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



December 1st, 2006

**MEMO**

**Legality of Licensing Requirements 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 Central and Eastern Europe (CEE). Further, the EFET Legal Committee has been asked to review certain provisions of EC legislation 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.**). Further, we elaborate on the infringement proceedings of the EU Commission (**V.**) and the steps that EFET has taken so far to challenge licensing requirements (**VI.**). We then conclude with possible further steps that individual members or EFET may follow up (**VII.**).

## 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 and benefits from the free movement of goods and the freedom to provide services.
- 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.
- 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 as such 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 the European Courts**, 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 and should abolish these restrictions as they contravene Art. 41 of the Energy Community Treaty.

## III. Legal Assessment

In the subsequent section the EFET Legal Committee examines the legal framework in the European Union (**1.**) and in the framework of the Energy Community Treaty (**2.**). The legal framework for other third countries under bilateral or multilateral treaties is not covered in this memo.

In the following restrictions on wholesale trading will be assessed 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 natural or legal person who **purchases electricity or gas** for the **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 **neither** cover **sales nor 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, i.e.

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

These restrictions are described below in more detail under Section **IV.** for certain countries in Central and Eastern Europe.

### 1. EU Member States and Accession Candidates

All Member States to the European Union ("EU") are obliged to adhere to the legal order of the 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 Community law notably Arts. 28 and 49 EC as set out below.

#### (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 Art. 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,

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

capital and persons. Services shall in particular include: activities of an 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 service

Although the ECJ has held on several occasions that the import and export of electricity fall within the scope of the 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** that falls **under the provisions of both, goods and services** as wholesale trading comprises different legal elements, i.e. the delivery of a physical good as well as commercial activities. Therefore, both the provisions dealing with the free movement of goods as well as the provisions on the freedom to provide services are applicable to wholesale trading.

The ECJ has previously held in the area of telecommunications that the provisions on goods and services **may be applied simultaneously** were 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]

In the following the restrictions imposed on wholesale trading will be assessed under both the provisions on the free movement of goods and the freedom to provide services.

### (4) Restrictions to trade

Arts. 28 and 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 Arts. 28 and 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 leading case *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. 28 EC if this selling arrangement indistinctly applies to domestic and imported goods. The Keck doctrine requires that the

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.

provision in question **affects** the marketing of domestic **products** and those from other 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 various appointments with different administrative bodies all of which is time consuming and requires staff and financial resources.

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. As previously highlighted the requirement to have a place of establishment and the requirement to obtain an additional licence in the host State are restrictions to trade which *de facto* affects foreign companies more than local undertakings and are non-discriminatory barriers to trade which are caught under Art. 49 EC.

To conclude, the **requirement to have an import licence, the requirement to establish a separate subsidiary or a branch in order to obtain a trading licence as well as the requirement to obtain an additional licence as such contravene Arts. 28 and 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 (for goods) and Art. 46 EC (for services).

[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.

These grounds 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 grounds are applicable to import licences for wholesale traders. Wholesale traders do not endanger public morality, nor are wholesaler trades in any way detrimental to public policy, public security or public health. The requirement to have an **import licence** is a restriction to trade that is **not justified** under Arts. 30 or 46 EC and thus **contravenes the provisions on the free movement of goods and the freedom to provide services.**

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 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. In essence, if a non-discriminatory restriction on Arts. 28 and 49 EC has been found to exist that restriction will contravene Art. 28 or 49 EC **unless it can be shown to be 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.**).

### (a). Legitimate Public interest

Member States have in the past come forward 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 supplies** and/or the **protection of consumers**.

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. The **addressees** of the Directives are the **transmission system operators** as well as the **Member States**. The Directives appeal at system operators to cooperate and coordinate all issues as regards network security. Further, the Directives address the need to ensure **sufficient transmission** and **generation reserve capacity** (Art. 3 para. 2 lit. f Directive 2005/89). The legislator was thus concerned about the performance of transmission system operators as well as of the availability of generation capacity.

It can be inferred from the Directives that the **legislator** was **not** so **concerned that wholesale traders might endanger security of supply**. On the contrary, the annex to Directive 2004/76 contains a non-exhaustive list of **instruments to enhance the security of supply one of those instruments being liquid tradable gas markets**. Art. 3 para 2 lit. g of Directive 2005/89 further calls on Member States to encourage the establishment of liquid wholesale markets. The legislator thus seems to deem **necessary** a **functioning wholesale market to safeguard security of supply**. In fact a multitude of market players on wholesale level will contribute to market stability as 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**.

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

The security of supply issue has also 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.

Member States have also 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 must be highlighted that the issue of consumer protection in the energy sector has already been **addressed in the Liberalisation Directives**. Pursuant to Art. 3 para. 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.

It must also be noted that **wholesale 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. Also, **wholesale trading** is **not directly linked** to and does not have a direct influence on **household customers** as wholesale trading is not a direct upstream market, but only constitutes a more distant market alongside the value chain.

In any case, wholesale traders are **technically** able to ensure energy trading activities and must enter into agreements with the national TSOs in order to have access to national grids. Further, wholesale traders are able to produce **appropriate funds** to secure operation of their activities. In order to minimise credit risks TSOs already require guarantees or bank statements before allowing wholesale traders to make use of their grid. And finally wholesale traders also have the **necessary staff** which is **adequately trained** and possesses sufficient **work experience** to run their operations. Therefore, wholesale traders are technically, financially and personally reliable.

By passing the Directives Member States and the Community have already agreed on **EU-wide standards** in order to safeguard the security of supply of gas and electricity. As there are common rules relating to the security of supply in the electricity and gas sector it is not for the Member States to regulate this area of law. Within this harmonised area of law Member States may only **take additional measures** in order to protect **overriding reasons of public interest that are not addressed by the harmonisation**. In order to impose additional measures on foreign companies Member States would thus be obliged to prove that the standards guaranteed in the State of establishment are not sufficient to attain the additional objectives pursued by the host State. 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.

Even if Member States could prove that they needed to adopt additional measures to protect **overriding reasons of public interest that are not addressed by the harmonisation** and

even if the Community rules on the security of supply and on consumer protection were not maximum harmonisation measures Member States would still 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 were **proportionate** for the attainment of the objectives pursued.

**(b). Proportionality**

Restriction to trade are only 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 attainment of the objective which they pursue and **must not go beyond what is necessary**.

First of all, the measures in question must be **suitable or appropriate** to protect the objectives that Member States 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 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. Even if these requirements were suitable to attain the objectives which Member States pursue Member States would still need to prove that they adopted the **least restrictive measure to trade** available.

The national measures in question, i.e. 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 thus 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

[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 i**n 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**.

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 who are 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.

Especially in circumstances where undertakings intend to provide services in the host Member State only on **an occasional basis**, the undertakings shall not be dissuaded from going ahead with their plans if, because of the compulsory requirement that they be entered on the register, the **authorisation procedure is made lengthier and more expensive**, so that the profit anticipated, at least for small contracts, is no longer economically worthwhile. 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 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.

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[13] Case 155/82, *Commission v Belgium* [1983] ECR 531.
[14] Case 33/74, *Van Binsbergen*, [1974] ECR 1299, para. 11.
[15] Case C-58/98, *Corsten* [2000] ECR I-7919.
[16] C-76/90, *Säger* [1991] ECR I-4221.

**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 to effectiveness of the fundamental freedoms guaranteed in the Treaty the ECJ has thus put the **burden of proof on the Member States as 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.

### (6) Conclusion

- **Wholesale trading** is a commercial activity that falls in the ambit of **Arts. 28 and 49 EC** and that benefits from the freedoms guaranteed under these provisions.
- 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.
- 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 as such disproportionate and **contravenes Arts. 28 and 49 EC**.

## 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) Proposal for a Services Directive

In order to eliminate all barriers to the internal market the European Commission launched in 2001 a major new strategy to ensure that service providers can operate as easily throughout the EU as they can in any single Member State. To this end the Commission issued in 2004 a Proposal for a Directive on services in the internal market.[19] The Council has in July 2006 issued its Common Position, the Second reading of the European Parliament is now pending.

This Proposal for a Directive has been subject to a vast debate in the course of which certain sectors were excluded from the scope of the Directive. The current version includes the energy sector in the Directive. As the debate is still ongoing and the sections dealing with

[17] Case 205/84 *Commission / Germany* [1986] ECR 3755, para. 54.
[18] Case 205/84 *Commission / Germany* [1986] ECR 3755, para. 54.
[19] KOM/2004/2

issues such as non-discrimination and derogations have not finally been decided on it is to date not clear whether the Directive will deal with questions concerning the energy sector.

The restrictions to trade imposed by certain Member States in Eastern Europe, i.e. import licences, the requirement to have a place of establishment as well as the additional licensing requirement, can thus at present not be assessed in the light of the Proposal for a Services Directive.

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

In order to complete the internal electricity and gas market the 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. Accordingly, the Directives stress the importance of these freedoms within the electricity market as they state:

> *"The freedom which the Treaty guarantees European citizens – free movement of goods, freedom to provide services and freedom of establishment – are only possible in a fully open market, which enables all consumers freely to choose their supplier and suppliers free to deliver to their customers."*

The Directives also appeal to Member States to harmonise conditions with respect to the conclusion of contracts:

> *"In order to facilitate the conclusion of contracts by an electricity undertaking established in a Member State for the supply of electricity to eligible customers in another Member State, Member States and, where appropriate, national regulatory authorities should work towards more homogenous conditions and the same degree of eligibility for the whole of the internal market."*

However, although the Liberalisation Directives require the Member States to have full regard of the freedoms under EC Treaty the **Directives do not explicitly deal with licensing conditions or the mutual recognition of licences**.

### (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. However, 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 (see below) and are therefore not privileged under the before mentioned principle. The Member State of origin principle relates only to regulatory requirements for financial services.

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. Thus the **wholesale activities in question are not caught under MIFID**.

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[20] Directive 2003/54, OJ L 176/37, 15 July 2003; Directive 2003/55, OJ L 176/57, 15 July 2003.
[21] OJ L 145/1, 30 April 2004.

### c. Enforcement of National Law

Some regulatory authorities in Central and Eastern Europe have raised concerns regarding the enforcement of measures against foreign wholesale traders. These regulatory authorities alleged that they would not be able to enforce decisions or measures against foreign companies.

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. 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 even address the question of cross border disputes (albeit in a different context), and allocates 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**.

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*

[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.

*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 Community. The Regulation 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 may well be obliged to abolish import 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 Eastern Europe. Parties to the Energy Community Treaty are **Albania**, **Bulgaria**, **Bosnia and Herzegovina**, **Croatia**, **Macedonia**, **Montenegro**, **Romania**, **Serbia**, **Bosnia Herzegovina,** the **UN Mission in Kosovo** as well as the **European Community**. According to the website of the Council of the European Union (who acts as depositary for the Treaty) Montenegro has so far not notified the ratification of the Treaty to the depositary (as of 21 November 2006).

The **objective** of the Energy Community Treaty (hereinafter "the Treaty") is set out in its 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 are applicable to the Energy Community. Further, a number of Directives in the environment sector will be extended to the Energy Community. Art. 81, 82, 86 and 87 of the EC Treaty will also 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 shall **implement the secondary legislation on energy by the 1st of July 2007**. The **Treaty thus**

[27] Decision 2002/584/HJA, OJ L 190/1 of 18 July 2002.
[28] For further information please refer to http://conventions.coe.int.

**creates specific obligations** for its Parties that must either be implemented into national law or are directly applicable such as the provisions on competition. However, as neither the Liberalisation Directives, nor Regulation 1228/2003 nor Arts. 81 ff. EC contain provisions that deal with licensing requirements, these requirements cannot be assessed in the light of these provisions.

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 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 the Energy Community may also take measures **to create a single 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 in 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. The Energy Community has to the knowledge of the EFET Legal Committee to date not taken such measures yet, as the organisation is

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

currently being set up. It is, however, expected that the Energy Community will make use of the available mechanisms and tools under the Treaty in the near future.

Pursuant to Art. 89 **Parties are obliged to implement decisions** addressed to them **into** their **domestic legal system** within a specified period. Failure by a Party to comply with an obligation or a decision may be brought to the attention of the Ministerial Council. The Energy Community Treaty therefore also provides for enforcement mechanisms against its Parties.

**Conclusion:**

- 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 the European Courts**, 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 and should **abolish** import licences, the requirement to have a permanent establishment as well as the requirement to obtain additional licence as these requirements **violate Art. 41 of the Treaty**.

## IV. Obstacles to Irade in individual Countries

### 1. EU Member States

### a. Czech Republic

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 includes 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.

Foreign companies in the Czech Republic may only conduct business activities on a permanent basis if they have either a subsidiary or a branch office, both of which must be entered into the Trade Register. Although the Energy Act itself does not require such a local presence, ERO does not grant trade licenses to companies without such a local presence. In the Czech Republic the registration of a branch office and the granting of a license may be applied for in a common procedure. Trading Licenses are granted for a minimum of five years or longer according to the specific application.

The requirement to have a **registered seat** and the requirement to obtain an **additional license** for wholesale trading in the Czech Republic **contravene Arts. 28 and 49 EC.**

**b. Hungary**

Under Hungarian law, trading electricity and the cross-border transmission of electricity each require separate licenses from the Hungarian Energy Office (HEO). Trading 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;
- enter into a Balancing Agreement with the System Operator or establish its own Balancing Group. The Balancing Agreement must be entered into subsequent to obtaining the HEO license.

In order to be able to import and export electricity from and to Hungary the trader will also have to obtain a **cross-border electricity transmission license** from the HEO. If the applicant fulfils the requirements for obtaining the trading license, cross-border transmission license can be granted automatically. A trading license is issued for a definite term to be defined by the HEO. It is worth noting, that a license may not either in whole or in part be transferred to another entity by the licensee. If the ownership structure of the licensee has changed then the acquirer of an interest amounting to more than 25 % of the voting rights must obtain prior approval of the HEO.

The requirement to have a **registered seat in the form of a subsidiary in Hungary** and the requirements to obtain a **trading licence** as well as **a cross-border transmission licence** are **contrary to the provisions of the EC Treaty on the free movement of goods and on the freedom to provide services.**

### c. Poland

Polish Energy Law requires a licence granted by the President of the Energy Regulatory Authority (the "ERA") for trading electricity within the territory of Poland. Trading licences are issued for a period of between 10 and 50 years. A licence may be granted to an applicant who:

- is in possession of the relevant funds in an amount, which guarantees the proper performance of the activity, or is capable of documenting its ability to acquire such funds;
- possesses technical capabilities that guarantee the proper performance of the activity;
- ensures the employment of persons with adequate professional qualifications.

The ERA may make the issue of the licence conditional upon the applicant providing security for possible third party claims resulting from its activity. The form, content and value of the collateral may be negotiated with the ERA.

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

### d. Slovenia

Under the Slovenian Energy Act a license must be obtained to participate in local wholesale and cross-border electricity trading . Such a license is to date not granted to a foreign company without a local presence (subsidiary or a branch) in Slovenia. 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.

The Slovenian Energy legislation is **currently under review** a new law has apparently been passed recently which abolishes the requirement to have a registered seat in Slovenia as well as the licensing requirement. The internet site of the Slovenian regulator has to date (as of 6 December 2006) -at least in the English version- not reflected this change of laws. However, the EFET LC has been informed that the new law will come into effect as of 2 December 2006.

The requirement to have a registered seat in Slovenia and the requirement to obtain a wholesale trading licence are contrary to Arts. 28 and 49 EC. **Provided** that the Slovenian government has in fact **abolished the requirement to have registered seat and the licensing requirement in Slovenia** – their Energy law would in this context be **compliant with Arts. 28 and 49 EC**.

**e. Slovak Republic**

Under Slovakian law it is not quite clear whether a supply permission (license) is required for the purposes of electricity trading. The Energy Act sets out the permission requirements only for supply purposes; it can therefore be argued that no such supply permission is needed for trading electricity as no such electricity is supplied to final customers. The Regulatory Authority (**RONI**) holds the view that a **supply permission** (license) is also necessary for **wholesale trading in electricity**. Licenses that had previously been granted under the old Slovak law ceased to be valid by the end of 2005. Entities active in the market needed to reapply for a license. 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 by proving that a contract with a license holder for transmission have been negotiated,
- prove a sound financial background.

The legislation in the Slovak Republic **contravenes Arts. 28 and 49 EC as it requires traders to have a registered seat** in the Slovak Republic and to obtain an **additional licence for wholesale trading.**

**2. Non EU Members**

**a. Romania**

Under Romanian law, trading electricity and cross-border transmission of electricity require a license from the Romanian Electricity and Heat Regulatory Authority. The license is valid for a maximum of eight years and can be renewed for the same period. In order to obtain such a license a company must:

- has established an office for the entire validity period of the license in Romania. Although the License Regulation does not define "secondary office", it is, however, recommended for a foreign legal entity to establish a subsidiary.
- Provide and maintain a financial guarantee which shall be no less than the sum necessary to cover the contracts in operation for 30 days.
- 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.

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

The requirement to have a **registered seat** and the requirement to obtain an **additional license** for wholesale trading in Romania **contravene Art. 41 of the Energy Community Treaty. In view of accession to the European Union these requirements should be abolished as they infringe Art. 28 and 49 EC.**

**b. Bulgaria**

Trading electricity in Bulgaria as well as across the Bulgarian borders require the trading license from the Bulgarian State Commission (SCEWR). A license is usually granted for a duration of up to 10 years but can be requested for a maximum of 35 years. In order to obtain such license a company must:

- have established a legal entity in the form of a subsidiary duly registered in the Trade Register with a Bulgarian district court,
- give evidence of technical, financial and legal capacity in the license application. Evidence is presented by the copy of the company registration, certificates of good standing, a tax registration of the applicant company and a registration with the Bulgarian statistical offices.

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

The requirement to have a **registered seat** and the requirement to obtain an **additional license for wholesale trading in Bulgaria are not compatible with Art. 41 of the Energy Community Treaty. In view of the fact that Bulgaria wants to become Member to the EU these requirements should be abolished as they infringe Art. 28 and 49 EC.**

**c. Serbia**

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 the form of a private limited liability company with a registered capital of EUR 500.00.
- 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.

**T**he requirement to have a **registered seat** and the requirement to obtain an **additional license for wholesale trading in Serbia** should be abolished as they **contravene Art. 41 of the Energy Community Treaty.**

## V. Infringement proceedings EU Commission

The European Commission launched infringement procedures under Art. 226 EC against several Member States in spring 2006 to monitor the implementation of the legislation in the energy sector. Amongst others, these procedures concern the Czech Republic, Poland and Slovakia. It is worth noting that the Commission has not launched infringement procedures against Slovenia.

In essence, the infringement procedure against the **Czech Republic** concerned

- violation of the unbundling provisions pursuant to Art. 13 para. 2 Directive 2003/55;
- violation of publication requirements for the storage of gas under Art. 19 para. 3 of Directive 2003/55;
- not notifying to the Commission the non-provision of its public service obligations under Art. 3 para. 6 of Directive 2003/55;
- violations of Art. 20 Directive 2003/55 regarding non-discriminatory access to pipelines.

The Commission also launched procedures under Art. 226 EC against the **Slovak Republic** for:

- violation of the unbundling provisions pursuant to Art. 15 of Directive 2003/54;
- not implementing procedures dealing with consumer complaints and not implementing measures to label the energy source in electricity;
- violation of Art. 22 of Directive 2003/54 regarding the construction of direct lines;
- not publishing all public service obligations under Art. 3 Section 9 of the Directive 2003/54;
- not granting non-discriminatory access to third parties to the transmission and distribution systems.

The infringement procedures against Poland concerned

- the absence of, or insufficient legal unbundling of and distribution system operators in order to guarantee their independence;
- the absence of the notification of the public service obligations;
- the preferential access for certain historical contracts in the market of electricity;
- the absence of labelling provisions in national legislation.

At the time the Commission issued its press release regards these infringement procedures (April 4, 2006) the Commission was still looking into whether Hungary's laws are in conformity with EC legislation. The Hungarian regulator stated in a meeting held on 2 November 2006 that they received a letter from DG TREN that informed them that Hungary has not properly implemented the Liberalisation Directives. Further information was not disclosed.

To date the Commission has not issued a decision on the infringement proceedings yet. Member States may by themselves bring their legislation in compliance with EU laws.

## VI. EFET Action and Responses

### 1. Czech Republic

On 24 January 2006 EFET sent a letter to the Czech Ministry of Industry and Trade to address its concerns regarding the licensing requirements in the Czech Republic. EFET set forth that according to the Czech energy law a legal entity is not required in order to trade in electricity in the Czech Republic. Further, EFET highlighted that in its opinion the requirement to have an establishment in the Czech Republic contravenes Art. 49 EC. In addition EFET set out that the latter requirement also caused problems as regards double taxation.

On 6 March 2006 the Ministry responded to EFET's letter. It stated that the applicable laws in the Czech Republic are fully **compliant with existing EU laws** and do not differ significantly from the relevant legislation in other EU Member States. Foreign companies were treated in a non-discriminatory matter as the same rules are applied for both, national and foreign companies. The Ministry pointed out that for a permanent and consistent activity a company is required to be entered into the trade register and have an establishment in the Czech Republic. Further, the Ministry set out that only activities performed on an ad-hoc basis, random or non-systematic would fall under Art. 49 EC and would neither require enrolment in the trade register nor would such activities require a trade licence.

The EFET Legal Committee is of the opinion that the applicable laws in the Czech Republic are **not compliant** with existing **EU laws** as they infringe Arts. 28 and 49 EC as set out above.

### 2. Slovak Republic

In October 2005 EFET sent a letter to the Slovak energy regulator (RONI) setting out its views on the Slovak Energy laws and possible breaches of EU law. In particular EFET stated that in its understanding a trader of electricity would not be required to obtain a supply permission, as a trader does not supply electricity to end users but purchases electricity for the purposes of re-sale. EFET also inquired about the validity of old licences after the year 2005 following the amendment of the energy law. Finally EFET set out that in its opinion certain provisions of the Slovakian energy law contravene Art. 49 EC.

So far, EFET hast not received a response from RONI.

### 3. Slovenia

On 24 January EFET sent a letter to the Slovenian regulator as regards the licensing and establishment requirements. In its letter EFET illustrated that the obligation to set out a legal entity in Slovenia contravened Directive 2003/54.

The regulator responded on 3 February 2006 and set out that they were aware that a legal presence in Slovenia is required as condition for obtaining a licence for the operation of energy-related activities in Slovenia, with the exception of *societas europeas*. The regulator further stated that discussions with the Ministry of Economics and the TSO were held and that the issue of legal presences for foreign companies was addressed. Apparently the Ministry indicated in the course of the discussions that this point may be addressed when the law is going to be amended. The regulator concluded that it would support to ease licensing conditions for wholesale traders, provided that the market could be clearly separated from the retail and supply markets.

The Slovenian regulator has thus promised EFET to alter its laws, this is evidenced by the fact that a new Energy law has been passed by Parliament which will enter into force in December 2006.

### 4. Hungary

EFET also sent a letter to the Hungarian Energy Office, the latter sent its response back to EFET on 6 March 2006 stating that the Hungarian law neither contradicts the spirit of Directive 2003/54 nor its articles. The Hungarian Energy Office held on the contrary that maintaining its licensing regime was necessary for the protection of household customers and small and medium-sized enterprises as well as the securities of supply on the Hungarian market. It was further held that licensing procedures do not create an artificial entry constraints for traders.

In the opinion of the EFET Legal Committee neither the requirement to have a registered seat nor the requirement to obtain (different!) trading licences are suitable to protect household or small industrial customers or safeguard the security of supply. In any event the requirement to have a place of establishment is disproportionate to safeguard customer interests or the security of supply. This requirement also deprives Art. 49 of all useful effect as by their very nature services – different than the freedom of establishment- does not require a permanent place of residence in order to pursue economic activities. As a result the EFET Legal Committee considers the mentioned restrictions as contrary to Arts. 28 and 49 EC.

### 5. Romania

Further, EFET issued a letter to the Romanian Regulatory Authority. ANRE expressed interest to increase liquidity, competitiveness and transparency on the Romanian market and is interested in facilitating international trade on a reasonable basis. EFET was thus invited to a meeting at the ANRE Head Quarters for further discussions.

### 6. Serbia

EFET also sent a letter to the Serbian Ministry of Mining and Energy, who responded to the letter on 8 February 2006 by stating that Serbia as party to the Energy Community Treaty committed itself to the implementation of parts of the Acquis Communautaire as proscribed in the Energy Community Treaty. The ministry further stated that the Treaty allows for the Regulatory authorities to establish their own licensing procedures. They recently adopted a Serbian licensing code was thus deemed to be in compliance with the Energy Community Treaty. The ministry invited EFET to contact the Energy Agency of Serbia to obtain further clarification on this issue.

## VII. Further steps

The EFET Legal Committee has considered further steps to enforce EU Treaty and Energy Community Treaty provisions as regards national licensing schemes. In essence, **it was decided to use lobbying mechanisms in order to remove** existing obstacles to trade. Existing regulatory obstacles need to be discussed **at national and EU level**.

EFET will address existing problems to the European Commission (DG TREN and DG Internal Market) and to the institutions of the Energy Community and come forward with adequate solutions to meet the concerns of national regulators. Efforts will be made to

address the obstacles that the licensing requirements impose in the **Third Liberalisation package**. The existence Primary EC law should be supplemented by more specific Secondary law, which should encompass provisions on wholesale trading and should prohibit licensing requirements.

EFET will continue a vital **dialogue** with the Energy Regulatory Regional Association (**ERRA**) and has already presented its ideas in the meeting in Riga (Latvia) at the beginning of September 2006. In parallel it is planned to have a "road-show to regulators" to discuss on a national level existing obstacles to trade between EFET and representatives of the national regulators.

In addition, EFET members can challenge licensing fees or licensing requirements before national authorities and ultimately bring the matter before a national court in order to obtain a preliminary reference under **Art. 234 EC to the European Court of Justice** (ECJ). However, members might for commercial reasons be hesitant to challenge the decisions of national regulatory authorities. Further, a request for a preliminary ruling before the ECJ may take several years, lobbying might thus be a faster approach to eliminate existing barriers to trade.

This Memo was endorsed by the
EFET LEGAL COMMITTEE
On 1st December 2006.