the electricity market, this aspect mainly concerns the dependence on imported primary energies, in particular, on crude oil and natural gas.<sup>369</sup> Since import partners are sometimes unreliable and the available quantities of natural gas and oil are limited anyway, security of supply is higher the less the generation of electricity relies on oil or gas imports.

Of equal importance for a high quality of life within the Community, is the price of power supply. The mere availability of electricity is no argument as long as it is not affordable by everyone. Thus, only a supply at an acceptable price is a supply supporting the goals of the Treaty.

Finally, the protection of the environment is also important for the promotion and realization of the goals named in Art. 2 EEC Treaty. The Council of Ministers has emphasized this in several declarations. "Whereas in particular, in accordance with Article 2 of the Treaty [...] part of the latter's task is to promote throughout the Community a harmonious development of economic activities and a continuous and balanced expansion, which cannot now be imagined in the absence [...] of an improvement of the quality of life and the protection of the

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<sup>369</sup> In this connection see Council Directive of 14. April 1975 *concerning the restriction of the use of petroleum products in power stations* (OJ No L 178, 9.7.1975 p. 26) and Council Directive of 13 February 1975 *on the restriction of the use of natural gas in power stations* (OJ L No 178, 9.7.1975, p. 24). The latter has been revoked by a recent Council Directive of 18. March 1991 (OJ No L 75, 21.3.1991, p. 52) because natural gas reserves now are considered to be of sufficient level with regard to the security of supplies of this source of energy.

environment;[...]"<sup>370</sup>

It follows that there are, apart from the introduction of more competition, four important goals within the electricity market that need to be pursued. All of them form part of the general objectives the Community wants to promote.

Thus, in applying Articles 85 and 86 EEC Treaty to the ESI, one has to find a balance between the concept of competition on the one hand and the security of supply, a reasonable price of supply, the protection of the environment and the promotion of the use of certain primary energies, on the other hand.<sup>371</sup>

It now has to be examined which restrictions of competition on the electricity market can find justification under the aspects security of supply, price of supply and protection of the environment.<sup>372</sup>

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<sup>370</sup> Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting within the Council of 17, May 1977 *on the Continuation and Implementation of a European Community Policy and Action Programm on the Environment*, OJ No C 139, 23.6.1977, p. 1; see similar resolutions and statements in OJ No C 112, 20.12. 1973, p. 1 and OJ C No 46, 17.2.1983, p. 1.

<sup>371</sup> Montagnon, *op.cit.* n. 127, pp. 60-61; concerning the environmental protection the necessity to balance the needs of the environment against other Treaty objectives such as competition does not only derive from Art. 2 EEC Treaty but is also expressly laid down in Art. 130 r (2), according to which "Environmental protection requirements shall be a component of the Community's other policies".

<sup>372</sup> The question whether restrictions to competition can find justification under the aspect "promotion of the use of certain primary energies" is not relevant for the purpose of this thesis since regulations that promote certain energy sources do not affect the possibility to enter into competition for the supply of electricity customers in the first place.

### III. The Security of Supply Aspect

The most important goal within the electricity market certainly is the security of supply. The people in the EEC would not gain any advantage from competition in the ESI if the price for that was unreliability or shortage of electricity supply.

Before examining which restrictions to the concept of competition are therefore justified under the security of supply aspect, two preliminary remarks are necessary.

#### 1. The Complex Structure of Security of Supply

Security of electricity supply is a state in which the electricity demand of the entire population can be satisfied at any given time.<sup>373</sup> Whether or not this state is achieved depends on a multitude of different factors.

In the first place, a number of technical requirements have to be fulfilled, such as the permanent maintenance of a certain mains voltage.<sup>374</sup> Apart from those technical requirements, a secure supply with electricity also depends on certain economic conditions. Power generation and distribution are activities demanding very large investments with long pay-back periods. Thus, foreseeability of developments and a considerable financial strength of the electricity utilities are necessary.<sup>375</sup> Since the safety of electricity supply depends on the interaction of a vast number of determinants it is almost impossible to establish a "turning-point" after which the security of supply is no longer guaranteed. Thus a deterioration in the safety of supply is, as a

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<sup>373</sup> J. Grawe, "Die stromwirtschaftliche Zusammenarbeit im vereinigten Deutschland" (1990) 7 Stromthemen, pp. 1-12 (pp. 2-3).

<sup>374</sup> *Supra*, chapter 2 part C.III.2.

<sup>375</sup> Foreseeability was one of the aspects the Commission took into account when it scrutinized the compatibility of certain agreements in the Dutch ESI with the European rules on competition; OJ C No 28, 2.2.1991, p. 32 (42).

rule, only gradually ascertainable.<sup>376</sup>

## 2. The Necessity to define Security of Supply on a European Basis

The second preliminary remark concerns the question whether it is true that the dependence on electricity imports from other Member States always endangers the security of supply in the dependent Member State. This is what the representatives of the electricity industry sometimes claim.<sup>377</sup> It is assumed that in times of energy crises the foreign power supplier would favour his own nationals. Since crossborder supply therefore allegedly cannot be relied upon, the security of supply is threatened if customers enter into contracts with electricity utilities in other Member States.

The influence of energy imports on the security of supply has once before played an important role in a case before the ECJ.

In *Campus Oil Limited v Minister for Industry and Energy*<sup>378</sup> the Court had to decide whether Irish rules obliging importers of petroleum products to purchase a certain proportion of their requirements from a State-owned company, which operated a refinery in Ireland, were compatible with the EEC Treaty. The Irish Government had issued these rules in order to keep the refinery going which was the only one in Ireland. If that refinery had closed, all suppliers of refined petroleum products on the Irish market would have been obliged to obtain their supplies from abroad, with approximately 80 % of these supplies coming from the United Kingdom.

Against this background, the ECJ considered the rules in question as being necessary for the maintenance of public security within the meaning of Art. 36 EEC Treaty because they had the purpose to guarantee "[...] a minimum supply of petroleum products to the State

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<sup>376</sup> Heitzer, *op.cit.* n. 47, p. 108.

<sup>377</sup> For arguments like these see Birkenmaier, *op.cit.* n. 202, pp. 154-155; Montagnon, *op.cit.* n. 127, p. 61.

<sup>378</sup> Case 72/83 [1984] ECR 2727.

concerned in the event of a supply crisis."<sup>379</sup> The Court, however, also stated that the "[...] quantities of petroleum covered by such a system must not exceed the minimum supply requirements without which the public security of the State concerned would be affected or the level of production necessary to keep the refinery's production capacity available in the event of a crisis [...]"<sup>380</sup>. Thus, according to the ECJ the public security is only endangered if a state totally relies on the import of petroleum products without having the capacity to refine at least a minimum supply in case of crises.

From this decision it can be inferred as a *argumentum a contrario* that the ECJ does not consider the safety of supply, and thus the public security, endangered if a state partly relies on the import of energy from other Member States.<sup>381</sup>

This point of view can be approved. The European Community is striving towards the completion of a single market with conditions similar to those of a domestic market, and the Member States grow closer together than ever before. Considering the present state of integration, one can no longer define security of supply on a national level, assuming that the dependence on imports from other European Countries puts the security at risk.<sup>382</sup> Just the opposite is true. Real security of supply, even in cases of severe crisis, can only be achieved if all Member States work very close together and help each other out. Whether or not the supply with electricity is secure can not be ascertained for an individual Member State, but has to be established for the European Community as a whole.

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<sup>379</sup> *Ibid.*, p. 2754.

<sup>380</sup> *Ibid.*, p. 2757.

<sup>381</sup> Everling, "Der Binnenmarkt nach der Rechtsprechung des Gerichtshofs" *op.cit.* n. 123, p. 149.

<sup>382</sup> Arndt, *op. cit.* n. 32 , p. 18; Birkenmaier, *op.cit.* n. 202, p. 155; Everling, "Der Binnenmarkt nach der Rechtsprechung des Gerichtshofs", *op.cit.* n. 123, p. 149; Gröner, *op.cit.* n. 144, p. 75.

Both preliminary points must be kept in mind when we now proceed to examine which restrictions to competition are justified under the security of supply aspect.

### 3. Restraints on Competition "justified" under the Security of Supply Aspect

Restraints to competition on the electricity market that are justified under the security-aspect can be categorized in (a) those that are necessary because of the technical peculiarities of the ESI and (b) those that are caused by economical circumstances.

#### a. Technical Requirements

The ESI is characterized by a number of technical peculiarities.<sup>383</sup> The most important are; the dependence on a grid, the very poor storage capability of electricity and the resulting simultaneity of production and consumption, the need to keep up a certain mains frequency at any given time, and the necessity always to have reserve capacities at one's disposal.

These peculiarities make it impossible to grant every competitor free access to the grid without introducing certain regulations. It is, for example, necessary to control the amount of electricity that is fed into the grid in order to keep the mains frequency in balance. It is also necessary to issue rules obliging the electricity utilities to keep reserve capacities in store.

From these examples it becomes obvious that there are a number of technical requirements that make it inevitable to control market access, as well as the behaviour of competitors on the market.<sup>384</sup> The

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<sup>383</sup> *Supra*, chapter 2 part C. III.2.

<sup>384</sup> Within this thesis it is not possible to mention even roughly all the technical conditions a secure electricity supply demands, especially because a detailed enumeration requires specialized knowledge about complicated technical processes.

necessary regulations can cause restraints to competition, which do not, however, contradict Articles 85 (1) or 86 EEC Treaty, since they are justified under the security of supply aspect.

#### b. Economical Requirements

Apart from the technical requirements, there are economical peculiarities within the ESI that justify restrictions of competition because they safeguard a secure supply.

There are substantial differences in the national frameworks for the electricity industries in Europe.<sup>385</sup> They concern the use of primary energies, environmental protection standards, fiscal treatment, consent and appellate procedures for the construction of new plants and state aids etc. These differences result in considerable variations in the electricity production costs. Therefore, the prices charged for electricity in the respective Member States differ substantially. Thus the starting conditions for a competitive market are much better for the electricity utilities of some Member States than for others. In particular the French company EDF is, due to the French energy policy<sup>386</sup>, able to produce power at almost unbeatable prices.

If one assumed that all anticompetitive agreements and practices which hinder the import of electricity, infringe Articles 85 (1) or 86 EEC Treaty and are therefore void, a considerable stress of competition from France would start. EdF has surplus power at its disposal which it would be pleased to sell to big industrial end users within the EEC. The German ESI especially fears the French competitor. Due to the high electricity production prices the German generators find themselves in a disadvantageous position which would not allow them to compete with offers that EdF threatens to make.

Thus, it is to be expected that German electricity utilities as well

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<sup>385</sup> *Supra*, chapter 2 part D.V.

<sup>386</sup> *Supra*, chapter 2 part D.V.

as those from other Member States would lose a number of very attractive industrial customers to EdF. In other words a lot of "cherries" would be "picked". France would probably become a dominant supplier to the rest of Europe because its cheap power would squeeze out other suppliers.<sup>387</sup> This in turn would lead to significant financial difficulties for the utilities losing the attractive customers. Some may even go bankrupt. Those difficulties could endanger a forward-looking improvement of generation and transmission facilities. Disadvantageous developments like these could in the long term, endanger the supply security.

It follows that, due to the different frameworks for the electricity industry in the EEC, the abolition of supply monopolies could cause significant economical difficulties for the electricity utilities of some Member States and hence on the long term could endanger the security of supply.<sup>388</sup>

This danger though, is not caused by the fact that other Member States would depend on electricity imports from France, since the dependence on energy imports as such does not threaten the supply safety. Rather, the security of supply rather is endangered because the variety, as well as the financial strength, of the electricity utilities could suffer.

Those difficulties would not arise if the national energy policies were better harmonized and the starting conditions for the competitors were more approximated. In this case each electricity utility losing an attractive industrial end user would have a realistic chance to find itself in return, a profitable customer outside its original territory. Thus, all utilities, and not only those being privileged by the energy policy of their State, could "pick cherries".<sup>389</sup>

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<sup>387</sup> Montagnon, *op.cit.* n. 127, p. 61.

<sup>388</sup> Engels, *op.cit.* n. 106, p. 67.

<sup>389</sup> About the necessity to harmonize the starting conditions see in place of many Kuhnt, "Atomstrom", *op.cit.* n. 55, p. 764.

Whether or not those negative developments actually will take place depends on a number of different economical factors. Supporters of more competition in the ESI for example, predict no negative but positive effects such as a reduction of the need for costly surplus generating capacity, as well as overall cost saving that could be passed on to customers.<sup>390</sup>

Prognoses about the effects of competition, though, are in principle as unreliable as weather forecasts.<sup>391</sup> Thus, a generally applicable assessment of the effects of competition to the conditions on the electricity market is hardly possible.<sup>392</sup> It will rather be necessary to scrutinize the consequences for the market and for the security of

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<sup>390</sup> Montagnon, *op.cit.* n. 127, p. 61.

<sup>391</sup> Hermann, "Ordnungsgrundlagen" *op.cit.* n. 31, p. 111; see also the differences of view over the advantages of competition in the recent Committee reports, *supra* n. 134.

<sup>392</sup> Heitzer, *op.cit.* n. 47, p. 108; R. Bierhoff, "Stromversorgung in der Bundesrepublik Deutschland" (1990) 40 ET pp. 758-761 (p. 760); J. Grawe, "Rechtliche Möglichkeiten und Grenzen eines europäischen Strommarktes" in U. Hüffer et.al. (eds.) Berg- und Energierecht vor den Fragen der Gegenwart, Festschrift für Fritz Fabricius, pp. 219-234 (p. 225); Niederleithinger, *op.cit.* n. 173, p. 68; Speich, *op.cit.* n. 160, p. 126; W. Tegethoff, "Fortbestand geschlossener Versorgungsgebiete in EG-Energiemarkt?" in W. Harms (ed.) Konturen eines EG-Energiemarktes, pp. 89-94, (p. 91); S. Klaue, "Sonderabnehmer", *op.cit.* n. 258, p. 154; Harms, *op.cit.* n. 128, p. 86.

supply in each individual case.<sup>393</sup>

In cases, however, in which the security of supply is endangered, restraints of competition that avoid these results are "justified" and thus are not caught by Articles 85 (1) or 86 EEC Treaty.

#### IV. The Price of Supply Aspect

The question that arises next is whether restraints to competition on the electricity market could be justified under the price of supply aspect.

Some authors<sup>394</sup> claim that the breaking up of supply monopolies and the introduction of competition to the electricity market would lead to price increases for domestic customers. If the local suppliers lose attractive industrial end users, it is up to the remaining customers to meet the fix costs as well as the expenses that arise from the fact

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<sup>393</sup> It also will be necessary to find solutions for the problems that have been described above under the expressions "prodigal son" and "services performed by grid owners".

It is for example essential that the grid owner receives an adequate transmission charge for the use of his system.

The "prodigal son"-problem seems to have been solved in England in a very reasonable way. According to the Electricity Act (Sec. 17) a public electricity supplier is not obliged to supply premises if circumstances exist by reason of which his doing so would endanger the security of supply. Thus a public electricity supplier is not under the duty to supply a "prodigal son" if this, due to a lack of capacity, endangered the regular supply of his other customers. The risk of finding a supplier hence partly lies with the customer that chooses a non-local supplier.

<sup>394</sup> *Supra*, chapter 3 part D.

that the facilities run less to capacity than usual.<sup>395</sup>

Due to the significance of a power supply at reasonable prices for a harmonious development of the economy, unequitable increases in electricity prices contradict the goals set up in Art. 2 EEC Treaty. Restraints to competition which are necessary to avoid undue price rises in the electricity supply of domestic customers, thus find a compensatory justification.

It has to be observed, though, that this does not apply to any price increase but only to those that are somewhat out of proportion. Marginal price rises do not threaten the achievement of Treaty objectives.

It is not easy to draw a line between those increases that have to be considered as undue and those that are still justifiable, but it seems reasonable to deploy the general rate of price increase in the Member States as a guideline.

It is hard to imagine, anyway that the introduction of competition to the electricity market will, on the long run, cause an increase in electricity prices. It rather is quite within the bound of probability that the breaking up of supply monopolies and an increase in cross border trade will result in considerable lower electricity prices for all customers. An advanced integration of the national grids for example, is bound to lead to remarkable economic benefits. Competition between new private generators and existing power plants also will have positive effects on the price regime. In addition, not only large end users, but also local distributors would profit from the possibility to shop around for a generator. Thus, local distributors would also have the chance to purchase cheap power and could pass these

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<sup>395</sup> Similar fears exist in England. Therefore the Government has introduced regulations that link the increase of electricity prices for household customers to the rate of inflation for the next two years. This way undue price rises are to be avoided. Sas, *op.cit.* n. 39, p. 494.

benefits on to their customers.<sup>396</sup>

It is, however, necessary to allow competitive market forces some time to blossom to full. Since several years are needed to build new power plants the emergence of sufficient competing capacity to have serious impact on prices may take quite a time.<sup>397</sup>

## V. The Protection of the Environment Aspect

At this point it has to be examined which restrictions to the concept of competition are "justified" under the aspect of the protection of the environment.

Apart from allowing third party access to the existing networks, competition on the electricity market can also be promoted by permitting the supply of industrial and commercial end users via private grids.<sup>398</sup>

Rules that control the construction of those private grids therefore can cause restraints to competition on the electricity market.

This applies, for example, to contracts, agreed, between the local

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<sup>396</sup> Engels, *op.cit.* n. 106, p. 63.

<sup>397</sup> This is why the present protests of firms in England about a rise in power prices must not be taken too serious yet; for the protests see: "Firms protest at 40% rises in power prices", Times 17.6.1991; see also: "Wakeham praises the benefits of competition", Financial Times 18.6.1991 and "Power prices fall by up to 15 % for big customers", Financial Times 15.5.1991; according to the two later articles it is not true that industrial end users face price rises. They, on the contrary, have been able to secure lower electricity prices.

<sup>398</sup> Seidel, *op.cit.* n. 106, p. 136; since the construction of a grid causes extremely high expenses, private networks in most cases, will be uneconomical. Nevertheless, situations are conceivable in which a customer wishes to be supplied by a non local utility, via his own grid. This could be the case in areas close to the borders.

supplier and the holder of the right of way that make it impossible for non local utilities to build a new grid for the supply of individual customers.<sup>399</sup>

The question arises, whether such a restraint to competition can find justification under the aspect of the protection of the environment.

Overhead cables for the transmission of electricity can disturb the environment considerably.<sup>400</sup> This may manifest itself in inroads on the physical substance of the terrain, like the clearing of trees or the draining of swamps which may destroy the natural environment of the wild life. But even where such drastic measures are not necessitated, additional pylons and cables will cause further visual distraction from the landscape. In addition, the result of recent scientific research suggests that high voltage cables emit electro-magnetic fields which damage human health.<sup>401</sup>

The European Council also attaches importance to the construction of networks for the environment. This can be inferred from the fact that overhead electricity transmission lines are projects that, according to Art. 4 (2) of Council Directive 85/337<sup>402</sup>, shall be made subject to an assessment of the effects on the environment caused by those projects.

Whether or not the disturbance caused by the construction of a new grid is significant enough to make it necessary to refrain from the project, depends on the concrete circumstances of each individual case. Aspects like the length of the planned grid or whether the

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<sup>399</sup> An example for such measures are the German *Demarcations Contracts*, *supra*, chapter 2 part C.IV.2. and *infra*, chapter 4 part C.I.

<sup>400</sup> H.J. Budde, "Elektrizitätsversorgungsunternehmen" in H. Rühle (ed.) *Energiepolitik und Marktwirtschaft*, pp. 155-167 (p. 161).

<sup>401</sup> "Confusion from crossed wires", *Financial Times* 30.1.1991.

<sup>402</sup> *Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment*, OJ L No 175, 5.7.1985, p. 40; see in particular Annex II No 3 (b).

marked-out route would touch a nature reserve are important. It is thinkable, however, that restraints of competition caused by the prohibition to build grids for the supply of individual customers are "justified" under the aspect of the protection of the environment. In face of the growing importance of environmental protection, which has found expression in Art. 130 r (2) EEC Treaty<sup>403</sup>, it can even be assumed that, as a rule, competition draws the shorter straw. This solution seems all the more adequate considering that competition can also be promoted by granting third parties access to the existing grids and thus does not depend on the construction of new grids.

#### VI. Analysis of the Commission's Approach to Art. 85 (1) EEC Treaty in Connection with the ESI

It has been established that anticompetitive agreements and conducts on the electricity market which are justified under the security of supply aspect, the price of supply aspect or the protection of the environment aspect do not infringe Art. 85 (1) respectively Art. 86 EEC Treaty.

The question arises whether this point of view coincides with the Commissions approach to Art. 85 (1) EEC Treaty.<sup>404</sup>

During the present Intergovernmental Conferences, the Commission has proposed that the revised Treaty should specifically consider an internal energy market and mention the security of supply. The text of one of the proposed Articles is: "The provisions in article 85 para. 1 may be declared inapplicable to any agreement in the energy sector which contributes to ensuring security of supply in the Community, to the extent that the restrictions it contains and which are indispen-

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<sup>403</sup> According to this provision environmental protection shall be component of the Community's other policies.

<sup>404</sup> Anticompetitive conducts on the electricity market that could contradict Art. 86 EEC Treaty have not been subject to a Commission Decision yet.

sable for achieving this objective do not give the enterprises concerned the possibility of eliminating competition for a large part of the products in question".<sup>405</sup>

The Commission thus proposes to add a provision, similar to Art. 85 (3) EEC Treaty, to the Treaty that provides for the possibility of exempting agreements necessary to ensure the security of supply from the application of Art. 85 (1) EEC Treaty.

The fact that the Commission considers such an amendment of the Treaty necessary, suggests that it does not share the view put forward in this thesis, according to which restraints to competition that are "justified" under the security of supply aspect do not infringe Art. 85 (1) EEC Treaty in the first place.

The conflicting view of the Commission also can be inferred from the recent Decision concerning the Dutch ESI. In examining, whether the agreements in question infringe Art. 85 (1) EEC Treaty the Commission did not expressly pay attention to the question of whether those agreements are necessary to ensure the security of supply.

The drawback of this approach, which takes no rule of reason into consideration, is that it denies Art. 85 (1) EEC Treaty the necessary flexibility to accomodate such important goals as security of supply or protection of the environment, without prior intervention of the Commission. This lack of flexibility is probably the reason why the Commission is not absolutely consequent in its approach. It rather takes, in deciding whether certain agreements contradict Art. 85 (1) EEC Treaty, aspects like the necessary foreseeability of developments into account, which in turn are relevant for the security of supply.<sup>406</sup>

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<sup>405</sup> *Europe-Documents*, No 5440, 27.2.1991, p. 9.

<sup>406</sup> This is all, that can be said about the Commission's approach at this stage. More information probably can be inferred from its Decision concerning the English and Scottish ESI because in the notices pursuant to Art. 19 (3) of Regulation 17 it paid more attention to aspects like the "proper operation of the market" than it did in the Dutch Decision.

### H. Summary and Conclusion of Chapter 3

In the preceding chapter, it has been established that agreements and behaviours which serve to uphold the existing supply monopolies or have a similar effects on competition on the electricity market, are subject to the application of Articles 85 (1) and 86 EEC Treaty.

The existing restraints to competition though, do not infringe those provisions, which have to be interpreted on the basis of a concept of workable competition, if they are "justified" under higher Treaty objectives such as the security of supply or the protection of the environment. Whether or not a justification can be found depends on the concret circumstances of each individual case.

In the following chapter it will be examined whether the agreements and behaviours that can be found in the English and German ESI amount to restraints of competition and whether they are justified under the security of supply, the price of supply or the protection of the environment aspect.

## Chapter 4 Examination of the Electricity Supply Industry in England and Germany

### A. Introduction

In the preceding chapter it has been established that the electricity industry is covered by the Treaty provisions on competition and concrete rules for the application of Articles 85 and 86 EEC Treaty have been elaborated.

In this chapter it has to be examined what kind of anticompetitive agreements and behaviours are to be found in the ESI of England and Germany.

It also will be necessary to discuss whether those agreements and behaviours do in fact infringe Articles 85 (1) or 86 EEC Treaty or whether it is possible to find a justification under higher Treaty objectives relevant for the electricity market.

### B. The Electricity Supply Industry in England and Wales

#### I. Existing Agreements

##### 1. Introduction

In connection with the privatisation of the ESI in England and Wales, several commercial agreements between various parties of the industry have been concluded.<sup>407</sup>

In order to give a general picture, the existing agreements can be divided into four categories. One important contract concerns the selling and purchasing of electricity on the wholesale market (*Pooling*

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<sup>407</sup> The same applies for the privatised Scottish ESI, but it would go beyond the scope of this thesis to deal with those agreements as well. As a matter of fact the overall result as far as the European rules on competition are concerned does not differ considerably from the outcome for the English and Welsh ESI.

*and Settlement Agreement*). Other contracts deal with financial details of the wholesale trade with electricity (*Option Contracts*). In addition, there are agreements that relate to the purchase of electricity from non-fossil energy sources by the Regional Electricity Companies<sup>408</sup> (*Nuclear and Renewables Contracts*). Finally, a fourth category of commercial agreements concerns details of the use of the existing grids and networks (*Grid and Distribution Codes and Connection and Use of System Agreements*).

All of those commercial arrangements have been notified to the Commission of the European Community in accordance with Regulation 17/62 in February 1990.

Pursuant to Art. 19 (3) of this Regulation, the Commission thereupon has published a notice<sup>409</sup> stating that it "intends to adopt a favourable position" in respect to all contracts. A final Decision has not yet been reached.<sup>410</sup>

A notice under Art. 19 (3) of Regulation 17/62 is required in connection with the issue of a negative clearance<sup>411</sup>, stating that on the basis of the facts in its possession, the Commission sees no reason for actions under Art. 85 (1) or Art. 86 EEC Treaty. It also is an essential element of the procedure concerning the issue of an exemption under Art. 85 (3) EEC Treaty<sup>412</sup>.

The notice issued in connection with the English and Welsh ESI does not reveal any definite information as to which of those two procedures is relevant here.

In practice companies, as a rule, apply for a negative clearance and notify for an exemption under Art. 85 (3) EEC Treaty at the same time,

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<sup>408</sup> Referred to as *RECs*.

<sup>409</sup> OJ C No. 191, 31.7.1990, p. 9.

<sup>410</sup> The same applies in respect of the agreements entered in by parties of the Scottish ESI. See notice pursuant to Art. 19 (3) of Regulation 17/62 in OJ C No 245, 29.9.1990, p. 9.

<sup>411</sup> Art. 2 of Regulation 17/62.

<sup>412</sup> Art. 4 of Regulation 17/62.

since the same form, Form A/B, is used for both procedures.<sup>413</sup> This leads to the assumption that the companies involved in this case also have made a joined application.

It nevertheless is possible to deduce some hints as to the Commission's point of view from the notice pursuant to Art. 19 (3) of Regulation 17/62. In cases in which the Commission plans to grant an exemption under Art. 85 (3) EEC Treaty, it has developed the habit of announcing that outrightly, in the notice under Art. 19 (3).<sup>414</sup> Since it did no such thing in the notice concerning the English and Welsh ESI but stuck to the more traditional terminology, "[..] intends to adopt a favourable position", it can be assumed that the Commission plans to issue a negative clearance and hence does not see any infringement of Articles 85 (1) or 86 EEC Treaty caused by the arrangements in question.

## 2. Pooling and Settlement Agreement<sup>415</sup>

In the newly privatised ESI of England and Wales, customers buy electricity from suppliers who in turn purchase it from generators through a wholesale electricity market called "pool".

Customers with a monthly demand exceeding 1 MW, thereby can choose their suppliers and the suppliers are free to shop around for a generator from which they want to purchase electricity. Concerning all other customers, the 12 RECs, as special suppliers, are under an obligation to offer supply at published tariff prices.

The entire physical trade with electricity between generators and suppliers, as well as part of the trade between generators and large end users, occurs through the pool for electricity. It is compulsory

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<sup>413</sup> Kerse, *op.cit.* n. 215, p. 39.

<sup>414</sup> Kerse, *op.cit.* n. 215, p. 42 note 16; for a recent example see OJ C No 17, 29.6.1990, p. 7 concerning the German "Jahrhundertvertrag".

<sup>415</sup> For details concerning all agreements see Capel, *op.cit.* n. 63, *passim*: see also H.P. Hermann, "Privatisierung der britischen Elektrizitätswirtschaft", (1988) 38 ET pp. 886-892; Sas, *op.cit.* n. 39, *passim* and OJ No L 191, 31.7.1990, p.9.

for all licensed suppliers of electricity (for example RECs and second tier suppliers<sup>416</sup>), and for licensed generators, to be member of the pool and hence party of the *Pooling and Settlement Agreement*. This condition is part of the terms of all licences to these persons issued by the Secretary of State or the Director General of Electricity Supply. In addition, membership is open to all parties interested in the generation of electricity such as large end users.

According to the terms of the *Pooling and Settlement Agreement* the pool is dealt with by the National Grid Company (NGC). By no later than 10.00 a.m. each day, all generators inform NGC of the availability of their plants for each half hour of the next day and of the price at which they are willing to sell their power (= offer price). NGC then ranks the generating units in order of increasing offer prices. To meet demand at the lowest possible costs, it dispatches and schedules the lowest price plant first. This system is called *Merit Order*.<sup>417</sup>

At about 4.00 p.m. NGC publishes a schedule that indicates to the generation units at what times at to what extent their output will be required the following day. The calculations on which the schedule is based take into account amongst other things, the requirements of system stability. It is for example necessary to have plants available on reserve in case of failure of one unit.

### 3. Option Contracts

Since the pool price is calculated on a half hourly basis, depending on the costs of supply, and the balance of demand and supply, it is likely to be quite volatile.

The unpredictability of the pool price is unwelcome for customers and even technically unworkable since the meters in most premises cannot cope with changing prices. In addition, generators as well as suppliers do not wish to be exposed to the financial risks that are

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<sup>416</sup> A person or a company other than a REC providing supply with electricity is called "second tier supplier".

<sup>417</sup> Cotterell, *op.cit.* n. 163, p. 59.

connected with a volatile price.

Therefore generators and suppliers, as well as generators and other third parties like big end users, have entered into contracts that aim at minimizing this risk. The *Option Contracts* provide for one party or the other to have the right to claim payments according to the difference between the pool price and a price fixed in the private agreement.<sup>418</sup>

During the restructuring phase of the English and Welsh ESI, initial *Option Contracts* were jointly negotiated between National Power, Power Gen and Nuclear Electric on the one side, and the 12 RECs on the other side. These contracts will expire in not later than three years time.

#### 4. Nuclear and Renewable Contracts

Under sec. 32 Electricity Act, the RECs have to produce evidence to the Director General of Electricity Supply showing that they have made arrangements according to which an aggregate amount of generating capacity from non-fossil fuel generating systems will be available to them. This so-called *non-fossil-fuel-obligation* concerns both nuclear and renewables generation.

In pursuance to details of this obligation, elaborated in orders made by the Secretary of State, the RECs are obliged to contract for an average of 8 GW of capacity from nuclear power plants over the period from 1990-1998.<sup>419</sup> They also have to enter into contracts for the purchase of increasing amounts of electricity from renewable energy sources (the final obligation is expected to amount to 800 MW for 1998)<sup>420</sup>.

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<sup>418</sup> The content of such an *Option Contract* could for example be: "The generator X agrees to pay the REC Y the difference between the pool price and a fixed price of 2.0p/kWh whenever the former is higher. In return the REC pays the generator a fixed sum each year"; see Capel, *op.cit.* n. 63, p. 20.

<sup>419</sup> OJ No L 191, 31.7.1990, p. 9 (p. 12).

<sup>420</sup> *Ibid.*, p. 13.

The necessary contracts (*Nuclear and Renewable Contracts*) have been entered into by generators like Nuclear Electric<sup>421</sup> on the one side, and the *Non-Fossil Purchasing Agency* on the other. This agency is jointly owned by the 12 RECs and buys electricity on their behalf. The essential feature of the *Nuclear and Renewable Contracts* is that the specified amount of electricity must be made available for the RECs by the generators.

## 5. Grid and Distribution Codes, Connection and Use of System

### Agreements

Pursuant to its transmission licence, NGC is obliged to draw up and implement a *Grid Code*.

NGC has the duty to offer use of the grid to every third party on the basis of a "common carriage" system. The *Grid Code* lays down technical standards and requirements for that kind of use of system. It determines conditions for the connection with the high voltage grid. The *Grid Code* also specifies certain ancillary services, necessary to maintain system stability, that have to be carried out by the generators and are purchased from them by NGC.

While the *Grid Code* itself is no private agreement, but is set up by NGC and approved by the Director General of Electricity Supply, there are *Connection and Use of System Agreements* that require compliance with the *Grid Code*. These *Connection and Use of System Agreements* are entered into by NGC and all parties that wish to use the grid, such as the RECs, generators and direct connected customers. All parties agree with each other to comply with the provisions of the *Grid Code*.

The licences for the RECs contain the obligation to set up a *Distribution Code*. Similar to the *Grid Code*, the *Distribution Codes* lay down technical requirements that have to be met by all users of the system, in order to keep up an efficient and secure distribution

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<sup>421</sup> A relatively small amount of electricity generated from atomic energy will be provided by other companies such as British Nuclear Fuels.

system. They, for example, deal with details as to the connection to the lines. The RECs are obliged to offer use of their systems to every third party on a non-discriminatory basis. For that purpose, *Connection and Use of System Agreements* that require compliance with the respective *Distribution Code* are necessary. This way each party agrees to observe the standards and requirements contained in the *Distribution Code* for the transport of electricity to customers.

## II. Infringement of Art. 85 (1) EEC Treaty?

The question that now arises is whether the arrangements on the English and Welsh electricity market infringe Art. 85 (1) EEC Treaty. In order to produce an answer, it will be necessary to examine whether the arrangements are agreements between undertakings that have, at their object of effect, the restriction of competition within the common market.

### 1. Option Contracts

#### a. Undertakings

The first question that has to be examined is whether the parties of the *Option Contracts* are undertakings in the meaning of Art. 85 (1) EEC Treaty.

An undertaking in the meaning of Art. 85 EEC Treaty is, according to a commonly used wide definition, "almost any legal or natural person carrying on activities of an economic or commercial nature"<sup>422</sup>, including state-owned corporations<sup>423</sup>.

The *Option Contracts* have been entered into by suppliers such as the RECs, by large end users and by generators. Suppliers and generators

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<sup>422</sup> *Supra*, chapter 3 part E.IV.3.

<sup>423</sup> In case 155/73 *Sacchi* [1974] ECR 409 (pp. 428-432) the ECJ regarded a state television company as undertaking in the meaning of Articles 85-90 EEC Treaty.

are private or state-owned<sup>424</sup> companies engaged in the trade with electricity and hence undertakings in the meaning of Art. 85 (1) EEC Treaty. It can be assumed that large end users with a demand of more than 1 MW per month, are also private or public legal bodies carrying out commercial activities of some sort, and therefore also qualify as undertakings in the meaning of Art. 85 (1) EEC Treaty. The *Option Contracts* thus have been concluded between undertakings.

#### b. Agreements

It now has to be examined whether the *Option Contracts* are agreements in the meaning of Art. 85 EEC Treaty.

The EEC Treaty does not define "agreement", neither has the ECJ produced a comprehensive definition. The prevalent view<sup>425</sup>, however, gives "agreement" a broad definition. According to the European Commission "it is sufficient that one of the parties voluntarily undertakes to limit its freedom of action with regard to the other"<sup>426</sup>. The parties of the *Option Contracts* have agreed to change the volatile pool price into a fixed price, as far as the trade among them is concerned. They thus have limited their freedom to negotiate and charge electricity prices. The *Option Contracts* therefore are agreements between undertakings within the meaning of Art. 85 (1) EEC Treaty.

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<sup>424</sup> Nuclear Electric is still a public undertaking and so where National Power, Power Gen and the 12 RECs prior to their privatisation.

<sup>425</sup> See the descriptions of what is covered by that term in: Korah, "Competition Law", *op.cit.* n. 139, p. 200; Vaughan, *op.cit.* n. 139, para. 19.32; Bellamy/Child, *op.cit.* n. 141, p. 49.

<sup>426</sup> See Commission Decision of 29.11.1974, Franco-Japanese Ballbearing Agreements, OJ L No 343, 21.12.1974, p. 19 (24).

### c. Restriction of Competition within the Common Market

The next question is whether the *Option Contracts* amount to a "restriction of competition" within the meaning of Art. 85 (1) EEC Treaty.

#### aa. Restraints to Competition caused by the Option Contracts

The *Option Contracts* could constitute a restraint to competition on the electricity market, insofar as generators use them to tie suppliers and large end users to them. As long as those buyers of electricity are bound to one generator through an *Option Contract*, other generators cannot enter into competition for them. These contracts thus have repercussions on the possibility to compete for the supply of the local distribution boards and large end users. They hence distort competition on the electricity market.

#### bb. Effect on Trade between Member States

To be covered by Art. 85 (1) EEC Treaty, the *Option Contracts* have to "affect trade between Member States". The ECJ tends to construe that element in a very broad sense.<sup>427</sup>

As a matter of fact, foreign utilities are excluded from the supply of customers which are tied to a certain generator, as well as British ones. The restraint to competition that proceeds from the *Option Contracts* thus not only impairs British generators, but also those from other Member States. This restraint has therefore effect on the trade between Member States.

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<sup>427</sup> For details see *infra*, chapter 4 part C.II.1.b.bb.

cc. Compensatory Justification for the Restraints caused by  
the Option Contracts

The next question is whether the established restraints to competition caused by the *Option Contracts* are "justified" under Treaty values relevant for the ESI or whether they constitute restrictions to competition that infringe Art. 85 (1) EEC Treaty.

The companies have entered into the *Option Contracts* to even out the variations of the pool price for electricity that due to the mechanism of the pool is quite volatile. This way they protect themselves against financial risks connected with an unpredictable price, and improve the foreseeability of developments. The companies involved hence put their future planning on a more secure foundation. This in turn helps them to avoid financial crises and supports their economical wellbeing, a factor that is important for the security of supply.<sup>428</sup>

Fixed prices also ensure that end customers will not have to face undue increases in the electricity price.<sup>429</sup>

The restraints to competition caused by the *Option Contracts*, are for those reasons, justified for the sake of a secure and efficient supply. Therefore they do not constitute "restrictions to competition" within the meaning of Art. 85 (1) EEC Treaty.

Against the qualification of the *Option Contracts* as restrictions to competition, in addition, speaks the fact that none of the initial contracts has a duration of longer than three years. The tying of suppliers to certain generators is thus limited to a relatively short period of time anyway.

The *Option Contracts* entered into by numerous companies within the English and Welsh ESI thus do not infringe Art. 85 (1) EEC Treaty.

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<sup>428</sup> *Supra*, chapter 3 part G.III.3.

<sup>429</sup> See Commission in OJ C No 191. 31.7.1990, p. 9 (at p. 11).

The Commission is likely to share this view.<sup>430</sup>

## **2. Nuclear and Renewables Contracts**

The 12 RECs have entered into various contracts with plants generating electricity from nuclear or renewable energy sources, according to which, these plants have to provide certain amounts of electricity for the RECs. The question arises whether those arrangements are agreements between undertakings that restrict competition in the meaning of Art. 85 (1) EEC Treaty.

### **a. Undertakings**

The *Nuclear and Renewables Contracts* have been concluded between the 12 RECs and generator companies, all of which are undertakings in the meaning of Art. 85 (1) EEC Treaty.

### **b. Agreements**

#### **aa. Involvement of Public Authorities**

The *Nuclear and Renewables Contracts* were entered into in compliance with the non-fossil fuel obligation contained in sec. 32 Electricity Act and orders by the Secretary of State issued on the basis of that provision. Therefore, it was not up to the parties of those contracts to decide whether they wanted to conclude them or not. The RECs were obliged to do so by measures of public authority. These public measures also set up conditions concerning some aspects of the content of the arrangements, such as the amount of electricity that has to be covered.

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<sup>430</sup> See notice pursuant to Art. 19 (3) of Regulation 17/62, OJ L No. 191, 31.7.1990, p. 9 (at p. 12); the Commission "intends to adopt a favourable position" in respect of the *Option Contracts*; for the interpretation of this formulation see *supra*, chapter 4 part B.I.1.

It therefore is questionable whether those arrangements fall under Art. 85 (1) EEC Treaty, since measures of national legislation do not constitute "agreements" within the meaning of this provision.<sup>431</sup>

The problem that needs discussion here is thus, whether the *Nuclear and Renewables Contracts* due to the involvement of public authorities have to be regarded as legislative measures, or whether they nevertheless are private "agreements" covered by Art. 85 (1) EEC Treaty.

#### bb. Decisions concerning the Involvement of Public Authorities

The ECJ as well as the Commission have been dealing with cases in which it has been at issue whether the arrangements in question were legislative measures or private "agreements" within the meaning of Art. 85 (1) EEC Treaty.

Both institutions have decided those cases on the basis of the respective circumstances, without developing generally applicable criteria for the distinction between public measures and "agreements".

But it nevertheless is possible to derive some rules from the decisions promulgated so far. The European Commission<sup>432</sup>, as well as the ECJ<sup>433</sup>, do in any case, regard an arrangement as "agreement" in the meaning of the European Competition Rules, if its parties have been free to refrain from entering into it. This is true even in respect to

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<sup>431</sup> Bellamy/Child, *op.cit.* n. 141, p. 50; R. Bieber in Beutler et al., *op.cit.* n. 87, p. 337; see also case 267/88 *Van Eycke v ASPA* [1988] ECR 4769 (at p. 4791).

<sup>432</sup> Commission Decision of 29.11.1974 relating to proceedings under Article 85 of the Treaty (IV 27.905 - Franco-Japanese Ballbearing Agreements), OJ No L 343, 21.12. 1974, p. 19 (p. 24) and Commission Decision of 19.12.1984 relating to Article 85 of the Treaty (IV 126.870 - Aluminium Imports from Eastern Europe), OJ No L 92, 30.3.1985, p. 1 (p. 37).

<sup>433</sup> Cases 240-242, 261, 262, 268, 269/82 *Stichting Sigarettenindustrie and Others v Commission* [1985] ECR 3831 (p. 3871) and case 41/83 *Italy v Commission* [1985] ECR 873 (p. 885), the latter relating to a behaviour under Art. 86 EEC Treaty.

an industry agreement that later expressly has been ratified by French law.<sup>434</sup>

From these rulings, it can be deduced that it is doubtful whether contracts such as the *Nuclear and Renewables Contracts* qualify as "agreements" under Art. 85 (1) EEC Treaty when the undertakings were obliged by public authorities to enter into them.

#### cc. The Commission's Point of View

The undertakings involved as well as the European Commission nevertheless do regard the contracts in question as "agreements".

They have formally been notified to the Commission, which has thereupon opened a procedure that will either lead to a negative clearance, or an exemption under Art. 85 (3) EEC Treaty. In the notice pursuant to Art. 19 (3) of Regulation 17/62, no indication can be found that the reason why the Commission intends to take a favourable position lays in the arrangements not qualifying as "agreements", within the meaning of Art. 85 (1) EEC Treaty.

#### dd. Commentary

The position that the *Nuclear and Renewables Contracts* are indeed "agreements" in the definition of Art. 85 (1) EEC Treaty, in spite of the state involvement, is perfectly justifiable. This may be illustrated by the following considerations.

The whole body of EC competition law is based on two pillars: Articles 30 et seq. EEC Treaty are concerned with state measures and Articles 85 et seq. EEC Treaty look at the effects of the activities of private parties. The two groups of rules complement each other and serve the same purpose. As a whole, they are meant to cover every conceivable

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<sup>434</sup> See Commission Decision of 15.12.1982 relating to a proceeding under Article 85 of the Treaty (IV 29.883 - AROW/ Bureau national interprofessionnel du cognac), OJ No L 379, 31.12.1982, p. 1 and the corresponding case 123/83 *Bureau national interprofessionnel du cognac v Guy Clair* [1985] ECR 391.

aspect of interference with free and undistorted competition.<sup>435</sup> Thus, it must be possible to classify any measure which has effects on competition either as a state measure (with the consequence that Art. 30 et seq will be applied), or as a private measure (in which case it falls under Art. 85 et seq.). Nothing must be allowed to effectively escape the scrutiny of both sets of rules.<sup>436</sup>

Classification does not pose any problems as long as a measure or behaviour can be traced back exclusively to an act of public authority or to the arrangements of private parties.

The *Nuclear and Renewables Contracts* are difficult to fit into the scheme as they contain elements of both: they have been concluded in the form of a private contract between companies, but on the other hand, they were required in order to satisfy the obligations imposed by sec. 32 of the Electricity Act 1989.

Should they then be treated as state measures, or as agreements in the meaning of Art. 85 (1) EEC Treaty?

For two reasons, the latter option is preferable.

First, even though the Electricity Act demands that the contracts be concluded, not every single provision or detail of the Nuclear and Renewables Contracts has been determined in advance. A lot of it is also the result of free negotiations between the partners.<sup>437</sup>

Second, it does not seem a good idea to blur the distinction between the Electricity Act itself, and the agreements which have been concluded in compliance with this Act. The first one is clearly a state measure. If sec 32 Electricity Act was found to be in breach of Art. 30 EEC Treaty, it would be prohibited and hence inapplicable. But why

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<sup>435</sup> *Supra*, chapter 2 part IV.5.

<sup>436</sup> This can for example be deduced from the judgement in case 229/83 *Leclerc v Sàrl "Au Blé vert"* ECR [1985] 17 (pp. 30 et seq.). Here the Court first examined the applicability of Art. 85 EEC Treaty to the measures in question and then, after having denied it, applied Art. 30 EEC Treaty; see also Steiner, *op.cit.* n. 139, p. 105.

<sup>437</sup> In this connection Stewing, *op.cit.* n. 50, p. 23 according to whom Art. 85 (1) EEC Treaty applies as long as the undertakings involved have some scope left to make their own decisions.

should this effect of Art. 30 EEC Treaty extend to the private agreements? Sec. 32 of the Act is no condition of law for the validity of these agreements. They will continue to exist with or without sec. 32. The agreements might have been induced by the Act, but they do not depend on its continued existence. In fact, as they are, they might as well have been concluded voluntarily in the first place, and hence should be treated the same way. Therefore, the *Nuclear and Renewables Contracts* could only be prohibited if they themselves were in conflict with EC competition law, and the decisive norm must be Art. 85 (1) EEC Treaty.

It could be objected that this is unfair to the private parties concerned and places them in an awkward position: they are threatened with a fine if they fail to conclude an agreement conforming to sec. 32<sup>438</sup>, and they are in danger of being fined by the Commission if the agreement infringes Art. 85 (1) of the EEC Treaty.<sup>439</sup> But this argument does not hold water.

Two constellations are thinkable:

The first situation is that the *Nuclear and Renewables Contracts* do not infringe Art. 85 (1) EEC Treaty. In this case the undertakings can be forced by national law to enter into them.

In the opposite case the Electricity Act demanded an action which would be prohibited under Art. 85 (1) EEC Treaty. It then itself would be in breach of the contract, namely of Art. 5 (2) EEC Treaty<sup>440</sup> and of

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<sup>438</sup> Sec. 32 subsec. 3 Electricity Act.

<sup>439</sup> Art. 15 (2) VO 17/62.

<sup>440</sup> The general duty of the Member States under Art. 5 EEC Treaty to abstain from enacting national laws that could endanger the effectiveness of Articles 85 - 90 EEC Treaty was first established in case 13/77 *INNO v ATAB* [1977] ECR 2115 (pp. 2144-2145); see also case 267/86 *Van Eycke v ASPA* ECR [1988] 4769 (p. 4791 consideration 16) and case 311/85 *Vereniging van Vlaamse Reisebureaus v Sociale Dienst Van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801 (p. 3826 consideration 10).

Art. 30 EEC Treaty<sup>441</sup> and due to the direct effect of the latter provision would be void. The undertakings involved were no longer obliged to conclude the *Nuclear and Renewables Contracts*. The private parties hence would not have to obey the national law if this inescapably put them into conflict with EC law. Thus attention must be paid above all to the requirements of EC competition law.

ee. Summary of Part b.

Despite the fact that sec. 32 Electricity Act imposes the obligation to conclude them, the *Nuclear and Renewables Contracts* are private arrangements between the undertakings involved. Thus, it is more appropriate to classify them as "agreements" in the meaning of Art. 85 (1) EEC Treaty than as state measures covered by Articles 30-36 EEC Treaty.<sup>442</sup>

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<sup>441</sup> If the *Nuclear and Renewables Contracts* in fact do infringe Art. 85 (1) it must be concluded that the Electricity Act obliging the companies to enter into those contracts constitutes a measure having equivalent effect as a quantitative restriction under Art. 30 EEC Treaty. The same correlation did the ECJ see in the *INNO* case ([1977] ECR 2115). It held: "In any case, a national measure which has the effect of facilitating the abuse of a dominant position will generally be incompatible with Articles 30 and 34 [...]" (p. 2145 consideration 35).

<sup>442</sup> With the same result *Sas*, *op.cit.* n. 39, p. 498 who also regards it necessary to notify the arrangements to the Commission and thus treats them as agreements under Art. 85 (1) EEC Treaty; see also *Cotterell*, *op.cit.* n. 163, p. 59.

### c. Restriction to Competition

The next question is whether the *Nuclear and Renewables Contracts* constitute "restrictions to competition" within the meaning of Art. 85 (1) EEC Treaty.

#### aa. Restraints to Competition caused by Nuclear and Renewables Contracts

A restraint to competition could derive from the fact that for a certain capacity, the RECs are tied up with generators running nuclear or renewables power plants. As to this amount, generators cannot enter into competition with each other for the supply of the RECs with electricity. The capacity covered by the *Nuclear and Renewables Contracts* thus, for a period of eight years, is excluded from an otherwise competitive market in which the RECs choose their generators.

#### bb. Effect on Trade between Member States

This restraint affects the trade with electricity between the Member States because the *Nuclear and Renewables Contracts* exclude foreign generators as well as British ones from the supply of the RECs.

#### cc. Compensatory Justification for the Restraint caused by Nuclear and Renewables Contracts

The restraint to competition caused by the *Nuclear and Renewables Contracts* does constitute a restriction under Art. 85 (1) EEC Treaty, unless a justification under the aspects elaborated above<sup>443</sup> can be found.

It could be justified under the security of supply aspect.

The *Nuclear and Renewables Contracts* were concluded to make sure that the RECs when purchasing electricity do not orientate themselves

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<sup>443</sup> *Supra*, chapter 3 part G.

solely to commercial aspects. If the RECs were free to choose generators for their entire demand, plants producing at relatively high costs such as those generating from renewable energy sources or atomic energy<sup>444</sup> would have quite bad prospects. They probably would very soon face severe financial difficulties. Some might even go bankrupt.

Thus, the *Nuclear and Renewables Contracts* have been concluded to support the nuclear and renewables industry, and hence help to ensure the future existence of certain kind of generating plants.<sup>445</sup> This in turn improves the diversity of fuel sources and hence the security of supply.<sup>446</sup> This is even more true because the *Nuclear and Renewables Contracts* promote fuel sources different from oil and gas the supply with which can be unreliable.

Moreover, the capacity covered by the *non-fossil-fuel-obligation* concerns only a relatively small percentage of the total electricity generation in England and Wales.<sup>447</sup>

The restraint caused by the *Nuclear and Renewables Contracts* thus is justified under the security of supply aspect and does not constitute a restriction to competition within the meaning of Art. 85 (1) EEC Treaty. This outcome is likely to be shared by the Commission.<sup>448</sup>

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<sup>444</sup> Electricity generated from atomic energy is, unlike in France, quite expensive in England and thus also is difficult to sell on a free market; see "Nuclear power's difficult rebirth", Financial Times, 5.3.1991.

<sup>445</sup> Sas, *op.cit.* n. 39, p. 498.

<sup>446</sup> Like here the Commission in its notice pursuant to Art. 19 (3) of Regulation 17/62, OJ C No. 191, 31.7.1990, p. 9 (at p. 13).

<sup>447</sup> Nuclear generated electricity accounts at present for 14.2 % of the total electricity generated in England and Wales; see "Nuclear power's difficult rebirth", Financial Times 5.3.1991.

<sup>448</sup> See notice pursuant to Art. 19 (3) of Regulation 17/62, OJ L NO. 191, 31.7.1990, p. 9 (at p. 13); the Commission "intends to adopt a favourable position" in respect of the *Nuclear and Renewables Contracts*; for the interpretation of this formulation see *supra*, chapter 4 part B.I.1.

### 3. Pooling and Settlement Agreement

The question that is to be discussed next, is whether the *Pooling and Settlement Agreement* is an agreement between undertakings which has as its object or effect the restriction of competition within the common market, and thus contradicts Art. 85 (1) EEC Treaty.

The *Pooling and Settlement Agreement* has been entered into by generators, the RECs and large final consumers, all of which qualify as undertakings in the meaning of Art. 85 (1) EEC Treaty.

Membership in the pool is, according to their licences, compulsory for the RECs as well as for generators. Such companies are thus required to enter into the agreement by an act of public authority. But, as explained in respect to the *Nuclear and Renewables Contracts*, the involvement of public authorities does not alter the fact that the arrangements in question are nevertheless agreements of private law to which Art. 85 (1) EEC Treaty applies.<sup>449</sup>

The *Pooling and Settlement Agreement* has been set up to accommodate two features connected with electricity trade over a fully interconnected system.<sup>450</sup>

The first feature is that, in order to avoid a collapse of the supply, the amount of power generated at the plants has to match the customers' demand at any given time. The second characteristic is the impossibility to distinguish between power that has been generated at one plant, and that generated at another.

Because of the necessity to meet the highest imaginable demand at any given time, a central co-ordination of all big electricity generators is required. The second feature results in the technical difficulty to determine which plant is supplying power to which customer. Thus the

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<sup>449</sup> This obviously is also the Commission's point of view. See notice pursuant to Art. 19 (3) of Regulation 17/62, OJ C No. 191, 31.7.1990, p. 9 (at p. 11).

<sup>450</sup> Capel, *op.cit.* n. 63, appendix 1.

output of the generators is effectively combined.<sup>451</sup>

The best way to deal with those peculiarities of the trade with electricity, is to buy and sell it through a single pool at a single price.<sup>452</sup> This is why the *Pooling and Settlement Agreement* has been concluded.

The agreement is thus a vital instrument for a satisfactory operation of the electricity market. It has neither at its object nor its effect to restrict competition, but it simply meets technical necessities associated with the peculiarities of electricity trade. It also does not have negative effect on the trade between Member States since membership to the pool is open to foreign generators as well as to British.

Summing up, the *Pooling and Settlement Agreement* does not constitute a restriction to competition and thus does not infringe Art. 85 (1) EEC Treaty. This conclusion is expected to be shared by the European Commission.<sup>453</sup>

#### **4. Connection and Use of System Agreements**

Finally, the *Connection and Use of System Agreements* could contravene Art. 85 (1) EEC Treaty.

Like the other contracts entered into in connection with the privatisation of the ESI in England and Wales, the *Connection and Use of System Agreements* are agreements between undertakings within the meaning of Art. 85 (1) EEC Treaty.

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<sup>451</sup> *Ibid.*

<sup>452</sup> *Ibid.*

<sup>453</sup> See notice pursuant to Art. 19 (3) of Regulation 17/62, OJ L NO. 191, 31.7.1990, p. 9 (at p. 11); the Commission "intends to adopt a favourable position" in respect of the *Pooling and Settlement Agreement*; for the interpretation of this formulation see *supra*, chapter 4 part B.I.1.

They cover technical and safety aspects relating to the connection and the operation of the high voltage grid and of all other electrical lines. The observance of those rules is necessary for the functioning of the whole system. They therefore are essential for the operation of the newly competitive generation and supply business in England and Wales. The *Connection and Use of System Agreements* hence do not constitute restriction to competition. They achieve just the opposite, in facilitating the continuous supply on a competitive basis.

It therefore is possible to agree with the expected view of the Commission, according to which the *Connection and Use of System Agreements* do not contravene Art. 85 (1) EEC Treaty.<sup>454</sup>

### 5. Summary to Part II

In the foregoing parts it has been demonstrated that the commercial contracts entered into in connection with the privatisation of the English and Welsh ESI, do constitute agreements between undertakings within the meaning of Art. 85 (1) EEC Treaty. Insofar as the arrangements cause restraints to competition on the electricity market, those restraints are justified under the security of supply aspect. None of the agreements therefore infringes Art. 85 (1) EEC Treaty.

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<sup>454</sup> See notice pursuant to Art. 19 (3) of Regulation 17/62, OJ L NO. 191, 31.7.1990, p. 9 (at p. 14); the Commission "intends to adopt a favourable position" in respect of the *Connection and Use of System Agreements*; for the interpretation of this formulation see *supra*, chapter 4 part B.I.1.

### III. Exemption under Art. 85 (3) EEC Treaty?

Since the agreements on the English and Welsh electricity market do not contradict Art. 85 (1) EEC Treaty, the question of whether those contracts perhaps qualify for an exemption under Art. 85 (3) EEC Treaty does not arise.

### IV. Infringement of Art. 86 EEC Treaty?

No such conducts on the electricity market in England and Wales have come to the present author's knowledge as would constitute an infringement of Art. 86 EEC Treaty.

## C. The Electricity Supply Industry in Germany

### I. Existing Agreements and Conducts

Two types of contracts can be found on the German electricity market: *Demarcation Contracts* and *Concession Agreements*.

*Demarcation Contracts* have been concluded between various kinds of electricity utilities. The contents of those contracts vary.<sup>455</sup>

Some simply provide for its parties the mutual obligation to refrain from supplying customers within the other party's area of supply.

Other *Demarcation Contracts*, which have been entered into by generators on the one side and distributors on the other side, contain the obligation of the distributor to purchase its entire demand or a specified percentage of its demand from the generator. These agreements sometimes provide for the distributor the requirement not to generate electricity itself, and for the generator the obligation not to supply end users in the distributors area directly (mutual recognition of the respective tasks).

Finally, some contracts contain provisions according to which an electricity utility commits itself to not offering third parties use of its system (electrical lines etc.) for the through transport of electricity to premises situated within the area of the other party to the contract. Those agreements concern the through transport to local distributors as well as to large end users.

The *Concession Contracts*, which have been concluded between electricity supply companies and local government bodies, provide for the utilities the exclusive right to use all public premises such as roads and paths to lay cables.<sup>456</sup>

In addition to these two types of contracts, one conduct can be found in the German ESI. All electricity utilities deny third parties access

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<sup>455</sup> *Supra*, chapter 2 part C.IV.2.

<sup>456</sup> *Supra*, chapter 2 part C.IV.2.

to their systems of grids and lines. They do so in respect of through transport of electricity to customers within their own area of supply, as well as in respect of the through transport to consumers that are customers of other utilities. This conduct is called *Durchleitungsverweigerung* (Through-Transport-Refusal).

The question arises whether the *Demarcation* or *Concession Contracts* or the *Trough-Transport-Refusal* infringe Articles 85 or 86 EEC Treaty.

## II. Infringement of Art. 85 (1)?

### 1. Demarcation Contracts

#### a. Agreements between Undertakings

The *Demarcation Contracts* have been entered into by German electricity utilities. Some of these are private companies, others have a majority public sector stake. They all fall under the wide definition of "undertakings" in Art. 85 (1) EEC Treaty.<sup>457</sup>

Since the *Demarcation Contracts* are contracts under private law in which the parties voluntarily have limited their freedom to choose a generator or to supply customers with electricity they also qualify as "agreements" within the meaning of Art. 85 (1) EEC Treaty.

#### b. Restriction of Competition within the Common Market

##### aa. Restraints to Competition caused by Demarcation Contracts

*Demarcation Contracts* aim at partitioning the market of electricity customers between the utilities involved.<sup>458</sup> Utilities that have agreed not to offer supply to end users in each others areas of supply, do not enter into competition with each other for those customers.

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<sup>457</sup> Arndt, *op.cit.* n. 32, p. 16.

<sup>458</sup> Lukes, "Demarkationsverträge", *op.cit.* n. 219, p. 1927.

Neither is there competition for the supply of local distributors if they have entered into exclusive purchase agreements with certain generators. The *Demarcation Contracts* thus help to establish supply monopolies and hence cause restraints to competition on the electricity market.<sup>459</sup>

#### **bb. Effect on Trade between Member States**

The next question is whether the *Demarcation Contracts* affect the trade between Member States.

Some authors<sup>460</sup> dispute that the *Demarcation Contracts* have an effect on intra-Community trade. They argue that these agreements, since they are concluded between German electricity utilities and exclusively concern the German market, establish domestic market sharing agreements that do not affect the electricity trade between Member States. The *Demarcation Contracts*, according to this view, hence do not fall under Art. 85 (1) EEC Treaty.

Whether or not this argumentation is to be followed depends on the interpretation of the term "effect on trade between Member States".

The ECJ tends to give it a very wide meaning.<sup>461</sup> This can for example, be deduced from its ruling in *Pronuptia de Paris*. The Court held that "[...] franchise agreements for the distribution of goods which contain provisions sharing markets between the franchisor and the franchisees or between the franchisees themselves are in any event liable to affect trade between Member States, even if they are entered into by undertakings established in the same Member State, in so far as they prevent franchisees from establishing themselves in another

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<sup>459</sup> Arndt, *op.cit.* n. 32, p. 17; Lukes, "Demarkationsverträge", *op.cit.* n. 219, p. 1827; Klaue, "Sonderabnehmer", *op.cit.* n. 258, p. 153; Harms, *op.cit.* n. 128, p. 83.

<sup>460</sup> Kuhnt, "Übertragung von Strom", *op.cit.* n. 118, p. 418; Hermann, "Odrnungsgrundlagen", *op.cit.* n. 31, pp. 110 et seq.

<sup>461</sup> Bellamy/Child, *op.cit.* n. 141, p. 111, note 58.

Member State."<sup>462</sup>

In *VVR v Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* the ECJ even went so far as to relinquish the proof of an actual effect on intra-community trade. It stated: "[...] such agreements *may* affect the trade between Member States in several aspects. First of all travel agents operating in one member State *may* sell travel organized by tour operators established in other Member States. (Italics added)"<sup>463</sup>

This wide interpretation also applies for contracts that solely concern national markets if they extend over the whole territory of a Member State. The Court has held that such an agreement "[...] by its very nature has the effect of reinforcing the compartmentalization of markets on a national basis [...]"<sup>464</sup> and thereby impedes the aims of the EEC Treaty.

The position of the ECJ to give the term "effect on the trade between Member States" a wide interpretation is perfectly justifiable. Due to the advanced level of integration within the European Communities nearly any kind of trade is capable of having cross border effects. This results in most restrictions to competition affecting the trade between Member States.<sup>465</sup>

But it is nevertheless, still possible that restraints to competition on a national market do not interfere with intra-Community trade. This for example, is thinkable in respect of a domestic market sharing agreement that does not cover the entire territory of a Member State, but only shares regional markets. Such an agreement does not *per se* fall under Art. 85 (1) EEC Treaty. Whether it is covered by that

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<sup>462</sup> Case 161/84 [1986] ECR 353 (p. 384 consideration 26).

<sup>463</sup> Case 311/85 [1987] ECR 3801 (p. 3828 consideration 18).

<sup>464</sup> Case 8/72 *Vereeniging van Cementhandelaren v Commission* [1972] ECR 977 (p. 991 consideration 29).

<sup>465</sup> S. Klaue, "Europäisches Kartellrecht und Energiewirtschaft", in H. Leßmann et al. (eds.), *Festschrift für Rudolf Lukes*, pp. 405-410, (p. 408).

provision rather depends on its effects on the patterns of imports and exports that might otherwise take place.<sup>466</sup>

*Demarcation Contracts* concluded between German electricity utilities that oblige the parties to refrain from supplying customers within the area of the other party, aim at sharing regional markets. Those contracts do not prevent the import of electricity from other Member States since they only bind their own parties. Neither do they have any influence on conceivable exports of electricity from Germany.<sup>467</sup> The prevalent view<sup>468</sup> therefore is that *Demarcation Contracts* merely containing the obligation not to offer supply to customers situated in the supply area of the other party of the agreement, do not affect the trade between Member States and hence do not infringe Art. 85 (1) EEC Treaty.

The verdict, however, must be different in cases where the *Demarcation Contracts* contain provisions according to which a utility has to purchase its entire demand or substantial parts of it, from the other party. Such an agreement necessarily results in other generators being excluded from the supply of that utility. The exclusion concerns German competitors, as well as foreign ones. *Demarcation Contracts* containing clauses like this, therefore affect the trade between Member States.

The same applies for agreements obliging their parties not to offer access to their systems of electrical grids and lines, to third parties that wish to supply customers within the supply area of the other parties of that agreement. Such contracts prevent competition for the supply of local distributors as well as large end users. Those customers are neither able to choose their supplier within Germany,

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<sup>466</sup> Bellamy/Child, *op.cit.* n. 141, p. 178.

<sup>467</sup> Due to the high production costs of electricity in Germany export of electricity does not take place anyway.

<sup>468</sup> Niederleithinger, *op.cit.* n. 173, p. 69; Lukes, "Demarkationsverträge", *op.cit.* n. 219, p. 1927; Arndt, *op.cit.* n. 32, p. 17; Hermann, *op.cit.* n. 31, p. 116.

nor can they import electricity from other Member States by using the existing grids.

Summing up, it has been shown that some *Demarcation Contracts* do not have any effect on the trade between Member States. Those *Demarcation Contracts* however, that provide for the obligation for a utility to purchase its entire demand (or substantial parts of it) from the other party, or to not offer third parties access to its grids and lines, affect intra-Community trade and thus are covered by Art. 85 (1) EEC Treaty.

**cc. Compensatory Justification for the Restraints caused by  
Demarcation Contracts**

The final question is whether the established restraints to competition caused by the *Demarcation Contracts* are "justified" or whether they constitute restrictions to competition that infringe Art. 85 (1) EEC Treaty.

Arguments in favour of the *Demarcation Contracts* usually refer to the aspects of security and price of supply, when it comes to the justification of these agreements. A safe supply at reasonable prices essentially relies, according to that view, on supply monopolies in which neither generators nor suppliers have to enter into competition with each other.<sup>469</sup>

This view cannot be followed. Some arguments against that opinion can be inferred from the English example.

Firstly, the restructuring of the English and Welsh ESI proves that it is technically possible to allow the through transport of electricity on a common carriage basis, without endangering the security of supply. It thus can no longer be argued that any through transport of electricity, due to technical reasons, endangers the security of supply. This does not mean, though, that through transport is always

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<sup>469</sup> For details of that argumentation see *supra*, chapter 3 part D.

and everywhere technically possible. There are certain requirements, such as the maintenance of a certain mains voltage, that have to be met at any time<sup>470</sup>. In order to guarantee these requirements, it can sometimes be necessary to refrain from allowing third parties access to the grid.

The English example however, demonstrates that the through transport of electricity in general does not, due to technical reasons, threaten a secure electricity supply.

Apart from the technical aspects, one can attempt to deduce some information from the English example about the financial consequences competition has for the electricity utilities.

The new regulations have been in force now for about one year and the undertakings seem to do quite well<sup>471</sup> on the new competitive market, contrary to concerns<sup>472</sup> voiced some months ago. It is, however, not possible to say anything definite about the financial consequences for the utilities at this stage, because it is still early days after all.<sup>473</sup>

Apart from that, it is doubtful anyway whether the experience made in England in this respect can serve as guide line for Germany.

When the English and Welsh ESI was privatised, it was clear that the market participants would mainly be drawn from the already existing utilities, plus some new private generators. Due to the limited capacity of the only interconnector link between England and the

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<sup>470</sup> This is why in England and Wales a central schedule and dispatch of the grid and the major stations, the pool, has been established.

<sup>471</sup> "Professor Stephen Littlechild, Offer's director-general, said the electricity industry was working well and already had a private sector mentality" see "Power prices fall by up to 15% for big customers", Financial Times 15.5.1991.

<sup>472</sup> See for example, "Power groups dim long-term view", Financial Times 2/3.2.1991 and "Power generators seen as risky for investors", Financial Times 4.2.1991.

<sup>473</sup> For details as to the profit prospects of the individual undertakings see Capel, *op.cit.* n. 63, *passim*.

continent<sup>474</sup>, the French low price utility EdF can not effectively participate in the competition for English customers. Thus, all significant market participants had roughly similar starting conditions and therefore the chance to hold their ground on the competitive electricity market.

In contrast to this, German electricity utilities would face very strong competition from the French state owned utility EDF, without having equal starting conditions. This stress of French competition could endanger the financial wellbeing, or even the existence, of a number of German electricity undertakings. This in turn, might result in a lack of diversity of electricity undertakings and, in the long run, threaten the security of supply.<sup>475</sup>

Whether or not the security of supply is actually at risk depends on a number of different factors. The economical strength of an undertaking and thus its capability to hold its ground against a competitor depends, for example, on the clientele structure and on the level of local economic activity within its supply area.

It thus is not possible to make generally applicable statements as to whether *Demarcation Contracts* that restrict competition are "justified" under the security of supply aspect.<sup>476</sup>

It has to be observed, though, that these agreements prevent any kind of competition. One can hardly imagine that it is necessary for the sake of a safe supply to prohibit competition generally.<sup>477</sup> It therefore can be assumed that the *Demarcation Contracts*, in preventing competition for customers in any case, overshoot the mark.<sup>478</sup> Thus, as

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<sup>474</sup> The interconnector has a capacity of 2 GW which represents about 4% of the generation capacity in England and Wales.

<sup>475</sup> *Supra*, chapter 3 part G.III.

<sup>476</sup> Heitzer, *op.cit.* n. 47, p. 108; Bierhoff, *op.cit.* n. 393, p. 760; Grawe, "Rechtliche Möglichkeiten", *op.cit.* n. 392, p. 225; Niederleithinger, *op.cit.* n. 173, p. 68; Speich, *op.cit.* 160, p. 126; Klaue, "Sonderabnehmer", *op.cit.* n. 258, p. 154.

<sup>477</sup> Gröner, *op.cit.* n. 144, pp. 74-75.

<sup>478</sup> Niederleithinger, *op.cit.* n. 173, pp. 46 et seq.

a rule, they will not find compensatory justification under the security of supply aspect.

The *Demarcation Contracts* finally could be justified under the price of supply aspect. Such a justification requires that the supply monopolies, which the *Demarcation Contracts* create, are necessary to avoid undue rises in the electricity prices. It has been established however, that competition on the electricity market, in the long run, will not result in an increase of power prices.<sup>479</sup> This is why agreements like the *Demarcation Contracts* that prevent competition totally, usually find no justification under the price of supply aspect.

c. Summary of Part 1.

It has been established that those *Demarcation Contracts* which merely contain provisions according to which the parties have to refrain from supplying customers in each others area of supply, do not infringe Art. 85 (1) EEC Treaty since they do not affect the trade between Member States.

Other *Demarcation Contracts* however, providing the duty of one party to purchase its entire demand (or substantial parts of it) from the other party, or to refrain from allowing access to its system to third parties for the through transport of electricity, affect the trade between Member States. Those agreements that prevent competition totally are, as a rule, not justified under the security or price of supply aspect. They hence infringe Art. 85 (1) EEC Treaty.<sup>480</sup>

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<sup>479</sup> *Supra*, chapter 3 part G. IV.

<sup>480</sup> Like here Klaue, "Sonderabnehmer", *op.cit.* n. 258, *passim*; A. Metzenhin, Mehr Stromimporte durch EG Recht (1989) 35 *WRP*, pp. 217-222 (p. 2199; Schwark, *op.cit.* n. 160, p. 214; Seidel, *op.cit.* n. 106, pp. 129-143; different Speich, *op.cit.* n. 160, p. 125.

## 2. Concession Agreements

### a. Agreements between Undertakings

The *Concession Agreements* have been concluded between electricity utilities and local government bodies.

The involvement of local government bodies raises the question of whether the *Concession Agreements* are agreements between "undertakings" within the meaning of Art. 85 (1) EEC Treaty.

With respect to the qualification of local authorities as "undertakings" the ECJ has stated that Art. 85 EEC Treaty "[...] does not apply to contracts for concessions concluded between communes acting in their capacity as public authorities and undertakings [...]"<sup>481</sup> From this judgement it can be deduced that local government bodies are not to be regarded as "undertakings" within the meaning of Art. 85 (1) EEC Treaty if they act as public authorities.

In the German legal system, however, administrative bodies such as local authorities can act in two different ways. They can either perform sovereign functions, or they can act in the same way as any other private individual or legal person.<sup>482</sup>

In the first case, their actions are subject to public law; in the second case they are subject to private law; both sets of rules being completely distinct from one another.

When entering into *Concession Agreements*, the local government bodies are ruled, according to a commonly agreed opinion<sup>483</sup>, by private law, since those agreements have an entirely commercial character. The *Concession Agreements* therefore are not made within the public law framework. Thus, the local government bodies do not act within their capacity as public authorities, but are engaged in economic activi-

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<sup>481</sup> Case 30/87 *Corinne Bodson v Pompes funèbres des régions libérées SA* [1988] ECR 2479 (p. 2512 consideration 18).

<sup>482</sup> The latter is called *verwaltungsprivatrechtliches Handeln*. An example would be the purchasing of office material.

<sup>483</sup> Arndt, *op.cit.* n. 32, p. 17; Kuhnt, "Übertragung von Strom", *op.cit.* n. 118. p. 418.

ties. They hence qualify as undertakings within the meaning of Art. 85 (1) EEC Treaty.

## **b. Restriction to Competition within the Common Market**

### **aa. Restraints to Competition caused by Concession Agreements**

According to the *Concession Agreements*, the local government bodies are obliged to refrain from allowing anybody, apart from the electricity utility which is party to the agreement, to lay cables and electrical lines on premises in public ownership. Since nearly all streets, roads and paths in Germany are publicly owned it is more or less impossible to construct new electrical lines or grids.

By the means of the *Concession Agreements*, the electricity utilities thus prevent other undertakings from supplying customers within their areas, via new grids. They hence hinder non local entities from entering into competition for the supply of their customers.

The *Concession Agreements* therefore cause restraints to competition.

### **bb. Effect on Trade between Member States**

These restraints affect the trade between Member States because they exclude foreign, as well as German utilities from the supply of customers via private grids.

### **cc. Compensatory Justification for the Restraints caused by Concession Agreements**

The question arises as to whether the restraints to competition caused by the *Concession Agreements* are "justified".

With respect to a conceivable justification under the of aspects security and price of supply the same applies as for the *Demarcation Contracts*. There is a distinct possibility that these agreements are sometimes necessary to safeguard a secure supply at reasonable prices. But, since the *Concession Agreements* prevent the construction of new

grids and hence competition totally, they overshoot the mark and usually cannot find compensatory justification under those aspects.<sup>484</sup>

The verdict might be different, however, in connection with the aspect of protection of the environment. Overhead cables cause considerable disturbance for the environment.<sup>485</sup>

It is therefore possible that the restraints to competition caused by the prohibition to construct new grids is "justified" under the protection of the environment aspect. It will be necessary to weigh up the Treaty objectives competition and environmental protection, against each other, thereby taking into consideration all circumstances of the respective case.<sup>486</sup>

Nevertheless, it can be assumed that, due to its growing importance, environmental protection in many cases takes precedence. The restraints to competition caused by the *Concession Agreements* therefore usually find a compensatory justification under the protection of the environment aspect.

### c. Summary of Part 2.

It has been established that the *Concession Agreements* cause distortions to competition on the electricity market, in that they prevent the supply of customers via private grids. Those restraints, however, as a rule, are "justified" since they are necessary to protect the environment and hence do not infringe Art. 85 (1) EEC Treaty.<sup>487</sup>

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<sup>484</sup> See for example the argumentation of Gröner, *op.cit.* n. 144, pp. 74-75.

<sup>485</sup> *Supra*, chapter 3 part G.V.

<sup>486</sup> For details of this weighing up see *supra*, chapter 3 part G.V.

<sup>487</sup> For the same result see Grawe, "Rechtliche Möglichkeiten", *op.cit.* n. 392, p. 230.

### III. Exemption under Art. 85 (3) EEC Treaty?

The German electricity undertakings could seek an exemption under Art. 85 (3) EEC Treaty for those agreements that contradict Art. 85 (1) EEC Treaty. This is relevant in particular for some of the *Demarcation Contracts*.

A condition for an exemption from the application of Art. 85 (1) is that the *Demarcation Contracts* are agreements which contribute "to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit and which [do] not:

- "(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

The *Demarcation Contracts* fail to satisfy the condition of Art. 85 (3) (b) EEC Treaty, because they bind electricity distributors to certain generators, or prevent the through transport of electricity. They hence make it absolutely impossible for non local utilities to enter into competition for the supply of large end users or distributors.

The *Demarcation Contracts* thus totally eliminate competition on the German electricity market.

It therefore can be assumed that the *Demarcation Contracts* do not qualify for an exemption under Art. 85 (3) EEC Treaty.<sup>489</sup>

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<sup>489</sup> Like here Niederleithinger *op.cit.* n. 173, p. 71; different Schwark *op.cit.* n. 160, p. 215.

#### IV. Infringement of Art. 86 EEC Treaty?

The German electricity utilities refuse third party access to their systems for the through transport of electricity to customers within their own area of supply, as well as to consumers situated in the supply area of other electricity undertakings.

The question arises whether that "*Through-Transport-Refusal*" is an abuse of a dominant position within the meaning of Art. 86 EEC Treaty.

##### 1. Relationship between Articles 85 and 86 EEC Treaty

As far as the electricity utilities deny through transport of electricity for the supply of customers within the supply area of another German undertaking, they do so with reference to corresponding provisions contained in the *Demarcation Contracts*. As shown above, those contracts usually contradict Art. 85 (1) EEC Treaty and are therefore void.

This raises the question of whether Art 86 EEC Treaty also can be applied to that kind of *Through-Transport-Refusal*". The answer to this question depends on the relationship between Article 85 (1) and 86 EEC Treaty.

Wohlfarth has argued that, due to the fact that Art. 86 EEC Treaty is a more general provision, it cannot apply in cases that are caught by the more special Art. 85 (1) EEC Treaty.<sup>489</sup>

Art. 86 EEC Treaty, however, is not a more general rule in the sense that it covered all cases falling under Art. 85 (1) EEC Treaty.<sup>490</sup> Therefore, the argumentation of Wohlfarth cannot be followed. Rather, it is possible that a conduct infringing Art. 85 (1) EEC Treaty also contravenes Art. 86 EEC Treaty.<sup>491</sup>

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<sup>489</sup> See Wohlfarth, *op.cit.* n. 207, Art. 86 no. 1.

<sup>490</sup> Smit/Herzog, *op.cit.* n.206, vol. 2, para. 86.06.

<sup>491</sup> Mestmäcker, *op.cit.* n. 216, pp. 356-357; Smit/Herzog, *op.cit.* n. 206, vol. 2, para. 86.06.

The Court has confirmed this repeatedly.<sup>492</sup> In *Hoffmann v La Roche*<sup>493</sup>, it stated that the fact that the conduct of an undertaking occupying a dominant position falls within Art. 85 EEC Treaty does not preclude the application of Art. 86 EEC Treaty.

It follows, that the fact that some of the *Through-Transport-Refusals*" violate Art. 85 (1) EEC Treaty does not influence the applicability of Art. 86 EEC Treaty to them.

## 2. Dominant Position within the Common Market

The EEC Treaty does not define "dominant position".

However, the ECJ regards, according to its established case law, an undertaking as being in a dominant position "[...] when it enjoys a position of economic strength which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers"<sup>494</sup>. This definition takes two aspects into consideration: the possibility to act independently, and the absence of competition.

In order to carry out an economic evaluation to decide about the existence of a dominant position, it is necessary to determine the relevant market for a particular product which is sufficiently differentiated from other product markets.<sup>495</sup>

The market in question here is the electricity market, meaning the market for the supply of customers such as large end users and local

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<sup>492</sup> For the relationship between Art. 85 and 86 EEC Treaty see also case 51/89 *Tetra Pak Rausing SA v Commission* (1991) CMLR p. 334.

<sup>493</sup> Case 85/76 [1979] ECR 451 (p. 550 consideration 116).

<sup>494</sup> See for example case 322/81 *Michelin v Commission* [1983] ECR 3461 (p. 3503 consideration 30) and case 311/84 *CBEM v CLT and IPB* [1985] ECR 3261 (p. 3275 consideration 16).

<sup>495</sup> Case 27/76 *United Brands Co v Commission* [1978] ECR 207 (p. 270); see also Vaughan, *op.cit.* n. 139, para 19.58.

distributors, with electricity.<sup>496</sup>

To establish whether the undertakings in question obtain a dominant position within that market, it furthermore is necessary to evaluate their economical strength and independence in respect of competitors. The German electricity utilities own the grids they use for the transmission and distribution of electricity to their customers. Due to the high investments necessary, it is nearly always uneconomical to build a new grid in order to supply a customer. The utilities are in fact therefore, in a monopolistic position as far as the electricity supply in their area is concerned.

The ECJ regards a very large market share as significant evidence of the existence of a dominant position<sup>497</sup>, and hence assumes that monopolistic undertakings usually obtain a dominant position.<sup>498</sup>

It therefore follows that the German electricity utilities are in a dominant position.<sup>499</sup>

The next question is whether they obtain this position "within the common market or a substantial part of it".

Art. 86 EEC Treaty not only prohibits the abuse of a dominant position by one undertaking but also by a group of undertakings.

Since all German electricity utilities refuse through transports, it has to be examined whether they together dominate a substantial part of the common market.

Examples of "substantial parts" in decisions of the ECJ include the territory of Belgium<sup>500</sup> and Germany<sup>501</sup>, but also considerably smaller

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<sup>496</sup> Kuhnt, "Übertragung von Strom", *op.cit.* n. 118, p. 420; Speich, *op.cit.* n. 160, p. 125.

<sup>497</sup> Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461.

<sup>498</sup> Arndt, *op.cit.* n. 32, p. 19.

<sup>499</sup> See in place of many Ritter, "Anwendung der EG-Wettbewerbsregeln", *op.cit.* n. 176, p. 46.

<sup>500</sup> Case 26/75 *General Motors Continental NV v Commission* [1975] ECR 1367 (pp. 1377-1378).

<sup>501</sup> Case 7/82 *GVL v Commission* [1983] 483 (pp. 506-507).

areas like the southern part of Germany<sup>502</sup>, or the Netherlands<sup>503</sup>. Since the whole of German electricity utilities cover the entire territory of Germany they, according to these decisions, dominate a substantial part of the common market.<sup>504</sup>

### 3. Abuse

The question arises whether the *Trough-Transport-Refusal* establishes an "abuse" of the dominant position obtained by the electricity utilities.

*Trough-Transport-Refusals* are not covered by the examples of abuses in Art. 86 (2) EEC Treaty. But since this list is not exhaustive, they may still fall under paragraph (1).<sup>505</sup>

As said above, the concept of abuse in Art. 86 EEC Treaty is an objective one.<sup>506</sup> The conduct of a dominant undertaking can only amount to an abuse if there is no objective justification for it.

This raises the question of whether the German electricity utilities have an objective reason for the *Trough-Transport-Refusal*. Otherwise, the refusal contradicted Art. 86 EEC Treaty and the undertakings were under the the legal obligation to allow third parties access to their

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<sup>502</sup> Cases 40-48, 50, 54-65, 111, 113, 114/73 *Coöperatieve vereniging Suiker Unie UA v Commission* [1975] ECR 1663 (pp. 1991-1993).

<sup>503</sup> Case 322/81 *Nederlandsche Banden-Industrie Michelin NV v Commission* [1983] ECR 3461 (pp. 3510-3512).

<sup>504</sup> Arndt, *op.cit.* n. 32, p. 19; Ritter, "Anwendung der EG-Wettbewerbsregeln", *op.cit.* n. 176, p. 48.

<sup>505</sup> Case 6/70 *Europemballage and Continental Can v Commission* [1973] ECR 215 (p. 245 consideration 26).

<sup>506</sup> *Supra*, chapter 3 part F.III.

systems.<sup>507</sup>

In order to decide whether there is an objective reason it is necessary to take the same aspects into account that are of importance in connection with the application of Art. 85 (1) EEC Treaty to the ESI.<sup>508</sup> All depends therefore, on the necessity of the *Trough-Transport-Refusals* for a secure supply at reasonable prices.

If the German electricity undertakings allowed third parties access to their grid, they would loose some attractive end users or local distributors to their French competitor EDF. This alone would probably neither endanger the security of supply nor the stability of prices at a reasonable level.<sup>509</sup> But the phenonenum of "cherrypicking" in the long run could have negative effects on the overall security of supply, as long as the starting conditions for competitors are as unequal as they are today.

Whether or not a *Trough-Transport-Refusal* qualifies as abuse of a dominant position is thus subject to a weighing up of all relevant interests.<sup>510</sup> In doing so one also has to take into consideration the technical difficulties that are connected with the through transport of electricity. The feeding in of power makes it, for example, essential that the grid owner provides a number of ancilliary servi-

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<sup>507</sup> This can be deduced from the Courts ruling in *Hoffmann-La Roche* (Case 85/76 [1979] ECR 461 (pp. 539-540)) Here the ECJ also had to decide whether a dominant undertaking controlling the entrance to a certain market abuses its position. It held: "An undertaking which is in a dominant position on a market and ties purchasers [...] by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position [...]".

<sup>508</sup> Everling, "Der Binnenmarkt nach der Rechtsprechung des Gerichtshofs", *op. cit.* n. 123, p. 150.

<sup>509</sup> See the argumentation of Arndt, *op.cit.* n. 32, p. 20.

<sup>510</sup> Everling, "Der Binnenmarkt nach der Rechtsprechung des Gerichtshofs", *op. cit.* n. 123, p. 151; Grawe, "Rechtliche Möglichkeiten", *op. cit.* n. 392, pp. 230-232.

ces.<sup>511</sup> It has to be scrutinized whether it is possible to compensate the performance of those inevitable services by the means of a transmission charge or whether their performance is an unreasonable burden for the grid owner that cannot be compensated at all. In the latter case a *Trough-Transport-Refusal* would not be abusive because the electricity utility had an objective reason for denying third party access.

#### 4. Summary of Part IV.

The German electricity utilities obtain a dominant position on the common market for electricity.

Whether or not a *Trough-Transport-Refusal* is an abuse of that position depends on the technical and economical circumstances of each individual case.<sup>512</sup> But as a rule the electricity utilities cannot deny third parties access to their systems just because they could loose some of their customers to a competitor.

#### D. Summary of Chapter 4.

The commercial arrangements made in connection with the privatisation of the ESI in England and Wales contain some restraints to competition that have effect on the trade with electricity between Member States. These restraints, however, are justified under the security of supply aspect. The English agreements thus do not infringe Art. 85 (1) EEC Treaty.

The same applies to the *Concession Agreements*, which generally are justified under the protection of the environment aspect.

As opposed to that, the restraints to competition caused by the German *Demarcation Contracts*, as a rule, find no justification. Those German

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<sup>511</sup> For details see *supra*, chapter 3 part C; see also Fischerhof, "Stromdurchleitung", *op.cit.* n. 114, pp. 17-21; E.h.G. Klätte, *op.cit.* n. 45, pp. 412-421.

<sup>512</sup> Hermann, *op.cit.* n. 31, p. 117.

agreements that infringe Art. 85 (1) EEC Treaty do not qualify for an exemption under Art. 85 (3) EEC Treaty because they eliminate competition totally.

The German electricity utilities obtain a dominant position on the common market for electricity. A *Trough-Transport-Refusal* establishes an abuse of that position, unless the utility in question for once can refer to an objective reason. The *Trough-Transport-Refusals* thus usually contradict Art. 86 EEC Treaty.

## Chapter 6 Conclusions

(1) It has been shown that electricity is an important element of the energy balance in Europe, and therefore plays a significant role in the completion of an internal energy market.

(2) The electricity market in the European Communities as it shows itself today, is characterized by; three main ownership structures of the electricity utilities, technical and economical peculiarities of the supply with electricity, supply monopolies nearly everywhere, different national energy policies, a lack of price transparency and a small but well working power exchange between the electricity utilities of the Member States.

(3) Corresponding to that variety of characteristics, the European Community has a number of legal instruments to support the further integration of the electricity market, such as the approximation of national energy policies, the introduction of price transparency, the promotion of electricity transit on large networks and the introduction of competition to the electricity market.

(4) The groups of electricity customers for which competition on the European electricity market is of interest, are large end users and local distributors.

There are two conceivable models of competition on the electricity market; third party access to the existing grids and the construction of new grids.

(5) Concerning the introduction of competition to the electricity market not only Articles 85-90 EEC Treaty, but also Articles 30-36 and 37 EEC Treaty, are relevant. These provisions all from part of the general principle of competition within the EEC Treaty and therefore they must all follow the same line of interpretation.

(6) The application of Articles 85-90 EEC Treaty to the electricity market thus is only one of a number of possibilities to support a further integration. Nevertheless, there are two factors which make the European rules on competition an especially efficient tool: First, they are aimed at the destruction of supply monopolies, which are largely responsible for the present desintegration of the electricity markets. Second, Articles 85-90 EEC Treaty are available to the Commission right now, since it is entirely at the Commission's discretion to take actions against offending parties.

(7) The application of Articles 85-90 EEC Treaty to the ESI is not subject to prior harmonization of legal and administrative frameworks in the Member States.

Neither has the fact that the Council has not yet issued provisions under Art. 87 (2) (c) EEC Treaty with respect to the ESI, any repercussions on the applicability of Articles 85 and 86 EEC Treaty to this branch.

(8) Finally, Art. 90 (2) EEC Treaty offers no possibility to restrict the application of those rules. Neither the electricity utilities in England and Wales nor in Germany, according to the view put forward in this thesis, are not undertakings entrusted with a service of general economic interest within the meaning of Art. 90 (2) EEC Treaty. This opinion is not likely to be shared by the European Commission. A different outcome in the interpretation of Art. 90 (2), however, does not lead to considerably different overall results in the application of Articles 85-90 EEC Treaty to the ESI. The application of all Treaty rules on competition to the electricity market, has to take the effects of competition for this branch, as well as their compatibility with other Treaty objectives, into account.

(9) Art. 85 (1) as well as Art. 86 EEC Treaty, are to be applied to all anticompetitive measures on the electricity market. In doing so, special consideration has to be given to the technical and economical peculiarities of this branch. The reason for that is that competition is neither an end in itself nor is it to be viewed in absolute terms,

but has always to be brought into accord with other Treaty objectives. Both Art. 85 (1) and Art. 86 EEC Treaty provide scope for taking those other, sometimes conflicting, Treaty goals into account. As far as Art. 86 EEC Treaty is concerned this scope can be found in the interpretation of the term "abuse". According to the opinion established in this thesis, the application of Art. 85 (1) EEC Treaty is subject to an inherent "rule of reason", which is of particular importance for the interpretation of the expression "restriction".

(10) Due to the technical and economical features of the ESI, there are, above all, four aspects that have to be taken into consideration in applying Articles 85 (1) and 86 EEC Treaty.

These aspects are security of supply, price of supply, protection of the environment and the promotion of the use of certain primary energy sources in power stations. They are all ingredients of the general objectives of the European Community formulated in Art. 2 EEC Treaty. It is thus possible that certain restraints to competition caused by the peculiarities of the ESI, do not infringe Art. 85 (1) or Art. 86 EEC Treaty because they find compensatory justification under one of these aspects.

(11) This is what applies to the commercial arrangements made in connection with the privatisation of the ESI in England and Wales. All of those agreements that cause restraints to competition are "justified" under the security of supply aspect.

Some of the German agreements also find justification either under the security of supply or under the protection of the environment aspect. Other agreements, however, as well as some conducts, due to the fact that they prevent competition totally, overshoot the mark and are as a rule, not justified for the sake of a safe supply at reasonable prices. They therefore contradict Art. 85 (1) respectively Art. 86 EEC Treaty.

Those German agreements that infringe Art. 85 (1) EEC Treaty do not usually qualify for an exemption under Art. 85 (3) EEC Treaty because they eliminate competition totally.

(12) It has been established that some of the justified restraints to competition have their roots in the technical peculiarities of the electricity supply. This in particular applies to arrangements like the English *Pool and Settlement Agreement*, which are inevitable for a secure and reliable power supply. Those agreements and conducts therefore will always find compensatory justification.

Other agreements and conducts, however, are only justified because of the different starting conditions for competition that exist on the electricity market today. This applies to some of the agreements and conducts in the German ESI. As soon as the national energy policies are better harmonized, and all electricity utilities have about equal chances to hold their ground on a competitive market, those restraints to competition are no longer necessary for a secure supply at reasonable prices. They then will find no more justification and thus, will contradict Art. 85 (1) respectively Art. 86 EEC Treaty.

(13) It follows that the European rules on competition today have only a limited effect on the further integration of the electricity market. Although there is no reason in principle why they should not be applied even now, Articles 85 (1) and 86 EEC Treaty will not blossom fully until the national frameworks are better harmonized.

This is why it is advisable for the European Communities not only to apply Articles 85 -90 EEC Treaty vigorously, but at the same time, and parallel to that, to actively promote a further harmonization of national energy policies.

(14) Since the European rules on competition at the moment only have a limited effect, another aspect gains importance. As long as competition for large end users and local distributors remains subject to considerable restraints, it is all the more important to promote the wholesale exchange of electricity between utilities, in order to further integrate the markets. Thus, the new Directive on electricity transit on large networks must be particularly welcome.

(15) The application of Articles 85 and 86 to the ESI has shown that it is inevitable to take all technical and economical circumstances of each individual case into account. In order to avoid uncertainties, delays or duplications, it therefore seems appropriate for the European Council to issue a Directive or Regulation in accordance with Art. 87 (2) (c) EEC Treaty which defines for the ESI, the scope of the provisions of Articles 85 and 86 EEC Treaty. Such a Regulation or Directive would have the advantage over the Commission's proposal, to add a provision similar to Art. 85 (3) to the Treaty, in that it could give guidelines for the application of Art. 85 as well as 86 EEC Treaty to the ESI.

A provision under Art. 87 (2) (c) EEC Treaty also could be much more detailed than an exemption similar to Art. 85 (3) EEC Treaty, and hence would be better equipped to meet the requirements of such a complicated economic branch as the ESI.

Moreover, the Commission's proposal only takes the security of supply into account and ignores equally important aspects like the price of supply and the protection of the environment.

Finally, a provision stating that agreements necessary for the security of supply are not covered by Art. 85 (1) EEC Treaty is, according to the view put forward in this thesis, futile. Art. 85 (1) EEC Treaty itself provides scope to take those aspects into account and thus is not infringed where agreements safeguard a secure electricity supply.

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