ENERGY POLICY IN THE LISBON TREATY: THE SPANISH EXPERIENCE IN THE SECTOR[1]

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I. Energy in the Constitutional Treaties

1. Background

Without going into great detail, it should be noted at the start that the goal of a common market for coal, steel and nuclear energy was the forerunner of the European Economic Community, or Common Market. In fact, the 1951 Treaty of the European Coal and Steel Community (ECSC) and the 1957 Treaty of the European Atomic Energy Community (EAEC, or Euratom) preceded the 1958 Treaty of the European Economic Community (EEC). However, many more years would pass before talk began of an "energy policy" for what is today the European Union[1].

Thus, the 1958 EEC Treaty contained no particular stipulations regarding energy policy, nor did it specify measures applicable to forms of energy other than those regulated by the other Treaties. More than 30 years passed, until 1 July 1987, when the Single European Act came into effect, before energy – in spite of the key role it had played in building the Common Market – began to be considered as part of Community policy.

However, the EEC Commisssion drew up a document regarding its energy policy goals in 1962, followed by another in 1968, entitled *First Guidelines for a Community Energy Policy.* The oil crisis of that year compelled the EEC, for the first time, to seriously face energy problems from a global viewpoint. To this effect, the Community set general objectives on energy issues, but each Member State preserved its full sovereignty to choose the measures to be used in order to attain these objectives.

Later, in 1974, 1980 and 1986, Community documents were approved that contained common numerical goals to serve as guidelines for national policies and to orient energy producers and consumers. The Resolution of 16 September 1986 set forth objectives for energy policy until 1995, amongst which an interesting highlight is that of "*greater integration, free from barriers to trade, of the internal energy market*

[1] Pranešimas, skaitytas tarptautinėje mokslo konferencijoje „Europos Sąjunga: teisinės reformos keliu" Vilniuje 2008 m. birželio 5 d.

with a view to improving security of supply, reducing costs and improving economic competitiveness". This is the first reference to an *"internal energy market"*.

The 1986 Single European Act (SEA) makes no mention of energy, but its Article 13 refers to Article 7.A of the EEC Treaty, which sets out the objective of an internal market. Even more surprising is the fact that the White Paper to achieve this internal market, which preceded the mentioned SEA, does not contain any mention of energy, either.

It was in 1988 that the Commission recognized that the internal market also included energy, and that was when the name *"Internal Energy Market"* appeared. Indeed, on 2 May 1988 a document with this title was published, in which this objective is comprehensively addressed for the first time. What is more, it is accompanied by an inventory of the barriers that must be overcome in each sector (coal, oil, natural gas, electricity and nuclear energy) to achieve the Internal Market.

The Commission took as its starting point the European Council Resolution of 16 September 1986 concerning energy policy objectives for 1995, among which it mentioned: greater integration of the internal energy market; elimination of all barriers in each sector; improving the security of supply; reducing costs; and improving economic competitiveness. Afterwards, at the Energy Ministers meeting held on 2 June 1987, support was given to the Commission's aim to make, firstly, an inventory of barriers and, secondly, submit to the Council the necessary proposals for their elimination by the end of 1992.

On 11 January 1995, the EEC Commission presented a Green Paper entitled "***For a European Union Energy Policy***". The objectives to be sought by the community energy policy are, on the one hand, to ensure the satisfaction of the needs of individual and industrial consumers at the least cost, while meeting the requirements of security of supply and environmental protection; and on the other hand, to achieve greater economic and social cohesion. The priorities for Community action stated in the Paper refer to regulating the measures necessary for the maintenance of effective but equitable competition between the operators, intended to allow freedom of movement and prevent liberalisation from damaging the energy efficiency investments necessary for environmental protection; to reconciling freedom of movement with the legitimate objectives of the Member States, while at the same time promoting the integration of markets and the convergence of such policies towards achieving the Internal Energy Market; and to protection of public service missions, the security of supply, environmental protection and energy efficiency.

Council and Commission Decision 98/181, dated 23 September 1997, approved the **European Energy Charter** Treaty, which established a framework for international cooperation between European countries and other industrialized countries with the aim of developing the energy potential of central and Eastern European countries and, at the same time, of ensuring security of energy supply for the European Union. This Charter was accompanied by a Protocol on energy efficiency and related environmental aspects.

A new Green Paper, entitled **"Towards a European strategy for the security of energy supply"**, was published by the Commission on 29 November 2000 (COM (2000) 769 final, not published in the Official Journal), and it acknowledged that the EU's external energy dependence has reached 50%, and that it will increase to 70% by 2020 or 2030; that 45% of oil imports come from the Middle East; that 40% of gas imports come from Russia; and that energy imports account for 6% of total imports. The Green Paper recommended drawing up a strategy for security of energy supply aimed at reducing the risks linked to this external dependence.

The 2000 Nice Treaty mentions "energy" (together with civil protection and tourism) in Article 3.1.u) TEC, at the end of a long list of actions aimed at meeting the Community goals stated in Article 2.

A Commission Communication, dated 11 September 2002 and entitled **"The internal market in energy: Coordinated measures on security of energy supply"** (COM (2002) 488 final – Not published in the Official Journal), emphasised that the creation of an integrated energy market would make Member States increasingly interdependent, and that it must be accompanied by coordinated measures to guarantee security of oil and gas supplies.

The third Green Paper on Energy, dated 8 March 2006 and entitled ***"A European Strategy for Sustainable, Competitive and Secure Energy"*** (COM (2006) 105 final, not published in the Official Journal), constitutes an important step forward in the development of an EU energy policy. It considered that to achieve its economic, social and environmental goals, Europe must face up to significant energy challenges: increasing dependence on imports, volatile prices of hydrocarbons, climate change, greater demand and barriers to the internal energy market. The Union should take advantage of its position as a world leader in managing demand and promoting renewable energy sources.

The dynamics launched by the 2006 Green Paper resulted in the EU Communication of 10 January 2007 entitled "**An energy policy for Europe**" (COM (2007) 1 final, not published in the Official Journal), which constituted a strategic analysis of Europe's situation and presented a series of measures ("energy package" with the aim of decidedly committing to a low-consumption, more secure, more competitive and more sustainable economy, one which guarantees the functioning of the internal market, the security of supply, the reduction of greenhouse gases, and of enabling the EU to speak with a single voice in the international sphere. On the basis of this Communication, the European Council meeting of 9 March 2007 adopted a comprehensive energy Action Plan for the period 2007–2009.

And on the same date, 10 January 2007, the Commission announced another Communication, entitled "***Towards a European Strategic Energy Technology Plan***" [COM (2006) 847 final – not published in the Official Journal] to adopt a European Strategic Energy Technology (SET) plan, with the aim of speeding up the development of clean, efficient and low-carbon technologies, bearing in mind that developing energy technologies can play a de-

cisive role and help to achieve the EU's goals of reducing energy consumption and greenhouse gas emissions by 20% between now and 2020 and increasing by 20% the share of renewable energy sources in Europe's energy mix.

Finally, the draft European Constitution considered "measures in the area of energy" as one of the areas of shared competence defined in Article I-14.i), and developed it in Article III-256 in identical terms to those subsequently stated in the Lisbon Treaty.

2. Energy policy in the Lisbon Treaty

As regards this study, the Lisbon Treaty introduced a new classification of the competences of the Union, which are listed in the Treaty on the Functioning of the European Union (TFEU). In the category of shared competence between the Union and the Member States, Article 4.2 refers to energy, separating it from civil protection and tourism, which it had been linked to until then, and which are now considered support and supplementary policies in Article 6.

However, not only does it classify energy policy as a shared competence, but it also, and for the first time in the Constitutional Treaties, regulates this policy, and includes the full content of Article III-256 of the draft Constitution. Thus, Article 194 of the TFEU, which includes Title XXI of Part III of the Treaty, sets out:

"1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, the Union's policy on energy shall aim, in a spirit of solidarity between Member States, to:
   (a) ensure the functioning of the energy market;
   (b) ensure security of energy supply in the Union;
   (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
   (d) promote the interconnection of energy networks.
2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.
   Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c). (limitations for environmental reasons).
3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature".

This new precept should be commented on.

O n e. When comparing the content of the Article with the content of the draft Constitution, it can be observed that significant amendments have been made (formal amendments aside, which are a result of the Lisbon Treaty abandoning the new denomination of the sources of law in

"European Law", "European Framework Law", etc.). Section 1 of the precept introduces the "solidarity clause" (*"in a spirit of solidarity between Member States"*), to date unheard of in Treaties as applied to the sphere of energy, and the practical application of which is difficult to imagine; and letter d) is added to Section 2, to include, as an energy policy objective, the promotion of the interconnection of energy networks, which, in fact, is part of the trans-European network policy.

Two. Energy policy falls within the framework of "*the context of the establishment and functioning of the internal market*", with a very concrete and specific purpose: "*to ensure the functioning of the energy market*". Thus, the existence of an "**internal energy market**" is recognized, which, despite its generalized acceptance and recognition in the EU's secondary law, is given the status of primary law by being expressly mentioned in a Constitutional Treaty.

Three. From the outset, energy policy appears with a limitation, which is that of addressing the need to "*preserve and improve the environment*". This is not the only limitation. For example, it must also comply with the regulations on competition, and on calls for tenders, among other requirements that are discussed below. But the TFEU stressed the fact that the production, transport and consumption of energy must make a priority of considering environmental needs.

Four. Specific goals are clearly set out for energy policy, paramount among which is that of "*ensuring the functioning of the energy market*". This makes it possible to distinguish between energy policy, as a general concept, and the "internal energy market", as one of the areas of the "internal market", or in other words, as one of the goals of the energy policy. However, the correct functioning of the internal energy market cannot be achieved unless, within such a market, the other goals of energy policy (security of supply, efficiency and energy saving, trans-European networks) are achieved, and so, ultimately, energy policy and the internal energy market are, in fact, equivalent expressions.

Five. The second of the energy policy goals mentioned in Article 194.1 of the TFEU is that of "*ensuring security of energy supply*". The second paragraph, however, seems to leave the prerogative of ensuring this security to the Member States, by stating that Community competences "*shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply*". As we shall see below, ensuring the supply of diverse sources of energy constitutes one of the crucial problems in the internal energy market and in national markets. Obviously, the Union cannot guarantee the security of supply energy at a pan-European level, and so this issue constitutes a typical situation in which shared competence applies, and the Treaty recognizes it as such.

Six. In the third place, promoting energy efficiency and saving, as well as developing new, renewable forms of energy, which are identified as aims of the Union's energy policy, are, above all, matters for the jointly accepted and developed natio-

nal policies of Member States, and so these too, for the same reasons, fall within the area of shared competence.

Seven. Finally, promoting Europe-wide energy transport networks is one of the most important instruments for achieving an internal energy market, and which the Union, through its programmes and funding sources, is in a position to implement via specific, concrete actions.

3. Why is energy policy not present in the constitutional Treaties?

Let us now consider the question of why energy policy, despite the important treatment given it in under European secondary law, as made clear in Section 1 above, was not addressed in the constitutional Treaties until very recently.

A) Complexity of the sector

The first response to the above inquiry would be to refer to the complexity of the energy sector, made up of diverse subsectors, each of which, in itself, is of sufficient complexity to consitute an independent sector. This situation has led to the provision of a specific regulatory context for each one, a situation that was impossible to express in the constitutive Treaties. Let us now examine this complexity.

a) Solid fuels

In this sector, the ECSC had created an unrestricted Single Market within the Community, and without taking into consideration the greater competitiveness of coal from third countries. The main problem to be faced was that of State aid to the industry. In principle, these were forbidden under the ECSC Treaty, but they continued to be granted, with the Commission's authorization, in order to compensate for losses, or to provide assistance for investment, restructuring or of a social nature. The Community regime of aid to the coal industry, which remained in force from 1 January 1994 until 23 July 2002, was set out in Decision 3632/93/ECSC. The ECSC was wound up when it had completed the term of 50 years stipulated in its constitutive Treaty.

b) Oil

This is considered a highly competitive sector, resulting from its worldwide integration, the presence of a large number of operators, the variety of products derived from oil, the diverse possibilities of transporting it, and which do not rely on a fixed network, the fact that consumers are in a position to choose among various suppliers, and that prices are generally transparent. The EU has made progress in removing some of the barriers to competition, through its Directives on public tendering, the proposal to eliminate monopolies in oil prospection and production, the harmonization of special taxes on hydrocarbons (Directive 92/12/EEC, of 25 February), and the possibility of setting maximum and minimum prices (Directive 70/550/EEC). Furthermore, it should be borne in mind that some of the barriers no longer exist, without any Community measures being needed, due to national processes to open up markets or to eliminate monopolies.

c) Natural gas

Attempts have been made to eliminate the barriers currently facing the sector by

means of various Community actions, such as the Decisions on trans-European networks for gas transportation (among others, Decisions 96/391/EC and 1229/2003/EC); the proposal on the declaration of interest to Europe of trans-European networks in the area of gas transportation; the 1992 Communication of the Commission to the Council on transport infrastructure in the gas sector; the 29 June 1990 Directive on price transparency and the transit of natural gas via large networks; Directive 98/30/EC of 22 June 1998, arising from the agreement reached in December 1997 on gas liberalization; and finally, Directive 2003/55/EC, of the Parliament and the Council, issued on 26 July 2003 (O.J. l 176, of 15.7.2003) on establishing common regulations for the internal gas market, repealing Directive 98/30/EC.

d) Electricity

The Commission aimed to overcome the barriers in this sector by means of a two-phase Plan that was presented in 1992. Phase one was considered to have been implemented with the presentation of the Plan, through the approval of Directives on electricity transportation via large networks, and on price transparency, both dated 29 June 1990, and common to the sectors of gas and electricity. The fundamental goal of Phase two, which was intended to be concluded by 1 January 1993, was the approval of a Directive on establishing common regulations for the internal electricity market. Directive 96/92/EC, of 19 December 1996, set out common requirements for the production, transport and distribution of electricity, and has since been replaced by Directive 2003/54/EC of the Parliament and of the Council, of 26 June 2003, on common standards for the internal electricity market.

B) Relationship with other Community policies

The second reponse to the question posed in Section 27 might be that energy has such close ties with other Community policies that it could be considered that energy is addressed indirectly in the Constitutive Treaties, i.e., through the development of the following policies.

a) Relationship with competition policy

Setting aside the coal-mining sector, which is the object of specific legislation via the ECSC Treaty, and the oil sector, which has practically achieved full openness to competition, the gas and electricity sectors present certain technical characteristics, which in fact leads to them being problematic as regards greater openness to competition. For example, electricity cannot be stored (which places it at a disadvantage with respect to virtually all other products, which can be accumulated and stored; an instantaneous reponse to demand must be made, whether this increases suddenly (peaks), or falls below expected levels (troughs); it is not exactly a supply, but rather a making-available (the consumer takes it when necessary); it can only be transported by cables (unlike telecommunications, for example, which can make use of cables, fibre optics, radio waves or just electromagnetic space); production is optimized to obtain the best price (at all times, the generating

station operating is the one producing the cheapest power); and finally, for reasons of social and economic policy, electricity prices are the same throughout the country for each type of supply.

In addition to the above considerations, it is also necessary to bear in mind, for both sectors, the existence of declarations of public service or of general economic interest, the need for administrative regulation, or the generalized existence of special or exclusive rights, or monopolies, in one or more phases of the production, transport and distribution (which in some cases may be considered natural monopolies).

b) Relationship with free movement of goods and freedom of establishment

The principle of the free movement of goods within the Community should, in theory, be applied to energy products, whatever their origin within the Community or the regime determining the freedom of movement for goods imported into a Member State. However, this principle comes up against barriers of various kinds: technical (regulations referring to diverse qualities of the products; security concerning transport and the materials employed in the construction of generating stations, especially nuclear power stations); legal (the public or private nature of the companies operating in the energy sector, the existence of the above-mentioned monopolies or exclusive rights, differences in prices between different countries); temporary barriers (problems such as those of the oil crisis or energy crises, which make it necessary to establish measures limiting consumption or introducing rationing).

With respect to the freedom of establishment and the provision of services, the Union is striving to eliminate barriers and discriminatory policies that may restrict the movement and/or establishment of persons, and the freedom of provision of services (removing barriers to obtaining research permits, gas or oil prospection and concessions, or authorizations for the operation of refineries, for the establishment and operation of fuel distribution outlets, or for transport concessions for gas, oil or electricity, or barriers to allowing third parties access to distribution networks, etc.).

c) Relationship with industrial policy

Energy is not merely an element that influences the price of other products, or a commodity that may, if needed, circulate freely within the Community. Its production, transport and distribution is also a key industry that is directly affected by Community industrial policies such as structural policy (development, the reconversion of industries), research and environmental protection. But industrial policies regarding energy have been strongly influenced by circumstances, diverse crises and the pressing, priority necessity to ensure supplies.

d) Relationship with socio-economic cohesion policy

In order to obtain greater economic and social cohesion, and to reduce the differences in prosperity among diverse countries and regions, the Union seeks to establish a more appropriate infrastructure for the energy sector, as an inadequate one constitutes an impediment to the eco-

nomic growth of less developed countries and regions and, hence limits its economic and social cohesion. To achieve this goal, it is proposed that cohesion-related issues should be systematically taken into account when the Union prepares its energy policy; that energy should be integrated within other EU policies, such as regional development, agriculture, the environment, transport, research and social affairs; and that a series of complementary measures should be adopted in order to reinforce energy infrastructure, energy efficiency and the possibilities concerning the internal potential of less developed countries and regions.

e) Relationship with environmental policy

With respect to environmental protection policies, the Union is continuing to reduce external environmental costs, integrating the environmental dimension into its sectoral policies, and thus into its energy policy. For this purpose, economic instruments will be used, including taxation, voluntary agreements on emission reductions, negotiated quotas and deposit systems. Due account is taken of the potential importance of such measures for industrial competitiveness and for the Community's own scope for action.

Examples of the connection between energy policy and environmental protection include the regulations limiting dangerous emissions from power stations and from motor vehicles; the establishment of maximum permitted values for emissions from large new incinerators; the Directives on the lead content of petrol and that of sulphur in fuels; the SAVE Programme to improve energy utilization and saving; the THERMIE Programme aimed at promoting technologies to improve energy efficiency; and finally, measures to favour more rational energy use, including taxation policy for their implementation, such as the posibility of a tax on CO2, the progressive effect of current taxes, aimed at energy saving, and the anticyclic structure of taxes intended to encourage greater energy efficiency.

Paradigmatic of the above-mentioned connection is the Commission's Communication of 14.10.1998 (COM (98) 571, not published in the Official Journal) to reinforce the integration of environmental aspects within European energy policies. More recently, the Commission published the Communication of 10.1.2007 (COM (2007) 2 final, not published in the Official Journal), recommending a series of measures to limit global warming to 2ºC by the year 2020.

f) Relationship with trans-European networks

The policy on trans-European networks is developed under Article 170 of the new Treaty on the Functioning of the European Union, which states "*the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures*". Decision 1364/2006 of the Parliament and of the Council, of 6 September 2006 (OJEU L262, of 22 September 2006), contains a list, ordered by the aims and priorities defined, of the projects of trans-European

energy networks that may be awarded Community funding. Such networks are considered instruments that are essential to the functioning of the internal energy market, to guarantee the security and diversification of supply and as an important reinforcing element in territorial cohesion.

g) Relationship with public tendering policy

Directive 2004/17/CE of the European Parliament and of the Council, of 31 March 2004, on the coordination of the procurement procedures in the water, energy, transport and postal services sectors, is applicable to any contracting authority or public company exercising activities in any of the following areas: gas, electricity, water, transport services, postal services, the extraction of fuels and the provision of ports or airports; it is also applicable to any contracting authority that, while not not having contracting powers, exercises one or more of the above-mentioned activities and has been granted special or exclusive rights by a competent authority of a Member State.

h) Relationship with fiscal policy

Directive 2003/96 of the Council, of 27 October 2006 (OJEU L 283 of 31 October 2006), as modified by Directives 2004/74/EC and 2004/75/EC, establishes a harmonized taxation system for energy and electricity products. The system of Community-wide minimum levels of taxation had long been restricted exclusively to mineral oils, and was now extended to coal, natural gas and electricity, applying minimum levels to energy products, when these are used as engine or heating fuel, and to electricity. The aim of this measure is to improve the internal market, reducing distortions of competition between mineral oils and other energy products. In order to achieve the Community's ecologic goals and those of the Kyoto Protocol, the measures seek to promote a more efficient utilization of energy in order to reduce dependence on imported energy and limit the emissions of greenhouse gases. Always bearing in mind the standpoint of environmental protection, the Directive authorizes Member States to grant fiscal concessions to companies that adopt specific emission-reduction measures.

4. Is there an internal energy market (IEM)?

Before answering this question, we must decide what we mean by 'an internal energy market'. The theoretical answer is realtively straightforward; an IEM is one in which there is freedom of movement for the persons (companies), goods, services and capital playing a role in the energy sector. In other words, an IEM is a market in which any producer or consumer of energy products (coal, oil, gas, electricity, nuclear energy) may produce, or transport, or consume it, freely and without any barriers by reason of nationality in any part of the European Union.

It is fairly undeniable that European consumers are not free to buy, nor are producers free to produce, energy products in any part of the Community space; nor may producing companies establish themselves freely in any Member State; nor is

the capital market, that is the possibility of acquiring shares or participations in any company, fully liberalized. Thus, to give just one example among many possible, while the French company EDF or the Italian ENEL can buy shares in electrical companies in other Member States, and even buy the company outright, European investors cannot purchase shares in EDF or ENEL because these are public companies that are situated 'outside' the market and thus, do not form part of the internal energy market.

This asymmetry or lack of reciprocity is so surprising and hard to understand that newly-incorporated Member States would therefore be well advised not to privatize their energy sectors, as this would entail the very real risk of the privatized companies being acquired by the energy giants of other European Union countries, with no reciprocal action permitted. If this were to happen, the control of a universal public service would pass to the government of another State, when the privatizing Member State had done so in the understanding that it was thereby collaborating in promoting the internal energy market. Such was the Spanish experience, as discussed below.

It may be wondered how this situation came about. The answer can only be that it has arisen from the position held by the Commission and ratified by the European Court of Justice.

From the outset, it should be made clear that the Commission seems to have reduced the scope of the IEM to gas and electricity, overlooking the other energy sectors and thus foregoing a comprehensive view of the sector. The Commission considers that achieving a genuine IEM is a priority goal of the European Union, and the existence of a competitive IEM is a strategic instrument, both in order to offer European consumers the choice between different suppliers of gas and electricity at fair prices and also to allow all companies access to the market, in particular the smallest ones and those investing in renewable energies.

In accordance with these considerations, two Directives have been passed; the first was Directive 2003/55/EC of the European Parliament and of the Council, of 26 June 2003, on common regulations for the internal market in natural gas, and which repealed Directive 98/30/EC (OJEU L 176 of 15 July 2003). This measure established common regulations for the storage, transport, supply and distribution of natural gas; it defined structures for the organization and functioning of the natural gas sector, including liquefied natural gas, biogas, gas obtained from biomass, and other types of gas; it also regulated access to the market, the criteria and the applicable procedures with respect to authorizing the transport, storage, distribution and supply of natural gas, as well as the exploitation of the corresponding networks.

The second measure was Directive 2003/54/EC of the European Parliament and of the Council, of 26 June 2003, on common regulations for the internal electricity market and which repealed Directive 96/92/EC (OJEU L 176 of 15 July 2003), and which established common regulations for the generation, transmission and distribution of electricity. It also

defined structures for the organization and functioning of the electrical sector, access to the market, the applicable criteria and procedures with respect to authorizations and calls for tenders, as well as the exploitation of the corresponding networks. But no similar Directives exist, with this aim of achieving an internal market, for other sectors of energy, which corroborates our statement that the Commission seems to have restricted the IEM to the areas of gas and electricity.

A second reason for the absence of an IEM even in the areas of gas and electricity is the interpretation made by the Commission of the free movement of capital, granting priority to this freedom over that of the "principle of the freedom of enterprise" or the "principle of the market economy" or the "principle of the open market economy with free competition", as recognized in Article 16 of the Charter of Fundamental Rights and Articles 4, 98 and 105 of the Treaty of the European Community, as cornerstone principles underlying Community policies, especially its economic and monetary policies. Nevertheless, the Commission, on the basis of Article 295 of the TEC, which does not prejudge the ownership regime established in Member States and allows the continuing existence of public companies, which in many cases are monopolistic in nature, whose fulfilment of free competition regulations is very much open to doubt and which preclude the accomplishment of an IEM, in the sense of allowing reciprocal rights. This position held by the Commission has been upheld by the European Court of Justice, and this issue is discussed below.

II. The Spanish experience

1. Case C-463/00: the golden share

In 1995 Spain began a process of privatisations of its main public undertakings. By the Law 5/1995 of 23 March 1995 on legal arrengements for disposal for public shareholdings in certain undertakings the Spanish Government introduced a legal mechanism to guarantee that in the main public enterprises that had been privatized the State kept the power of a prior authorization on the main operations concerning the life of these enterprises (like merger operations) or operations consisting in dealings in the share capital or in direct or indirect acquisitions of shares resulting in a holding of at least 10% of the share capital. Several Royal Decrees implemented this Law concerning Repsol, Telefónica, Argentaria, Tabacalera and Endesa. (petroleum, telecommunications, banking, tobacco and electricity sectors respectively). The prior approval was limited in time: the shortest was fixed for Tabacalera until the 5 October 2000 and the longest for Endesa until the 8 June 2008.

The Commission began an infringement procedure against Spain, considering these provisions may infringe art.56 (free movement of capitals) and art. 43 (freedom of establishment) of the EC Treaty. The procedure led to the judgement of 13 May 2003, where the Court declared the infringement of art.56 EC, but did not examine the infringement of art.43, in so far, as the restrictions on the freedom of establishment are a direct consequence of the obstacles to the free movement of capitals, to which they are inextricably linked.

The Court considered that "depending on the circumstances, certain concerns may justify the retention by the Member States of a degree of influence within undertakings that were initially public and subsequently privatised, where those undertakings are active in fields involving the provitions of services in the public interest or strategic services" (paragraph 66), although "those concerns can not entitle Member States to plead their own system of ownership, referred to in art.295 CE, by way of justification of obstacles, resulting from privileges attaching to their position as a shareholder in a privatised undertaking, to the exercise of the freedoms provided for by the Treaty" (paragragh 67).

So the first conclusion we should keep in mind form this judgement is that the ECJ admits that in privations operations on strategic services for a Member State the Governments may keep certain powers that have to comply in any case with Community Law.

The second interesting aspect of this judgement is the analyses of the problem from the point of view of the free movement of capitals. Although it is true that the acquisition of shares supposes a movement of capital in the sense of art 56, according to the annex of Directive 88/361/ECC, the aim of these acquisitions is the establishment in the Member State in so far as only high rate of acquitions allow the State to intervene through this regimen of prior approval.

Another interesting aspect of this judgment is that it does not admit, as the Advocate General had suggested in his conclusions, that beside the public and the private undertakings there is a third category consisting in public undertaking privitized and operating in strategic sectors. The Court only considers the question of the ownership as a question the Treaty does not regulate.

In the Court's view a **system of prior administrative approval** must be proportionate to the aim pursued, inasmuch as the same objective could not be attained by less restrictive measures, in particular a system of declarations *ex post facto*. Such a system must be based on objective, non discriminatory criteria which are known in advance to the undertakings concerned and all persons affected by a restrictive measure of this type must have a legal remedy available to them (paragraph 69).

From this paragraph we can examine the main ideas the Court has on theses kind of special powers: First, the Court prefers a system of approval ex post facto rather than a system of prior approval. In that sense, the only case where it has admitted a golden share system has been in Belgium, where the State kept an approval *ex post* on Distrigaz (case C-503/99, Commission/Belgium). Secondly, the State has to fix certain criteria that have to objective, non discriminatory and public. The Kingdom of Spain had plead before the ECJ that those criteria are "indetermined legal criteria", that allow a certain degree of discretionary, not to be confused with arbitrary. And, last but not least, there must be a legal remedy interested persons may use in order to defend their rights.

From the five undertakings involved in this case, the Court excludes the ones operating in the tobacco and in the bank-

ing sector, because there was no link with strategic imperatives and the need to ensure continuity in public services. Whereas for the other three the ECJ .considers that it is undeniable that the objective of safeguarding supplies of such products or the provision of such services within the Member State concerned in the event of a crisis may constitute a public security reason. But public security reasons require a strict interpretation to avoid that Member states may can determine unilaterally their scope.. It means that the Member State concerned can guarantee a minimum supply of petroleum<and electricity and a minimum level of telecommunications services and does not go beyond to what is necessary to this purpose.

In the Court's view the Spanish legislation examined offered a lack of precision that gave the investors concerned no indication of the specific, objective circumstances in which prior approval would be granted or withheld. This broad discretion of the national authorities represented a serious threat for the investors. So the Court ruled that the lack of objective and precise criteria made this legislation go beyond to what is necessary to attain the objective relied on by the Spanish Government.

2. Case C-274/06

In 1999 the Supplementary Provision no 27 to Law 55/1999 of 29 December on fiscal, administrative and social measures introduced a new way of control to limit voting rights of public entities in Spanish undertakings in the energy sector. As we have just explained the Spanish energy sector presents several characteristics that make it special within the EU. In fact Spain is an energy island, because of the problems of interconection with the rest of Member States, and the fact that there is no internal market in the energy sector makes it even worse form the point of view of the safeguard of the energy supply. Taking into account all these reasons the Supplementary Provision 27, amended by article 94 of Law 62/2003 of 29 December provides that where an entity controlled directly or indirectly by a public authority takes control of, or acquires a significant shareholding in an undertaking in the energy sector, the Council of Ministers may within a period of two months decide not to recognize or to impose certain conditions on the exercise of the corresponding political rights. The decision is to be based on certain criteria designed to safeguard the energy supply.

The Commission opened an infringement procedure against Spain considering this Supplementary Provision 27 incompatible with art.56 of the EC Treaty regarding this restriction of political rights of the shareholders a restriction on the free movement of capitals that is not justified by the need to safeguard energy supply. In fact by a judgment of 14 February 2008 the ECJ declared that by keeping these measures Spain had failed to fulfill its obligations under article 56 EC .

The Court considered that although these measures did not restrict the acquisition of shares it produced the effect of retrain public undertakings established in other Member Stares of entering into the capital of Spanish undertakings operating

in the energy sector and for this reason it constitutes a restriction on the free movement of capitals.

On the other hand such a restriction in not justified by a reason of public security because there is no real threat for the minimum supply of energy in Spain. The public character of the investor does not constitute by itself a reason of danger for the energy supply. The interest in reinforcing the competitivity in the energy market is not a justification for this measure either. Finally the supervision of public undertaking in the moment of the acquisition of a significant participation does no guarantee that once the voting rights are recognized the undertaking will use them in a proper way to safeguard the energy supply.

The ECJ comes to the conclusion that these measures do not fulfill the requirements of proportionality because they apply to all the decisions that may be submitted to the shareholders' vote, regardless the fact of their link with the safeguard of energy supply.

3. Case C-207/07: the function 14 of the National Energy Commission

On the 24 February 2006 the Spanish Government adopted the Royal Decree-Law 4/2006 amending the fourteenth function of the National Energy Commission (NEC) in order to make the acquisition of certain shareholdings in undertakings which carry on certain regulated activities in the energy sector and the acquisition of the assets necessary to carry on such activities subject to the prior approval of this Commission.

The NEC is the national regulatory authority in the energy sector. Under its legal frame acquisitions of shareholdings of undertakings operating regulated activities in the energy sector in Spain were submitted to prior approval (Function 14). We are in front of an instrument of prior administrative approval which ain is to safeguard energy supply and the economic conditions of the undertakings involved in the regulated activities in the energy sector. This function was introduced by a Law of 1994 for the electricity sector and extended to the gas sector in 1998. What Royal Decree-Law 4/2006 did is to widen up the subjective and the objective scope of this prior approval. From a subjective point of view not only acquisitions planed by undertakings which carry on regulated activities but also acquisitions planed on undertakings that carry on these activities had to be examined by the NEC. On the other hand, from an objective point of view, the new regulation included a definition of assets that had to be considered strategic for the purposes of this regulation.

The transactions subject to prior approval of the NEC are followings:

- the acquisition of a shareholding in an undertaking which carries on itself or through other undertakings belonging to the same group certain activities in the energy sector where that shareholding exceeds 10 % or any other percentage giving a significant influence over that undertaking and
- the acquisition of the assets necessary to carry on these activities.

In all these cases the NEC makes an economic analysis of the operation, examining the regulated activities affected by it and the significant risks or negative effects

on it, as well as the infrastructures affected by it.

The Royal Decree-Law has forseen four reasons to deny or to establish conditions:

a) significant risks or negative effects on the activities
b) protection of a general interest in the energy sector, safeguard of the aims of the sector policy, taking into account the assets considered strategic
c) the possibility that the undertaking may not be able to continue to carry on the regulated activities as a result of the other activities carried on by any of the undertakings involved in the operation
d) the safeguard and the quality of the supply and the safeguard form risks in the infrastructures that may not allow a minimum supply.

Regulated activities are the activities on which the safeguard of the energy supply relies. On the other hand we have to keep in mind that the new function 14 only applies to cases in which there is a significant influence on the decisions of the undertaking. 10% or more of the shareholding gives its owner the right to have a representative in the Council of Administration of the undertaking. Private undertakings in the electric or in the gas sector have a large number of shareholders. That means that a participation of 10 % is very significant and give a huge power. In that sense the reference in the Royal Decree-Law to shareholdings exceeding 10% tries to control the influence on the safeguard of energy supply.

The Commission opened an infringement procedure against Spain that arrived to the ECJ in April 2007 and is still pending.

In this case Spain considers that it has to be analyzed only from the point of view of the freedom of establishment (art. 43 EC Treaty) and not from the point of view of the free movement of capitals (art. 56 EC Treaty). And the reason is because, although there is a movement of capitals underneath these operations, the aim of all of them is to get established in another Member State. Thus the legal basis of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids is art. 44 EC,and not art. 56 EC. This argument has not been contested by the European Commission during this procedure.

Function 14 follows a regulated procedure: The NEC has to decide within one month; the information that has to be submitted is standard (description of the planned acquisition, finance compromises of the parties involved, structures of the undertakings, activities, inversions etc; if the NEC does not decide within the given term the Law presumes that the operation is allowed; the reasons to prohibit or to establish conditions on these operations are determined in the Royal Decree-Law and based on objective and precise criteria and, finally, the decision is published and the interested parties have a legal remedy against it.

Between 1995 and 2006 the NEC has examined 212 cases in the light of the former function 14. After the amendment introduced by the Royal Decree-Law 4/2006 38 cases have been examined. Only in 1% of all these cases operations have been banned. In 97% operation have been au-

thorized with or without conditions and the decision has not been taken to court. And in 2%, although the decision had been authorized with conditions, it was taken to court.

4. Other cases concerning the takeover bid on Endesa:

Endesa is the leading undertaking in the energy sector in Spain. In 2006 in electric generation the quota Endesa had was the 28 % of all the energy produced in Spain and 44% of all the nuclear energy produced in this Member State. It also operates in the gas sector although its participation is not that relevant. Nevertheless Endesa's participation in the electricity and gas markets give this undertaking a very significant importance in the safeguard of energy supply in Spain.

The privatisation of Endesa gave other undertakings the opportunity to participate in its capital. So in the last years three takeover bids were planned on Endesa: first Gas Natural, afterwards the German undertaking E.ON and finally the Italian public undertaking Enel together with the Spanish Acciona.

A) Case T-417/06, Endesa/Commission

On 5 September 2005 Gas Natural announced its intention to launch a bid for Endesa's entire share capital. In the Spanish Government's view this bid had no Community dimension. Endesa wrote to the Commission informing it that it considered the concentration had a Community dimension. On 15 November 2005 the Commission adopted a decision declaring the lack of Community dimension (case COMP./M.3986 Gas Natural/Endesa). On 3 February 2006 the Spanish Council of Ministers authorised the concentration subject to certain conditions. Endesa brought an annulment action against the Commission's decision. The CFI by judgement of 14 July 2006 dismissed the action.

This case presents relevant aspects in order to declare an operation of Community dimension and it analyzes in detail the accounting standards of Endesa, but it offers no interest form the point of view of the powers kept by a Member State in privatised undertakings.

B) Case C-196/07, Commission/Kingdom of Spain

The second bid launched for Endesa had a Community dimension. Nevertheless the Spanish Government considered that art. 21, paragraph 4, of the Merger regulation allowed him to establish certain conditions in order to safeguard the energy supply. In this way the National Energy Committee first, and the Ministry for Industry, later on, imposed a number of conditions considered incompatible with Community law by the Commission. The Commission approved two decisions of 26 September and 29 December 2006 on the legal basis of art. 21 of the Merger Regulation. Spain did not bring these decisions before the ECJ. The Commission brought an infringement procedure before the ECJ and the Court declared by judgment of 6 March 2008 that by not withdrawing these conditions the Kingdom of Spain had failed to fulfil its obligations under art. 2 of each of the above mentioned Commission's decisions.

The ECJ considered not only that by the date the reasoned opinion had to be answered Spain had not fulfilled its obligations under the two decisions, but also that there was no reason to remove the case from the registrar, since there could be a State liability for infringement of Community Law and the Kingdom of Spain had not proofed that it was imposible to fulfil the conditions imposed on E.ON.

C) Cases T-65/08 and T-65/08 R, Kingdom of Spain/Commision

The 26 March 2007 the undertakings Acciona and Enel decided to launch a bid on Endesa. This concentration again had a Community dimension and again the NEC and the Ministry for Industry imposed several condition. The Commission adopted a decision on 5 December 2007 on the basis of art.21 of the Merger Regulation, that was contested before the CFI by Spain, asking for interim measures. By order of 30 April 2008 the President of the CFI dismissed the interim measures arguing that there was no urgency in their adoption. The action for annulment is still pending before the CFI.

Spain has alleged a that the Commission lacks the competence to adopt the contested decision under Article 21 of the Merger Regulation; that the contested decision is vitiated by a lack of reasoning and finally that the Spanish authorities were not obliged to communicate the conditions imposed on the public bid for the purchase of Endesa to the Commission since those conditions sought to protect a legitimate interest, namely public security.

The Commission has also opened an infringement procedure against Spain. We have already received a reasoned opinion.

Conclusions

Although the ECJ allows Member States to keep a degree of influence within undertakings that were initially public subsequently privatised, where those undertakings are active in the field of provision of services in the public interest or strategic services, the three instruments the Spanish Government has used after the privatisation of its public undertaking in the energy sector (Endesa) have been brought before the ECJ by the Commission. First the golden share legislation (Law 5/1995 and its Decrees) was declared incompatible with art. 56 EC (and was abolished by Law 13/2006 of 26 May 2006); then the Supplementary Provision 27 of Law 55/1999 was also declared incompatible with this article and, finally the new function 14 of the NEC has been brought before the ECJ and the case is still pending.

On the other hand the Commission has begun infringement proceedings in the light of art 21 or the Merger Regulation against decision taken by the Spanish Government in the frame of the takeover bid on Endesa. First in the case E.ON – Endesa, takeover bid that was not fulfilled and now in the case ENEL and Acciona on Endesa, still pending before the CFI. Those cases show the relation between regulation and merger cases and the importance of the respect to national policies in this field in so far there is no internal market in the energy sector.

ENERGETIKOS POLITIKA IR LISABONOS SUTARTIS: ISPANIJOS PATIRTIS ENERGETIKOS SEKTORIUJE

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S a n t r a u k a

Lisabonos sutartimi sprendžiami Europos piliečiams keliantys nerimą klausimai, joje visapusiškai atsispindi politinis pasiryžimas spręsti dvigubą uždavinį – kovoti su klimato kaita ir parengti tinkamą energetikos politiką. Pirmą kartą į sutartį įtrauktas energetikos skirsnis, kuriame nustatomi šios srities Sąjungos politikos tikslai užtikrinti tinkamą energetikos rinkos veikimą, visų pirma energijos tiekimą ir efektyvaus energijos naudojimo skatinimą bei naujų formų energijos ir atsinaujinančių energijos šaltinių paiešką. Autoriai apžvelgė pasaulyje vykstančias sparčias permainas, kai ES privalėjo imtis spręsti globalizacijos, klimato ir demografinės kaitos, saugumo, energetikos bei kitas problemas. Minėtos problemos ir Ispanijos patirtis energetikos sektoriuje yra plačiai analizuojamos šiame straipsnyje.

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