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INTRODUCTION

1. The Council of 29 November 1994 concluded that "further discussion is necessary on how to open the markets beyond the area of electricity production, especially on the question of the possible simultaneous introduction of a negotiated TPA and a so-called single-buyer system. 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. The Commission is called on to examine and outline the anticipated consequences of the side-by-side application of both approaches, in particular with respect to the potential for competition and the impact on the various groups of suppliers and purchasers"⁽¹⁾.
2. Furthermore, the Council wanted to be informed whether with regard to tendering procedures for new production capacity, which form part of the organisational structure of single buyer systems for example, specific types of new electricity production need to be authorised in parallel to the tender procedure. Finally the impact of negotiated third party access and so-called single buyer systems on small and very small Community electricity systems should be analysed.
3. This working paper of the Commission addresses the above-mentioned study requests and presents the respective findings and evaluations of the Commission. This working paper does not repeat in detail the :
 - working definitions of a negotiated TPA and Single Buyer system,
 - results concerning competition potentials for producers and consumers of electricity under both systems,
 - the detailed description of authorisation and tender procedures,

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The Council conclusions of 29. November 1994 are contained in Annex I

which are contained in the study made at the request of the European Commission by the "Energiewirtschaftliches Institut" at the University of Cologne on : "TPA and single buyer systems; producers and parallel authorisations; small and very small systems".

4. However this working paper highlights the main differences between the negotiated TPA and Single Buyer system in terms of :
 - opening of and access to electricity markets,
 - enforcement of public service obligations to achieve services of general economic interest, especially to guarantee security of supply,
 - realisation of an internal electricity market, in which transborder electricity flows are not restricted in an unjustified manner,
 - respect of the legal provisions of the Treaty.

5. Part one of this working paper on the simultaneous introduction of negotiated TPA and Single Buyer systems is structured as follows :
 - description of negotiated TPA and Single Buyer systems,
 - comparison between the internal organisation of the systems,
 - negotiation of contracts,
 - single buyer's behaviour,
 - direct lines,
 - competition and investments,
 - legal analysis

Part two addresses the subject of parallel capacity authorisations within tendering systems.

Both parts of this working paper focus exclusively on electricity systems based on negotiated TPA and Single Buyer system elements.

A second working paper will follow later which will contain part three of the Council's request to the Commission, and which will cover the issue of small and very small

electricity systems.

6. In presenting its findings the Commission has taken into account the comments presented by Member States as well as the arguments submitted by the European Electricity Industry (EURELECTRIC), the Community's big industrial energy consumers (IFIEC), the Community's independent electricity distributors (GEODE) as well as by other small and medium-sized consumers (BEUC).

EXECUTIVE SUMMARY

7. The Single Buyer (SB) system, as proposed in its present form, cannot be considered as being economically equivalent to the Commission's proposal of negotiated Third Party Access (TPA) as it falls short of what is desirable and achievable from a competition point of view; reciprocity can only be assured between the systems if certain basic adaptations are applied to the present SB-model. Both systems must be based on a common and transparent definition as regards categories of eligible consumers. The opening of the market is realised via the coverage of these eligible consumers.
8. As regards the simultaneous introduction of both systems and their compatibility with the Treaty, it can be concluded that the SB system, as provided in its present form with its internal monopoly structure, is to be considered as a measure of equivalent effect to a quantitative restriction on imports within the sense of article 30 of the EC Treaty. Furthermore, it should not contain obstacles to the freedom of establishment going beyond constraints imposed by public security.

The present proposal would result in all supplies and production being channeled de facto through the Single Buyer. A system which channels imports and exports through an intermediary is contrary to the principle of free movement of goods. Exclusive rights resulting in absolute control over imports, transmission and

distribution are prima facie contrary to the basic Community principle of free movement and competition and cannot be automatically justified on public services grounds, but need to be analysed case by case to ensure respect of the principle of proportionality.

Security of supply reasons could justify an exemption based on "public security" provided in article 36 of the Treaty. There is no evidence in the case law of the Court leading to an automatic suspension of the Treaty rules on free movement and competition. As the negotiated TPA-system shows, security of supply and public service obligations can be met in a system more open to competition.

It is obvious that according to the respective security of supply situations Member States organise electricity markets according to their different needs. The Single Buyer system wants to provide an organisation of the electricity market based on long term system planning aiming at securing supply with a central management of production, transport and distribution. Without affecting the goal of this long term planning, and security of supply adaptations of the Single Buyer system are necessary to ensure compatibility with the Treaty and for reasons of economic equivalence.

9. To ensure a maximum of reciprocity and compatibility with the Treaty, the following modalities have to be met :

- Degree of consumer choice for eligible consumers : In case of the SB system eligible consumers should have the freedom to contract electricity supplies with external producers under the same conditions as and with domestic independent electricity producers.
- Imports and exports of electricity : Both systems could generate directly comparable and acceptable results if the import regime under the SB-model is governed by an obligation of the SB to buy unlimited quantities of imported electricity under certain objective conditions, by transparency of tariffs to use

the transmission system and thereby transparency of prices to be paid by the Single Buyer for imported electricity. Furthermore, electricity imports should only be subject to objective and justified conditions (i.e. lack of interconnected capacity or for public security reasons).

- Transparency and distortion of competition : In order to ensure that the principles of objectivity, transparency and non-discrimination are respected, to guarantee that competition is not distorted, to avoid the risk of potential discrimination, and to achieve neutral and independent treatment, the Single Buyer, where part of an integrated undertaking, should be fully unbundled in terms of a full separation of management and of information flows between its different activities, especially in terms of production and supply.
- Competition at the level of production : Tendering procedures for new and additional production capacities, which are more restrictive in competition terms than authorisation systems, should only be organised and decided by public authorities or other independent entities appointed for this purpose.
- Parallel authorisations of Independent Producers : To redress the imbalance between authorisation and tender procedures, independent producers should, even under tendering systems, benefit from parallel authorisations to strengthen competitive forces. A transparent definition for independent producers in SB-systems must be introduced, on the basis of quantitative capacity thresholds. In addition, autoproducers, export-producers and RWC producers (renewable, waste, CHP) should also benefit from parallel authorisations to fulfil the need for their specific type of production capacity.
- Direct lines: In the Single Buyer system all eligible consumers shall have the freedom to construct and use direct lines for transactions with external producers and domestic independent producers (and vice versa for producers to supply eligible consumers) within the framework of Art.7 of the draft modified Directive.

Part I : Simultaneous introduction of the TPA and SB system

I. DESCRIPTION OF THE DIFFERENT SYSTEMS

10. The comparison of the two systems should take into account not only the functioning of the two systems themselves, but also the context in which they would function both at the level of the organisation of the production and at the level of the definition of the eligible consumers for access to the network.

A. The single buyer and negotiated TPA

11. The objective of the Commission's negotiated TPA-proposal is to open electricity markets and to strengthen competitive forces within historically grown, closed and monopoly-oriented electricity systems, without jeopardizing the fulfilment of public service obligations, especially the security of electricity systems. According to its promoters, the SB-proposal aims at a safeguard of services of general economic interests via the transparent, non-discriminatory imposition of public service obligations and at long-term system planning while at the same time introducing competitive forces at the level of production and, to some extent, at consumption level.

12. In general, within a TPA-system eligible electricity consumers have the choice to find inside or outside their electricity system the most competitive electricity producers; to negotiate supply contracts with them while negotiating with the system operator(s) the respective contracts for use of the transmission/distribution systems to execute the supply contracts agreed upon. According to the Directive proposed by the Commission the conclusion of contracts to use the transport system can only be refused because of mainly objective elements, like lack of transmission capacity or the fulfilment of public service obligations. However, in practice there is also the danger that the system operator, possibly being part of an integrated company, may abuse his dominant position. This risk can only be limited through the introduction of efficient control or dispute settlement

mechanisms.

13. The general rule is that the Single Buyer will purchase electricity according to an economic merit order from producers under contract with the Single Buyer. The Single Buyer will be obliged to optimise the price of its purchases from producers, so as to provide the lowest possible sales price to its consumers. In case of the Single Buyer system it can be generally stated that any direct negotiation between eligible consumers and producers is an exemption within the organisational structure. The exemptions are foreseen only for transborder transactions but not for transactions inside the system of the Single Buyer. Even in cases where eligible consumers can shop around to find more competitive external electricity suppliers, this electricity can only be sold to the Single Buyer to integrate it into the internal electricity system. However, the eligible consumer may benefit from these contracts if the conditions for the sales negotiations between eligible consumers and the Single Buyer are properly set.

Transparency would be fully assured as the Single Buyer would be obliged to purchase the external electricity at a price being the original sales price between the eligible consumer and the Single Buyer minus the published tariff for the use of the transmission system. The Single Buyer may refuse to buy back the electricity of an external supplier only because of objective reasons like a lack of transmission capacity or public security. As in the case of negotiated TPA, the Single Buyer has the possibility to abuse its dominant position and to favour the production or distribution interests of its own vertically integrated company. Appropriate control mechanisms and other structural precautions are, therefore, a precondition for the proper functioning of the system.

14. In both cases, the eligible consumer gets an advantage through the choice of electricity supplier; in both cases the freedom of negotiation is assured, provided that when there are links with production (integrated undertaking), guarantees exist that the transporter can not let its interests as producer prevail over its obligations as transporter.

However, even though the negotiated TPA system is as open to national producers as it is to those of other Member States and thus introduces an internal liberalisation of the market, the single buyer system does not permit an equivalent opening of internal exchanges in the territory covered by the single buyer as compared to imports/exports. Inside its system the Single Buyer holds a purchase and sales monopoly for electricity. One can consider that such a situation constitutes a factor of discrimination in reverse, but one can also consider that by letting a different organisation of the market continue to exist, this can result in a distortion of competition.

15. The effects of the resale of imports by eligible consumers to the Single Buyer in terms of competition will depend on the price levels that exist in the Single Buyer system and in the neighbouring systems. On the one hand the Single Buyer will be under the obligation to optimise its sales prices to consumers. However, Member States might want to follow pricing policies for specific categories of consumers. On the other hand the number of imports offered to the Single Buyer and their size in terms of electricity, will be important in determining the competitive effect within the Single Buyer system. Competitive import prices will force the Single Buyer to offer more competitive prices to consumers.

B. Systems of access to the network and organisation of production

16. Both, the negotiated third party access and the Single Buyer system introduce competition at the level of electricity production. The amended proposal of the Commission introduced, with the formula of negotiated access by third parties to the network, the choice between the authorisation procedure (original proposal) and the tendering procedure (amendment by Parliament) for the construction of new production capacity :

- the authorisation regime gives the initiative to the producer which wants to open up new production capacity; the proposal for a Directive lays down the

reasons for the refusal of an authorisation. These authorisations are issued by the regulatory authority. The authorisation procedure exposes all new and existing production facilities to competition;

- the tendering regime gives the initiative to the regulatory authority when it considers that the demand can no longer be satisfied by the existing capacity in its territory. The tender only covers new additional capacity needs; already existing capacity will not be exposed to competition. These calls for tender should also be open to the benefit of existing capacities in other Member States. This method of tendering should permit States, which so choose, to give preference to certain fuels in comparison with others, for reasons especially of protection of the environment or security of supply. The national producers or those of another Member State must, therefore, wait for the launching of a call for tender for considering their establishment in another Member State. The tendering regime would include the possibility to integrate energy efficiency options in the bidding process (for example in the form of Integrated Resource Planning).

It is clear that the level of exposure to competition will be greater under an authorisation procedure than under a tendering procedure.

17. Although differences and imbalances in terms of competition exist between both systems, it needs to be underlined that these differences are part of the system approach chosen. Long-term planning, forming part of the Single Buyer system, would be technically difficult with a totally free authorisation procedure. However some of these imbalances can be reduced through the introduction of elements of the authorisation procedure into the call for tender system (see part two of this working paper). In the long term, even in the tendering system all production facilities will successively have been exposed to competition. Furthermore, the free initiative permitted by the authorisation regime has to take into account the risks associated to these investments. There are no secured outlets for these new production facilities.

C. Systems of access to the network and eligible consumers

18. The Single Buyer system as generally perceived from the start (French proposal) did not include distributors among the eligible consumers. As such it would constitute a measure of equivalent effect to a quantitative restriction on imports within the sense of article 30 of the Treaty. It since appeared that the exclusion of distributors was not intrinsic to the Single Buyer system. The present working paper therefore assumes that the definition of eligible consumers is the same in both systems, i. e. large industrial consumers and distributors, in line with the logic of the Commission's proposal. As it has been underlined in its proposal, the possibility of access to the network for distributors should allow captive consumers (domestic consumers) to benefit indirectly from the least expensive electricity in the Community and should especially shelter them from the tendency which the producers could have to cross-subsidize large industrial consumers to the detriment of distributors and domestic consumers. As domestic consumers can only indirectly benefit from competition it is not possible to establish an assessment of price developments or economic benefits. However, the advantages for small consumers seem to be higher under the system of negotiated TPA as the freedom of choice for distributors is better than in the case of the Single Buyer system. For captive consumers, regulation will still be necessary to ensure fair pricing and absence of cross-subsidies.
19. Under the Single Buyer system, the possibility of shopping around also given to distributors will increase the competitive pressure on the Single Buyer. The opening of the network to distributors is, therefore, part of the objective to reinforce the general efficiency of the electricity systems, to the benefit of the competitiveness of not only the large consumers, but also of the SME's and the service companies connected to the network of the distributor.
20. However, although the definition of eligible consumers is the same under both

systems, it should not be forgotten that under the negotiated TPA system, eligible consumers are free to shop around inside and outside the system of the network operator whereas under the Single Buyer proposal, eligible consumers would only be allowed to find more competitive suppliers outside the electricity system.

D. Systems of access to the network and the structure of production

21. One must, however, admit that whatever the choice is on access to the network, its effect can only be considered as a progress (without prejudging whether this progress is sufficient in the context of an internal electricity market) taking into account the dimension of the investments and their lifespan. This is in particular true in the markets where there are overcapacities linked to long-term investments like for example nuclear energy in France. In the case of France the need for new capacity will not appear before the year 2000 and consequently, whatever the choice of access regime is, no call for tender will be launched before this date expires.

E. Systems of access to the network and the structure of the systems

22. The more the options multiply themselves, the more it will be possible to give to Member States the possibility not just to adapt their organisation and the structure of the companies to the Directive, but to adapt the application of the Directive to their organisation and to their structure. This approach, therefore, tends towards subsidiarity, but does not follow the path of integration of electricity systems in as far as the only flexibilities to be introduced as compared with the present situation shall be at the level of the right of establishment and free movement. Every effort should, therefore, bear upon the preservation of equal chances for operators in markets other than their own domestic markets (prohibition of discrimination and of import/export monopolies) and the safeguarding of fair conditions of competition.

F. System of access to network and geographical organisation

23. The more fragmented the organisational structures are and the more separated electricity systems are in a geographical area the more complex the access negotiations will be because the electricity will have to transit through different areas before reaching the consumer. The choice of network access will not change this physical obstacle.

II. COMPARISON BETWEEN THE INTERNAL ORGANISATION OF THE SYSTEMS

24. The two systems are based on different methods of functioning and organisation. This situation can lead to a distortion of competition as regards the structure of the undertakings or as regards the choice of organisation of production.

A. The question of vertically integrated companies

25. To address the situation of integrated structures, rules for separation of accounts between the three activities and, obligations in particular for the network operator, have been proposed by the Commission.
26. When these kind of structures act within the context of a TPA regime, they should accept that their production activities will be exposed, also in the national market, to competition by independent producers which use the network of the integrated company to directly supply electricity to consumers. In such a situation, the integrated undertaking, be it a public or a private one, shall have to adopt a competitive behaviour and a market strategy. Contrary to this, a single buyer which also might have production responsibilities, shall be sheltered within its own

market from competition. on the one hand because the opening up of new production capacity depends on a call for tender, and on the other hand because even if independent capacity does exist, it shall have to sell its electricity to the Single Buyer. This situation can lead the Single Buyer to develop predatory strategies in other markets. However, it is possible to limit the risks of such behaviour :

- by enlarging in the case of the Single Buyer system the parallel authorisation procedure, which in the proposed Directive is reserved to all autoproducers and independent producers;
- by enlarging the facilities of network access to the buying of electricity from domestic producers. The role played by the Single Buyer should ensure the safe operation of the system because it would intervene in the same manner as for import transactions.

27. The risks of disequilibrium can also appear in a Member State which choses for a TPA system. Whatever the conditions for negotiation offered to the consumer, they risk to remain ineffectual if the eligible consumer or the producer has to enter into negotiation with a succession of transport networks in the national territory to gain access to an independent producer.

B. Consequences of the choice of the procedure at production level

28. The choice of the production regime can also influence the equilibrium between the systems. The recourse to a call for tender system means that the producer from another Member State shall have to wait for the launching of a call for tender to be able to establish himself in the Single Buyer's area and under the condition that he wins the call for tender. In a reversed way, the producer can at any moment ask for an authorisation to establish production capacity close to an eligible consumer.

Applying for an authorisation does not mean that it will be granted; a refusal can, on the basis of the proposed Directive, be given especially for reasons of the protection of the environment.

29. Although the risk of disequilibrium at the level of production may exist in a system of negotiated TPA and a Single Buyer system, it exists as soon as one of them chooses for a tendering system. Certainly, the proposal of the Commission opens up this possibility for the TPA regime, but it is probable that a Member State which chooses the tendering system will also choose the Single Buyer system - if this possibility is given by the Directive - because it responds to the same concern of the planning of the system.

30. It is, therefore, necessary that a Single Buyer system associated with a tendering system is accompanied by a series of precautions :

- as within the framework of negotiated TPA the initiative for the call for tender and the procedure for judging the calls for tender should provide a maximum guarantee for objectivity and should, therefore, be placed under the responsibility of an entity independent from the Single Buyer, whether this be the regulatory authority or an ad hoc body;

- moreover, as the export of electricity in the absence of an authorisation procedure and, while awaiting a call for tender, is the only way open to a producer from another Member State, exchanges of electricity shall have to be made easier. Since the electricity is absorbed by the network from its arrival in the territory of the Single Buyer, the transport tariff must be applied without consideration of the distance between the producer and the consumer.

III. THE NEGOTIATION OF THE CONTRACTS

31. Even when the contractual modalities cannot be the same between the two

systems, it is necessary that in both the negotiations take place under the same conditions of freedom and confidentiality. This element is important so that the obligatory intervention by the Single Buyer is not considered as the exercise of an import/export monopoly.

32. The confidentiality of the price of electricity bought by a consumer from another producer than the utility on which it depends must be preserved in any system. Nevertheless, this is still more necessary in the case where a consumer sells back to the Single Buyer the electricity contracted with another producer.
33. The transparency of transport tariffs shall be required where the network is part of an integrated company, whatever system is chosen. In the case of the Single Buyer the transparency entails the publication of tariff rates which allow the consumer to negotiate the sales contract while knowing the conditions for transport and while integrating the tariff in the negotiation of the price. These tariffs should be able to be applied for the domestic consumption, considering that by definition, because of the Single Buyer system, they will be independent of the distance.
34. The freedom to negotiate shall also bear upon the quantities. In the Single Buyer system the electricity is absorbed in case of imports by the network. It is, therefore, conceivable that the consumer could negotiate more electricity than its needs; the Single Buyer should have to accept these quantities if the conditions are satisfied (disposal of transport capacity, public security) and should have to do so against payment of the price it would normally also offer for imports. This price would be the price paid by the consumer to the Single Buyer for supplies by the Single Buyer, minus the transport tariff. Such a provision would introduce a supplementary flexibility in the Single Buyer system and the Single Buyer model should therefore be governed by an obligation of the Single Buyer to buy unlimited quantities of imported electricity under certain objective conditions.

35. Other conditions of the contract

- According to the promoters of the Single Buyer concept the external electricity contracted by eligible consumers could only be sold to the Single Buyer and integrated into his long term system planning if this electricity is purchased by the eligible consumer on the basis of a long term supply contract. However, it would be nearly impossible to set the duration of these contracts in advance, as they cannot be dissociated from quantities, the quality, timing and the origin of the supply. It would be discriminatory and, therefore, contrary to article 30, if different conditions of duration were imposed on transborder contracts and domestic contracts for the same categories of consumers. Such a discrimination would be even more unjustified in the case of the Single Buyer, since it has the necessary instruments to manage the possible risks. Furthermore it is not evident that some limited short or mid-term supplies could not be integrated into long term system planning. Therefore, the duration of import contracts by eligible consumers cannot be limited to only long term supply contracts. The duration of the contracts will depend on the quantity, quality, timing and origin of the supplies.

- There is no apparent difference in financial terms for the big industrial customer, as long as transport charges are transparent, a purchase obligation of the Single Buyer exists and the contract conditions between the big industrial consumer and the external supplier remains confidential. Big industrial consumers may even prefer the system of financial compensation under the Single Buyer proposal as it guarantees a higher degree of transparency and avoids possibly complicated access negotiations. The price for the external electricity contracted and to be paid by the Single Buyer would be the original electricity price agreed between the eligible consumer and the Single Buyer minus the published tariff for use of the transmission system.

- However, whereas under the negotiated TPA proposal supply contracts can be concluded and executed between big industrial customers and external suppliers, the same is not true for the Single Buyer proposal. Under the latter proposal the big

industrial consumer will always be forced to sell the external electricity to the Single Buyer which will integrate it into its own system. The eligible consumer under the TPA proposal will be responsible vis à vis the electricity supplier chosen with regard to the whole lifetime of the contract. Under the Single Buyer system the duration of this responsibility will be more limited, because normally it will stop to exist after the eligible consumer has sold the electricity to the Single Buyer and after the external supplier has been paid for the electricity contracted.

IV. SINGLE BUYER'S BEHAVIOUR

36. The risk of distortion of competition can come from the opacity of the functioning of the single buyer when it exercises responsibilities at the level of production. An integrated company shall indeed be in a dominating position, whatever the system. Nevertheless, characteristics of the Single Buyer system reinforce this position :

- As already mentioned, an integrated company in a TPA system works in a more competitive environment in so far as TPA applies also to relations between independent producers and consumers within its area, under the control of national competition authorities. In the Single Buyer system, there are no such relations but a sales monopoly.
- In addition, there is in the end a cumulation of responsibilities and powers conferred to the Single Buyer, as regards planing of needs and resources, development, maintenance and operation of the network (including dispatching), buying and selling electricity destined to consumers in its area, which makes it necessary to impose supplementary modalities in order to prevent anti-competitive behaviour.

An inherent risk of distortions of intra-Community trade and competition, arising from a possible behaviour of the Single Buyer, could lead to predatory pricing. Although this is a problem arising from the general combination of a vertically-integrated

company with the regime of tendering, there are factors which reinforce this risk in the present Single Buyer system. The risk of predatory pricing arises from the cumulation of responsibilities and powers conferred to the Single Buyer. This leads to an overall "opacity" of the functioning of the Single Buyer when it exercises its system obligations and the other responsibilities at the level of production.

As already mentioned, an integrated company in a TPA system works in a more competitive environment in so far as TPA applies also to relations between independent producers and consumers within its area. Under these direct negotiations producers will seek to obtain the most favourable price for their output - at least, they will seek to recoup their costs and are therefore unlikely to be able to trade in electricity at prices which do not cover costs over anything but the very short-run.

The Single Buyer, under the obligation to purchase all electricity produced within the system and coming from imports by eligible consumers, may be in a position where he could consider to sell or export a possible surplus from the purchase obligations at a very low price.

However, it should generally not be in the interest of the Single Buyer to sell electricity below purchase prices. Regarding his purchase obligations there is the possibility not to accept a physical delivery but to negotiate a stand-by price instead.

Nevertheless, there is the necessity of national regulation and competition authorities to supervise the market behaviour of the Single Buyer. With regard to both systems, dispute settlement mechanisms, as laid down in the modified draft Directive are therefore applicable to all aspects of both systems. Published electricity prices would facilitate this task.

37. Consequently, the setting up of the single buyer system must be accompanied by a number of measures designed to guarantee non-discriminatory treatment of the

other users of the network, and to reduce the risk of a distortion of competition because of the coexistence of two different systems :

- The single buyer activities must be monitored by a regulation authority which has the power to intervene at any moment to ensure that the decisions of the single buyer are compatible with Community law;
- As already provided by the Commission's proposal, the responsibility of the call for tender must be outside the group of the Single Buyer in order especially to avoid that it will favour the choice of fuels according to its own industrial interest and not according to the public interest and to protect the commercial secrets of the applicants in a tender procedure;
- There must be transparency, with regard to responsible public authorities, of the Single Buyer's long term system planning to verify whether his actions, especially the refusal to purchase externally contracted electricity, are justified;
- Finally, in order to ensure that the decisions of import/export are taken by the network without considering its own industrial interests, an unbundling of accounts will be insufficient and an unbundling of management will be needed. The cumulation within the Single Buyer of various powers and responsibilities increases the risks of distortion and discrimination and, therefore, makes it also necessary to ensure a full unbundling of management.

V. DIRECT LINES

38. In a TPA system, direct lines are seen as an alternative to the use of the integrated network. Any producer is, therefore, authorised, subject to general conditions, to build a direct line to a consumer and reversely. In a Single Buyer system direct lines are seen as an exception to the principle that all electricity consumed in the territory shall transit through the integrated network. However, the Single Buyer proposal accepts that direct lines can be used for the purposes of eligible consumers and some other predefined producers. Under the Single Buyer as proposed direct lines

are, therefore, authorised for export purposes and for autoproducers to supply their own premises.

Finally, one must be aware that whatever the system, environmental constraints will limit the possibility to build new lines. Even if there is an obligation on the Single Buyer to buy back imported electricity proposed by an eligible consumer, this obligation is not absolute since lack of capacity or public security may lead to a refusal. The possibility to use a direct line is therefore necessary also in a Single Buyer system. In the Single Buyer System all eligible consumers shall have the freedom to construct and use direct lines for transactions with external producers and domestic independent producers (and vice versa for producers to supply eligible consumers) within the framework of para.7 of the draft modified Directive.

VI. COMPETITION AND INVESTMENTS

39. In both the negotiated TPA as well as in the Single Buyer system a change will take place in the structure of competition of the market. The new competition conditions could bring along the danger that the former winners of competition under yesterday's rules might no longer be the new winners under tomorrow's rules. This entails that there may be a problem for investments which have been made under the rules of the past; they may become non-economic or stranded.
40. The possibility of stranded investments, as a consequence of a change in the competition rules, are not a problem particular to the electricity industry. The same has happened in many sectors of the economy which have undergone a process of change and liberalisation. Energy, as part of the internal market, is in this respect no exception.
41. However, the investment costs in the energy sector and the environmental costs linked to the construction of new capacities could justify cautious rules for a transition period. Whatever the choice for access to the system might be, there is

the risk that export will be realised on short term marginal cost basis not reflecting real costs of production which would need to be borne by domestic consumers.

42. The Commission's proposal on negotiated TPA as well as the Single Buyer proposal offer the possibility to apply a tender procedure for new production capacities which would not expose existing generation facilities to competition. Finally, it needs to be underlined that the change of competition rules will only be a temporary problem to which electricity companies will have adapted themselves after a period of transition.

VII. LEGAL ANALYSIS

43. The purpose of the Commission's proposal is to give effect to the freedom of trade in electricity and of establishment in the European electricity market in accordance with art. 30 - 37, 57, 66 and 100 A of the Treaty. The question is then to be sure that the introduction of the Single Buyer system will not undermine these provisions of the Treaty.

The Commission's proposal lays down rules aimed at preventing discrimination in the delivery of authorisations, in the management of public tenders, in the treatment of access negotiation to networks with a view to establishing the internal market in electricity. The Single Buyer system should provide the same level of protection.

A. Freedom of exchanges in electricity

44. The objective of the negotiated TPA-proposal is to open up the electricity market progressively, and in a first transitional phase to restrict the use of the interconnected network to a limited number of actors being most able to make use of it. Within this gradual approach experience will be acquired by the system operator to fully maintain security of supply. Experience will also show whether the number of users of the interconnected system can be enlarged in a consecutive

stage. The restrictions of access to the interconnected system therefore seem to be justified because of system security reasons.

45. According to art. 37 any body through which a Member State, in law or in fact, either directly or indirectly, supervises, determines or appreciably influences imports or exports between Member States shall have to be adjusted.
46. In the negotiated third party access, as well as in the Single Buyer system, the network operator remains a natural monopoly or holds to some extent a monopolistic position, supervising imports/exports between Member States. The question is to know if in the case of Single Buyer, the network operator will have more possibilities to influence exchanges between Member States.
- The export operations will be governed by exactly the same rules as in third party access. The negotiations between the independent producer and the Single Buyer for access to the network will take place as foreseen in the Commission's proposal;
 - The imports will be, in both cases, at the consumer's initiative and the conditions of negotiations with the producer will be the same. No administrative formalities should affect imports and exports;
 - If the single buyer is the owner of all the electricity in the network - which is not the case in the other system - it does not have the exclusive right to negotiate import contracts and has the obligation to accept the electricity contracted with producers from an other Member State - or area - subject to the same criteria as in Commission's proposal;
47. On the contrary, the single buyer has all the characteristics of a monopoly for the domestic producers which have the possibility to sell directly to domestic consumers only in limited cases (autoproducers selling electricity into company groups).

48. The Court has laid down², that the existence of a monopoly enjoying exclusive import rights constitutes a discrimination not only vis a vis Community exporters based in other Member States but also in relation to users based in the Member State concerned. In the above mentioned case, it is important to underline that all production monopolies enjoyed exclusive import rights, thus the Court laid down the rule that every national monopoly of a commercial character must be adjusted so as to eliminate the exclusive right to import from other Member States.
49. Articles 30 and 34 prohibit quantitative restrictions on imports and exports and all measures having equivalent effect.

The Court has in particular stated that "rules or practices which result in imports being channelled in such a way that only certain traders can effect these imports, whereas others are prevented from doing so are contrary to article 30"³. It is obvious that the regime envisaged in the Single Buyer system constitutes a measure having equivalent effect to a quantitative restriction on imports with regard to eligible consumers; they are excluded from direct imports as they always remain clients of the grid. The question is then whether this restriction can be justified by art. 36 under the heading "public security", in terms of security of supply. In relation to electricity, security of supply can mean

- security of supply of fuels for electricity generation,
- availability of generating capacity sufficient to meet demand, or
- security of the transmission system.

If, therefore, security of supply can justify restrictive measures under the heading of article 36, it still remains necessary that these measures are proportional to the objective. It appears justified that a State ensures that its degree of dependence does not weaken its own electricity production in an unacceptable manner and puts into place an organisation of the sector which allows for a management of the

² Manghera case C-347/88 ECR 1990 p. 1-4774

³ Case 104/75 De Peijper ECR 1976, p. 613.

production capacity, while taking account of the duration of the amortisation of the investments. Based on this, the organisation of a Single Buyer charged with the management of long-term planning could constitute an appropriate instrument, if the modalities of the functioning of this organisation are themselves proportional to the objective.

Besides taking account of the central role played by the Single Buyer in the system, it shall have to accept the necessary flexibility for the free trade in electricity. The Commission, therefore, considers that the Single Buyer system will not see its goals put into jeopardy if the long-term planning provides the possibility of short-term imports and of a coexistence of the authorisation and tendering procedures for independent producers. The Commission should be able to verify the long-term planning, as it will also verify the definition of the public service obligations which also justify exceptions to access to the network under the system of negotiated TPA.

50. Under art. 58, the right of establishment has to be recognised for all companies incorporated in a Member State, without discrimination. The same conditions for the creation of power generation by a company located in one Member State, will prevail for investors coming from other Member States, whatever is the system chosen. The differences in the right of establishment exercise will depend on the modalities chosen for constructing new production capacities - as in the Commission's proposal - and not on the network access modalities.

B. Transparency rules

51. The Single Buyer will be subject - as the network operator - to the rules on competition contained in articles 85 to 90 of the EC Treaty. The precondition for the application of these provisions are transparent rules permitting control of behaviour. The control authorities should have an equal access to the reasons, for instance, for the refusal of a import contract. The responsibilities of the Single Buyer cannot be mixed with public authorities' responsibilities in public tenders.

Part II : Parallel authorisation of certain types of power plants in Member States which opt for a tendering procedure.

I. INTRODUCTION

52. The Commission has also been invited by the Council to study whether in Member States, which would opt for a tendering system as regards new production capacities, a parallel authorisation procedure would need to exist for certain qualified types of electricity production. The following categories of new production installations have been mentioned by the Council :

- power plants for export purposes;
- autoproducers;
- independent power producers;
- power plants producing on the basis of renewable energies, waste or combined heat and power.

53. The Commission proposed in article 5 (3) of its modified draft Directive concerning common rules for the internal electricity market (COM (93) 643) that all independent producers as well as all autoproducers should have the right to be authorised in parallel to the call for tender procedure.

54. The following chapters will address the possible combinations of tendering and authorisation systems with either negotiated TPA or Single Buyer structures; it will also address the arguments for the need of parallel authorisations in tendering systems as well as the possibilities of increasing competitive forces at the level of production via the combination of elements contained in the tendering and authorisation procedures.

II. AUTHORISATION AND TENDER PROCEDURES

55. In theory the following four organisational structures could be made available for the use of Member States :

- authorisation procedure linked with the Single Buyer system;
- tendering procedure linked with the Single Buyer system;
- authorisation procedure linked with the negotiated TPA-system;
- tendering procedure linked with the negotiated TPA-system.

56. It is obvious that the two polar cases of authorisations and negotiated TPA and calls for tender and Single Buyer are, from a theoretical point of view, the organisational structures being most likely to either achieve the objectives of introducing market forces into the electricity system or to give priority to central planning and the fulfilment of public service obligations. The combination of authorisation procedures and Single Buyer system would try to combine the free right of establishment with a central purchase and sales system. This system approach is reflected for example in pool market organisations, however, with some differing system specific elements. The combination of tendering procedures and negotiated TPA would introduce a certain choice to select new production capacities without giving these new capacities fully secure outlets for their production. The position of independent producers, autoproducers and RWC-producers (Renewables, Waste, CHP) under these system combinations would be as follows.

57. Negotiated TPA with tendering

The **Independent Producer** seems to be in a good position, because he could draw profit from all advantages of a TPA system without being bothered by all the restrictions the regulator may impose by the tendering procedure. Of course, the regulator can influence this development by imposing a particular fuel (e.g. coal), but only in a limited manner. The conclusion is that a TPA system combined with tendering may favour IPP's operating under the parallel authorisation procedure. It must, however, be underlined that the combination of TPA and tendering

procedure is rather hypothetical since tendering always implies the existence of long-term supply contracts with the system.

Auto-Producers are covered by Article 21 (1)ii with respect to the network access, and by Article 13 (4) in connection with the Council Recommendation 88/611 as regards the corresponding national legislation (if RWC-based, see below):

RWC-Producers may be entitled to draw full profit from the virtually unlimited preference to be given to them at dispatch, as laid in Article 13 (4) of the "Modified Proposal" subject however of transposition into national law.

58. Negotiated TPA with licensing procedure

In this case, **Independent Producers** would be on the same footing as all other generators.

Auto-producers and RWC-producers would be in a similar position as described under paragraph 57.

59. Single Buyer with tendering procedure

Export Producers, being independent producers, are not allowed to sell electricity within the Single Buyer's area, but may export. This implies for the generator the need of :

- a long-term (15 years or more) supply contract with a foreign consumer;
- long-term transmission contracts with the national and foreign network operator.

There are some doubts whether the network operators are in a position (or willing) to conclude such long-term transmission contracts, due to the known difficulties of building new transmission lines and to the growing saturation of the existing ones.

Auto-producers and RWC-producers would be in a similar position as above.

Other Independent Power Producers, not producing for export purposes, but interested in producing for the market in the Single Buyer area, will have to make bids in the tendering procedure and will have to win the call for tender. There is no possibility for these independent producers to acquire an authorisation, or to sell their electricity to consumers. All their transactions will have to run through the tendering procedure and the Single Buyer system.

60. Single Buyer with licensing procedure

This, again, is a highly hypothetical case, since the philosophy of the Single Buyer system is based on detailed central planning, which would become impossible if the Single Buyer would be obliged to purchase the electricity of a great number of independent power stations. In particular, this would require a thorough re-definition of the system as presented by France.

In any case, a general licensing system would introduce the same rights and obligations for Independent Power Producers and all other generators.

The protection scheme for auto-producers and RWC-producers would be similar as described above.

III. THE NEED FOR PARALLEL AUTHORISATIONS WITHIN TENDER SYSTEMS

61. It has already been shown in part one of this working paper that calls for tender for new production capacities are a competitive tool within a process of central planning to balance expected additional electricity demand with supply. The initiative to allow new production installations in the system or to open the possibility of long term contracts with external suppliers is therefore taken by the respective planning authorities and not by the electricity producers.

62. It has been argued recently that there should be no authorisation in parallel to the tender system as this would complicate the planning function as well as other obligations of the Single Buyer. However, it is the conviction of the Commission that no tender procedure is able to reflect properly all production capacity requirements existing in the electricity market and that, therefore, every tender procedure needs to be complemented by a parallel authorisation procedure. This basic fact is accepted in both, the negotiated TPA and the Single Buyer proposal. The crucial question, however, is the extent of authorisations required or justified in parallel to the tender procedure.
63. Industrial Auto-Producers are normally independent producers generating electricity for their own use, but selling surplus electricity to the system and buying peak or stand-by electricity from the system. The capacity requirements of these auto-producers are established on the basis of individual company needs which are not known to central planning authorities. By definition the launching of call for tenders to enlarge production capacities for the public demand is not suited to cover individual demand which shall not be satisfied via the integrated transmission system. Therefore, autoproducers require parallel authorisations.
64. RWC-Producers are normally independent producers or auto-producers (see arguments above), but being faced with particular problems due to the primary energies (renewables, waste) or the technology used (CHP). In theory these producers could be included into tender procedures for new capacities as long as they are not auto-producers. However, as these producers suffer from very high production costs (with the exception of hydroelectricity) they would not be able to survive in a tendering climate of sharp competition.
65. CHP generators are in a somewhat different situation. They usually have the highest overall efficiency and should in principle be economic and competitive. However they have to compete in two markets, i.e. electricity and heat. In no case they can afford to lose one of these outlets as this would erode their whole economic base. An exclusion from competitive tendering, therefore, seems to be

justified.

66. It could be argued that specific tenders for RWC-producers only could be organised to overcome these economic disadvantages. However, this approach would not change the fact that for the construction of new capacities producers based on RWC would have to wait for a central planning initiative whereas for the political support of these environmentally benign production facilities it would be more efficient not to have this restriction but to allow at any time the construction of such facilities which could be supported in an appropriate manner.
67. Export Producers are independent producers which generate electricity for export purposes only. Central planning and tendering would never be in a position to cover these capacities as they would not effect the internal electricity demand and supply balance of the system. As regards the electricity producers mentioned under para 63, 64 and 67 both the negotiated TPA and the Single Buyer proposal accept the existence of parallel authorisations. However, there is no such agreement as regards the treatment of independent producers.
68. Other Independent Producers are generators not assuring any electricity transmission and distribution functions inside the area of the system operator (Art. 2 (20) of the draft modified Directive). This means that also vertically integrated utilities planning to establish production installations in the area of other integrated electricity systems would be regarded to be independent producers. The above definition, valid for parallel authorisations, has been established for negotiated TPA systems and it needs to be discussed whether this definition would also be appropriate for tendering systems linked with a Single Buyer.
69. The parallel authorisation of these independent producers including vertically integrated electricity companies outside the system area could jeopardise the centrally planned demand and supply balance. Within a Single Buyer system these independent producers would have no secured outlets and could only sell to the Single Buyer. The Single Buyer would only purchase this electricity after all the

obligations based on long-term supply contracts have been met. It could be said that it is hardly imaginable that independent producers would request a parallel authorisation if no appropriate sales possibilities exist.

70. On the other hand it had been shown under part I that the tendering procedure in competition terms is more restrictive than the authorisation procedure and that an additional opening could overcome this imbalance. However, an opening in favour of some clearly defined other independent producers would only make sense if they could compete directly for eligible consumers inside the system. If these conditions could be met, the parallel authorisation of independent producers would be a tool to increase the competitive environment of the tendering/Single Buyer system.

This would then have to imply that independent producers can establish themselves within the Single Buyer system through parallel authorisation, and that these independent producers should be able to enter into contracts with eligible consumers within the Single Buyer system, along the lines as foreseen for imports from external producers. These two measures would redress the imbalance in competition under a tendering regime, and would provide independent producers with the possibility of finding an outlet for their sales within the system.

71. Such eligible consumers could for example be electricity intensive industrial consumers, which have already the possibility to find cheap electricity supplies outside the system. However, some sort of restrictive definition for independent producers seems to be necessary, so as not to totally disrupt the Single Buyer system with new power plants of very high capacity (1000 MW for example). Therefore, the introduction of a quantitative capacity threshold may be required and appropriate to ensure overall system stability.

IV. PARALLEL AUTHORISATIONS FOR PRODUCERS

72. It is clear that in all systems which follow a tendering procedure a number of

specific types of new electricity production will need to be authorised in parallel to the tender procedure, because they cannot be satisfactorily dealt with by the tendering procedure.

73. Autoproducers, which produce to meet their own consumption requirements, cannot be satisfied through a call for tender and will, therefore, require a parallel authorisation.
74. RWC-producers (Renewables, Waste, CHP) could in theory be included in tendering procedures, but this would not sufficiently satisfy the political need to support these environmentally benign production facilities. Therefore, to meet this demand RWC-producers will also require a parallel authorisation.
75. Export producers, because they are generating exclusively for foreign markets, cannot be covered by a central planning and tendering procedure and, therefore, will also require a parallel authorisation.
76. Independent producers could risk jeopardising the centrally planned demand and supply balance in all systems following the tendering procedure. However, it has been shown that the tender procedure itself in competition terms is more restrictive than the authorisation procedure. An additional opening by means of parallel authorisations for independent producers could overcome this imbalance. As such, assuming the conditions are met that independent producers could compete inside the system for eligible consumers, the parallel authorisation of independent producers could be used as a tool to strengthen the competitive environment of the tendering/Single Buyer system. However, to avoid the total destabilisation of the Single Buyer system by new power plants of very high capacities, a transparent definition for independent producers must be introduced, on the basis of quantitative capacity thresholds.

CONCLUSIONS

A. Reciprocity

77. The Single Buyer system, as proposed in its present form, cannot be considered as being equivalent to the Commission's proposal of negotiated Third Party Access, nor does it provide for reciprocity, as it falls short of what is desirable and achievable from the competition point of view. A high degree of reciprocity can only be assured between the systems if certain basic adaptations are applied to the present SB-model.

It is clear, therefore, that at the extremes, two types of market organisation, in which those opting for the Commission's TPA system follow the authorisation procedure, while those opting for the Single Buyer system follow the tendering procedure, are so different that they cannot provide an equivalent degree of market access, nor reciprocity between the systems. It is true also that in such a case there is a risk of unilateral liberalisation by some Member States, while others stay behind.

From the point of view of the Commission this is a valid argument if one compares the proposal of the Commission for TPA with the French proposal for a Single Buyer system. However, the conclusions of this paper attempt to identify the outlines of a modified Single Buyer system, which would give stronger guarantees for reciprocity and non-discrimination, and for equivalent economic results. To be able to reach this conclusion different basic adaptations need to be made which aim at increasing transparency and at further enlarging the possibility of access to the market (mainly as far as the establishment of electricity producers is concerned) and of exchanges both within and outside the system (between producers and eligible consumers).

If these adaptations of the Single Buyer could be preserved, this model can be seen as ensuring a similar opening of electricity markets compared to negotiated

TPA. Both systems must be based on a common and transparent definition of eligible consumers (ie. large industrial consumers and distributors). The opening of the market is realised via the coverage of these eligible consumers.

78. To ensure a maximum of reciprocity and compatibility with the Treaty, the following modalities have to be met :

- Degree of consumer choice for eligible consumers : In case of the Single Buyer system eligible consumers should have the freedom to contract electricity supplies with external producers under the same conditions as with domestic independent electricity producers.
- Imports and exports of electricity : Both systems could generate directly comparable and acceptable results if the import regime under the Single Buyer model is governed by an obligation of the Single Buyer to buy unlimited quantities of imported electricity under certain objective conditions, by transparency of tariffs to use the transmission system and thereby transparency of prices to be paid by the Single Buyer for imported electricity. Furthermore, electricity imports should only be subject to objective and justified conditions (i.e. lack of interconnected capacity or for public security reasons).
- Transparency and distortion of competition : In order to ensure that the principles of objectivity, transparency and non-discriminations are respected to guarantee that competition is not distorted, to avoid the risk of potential discrimination, and to achieve neutral and independent treatment, the Single Buyer, where part of an integrated undertaking, should be fully unbundled in terms of a separation of management and of information flows between its different activities, especially in terms of production and supply.
- Competition at the level of production : Tendering procedures for new and additional production capacities, which are more restrictive in competition

terms than authorisation systems, should only be organised and decided by public authorities or other independent entities appointed for this purpose.

Parallel authorisations of Independent Producers : To redress the imbalance between authorisation and tender procedures, independent producers should, even under tendering systems, benefit from parallel authorisations to strengthen competitive forces. A transparent definition for independent producers in Single Buyer systems must be introduced, on the basis of quantitative capacity thresholds. In addition, autoproducers, export-producers and RWC producers (Renewable, Waste, CHP) should also benefit from parallel authorisations to fulfil the need for their specific type of production capacity.

Direct lines: In the Single Buyer system all eligible consumers shall have the freedom to construct and use direct lines for transactions with external producers and domestic independent producers (and vice versa for producers to supply eligible consumers) within the framework of Art.7 of the draft modified Directive.

79. The above conditions apply specifically to the Single Buyer, within the Single Buyer system, however, a number of these conditions could also apply to all integrated undertakings in both the Single Buyer and the TPA system. It is clear that in both systems an unbundling of management in integrated utilities would improve competitive forces.

B. Compatibility with the Treaty

80. As regards the simultaneous introduction of both systems and their compatibility with the Treaty, it can be concluded that the SB system, as provided in its present form with its internal monopoly structure, is to be considered as a measure of equivalent effect to a quantitative restriction on imports within the sense of article

30 of the EC Treaty. Furthermore, it should not contain obstacles to the freedom of establishment going beyond constraints imposed by public security.

The present proposal would result in all supplies and production being channeled de facto through the Single Buyer. A system which channels imports and exports through an intermediary is contrary to the principle of free movement of goods. Moreover, the unmodified Single Buyer could be more prone to the risk of predatory pricing than the negotiated TPA system by virtue of the structure of incentives and obligations inherent in the system. Exclusive rights resulting in absolute control over imports, transmission and distribution are prima facie contrary to the basic Community principle of free movement and competition and cannot be automatically justified on public services grounds.

Security of supply reasons do not automatically justify an exemption based on "public security" provided in article 36 of the Treaty. There is no evidence in the case law of the Court leading to an automatic suspension of the Treaty rules on free movement and competition. As the negotiated TPA-system shows, security of supply and public service obligations can also be met in a system which is less restrictive to competition.

It is obvious that according to the respective security of supply situations Member States organise electricity markets according to their different needs. An acceptable balance must be reached between the necessity of completing the internal market and the legitimate preoccupations of security of supply. The Single Buyer system wants to provide an organisation of the electricity market based on long term system planning aiming at securing supply with a central management of production, transport and distribution. Nevertheless, without affecting this long term planning approach, adaptations of the Single Buyer system are necessary in order to make it compatible with the Treaty.

C. Integration of the Market

81. Is a coexistence of two systems compatible with the process of integration in electricity markets? Will there be identifiable progress towards an internal electricity market based on two systems, as compared to the present situation?

Certainly a parallel coexistence of two systems creates problems in establishing an internal electricity market as integration does not follow a harmonised approach. However, the Commission's proposal itself is part of a second phase of transition towards liberalised energy markets, in which the Commission wants Member States to gain experience in stronger liberalisation and competition. It is important that annual reporting of the experience gained and of progress towards liberalisation is made. The Commission will subsequently assess the situation and draft after four years a report on this experience. If from a market integration point of view this experience in liberalisation - and competition - is not ideal, then this will be rectified in a third and final phase of legislative activity with the aim of fully completing the internal market in all sectors of the Member States' economies.

MINUTES

of the 1807th Council meeting
(Energy)

held in Brussels on 29 November 1994

CONCLUSIONS**AMENDED PROPOSAL FOR A EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE
CONCERNING COMMON RULES FOR THE INTERNAL MARKET IN ELECTRICITY**

"After the submission of the amended proposals for Directives on common rules for the internal market for electricity and natural gas by the Commission in response to the position of the European Parliament and the conclusions of the Council on 30 November 1992 the Council has concluded the following:

1. The Council confirms the necessity of completing the internal energy market, taking into consideration the different situations in Member States and the basic principles identified in the Council Conclusions of 30 November 1992. It is therefore essential to work towards secure, open, transparent, efficient, competitive and environmentally acceptable electricity and gas markets, taking into account the energy objectives of rational use of energy and development of renewable and indigenous energy sources.
2. The Council recognizes that the energy situation in Member States, and in particular their different levels of energy security of supply, have led to different structures in the organization of the sector. The Council is therefore convinced that the completion of the internal electricity and gas markets requires flexible solutions, which, however, must be applied in the spirit of reciprocity between Member States and lead to equivalent and non-discriminatory opening of markets.
3. The Council recognizes the fact that the deliberations are first concentrating on the electricity market. In this connection, five key topics with regard to the electricity market were identified under the Greek Presidency. Agreement has to a large degree now been reached on four of these topics, while there is the need for additional discussion and clarification with regard to market liberalization in areas extending

beyond the production sector and to other aspects of the Directive, for instance that of harmonization and taking into account that each of these five key topics should represent part of an overall agreed solution.

4. There is agreement in principle on the following themes regarding the electricity sector:

- (a) As regards the production of electricity and with the goal of achieving competition within the branch, Member States should be given the right to choose between authorization and/or tender procedures for new production capacity. Authorization and tender procedures shall take place according to objective and non-discriminatory criteria. For monitoring the organization and execution of the tender procedure, Member States shall appoint an independent public or private body; the treatment of certain types of power production to be authorized in parallel to tender procedures needs further analysis.
- (b) Vertically integrated companies shall keep on a comparable basis separate accounts for the activities of production, transmission and distribution, in a way which will avoid discrimination and cross subsidies and will ensure undistorted competition. To guarantee adequate transparency, these separate accounts must be accessible to the independent entities defined by the Member States, as well as to dispute settlement authorities as provided for in the proposed Directive.
- (c) The provisions of the Directive concerning the network operator are to be limited to those necessary to ensure the implementation of the Internal Electricity Market in a non-bureaucratic way.
- (d) Insofar as Member States impose public service obligations on undertakings in the electricity sector in the general economic interest, – which may include, for instance, services in the fields of environment and security of supply – these must be clearly defined, transparent, non-discriminatory and monitorable. They shall be published and communicated to the Commission. The requirements of Article 90(2) of the EC Treaty have to be respected.

5. Further discussion is necessary on how to open the markets beyond the area of electricity production, especially on the question of the possible simultaneous introduction of a negotiated TPA and a so-called single-buyer system. 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.

The Commission is called on to examine and outline the anticipated consequences of the side-by-side application of both approaches, in particular with respect to the potential for competition and the impact on the various groups of suppliers and purchasers. This analysis will also deal with the question whether in Member States introducing a tender procedure, power plants producing for export, for autoproduction and independent production, as well as power plants based on CHP and renewable energies, should be permitted by authorization procedures – in parallel to the tender procedures – as well. This analysis will also deal with the specific problems of opening the markets in small and very small electricity systems.

6. The Permanent Representatives Committee is requested to finalize work on the basis of the abovementioned principles so that a common position can be formally adopted as soon as possible in the year 1995.
7. Four years after the expiration of the deadline for enacting the Directive in national legislation, the Commission shall submit a report on the experience made and propose, depending on the outcome, such changes in the Directive or other initiatives as may be required to better attain the goals outlined in paragraph 1.