Editorial

The European Institutions adopted a wide range of measures to liberalize energy markets. The first package dates from 1996 and the second package from 2003. Although these developments are relatively recent, market participants are disappointed by the results of liberalization and competition so far. In 2005 and 2006 the Commission carried out a large inquiry into the causes of the lack of effective competition. The results of this inquiry were presented in a voluminous and well documented report on 10 January 2007. The findings spurred new legislative initiatives, which culminated in the presentation of a proposal for yet another legislative package. In his contribution to this review Peter Mombaur provides an overview of the legislative steps and measures taken so far.

One of the prominent features of the package concerns the use of networks. In the light of its findings concerning abusive and discriminatory use of and underinvestment in network infrastructure by vertically integrated energy companies, the Commission proposes to order the complete separation between production and supply activities, on the one hand, and transmission businesses on the other hand. According to this proposal, shareholders will no longer be allowed to have controlling interests in both sets of activities at the same time. Conscious of the political problems to which this proposal can give rise, in particular in France and Germany, the Commission also presented an alternative solution to the complete unbundling option. This alternative is called the 'deep' independent system operator (deep ISO). This option implies that transmission activities can continued to be controlled by the same shareholders as those controlling production or supply activities, but grants the TSO a large degree of independence as regards the functioning and maintenance of the transmission network.

Obviously, both the ownership unbundling option and the deep ISO alternative have major consequences for European energy companies and their public and private shareholders. Both options affect the freedom of shareholders to organize their property as they think fit. This intervention into property rights necessarily raises legal questions as to its compatibility with fundamental rights, as guaranteed by national constitutions and international treaties, such as the European Convention of Human Rights.

Moreover, Article 295 of the EC Treaty explicitly states that the Treaty does not prejudice the rules in the Member States governing the system of property ownership.

This difficult relationship is at the core of the contribution of Franz-Jürgen Säcker and the joint article of Christian Pielow and Eckart Ehlers. It is no coincidence that these three authors are German nationals. The unbundling issues have given rise to a vivid debate in this country. None of the three authors consider that there is a straightforward and explicit need for far-reaching measures and seem to disagree with the conclusions by the Commission as regards the anticompetitive effects of joint ownership of networks and competitive activities. Christian Pielow and Eckart Ehlers underline the importance for the Commission to substantiate its anticompetitive concerns. In the absence of clear distortions of competition, the Community may lack an explicit legal basis to adopt the proposed measures. Franz-Jürgen Säcker focuses more on the ISO option and draws some interesting parallels with other regulated sectors such as the railway sector. In his view, there is no real need for the measures proposed by the Commission. Adequate solutions for possible abusive use can be found in German corporate law and guaranteed through effective regulation.

It should be noted, however, that lawyers are masters in finding problems for solutions. Their activity is essentially retrospective in nature. They rely on precedents and crystallized principles to assess the acceptability of new political proposals. The fact that existing rules do not allow certain options does not necessarily preclude that a different conclusion is reached by relying on a more dynamic interpretation of the law. In any event, the unbundling measures proposed by the Commission are bound to fuel an active legal debate.

Assuming that fair and unrestricted access to network infrastructure can be ensured, competition can only work if actual and potential market players can have upstream access to energy and downstream access to customers. In its report on the sector inquiry, the Commission has identified several problems that prevent such access: concentration, lack of liquid wholesale markets and a general reluctance by incumbents to compete in other markets. Interestingly, the report only pays modest attention to one important aspect of access to upstream energy sources, in particular gas in natural or liquefied form from third country suppliers, such as Russia and Algeria. In fact, the only part of the report that is relatively positive in nature are the sections dealing with LNG. Even so, the Commission has

extensively dealt with gas purchasing contracts in the past, in particular with destination clauses and other market sharing related clauses. The contribution of Leigh Hancher deals with this decisional practice and hence with the Commission's difficult task of striking a balance between the interests in obtaining third country gas supplies and the objective of the internal market.

Finally, liberalizing markets is about opening up markets to competition. It assumes that competition is the best means to ensure an optimal allocation of resources and consumer welfare. Competition guarantees that the best firm selling the best product at the lowest possible price wins the patronage of the customers. This process is generally with downward price trends. It is therefore not surprising that market opening was associated by the general public as a promise for lower price levels. For varied reasons, energy prices have not fallen, at least not as much as could have hoped. On the contrary, rising energy prices is an increasing cause of concern of households and industry. Large industrial users that compete internationally are particularly hurt by this phenomenon.

Since liberalization is not yielding the expected results, energy users increasingly require the authorities to intervene directly in the pricing process by combating excessive or unfair prices, at least what the demand side of the energy considers to be unfair or excessive. In several Member States competition authorities do indeed succumb to that pressure by bringing unfair or excessive pricing cases against electricity suppliers. These precedents and the legal rules upon which they rely is the topic of the last contribution of this review. Marc van der Woude focuses on the conceptual and practical difficulties in applying Article 82 of the EC Treaty that prohibits unfair trading conditions imposed by dominant firms.

The topics addressed by this review just offer some examples of the main legal issues raised by the liberalization of the European energy markets. The review has not the ambition to cover all legal issues exhaustively. That would be a daunting task. One thing is certain indeed, liberalization of the energy markets has served lawyers well. It is left to the discretion of the readers to assess whether that result suffices as societal benefit of the harmonization packages.

Brussels, January 2008

Marc van der Woude
Guest Editor