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MEMO ON THE LEGALITY OF LICENSING AND LOCAL PRESENCE REQUIREMENTS FOR ENERGY TRADING IN CENTRAL AND EASTERN EUROPE

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MEMO
On The

Legality of Licensing Requirements for Energy Trading in Central and Eastern Europe

I. Introduction

The EFET Legal Committee has been asked to prepare a memo on the licensing requirements for wholesale energy trading in a number of countries in the Central and Eastern European (and South-Eastern) region (CEE/SEE). Further, the EFET Legal Committee has been asked to review certain provisions of EC legislation and the Energy Community and to assess whether licensing requirements are compatible with these provisions.

In this Memo the EFET Legal Committee assesses the applicable laws and provisions for different groups of countries (under **III.**) as well as licensing requirements in certain countries in Central and Eastern Europe (**IV.**).

This Memo is an up-date to a previous update, dating from December 2006.

II. Executive Summary

The findings of the EFET Legal Committee can be summarised as follows:

Wholesale trading is a commercial activity that falls in the ambit of Arts. 28 and 49 EC Treaty. Energy trading benefits from the guarantee of free movement of goods, and the freedom to provide services.

Licensing obligations are only a first barrier to national markets. For foreign traders they often are combined with other cost-intensive procedures , e.g. seeking legal advice from local counsels or the necessity to have every official conversation translated.

Wholesale Trading is not equivalent to supply of Energy. Therefore, certain provisions safeguarding the supply to customers are disproportionate if applied to wholesale traders.

Pursuant to internal market rules, Member States must mutually recognise all legal and supervisory requirements that traders fulfil in their Member State of establishment.

Member States may impose restrictions to the free movement of goods or the freedom to provide services provided that these restrictions are justified under either Art. 30 or 46 EC or the "rule of reason".

Import licences are discriminatory barriers to trade that cannot be justified under either Art. 30 or 46 EC. In particular, energy trading has no impact on security of supply and/or consumer protection.

The requirement to have a registered seat in a host State deprives Art. 49 EC of its effect and is disproportionate. This requirement infringes Arts. 28 and 49 EC.

The requirement to have an additional license in a host State is disproportionate and contravenes Arts. 28 and 49 EC.

The Energy Community Treaty establishes the principle of free movement of goods and provides for the creation of a single market for "Network Energy".

The Energy Community Treaty interprets principles that stem from Community law in conformity with the case law of European Court of Justice, the Energy Community will follow new developments of community law.

Parties to the Energy Community are under comparable obligations as the EU Member States as regards licensing requirements.

Current requirements to issue licenses only for national companies contravene Art. 41 of the Energy Community Treaty.

III. Legal Assessment

In this Memo, the EFET Legal Committee examines the legal framework in the European Union the framework of the Energy Community Treaty. The legal framework for other countries under bilateral or multilateral treaties is not covered in this Memo.

We will assess restrictions on wholesale trading in the light of European Community law and under the Energy Community Treaty. Wholesale trading in this context shall mean the commercial activity of any person who purchases electricity or gas for resale inside or outside the system where they are established. The term wholesale trading in this context shall encompass both physical and financial trading, but shall not cover energy supply activities to final customers or industrial customers.

In essence there are three types of restrictions imposed on wholesale traders that will be assed in the following:

- import licences (i.e. a licence that allows traders to import electricity or gas into a country;
- requirement to have a permanent establishment in the host state;
- requirement to have an additional licence (such as a retail supply licence or a wholesale trading licence) in the host state.

Existing national restrictions are described below in more detail below.

1. EU Member States

All Member States to the European Union ("EU") are obliged to adhere to the legal order of the European Community. Community law comprises both, primary law, i.e. the provisions of the different treaties (**a.**) as well as secondary law (**b.**), i.e. Regulations, Directives, Decisions and Recommendations as defined in Art. 249 EC.

a. Primary Law

The EFET Legal Committee is of the opinion that all three of the aforementioned restrictions contravene prevailing EU law, notably Arts. 28 EC and 49 EC, as set out below in Section III.

(1) Free movement of goods

Art. 28 EC sets out the principle of free movement of goods. Electricity and gas are goods for the purposes of Art. 28 EC.[1]

(2) Freedom to provide services

Art. 49 EC prohibits restrictions on the freedom to provide services within the Community in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. Pursuant to Article 50 EC, services shall be considered to be 'services' where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. Services shall in particular include: activities of an

1 See Cases C-393/92, *Almelo* [1994] ECR I-1477, C-158/94 *Commission v Italy* [1997] ECR I-5789.

industrial character; activities of a commercial character; activities of craftsmen; activities of the professions.

Wholesale trading is a commercial activity which is provided for remuneration. Wholesale traders usually operate from one Member State in which they are established, from their place of establishment wholesale traders carry out their economic activities in other States on a temporary basis. Wholesale trading can thus also be qualified as a service in the sense of Art. 49 EC.

(3) Distinction between goods and services

Although the European Court of Justice (ECJ) has held on several occasions that the import and export of electricity falls within the scope of the EU Treaty rules on the free movement of goods,[2] wholesale trading with electricity and gas also comprises further commercial elements as the main focus of trading is not the import or export of physical power but the underlying commercial transaction that rather falls in the ambit of the provisions on the freedom to provide services. The legal nature of wholesale trading can thus be qualified as a mixed activity falling in the scope of provisions for goods and services as wholesale trading comprises different legal elements, i.e. the delivery of a physical commodity as well as underlying commercial activities.

The ECJ previously held in the area of telecommunications that the provisions on goods and services may be applied simultaneously where the national measure at issue infringes both the provisions on the free movement of goods as well as the provisions on the freedom to provide services.[3]

Hence we conclude that, the EC Treaty provisions dealing with the free movement of goods as well as the provisions on the freedom to provide services are applicable to wholesale energy trading.

(4) Restrictions to trade

Art. 28 and Art. 49 EC prohibit discriminatory barriers to trade. Discriminatory barriers to trade are restrictions that impose less favourable conditions on foreign that on domestic products or services. Import and export restrictions are such discriminatory measures that are caught under the aforementioned provisions. Import licences are restrictions on import and are thus discriminatory barriers to trade that contravene Art. 28 and Art. 49 EC.

Further, certain non-discriminatory barriers to trade are also prohibited in the internal market. In its case law the ECJ held that Art. 28 EC can also apply to national rules which do not discriminate against imported products as such but which inhibit trade nonetheless. In its leading case *Cassis de Dijon*[4] the Court affirmed that Member States may regulate all matters which have not yet been subject of Community harmonization as long as such disparities in national law can be justified under the so-called rule of reason.

The ECJ has also held in its landmark ruling *Keck*[5] that selling arrangements, i.e. rules such as when, where by whom and at what price goods may be sold fall outside the scope of Art.

2 Cases C-393/92, *Almelo* [1994] ECR I-1477, C-158/94 *Commission v. Italy* [1997] ECR I-5789.
3 Case C-390/99, *Canal Satélite Digital SL* [2002] ECR I-607.
4 Case 120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.
5 Cases C-267-8/91, *Keck et Mithouard* [1993] ECR 6097.

28 EC if this selling arrangement indistinctly applies to domestic and imported goods. The *Keck* doctrine requires that the provision in question affects the marketing of domestic products and those from other EU Member States in the same manner in law and in fact.

Obtaining a licence and having a permanent place of establishment affects foreign entities in fact more than domestic companies. The requirement to have a registered seat in the host State is linked with high costs for wholesale traders as they are required to hire offices and staff and to set up an entire new business in the host State. In order to open an office traders will incur costs for legal and translation services; ideally local staff will be employed or the costs for relocation of staff from the Member State of establishment must be incurred. If local staff is hired the company must also learn about and comply with local labour law requirements, if staff from the Member State of origin is relocated further administrative requirements (residence permit, work permit) must be met.

The above said applies likewise for the requirement to obtain an additional license in the host State. Wholesale traders that wish to obtain such a licence will be faced with legal and translation costs, the notarisation of documents and a costly administrative procedure.
Both, the requirement to have a place of establishment as well as the requirement to obtain an additional trading licence thus affect foreign traders in fact more than domestic ones even though they apply across the board to national as well as foreign companies. These requirements are non-discriminatory measures which inhibit trade and thus fall under Art. 28 EC.

Although the case law on Art. 28 EC cannot directly be applied to Art. 49 EC the ECJ has in fact applied a similar set of rules to Art. 49 EC and consistently held that genuinely non-discriminatory restrictions are also caught under Art. 49 EC.[6] The Court set out that Art. 49 EC requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State but also requires the abolition of non-discriminatory restrictions which are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where he lawfully provides similar services.[7]

As set out above non-discriminatory restrictions are such that apply across the board to national and foreign companies but which affect foreign companies *de facto* more than national companies and the requirement to have a local establishment contravenes Article 49 EC.

(5) Justifying restrictions

Barriers to trade that fall in the ambit of Arts. 28 and 49 EC may be justified on the grounds of a set of written derogations under Art. 30 and Art. 46 EC . These overriding reasons are, *inter alia*, public morality, public policy, public security, the protection of health and life of humans and are only applicable to discriminatory measures by Member States. Import licences which are discriminatory in nature can thus only be justified on grounds of public morality, public policy, public security etc. None of these overriding reasons are applicable to import licences for wholesale traders, in particular not "security of supply.

Indistinctly applicable rules or non-discriminatory measures - such as the requirement to have a permanent establishment and the requirement to obtain an additional licence- may only be

[6] Case 275/92, *Schindler* [1994] ECR I-1039, Case C-384/93, *Alpine Investment* [1995] ECR I-1141.
[7] Case C-272/94, *Guiot*, [1996] ECR I-1905, Case C-3/95, *Reisebüro Broede* [1996] ECR I-6257, para. 25.

justified by mandatory requirements under the "rule of reason", e.g. on grounds such as the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions or the defence of consumers etc.

Member States must show that those restrictions are objectively justified in pursuance of a legitimate public interest (a.) and provided that the measure in question is proportionate for the attainment of these objectives (b.). This double-test applies to any discriminatory measure. Furthermore the discriminatory measure must be proportionate (c.).

(a) Legitimate public interest

Member States may wish to justify the discriminatory measure with the argument that licensing requirements as well as the requirement to have a registered office in the host State are necessary in order to guarantee security of energy supply, or the protection of consumers. These may serve as basis for overriding reasons provided in Art 30 and Art.46, if they have not been subject of Community harmonisation yet

The issue of security of supply has specifically been addressed in two Directives, i.e. Directive 2004/67[8] concerning measures to safeguard security of natural gas supply which had to be transposed by 19 May 2006 as well as the Directive 2005/89[9] concerning measures to safeguard security of electricity supply and infrastructure investment which should be transposed by Member States into national law by 24 February 2008. The security of supply issue has therefore been subject to Community harmonisation.

A multitude of market players on wholesale level will contribute to market stability as energy markets will be liquid and more transparent, whereby shortages on the market will be foreseen by market players and can be met by those players in advance. The same conclusion can be drawn for from recital one of the Regulation (EC) No 1775/2005 on condition for access to the natural gas transmission networks. The Regulation is in force in all Member States since July1st, 2006.

Recital 1 thereof reads as follows: *"it is now necessary to provide contribution towards the creation of an internal market for in particular regarding the trade of gas.*

This language is a clear indication that the European Commission sees the essential role of gas trading for the completion of the European gas market. Both, the requirement to set up local branches/subsidiaries and the license obligation are impeding the creation of a single European energy market.

The security of supply issue has been addressed in the Liberalisation Directives. Art. 4 of Directive 2003/54, and Art. 5 of Directive 2003/55, provide that Member States shall ensure the monitoring of the security of supply issues which shall cover the supply/demand balance on national markets, the level of expected future demand and envisaged additional capacity being planned or under construction, the quality and level of maintenance of networks as well as measures to cover peak demand and to deal with shortfalls of one or more supplier.

Wholesale energy trading does not directly affect the security of supplies. Security of supply is primarily a matter of functioning grids as well as of adequate supply of generation capacity. Wholesale energy trading is not directly linked to and does not have a direct

[8] OJ L 127/92, 29 April 2004.
[9] OJ L 33/22, 4 February 2006.

influence on household customers as wholesale trading is not a direct upstream market, but only constitutes a more distant market alongside the value chain.

Consumer protection
Member States have argued that the requirement to have a registered seat in the host state as well as the licensing requirement as such would serve to ensure the protection of consumers. In this context it should be highlighted that the issue of consumer protection in the energy sector has already been addressed in the Liberalisation Directives. Pursuant to Art. 3 paragraph 3 of Directive 2003/54 and Directive 2003/55 Member States are under an obligation to ensure the provision of universal services and Member States may to this end appoint a supplier of last resort. Art. 3 contains a bundle of measures that Member States must and may take for the protection of consumers in the electricity and gas sector. Further, the regulatory authorities control the connection and access to national networks including transmission and distribution tariffs. The areas in which consumers might be affected have thus been addressed in the Liberalisation Directives.

The same considerations apply in the field of consumer protection. As this area of law has been subject to Community harmonisation Member States may only take additional measures in order to safeguard overriding reasons of public interest that are not adequately protected by Community measures. Member States may therefore not invoke security of supplies as well as consumer protection as these objectives are already subject to Community harmonisation.

Member States do need to prove that the measures in question, i.e. the requirement to have a registered seat and the requirement to obtain an additional licence are proportionate for the attainment of the objectives pursued. Out of several restrictive measures available, only the least restrictive is allowed.

(c.) Proportionality

Any discriminatory restrictions can only be justified if they meet the proportionality test. The ECJ has consistently held that in accordance with the principle of proportionality, the application of national rules must be appropriate for securing the objective which they pursue and must not go beyond what is necessary.

First of all, the discriminatory measures in question must be suitable or appropriate to protect the objectives that the Member State wish to attain. In other words: the requirement to have a registered seat and the requirement to obtain an additional licence must be suitable tools to safeguard security of supply and/or consumer protection. As wholesale trading has no direct effect on these objectives it is already questionable whether these requirements are suitable to safeguard security of supply and consumer protection.

The national measures in question, the requirement to have a registered seat as well as the requirement to obtain an additional licence in the host State, must not go beyond what is necessary. In other words: there must be no other measures available to the Member States that impose lesser restrictions on wholesale traders.

A notification that a company wishes to commence wholesale trading activities would be adequate for Member States to have knowledge about market participants and their activities. Such a notification would also be a less restrictive measure than imposing establishment- or additional licensing requirements. The requirement to have a place of establishment and the

requirement to obtain an additional licence are therefore not necessary to attain the objectives pursued.

Finally, measures taken by the Member States must be proportionate. Host States are required to examine if the conditions under which an activity is permissible or licensed in the Member State of establishment is similar or comparable to the conditions imposed by the Host State provided that the activities in question are subject to proper supervision in the Member State of establishment.[10] Further, the host Member State must take into account the evidence and guarantees already furnished by the provider of the services in the pursuit of his activities in the Member state of his establishment.[11] The Court thus requires Member States to mutually recognise licensing or other regulatory requirements that a trader must comply with in its Member State of origin. The ECJ has set out that national measures that lead to the duplication of administrative controls are not objectively justified.[12] Only if the host Member State can demonstrate that additional measures are required to safeguard further public interest criteria that are not being safeguarded under the supervision of the Member State of origin they may impose additional requirements on traders. It is thus on the Member States to demonstrate that regulatory supervision in the Member State of origin is not sufficient.

The Court held in *Commission v. Belgium*[13] that Belgian legislation according to which the sale of certain pesticides was subject to authorisation which could only be obtained by a person established in that Member State contravened Art. 28 EC. The requirement to have an establishment on national territory in order to market goods that had lawfully been brought on the market in another Member State is thus incompatible with Art. 28 EC. The underlying idea of the Court is that once a good has lawfully been marketed in one Member State this good may be freely flown across the borders within the Community.

This reasoning also applies in the field of services. The freedom to provide services entails the carrying out of an economic activity for a temporary period in a host State, whereas by contrast the right of establishment entails the pursuit of an economic activity from a fixed base in a Member State for an indefinite period. The Court held in *van Binsbergen* that the requirement of a habitual residence within the territory of the state where the service is to be provided may have the result of depriving Art. 49 EC of all useful effect in view of the fact that the objective of that Article is to abolish restrictions on the freedom to provide services imposed on persons not established in the state where the service is to be provided.[14] In other words the requirement to have a permanent establishment in the host State is contrary to the very nature of the freedom to provide services as it deprives Art. 49 EC of all useful effect.

The Court held in the case *Corsten*:

> *"In consequence, the authorisation procedure instituted by the host Member State should neither delay nor complicate exercise of the right of persons established in another Member State to provide their services on the territory of the first State where*

[10] Case 110-111/79 *Van Wesemael* [1979] ECR 35, para. 3; see also Case 279/80 *Webb* [1981] ECR 3305, para. 20 in which the Court held that a measure would be excessive in relation to the aim pursued if the requirements to which the issue of a licence is subject coincided with the proofs and guarantees required in the State of establishment. Case 29/82 *van Luipen* [1983] ECR 151.
[11] Case 279/80 *Webb* [1981] ECR 3305, para. 20.
[12] Case 205/84 *Commission / Germany* [1986] ECR 3755, para. 47. The Court set out that if equivalent statutory conditions have already been satisfied in the state in which the undertaking is established the supervisory authority of the state in which the service is provided must take into account supervision and verifications that have already been carried out in the Member State of establishment.
[13] Case 155/82, *Commission v Belgium* [1983] ECR 531.
[14] Case 33/74, *Van Binsbergen*, [1974] ECR 1299, para. 11.

examination of the conditions governing access to the activities concerned has been carried out and it has been established that those conditions are satisfied."[15]

The ECJ has also held that a restriction is all the less permissible where the service is supplied without its being necessary for the person providing it to visit the territory of the Member State where it is provided.[16] The ECJ has thus set out even stricter rules for corresponding services, for which it is not even necessary that the service provider crosses the border to provide the services. As an energy trader does not need to cross the border in order to provide its services in a host Member State, energy trading should be qualified as a corresponding service.

Considerations of an administrative nature can also not justify derogation by a Member State from the rules of Community law.[17] It is not sufficient that the presence of the undertaking may make it easier for those authorities to perform their task. It must also be shown that those authorities cannot carry out their supervisory tasks effectively unless the undertaking has in the aforesaid state a permanent establishment.[18] In order to guarantee the effectiveness of fundamental freedoms guaranteed in the Treaty the ECJ has thus put the burden of proof on the Member States. They must demonstrate that their requirements are in pursuance of a legitimate public interest and fulfil the proportionality test. If the licensing conditions or other supervisory measures imposed by the state of establishment are similar or comparable to those imposed by the host State the latter is obliged to recognise and accept the supervision of the host State. States may thus not merely argue that carrying out their supervisory tasks is easier if the energy trader had a place of establishment in the State in which the trading activities are carried out.

[15] Case C-58/98, *Corsten* [2000] ECR I-7919.
[16] C-76/90, *Säger* [1991] ECR I-4221.
[17] Case 205/84 *Commission / Germany* [1986] ECR 3755, para. 54.
[18] Case 205/84 *Commission / Germany* [1986] ECR 3755, para. 54.

b. Secondary Law

The requirement to acquire an additional license in the host State and the requirement to have a registered seat could also contravene Secondary Community legislation.

(1) Directive 2006/123/EC (Services Directive)

The objective of the Service Directive 2006/123/EC of 12 December 2006 [19] is to make progress towards a genuine internal market in services in order to ensure that both service providers and recipients benefit more easily from the fundamental freedoms guaranteed in Article 43 and 49 of the Treaty. This Directive establishes a general legal framework which favors freedom of establishment for providers as well as the free movement of services.

To improve the free provision of services, the Directive stipulates that the Member States must guarantee freedom of access to the service activity and the freedom to exercise such activity throughout their territory. The Member State to which the service provider moves to become established may only enforce its own requirements inasmuch as these are non-discriminatory, proportional and justified for reasons of public order, public safety, public health or environmental protection. Energy related services are not excluded from the scope of the application

The Directive has to be implemented by EU-Member States by the 28 December 2009.

(2) Directives 2003/54 and 2003/55 (Liberalisation Directives)

In order to complete the internal electricity and gas market the European Commission launched in the year 2003 a second set of Liberalisation Directives for the electricity and gas sector. These Directives[20] require Member States to have full regard of the fundamental freedoms of the EC Treaty, such as the free movement of goods and the freedom to provide services but do not explicitly deal with the recognition of licenses in the EU.

[19] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market *OJ L 376, 27.12.2006, p. 36–68*

[20] Directive 2003/54, OJ L 176/37, 15 July 2003; Directive 2003/55, OJ L 176/57, 15 July 2003.

(3) MIFID

The Directive on markets in financial instruments[21] ("MIFID") sets out the idea of the European passport and Member State of origin principle. MIFID is an instrument for the field of financial market regulation. The wholesale activities in question are not subject to MIFID and/or exempted from MiFID and are therefore not privileged under the before mentioned principle. Art. 2 MIFID provides for a number of activities that are exempted from the scope of the Directive such as persons whose main business consists of dealing on own account in commodities and/or commodity derivatives unless the persons are part of a group the main business of which is the provision of other investment services or banking services, Art. 2 para. 1, lit. (k) MiFID.

Wholesale energy activities in question are not caught under MIFID.

c. Enforcement of National Law

Some regulatory authorities in the Central and Eastern Europe region have raised concerns regarding the enforcement of administrative measures against foreign wholesale traders. Some regulatory authorities argued that a national license regime and the requirement for a secondary office would need to remain in place, as they would not be able to enforce their decisions or administrative acts against companies with no seat or branch in their respective country.

The EFET Legal Committee wishes to highlight that the application of national law or the enforcement of regulatory measures does not depend on the nationality of a person concerned or of the place of establishment of an undertaking. Each regulatory authority can -just like any administrative body- enforce nationals laws in their jurisdiction irrespective of the nationality of the individual concerned. The question of enforcement of decisions of national authorities also arises in other sectors. National competition authorities also issue decisions in which they prohibit certain types of market behaviour in their jurisdiction and impose fines on undertakings regardless of the nationality of a person of the place of establishment of a company. In case those foreign trading companies infringe regulations when doing business, they may incur fines, or may be faced with bans from nominating energy deliveries to the TSO. In most of the cases, the TSO concerned will be able to sue in court or exclude rogue traders from using their system. Therefore, national regulatory authorities are able to enforce decisions or measures in their country's territory. As shown above the Court has also rejected the argument of Member States wishing to make easier for themselves their administrative tasks.

Directive 2003/54 also addresses the competencies of national regulatory authorities and does not seem concerned with the fact that some market participants are established in another territory. Art. 23 para. 10 of Directive 2003/54, and Art. 25 para. 10 of Directive 2003/55 address the question of cross-border disputes. Both provisions allocate decision-making power to the regulatory authority which has jurisdiction over the system operator in question. Further, Art. 23 para. 12 of Directive 2003/54 and Art. 25 para. 12 of Directive 2003/55 order national regulatory authorities to contribute to the development of the internal market and of a level playing field by cooperating with each other and with the Commission in a transparent manner.

[21] OJ L 145/1, 30 April 2004.

Within the institutional framework of the Council of Europe a number of European Conventions were signed on legal co-operation in administrative matters between the Parties.[22] These agreements are *inter alia* the European Convention on the Obtaining abroad of Information and Evidence in Administrative Matters,[23] the European Agreement on the Transmission of Applications for Legal Aid and its Additional Protocol[24] as well as the European Convention on the Service Abroad of Documents relating to Administrative Matters.[25] Although not all EU Member States have signed and/or ratified each of these Conventions, these instruments are available to the members of the Council of Europe and are open for ratification.

The ECJ has previously ruled on the requirement to have a permanent establishment in order to ensure criminal liability in a specific Member State. In the case *Commission v Belgium*[26] the Court held that even though criminal penalties may have a deterrent effect as regards the conduct which they sanction that effect is not guaranteed and *"in any event is not strengthened (…) solely by the presence on national territory of a person who may legally represent a manufacturer."* The Court concluded that the requirement that a representative be established on national territory was not such as to provide sufficient additional safeguards in criminal liability to justify an exception to the prohibition contained in Art. 28 EC. Further, under the Council Framework Decision of 13 June 2002[27] on the European arrest warrant judicial decisions of Member States with a view to conducting criminal prosecution or executing a custodial sentence may be executed by other Member States on the basis of the principle of mutual recognition and in accordance with the provisions of the Framework Decision. There are also a number of Conventions in force under the Council of Europe that deal with co-operation in criminal matters.[28]

As regards civil claims Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters regulates the field of judicial cooperation in civil matters in the EU. Regulation (EC) 44/2001 does not only appeal to the mutual trust in the administration of justice in the Community but also provides that judgments given in a Member State are being recognised automatically without the need for any procedure except in cases of dispute and also ensuring that the enforcement in one Member State a judgment given in another is efficient and rapid.

2. Energy Community Treaty

Countries that are not Member States to the European Union are obliged to abolish energy trading related licences, the requirement to have a registered seat as well as additional licensing requirements if they are Parties to the Energy Community Treaty.

The Energy Community Treaty is a multi-party treaty under public international law that was signed on 25 October 2005 and entered into force on the 1st of July 2006. The Energy Community Treaty is concluded for a period of ten years from the date of entry into force but may be extended in duration. The Treaty establishes a unified Energy Community in South

[22] For further information please see the website of the Council of Europe under http://conventions.coe.int.
[23] European Treaty Series 100.
[24] European Treaty Series 92 and 179.
[25] European Treaty Series 94.
[26] Case 155/82, *Commission v Belgium* [1983] ECR 531, para. 15.
[27] Decision 2002/584/HJA, OJ L 190/1 of 18 July 2002.
[28] For further information please refer to http://conventions.coe.int.

Eastern Europe. Current parties to the Energy Community Treaty are Albania, Croatia, Macedonia, Montenegro, Serbia, Bosnia-Herzegovina, and the UN Mission in Kosovo as well as the European Community. According to the website of the Council of the European Union, all signatory States have notified the ratification of the Treaty to the depositary.

The objective of the Energy Community Treaty (hereinafter "the Treaty") is set out in Art. 2. The task of the Energy Community is to organize relations between the parties and create a legal and economic framework in the energy sector. Pursuant to title 2 of the Treaty parts of the "*acquis communautaire"* on energy, environment, competition and renewables are extended to the Energy Community, Art. 3. As regards energy legislation Directive 2003/54/EC and Directive 2003/55/EC as well as Regulation 1228/2003/EC all are applicable to the Energy Community.

Art. 81, 82, 86 and 87 of the EC Treaty will be applicable to the Energy Community as well as secondary legislation on renewable energy sources. The Contracting Parties are obliged to implement these EC law provisions into their national law. According to Annex 1, the Contracting Parties had to implement the secondary legislation on energy by 1st of July 2007.

In our view this deadline has not been respected by all countries setting up national licensing schemes combined with branch requirements. This represents a violation of Article 41 of the Treaty.

Article 41 of the Treaty prohibits customs duties and quantitative restrictions on the import and export of network energies and all measures having equivalent effect. Quantitative restrictions or measures having equivalent effect may be justified on grounds of public policy, public security, the protection of health, life, animals or plants etc.[29] Art. 41 thus establishes the principle of free movement of goods (as it is modelled after Art. 28-30 EC) for the Energy Community. According to Art. 24, the Energy Community shall adopt measures to adopt the acquis communautaire to the Energy Community taking into account both the institutional framework of the Treaty and the specific situation of each of the contracting parties. Further, the Energy Community may take measures to implement amendments to the acquis communautaire, Art. 25. The Energy Community Treaty will thus follow developments of European Community law. Also, the institutions of the Energy Community are obliged to interpret any term or other concept used in this Treaty that stems from European Community law in conformity with the case law of the ECJ or the Court of First instance. The concepts used under the Energy Community Treaty will be identical to those used under EC Community law. European Community law will thus be drawn on to interpret the provisions of the Energy Community Treaty. Hence, the obstacles to trade imposed by certain countries in Eastern Europe as described above under Section III. are not compatible with Art. 41 of the Energy Community Treaty as they restrict the free movement of goods and are not justified.

As the Treaty guarantees the free movement of goods and as the Energy Community will interpret these terms in accordance with European Community law Parties to the Treaty are under the same obligation as the EU Member States as regards licensing requirements. Import licenses that are discriminatory restrictions to trade should therefore be abolished. The requirement to have a registered seat in the host State is disproportionate and thus not

[29] Art. 30 EC contains a similar provision.

allowed under the Treaty. Additional licensing requirements are only allowed for if the Member State of origin does not safeguard certain public interest criteria that the host State deems necessary to protect; Parties are under a duty to mutually recognise supervisory rules or requirements that wholesale traders comply with in their State of establishment. If the rules or obligations are similar or comparable the host State may not require an additional licence.

Pursuant to Art. 42 of the Treaty, the Energy Community may also take measures to create a single energy market without internal frontiers for "Network Energy". Such measures may be taken in the form of a decision or a recommendation, decisions are legally binding in their entirety upon those to whom they are addressed; recommendations have no binding force, Art. 76. The institutions of the Energy Community thus have the choice between different instruments to set up an internal market for Network Energy within the Energy Community. Further, the Energy Community may take measures for the regulation of import and export of Network Energy coming from third countries, Art. 43.

IV. Obstacles to trade per individual countries

1. EU Member States

a. Czech Republic

Electricity
A Trading License is required for Energy Trading in the Czech Republic; the competent authority is the Energy Regulatory Office (ERO). In order to obtain a license a company must

- have established a legal entity in the form of either a branch office or a subsidiary, duly registered in the Trade Register pursuant to the Czech Business code;
- prove the trustworthiness of the statutory representatives authorised to act on its behalf by producing an extract from the criminal register;
- provide evidence as regards the fulfilment of mandatory education requirements of their statutory representatives; (a) completion of a university degree plus at least three years of relevant work experience or (b) the completion of secondary education plus a minimum of six years of relevant work experience;
- Meet certain financial requirements which include producing audited financial statements and a five years business plan. Further, the undertaking must prove that they have the appropriate funds to secure the operation of the licensed activity for at least five years (e. g. in the form of a bank guarantee);
- provide information regarding technical requirements to ensure the operation of the license activity by proving that a transmission agreement has been concluded with the TSO or in the event that such an agreement has not been negotiated a description of the intention to do so.

Non-Czech companies in the Czech Republic are allowed only to conduct business activities on a permanent basis if they have either a subsidiary or a branch office, as entered into the Trade Register.

Trading Licenses are granted for a minimum of five years or longer according to the specific application.

b. Hungary

Electricity
Under Hungarian law, trading electricity requires a license from the Hungarian Energy Office (HEO). Since January 2008, trading companies can apply for a restricted trading license and do not need to have a local presence anymore for this “restricted” license (excluding supply).

Supply licenses are valid for an initial period of ten years (but may be renewed without limitation). In order to obtain the aforementioned trading license a company must:

- have established a legal entity in the form of a subsidiary (either private limited liability company or a company limited by shares). A branch office is not sufficient. Foreign companies entering the Hungarian market must establish a subsidiary. Their

registered capital of a Hungarian electricity licensee company must continuously be at least HUF 50 million (equals approximately € 190.000);

- provide a deposit or an irrevocable bank guarantee serving as a transaction security. The amount of which shall be equal to 1/12 of the annual electricity trade but at least HUF 20 million (approximately € 76.000) and no more than HUF 500 million (€ 1,9 million);
- prepare Business Conduct Rules with the respect to its trading activities which must specify contractual terms for the general technical and commercial considerations, settlement of accounts and payment conditions for the services provided by the licensee;
- have a business plan approved by an independent expert;
- provide information on the balancing group to which the applicant intends to join or on the establishment of its own balancing group. The Balancing Agreement with the System Operator must be entered into subsequent to obtaining the HEO license.

Natural Gas

Under Hungarian law, trading natural gas requires a license from the Hungarian Energy Office (HEO). Different from the situation in power, no "restricted license" exists. The operation licence is valid for an indefinite period of time but it is also a condition of granting the licence, that the applicant has the majority ownership of the tools and their equipment necessary for pursuing the activity. If the applicant does not have majority ownership of the assets required for pursuing the activity and their equipment, the licence may be issued only for a definite period ending no later than 31 December, 2008.

In order to obtain the aforementioned trading licence applicant must:

- have established a legal entity in the form of a subsidiary (either private limited liability company or a company limited by shares). A branch office of foreign companies entering the Hungarian market are also allowed to obtain trading licence from HEO in case international treaty between Hungary and the State of the entering foreign company makes it possible and the branch office is complying with all the regulations of the Hungarian Gas Act. Their registered capital of a licensee must continuously be at least HUF 50 million (equals approximately € 200.000);
- provide a deposit or an irrevocable bank guarantee serving as a transaction security. The amount of which shall be equal to 1/12 of the annual natural gas trade but at least HUF 20 million (approximately € 80.000) and no more than HUF 500 million (€ 2 million);
- prepare Business Conduct Rules with the respect to its trading activities which must specify contractual terms for the general technical and commercial considerations, settlement of accounts and payment conditions for the services provided by the licensee;
- have a Business Plan approved by an independent expert;
- must have an appropriate independent structure and management to provide the persistent natural gas supply;
- must provide appropriate and qualified staff for the trading, managing and controlling activities;

- must provide the appropriate tools, methods and technology for the trading, managing and controlling activities;
- must ensure the regulatory conditions required for pursuing the activity subject to licensing under extraordinary circumstances;
- must have a data communications and information system described by the Operating and Commercial Code;
- must have the other necessary licences described by the applicable laws.

c. Poland

Electricity
Polish Energy Law requires a gas or electricity licence granted by the President of the Energy Regulatory Authority (the "ERA") for trading electricity within Poland. Trading licences are issued for a period of between 10 and 50 years.

The Energy Law states that licences may be issued to entities with corporate seat in other EU Member States or in EFTA countries. This means that an entity seated in an EU Member State or EFTA country may apply for a Polish trading licence without the need to establish a permanent presence in Poland.

Natural Gas
The license for trading natural gas mirrors generally the electricity trading license. In addition to the statutory requirements for power, in case of a natural gas trading licence covering trading in natural gas between Poland and abroad maximum supply caps are part of the license condition.

Any international gas trading licence is granted by the President of ERA only after taking into account the requirement for diversification of the sources of supply and energy security. This assessment is made for any individual license application.

The relevant secondary legislation issued by the Minister of the Economy specifies the maximum share of gas imports from a single country is 72% for the years 2005 - 2009, 70% for the years 2010 - 2014, 59% for the years 2015 - 2018 and 49% for the years 2019 - 2020. These maximum percentages are included into the licences for international trading in natural gas.

The Energy Law states that licences may be issued to entities seated in Member States or in EFTA/EEA countries.

d. Slovenia

Electricity
Pursuant to the Slovenian Energy Act (Official Gazette no 79-3757/1999, with subsequent amendments, the most recent being amendment published in the Official Gazette no. 70-3025/2008, in force as of 12th July 2008; hereafter »**EZ**«) wholesale electricity (and natural gas) trading is not listed as a business activity that would require a specific license. On the other hand, the law expressly requires the license for conduct of supply of and intermediation and representation activities in connection with electricity (and natural gas) trading.

Notwithstanding to above, there are still certain ambiguities under the EZ on what qualifies as "wholesale energy" trading. The problem namely arises due to the definition of "supply" under the EZ, which is defined as sale, including but not limited to further on-sale of energy (i.e. electricity, natural gas) to customers. A customer is defined as legal or natural person, who is supplied with energy for its own use as end-consumer or for further on-sale.

Consequently, one could argue that the definition of supply does not necessarily carve out wholesale of energy from the energy license requirements, since it includes also persons purchasing energy in order to sell it to others for their own account. It appears, however, that the regulator does not support such strict interpretation of the law and according to the known positions (while differing between so called closed and open contract for electricity) treats the wholesale electricity trading (and cross border electricity trading) as activity for which no license is required.

Natural Gas
With regard to the wholesale trading with natural gas, the same reasoning should apply, in theory there should be no licensing requirement with regard to wholesale natural gas trading.

Subsidiary/Branch Requirement
The branch or subsidiary requirement for conduct of wholesale energy business stands/falls with the requirement for a subsidiary. Assuming that wholesale energy trading does not require a license under the EZ, there is also no branch or subsidiary requirement at least under the EZ.

The uncertainty about the branch requirement arises due to the general provisions of the Law on Commercial Companies (Official Gazette of the Republic of Slovenia, no. 42, 2006, as amended; hereafter: ZGD-1). ZGD-1 provides in general that foreign companies must conduct profitable activities in Slovenia through the branch office. Recent commentaries to the said provisions of the ZGD-1 state however that such presence requirement may not be applicable in relation to EU companies, claiming that, in the light of the EC law and jurisprudence such provision shall be interpreted more as a right than as an obligation with regard to the companies from the EC member states.

Previous recent positions of the Ministry of Economy stated that conduct of business activities in Slovenia by foreign companies (and EU companies), unless temporary, requires establishment of a branch, which consequently means, that in such case, according to the Ministry of Economy also non-temporary conduct of whole sale electricity and natural gas trading within Slovenia, would require the same.

Under the Slovenian Energy Act a license must be obtained to participate in local wholesale and cross-border electricity trading and supply. In order to obtain a license a company must:

- be appropriately registered legal entity or (in the case of a sole proprietor) have its energy-related activity notified in accordance with the Ordinance on the Implementation in and Use of the Standard Classification of Activities;
- have appropriately trained staff capable of carrying out the activities for which a license application has been made;
- have the appropriate funds, or can prove that it can obtain the funds needed for carrying out the energy-related activity for which the applicant wishes to obtain a license;
- have not had an equivalent license revoked in the years preceding the application for obtaining a license;
- must not have been convicted of a criminal offence associated with any involvement with economic activities.

e. Slovak Republic

Electricity

Under Slovak law, a license for supply of electricity issued by the Regulatory Office for Network Industries ("RONI") is required for the purposes of electricity trading. Slovak law thus does not make any distinction between trading and supply. The license for supply of electricity may be issued for one or more licensing activities for an indefinite period, unless requested otherwise by a company. In order to obtain license a company must:

- have established legal entity in the form of either a branch office or a subsidiary, duly enrolled in the Trade Register. RONI has indicated that it will accept both forms of establishment, a registration in the Commercial Register is also required;
- appoint the responsible representative and prove his professional qualification as well as a clean criminal record;
- provide evidence of the fulfilment of various technical requirements such as the existence of a balancing contract with the TSO;
- clean criminal records of members of the statutory body.

Natural Gas

Unlike the electricity trading, trading with gas in the Slovak Republic is not explicitly recognized by the Energy Act. The Energy Act sets out the requirements for supply of gas only, i.e. for sale, including resale, of gas to customers. Nevertheless, based on the definition of the gas supplier[30] it can be argued that gas trading falls within the scope of supply of gas and, therefore, a license for supply of gas issued by RONI is needed for trading with gas. The conclusion on necessity of a supply license for trading in gas was confirmed by RONI. The requirements for obtaining a license for gas supply are identical to the requirements related to the license for electricity supply.

f. Romania

Electricity

Under Romanian law, trading electricity and cross-border transmission of electricity require a license from the Romanian National Regulatory Authority in the Energy Sector (the "**Authority**"). An electricity trading license is valid for a maximum of ten years and may be subsequently renewed if the licensee has complied with the terms and conditions of the license and continues to meet the requirements of the then prevailing legal framework in this sector. In order to obtain such an electricity trading license a company must, *inter alia*:

- Have established an office for the entire validity period of the license in Romania. Although Government Decision no. 540/2004 (the "Licensing Regulation") does not define "secondary office", it is, however, recommended for a foreign legal entity to establish a subsidiary or a representative office.
- Provide and maintain a financial guarantee which shall be no less than the amount necessary to cover the contracts in operation for 30 days.
- Provide proof of adequate financial resources available for the performance of the relevant activity – such financial resources (represented either by the share capital of the licensee or available credit lines) must not be less than 500,000 €
- Provide satisfactory proof of technical, financial and legal capacity, material and human resources and organizational structure required to meet the legal standards of performance of the licensed activity.
- Prepare and submit the company's financial statement, a financial report as well as an "Annual Activity Report" in the form and content in accordance with the "Technical Reporting Procedure" issued by the Romanian authority. Further, the licensee shall issue and submit regularly reports that allow the evaluation of the licensee's behaviour on the power market.

The licensee is further obliged to notify the Authority of any contract conclusion for electricity purchase or selling with the aim of carrying out activities of electricity import or export.

[30] Gas supplier means a gas undertaking, i.e. a natural person or legal entity, who performs, *inter alia*, purchase of gas for the purpose of resale and gas supply.

A license may in whole or in part be transferred only with the prior written approval of the Authority. Any transfer/assignment of a license without such prior written approval is considered to be null and void and is sanctioned as an infringement of the license.

In 2007 Romania adopted a new electricity law (Law no. 13/2007). Law 13/2007 does NOT lift such barriers nor does it institute any exemptions for energy traders in other EU Member States.

An unsuitable attempt at eliminating EU-trade barriers was made through Government Decision no. 553/2007. Pursuant to Article 10 thereof, electricity trading may be carried out in Romania by a foreign legal entity in the absence of a license issued by the Authority, provided that the following conditions are cumulatively met:

(a) there is a bilateral agreement in place between Romania and the state whose national the foreign legal entity is, providing for the mutual recognition of the validity of licenses in the electricity sector issued in either of the two states; *and*

(b) the foreign legal entity holds a valid electricity trading license granted by the competent authority in the relevant state; *and*

(c) the competent foreign authority confirms in writing to the Authority that the licensee is not in breach of the legal regulations in the electricity sector applicable in such state.

The licensee does not need to have an entity or secondary office in Romania, but must establish, together with the Authority, the means of liaising with the foreign license holder. This means in fact the appointment of a representative, resident in Romania.

Since there are no bilateral agreements in force between Romania and other countries regulating the mutual recognition of licenses in the electricity sector and consequently, Government Decision no. 553/2007 has no impact and does not lead to any improvement as far as the licensing situation is concerned.

Natural Gas

Under the Romanian framework regulation in the natural gas sector (Law no. 361/2004) activities consisting in supply/trading of natural gas are subject to licensing by the Romanian National Regulatory Authority in the Energy Sector (the "Authority"), in accordance with Government Decision no. 784/2000 (the "Licensing Regulation") and implementing legislation. A license for the supply of natural gas may be issued for a maximum validity term of 30 years. In order to obtain a license for the supply of natural gas, a company must, *inter alia*:

- be a legal entity headquartered in Romania or, if the applicant for the license is a foreign legal entity, such entity must establish a secondary office in Romania for the entire term of validity of the license (there is no indication as to the exact form of such “secondary office” but, in practice, the most frequent method of compliance with such requirement appears to be the establishment of a branch);
- provide to the Authority proof of financial guarantees (which may be evidenced through a number of methods, including bank guarantee letters or parent company guarantees) – the value of such financial guarantees must be of not less than 1/12 of the costs for the acquisition of natural gas in the preceding year or, for the first year of licensed activity, 1/12 of the cost of the natural gas which the applicant estimates to supply during such first year of activity;

- provide satisfactory proof of technical, financial and legal capacity, material and human resources and organizational structure required to meet the legal standards of performance of the licensed activity (including quality management certificates and internal regulations evidencing appropriate client service/complaints settlement system in accordance with Romanian standards for supply of natural gas);
- comply with a number of reporting requirements towards the Authority (including, *inter alia*, financial information, copies of any import contracts or, upon request of the Authority, copies of agreements for the transit of natural gas through the Romanian network).

The rights granted to the licensee under the natural gas supply license cannot be transferred/ assigned without the consent of the Authority. Note that a supply license only allows the licensee to carry out the specific licensed activity.

The Authority's approval must also be sought in a number of other situations (by way of example, the licensee is bound to notify to the Authority, 30 days in advance, any intention of the shareholders/directors to carry out any operations as a result of which the licensee's share capital is reduced by more than 25%).

g. Bulgaria

Electricity

Trading electricity inside Bulgaria as well as across the Bulgarian borders require a trading license from the Bulgarian State Commission for Energy and Water Regulation (SCEWR). A license is usually granted for up to 10 years but can be requested for a maximum of 35 years. In order to obtain such license a company must give in the license application and the attachments thereto evidence of technical, financial and legal capacity, material and human resources and organizational structure needed to meeting the regulatory requirements for performance of the licensed activity. Evidence on legal capacity is proven by the copy of the company registration, certificates of good standing and a registration with the BULSTAT the national registration agency.

Technical capacity and material resources are evidenced by copies of lease contracts and other appropriate documents; Compliance with financial strength is proven by letters from banks, parent company guarantees and an appropriate business plan.

Significant amendments in the Bulgarian Energy Act (EA) were published in State Gazette No 74 of 8th September 2006. Pursuant to these amendments, a license shall be issued also to a legal entity registered under the legislation of an EU Member State or of another state – party to the European Economic Area Agreement, if this entity complies with the above mentioned requirements. This amendment entered into force on 1 January 2007.

The amendments of 8th September 2006 brought about the abolishment of the requirement companies from EU Member States to establish a subsidiary in Bulgaria in order to obtain a trading license**.**

The Bulgarian authority has to decide on an application within 3 months following a public hearing.

Pursuant to Article 102 EA, in force as from 1 January 2007, energy companies, incl. electricity traders, and eligible consumers may conclude electricity transactions with persons

who are local persons of EU Member States *or* persons registered in a country with which the Republic of Bulgaria has reached an agreement pursuant to an international treaty for mutual application of the laws of the European Communities, when:

(i) The respective energy companies and eligible consumers are granted the right to free trade with electricity under the laws of the other country, and

(ii) Under reciprocity conditions, the laws of the other country provide an opportunity for free trade with electricity to eligible consumers of that country, and

(iii) Provided that the household consumers and the enterprises with less than 50 employees and with annual turnover up to 19,5 million BGN are secured with the necessary electricity complying with certain quality criteria and at transparent and reasonable prices.

Natural Gas

Bulgarian law does currently not provide for natural gas trading. In contrast to electricity traders, gas traders do not need to obtain a license for trade in natural gas under Bulgarian law

h. Greece

Electricity

The production, transmission, distribution and supply of electricity on the Greek territory is performed in accordance with the provisions of Greek law 2773/1999. According to article 2 of Greek law 2773/1999, supply is defined as "sale of electricity to Customers", including the import of electricity by an Eligible Customer exclusively for its own use. The law does not differntiate between a electricity wholesale trading and electricity supply. The Greek law does not require the applicant to have an office in Greece.

According to article 24 of Greek law 2773/1999 the supply of electricity to Eligible Customers (and in case of DEH AE to non-Eligible Customers as well) and the trading of electricity is permitted to persons having been granted the respective Electricity Supply License. Such license is granted by the Minister of Development, pursuant to RAE's opinion, in accordance with the terms and conditions provided for by the Electricity Production and Supply License Regulation for Eligible Customers, provided that the respective applicant:

- the applicant is limited liability company having share capital at least 60,000€
- the applicant has the appropriate organisational and administrative structure to ensure a reliable, wise and good operation of the supply activity in accordance with the terms and conditions provided for by the Electricity Production and Supply License Regulation for Eligible Customers
- the applicant is a financially robust and solvent corporate, as proved by the data included in the respective application and determined by the Code of Management of the Distribution Grid System.

During the exercise of the supply activity the licensee is obliged to prove sufficient long term guarantees, in order to secure availability of sufficient power of electricity for the System, in accordance with the Code of Management of the System.

Furthermore, according to the provisions of the Electricity Production and Supply License Regulation for Eligible Customers, EU natural and legal persons (including *consortia*) have the right to file an application for an Electricity Supply License[31].

The License is granted for a defined therein period of time and the licensee has the right to ask for an extension, after more than two thirds of the specific time period have lapsed. The Greek law does not require the applicant to have an office in Greece.

Natural Gas

Greek law 3428/2005 provides for the licensing requirements of the supply[32] and distribution of natural gas to clients[33] (among which the wholesale customers are included) in the Greek market as follows:

According to article 22 of Greek law 3428/2005, a Natural Gas Distribution License is granted by the Minister of Development, pursuant to the interested party filing a respective application and the opinion of the Greek Regulatory Authority for Energy (RAE), in accordance with the terms and conditions provided for by the Natural Gas License Regulation. Please also note that in cases where more than one applicant file for a Natural Gas Distribution License concerning the same geographical area in Greece a call for tender is launched by a decision of the Minister of Development. Such tender decision is published in the Greek Government Gazette. RAE evaluates the applications and opines either on the granting of the license to a certain applicant or on characterizing the procurement as unfruitful.

In view of the fact that the license regulation for Natural Gas has not yet been enacted, natural gas distribution in Greece is performed by the Greek Public Gas Corporation SA (DEPA AE) and its subsidiaries, the, currently three, Gas Supply Companies of Attica, Thessaloniki and Thessaly (EPAs).

[31] Pursuant to clarifications requested by RAE, the requirement for the applicant to be a société anonyme or a limited liability company is satisfied, with respect to EU nationals, if the company applying has a similar to a société anonyme or a limited liability company corporate type.

[32] According to article 2 paragraph 23 of Greek law 3428/2005 supply is "the sale of natural gas to Clients".

[33] According to article 2 paragraph 23 a client is "anybody (both natural and legal person, as the case may be) who/ which is supplied with natural gas for its own use or purchases natural gas in order to resell it within or outside the grid in which he/ it is established, including EPAs, except for the TSOs and DSOs (Transmission System Operators and Distribution System Operators) of natural gas".

According to article 24 paragraph 1 of Greek law 3428/2005, the sale of natural gas to eligible and non-eligible customers is performed by holders of a Natural Gas Supply License.

The Supply License is granted by the Minister of Development, pursuant to the interested party filing a respective application and RAE's opinion, in accordance with the terms and conditions provided for by the License Regulation for Natural Gas.
According to article 40 paragraph 4 of Greek law 3428/2005, until the issue of the License Regulation for Natural Gas the supply of natural gas to eligible customers is permitted even without holding the respective license in accordance with article 24 paragraph 1 of Greek law 3175/2003 (i.e. *natural gas can be supplied by DEPA and other third persons not defined in the aforementioned provision*). Within three months from the issue of the License Regulation, all the persons currently exercising the supply activity must apply as well to officially get a Natural Gas Supply License.

The Natural Gas License Regulation, which refers to both the Natural Gas Distribution and the Natural Gas Supply License have not yet been enacted. According to a not yet final draft[34] of the Natural Gas License Regulation, which is posted on RAE's website, the relevant main points are the following:

- EU companies and EU citizens are entitled to submit an application for acquiring a Natural Gas Distribution or Natural Gas Supply License . A local establishment is not required.
- The maximum contemplated duration for a Distribution License is (50) years and (10) years for a Supply License;

2. Non EU Members

a. Serbia

Electricity
Serbian law requires a license for trading electricity and cross-border transmission of electricity from the Serbian Energy Agency. In order to obtain such a license a company must:

- have established a legal entity in the form a subsidiary established and registered in Serbia in any form envisaged by law (limited liability company, joint-stock company, limited partnership, general partnership, etc).
- Serbian law requires, *inter alia*, all contracts of import, export and transit of electricity entered into to be reported to the system operator prior to their implementation.

The electricity trading license is issued for a period of 10 years and may be renewed.

[34] The draft posted on RAE's website has certain chapters blanks and has not yet been enacted.

Cross-border trading, i.e. transactions involving passage of electricity to, from or through Serbia requires that the Market Operator allocates in auctions appropriate cross-border power transmission capacities to each transaction. Capacities may be allocated only to licensed energy traders that have an agreement with the Market Operator on access to cross-border capacities. All contracts of sale, import, export and transit of electricity must be reported to the Market Operator, prior to their implementation.

Natural Gas

Trading with natural gas is also subject to licensing. License can only be issued to companies registered in Serbia. Any gas trading license is issued for a period of 10 years, with the possibility of renewal. The rules on access to the gas transport capacities have not yet been enacted.

b. Croatia

Electricity

For commencement of trading of electricity in Croatia, according to Energy Act, the prior approval – licence of particular regulatory body ("*Hrvatska energetska regulatorna agencija*" – Croatian Energy Regulatory Agency, hereinafter HERA) is required. A license may be obtained from HERA, if the conditions set out in Article 17 of the Energy Act are fulfilled by the applicant.

Following activities are subject to the licensing requirement:

1. production of electricity;
2. transfer of electricity;
3. distribution of electricity; and
4. delivery of electricity.

A licence can be issued to a legal entity with corporate seat in Croatia:

The applicant must be registered in the commercial register for carrying out energy activities, The applicant must employ technically qualified staff to carry out energy activities and must employ the necessary number of personnel qualified to carry out energy activities. The applicant company must have available funds, or must give evidence that it can provide funds, necessary for carrying out energy activities.

The licence for the energy activity for which the energy undertaking applies has not been revoked during the last ten years preceding the year of application and the members of the Board of the applicant company have not been convicted for an infringement related to carrying out energy activities during the last five years (directors have not been convicted of an energy related felony),

In order to perform business activities in Croatia at least a branch office has to be established pursuant to the Croatian company law as only a Croatian company can file the application for the license.

Natural Gas

Pursuant to Article 17 of Energy Act, conducting of business activities in the energy sector in the Croatia is subject to a license. The following activities are subject to the licensing requirement:

1. production, purchase or import of natural gas;
2. storage of natural gas;
3. transfer of natural gas;
4. distribution of natural gas; and the physical delivery of natural gas.

A license may be obtained from HERA if the conditions set out in Article 17 of the Energy Act are met. The license requirements power obtain a license are identical with those applicable for electricity.

The requirement to have a registered seat and the requirement to obtain an additional license for wholesale energy trading in Croatia contravene Art. 41 of the Energy Community Treaty.

V. Infringement proceedings EU Commission

The European Commission should launch infringement procedures under Art. 226 EC against all EU Member States listed in this memo for non-compliance with Article 28 and Article 49 EC Treaty.

The energy secretariat should initiate arbitration proceedings against Serbia and Croatia for non-compliance with Article 41 Energy Community Treaty.

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