European Federation of Energy Traders

Comments on the current Council Presidency drafts of consolidated versions of the EU electricity and gas directives, with all amendments.

(Updated to July 2002)

Comments are set out sequentially by reference to corresponding Articles and clauses of both consolidated versions; many observations apply to both electricity and gas; those which do not, are noted accordingly.

EFET submits the following comments for consideration by the Council of Ministers, the Parliament and the Commission. We have concentrated on the issues, which are of greatest importance in the further liberalization of European **wholesale** energy markets. We are convinced that the efficient functioning of wholesale markets is axiomatic to the accrual of further benefits to consumers of energy in continental Europe. Experience of the internal energy market so far suggests that a more thorough unbundling of networks and more carefully supervised TPA conditions are indispensable to development of wholesale liquidity and transparency. The comments are therefore organized under three headings:

1. **Unbundling**
2. **Functioning of Wholesale Energy Markets**
3. **Third Party Access**

Unbundling

Art. 2 (definitions)
2.4 (electricity) Is a definition of "independent producer" needed any more, in the light of the revised unbundling provisions?
Art.7
7.4 (electricity); 7a.2 (gas) These provisions on legal and management unbundling should surely be moved to Chapter V (electricity)/ Chapter VI (gas).
Art. 9 (electricity); Art. 8 (gas) (confidentiality/ Chinese walls)
Strengthen by inserting after words " … own activities…" the phrase: "… or activities of its affiliates within an integrated (energy) (gas) undertaking." At end add: "Measures taken to ensure confidentiality must be set out in the compliance programme and the annual report referred to in Article 7(4)(d) [electricity]…Article 7a(d) [gas]."
Art .10
10.3 (electricity) It would be useful to add at the end of the very last paragraph words such as "where such undertakings are wholly independent in ownership terms from any vertically integrated electricity undertaking with more than (100 000) customers."

Functioning of Wholesale Energy Markets

Art 2 (definitions)
2.12 (b) (gas) The phrase "any instrument" should be expanded to explain that this can be physical, contractual or financial in nature. The balancing need dealt with in this clause is necessarily as between load and "supply"(as elsewhere defined), nor between load on the one hand and either supply or physical inputs (in the form of production, importation or other delivery) by a supply undertaking on the other. We therefore suggest phraseology such as: "…any instrument, which may minimize the energy imbalance caused by variations in the demand load of customers with supply…"
Art. 3
3.3 (electricity) The reference to "reasonable prices" is unsatisfactory. It could result in litigation about the reasonableness of freely agreed contractual terms, or in unwarranted continuation of commodity price regulation, or in other attempts to prevent legitimate wholesale market price signals being reflected to consumers. To ensure that the full benefits of competition are made available to consumers, it would be better to replace the word "reasonable" with "competitive".
Art. 8 (electricity) (dispatch of generation)
8.1 Must a TSO be responsible for dispatch of generating installations and for use of interconnectors? Such an absolute requirement is not compatible with a traded market, where plant operation/dispatch is decided by bilateral agreement between network users and plant owners/operators, nor with systems that involve designation of an independent market operator or if an RTO. (The requirement is equally too rigid, in case in future other Member States and regulators might wish to designate such parties).
8.2 In the first sentence, would it not be in the interest of more rapid completion of the single market now to delete the phrase "Without prejudice to…"? In the last sentence, the principle of giving economic precedence to power sources offering more competitive terms should now be strengthened, and the consideration of taking account of technical constraints on the system demoted to an exception, rather than a primary part of the dispatch rules.
8.3 Criteria for giving priority to renewable sources or to CHP should be elucidated to become consistent with provisions (including future amendments) of the Renewables Directive (and of any prospective CHP Directive) and to be subject to future amendments of such Directive(s).
Art. 19 (electricity); Art.18 (gas)
19.1 (b) and 18 (b) (criteria for "eligibility") Now that both consolidated texts (apparently) recognize the principle of mandatory wholesale access and group the rights of wholesale customers with industrial and commercial customers, the wording in the first line needs adaptation. The phrase "…are free to purchase… from the supplier of their choice…" is meaningless in a wholesale intermediation context, without specifying how the choice is exercisable. Therefore add after the word "Community" the phrase: "and obtain third party access to the transmission and distribution system pursuant to Article16."
Art. 23a (electricity)
This article creates an obligation to report to the Commission on imports. There is no definition of what "third countries" are (though presumably "non-EU"?), nor any indication of whether "imports" is intended to mean flows or transactions. The imprecision could be used in due course as an excuse to require electron "tagging" schemes of a type not justified under the terms of section II of the Annex.

Annex (electricity)

A relative costs requirement is not appropriate since suppliers (and traders) have no information about the generation cost of electricity we buy. The removal of this requirement in the revised Commission proposal is therefore supported.
In Part II (a) – dealing with global composition of fuel mix - it is not made clear enough that average national fuel consumption figures could be substituted for the "actual fuel mix" in certain cases. Such substitution will be needed in respect of volumes of electricity acquired in OTC or exchange transactions, the sources of which become progressively "fragmented". This commercial fragmentation cannot be related to physical sourcing in the absence of impracticable "labeling" schemes for all electrons. (Such labeling or "tagging" would require IT databases and compatible IT interfaces between all wholesale counterparties, as well as between them and TSOs, which at present do not exist. It would also act as a disincentive to wholesale transactions and thus impair market liquidity and curtail trade between Member States). The amended text in Art. 3(5) of the revised Commission proposal remains a concern and may not be compatible with green certificate trading schemes.

Third Party Access

Art. 7
7.3 (fourth indent) (electricity); 7.2 (c) (gas) Responsibilities of TSOs should be expressed to include the provision of information to system users/ shippers, including the publication of available capacity and of historical capacity utilization and actual flow data. (In properly functioning wholesale markets, such provision is essential to facilitate accurate nominations and fulfillment of balancing obligations.)
Art. 14
14.3 (gas) A wide ranging derogation from obligations to grant access to pipelines, by reference to future long term contractual supply obligations of integrated gas undertakings, is contrary to the spirit of the Directive, interferes with commercial dealings between market parties in an unwarranted manner, and risks impairment of the functioning of the internal market in energy at the wholesale level.
Art.15 (gas)
We favour the alternative text in footnote 21. Only dominant incumbents' terms need be subject to supervision. However, the text should be expanded to mandate regulated access for all dominant incumbents' storage services, until such time as the competent national authority judges that a competitive storage market is shown to exist. (And they should report to the Commission annually on competition in storage up to such point.) The revised wording on negotiated access in the Commission's amended proposal is insufficient to ensure non-discriminatory access to essential storage facilities.
This article should, finally, cross-refer to Art. 21 (gas), which now deals more comprehensively with regulatory intervention in the rules of access.
Art. 21 (electricity) (direct lines)
21.3 The wording of this clause, dealing with the right of market parties who could build a direct line also to obtain third party access, does not fit with the improved definitions. Re-word to read: "The possibility of obtaining supply through a direct line as referred to in para.1 shall not affect the right of an eligible customer to obtain supply in accordance with Article16."
Art. 21 (gas)
Article 21 is intended to cover the regulator's functions as a dispute settlement authority. As drafted, Article 21 indicates that the regulator could resolve disputes about flexibility

instruments – i.e. intervene in trade negotiations for flexible gas. This does not seem appropriate, in cases where neither is an incumbent transmission monopoly.

Art. 22

Clause 2 of this article should include the specification of a responsibility of the regulatory authority, which reflects the rights of system users set out in Art.16 (electricity) and Art.14 (gas).

Art. 23 (gas) (upstream access)

23.2 (b) The word "difficulties" is too broad. This clause could provide a panacea for artificial means of blocking or delaying access by downstream parties.

EFET
July 18, 2002