

Maintaining the Balance of power: Liberalisation, Reciprocity and Electricity in the European Community

by Angus Johnston *

1. Introduction.

Electricity has long been taken for granted in much of the western world. It is such an essential part of our everyday lives that we accept its 24 hours-a-day availability almost without thinking, at least until the bill arrives. Yet recent changes in political and economic philosophy have led to greater scrutiny of the sector and its structure. However, in a field so historically sensitive, both politically and economically, for many years calls for reform and liberalisation met with significant opposition. The negotiations on liberalisation have been difficult, hard-fought and, as a result, lengthy. The many compromises which have had to be made have led to a rather uncertain situation as regards the requirements of this new phase of liberalisation. One of the consequences of this uncertainty is the reciprocity provision in the Directive for the internal market in electricity.¹

2. The Background to the Directive Concerning the Internal Market for Electricity

The purpose of providing this introduction to the sector is not to give a comprehensive analysis,² but rather to sketch the proper context for a discussion of reciprocity under the Directive.

2.1 Political and Economic Factors: a Brief Background History

Given the vital role played by energy in general, and by electricity in particular, it is in many ways quite surprising that it took so long for the EC to turn its attention to the functioning of the electricity industry. Indeed, the Spaak Report of 1956 had identified the electricity industry as a priority sector.³

Many different considerations played their part in keeping energy issues off the general EC agenda until the mid-1980s. Politically, energy has always been a highly sensitive subject for the Member States, as Europe's attempts to recover from the Second World War and its responses to the oil crises of the 1970s illustrate. This political 'no-go' area was reinforced by the existence of a relatively stable consensus among Member States on the desired structure of the electricity industry. The original economics of creating a national system tended towards monopoly in the sphere of network construction, given the substantial economies of scale involved, as well as the benefits to be gained in co-ordinating the functions of production, transmission and distribution. After all, since electricity is in general not something which can be stored for any period of time, available supply and thus production capacities must be matched to the fluctuations of demand, which was usually best achieved by co-ordination between these functions, or often integration of them in a single, usually state-owned entity. The similarity in approach in many Member States also fostered

* This article was written as the Final Thesis for the LLM Programme in European Community Law at the Rijksuniversiteit te Leiden in the Summer of 1998. The author is now a student at Brasenose College, Oxford University. Many thanks are due to Professor P.J. Slot and Mr E.D. Cross for their time and assistance during the writing of this piece. The usual disclaimer applies.

¹ Directive 96/92/EC (OJ 1997 L 27/20).

² For more specific and detailed works on the sector see T.P. Hughes, *Networks of Power*, (Baltimore: Johns Hopkins, 1983), and A. Midttun (ed) *European Electricity Systems in Transition: A Comparative Analysis of Policy and Regulation in Western Europe*, (Kidlington: Elsevier, 1996) (hereafter, *European Electricity Systems in Transition*). For a fuller version of this section, see the on-line edition of this article on the website of the Centre for Energy, Petroleum and Mineral Law and Policy, of the University of Dundee (<http://www.dundee.ac.uk/petroleumlaw/html/home.htm>).

³ Comité Intergouvernemental Créé par la Conférence de Messina, Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères, Brussels, 1956 (Spaak Report).

relatively good relations between utilities in different countries. With secure positions on their home markets, loose organisations for co-operation such as the UCPTE⁴ were set up to organise swaps of electricity between utilities in a framework of mutual assistance and efficiency.

We must also consider the diversity which developed in the choices made on fuel sources for electricity production. Some countries have their own resources of particular fuels (e.g. coal, oil and natural gas), while others choose to import alternative sources to reduce their reliance on one particular energy source (e.g. imported coal to prevent dependence on oil, especially after the 1970s). Nuclear energy has been the subject of intense political debate, and is simply no longer an option in some countries. Similarly, environmental considerations have led some countries to seek the development of renewable energy sources, particularly in more recent history.

2.2 Towards an Internal Market in Electricity

The change in political opinion *vis-à-vis* the electricity sector was the result of a number of factors, and many of these elements are reflected in the current Community policy towards the sector. First of all, the energy crises of the 1970s had caused unpredictable fluctuations in electricity demand and prices.⁵ Furthermore, the utilities' policy for the construction of new capacity had of course been based on the consensus which had existed in previous years on the inevitable march of increased demand, situated in a relatively benign political climate. As a result, countries such as France and Belgium found that they had over-invested in their nuclear programmes, and had significant excess production capacity.

The structure of the industry was exposed by the fall in energy prices in the mid-1980s, when the local or national obligations of the utilities prevented them from take advantage of such price reductions in raw materials. To many industrialists, this pricing issue gave them the impression that energy was just another commodity, for which price rather than security of supply was the paramount consideration; many felt that the existing structure was hampering a more efficient development of the supply of that commodity, which was so vital to almost any industrial process.⁶

On a more systemic political level, the approach based on nationalisation and public sector management had outstayed its welcome, particularly in the context of the European economic downturn of the late 1980s. Calls for privatisation and deregulation became commonplace, particularly in the aggressively free market atmosphere of the United Kingdom under Mrs Thatcher, and while the electricity sector was not high on the list for such treatment, 'in retrospect, it was perhaps inevitable that it would become caught up in the process'.⁷

EC energy policy in its modern form can be traced back to the Single Market initiative, launched by the Commission in its White Paper on June 15, 1985;⁸ its change in philosophy, shifting from trying to achieve free movement to trying to overcome the *barriers* in the way of free movement, marked a new way of examining the 'familiar litany' of the four freedoms,⁹ and was not lost on those concerned with energy in Europe. This was especially so since it was clear that a more effective internal market in the Community would benefit tremendously from reduced energy costs and the potential improvement in security of supply which a more integrated EC energy market was expected to bring.

⁴ *Union pour la Coordination de la production et du transport de l'électricité* (UCPTE).

⁵ F. McGowan, *The Struggle for Power in Europe* (London: RIIA, 1994), p. 19.

⁶ *Ibid*, p. 21, and see A. Kahane, 'World Electricity and Gas Industries: Pressures for Structural Change', (1990) *Annual Review of Energy*.

⁷ F. McGowan, *The Struggle for Power in Europe*, p. 23.

⁸ Com (85) 310, (1985).

⁹ *Ibid*, pp. 38-41.

The Commission Working Document on the Internal Energy Market of 1988, in line with the general philosophy of the Single Market Programme, identified the key precondition for progress in the energy industry as ‘the greatest possible transparency with regard to potential obstacles’.¹⁰ With specific reference to electricity, the Commission identified a number of potential obstacles to the creation of an internal electricity market, although the major focus was clearly on how the industry was organised in Europe. Aspects which were highlighted were those of unequal treatment of producer utilities as between Member States (such as fiscal and financial conditions, consent procedures for the authorisation of new construction, the cost of production depending on the cost of fuels where fuel choice policy varied significantly between Member States), the compartmentalisation of national markets due to the largely internal character of high-voltage interconnection systems, and supplies to users at the distribution, large consumer and ordinary consumer levels. Also included on the list were taxation differences and the relative opacity of electricity costs and prices, without which any workable system of competition would be extremely difficult to achieve.

The response to the Commission’s proposals was one of heated debate throughout the industry, and after the explanation above of the characteristics of the industry, one could be forgiven for thinking that the proposals would make no headway at all. However, such an assessment would fail to appreciate the dynamics of the industry during the 1980s and early 1990s. Previously, the issue of inter-Member State trade in electricity was no more than one of balancing the efficiency of neighbouring systems in the short-term, rather than trade in the traditional sense. This balance in trade did not persist. Different national policies on the industry, especially on the issue of the construction of new capacity, created a new environment, in which countries with significant excess production capacity came to fulfil the requirements of their neighbours, where the planning policy of the latter had failed fully to cover national requirements. This was especially true of the relationship between France and Italy, in which the latter became a significant net importer of power from France, although Belgium and Germany had also built up a significant export capability by 1992.¹¹ Overall trade rose from only 3% of Member States’ requirements in 1970 to nearly 7% in 1990.¹²

With new patterns of trade there almost inevitably come trade disputes, and in the electricity sector this meant a further knock to the previously cosy relations between national utilities. The root of these difficulties was the increasing electricity production surplus in France, due to massive investment in nuclear power in the 1970s and early 1980s. When capacity proved to have outstripped actual demand by some margin, *Electricité de France* (EDF) was forced to seek outlets for this surplus in foreign markets, to offset the huge capital charges it had to pay on the original financing of its generating plants. At the outset, this trade did not cause significant difficulties, since the French nuclear power plants had low operating costs, and thus produced electricity which EDF could offer to (for example) Italian importers at prices below those charged by Italian producers.

However, when non-neighbouring countries sought to purchase electricity for import from France, the spectre of transmission across the immediate neighbouring Member State was raised. This was the problem experienced by Portugal when it sought to buy French power, and was faced with what it considered to be exorbitant charges demanded by Spain to act as the intermediary. Only the threat of EC intervention caused the three states to come to agreement.¹³ A further problem arose when large German consumers tried to purchase electricity from France. Local utilities in Germany were strongly opposed to this plan, as they saw a reliable customer defecting to another supplier, to avoid the local utilities’ relatively high charges. In the event, EDF was not prepared to supply such foreign customers directly, but the protectionist attitude of the German local utilities

¹⁰ Commission Working Document on the Internal Energy Market, Com (88) 232, (1988), para. 34.

¹¹ Eurostat: *Energy Statistics*, (Luxembourg, 1992).

¹² International Energy Agency, *Energy Statistics of IEA Countries*, (Paris: OECD, 1993).

¹³ *Power in Europe*, 49, 11 May 1989.

clearly rankled.¹⁴ Ironically, both by initiating a more traditional form of trade in electricity and by providing the Commission with opportunities to get involved in the international workings of the industry, France had proved a major catalyst in creating a political reaction in the Member States to the Commission's internal energy market ambitions which turned out to be more favourable than might have been expected.

From the perspective of the period after Directive 96/92, it is possible to identify three phases in the creation of the internal market for energy, as indeed the Commission has done in its 'Report on the State of liberalisation of the energy markets' in 1998.¹⁵ The first phase consisted of the Directives on price transparency and transit through transmission grids,¹⁶ and both these initiatives are clearly identifiable in the 1988 Working Paper discussed above.¹⁷ While the essential nature of the price transparency Directive is not disputed, the 1998 Report admits that, despite the fact that the transit Directive did mark some progress, 'it has to be recognized (*sic*) that this trade has only been possible between monopolistic network and public utilities and not between consumers in one Member State and producers in another'.¹⁸ To address this difficulty, the question of third party access to the network would have to be tackled.

Phase two involved the adoption of the hydrocarbons licensing Directive, which essentially fulfils the function of allowing equal and non-discriminatory access to the activities of prospecting and exploring for, and the production of oil and natural gas within the territory of the EEA.¹⁹ These production elements in the electricity sector form part of the Directive on the internal market for electricity, which, along with the natural gas Directive²⁰ make up the third phase of the Commission's approach. This incremental approach clearly aimed at a gradual infiltration of Community law into the sector, with its final goal as a fully integrated energy market in the Community. To achieve this, long and hard negotiations on the terms on which the Member States would accept an internal electricity market would first have to be carried out.

3. The Negotiation of the Directive Concerning Common Rules for the Internal Market for Electricity.

In this section, a brief summary of the process will be given, insofar as it pertains to the development of the Single Buyer concept and the reciprocity notion to which this gave rise.²¹

The Original Proposal was based on the three main elements of the creation of a transparent and non-discriminatory system for granting production licences, the unbundling of management and accounting of the production, transmission and distribution functions of vertically integrated undertakings, and the introduction of limited Third Party Access (TPA) to the transmission and distribution networks. The theory behind TPA is to enable producers and consumers to conclude contracts directly with each other, thus furthering the objectives of competition and competitive prices. This access is important to encourage competition on both the consumers' and the generators' side of the electricity market,²² by exposing both ends of the market to such pressures.

¹⁴ McGowan, *The Struggle for Power in Europe*, p. 48.

¹⁵ Com (98) 212 (1998).

¹⁶ These are Directives 90/377/EEC (price transparency) (OJ 1990 L 185/16), and, in the electricity sector, 90/547/EEC (transit) (OJ 1990 L 313/30).

¹⁷ Com (88) 232 (1988), p. 72 para. 13, and p. 75 para. 18.

¹⁸ Com (98) 212 (1998), p. 4.

¹⁹ *Ibid.*, p. 4.

²⁰ Adopted by the Council in Energy Council Meeting No. 2092 of 11 May 1998 (see the Council's Internet site, at this address: <http://ue.eu.int/newsroom/main.cfm?LANG=1>).

²¹ On the negotiations, see P-A. Trepte, (1992) *Utilities Law Review* 18, and L. Hancher, (1992) *Utilities Law Review* 133, and (1993) *Utilities Law Review* 79, and (1994) *Utilities Law Review* 64, and (1996) *Utilities Law Review* 217 for summaries, comments and criticisms of the various drafts and proposed amendments.

²² A.M. Klom, 'Liberalisation', (1996) 14 *JERL* 1, p. 10.

The original proposal contained a form of obligatory or regulated TPA to electricity networks to facilitate such direct contractual relationships. However, both the ECOSOC²³ and the Parliament²⁴ were unhappy with the TPA proposal, and suggested amendments to the system.

In its Amended Proposal in 1993, as a concession to these concerns, the Commission introduced the idea of negotiated TPA to the networks.²⁵ This would involve direct sales by producers to eligible customers, and would then require the producer to negotiate with the network operator to gain access to the network to transport these supplies. On the generation side, the introduction of competition requires either the stimulation of imports through international interconnections or the establishment of other producers to compete within the system.²⁶ The proposal covered the procedures necessary for achieving the latter by means of a tendering or an authorisation procedure for the construction of new production capacity.

However, this new approach to TPA failed to win over all the Member States, and during negotiations in Council in 1994, the French Government put forward an alternative scheme for the TPA concept: that of the single buyer. In this proposed system, only one entity can purchase and sell electricity within the area in question: the single buyer. As a result of this, all producers must sell their electricity to the single buyer, and at the other end of the scale all consumers will have to meet their requirements through purchases from the single buyer. Further, the single buyer would be given control over calls for tender, and would only grant certain consumers the possibility of concluding contracts for the supply of power from abroad. It is clear that this system does not leave much room for any significant opening up of the electricity market for new producers, any more than it is likely to provide consumers with increased choice and greater efficiency savings. It is equally clear that the aim of the single buyer proposal was to allow a planned economy approach to persist in those countries which were not yet ready to abandon it.²⁷

The Council, the negotiations on the proposed Directive having stalled, asked the Commission to examine the single buyer proposal and the possible consequences for the market of the parallel existence of single buyer systems alongside more liberalised systems. This latter point raised for the first time the issue of reciprocity between the arrangements adopted in the different Member States, as the Commission recognised in its Working Paper on the Organisation of the Internal Electricity Market of 22 March 1995 (which dealt with the question of the single buyer).²⁸ 'In this context, it is necessary to verify that both approaches, *in the spirit of reciprocity*, lead to equivalent economic results and, therefore, to a directly comparable level in the opening of markets and to a directly comparable degree of access to electricity markets and that they conform with the provisions of the Treaty.'²⁹

After its investigations, the Commission concluded that, as it stood, the single buyer system could neither be considered equivalent to the proposed negotiated TPA system, nor could it be said to be in conformity with the provisions of the Treaty. Intriguingly for our purposes, the Commission stated³⁰ that 'reciprocity can only be assured between the systems if ... [b]oth systems [are] based on a common and transparent definition as regards categories of eligible customers. The opening of the market is realised via the coverage of these eligible customers'. Indeed, in its discussion of the two

²³ Opinion on the proposal for a Council Directive concerning common rules for the internal market in electricity (93/C 73/10), OJ 1993 C 73/31.

²⁴ Opinion of the European Parliament on the proposal for a Council Directive concerning common rules for the internal market in electricity, delivered on 17 November 1993 (referred to in Com (93) 643 final (1993): Amended Proposal on common rules for the internal market in electricity, p. 4, para. 6).

²⁵ Com (93) 643 final (1993): Amended Proposal on common rules for the internal market in electricity, p. 8 para. 11(c).

²⁶ A.M. Klom, 'Liberalisation', (1996) 14 JERL 1, p. 10.

²⁷ See A. Midttun, 'Electricity Policy within the EU: One Step Forward, Two Steps Back', Chapter IX in A. Midttun (ed.), *European Electricity Systems in Transition*, p. 272.

²⁸ SEC (95) 464 final, (1995), printed in *Europe Energy* March 24 1995, No. 443, Sec V.

²⁹ *Ibid*, emphasis added.

³⁰ *Ibid*, para. 7.

systems, the Commission recalled that the French proposal did not include distributors among the eligible consumers.³¹ Since it was of the opinion that this would be contrary to Article 30 EC, it made the assumption in its further analysis that the definition of eligible consumers under the two systems would be the same. At the time of writing, it seems highly likely that this definition will be anything but similar in some of the Member States.

As regards the EC Treaty, the Commission felt that the case law on Article 30 EC³² led to the conclusion that a system which results in imports being channelled so that only certain traders can affect them amounts to a measure having equivalent effect to a quantitative restriction on imports: eligible consumers would be excluded from direct imports, as they would never be anything but clients of the grid.

Despite its misgivings about the single buyer concept, the Commission recognised the need to get negotiations underway again, and thus proposed a number of amendments to the single buyer concept, 'to ensure the maximum of reciprocity and compatibility with the Treaty'. These amendments concerned, *inter alia*, the degree of choice available for eligible consumers, the import and export regime, the full unbundling of the different functions of the single buyer to ensure transparency, and the encouragement of competition at the level of production.

The question of TPA and eligibility continued to dog negotiations throughout 1995 and 1996. The key issue boiled down to the extent of market opening which was to be required in the first phase of liberalisation, and the definition of the consumers which were to be allowed to participate in that first phase. The complex compromise which was finally reached is embodied in Article 19 of the Directive. The idea is to ensure that the single buyer and negotiated TPA systems will lead to an equivalent level of market access. This is to be achieved in the first phase by basing the calculation of market access levels on final consumers of over 40 GWh per year,³³ which according to the Commission's latest calculations amounts to an average Community share of electricity market opening of 25.37%.³⁴ This is to be opened progressively after three years to 20 GWh, and after six years to 9 GWh.³⁵ Thus, after six years, approximately 33% of the market will be required to be open to competition.³⁶

However, in meeting this market opening requirement, Member States are free to specify which types of customers are to have access to the network, subject to the restriction that all those consuming more than 100 GWh must be included.³⁷ Similarly, even if distributors are not included as eligible in a given Member State, they must be granted access to supply the electricity contracted by customers who *are* designated as eligible. Thus, the precondition for reciprocity identified by the Commission in its 1995 Working Paper of a common definition of eligible customers is not present in the final text of Directive 96/92. Indeed, if one examines Article 19(5), it is clear that these potentially differing definitions of eligibility are vital in distinguishing the strong obligation of Article 19(5)(a) from the more discretionary possible application of Article 19(5)(b) to cross-border transactions for the supply of electricity.³⁸ Thus, it is clear that this issue of the definition of eligibility was (one of) the main reason(s) for the inclusion of a reciprocity clause in the Directive.

4. Competition and the Problem of the 'Free Rider'

³¹ *Ibid*, para. 18.

³² Specifically, case 104/75 *Officier van Justitie v. de Peijper* [1976] ECR 613.

³³ Directive 96/92/EC (OJ 1997 L 27/20), Article 19(1), second paragraph.

³⁴ Communication from the Commission OJ 1997 C 330/18 (also available on the Internet at this address: http://www.europa.eu.int/en/comm/dg17/perc_en.htm).

³⁵ Directive 96/92/EC, Article 19(2).

³⁶ Commission 'Guide to the Electricity Directive (still being developed)', (last updated 12 December 1997), taken from the Internet (address: <http://www.europa.eu.int/en/comm/dg17/elec/memor.htm>). Of course, a number of Member States have already gone, or plan to go, much further than this.

³⁷ Directive 96/92/EC, Article 19(3).

³⁸ See Section 6, *infra*, for an analysis of Article 19(5).

This problem with the definition of eligible customers is one factor in the overall problem which the single buyer proposal presented to the negotiators: could negotiated TPA and the single buyer exist alongside each other in a progressively liberalising European electricity market? The Commission's 1995 Working Paper discussed above had highlighted many of the difficulties, and had introduced the concept of reciprocity as an essential element in the debate. Before going on to discuss the general concept of reciprocity in EC law, and its specific application in the electricity sector, I feel it would be useful to provide a brief sketch of the problems of the co-existence of the two broad types of system which the Directive allows. In this, I will draw on the work of Klom to provide the basic situation.³⁹

Essentially, the problem arises where some countries liberalise while others keep their markets closed. Government protection in the 'closed' Member State allows the industry there to modernise and build up competitive advantages which allow them to compete effectively in global markets, *without* suffering any competition in their domestic markets. Hence, the term 'free rider' is used to describe the free ride to profits which the closed industry hitches on the back of the liberalisation in other Member States. Klom gives the pertinent example of EDF, with its total monopoly on the French power market and its recent forays into markets in Argentina, Australia and Sweden,⁴⁰ as well as its (1996) 5% share of supply on the English market,⁴¹ all without having had to open up its own home market to outsiders.

From this discussion, it is clear that the problem for the other countries in trade is one of the absence of *reciprocity of access*. The competitive playing field becomes tilted towards those who have both access to foreign markets and protection at home. This can bring benefits to the Member State which chooses not to liberalise, as long as they continue to innovate, and as long as their trading partners will tolerate the playing field being tilted in this way. However, if all were to go in search of these benefits, then a return to protectionism along national lines would surely be the outcome, which runs directly contrary to the policy of the EC, so clearly developed by the work of the Council and the Commission, and the case law of the Court of Justice.

Two basic practical difficulties can thus be identified. First, the industry in liberalising Member States will be deprived of access to the markets in Member States which choose the closed option. This hinders the development of cross-border trade, and shelters the closed market from the benefits which competition is intended to bring: lower prices to consumers and greater efficiency in the industry in general. Secondly, as long as liberalised and closed systems co-exist, the liberalising Member States may be unhappy if they have to allow access to their home market to power from a closed market. This could distort the development of competition in the liberalising Member State, and result in an export of wealth to the closed Member State at the expense of the economy of the liberalising Member State.

In the electricity context, Klom feels that it is clear that the single buyer counter-proposal 'forms a perfect example of a strategy of non-liberalisation linked with technological innovation'.⁴² While the outcome of the negotiations, with the various amendments to the single buyer proposal, means that the closed - liberalising distinction is not as clear-cut as in the conceptual discussion above, the basic problems which that discussion has identified do remain. Member States which were favourably disposed towards a liberal organisation of the electricity sector were certainly annoyed that their industry would largely be deprived of the ability to export power to closed Member State systems, but it seems that their real fear was being unable to *prevent imports from*

³⁹ A.M. Klom, 'Liberalisation', (1996) 14 *JERL* 1.

⁴⁰ *Ibid*, p. 2; it should be noted that EDF has since withdrawn from its involvement in the Swedish *Sydkraft*, at least in large part.

⁴¹ *Ibid*, p. 4.

⁴² A.M. Klom, 'Liberalisation', (1996) 14 *JERL* 1, p. 11.

closed systems into their own more liberal structures.⁴³ To assuage these fears, the French proposed the concept of positive reciprocity, so as to defend their single buyer concept in the negotiations for the Directive. (What exactly was meant by ‘positive reciprocity’ is not altogether clear: sections 4 and 5 below discuss reciprocity, both in general and in the context of the internal market in electricity. The result was the inclusion of Article 19(5) in Directive 96/92, the ‘reciprocity provision’.) For those familiar with the history and legal development of the EC, the very existence of a reciprocity clause may come as something of a surprise. In the next section, therefore, I will provide some previous examples of reciprocity and the policy which lay behind the use of such clauses. This will be then be followed by an analysis of Article 19(5) of Directive 96/92.

5. Reciprocity: the Concept and its Objectives.

5.1 Previous Use of the Concept by the EC

Reciprocity made an appearance in both the banking and public procurement legislation under the 1992 programme, in the context of relations between the EC and entities of third states. The position under the Second Banking Directive⁴⁴ has received the most attention, given the widespread international criticism which the original proposals attracted.⁴⁵ These first proposals required all Member States to inform the Commission of any request for the authorisation of the establishment of a third state credit institution in that Member State. This was to give the Commission the opportunity to examine whether Community institutions received reciprocal treatment in that third state. During this examination, the Member State would have had to suspend its authorisation procedures pending a Commission Decision on the issue. The key question, of course, was exactly what this notion of reciprocity entailed. Was the Commission demanding ‘merely’ formal national treatment, or did it expect EC companies to be guaranteed substantive equality of opportunities?⁴⁶ Fear of the latter interpretation prompted some third states such as the USA to argue that reciprocity was to be contrasted with national treatment, the former signalling a retreat to protectionism and a somewhat arrogant presumption that the EC could use it to press for changes in the internal rules of another political entity.⁴⁷

In the end, it seems that the rules were watered down in response to the critique. The Second Banking Directive now applies a differentiated approach to these questions. In Article 9(3), reciprocity through equivalent market access is sought by the means of the Council mandating the Commission to enter into negotiations with the third country in question to secure this. Article 9(4) seeks the more modest objective of *de facto* national treatment, for which the Commission can negotiate without any Council mandate. Finally, the whole system no longer involves the automatic suspension of Member State authorisations: the reporting obligation on the Member States is limited by Article 9(1) to general difficulties experienced by companies of that Member State in the third country. This increased bilateralism and emphasis on negotiation with the third country has served to remove much of the uncertainty regarding the scope of the reciprocity concept.⁴⁸

However, for our purposes, more interesting is the Commission’s response to the criticism levelled at its original proposals, and its policy justification for the use of the reciprocity concept. It clearly saw reciprocity as a way to strengthen the multilateral trading system, especially where there

⁴³ L. Hancher, ‘Delimitation of Energy Law Jurisdiction: the EU and its Member States: From Organisational to Regulatory Conflicts’, (1998) 16 *JERL* 42, p. 55.

⁴⁴ Directive 89/646/EEC, OJ 1989 L 386/1.

⁴⁵ See P. Eeckhout, *The European Internal Market and International Trade: a Legal Analysis*, (Oxford: Clarendon Press, 1994), Chapter 2 (hereafter *The European Internal Market and International Trade*).

⁴⁶ G. Wils, ‘The Concept of Reciprocity in EEC Law: an Exploration into these Realms’, (1991) 28 *CMLRev* 245, p. 265.

⁴⁷ *Ibid*, p. 267.

⁴⁸ *Ibid*, pp. 268-9.

were, as yet, no multilateral rules in a particular sector. The EC would strive to achieve greater liberalisation in international negotiations (then being held under the Uruguay Round), *but* until such agreements existed, it felt that it would be premature to grant the benefits of internal EC liberalisation to non-Member States. Thus, the reciprocity concept was employed. This aim was reflected in the final text of the Directive, where it is stated in the Recitals that the aim was ‘not to close the Community’s financial markets but rather, as the Community intends to keep its financial markets open to the rest of the world, to improve the liberalisation of the global financial markets in other third countries’.⁴⁹

Seen in the context of the GATS negotiations, the EC was keen not to weaken its negotiating position, and indeed saw reciprocity as a means of underlining its commitment to liberalisation in pushing for the adoption of a GATS during the Uruguay Round. A similar rationale is evident in the inclusion of reciprocity in the field of public procurement, as the EC wished to safeguard its position in the negotiations for the extension of the Government Procurement Code to the ‘excluded sectors’.⁵⁰ Thus, Article 29 of Directive 90/531⁵¹ allows the rejection of a tender originating for more than 50% from a third state if the EC has not concluded an agreement ensuring comparable and effective access for EC companies to the markets of the third country.

From all of this, it can be concluded that the aim of reciprocity clauses can be said to be a politico-economic one: fostering a climate where liberalisation of markets is the prevailing trend. This approach resulted in pressure on third states to follow the EC in liberalising various sectors, and also allowed the EC to pursue such liberalisation, safe in the knowledge that it had instruments at its disposal to ensure that it could control foreign incursions which tried to take advantage of EC liberalisation from their own secure, home bases.⁵² In the international context, support for such a conditional approach could be drawn from the Tokyo Round Codes, whose advantages are extended only to the countries which signed them. Their conditional character was tolerated in the multilateral trading system as a useful device for getting around the free-rider problem discussed above.⁵³

5.2 The US-Canadian Experience

However, this international rationale for adopting reciprocity clauses has not always met with significant support, despite a growing international consensus on introducing competition into the electricity sector.⁵⁴ In the USA, for instance, the Federal Energy Regulatory Commission (FERC) was granted the power to impose open access on Federally regulated transmission lines in Section 211 of the Energy Policy Act of 1992. Part of its strategy in using competition as a tool to provide power for consumers at the lowest possible cost, while ensuring adequate supplies, has been to facilitate and encourage the formation of Regional Transmission Groups (RTGs).⁵⁵ By pursuing reciprocity as a policy both within and between these RTGs, the FERC has sought to introduce competition to the area covered by the RTG itself and to access for RTGs to each other’s networks.

⁴⁹ Directive 89/646/EEC, 21st Recital.

⁵⁰ P. Eeckhout, *The European Internal Market and International Trade*, p. 307ff.; for further details on the public procurement issue in this context, see, *ibid*, Chapter 9.

⁵¹ Directive 90/531/EEC OJ 1990 L 297/1.

⁵² See Section 3.5 above for a general explanation of this problem.

⁵³ P. Eeckhout, *The European Internal Market and International Trade*, pp. 362-366.

⁵⁴ See, for example, the OECD Report on the Application of Competition Policy to the Electricity Sector, OECD/GD (97) 132, (Paris: OECD, 1997).

⁵⁵ For an interesting discussion of this latest trend and its implications for competition law, see J.R. Attwood, ‘Antitrust, Joint Ventures and Electric Utility Restructuring: RTGs and Poolcos’, (1996) 64 Antitrust LJ 323.

As Sanderson has commented,⁵⁶ this raises the question whether the logic of reciprocity as applied by the FERC also extends from an inter-state to an *international* context - viz the electricity trade between Canada and the USA. For him, it seems likely that introducing reciprocity in the context of international trade will have an effect contrary to the goal of lowering costs to US consumers through enhanced competition. 'If the demand for reciprocity leads Canadian regulators to limit Canadian exports either by introducing obstacles to membership by Canadian utilities in RTGs or by failing to introduce deregulation in Canada which results in what the US regulators think permits comparable access to Canadian markets, a source of supply and competition will be lost'.⁵⁷ Indeed, the use of reciprocity as a tool to lever open the markets of other US states aims to bring the benefits of deregulation to consumers in the state upon which reciprocity is being imposed. This 'justification is entirely lacking in the context of imports from Canada. It is not the function of US regulators to ensure least cost energy to Canadian consumers'.⁵⁸

5.3 The European Community Context

Whether or not one agrees with Sanderson's analysis of the reciprocity phenomenon in the Canada-US context, one may also ask whether the objections raised above have any force in the context of the European Community. Sanderson's essential point is that a *federal* authority of one sovereign state has no business trying to procure structural alterations in the electricity supply industry in another sovereign state. It seems that a strictly legal approach would suggest a rejection of reciprocity as a concept which could ever apply within the EC. The rights and obligations under the EC Treaty fall equally on all the Member States, and non-compliance by one of them has never been accepted as a ground for another to refuse to grant equal and non-discriminatory treatment as the Treaty requires. Article 170 EC is the closest which the EC Treaty comes to reciprocity in the 'sanction of obligations',⁵⁹ but in practice it is almost never used, with the Article 169 procedure and the threat of (often illegal) retaliation playing more important roles.

Yet as Klom is at pains to point out,⁶⁰ this is reciprocity from the legal point of view. The discussion of reciprocity in the context of the EC internal market for electricity should instead be seen as an economic issue. As the Commission itself commented in its 1995 Working Paper on the single buyer concept, reciprocity here is about equivalent market access and market opening, leading to equivalent economic results for all concerned. In this context, it seems to me that it is much more clearly part of the EC Commission's 'federal' (if I dare to use the word) yet *sui generis* mandate to promote general liberalisation of the electricity sector, especially given growing Member State acceptance of the necessity of such liberalisation. By providing reciprocity safeguards for those Member States which wish to follow the spirit of the gradual liberalisation embodied in the Directive, it can be said that the general policy aims identified in the earlier uses of reciprocity in relations with third states are also at work here. The liberalising parties gain a degree of protection while the more conservative Member States are placed under a certain degree of pressure to increase the pace of their own liberalisation. At least that seems to have been the theory. Whether this is the practical outcome of Article 19(5) is another matter altogether.

6. How will Reciprocity Operate under the Directive for the Internal Market in Electricity?

⁵⁶ C. Sanderson, 'Reciprocity as a Condition Precedent to Canada-US Trade in Electricity', (1995) 13 *JERL* 1, p. 7; Sanderson is a Canadian practitioner trying to fathom the thrust of US regulatory policy (see the note on p. 1 of his article).

⁵⁷ *Ibid*, p. 9.

⁵⁸ *Ibid*, p. 10.

⁵⁹ Wils's phrase (in (1991) 28 CMLRev 245, pp. 260-262).

⁶⁰ A.M. Klom, 'Liberalisation', (1996) 14 *JERL* 1, p. 7.

6.1 An Attempt at an Interpretation

6.1.1 General Points:

After the theoretical discussion of the previous section, one might think that the actual interpretation of the reciprocity provision would not present serious problems, given the clear policy choices which seemed to underlie it. However, things are rarely as straightforward as we would wish. The least controversial point here is Article 19(5)(a), which provides a firm prohibition of any restrictions of trade where a customer is eligible in both of the systems involved. This is in line with the Commission's observation in its 1995 Working Paper on the single buyer concept that 'reciprocity can only be assured between the systems if ... [b]oth systems [are] based on a common and transparent definition as regards categories of eligible customers. The opening of the market is realised via the coverage of these eligible customers'. Where these definitions do coincide, an open market requires that no discrimination exists between domestic and cross-border contracts for the supply of electricity.

By contrast, Article 19(5)(b) raises more complicated questions. The general compromise on market opening has already been discussed above,⁶¹ and it is worth keeping in mind the central position of the market opening target of 25.37%. Article 19(5) itself opens with the words 'To avoid imbalances in the opening of electricity markets', which suggests that in the absence of any such imbalance (i.e. where the two Member States involved have achieved the same level of market opening) its provisions will be inapplicable. Thus, a first precondition for the application of the provision seems to be that the Member State which wishes to rely on it must have a higher level of market opening than the other Member State concerned.

Member States may choose exactly how their individual systems will fulfil this market opening requirement, and structural differences in the markets of the various Member States will lead to a position where the actual threshold of eligibility for consumers may vary between Member States in achieving that percentage. This may lead to the situation envisaged in Article 19(5)(b), where a customer will be eligible in one Member State but not in another. As the Commission notes in its 'Guide to the Electricity Directive',⁶² to reach the threshold one Member State may have to set the threshold at consumption of 30 GWh, while another might be able to set it as high as 40 GWh. In that case, a customer could be eligible in the former country with a consumption level of 35 GWh, but this would not qualify him in the latter country.

Also of crucial importance here is the requirement that any request to the Commission under Article 19(5)(b) must come from the '*Member State where the eligible customer is located*'.⁶³ This is vital when we come to analyse the possible situations which may fall under the provision, and how it may operate in practice.

6.1.2 The Particular Situations:

Let us imagine two Member States (MS_1 and MS_2), where MS_1 has a higher level of market opening than MS_2 . Let us further imagine two customers, C_1 and C_2 , located in MS_1 and MS_2 respectively. For each customer there are the following possibilities:

- (I) Eligible in both MS_1 and in MS_2 ;
- (II) Eligible in MS_1 but not in MS_2 ;

⁶¹ See Section 3, *supra*.

⁶² European Commission DG XVII, 'Guide to the Electricity Directive (still being developed)', (last updated 12 December 1997), taken from the Internet (address: <http://www.europa.eu.int/en/comm/dg17/elec/memor.htm>), (hereafter, the 'Guide').

⁶³ My emphasis.

(III) Eligible in MS₂ but not in MS₁.⁶⁴

Situation (I) falls under Article 19(5)(a) and has been discussed above. Situation (II), however, is new. For C₁, it may lead to a refusal by MS₁ to allow imports from a less liberalised system or to a refusal from MS₂ (or the transmission network operator there) to supply the electricity contracted for on the ground that C₁ is not an eligible customer under its legislation.⁶⁵ In either case, for C₁ to have any hope of Commission intervention in its favour, a request must be made by MS₁ to the Commission under Article 19(5)(b), since that is the 'Member State where the eligible customer is located'. A Member State is unlikely to refer its own conduct to the Commission for scrutiny, and if its policy is one of keeping out such 'less-liberalised imports' then it is hardly going to give the Commission the opportunity to overturn that policy by making such a reference concerning MS₂'s conduct.

This conclusion would seem to be at odds with the role assigned to the Commission under Article 19(5)(b) of making an assessment of 'the situation in the market and the common interest'. If a Member State can so easily avoid making such requests, then the Commission will rarely (if ever) be able to carry out this function. Of course, not all Member States will be in a position to seek to refuse such imports, as some are increasingly dependent on imports to meet national consumption requirements. In these cases, therefore, the first risk for C₁ (of MS₁ refusing to allow importation) will not exist, and the likelihood of a request to the Commission to examine the conduct of MS₂ will be much greater. In this way, the reciprocity clause may actually aid imports from closed to open electricity systems,⁶⁶ which is quite ironic given the arguments for the provision (on encouraging liberalisation while allowing a certain measure of protectionism) canvassed above.

By contrast, C₂ is unlikely to have much joy in obtaining electricity by importing it from abroad. One of the main points of keeping MS₂'s system closed is to ensure a steady national market for the industry in MS₂, and to allow for long-term planning in the sector on this basis; the argument is that this would be undermined if C₂ could circumvent the national definition of customer eligibility by means of Article 19(5)(b). Thus, MS₂ is almost certain not to make a request to the Commission against itself, and contrary to its own policy priorities. Of course, this critique is based on the assumption that customers have no meaningful recourse against their own Member States for acting in this way, but all that can be said here is that the Directive certainly does not provide clear guidance as to how such disputes may be settled.⁶⁷

6.1.3 National Rules on Dealing with such Complaints:

⁶⁴ Naturally, situation (III) will be rare: since the statistics show that the overall level of market opening in MS₁ is higher, it stands to reason that most eligible customers in MS₂ would be eligible in MS₁, as would a more or less significant proportion of non-eligible MS₂ customers.

⁶⁵ In case it is unclear how a Member State's government could get involved in this process, given the (occasional) incidence of privatisation, or, more commonly, at the very least unbundling, of functions in the electricity industry which will accompany the implementation of the Directive, the Dutch legislation may serve as a clarification. Article 28(1) of the Dutch Electricity Act 1998 provides that the Manager of the High Voltage Network shall report every three months to the Minister of Economic Affairs on all the applications it has received to transport both imports of electricity into and exports of electricity from the Netherlands. The Act goes on to prohibit the Manager of the network from offering to transport such electricity where a Dutch customer would not be eligible in the state of export (Article 30), subject to the Minister's power under Article 32(1) to grant dispensation from that prohibition under certain conditions.

⁶⁶ See, in the same vein, L. Hancher, (1996) *Utilities Law Review* 217, p. 218.

⁶⁷ The independent competent authority which Member States must establish pursuant to Article 20(3) does not seem to have been intended to cover such issues, especially since its powers *vis-à-vis* the national government will depend upon the mandate given to it by that government in the enabling legislation. Article 20(3) provides that the authority must settle disputes concerning (*inter alia*) refusal of access and refusal to purchase, but whether this would cover the Article 19(5)(b) situation is not at all clear.

Perhaps the most satisfactory solution is to be found in the Court's case law on national remedies for the enforcement of Community law. Even if this issue of challenging a Member State's refusal to make such a request does fall under national administrative law, those legal remedies and procedural rules must be *adequate* and *effective* in securing Community rights.⁶⁸ In *Heylens*, the Court held that 'since free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community, the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right'.⁶⁹

While it may be difficult to assert with certainty that the same argument may be made here for the right to free movement of goods, given that the Directive itself does not provide for the full free movement of goods and that any right of the complainant is dependent on the Commission's good will under Article 19(5)(b), I would suggest that the *interest* of the complainant in having such a request made to the Commission has a sufficient connection to Article 30 EC issues to warrant an approach similar to that taken in *Heylens*. Taking this step in the argument allows us to avoid lengthy and rather philosophical disputes over what the *nature* of the complainant's right is under the Directive (and thus how far national law need go to protect such a right conditional on the exercise of the Commission's discretion in the complainant's favour). If this reasoning is persuasive, then it seems that national law will have to provide an adequate opportunity for an individual complainant to challenge its Member State's refusal to make such a request before a national court.⁷⁰

In the final analysis, it seems that the drafting of Article 20 was not specifically designed to deal with the settlement of disputes arising from the operation of the reciprocity provision, or at the very least that it is not (without more) well-suited to the settlement of such disputes. This may leave a sizeable task to national procedural law to fill the gaps left by the mechanisms envisaged under the Directive.

6.2 The Role of the Commission

Leaving aside the intricacies of how a request may reach the Commission, the question remains: what powers does the Commission actually have under the provision? The first important element is the word 'may', which indicates a Commission discretion in deciding whether or not it will 'oblige ... the refusing party to execute the requested electricity supply'. This implies that it will be difficult to succeed in any challenge to a Commission decision under Article 19(5)(b), in view of the Court of Justice's reluctance to second-guess the Commission's determinations in matters of complex economic or factual assessments.⁷¹ In exercising this discretion, the situation in the market must be taken into account, which is presumably a reference to the respective levels of market opening achieved by the two Member States in question, as well as any other relevant factors. Further, the common interest must be considered by the Commission, which will no doubt include elements

⁶⁸ Case 14/83 *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891, para.s 23-28.

⁶⁹ Case 222/86 *UNECTEF v. Heylens* [1987] ECR 4097, para. 14.

⁷⁰ In making these arguments, I realise that the Court's more recent case law in this area has suggested a retreat from the principles which seemed to underlie *Von Colson* and its progeny (see P.P. Craig and G. de Búrca, *EC Law: Text Cases and Materials*, (Oxford: Clarendon Press, 1995), pp. 205-223, M. Hoskins, 'Tilting the Balance: Supremacy and National Procedural Rules', (1996) 21 ELRev 365, and most recently S. Prechal, 'Community Law in National Courts: the Lessons from Van Schijndel', (1998) 35 CMLRev 681). However, I feel that these cases do not concern national provisions which render the grant of a remedy impossible, but rather rules which detract from the adequacy or effectiveness of the remedy (see Craig and de Búrca, *supra*, p. 213). While the issue of detracting from adequacy and effectiveness will no doubt arise later in connection with these questions under the Directive for the internal market for electricity, I am here concerned to establish that a remedy will (have to) exist in the first place.

⁷¹ See the Court's case law on the grounds for illegality of Community acts (P.P. Craig and G. de Búrca, *EC Law Text, Cases and Materials*, (Oxford: Clarendon Press, 1995), pp. 501-5), and on the non-contractual liability of the Community (*ibid*, Chapter 12).

such as the preservation of the integrity of the gradual process of liberalisation, as well as ensuring that the general rules of the Treaty are observed.

After this assessment, a literal reading of the wording of the provision suggests that the Commission has no power at its disposal other than to require that the customer be supplied as he requests. This would suggest that the Commission can only require a Member State to allow the transaction to go ahead, which does not cover what I identified earlier as the main fear of the more liberalisation-inclined Member States: how to keep imports from less liberalised systems *out*. Certainly, the wording of Article 19(5)(b) does nothing to suggest that it gives either the more liberalised Member State the power to prevent such imports or the Commission the power to sanction such a move. In this discussion, it should be kept in mind that Article 3(1) of the Directive provides that '[t]he two approaches to system access referred to in Articles 17 [negotiated TPA] and 18 [single buyer] must lead to equivalent economic results and to a directly comparable degree of access to electricity markets'. The Commission is of the opinion that the supervision of the implementation process in the light of Article 3(1) is its task, and not that of the Member States.⁷²

Once again, a number of situations can be distinguished here. First, a Member State which has met the market opening threshold may wish to prevent imports from a country which has not (yet) achieved that level. While Article 19(5)(b) does not seem to provide any opportunity for the liberalising Member State to close its frontiers (with or without Commission help), it seems that an Article 169 EC action against the defaulting Member State may be possible. However, this will provide little comfort to the liberalising Member State in the meantime: as mentioned above, in legal terms, that Member State is not entitled to take reciprocal measures simply because the other country has failed to comply with its obligations under the Directive.

Secondly, if both Member States in question have met the target of 25.37% opening, but one has voluntarily gone beyond this minimum level by lowering its customer eligibility threshold further, a similar situation of 'imbalance' in market opening will exist. It seems that Article 19(5)(b) *will* allow the Commission to order the less liberalised country to take supplies if it deems it appropriate after its assessment of the situation.⁷³ As in the first situation, however, the wording of Article 19(5)(b) seems to offer no solace for a Member State trying to keep out imports of electricity from its less liberalised neighbour(s). However, in its 'Guide', the Commission has suggested that 'then reciprocity could, in certain cases, be claimed' *so as to allow the more liberalised Member State to refuse access to a supplier from the less liberalised Member State that wishes to supply a customer eligible in the former Member State, but not eligible in the latter*.

This interpretation certainly accords with the expectations of the Member States who feared these problems of imbalanced market opening, but quite *how* the Commission thinks that this result is to be achieved under the Directive is not explained in the 'Guide' in any detail. Given that the wording of Article 19(5)(b) does not confer any such power on the Commission to sanction such restrictions, it seems that the only way that they can come about is by unilateral Member State action,⁷⁴ with a refusal by the Commission to order that unilateral action to be brought to an end in the event of a request submitted to it under Article 19(5)(b).⁷⁵ The fact remains, however, that the task of conducting the analysis of the market and the common interest in these matters does seem to have been given to the Commission under Article 19(5)(b). This in itself may be a further argument strengthening any challenge made before a national court by a complainant against its own Government's refusal to make a request to the Commission.

⁷² In its 'Guide to the Electricity Directive', n. 62, *supra*.

⁷³ See L. Hancher, (1998) 16 *JERL* 42, p. 60 for the contrary view.

⁷⁴ See Section 6.2, *infra*, for an analysis of such individual Member State action.

⁷⁵ Whether such a refusal to act by the Commission would be challengeable by an individual before the Court of First Instance is not clear, although general principles would suggest that it would be. However, the likelihood of such challenges being brought may also be small.

The third possibility here is the situation where, although both Member States in question have reached the minimum 25.37% market opening requirement, one of them feels that its market is *de facto* more open than that of the other. This could be put down to a difference in the structure of the two markets in question, for example. According to the Commission,⁷⁶ Article 19(5)(b) concerns only the issue of legal eligibility to purchase freely, and makes no reference to qualitative considerations such as market structure. However, since Article 3(1) contains an obligation on the Member States to achieve equivalent economic results in the implementation of the Directive, the Commission is of the opinion that it may seek to enforce this provision in such a situation, either on its own initiative or at the request of a disgruntled Member State. Here again, however, the remedy would appear to be an enforcement action under Article 169 EC, which would not offer the complainant Member State any opportunity to deny the imports access to its market.

All in all, the wording of the provision is sufficiently imprecise and at odds with the expectations of many of the Member States which pushed for its inclusion that its operation can at present only be shrouded in uncertainty. So much so, indeed, that some Member States have adopted, or seem to be considering the adoption of, their own reciprocity provisions in their national implementing legislation.⁷⁷ Before discussing the position of such national provisions, as well as the status of Article 19(5)(b) itself, the next sub-section seeks to identify the likely situation in practice as regards inter-Member State trade and reciprocity.

6.3 The Potential for Practical Difficulties Which May Require Recourse to Reciprocity

Of course, all of these interpretative difficulties would be of little import if in practice the kind of issues which they raise simply did not arise. Unfortunately for those who will have to interpret and apply the Directive, such difficulties seem likely to occur in at least a few cases. A study of the existing inter-Member State high voltage transmission lines, coupled with the proposed programmes of the various Member States for the implementation of the Directive, suggests a number of possible trouble spots. The relevant parameters for this study are the location and number of interconnections between Member States, the proposed levels of market opening and the thresholds for consumer eligibility in the programmes of the Member States.⁷⁸

The relationship between Germany and France in this sector has been an interesting one in the past, and one can also envisage the United Kingdom and France having a few discussions on the subject when the French approach becomes clear. Of course, the scope for such conflicts will also depend on questions of trade necessity (for example, Italian imports from France to be able to satisfy national demand) and the capacity of the relevant interconnectors. Indeed, in view of the fact that lack of capacity may be a legitimate reason to deny access to a national network under the Directive,⁷⁹ this may become one of the key areas in electricity trade in the future.⁸⁰ In assessing the significance of these examples, it should be remembered that they do not take into account a number of features vital to the practical operation of the electricity sector (such as transit through third states, and the issue of swaps of electricity contracts). In a paper of this size, it proved impossible to go into the *minutiae* of the trade in this way. However, it is important to realise that a complete analysis of the potential for the application of any reciprocity provisions (whether on the Community or the national level) must take into account these other features.

⁷⁶ In the Guide (see n. 62, *supra*).

⁷⁷ See the Dutch Electricity Act 1998, referred to in n. 65, *supra*.

⁷⁸ The data used in this discussion is drawn from the Commission's Report on the State of liberalisation of the energy markets (Com (98) 212 (1998)) and from DG XVII's Information Document on 'Trans-European Energy Networks: Policy and Actions of the European Community', (Luxembourg: EC Commission, September 1997).

⁷⁹ Under Article 17(5) (negotiated TPA) or Article 18(4) (single buyer).

⁸⁰ See Hancher, (1998) 16 *JERL* 42, p. 53, who refers specifically to the connections between Italy and the rest of Europe, and between the United Kingdom and France.

7. The Legality of Reciprocity Provisions Under European Community Law.

7.1 *Is the Directive Itself Compatible with Community Law?*

7.1.1 The thresholds:

Concluding the negotiations for the Directive required a complex compromise based upon the level of market opening to be achieved at each stage, and the ability to define those consumers who were to make up that part of the market which was to be opened. By definition, this involved setting thresholds of market opening to be achieved, which clearly do not provide for free movement of electricity between Member States (as Articles 30 - 36 EC would seem to require), nor for the freedom to provide the service of supplying electricity (which is the aim of Articles 59 *et seq*). Are these thresholds, which form the basis of the reciprocity provision to be considered below, themselves permissible under EC law?

Given the sensitivity of these negotiations, and the difficulties experienced before a compromise was reached, it is not surprising that the Commission does not deal with this question in its 'Guide'. However, it does refer to the principle of 'progressivity', 'according [to] which Member States may be allowed to follow a step-by-step opening of the market', which suggests that the issue of a breach of Article 30 EC was never seriously considered as a difficulty for the Directive. Indeed, while one could insist on a strict interpretation of this fundamental freedom and its application to internal electricity market, it seems that the present climate is likely to lead to a more relaxed view. If we recall the political, economic and structural situation in the sector over many years, then a gradual opening of the market would appear to be the only way to keep all the Member States and entities concerned happy, while achieving an increasing degree of liberalisation.

This general trend of tolerance is also visible in the recent case law of the Court of Justice in the sector. In its recent decisions in the series of cases concerning electricity and/or gas import/export monopolies (the *Energy Cases*),⁸¹ and in its *Franzén* judgment,⁸² the Court refrained from endorsing the views of the Commission on the application of the Treaty's rules to such monopolies.⁸³ Through its treatment of Articles 37 and 90(2) EC in the *Energy Cases*, the Court ruled that the Commission had not made out its case that such import/export monopolies were contrary to the Treaty. It did this by ruling that Article 90(2) could be applied whenever the enterprise concerned would be unable to fulfil its public duties (rather than the Member State having to show that the undertaking's financial viability would be threatened), and by holding that, to show that the granting of the rights was disproportionate, it was for the Commission to demonstrate that suitable alternatives existed which would not endanger the performance of those public service duties. This cautious attitude was significantly less progressive than many had hoped, and gave a clear indication that the Court was not prepared to take on a quasi-legislative role where the political institutions had failed to take certain measures.⁸⁴

While two Commission officials from DG IV have suggested that the Court's 'relatively severe treatment' of the Commission's arguments in these cases 'may have its origins in the desire not to interfere with the legislative developments which had taken place between the start of the

⁸¹ Cases C-157/94 *Commission v. Netherlands* [1997] ECR I-5699, C-158/94 *Commission v. Italy* [1997] ECR I-5789, C-159/94 *Commission v. France* [1997] ECR I-5815, and C-160/94 *Commission v. Spain* [1997] ECR I-5851 (judgments handed down on 23 October 1997).

⁸² Case C-189/95 *Criminal Proceedings against Harry Franzén* [1997] ECR I-5909 (judgment of 23 October 1997).

⁸³ See the forthcoming annotation by P.J. Slot in (1998) 35 CMLRev.

⁸⁴ *Ibid.*

procedure and the delivery of the judgments',⁸⁵ it seems likely that this attitude of the Court will also be significant for the interpretation of the Directive on the internal electricity market.⁸⁶ In this cautious vein, therefore, it seems likely that the Court would view the gradual opening of the electricity markets of the Member States (and the attendant thresholds which we are concerned with here) as progress towards achieving the goal of Article 3(g) EC of 'a system ensuring that competition in the common market is not distorted' as well as that of general liberalisation, and thus not incompatible with the Treaty's rules.

7.1.2 The Reciprocity Provision:

Generally speaking, reciprocity is not an acceptable principle in EC law. The Court of Justice has repeatedly made it clear that the obligation to comply with Community law is not a reciprocal one, dependent on other Member States also being in full compliance. Cases such as *Commission v. Italy*⁸⁷ and *Commission v. United Kingdom*⁸⁸ have made it clear that '[u]nder the legal order established by the Treaty, the implementation of Community law by Member States cannot be made subject to a condition of reciprocity. Article 169 and 170 of the Treaty provide a suitable means of redress for dealing with a failure by Member States to fulfil their obligations under the Treaty'.⁸⁹

In the 'Guide',⁹⁰ the Commission explains that the combination of the principles of progressivity (discussed above) and subsidiarity (whereby Member States may choose to open the market more rapidly) 'may result result in serious imbalances of rights and obligations between electricity companies of different Member States'. Therefore, it considers that a reciprocity clause such as Article 19(5)(b) is justifiable under the Treaty, 'insofar as this provision is *transitional* and *of reasonable duration* and is *in keeping with a progressive pattern*'. According to the Commission, Article 19(5) fulfils these conditions, and thus is seen as compatible with the Treaty.

In this context, it should be borne in mind that the Directive itself sanctions the possibility of achieving only limited market opening. If the analysis in Section 6.1.1 above is persuasive, then this sanction is (or will be held to be) compatible with the Treaty. This being so, Klom's emphasis⁹¹ on the *economic* rather than the legal nature of the reciprocity clause becomes clear. There may be situations where the clause may be enforced as against a Member State which has in fact fulfilled the minimum requirements under the Directive, and which is thus not technically in breach of any *legal* obligation under Community law. However, the provision empowers the Commission to order that a transaction be carried out if the *economic* situation on the market, in conjunction with the general interest, is in favour of such an order. Thus, the reciprocity provision aims at achieving a balance by requiring the less liberalised countries to be more open.⁹² Thus, for the purist, this may all seem incompatible with Article 30, *stricto sensu*; however, for the realist, the cold hard facts of European politics (from which the European judiciary has never been exempt) suggest a more lenient assessment.

7.2 National Reciprocity Clauses

⁸⁵ R. Dohms and C. Levasseur, 'Commentary on the judgments of the Court of Justice of 23.10.97 relating to monopolies for the importation and exportation of gas and electricity', Competition Policy Newsletter, February 1998 (author's own translation into English).

⁸⁶ L. Hancher, (1998) 16 *JERL* 42, p. 51ff.

⁸⁷ Case 52/75 *Commission v. Italy* [1976] ECR 277.

⁸⁸ Case C-146/89 *Commission v. United Kingdom* [1991] ECR 3533.

⁸⁹ *Ibid*, para. 47 of the judgment.

⁹⁰ See n. 62, *supra*; note the earlier reference of the Commission in the *Scottish Nuclear* decision (91/329, (1991) OJ L178/31) to the acceptability of a 'system of gradual competition'.

⁹¹ A. M. Klom, 'Liberalisation', (1996) 14 *JERL* 1, p. 7.

⁹² Although see the comment in the text accompanying n. 66, *supra*, where it is suggested that Article 19(5)(b) may in practice be more likely to help electricity from less liberalised Member States to gain access to more liberalised markets.

7.2.1 The Example of the Dutch Electricity Act 1998:

Ever since the Directive was adopted, the consultation process in the Netherlands for its implementation has stressed the possible adverse consequences for liberalisation (both on a national and a European level) of the lack of a level playing field for competition among all the Member States.⁹³ From the outset, therefore, a notification system has been central to the Dutch plans; under Section 28(1) of the 1998 Act, the Manager of the High Voltage Network (HVN) must notify the Minister every three months of applications for transfrontier transmissions of electricity, which includes imports and exports of electricity. This provides the Minister with the necessary information to supervise all cross-border electricity trade involving the Netherlands.

While Article 29 goes on to list the instances in which the HVN Manager is *required* to make an offer for the transportation of electricity imported into the Netherlands, Article 30 *forbids* the making of such an offer if the customer which fulfils the criteria of Article 29 nevertheless would not be regarded as eligible in the exporting Member State. It is then up to the Minister to decide, at the request of a customer or supplier, whether or not to grant dispensation from the prohibition of Article 30 'if it is plausible to assume that the transport of the electricity in question will not disrupt the balance of the electricity markets'.⁹⁴ Thus, the presumption is one of no importation, and this can only be rebutted after an individual application to the Minister, who must take into account in his assessment 'whether the prohibition of the relevant transportation of electricity is necessary and proportionate in view of its objective, as well as whether the prohibition would affect the development of trade to an extent that is [contrary] to the interests of the Community' within the meaning of Article 3(3) of the Directive.⁹⁵

In his 'Letter to the Lower House of the States-General concerning policy proposals on the electricity industry',⁹⁶ the Minister of Economic Affairs clarified how these provisions allowing import restrictions would operate. In making the assessment under Article 32, a distinction would be made between incidental swaps in the form of mutual assistance for countries co-operating in the UCPTE and more structural supply contracts, presumably with only the latter being potentially subject to restrictions.

The letter goes on to distinguish between three categories of customers in the application of the reciprocity provisions. As under the Directive, customers with a annual consumption in excess of 100 GWh will be free to import their own requirement. Secondly, 'designated categories' of customer (such as distributors, traders and generators) will in principle get free access to the European market. However, if, 'following assessment against the [D]irective', the Minister concludes that no reciprocity exists between the Netherlands and the exporting country, 'he will have the power to restrict imports from certain countries for those designated categories'. Exactly what the Dutch Government envisages will be the content of this investigation of reciprocity is not completely clear from the Act or the consultation documents, although the Letter of November 1996 refers to 'differences in environmental requirements, tax aspects and encouragement for renewable energy'.

A third category of customers may also have greater market accessibility than required under the Directive, *subject to* a 'test for equal terms of competition'. This will consist of two criteria: first, a comparable consumer in the exporting Member State must be free to purchase power in the Netherlands; and second, the transmission grid in the exporting country must be accessible, with

⁹³ See the Consultation Document, 'Current Lines towards an electricity market: the framework for a new Electricity Act in the Netherlands', (Dutch Ministry of Economic Affairs, 1996), 'Section 9 - International Aspects', pp. 23-24.

⁹⁴ Article 32(1) of the 1998 Act.

⁹⁵ Article 32(2) of the 1998 Act.

⁹⁶ Of 8 November 1996, in 'Section 9 - International Aspects'.

access conditions and tariffs equally applicable to all comparable electricity transmissions, whether for import from or export to the Netherlands.

In all these cases, the Dutch Government stresses that the ultimate point is to ‘strike a fair balance’, trying to respect relations with direct neighbouring countries through consultations with them and with the Commission. Its policy provides a good illustration of a number of the issues which have been discussed above. First, there is a clear concern that the provisions of the Directive itself may not give sufficient scope for protecting against the dangers of imbalances in market opening across the European Community, shown by the very existence of the possible import restrictions under the 1998 Act. Second, the specific criteria adopted in the Act show the particular concern with the criteria for customer eligibility in other Member States, as well as the more general issues of tariffs and conditions for access to the markets of other Member States. Finally, the apparent complexity of the Dutch reciprocity provisions themselves illustrates how much will depend on the specific choices taken by each Member State in the implementation of the Directive in national law. The three category system adopted in the Dutch legislation on market opening has clearly had an influence on how the Dutch system intends to approach the question of reciprocity, and the same will no doubt be true of other countries’ implementing rules. However, in their basic rule (that imports are to be supervised and can be prevented by the Minister), the Dutch provisions are sufficiently typical to form the basis for the assessment of the legality of such provisions under Community law.

7.2.2 The Status of National Reciprocity Provisions under Community Law:

7.2.2(a) Articles 30 and 36 EC

The motivation behind such national reciprocity provisions has been described above. However, from the viewpoint of Community law, it has also been commented that reciprocity is not an acceptable concept. While it has been suggested that the framework of the Directive may rescue the reciprocity provisions in Article 19(5)(b), it has also been submitted that that Article will not cover unilateral Member State action on the basis of reciprocity. This means that the assessment of such national provisions must be made under general Community law. This being so, it seems clear that where such provisions seek to restrict imports of electricity, they will in principle be caught by Article 30 EC, as measures which have an effect equivalent to a quantitative restriction on imports of electricity, which has long been regarded by the Court as a good within Article 30.⁹⁷ The national measures would result in discriminatory treatment of foreign electricity destined for eligible customers, as opposed to the treatment accorded to nationally-produced electricity (as well as to electricity from a similarly liberalised Member State), and clearly affect trade between Member States under the *Dassonville* formula.⁹⁸

Thus, any Member State which seeks to impose such import restrictions will have to find a way of justifying them under the EC Treaty. Article 36 EC would logically seem to be the first place to look for such a justification. However, it is here that the Member State will run up against the *Campus Oil* judgment,⁹⁹ and will have difficulties in relying on Article 36. While the Member State will wish to raise the shibboleth of the sector - security of supply - to defend its import restrictions, this seems likely to fail after the clear analysis provided by Advocate General Cosmas in his opinion

⁹⁷ See Case 6/64 *Costa v. ENEL* [1964] ECR 585, pp. 597-598; confirmed in one of the *Energy Cases*, Case C-157/94 *Commission v. Italy* (see n. 81 *supra*), paras. 14-19.

⁹⁸ In that they ‘are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade’: Case 8/74 *Procureur du Roi v. Benoit and Dassonville* [1974] ECR 837, para. 5 of the judgment.

⁹⁹ Case 72/83 *Campus Oil v. Ministry for Industry and Energy* [1984] ECR 2727.

on the *Energy Cases*.¹⁰⁰ He stressed the strict limits to the step which the Court had taken in *Campus Oil* in allowing security of supply within the concept of public security under Article 36. Its emphasis on the *interruption* of supplies and the resulting dangers for the country's very *existence* as the issues which could affect a country's public security, coupled with its tolerance of the Irish rules on obtaining oil supplies to ensure a *minimum supply* should lead to the conclusion that the exception of Article 36 could apply only to ensure that minimum.

While it could not be denied that a continuous, uninterrupted supply of electricity, like oil in *Campus Oil*, is vital for the functioning of all modern States and their economies, allowing measures which have 'the object of bringing about favourable conditions of supply from the viewpoint of cost, quality and selective management' to fall within the Article 36 exception would give 'almost unlimited scope for potential exceptions to the principle of free movement of goods. ... [I]n practice that would be tantamount to setting apart energy policy as a special ground which could justify derogating from Articles 30 and 34 of the Treaty'.¹⁰¹ The Court held that the measures in question fell under Article 37 EC, and that this meant that Article 36 EC was irrelevant to the question of possible justifications.¹⁰² However, where national reciprocity provisions are concerned, the issue is more akin to that of Government-issued import licences, and thus I would argue that it should be examined under Article 30: even if there were a national monopoly to which Article 37 could apply, it is submitted that these reciprocity measures are not inextricably linked to such a monopoly, but rather are more generally capable of affecting inter-Member State trade, and should be examined under Article 30 (including possible justification under Article 36).¹⁰³

7.2.2(b) Article 90 EC

It seems, therefore, that a Member State must look elsewhere to find a justification for such import restrictions based on reciprocity. Article 3(3) of the Directive refers to the disapplication of specific provisions of the Directive insofar as they 'would obstruct the performance, in law or in fact, of the obligations imposed on electricity undertakings in the general economic interest and insofar as the development of trade would not be affected to such an extent as would be contrary to the interests of the Community'. Article 32 of the Dutch Act specifically refers to Article 3(3) of the Directive, and requires the Minister to assess the necessity and proportionality of the import restriction, which are all elements recognised by the Court of Justice in its case law on Article 90(2).¹⁰⁴

This possibility of reliance on Article 90(2) was confirmed by the Court of Justice in the *Energy Cases*,¹⁰⁵ seeming as it did to follow the more explicit opinion to this effect of its Advocate General in the cases.¹⁰⁶ The Court confirmed not only that Article 90(2) could be used to justify measures which infringe Article 37,¹⁰⁷ but also that *Member State measures* (as well as the activities of the firms entrusted with such obligations) which infringe the free movement of goods rules could be justified under Article 90(2).¹⁰⁸ By analogy, it is submitted that this reasoning is equally applicable to the justification under Article 90(2) of measures which, *prima facie*, infringe Article

¹⁰⁰ Opinion in Cases C-157-160/94, delivered on November 26, 1996, [1997] ECR I-5701, pp. 5740-5748, esp. p. 5746ff.

¹⁰¹ *Ibid*, pp. 5746-5747, para. 82 of the Opinion.

¹⁰² See Case C-157/94 *Commission v. Netherlands*, n. 81, *supra*, para. 24.

¹⁰³ See the *Franzén* case (C-189/95, n. 82, *supra*), paras. 35, 36 and 67ff. for this distinction.

¹⁰⁴ See, in particular, the recent *Energy Cases*, n. 81, *supra*.

¹⁰⁵ *Ibid*.

¹⁰⁶ See n. 116, *supra*, para. 89 of the Opinion. See the forthcoming annotation by P.J. Slot, n. 83, *supra*.

¹⁰⁷ Which had been severely doubted since *Campus Oil* (n. 99, *supra*); see the analysis of Advocate General Cosmas in his Opinion in the *Energy Cases*, n. 100, *supra*, para.s. 88ff. It should be noted that these cases concerned only the use of the Article 90(2) justification in the context of Article 37: since the Court ruled that it was unnecessary to examine Article 30 *et seq*, it was not decided whether Article 90(2) was equally applicable in the Article 30 context.

¹⁰⁸ Case 157/94 *Commission v. Netherlands* [1997] ECR 5699, paras. 30-32.

30; this is supported by the wording of Article 90(2) itself, which refers to the ‘rules contained in this Treaty’, and not just to Article 37 or the competition rules. Furthermore, the Court’s judgment in the *Commission v. Netherlands* instalment of the *Energy Cases* saga refers to the rules contained in Articles 30, 34 and 37,¹⁰⁹ and goes on to make its ruling on ‘exclusive rights which are contrary to, *in particular*, Article 37 of the Treaty’.¹¹⁰ This suggests that the same approach will also be applied to justifications of such Member State measures which are found to fall within Article 30 (and, indeed, within Article 34).

To be able to rely on Article 90(2), the Member State will have to fulfil a number of conditions under that Article and the Directive. The public service obligation imposed by the Member State on the relevant entity (for example, the distributors in the Dutch system have these obligations) must be conferred by a public law measure.¹¹¹ Second, under Article 3(2) of the Directive, Member States must notify the public service obligations which they have imposed to the Commission. However, there does not appear to be any specification of what the Commission is to *do* with these notifications. Hancher suggests that there is no need for the Commission to approve these measures, nor need it grant some form of negative clearance (by analogy with the competition rules).¹¹² Slot is of the opinion that ‘one would expect the Commission to verify the compatibility of the public service obligations with’ Article 90, especially given the explicit reference to Article 90 in Article 3(2).¹¹³ Overall, I would suggest that Article 3(2) leaves it to the Commission to commence Article 169 EC proceedings against a Member State if it considers that those public service obligations are not in conformity with the Treaty, while allowing Member States to rely on them in the context of the Directive unless the Commission succeeds in such a challenge.¹¹⁴

In the meantime, it would appear that Member States could rely on the safeguarding of such obligations to refuse access to their markets for imports of electricity, subject to the proviso that this does not endanger its obligation to reach the required level of market opening under the Directive. In Hancher’s view, this could only be done on a case-by-case basis: ‘general measures reserving rights and privileges are no longer tolerated under the system of the Directive’.¹¹⁵ If she is correct, this may have consequences for the system chosen for the Dutch Act: as I commented above, it seems to adopt a presumption of no importation if its definition of reciprocity is not met, subject to Ministerial dispensation from that prohibition on application in individual cases. Presumably, the suggestion is that such a blanket ban is not necessary to safeguard such public service obligations, or is at the very least not proportionate to achieving that aim.

In the event of a challenge, what does a Member State have to do to show that such restrictions are necessary to safeguard these public service obligations? It seems that, after the *Energy Cases*, the Member State would have to provide evidence that without these restrictions, it would not be possible for the undertaking to perform the particular tasks given to it under economically acceptable conditions. It is not necessary that the undertaking’s economic viability is threatened for Article 90(2) to be applicable.¹¹⁶ For example,¹¹⁷ in the Dutch context, it would need

¹⁰⁹ *Ibid*, para. 30.

¹¹⁰ *Ibid*, para. 32.

¹¹¹ See, e.g., Case 66/86 *Ahmed Saeed Flugreisen v. Zentrale zur Bekämpfung Unlauteren Wettbewerbs* [1989] ECR 803, para. 55. The recent case of *Commission v. France* (Case C-159/94, n. 81, *supra*) underlines this requirement: the French Government had relied, *inter alia*, upon environmental obligations imposed on EDF to justify the exclusive import and export rights which it had granted EDF. However, the concessions which had granted these rights to EDF made no mention of these environmental obligations, which were general, and not specific to EDF. Thus, the Court ruled that the performance of such environmentally-related tasks could not fall within the scope of the exception of Article 90(2) (see para. 69 of the judgment).

¹¹² L. Hancher, (1998) 16 *JERL* 42, p. 58.

¹¹³ P.J. Slot, n. 83, *supra*.

¹¹⁴ This raises the possibility of a challenge to these obligations by an individual before a national court, in the absence of any Commission action on the matter, which will be considered briefly below.

¹¹⁵ L. Hancher, (1998) 16 *JERL* 42, p. 58.

¹¹⁶ See Case C-157/94 *Commission v. Netherlands* [1997] ECR I-5699, paras. 52 and 53.

to be shown that the distributors would be unable to meet their public supply duties if they could not rely on secure supplies of electricity. After the *Energy Cases*, it seems that the burden of proving this will lie in the first instance on the Member State seeking to rely on the Article 90(2) exemption. As Hancher notes, the fact (which the Court confirmed in the *Energy Cases*) that such obligations can be drawn very broadly gives significant discretion to the Member States and consequently eases the task of discharging this burden of proof.

Further, once this situation has been shown to exist, the task which the Court has set the Commission (to establish, through a detailed investigation on all the facts, that a Member State could have applied less restrictive rules to achieve its chosen public service goals) has been described as ‘a virtually impossible one’.¹¹⁸ To take the example of distributors again, the Commission might have to try to show that they could meet their supply obligations by concluding long-term import contracts with foreign suppliers.¹¹⁹ All of this goes to the questions of how such alternatives could be shown, and by whom it has to be shown that they exist. These questions may become very relevant for private parties who seek to challenge the national reciprocity provisions (or their consequences - e.g. the refusal by the transmission system operator to grant access to the grid to foreign electricity imports) before a national court. Are they really likely to be required to show the existence of such alternatives, beyond a ‘mere theoretical possibility’? This is hardly something which they will be in any position to do.¹²⁰

Finally, such import restrictions must not obstruct the development of trade to an extent which is contrary to the interest(s) of the Community. Article 3(3) of the Directive specifically states that this Community interest includes competition with regard to eligible customers. Furthermore, if a challenge is brought against a Member State’s reciprocity provisions on the basis that it had relied on having met the thresholds of market opening required, Hancher has suggested that the Court ‘would take this threshold as representing the Community interest within the meaning of Article 90(2), last sentence’.¹²¹ Article 32 of the Dutch Act explicitly requires the Minister to take this issue of the Community interest into account in his determination of applications for dispensation from the import prohibition under Article 30 of the Act. While the Court in the *Energy Cases* admonished the Commission for its failure to provide sufficient evidence of the possibility of such inter-Member State trade in electricity (and gas), and for failing sufficiently to define the Community interest which was affected, it seems that under the Directive there already exists a clearer framework for making such assessments: the interest in competition with regard to eligible customers, the achievement of the market opening thresholds by all Member States and, I would suggest, the gradual progress to an increasingly liberalised Community market in electricity, with the attendant consequences of free movement of goods and the (increasingly) free play of competitive forces.

7.2.2(c) Some Concluding Thoughts on National Reciprocity Provisions

Hopefully, from this whirlwind tour¹²² through the various requirements which a Member State will have to fulfil to be able to rely on Article 90(2) to justify such reciprocity-based import restrictions,

¹¹⁷ L. Hancher, (1998) 16 *JERL* 42, p. 58.

¹¹⁸ *Ibid*, p. 51.

¹¹⁹ *Ibid*, p. 60.

¹²⁰ Hancher suggests (*ibid*, p. 59) that it should be for the party seeking to rely on the Article 90(2) EC exemption to discharge the burden of proof in individual proceedings before the national courts, citing the approach taken by the national judge in the *Almelo* proceedings (ruling of October 1996) (Case C-393/92 *City of Almelo v. Energiebedrijf IJsselmij* [1994] ECR I-1477, on its return to the national court), although quite how far this would reach in this context is unclear.

¹²¹ L. Hancher, (1998) 16 *JERL* 42, p. 59.

¹²² For more comprehensive treatment of Article 90 EC, the reader should refer *inter alia* to contributions by Slot ((1991) 28 CMLRev 964 and (1998) 35 CMLRev (forthcoming)), D. Edward and M. Hoskins (‘Article 90, Deregulation

the following points will be clear. First of all, it will not be sufficient simply to rely on having reached a significantly more advanced stage of liberalisation than the Member State whose imports of electricity are being restricted. Article 90(2)'s conditions must still be fulfilled for it to provide a justification, even though these requirements are often not overly taxing for Member States (as the *Energy Cases* seem to show).

Second, and the logical corollary of the first point, the only restrictions which can be justified are those which seek to safeguard the public service obligations which the Government of the Member State has imposed on certain entities. Thus, while such obligations can be drafted with an extensive scope, they will not serve to justify restrictions on imports by a company which has no public service obligations and no intention of supplying franchise customers. After all, the whole point of the Directive is to allow market forces *in*.¹²³ Capacity problems notwithstanding,¹²⁴ it seems that if such imports fall victim to a national reciprocity clause, they will have a good claim to demand access, as the justifications available under Community law do not seem to allow for reciprocity requirements in these circumstances.

Finally, the scope for justifying national reciprocity provisions on the basis of Article 90(2) will to a great extent be dependent on how each Member State decides to structure its electricity system in response to the requirements of the Directive. Of especial importance, of course, are the nature, content and extent of public supply obligations which the Member State chooses to impose on various entities at different stages within that structure. Those countries (such as France)¹²⁵ with a greater tradition of public service obligations may end up with greater scope for refusing imports under Article 90(2) and the Directive, although this will depend on the various level of market opening achieved by the different Member States, and on the attitude taken by the Commission to such national reciprocity provisions as the process of liberalisation progresses. Furthermore, it may well be that any blanket ban on importation, subject to exemption by government approval may fall foul of the system of the Directive, in that it fails to provide for an analysis of the merits of each individual case, denying importation only after careful examination of all the relevant circumstances.

These conclusions seem to accord with Hancher's assessment that, overall, national reciprocity provisions seem 'dubious' from a legal point of view.¹²⁶ This will not be welcome news for those Member States who are inclined to a more rapid liberalisation of the electricity sector, as it seems to offer very few opportunities to protect their markets from electricity originating in less liberalised systems. Indeed, it seems highly unlikely that these more liberalised Member States will have much success in bringing Article 170 EC actions to open up the markets of less liberalised Member States, once again because the Directive itself does not demand totally free movement of electricity. Perhaps they will have to find other methods to promote liberalisation so as to avoid such difficulties, rather than seeking to rely on national reciprocity provisions which may in a number of cases prove difficult to defend.

8. Conclusions.

and EC Law', (1995) 32 CMLRev 157) and D. Edward, 'Article 90 EC Treaty and the Deregulation, Liberalisation and Privatisation of Public Enterprises and Public Monopolies', Report for the Series 'Europe before the Intergovernmental Conference 1996', (Bonn: Zentrum für Europäisches Wirtschaftsrecht, 18 December 1995), Publication No. 60.

¹²³ L. Hancher, 'The Electricity Directive in a Competitive Market', Speech the Annual European Energy Law Seminar held by the Leiden Internationaal Instituut voor Energierecht, Noordwijk, May 11 and 12, 1998. The extent to which such companies will themselves be under public service obligations will depend entirely on the formulation of their individual operating licences by the issuing authorities in the Member State concerned

¹²⁴ Articles 17(5) and 18(4) of the Directive permit the refusal of access on this ground. There may also be a need to consider the status of any provisions of national law providing further defences to claims for Third Party Access.

¹²⁵ See, for a useful summary of the situation in France, M. Poppe and L. Couret, 'The French Electricity Regime', Chapter VII in A. Midttun (ed.), *European Electricity Systems in Transition*, especially p. 202ff. and p. 213ff.

¹²⁶ L. Hancher, 'The Electricity Directive in a Competitive Market', n. 123, *supra*.

This survey of an apparently straightforward concept has raised a number of difficult questions when reciprocity is used *within* the European Community. Legally speaking, within the Community legal order, reciprocity has long been frowned upon by the Court of Justice as being inappropriate in such a new type of supranational system. However, in its relations with third countries, the Community has occasionally turned to reciprocity as a tool for encouraging more general liberalisation, while affording itself a certain measure of protection against the incursions of companies from less liberalised countries. It seemed that, in the context of electricity liberalisation within the Community, these twin goals were ideally suited to a situation of potentially multi-speed market opening.

However, the actual embodiment of the reciprocity concept in the Directive for the internal electricity market has, on closer inspection, left a great deal to be desired. Article 19(5)(b) seems to adopt a rather lop-sided approach to reciprocity in the internal electricity market. The Commission would appear to have the power only to secure further market opening, and seems not to be able officially to sanction import restrictions imposed by more liberalised Member States, concerned at the possible consequences for their systems of imports from a still relatively closed market. This is understandable in view of the constraints of Article 30 EC, but it may leave many Member States wondering whether the ‘compromise’ reached was not in reality more of a surrender. True, it seems that the Commission may be able to ‘tolerate’ such national reciprocity provisions, by exercising its discretion under either the Article 169 EC procedure or else in response to any requests under Article 19(5)(b). However, the more general supervisory role of the Commission, laid down in Article 155 EC, may prove difficult to perform in the context of the Directive. Article 3(1) requires the achievement by the Member States of ‘equivalent economic results’: given the great diversity of national systems possible under the rather watered-down provisions of the Directive, supervising whether there really is ‘equivalence’ may prove rather tricky - on what basis is this equivalence to be assessed? The Commission’s general approach to the sector is likely to evolve throughout the transitional period, and will be the key to how reciprocity will operate in practice under the Directive and general Community law.

However, the Directive will also present the Member States with challenges of considerable complexity. The brief examination made above of the possible inter-Member State relationships in electricity trade suggests that there will be at least some scope for the operation of reciprocity notions in the sector, at least during the designated transitional period of Article 26. To understand this scope fully, a wider investigation needs to be made of electricity swap transactions, of the phenomenon of transit across intervening Member States’ territory, and of the present and projected future electricity trade balances between Member States. In any event, where disputes arise between national eligible customers (seeking to purchase foreign power) and their Government, national procedural law may have to adapt itself to the system envisaged by Article 19(5)(b) by providing a judicial remedy against Government decisions on whether or not to make a request to the Commission, to avoid the rights and interests of eligible customers being adversely affected.

All of these factors point towards the likelihood of at least some use actually being made of reciprocity provisions in the electricity sector. It has been suggested in some quarters that the Directive itself is not in conformity with Community law. While a strictly legal approach would suggest this to be the case, it seems (as evinced by the recent *Energy Cases*)¹²⁷ that the gradual liberalisation process is something with which the Court will be very reluctant to interfere. This is likely to lead it, should the need arise, to pronounce the Directive compatible with the Treaty. However, given the limited scope of Article 19(5)(b), it seems conceivable that some Member States will adopt reciprocity provisions, not unlike those contained in the Dutch Electricity Act of

¹²⁷ See n. 81, *supra*.

1998.¹²⁸ Legal analysis of such provisions under the EC Treaty suggests that in many cases they will be contrary to Article 30 EC. Only in relatively specific cases will the exception of Article 90(2) provide any assistance, while it seems that after *Campus Oil*¹²⁹ Article 36 will not be applicable, except in the most exceptional of circumstances. Indeed, the very fact that such restrictions may be justifiable only in specific cases also suggests that any blanket presumption against importation will offend against the kind of case-by-case analysis which these exempting provisions seem to demand.

Much of the assessment of national reciprocity provisions will depend on the organisation chosen for the sector by each Member State, including especially such factors as the national tradition (if any) of public service obligations, and the way in which these are imposed in the national implementing law. Given the startling diversity of systems possible under the Directive, making any general assessment is very difficult: the most that can be said is that the Commission's supervisory task under Article 155 EC was never likely to be a straightforward one, and the lack of clarity in the Directive, while the understandable result of some hard bargaining in Council on all sides, will not make things any easier. However, whether this will herald the arrival of a significant number of cases on the ECJ's doorstep is less certain, and will depend on the willingness of those to whom access is denied to challenge such Government (and possibly Commission) decisions, as well as on the readiness of national courts to grapple with the problems which the system of the Directive will pose.

Not for the first time in the history of the European Community, therefore, the ultimate fate of a legal provision may rest with private companies and the national courts¹³⁰ which hear their complaints.¹³¹ Their vigilance is certainly a useful enforcement mechanism, but a better-drafted Directive might well have saved everyone a great deal of trouble. Whether the situation will be merely a transitional one is as yet unclear. The Commission certainly makes this assumption in justifying the presence of a reciprocity clause in the Directive in the first place,¹³² but the negotiating difficulties which led to reciprocity in the first place may prove just as troublesome in the future. Phase three of the liberalisation process is therefore to be awaited with interest.

¹²⁸ See the discussion of these provisions in the text accompanying n. 93ff., *supra*.

¹²⁹ See n. 99, *supra*.

¹³⁰ See the seminal judgment of the Court of Justice in Case 26/62 *Van Gend en Loos v. Nederlands Administratie van Belastingen* [1963] ECR 1, p. 13.

¹³¹ Of course, this contention ignores the possible impact of the Energy Charter Treaty on questions of market access and trade. That this may be significant was emphasised by the Commission representative at the Annual European Energy Law Seminar in Noordwijk on 11 and 12 May 1998 (see n. 135, *supra*), when he referred to the potential effects of national treatment obligations in international Treaties such as the Energy Charter Treaty on the ability of Member States to rely on such reciprocity provisions *vis-à-vis* other contracting parties to such Treaties. Exactly how this would operate in the context of inter-Member State relations under the Directive is unclear: this would seem to depend on the policy of the Member States concerned in applying GATT/WTO obligations in their relationship *inter se* on energy matters (since it is unclear whether or not GATT in its present form is applicable to the energy sector – see M.M. Roggenkamp, 'Implications of GATT and EEC on Networkbound Energy Trade in Europe', (1994) 12 *JERL* 59: see especially pp. 63-65 and the references cited therein) and the status of such policies under Article 234 EC. For further material on the Energy Charter Treaty, the reader is referred (*inter alia*) to the following selection of material: Craig. S. Bamberger, *The Energy Charter Treaty: a description of its provisions*, (Paris: IEA/OECD, 1995); T.W. Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment & Trade*, (London: Kluwer Law International, 1996).

¹³² See the text accompanying n. 90, *supra*.