

Tulsa Law Review

Volume 27
Number 4 *International Energy Law Symposium* Volume 27 | Number 4

Summer 1992

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Recommended Citation

Michael E. Arruda, & Klaus H. Burmeister, *Europe 1992: Toward a Single Energy Market*, 27 Tulsa L. J. 569 (1992).

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EUROPE 1992: TOWARD A SINGLE ENERGY MARKET*

Michael E. Arruda† and Klaus H. Burmeister‡

I. INTRODUCTION

The term "Europe 1992" symbolizes the most ambitious program of deregulation undertaken anywhere in the world. By December 31, 1992, the twelve member states of the European Community (Community)¹ intend to create a single European market of more than 340 million consumers by removing the physical, technical, and fiscal barriers currently existing between them.

The purpose of this article is to put Europe 1992 in perspective as a general concept and to provide a framework for assessing its effect on the energy sector, particularly the oil and natural gas industries. The major policies and goals established by the Community for future energy development will be identified. In many cases, given the lack of concrete proposals, the discussion will be speculative.

II. BACKGROUND OF THE EUROPEAN COMMUNITY

The concept of economic unity in Europe has its roots in the Treaty of Paris and in the Treaty of Rome, which collectively forms the charter of the Community and serves as the basis for the programs that are referred to as "Europe 1992."

* Portions of this article appeared in the *Rocky Mountain Mineral Law Foundation* and in *A Blueprint for Mineral Development*, 1991 INSTITUTE ON INTERNATIONAL RESOURCES LAW 1.

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1. Currently, Community membership consists of Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom.

A. *The Treaty of Paris*

In 1951, the European Coal and Steel Community (ECSC) was established when the Treaty of Paris was signed on April 18.² The six signatory country states were France, Germany, Italy, Belgium, Luxembourg, and the Netherlands. The ECSC represented the first model of the European Common Market. It was the first time that national governments had ceded part of their sovereignty to a central authority. Significantly the member states adopted a policy on external tariffs while eliminating tariffs on trade within the ECSC.

The ECSC also identified several key practices that served as impediments to a fully integrated economy. Primarily, these impediments included: (1) import and export duties and other restrictions on the movement of products associated with the coal and steel industry; (2) a framework of discriminatory measures or practices between producers or between purchasers and consumers, particularly in prices and delivery terms; (3) discriminatory measures that interfered with the purchaser's free choice of suppliers; (4) subsidies or aids granted by states, including special charges; and (5) restrictive practices that exploited markets.³ The ECSC also established a series of institutions for its governance, including a High Authority, a Common Assembly, a Special Council of Ministers, and a Court of Justice, each separate and apart from the parallel institutions of its member state.⁴

B. *The Treaty of Rome*

In 1957, after years of negotiation, the six ECSC countries signed two treaties in Rome. The first established the European Atomic Energy Community (EURATOM).⁵ The other, commonly referred to as the Treaty of Rome, established the European Economic Community (EEC).⁶ Together with the ECSC Treaty, these treaties created three communities that existed parallel to each other, each having their own organizational structure whose similarities were greater than their differences.

2. Treaty Establishing European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty].

3. *Id.* art. 4.

4. *Id.* arts. 8-45.

5. Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167 [hereinafter EURATOM Treaty].

6. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

Recognizing the general redundancies, the three communities entered the Merger Treaty in 1965 with an eye toward establishing the European Community.⁷ The Merger Treaty did not, as its name suggests, merge all of the treaties into one instrument since the three treaties essentially remained in place. However, the Merger Treaty did establish a single commission, the European Commission, and a Council of Ministers for the three communities. A single Court of Justice had already been created by the EEC treaty in 1958, which was continued under the Merger Treaty.

In the early years of the Community, the member states imposed various limitations on their own sovereignty in order to create a customs union and single market over a transitional period. Considerable progress was made toward achieving this goal, especially in the removal of customs duties between member states and the establishment of a common customs tariff for imports from outside the Community.

However, after these important initial successes, progress slowed during the 1970s for a number of reasons. First, the economic recession in the 1970s led member states to take steps to protect short-term interests in their home markets for home producers. Since the more blatant protectionist means were no longer allowed under the EEC, more subtle means were employed, including state aid and subsidies, discriminatory public procurement policies, product standards, and the erection of other technical barriers. The second major factor slowing down the pace of integration was the increasing size of the Community. The United Kingdom, Ireland, and Denmark joined the Community in 1973, Greece in 1980, and Spain and Portugal in 1986. With the addition of these members states, the number of members required to agree on legislation where unanimity was mandated, to say nothing of the increased linguistic onus, had a dampening effect on further progress.

The decline in Community consciousness began to reverse itself in the 1980s, partially due to economic recovery. In addition, the member states realized that, individually and collectively, they seriously trailed behind the United States and an emerging economy in Japan and that the completion of the single market would be necessary if the Community were to compete.

7. Treaty Establishing a Single Council and Single Commission of the European Communities of April 8, 1965, 1967 O.J. (L152) [hereinafter Merger Treaty].

C. *The White Paper*

The European Commission⁸ caught the member states' mood with the publication in 1985 of the now-famous White Paper.⁹ The White Paper differed from earlier initiatives because it pragmatically identified 300 specific measures to which the Council of Ministers would have to agree in order to remove the obstacles to the creation of a truly integrated single market. If there is one overriding theme in the White Paper, it is that the way ahead should be a deregulatory approach. The White Paper identified areas in which the member states were traditionally reluctant to endorse deregulation because the efficacy of such deregulations in these areas often involved relying on controls in force in other member states.

Once the changes contemplated by the White Paper are implemented, border controls no longer will exist in the Community. Technical standards and approval certificates issued for a product in one member state will be accepted in all member states if the goods meet agreed essential requirements. Governmental and semi-public agencies in all member states will be required to follow nondiscriminatory procedures in procuring goods and services. The liberalization of capital movements, banking, and investment services will reduce the cost of financing businesses.

The economic benefits expected from Europe 1992 are staggering. Cecchini's *Report on the Cost of Non-Europe*, commissioned by the European Commission, predicts costs savings of more than \$220 billion.¹⁰ The integration of the European market will boost employment by creating 1.8 million new jobs and result in an increase of 4.5% in gross domestic product (GDP) of the Community and a real deflation of 6.1% of consumer prices.¹¹

Although the national governments are slow to adopt some of the politically sensitive parts of the Europe 1992 program, the project has

8. For a discussion of the European Commission and other organs of Community governance, see *infra* part III.

9. Completing the Internal Market: White Paper from the Commission to the European Council, COM(85) 310 final [hereinafter White Paper].

10. PAOLO CECCHINI, *THE EUROPEAN CHALLENGE 1992: THE BENEFITS OF A SINGLE MARKET* (1989).

11. *Id.*

gained momentum and the progress made appears irreversible. However, with less than twelve months to go, more than fifty Directives remain to be adopted by the Council of Ministers.¹²

D. *The Single European Act*

The White Paper was followed by the agreement of the member states to the Single European Act (SEA), one of the most important amendments to the Treaty of Rome since its adoption in 1957.¹³ The SEA, which came into force in 1987, is of fundamental importance for the completion of the single market for a number of reasons. First, it expressly fixes the target date of December 31, 1992, for completing the single market.¹⁴ The target date has become an important focus of the program and has undoubtedly contributed to accelerating progress in the adoption of the necessary Community legislation.

Second, the SEA amends the original Treaty of Rome by providing that the majority of legislation necessary to complete the internal market can be adopted by a qualified majority rather than a unanimous vote of the Council of Ministers.¹⁵ The change in the voting rules has had an important effect on speeding up progress toward the single market. However, there are some important exceptions to the majority voting rule: unanimity is still required for legislation on tax¹⁶ and certain employee rights.¹⁷

Third, the SEA introduced the new cooperation procedure with a view to filling the democratic deficit.¹⁸ There has been a historical fear in many circles that there is insufficient parliamentary control over Community legislation. The EEC had become rather unpopular since the only representatives directly elected by the citizens of the single member states did not have to *decide* on any issues affecting the European citizens. Thus, many European citizens viewed the EEC as a bunch of bureaucrats. The new cooperation procedure provides for active participation by the European Parliament in the legislative process, as opposed to the traditionally advisory functions of the European Parliament. Under the procedure, the Council of Ministers adopts a common

12. See Tom Walker, *Laws for 318 Million*, THE TIMES (London), Mar. 20, 1992, at 33.

13. Single European Act, 1987 O.J. (L 169) [hereinafter SEA].

14. *Id.* art. 13; EEC Treaty art. 8(a) (amended 1987).

15. EEC Treaty arts. 28, 57(2), 59, 70(1), 84(2).

16. *Id.* art. 99.

17. *Id.* art. 57.

18. *Id.* art. 149.

position by majority vote, then sends it to Parliament. Parliament may accept, reject, or propose amendments to the proposal. If Parliament does not accept the common position, the European Commission may amend the proposal, which is returned to the Council for adoption. The new cooperation procedure has significantly increased the European Parliament's influence.

Finally, the SEA extended the scope of the Treaty of Rome by confirming the authority and jurisdiction of the Community and by introducing new powers in certain sectors.¹⁹ One of the most important sectors in the SEA relates to the environment²⁰ and there is no doubt that the European Commission will be making more proposals in this field to reflect popular concerns of member states.

E. *The European Economic Area*

On October 22, 1991, the member states of the European Community and the member states of the European Free Trade Association (EFTA)²¹ presented a draft of a treaty for the creation of the European Economic Area (EEA). The main goal of the treaty is to implement the fundamental freedoms provided by the EEC Treaty in the newly created EEA so that, effective January 1, 1993, goods, once imported into the EEA or manufactured in the EEA, can circulate freely throughout the Community and the member states of the EFTA.

The treaty creating the EEA stops short of entirely extending the internal market of the Community. Under the treaty, the EFTA member states would, with certain exceptions, adopt Community rules on free movement of goods, capital, labor, company law, consumer protection, education, the environment, research and development, and social policy. However, EFTA member states would remain free to adopt the common agricultural policy and the harmonized rules on indirect taxes. Border controls between the Community and the EFTA would continue to exist.²²

The full impact of the EEA Treaty is not yet clear. First, the EEC

19. *Id.* arts. 102A, 118A-B, 130A-T.

20. *Id.* art. 130R-T.

21. The European Free Trade Association was established on November 20, 1959, in Stockholm. Present members include Austria, Finland, Iceland, Liechtenstein, Norway, Sweden, and Switzerland.

22. 4 Common Mkt. Rep. (CCH) ¶ 96,107 (March 1992).

Court of Justice has ruled that portions of the EEA Treaty are incompatible with the EEC Treaty.²³ As a result, the treaty was renegotiated between the member states. Whether or not the treaty in its renegotiated form is compatible with the EEC Treaty is unclear, since the Court of Justice ruled only on certain aspects of the treaty. Second, the treaty has yet to be ratified by twenty legislative bodies—the legislatures of the twelve member states of the Community, the legislatures of the seven EFTA states, and the European Parliament. Third, two of the EFTA member states, Austria and Sweden, have already applied for a full Community membership and most of the other member states, such as Switzerland, have declared that full Community membership is their ultimate goal. Thus, if the EEA Treaty is ratified, it appears that the EEA may have only a short life.

III. INSTITUTIONS OF THE EUROPEAN ECONOMIC COMMUNITY

The basic framework of the Community was established in the Treaty of Rome, though the Merger Treaty had the effect of establishing a single council and a single commission. Collectively, these treaties establish a matrix of governmental institutions that will govern the adoption and implementation of Community principles associated with Europe 1992. The Community's four principal bodies are the European Commission, the Council of Ministers, the Parliament, and the Court of Justice.

A. *The European Commission*

The European Commission is most similar to the prime minister in a parliamentary system. The Commission consists of seventeen members, appointed for four-year terms by the member states. It has the power to initiate proposals and legislation but not to enact them. The Commission is charged with ensuring compliance with Common Market rules by member states, individuals, and companies, and has the power to fine individuals and companies for breaching these rules.²⁴ In addition, the Commission is empowered to negotiate trade agreements with non-Community countries.²⁵

23. Opinion on the Draft Agreement Relating to the Creation of the European Economic Area, [1992] 1 CEC (CCH) 184 (Jan. 1991).

24. EEC Treaty arts. 155-163 (as amended 1987).

25. *Id.* art. 228.

B. *The Council of Ministers*

The Council of Ministers consists of ministers from the member governments.²⁶ It is the Council of Ministers that enacts the proposals of the European Commission. While the European Commission has the exclusive right of initiative, the Council of Ministers creates Community law when it acts on proposals of the Commission. Though the Council may amend a proposal of the Commission, it must do so unanimously.²⁷ Decisions generally are taken on the basis of a qualified majority, using a weighted voting scheme set out in the EEC Treaty.²⁸ The presidency of the Council rotates every six months in the order dictated by the EEC Treaty.²⁹

C. *The European Parliament*

The Parliament primarily serves in an advisory function. It is comprised of representatives elected in the member states, each of whom sits for five years. The functions of the Parliament are dispersed geographically: plenary sessions are held in Strasbourg; staff headquarters are maintained in Luxembourg; and special committee meetings are held in Brussels. The basic function of the Parliament is to oversee the legislative process of the European Commission and the Council of Ministers.³⁰ The Parliament does not have lawmaking authority like its member state legislatures. Its powers, though generally advisory, do extend to certain significant areas. For instance, before the Council of Ministers may act on a proposal by the Commission, the Parliament must provide its opinion.³¹ The Parliament has authority to veto treaties with non-Community countries.³² It is also required to act by a majority of its membership before new members are admitted to the Community.³³

D. *The Court of Justice and the Court of First Instance*

The judicial branch consists of the Court of Justice created by the EEC treaty³⁴ and the newer Court of First Instance established by the

26. *See id.* arts. 145-154.

27. *Id.* art. 149.

28. *Id.* art. 148.

29. *Id.* art. 146.

30. *Id.* arts. 137-144.

31. *Id.* art. 149.

32. *Id.* art. 145.

33. *Id.* art. 237.

34. *Id.* arts. 164-188.

Council under SEA authority.³⁵ The Court of Justice is comprised of thirteen judges and six advocates-general. The Court of Justice has jurisdiction to consider any measure adopted by the Commission, the Council of Ministers, or a member state government that might be incompatible with Community law. It also has jurisdiction to issue binding advisory rulings on the construction of Community law to a member country upon application by a national court.³⁶ If a national court realizes that the construction of Community substantive law may affect the outcome of the case before that court, it *may* present this issue to the Court of Justice.³⁷ However, if such an issue is raised in a case pending before a court whose decisions are final, such court *must* present this issue to the Court of Justice.³⁸ Therefore, the Court of Justice serves effectively as the supreme court for the interpretation and application of Community law.

In view of the growing caseload of the Court of Justice, the Court of First Instance was formed in 1989 at the request of the Court of Justice.³⁹ The Court of First Instance has a membership of twelve judges, serving in chambers of three or five judges. It has jurisdiction over disputes between the Community and Community officials, actions brought by natural or legal persons against Community institutions relating to the application of Community competition law, or to certain compensation claims against Community institutions. The SEA specifically reserved the exclusive jurisdiction of the Court of Justice to hear and determine actions brought by member states or by Community institutions or requests for preliminary rulings referred to the Court of Justice by the courts of the member states.⁴⁰ Also, the decisions of the Court of First Instance are subject to appeal to the Court of Justice on questions of law.⁴¹

IV. JURISPRUDENCE OF THE EUROPEAN COMMUNITY

The jurisprudence of the Community is not established in any one place. It is inferred from the applicable treaties and the internal pronouncements and decisions that are generated by the Community's legal

35. *Id.* art. 168.

36. *Id.* art. 177.

37. *Id.*

38. *Id.*

39. Council Decision 88/591, 1988 O.J. (L 319) 1.

40. EEC Treaty art. 168A.

41. *Id.*

institutions. In essence, there are two main bodies of law that govern conduct within the Community. The first body of law is the treaties themselves. The treaties include the Treaty of Paris establishing the ECSC, the Treaty of Rome establishing the EEC and EURATOM, and the SEA amending the Treaty of Rome.

The second body of law governing Community conduct is institutional law. Institutional law includes those laws created by the Council of Ministers governing the relations of the member states within the Community. There are four identifiable components to institutional law: regulations, directives, decisions, and non-binding recommendations.⁴² Regulations are binding edicts of the Council of Ministers and are directly applicable to each single citizen of the member states without any further implementation by the member state governments. Directives are strict guidelines binding only on the member states with respect to the ultimate result to be achieved. A directive gives each member state flexibility and latitude in transposing the directives into national laws to achieve the prescribed result. Decisions are issued by the Council in the context of a particular party's request or activities and apply only to the parties to which it is directed. However, in some cases a decision may apply to all states. Finally, non-binding recommendations and opinions may be issued.

Community law is enforced at the Community level by the European Commission or at the national level by the member state government and courts. Where there is a direct conflict between national law and Community law with respect to any Community matter, Community law is supreme.⁴³ Where the conflicts are indirect, it may be necessary to comply both with Community law and national standards.

V. ELEMENTS OF THE 1992 PROGRAM

Although the White Paper initially identified 300 measures necessary to complete the single European market, that number has been reduced to 279 by redundancy and consolidation. The White Paper separated these measures into three areas according to the type of impediment to the single market.

A. *Physical Barriers*

The first group of measures identified by the White Paper are aimed

42. *Id.* art. 189.

43. *Id.* arts. 169-171; Case 48/71, *Commission v. Republic of Italy*, 1972 E.C.R. 527.

at removing physical barriers.⁴⁴ Physical barriers are the customs and immigration posts at member states' borders. Currently, the shipment of goods between countries is interrupted at the border to allow checks to enforce external trade quotas, collect value-added and excise taxes, carry out health, safety, road transport and similar controls, compile trade statistics, and implement Community agricultural policy.⁴⁵ In addition, individuals may still be routinely checked for immigration, taxation, and law enforcement purposes. Due to the uniform external customs regime of the Community, customs posts are used for the collection of duties only when goods are imported from non-Community countries.

Europe 1992 proposes the elimination of all systematic controls at frontiers within the Community. In 1988, it brought forth the Single Administrative Document,⁴⁶ replacing about seventy customs and border control forms with a single form. By eliminating the customs posts as an enforcement mechanism, internal trade quotas preventing the free movement of goods within the Community will be abolished gradually, and a new mechanism for the collection of value-added taxes on cross-border transactions must be devised.

Regarding the collection of statistics, the Commission is looking at the necessity and desirability of statistics in a single market. Ultimately, the myriad of physical controls must be removed if the Commission is to achieve its objective that it should be as easy to sell from Paris to Frankfurt as it is to sell from Paris to Lyon.

B. *Technical Barriers*

Technical barriers also represent an impediment to the completion of a single European market.⁴⁷ One of the fundamental principles of the Community is the free movement of goods either produced in the Community or imported legally and put into circulation within the Community. However, multiple laws, regulations, and industrial norms have prevented or inhibited the unfettered intra-Community trade in goods. Technical barriers include a variety of legal and regulatory measures

44. White Paper, *supra* note 9, ¶¶ 24-55.

45. AUDREY WINTER ET AL., *EUROPE WITHOUT FRONTIERS: A LAWYERS GUIDE* 11 (1989).

46. Council Regulation 678/85 of 18 February 1985 Simplifying Formalities in Trade in Goods within the Community, 1985 O.J. (L 179) 1, creating the Single Administrative Document.

47. White Paper, *supra* note 9, ¶¶ 57-159.

which currently prevent the free movement of goods, labor, skilled professionals, services, and capital within the Community or restrict competition in public procurement and create obstacles to industrial cooperation.

Currently, a variety of technical standards exist across the Community. For instance, equipment and machinery may have to meet different technical specifications or standards depending upon the member state in which they are sold. Often testing and certification procedures have to be duplicated. In the past, attempts to harmonize national standards applicable to certain products failed because they required a detailed discussion of technical aspects at a ministerial level and unanimous approval by the delegates of the member states.

The 1992 program proposes a radical new approach requiring harmonization of essential health, safety, consumer, and environmental protection standards. The new uniform requirements will be set out in general terms, whereas the detailed specifications will be drafted by several European standards organizations.⁴⁸ With respect to nonessential requirements, the member states mutually have agreed to recognize each other's standards and approval certificates.

Europe 1992 also provides for the free movement of all trained professionals with the Community. While nationals of a member state of the Community have had the right for some time to reside in any other member state in order to work as blue collar employees, university degrees and professional diplomas required for medical, legal, or other professional practices have not been uniformly recognized. Europe 1992 will improve the free movement of labor and professionals by requiring each member state to recognize the degrees and diplomas granted by the others and permit professionals to practice in the European country of their choice, subject only to qualifying examinations.⁴⁹

In 1988, a directive seeking to ensure the free movement of capital was adopted.⁵⁰ The directive effectively removes all currency exchange

48. Council Resolution on a New Approach to Technical Harmonization and Standards, 1985 O.J. (C 136) 1.

49. Council Directive 89/48 of 21 December 1988 on General System for the Recognition of Higher Education Diplomas Awarded on Completion of Professional Education and Training of at Least Three Years Duration, 1989 O.J. (L 19) 16.

50. Council Directive 88/361 of 24 June 1988 for the Implementation of Article 67 of the Treaty, 1988 O.J. (L 178) 5.

controls between the member states and permits companies and individuals to deposit their cash, lend or borrow money, and invest with financial institutions anywhere within the Community.

A key objective of Europe 1992 is to open public procurement previously protected under favored national champion supplier firms. The public sector represents an enormous market that amounted to fifteen percent of the Community's gross domestic product or approximately \$575 billion in 1987. Specific proposals made in connection with Europe 1992 intend to introduce greater openness, transparency, and nondiscrimination in all phases of bidding procedures.⁵¹

Ultimately, mutual recognition is the basic deregulatory approach that will be adopted by the Commission for all technical barriers. Thus, the member states must accept the universality of the fundamental objectives of their rules. As long as the objectives are met, different forms of national legislation may be adopted so long as it does not discriminate against products or services of other member states.

C. *Fiscal Barriers*

The third area of impediment to the creation of the single market is the removal of fiscal barriers. Inter-member state transactions must be taxed in the same way as domestic transactions. The removal of fiscal barriers thus focuses on the indirect taxes such as value added tax (VAT) and excise assessments.⁵²

The Europe 1992 program focuses on VAT rates and collection. The original Europe 1992 program proposed to treat a cross-border transaction the same as any domestic sale and to require a domestic seller to collect VAT from the foreign purchaser at the VAT rates in the country of sale. Since VAT ultimately should accrue to the country of consumption rather than the country of sale, the second proposal sought to establish a Community-wide clearing house for passing VAT collected by the exporting member states to the applicable importing states. The complex system of reapportioning VAT receipts among member states faced strong political opposition. In October 1989, the Council therefore agreed that export sales should continue to be VAT-exempt in the country of sale and subject to import VAT in the country of consumption. The Commission has strongly objected to this procedure, claiming that it would create more, rather than less, bureaucratic red tape. Similar

51. WINTER ET AL., *supra* note 45, at 109-10.

52. White Paper, *supra* note 9, ¶¶ 160-218.

problems have arisen with respect to the proposed harmonization of VAT rates, which currently range from zero to thirty-eight percent depending on the goods involved.

VI. SPECIFIC EFFECTS OF EUROPE 1992 ON THE ENERGY SECTOR

No one regulation or directive sets out the framework under which the Community energy sector will be governed after 1992. However, the Commission has identified a range of commercial issues unique to the energy sector that must be addressed by a combination of industry initiatives and national legislation before a true single energy market is achieved.

In 1986, the Council of Ministers adopted a resolution concerning energy policy objectives for 1995.⁵³ That resolution established the framework for the analysis and conclusions associated with the achievement of a single European energy market. The Commission was concerned about the adequacy and security of available energy sources, uncertain long-term prospects for supply and demand, dependence on imported energy, in particular imported oil as a proportion of total energy demand, and the need for regular information on member states' energy policies.

In May 1988, the Commission approved a working paper entitled *The Internal Energy Market*⁵⁴ based on the 1986 Council Resolution. In the paper, the Commission made a general recommendation on Community policies and identified specific obstacles in each of the major energy sectors to completing a single market. Two of the major energy sectors identified by the Commission were the oil and natural gas sectors.

A. Oil Sector

1. Recommendations for a Single Market

The activities of the oil sector can be analyzed under three general areas: exploration and production, refining, and retail distribution including transportation and storage. Exploration and production activities in the oil sector are limited mainly to the United Kingdom, which generates approximately ninety percent of the Community's crude oil.

53. Council Resolution 86/C241/01 of 16 September 1986 Concerning New Community Energy Policy Objectives for 1985 and Convergence of the Policies of the Member States, 1986 O.J. (C 241) 1.

54. *The Internal Energy Market*: Commission Working Document, COM(88)238 final.

Exploration and production activities also are conducted in the Netherlands, Denmark, Germany, Spain, France, Greece, Italy, and to a limited extent in Belgium, Ireland, Luxembourg, and Portugal. In each member state, exploration and production are regulated by laws that provide for the award of concessions under defined circumstances.

All member states, except Luxembourg, possess refining capacity. Nearly seventy-five percent of such capacity belongs to ten major companies.

Finally, at the marketing end of the spectrum, a small number of companies control a large majority of sales or distribution outlets. National companies generally have an important position in their home countries. The most significant position held by a national oil company is that held by Campsa in Spain, which accounts for ninety percent of the retail outlets in that country.⁵⁵

The Commission observed a high degree of internal competition in the oil sector due to a number of factors including global integration of oil markets, a large number of international operators, sufficiency of supplies, an extensive transportation network, the availability of competing suppliers, and price transparency.⁵⁶

Despite such competition, the Commission's general recommendation was that the Community take steps to limit its use of oil as a component of its energy demand. In 1986, oil provided nearly fifty percent of the primary energy needs of the Community. By 1995 the Commission plans to limit oil's share in primary energy consumption to forty percent. Further recommendations include limiting oil imports to no more than thirty-three percent. The Commission believes that its objectives should be achieved by subsidizing competing forms of energy, taxing oil at a higher rate than competing forms of energy, restraining or banning publicity for certain oil products, and setting statutory limits on the devotion of oil for certain uses, such as industrial facilities.⁵⁷

2. Obstacles to a Single Oil Market

To achieve its objective of forming a single oil market, the Commission identified over a dozen obstacles, whose removal will equalize competition among the integrated oil companies as well as the independents

55. Communication from the Commission on a Community Regime for Procurement in the Excluded Sectors: Water, Energy, Transport and Telecommunications, COM(88)376 final [hereinafter Excluded Sectors].

56. The Internal Energy Market, *supra* note 54, at 40.

57. *Id.*

that are operating in the Community.⁵⁸

Exploration and production monopolies. Some states reserve exploration and production rights to their national oil companies, excluding outsiders. In some states, such as Italy, the national company has exclusive prospecting priority in certain areas. In others, such as Denmark, Greece, Ireland, and the Netherlands, the national company has the right to participate in a commercial discovery after the fact.

Exploration licensing procedures. The Commission recommended that licenses or concessions be issued according to criteria that are both nondiscriminatory and transparent to all Community companies. Access to the Community's oil resources must be nondiscriminatory in order to maintain free competition between operators. The Commission noted that reciprocity clauses among member states only exacerbated the problems of discrimination and non-transparency.

Oil field development conditions. The Commission recommended the elimination of implicit conditions encouraging companies to order supplies and equipment from national suppliers. These pressures tend to come into play when an oil field is brought into production.

Taxation of oil production. Because tax accounts for one-half to two-thirds of the final product price in the Community, the Commission expressed concern about the effect of various tax systems on field development and the conditions of competition, noting that some countries reduced taxation to encourage production while others had not. The Commission recommended harmonization of taxation though it recognized the problems in doing so. Problems include the differential costs of development of different oil fields and the need for tax incentives to encourage development.

Landing obligations. The Commission recommended the elimination of the requirement in Italy and the United Kingdom that resources be landed in the mother country before being transhipped to other destinations. Such landing requirements, despite exemptions, tend to increase costs of the ultimate product, thus affecting overall competition.

Restrictions on imports from certain non-Community countries. Spain, Greece, France, and Portugal allow importation of petroleum products from non-Community countries only by the company that owns the national monopoly. Other operators cannot import products from non-Community countries. France restricts the importation of crude oil

58. *Id.*

and products imported directly from non-Community countries. The Commission recommended a common policy for trade with non-Community countries.

Obligation of refiners to accept oil acquired by the State. Two member states, Spain and France, maintain a requirement that their oil refiners accept oil that has been acquired or produced by the state. Developed as a means to assure the refinement of a member state's production, the home state production requirement reflects the oil crisis of the late 1970s. The requirement adds to the cost of the refined product and thereby detracts from competition because state-produced oil traditionally has commanded a higher price, making sales of refined products noncompetitive with those of other companies.

National or home flag requirements. The Commission recommended the gradual elimination of national or home flag requirements in Spain, France, and Portugal on the carriage of certain goods. Under the recommendation, a member state would no longer be allowed to require products to be carried in ships flying the flag of the member state which produced the product. The Commission believes the elimination of home flag requirements will be accomplished under its 1986 regulation governing freedom of maritime transportation among member states and between member states and third countries.⁵⁹ The regulation applies not only to the carriage of oil and oil products, but also covers all other merchant fleets. Likewise, the Commission criticized Germany's requirement that its oil products be carried within the country on national inland carriers. The Commission observed that this obligation is contrary to the freedom to provide services in the transportation area.

Exclusive right to market output of national refineries on domestic market. Campsa, Spain's national oil company, bears the exclusive right to market the output of Spanish refineries for the domestic market. The exclusive marketing practice has the effect of preventing any distributor other than Campsa from obtaining key products from the nation's refineries for the domestic market. The Commission has recommended that the practice be abolished.

Quantitative restrictions on importation of oil products from other Community countries. The Commission has criticized the restrictions of Spain, Greece, Ireland, Italy, and Portugal placed on imports from other member states. In some cases it has commenced infringement proceedings, while other practices are under examination.

59. Commission Regulation 4055/86, 1986 O.J. (C 241) 1.

Import licenses. Belgium, Spain, Greece, and Portugal have imposed various forms of import licensing that are tantamount to import quotas. In Belgium, the Commission has opened an infringement file; in Greece, the Commission has recommended a single administrative document. The measures in Spain and Portugal are expected to be temporary.

Preferences for importer/distributors. In Spain, Greece, France, and Portugal national legislation imparted a special status for importers and wholesale distributors of oil products. Only companies with approved status are allowed to market within the state. Preferential laws prevent deliveries by out-of-country distributors, even though the distributor may be approved in the other member state. While the Commission has not recommended a specific corrective measure, the Commission expects that the identification of this preference will put pressure on the respective legislatures to repeal this legislation.

Differences in rules and technical norms applicable to petroleum products. The Commission observed a panoply of different technical specifications for oil products. To date, Community law harmonizes only a few aspects of petroleum products such as the lead content of petroleum. Differences in standards add to costs during production, storage, and transportation of products and affect companies that supply more than one national market from a single refinery. The Commission observed that there will be acceptable ranges of standards, some of which could be upheld on the basis of climatic factors. In all cases, the Commission recommended that the technical standards be harmonized as much as possible.

Difference in compulsory storage arrangements. Community law generally requires member states to maintain ninety-day security stocks, which can be offset by indigenous production capability. Many member states have passed the storage requirement on to companies producing and operating within their borders. Where there are differences in national requirements for storage, oil companies operating in one member state are at a disadvantage with those operating in another. The disparity in requirements adds to a producer's costs which ultimately is reflected in price.

The Commission desires to establish a central storage agency which would require efforts by each member state to finance and provide stockpiles through companies operating within its boundaries. The overall goal is to ensure that no one company bears a disproportionate burden of Community-wide storage responsibilities such that its products would

become noncompetitive with those of companies bearing a lesser storage burden.

Pricing systems. The Commission observed that the pricing system across the Community was completely disparate. In Spain, the price of petroleum products is fixed, based on national criteria. Greece, Belgium, Ireland, Italy, Luxembourg, and Portugal maintain a ceiling price system, while other states such as Germany, the United Kingdom, Denmark, France, and the Netherlands allow the free market system to prevail.

Differences in excise duty and value added taxes. In the area of taxes, the Commission focused on disparities in excise duty and VAT among the member states. The Commission recommended the harmonization of excise duty, proposing that member states apply common rates of excise duty. Excise duty would be calculated, in the case of petroleum, by the arithmetic average of the excise duty charged on each product in the member states. The same method would be used for heating and fuel oil. For VAT, the Commission proposed an equalization that would establish VAT rates within the four to nine percent range for a reduced rate and a fourteen to twenty percent range for a standard rate. Such an approximation will require some states to modify the number and level of rates used. The Commission proposed the prohibition of other indirect taxes, for example, counter-cyclical taxes, unless they are accepted by all member states and applied simultaneously.

3. Priority Corrective Measures

The Commission observed that certain practices of the oil industry should be abolished as a matter of priority.⁶⁰ High on the list is the disparity in taxation. In an effort to achieve an approximation of taxation, one fuel-neutral proposal attempts to approximate taxation on the basis of the purpose to which the fuel is devoted, regardless of the source. Other areas of concern include differences in rules and technical norms applied to petroleum products. Other practices targeted for elimination are those obstacles resulting in oil monopolies, including import restrictions, import licenses, price systems, the exclusive right of refining, the exclusive right of marketing national product, and the prohibition of cross-frontier deliveries. Finally, the Commission noted the need to eliminate all obstacles to internal transportation caused by national carrier requirements.

60. The Internal Energy Market, *supra* note 54, at 53-55.

B. *Natural Gas Sector*

1. Recommendations for a Single Market

The second major energy sector addressed in the White Paper was Community natural gas. Activities in the gas sector were analyzed similarly to those in the oil sector in terms of exploration and production, transmission, and distribution. Exploration and production are subject to the same rules as the oil sector. Once the gas is produced, transmission systems generally buy gas from producers under long-term contracts, transport it, and sell it in large quantities to industrial users, power stations, and other companies for public distribution. Public distribution companies then sell gas to small industrial customers or members of the public directly. In each case, national or regional monopolies virtually dominate the transmission and distribution industry in Europe. The only exceptions to the dichotomy between transmission and distribution are in the United Kingdom and France, where a single institution in each country effectively controls both transmission and distribution.⁶¹

Currently, the countries in the Community use natural gas for eighteen percent of primary energy consumption. Of the eighteen percent, approximately thirty-five percent comes from sources outside of the Community. This proportion is expected to rise to forty percent by the year 2000. The role of natural gas in each member state depends heavily on indigenous supplies. Some countries, such as France, Italy, Germany, the United Kingdom, and Belgium, have a long-established gas market. Newer entrants include Denmark, Ireland, and Spain. Environmental legislation and developing technologies for burning natural gas could very well increase consumption beyond forty percent.⁶²

2. Obstacles to a Single Natural Gas Market

As with the oil sector, the Commission identified many obstacles to the creation of a genuine common market in the natural gas industry.⁶³

Exploration and production. Licenses for the exploration and production of natural gas are granted under a variety of conditions. Normally there is a two-phase process for exploration and for production. The licenses vary from one state to another. In some states, the national

61. See generally Excluded Sectors, *supra* note 55, at 44-48.

62. The Internal Energy Market, *supra* note 54, at 57-58.

63. Proposal for a Council Directive on the Transit of Natural Gas Through the Major Systems, COM(89)334 final at 6.

oil company has the exclusive right to search for gas in certain geographic areas. In other states, the licensee must be a legal entity registered in the member state. In yet others, any change in participation of the licensee cannot occur without the permission of the state. In each case, these requirements imply the necessity of local participation in the corporate structure of the licensee.

Transportation. Gas transportation in the member states is subject to monopoly. Common carriers are virtually unknown. While the situation may be changing in the United Kingdom where a common carrier provision of the 1986 Gas Act has been implemented, generally there is no mechanism that requires the main transporters to carry the gas of third parties. Ultimately, the Commission observed that the existence of these restrictions effectively blocked both the import and export of gas in the member states. Implicit in the Commission's observation was the need to establish a common carrier system.

Integration of European gas grid. A long-pursued goal of the European Energy Sector has been the interconnection of the European gas grid. To date, the United Kingdom, Ireland, Spain, Greece, and Portugal have not been connected to the grid. The Commission has proposed a Council Directive on the transit of natural gas through the major systems.⁶⁴ The directive is intended to open up high pressure national natural gas transmission grids to use by other member states' gas supply companies. A number of member states, in particular the United Kingdom, Germany, and the Netherlands, are opposing the Directive. They point to the Community's large and increasing reliance on non-Community sources for natural gas and to the fact that natural gas already faces considerable competition within the gas market and from other energy sources.

Harmonization of taxation. The Commission observed that natural gas taxes vary sharply from one Community country to another and recommended that these taxes be harmonized following the Commission's proposals on the convergence and approximation of VAT rates in the case of the oil sector.

Price transparency. Pricing mechanisms vary from country to country. In some states, such as France, Italy, Belgium, and the Netherlands, sales are based on tariffs. In others, like the United Kingdom and Germany, individual contracts are negotiated. The Commission's goal is to

64. *Id.*

discourage pricing that results in artificial price advantages, without encouraging the publication of individual rates. The Commission's progress in achieving price transparency has resulted in a directive concerning a Community procedure to improve the transparency of gas and electricity prices charged to end users.⁶⁵

Public contracts. The Commission observed the potential disparity in purchasing procedures by large transmission companies whose manufacturing and installation subsidiaries may have an effect on competition in the transmission area.⁶⁶

Imports and exports. National legislation in the areas of import and export controls varies and is imposed either through specific provisions in legislation or as a condition of the production or transportation concession. Where a company holds a monopoly or dominant market position, it effectively is allowed to block movements of natural gas into or out of the country where pipeline systems are in place.

3. Priority Corrective Measures

The Commission identified three crucial areas that the natural gas industry must address in order to achieve greater integration in the gas market. In some cases, the Commission has proposed legislation to effect the results. First, the Commission urged greater price transparency for off-tariff sales, especially in the United Kingdom and Germany, and the harmonization of taxation. Second, the Commission is pursuing measures to encourage the interconnection of the European gas pipeline network grid. Finally, open access by transmission or distribution companies in the form of common carriage is encouraged.

C. *First Progress Report*

A progress report on the Community's efforts to address the recommendations contained in the Internal Energy Final Report was issued on May 18, 1990.⁶⁷ The report noted that few of the recommendations contained in the Commission's Working Paper of May 1988 were challenged by any of the institutions, but that as of May 1990 "there is still a long way to go." The report also noted that the European Council in Rhodes, held in December 1988, stated that energy was "one of the areas in which

65. Draft Council Directive Concerning a Community Procedure to Improve the Transparency of Gas and Electricity Prices Charged to End Users, COM(89)332 final.

66. See *infra* part VII.A.

67. The Internal Energy Market First Progress Report COM(90)124 final.

it was vital that the pace of change be speeded up."⁶⁸

The progress report made observations with respect to the following key elements to the completion of the internal energy market. Work is ongoing on the harmonization of standards and technical specifications and should be completed shortly. Standards for petroleum products will be adopted before the deadline. While considerable progress was made with respect to public procurement in the energy sector, the exemption for oil, gas, and coal exploration and production under certain conditions will need to be reviewed at the end of 1995 in light of its record. The level of the reference rates for excise duties still must be resolved. Ongoing assessment relating to the dismantling of oil monopolies is being pursued by the Commission, though inconclusively. The Commission had adopted proposals for new legislation dealing with the transparency of energy prices charged to industrial consumers,⁶⁹ increased trade through the obligation to provide transit, and better exchange of information on energy investments.⁷⁰

The Commission also identified several areas that must be addressed in the future. First, the notion of "security of supply" must be defined in the context of the Community as a whole and not its member states. This definition includes issues of diversification, competition, scope of regulation, and the allocation of resources. Second, the issue of energy dependence outside the Community must be addressed. Particular attention must be paid to relations with the Gulf countries. Better use of existing energy networks must be achieved. In particular, gas networks are operating at a very low level of efficiency, in the range of less than forty percent as compared to eighty percent in the United States. Open access to third party users is considered to be a potential solution to the inefficiency. Finally, existing technical standard disparities between energy sources must be reduced. The liberalization of public procurement will necessitate accelerated efforts in standardization. Harmonization also should extend to environmental standards. It is anticipated that the Second Progress Report will be issued in the third quarter 1992.

68. *Id.* at 2.

69. In June 1990, the Council adopted Directive 90/377 Concerning a Community Procedure to Improve the Transparency of Gas and Electricity Prices Charged to Industrial End-Users, 1990 O.J. (L 185) 16.

70. In July 1989, the Commission submitted Draft Council Regulation Amending Regulation 1056/72 on Notifying the Commission of Investment Projects of Interest to the Community in the Petroleum, Natural Gas and Electricity Sectors, 1989 O.J. (C 250) 5.

D. *European Energy Charter*

The most significant recent development in the energy sector is the European Energy Charter.⁷¹ On December 17, 1991, the Charter was signed by forty-seven countries from both western and eastern Europe, including twelve Soviet republics.⁷² It is considered the first step toward matching the energy demands, capital, and expertise of western Europe with the immense resource potential of eastern Europe and the Soviet republics. The Charter will be implemented through a "Basic Agreement" and "Protocols" that are specific to each energy sector.

The goals of the Energy Charter are many and explicitly target three major areas for future work by the signatories. First, the signatories recognized the need for the expanded development of trade in energy. To achieve this, they noted the need to: (1) develop open and competitive markets for products, materials, equipment, and services; (2) obtain access to resources, including exploration and development; (3) remove technical, administrative, and other barriers with respect to energy, equipment, technology, and services; (4) develop and connect an energy transportation infrastructure; and (5) obtain access to capital.⁷³

Second, the Energy Charter signatories agreed on the need for increased cooperation in the energy field, including coordinating energy policies, obtaining mutual access to technical and economic data, formulating stable and transparent legal frameworks for the development of resources, and exchanging technology.⁷⁴

Thirdly, the signatories focused on energy efficiency and environmental protection, observing the need to promote an energy mix to minimize adverse environmental consequences through market-oriented energy prices that reflect environmental costs and benefits and the use of new and renewable energies and clean technologies.⁷⁵ Where nuclear sources were chosen, the signatories emphasized the need to maintain a high level of safety and cooperation.⁷⁶

It is anticipated that implementation of these goals will occur in the framework of state sovereignty over energy resources. Where private initiative and funding are not appropriate or available, intergovernmental

71. Proposal for a Pan-European Energy Charter, COM(91)36 final.

72. *12 Former Soviet Republics Are Among Signers of European Energy Charter*, 9 Int'l Trade Rep. (BNA) 36 (Jan. 1, 1992).

73. European Energy Charter.

74. *Id.*

75. *Id.*

76. *Id.*

working groups must be formed to achieve these goals, such as the formulation of a coherent energy policy.

The Charter identifies seven areas in which its efforts will be focused:

1. Access to and development of energy resources to assure that the rules governing the acquisition, exploration, and development of resources are "publicly available and transparent";

2. Greater access to international as well as local markets;

3. Liberalization of trade in energy, products, equipment, and services including the development of commercial international transmission networks;

4. Promotion and protection of investments, underpinned by a "stable, transparent" legal framework for foreign investment in order to ensure a high level of investment security and facilitate investment risk guarantee schemes;

5. Safety principles and guidelines;

6. Technology exchanges in energy production, conversion, transportation, distribution, and energy efficiency;

7. Energy efficiency and environmental protection, to address consistency between energy policies and environmental agreements and conventions, market-oriented prices, reflecting environmental costs and benefits, and incentive programs for profitable investment in energy efficiency project; and

8. Education and training, to include professional and occupational training, as well as a public information program.⁷⁷

The signatories acknowledge that the governments of central and eastern Europe and the republics of the former Soviet Union may require transitional arrangements before they are able to comply strictly with the Basic Agreement and Protocols. These will be negotiated with each of the states that request transitional treatment.

VII. IMPACT OF PUBLIC PROCUREMENT AND ENVIRONMENT DIRECTIVES ON THE ENERGY SECTOR

In the overall Europe 1992 program, in addition to the energy sector reforms, there are over a dozen areas addressed by directives and regulations promulgated by the Commission and Council that will affect companies in the energy sector. These areas include procurement, labor,

77. *Id.*

companies, mergers and acquisitions, taxation, monetary union, free exchange of goods, intellectual property, environment, employment, competition, insurance, securities, construction, and professional services. While each of these areas will have an effect on the overall corporate behavior of an energy company, the areas of public procurement and environment are worth highlighting as examples where Council action will have a strong influence on the conduct of its central business activity after December 31, 1992.

A. *Public Procurement*

According to Cecchini's *Report on the Cost of Non-Europe*, in 1988, public procurement represented almost fifteen percent of the Community's gross domestic product.⁷⁸ In the White Paper, the Commission pointed out that, despite the existing Community legislation dating back to the early 1970s, national public authorities still tend to place their orders for supplies and for construction projects overwhelmingly with domestic enterprises.⁷⁹ The Cecchini Report estimated the waste of taxpayer's money due to the failure to open public-sector purchasing and construction markets to Community-wide competition to be an average of approximately \$22 billion per year.⁸⁰ The continuing support for national champions is clearly a major obstacle to the achievement of a truly internal market.

To reverse the favoritism given to national champions, the White Paper announced the Commission's intention to amend the existing directives to upgrade their effective application in each of the member states. In March 1987, the Commission presented a reform package for the public procurement sector announcing action on four fronts.⁸¹ First, the Commission proposed to make tendering and award procedures more transparent by overhauling the existing legislation. Second, it recommended the introduction of rules for Community-wide competition in the sectors not covered by the original legislation, including telecommunications, transportation, energy and water. Third, the Commission suggested the adoption of rules addressing the procurement of services, in

78. CECCHINI, *supra* note 10, at 16.

79. White Paper, *supra* note 9, ¶¶ 81-87.

80. Guide to Economic Community Rules on Government Procurement, 1987 O.J. (C 358) 1 [hereinafter Community Rules].

81. *Id.*; see also Excluded Sectors, *supra* note 55.

addition to procurement of supplies and public works. Finally, the Commission encouraged tighter enforcement of Community rules affecting procurement.

Until recently, directives affecting public procurement did not include the water, energy, transportation, or telecommunications sectors. These sectors were excluded from previous procurement efforts because some states allowed a private entity to handle these activities while others used public entities. Since the approach in the procurement directives had been on public procurement, inclusion of these quasi-public, quasi-private sectors in the directives would have invited failure. In addition, the quasi-public, quasi-private sectors experience conditions that do not involve significant competition because of the closed nature of their operative markets or because of special or exclusive rights or benefits granted by national authorities.⁸² The Commission determined that it was important to address the quasi-public, quasi-private sectors collectively, regardless of the legal form, and therefore excluded them from its previous directives. The exclusions applied until September 1990, at which time the Directive on the Excluded Sectors or Utilities Directive was adopted.⁸³ Its terms are the results of a hard-fought compromise and do not go as far as the Commission originally intended.

The Utilities Directive applies to both public agencies and private parties, if they are acting under special licenses.⁸⁴ The essential elements of the Directive address the compulsory publication of invitations to tender in the Official Journal and application of Community award procedures. The Directive envisions three basic schemes available to a procuring entity in the bid process: (1) open procedures, where all interested suppliers or contractors may submit tenders; (2) restricted procedures, where only candidates invited by the contracting entity may submit tenders; and (3) negotiated procedures, where the contracting entity negotiates the terms of a contract with one or more suppliers or contractors of its choice.⁸⁵

In each case, a call for competition must be made, unless any of the following circumstances are encountered:

1. Absence of a suitable tender or any tenders following a previous call for competition for a similar contract;

82. Community Rules, *supra* note 80; *see also* Excluded Sectors, *supra* note 55.

83. Council Directive 90/531 of 17 September 1990 on the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Telecommunications Sectors, 1990 O.J. (L 297) 1.

84. *Id.* art. 2(1).

85. *Id.* art. 1(6).

2. Research and development contracts;
 3. Contracts that can be executed only by a particular supplier or contractor;
 4. Circumstances of extreme emergency where time periods governing tenders cannot be met;
 5. Additional deliveries under a previous contract where a change in supplier would be incompatible with the original contract;
 6. Repetition of similar work under a previous competitive contract;
 7. Availability of bargain purchases (below normal market prices);
- or
8. Purchases from a supplier winding up its business activities.⁸⁶

Where a call for competition is required, the Directive sets out several means by which a call can be made. One way the call can be made is on a project-specific basis, setting out necessary details on the project under consideration. Another is through periodic indicative notices to obtain intentions of interest for contracts that will be awarded by restricted or negotiated procedures without further publication of a call for competition. The last way in which a call for competition can occur is on the basis of a qualification system, which may be a hybrid that can apply to tenders in a restricted or negotiated procedure.⁸⁷

A detailed schedule of procedures governing the tender process is set out in the Utilities Directive. The schedule sets out the chronology from the notice of the contractor's intention to entertain tenders to the contractor's decision to award a contract.⁸⁸ In a restricted or negotiated setting, the contracting entities are required to adopt objective criteria and rules and make them available to interested suppliers or contractors.⁸⁹ In addition, the Directive requires that Community technical specifications be employed where they exist, although departures are allowed for good cause.

The Utilities Directive also addresses the criteria contract awards. The standards are flexible, but must be set out in the notice of tender or contract documents in descending order of importance. The Directive allows a contracting entity to establish two types of criteria. One allows an award to be made to:

86. *Id.* art. 15(2).

87. *Id.* art. 16.

88. *Id.* arts. 24-29.

89. *Id.* art. 25.

the most economically advantageous tender, involving various criteria depending on the contract in question, such as delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance, commitments with regard to spare parts, security of supplies and price. (Where these criteria set out in paragraph (a) are desired, contracting entities must set out minimum specifications in the tender notice or the contract documents.) The other allows the award to be based on the lowest price only.⁹⁰

Under the Utilities Directive, a tender for a supply contract may be rejected where the proportion of products originating in a non-Community country exceeds fifty percent of the total value of the products constituting the tender.⁹¹ Under such circumstances, preference must be given to competing Community-origin tenders unless the prices of the Community-origin tenders exceed the price of the foreign tender by three percent or more.⁹²

It is significant what is *not* within the scope of the Directive. The Directive does not apply to contracts considered by a member state to involve state security interests.⁹³ Nor does it apply to most contracts awarded pursuant to an international agreement with a non-Community country.⁹⁴ The Directive also sets a threshold value before its requirements attach. In the case of supply contracts, bids in connection with oil, gas, coal, or other solid fuel exploration, the threshold value of the award is \$552 thousand (ECU 400,000). The value of public works contracts must exceed \$6.9 million (ECU 5,000,000) before the Directive applies.⁹⁵

Finally, the Utilities Directive contains a procedure allowing a member state to request that the Commission exempt contracts associated with the exploration and production for oil, gas, coal, or other solid fuels in geographical areas designated by the member state. The Commission is empowered to grant the exemption where *all* of the following five conditions are met:

1. Other contractors were allowed to participate in bidding for the underlying concession under the same conditions as the contracting entity;

90. *Id.* art. 27(1).

91. *Id.* art. 29(2).

92. *Id.* art. 29(3).

93. *Id.* art. 10.

94. *Id.* art. 11(1).

95. *Id.* art. 12.

2. The qualifications of all bidders for the underlying concession were established prior to the time bids for the concession were evaluated;

3. The award of the concession was based on objective criteria which were established and published prior to the bidding and applied in a nondiscriminatory manner;

4. All terms and conditions of the activities under the concession were established in advance of the award of the concession and applied in a nondiscriminatory manner; and

5. The contracting entity is not required by national law to provide information on its intended or actual source of procurement.⁹⁶

The Procurement Directive requires implementation by most member states by July 1992, and the directives are to be in force by January 1993 at the latest, with exceptions allowed for Spain, Greece, and Portugal.⁹⁷

A directive on enforcement of Community rules in the excluded sectors has been adopted.⁹⁸ Although the member states agree on the necessity for a procedure to benefit suppliers and contractors from excluded sectors, it was very difficult to reach agreement on this directive.

The current proposal concerning the excluded sectors is intended to address the current disparity of remedies in the various member states. For instance, the suspension of illegal award procedures is not available under similar circumstances in all member states. Likewise, obtaining damages is subject to such constraints in many states that it may not be a practical remedy.⁹⁹

The goal of the proposed directive governing the excluded sectors is to require each member state to adopt or amend administrative and judicial procedures so that contractors and suppliers have effective and prompt remedies against contract award procedures that are incompatible with Community procurement law. Under consideration are interlocutory remedies designed to set aside or modify a contested award to maintain the status quo. Also under consideration is the remedy of damages for those breaches that cannot be avoided or corrected during the award process. The level of damages is still under consideration, as is the necessary quantum of proof incident to recovery.¹⁰⁰

96. *Id.* art. 3.

97. *Id.* art. 37.

98. Proposal for a Council Directive Coordinating the Laws, Regulations and Administrative Provisions Relating to the Application of Community Rules on the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Telecommunications Sectors, COM(90)297 final. Member States must implement the Directive by July 1, 1992. *Id.* art. 17.

99. *Id.* at 3.

100. *Id.* art. 2, at 27.

The excluded sectors directive allows member states to adopt an alternative system of attestation.¹⁰¹ Companies that qualify for this system do not risk suspension of their contract award, though they remain subject to other interim measures as well as damages. The attestation system is designed to apply to contracting entities whose contracts are of crucial importance in the public sector, such as utilities. The attestation procedure involves regular review of contracting procedures by national representatives for conformity with national and Community procurement law. Companies subject to the attestation alternative must state this fact in the tender notice published in the Official Journal.

Finally, the excluded sectors directive envisions a conciliation procedure at the Community level as a means of alternative dispute resolution.¹⁰² It is expected that agreement on the final form of the directive will not be reached for some time.

B. *Environment*

The second area in which the energy sector can expect major changes is the environmental area. While the current debate about Europe 1992 tends to emphasize economics, the ecological necessity of a Community environmental policy has long been recognized in the environmental action programs submitted by the Commission and adopted by the Council. They are based on the truism that environmental pollution is not and cannot be confined to the territory of a member state, but is always a transnational problem. A common environmental policy, implemented on the basis of Community law, is thus required both for ecological as well as economic reasons.

The 1957 Treaty of Rome did not specifically refer to the need for an environmental policy, but the Community began developing a policy in the early 1970s. In 1973, the Council adopted the First Action Programme on the Environment which set out the basic principles of a common environmental policy, including the principle of preventive action and the principle that the "polluter must pay."¹⁰³ Based upon this First Action Programme and three subsequent action programs, the Community has adopted numerous measures and more than 100 items of legislation. The major concern is water pollution, but Community legislation

101. *Id.* arts. 3-9, at 30-32.

102. *Id.* art. 13, at 35.

103. First Action Programme on the Environment, 1973 O.J. (C 112) 1.

on air pollution, hazardous substances, and waste management is becoming increasingly important. In light of the program to complete the internal market, the Commission has increased its activities in the environmental field.

The SEA was an important development because it confirmed the ability of the Community to legislate in the environmental field and set out specified powers to act.¹⁰⁴ The general rule is that legislation must be adopted unanimously, although the Council can itself decide that some measures should be capable of being adopted by qualified majority. The SEA amendments to the EEC established objectives for Community environmental actions: "to preserve, protect and improve the quality of the environment; to contribute towards protecting human health; [and] to ensure a prudent and rational utilization of natural resources."¹⁰⁵

The SEA also sets out three basic principles of Community environmental law and policy. The policies include preventive action, rectification of environmental damage at the source, and the principle that the "polluter should pay."¹⁰⁶

Finally, the SEA sets out specific factors to be taken into account by the Community in deciding on corrective or punitive measures in the environmental field.¹⁰⁷ The factors that must be considered are "the available scientific and technical data, environmental conditions in the various regions of the Community, the potential benefits and costs of action or of lack of action, the economic and social development of the Community as a whole, and the balanced development of its regions."¹⁰⁸

The SEA adds that the Community shall take action to the extent that the environmental policy objectives can be better attained at a Community level than at the level of the individual member states.¹⁰⁹ Moreover, the SEA gives member states the right to maintain or introduce "more stringent protective measures compatible with this Treaty."¹¹⁰

The Commission has identified several specific areas of environmental concern. The prevention of water pollution is one of the priority areas in Community environmental policy and is the sector in which the Community has the most comprehensive legislation. The four regulatory

104. EEC Treaty art. 130R-T.

105. *Id.* art. 130R(1).

106. *Id.* art. 130R(2).

107. *Id.* art. 130R(3).

108. *Id.*

109. *Id.* art. 130R(4).

110. *Id.* art. 130T.

strategies being pursued include water quality standards, effluent standards for dangerous substances, product standards for certain goods, and standards for pilotage of vessels for the prevention of oil pollution. Effluent standards for dangerous substances and vessel pilotage standards have the greatest impact on the energy sector.

One of the cornerstones of the Community's environmental legislation on water pollution is Directive 76/464¹¹¹ which covers pollution caused by dangerous substances discharged into the aquatic environment. The purpose of the Directive is to eliminate, over a defined period of time, water pollution caused by the discharge of particularly dangerous substances and to reduce water pollution caused by the discharge of other less hazardous substances. The Directive applies to inland surface and internal coastal waters of the Community.

Directive 76/464 is complemented by a Directive on ground water¹¹² which follows the same regulatory pattern but contains even stricter standards. The aquatic environment Directive sets out two lists of hazardous substances, the black list and the gray list. Pollution from substances listed on the black list must be eliminated by means of a system of uniform effluent standards. Member states must establish implementation programs for reduction of water pollution by gray list substances. The implementation programs must contain water quality standards which, however, may be largely determined by the member states.

Establishing specification standards for vessels is also important in terms of water pollution reduction. In order to prevent accidental pollution, two Directives concerning the pilotage of vessels in the North Sea and the English Channel have been issued. The Directives set out minimum safety standards for domestic and certain foreign tankers entering or leaving Community ports.¹¹³ In addition, the Community has established a research program to assess control strategies for handling hydrocarbons discharged at sea.¹¹⁴

111. Council Directive 76/464 of 4 May 1976 on Pollution Caused by Certain Dangerous Substances Discharged into the Aquatic Environment of the Community, 1976 O.J. (L 129) 23.

112. Council Directive 80/68 of 17 December 1979 on Protection of Groundwater Against Pollution Caused by Certain Dangerous Substances, 1980 O.J. (L 20) 43.

113. Council Directive 79/115 of 21 December 1978 Concerning Pilotage of Vessels by Deep-Sea Pilots in the North Sea and English Channel, 1979 O.J. (L 33) 32; Council Directive 79/116 of 21 December 1978 Concerning Minimum Requirements for Certain Tankers Entering or Leaving Common Ports, 1979 O.J. (L 33) 33.

114. Council Decision of 6 March 1986 Establishing a Community Information System for the Control & Reduction of Pollution Caused by Spillage of Hydrocarbons & Other Harmful Substances at Sea, 1986 O.J. (L 077) 33; Council Resolution of 26 June 1978 Setting Up an Action Program of

The Commission also proposed minimum requirements for vessels entering or leaving Community ports carrying packages of dangerous or polluting goods in order to minimize the risk of accidents.¹¹⁵ Ultimately, progress in this area is slow because the member states want to maintain sovereignty in this sector.

Community legislation is much less comprehensive in the area of air pollution than legislation on the aquatic environment. Automotive emissions, sulfur dioxide, nitrogen oxide and particulate emissions from stationary sources, air pollution from industrial plants, and lead and asbestos pollution are specifically addressed by existing legislation.

In the area of noise pollution, legislation has focused primarily on limiting traffic noise by addressing common product standards rather than mandatory noise levels. Existing directives concern noise generated by motor vehicles, aircraft, electric generators, power cranes, compressors, and other construction equipment.

The emerging focus of the Community's environmental program has been on waste management. In a recent paper, the Commission set out a Community strategy for waste management, reiterating the main objectives of the Community's waste management policy.¹¹⁶ The paper addressed waste prevention, waste recycling and reuse, and safe disposal of non-recoverable residues.

In a 1975 framework Directive, waste is defined as "any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law," with the exclusion of certain types of waste such as radioactive waste, waste waters, and gaseous effluent emitted into the atmosphere.¹¹⁷ The framework Directive sets out basic obligations of the member states to encourage the prevention, recycling, and processing of waste and to ensure that waste is disposed of without injury to health and the environment. To meet the basic obligation, the member states must initiate waste disposal plans, establish permit systems for businesses involved in commercial treatment, storing or tipping waste, and prevent uncontrolled waste disposal. The Directive applies

the European Community on the Control and Reduction of Pollution Caused by Hydrocarbons Discharged at Sea, 1978 O.J. (C 162) 1.

115. Opinion of the Economic & Social Committee on the Proposal for a Council Directive Concerning Minimum Requirements for Vessels Entering or Leaving Community Ports Carrying Packages of Dangerous or Polluting Goods, 1989 O.J. (C 329) 8.

116. A Community Strategy for Waste Management, COM(89)934 final.

117. Council Directive 75/442 on Prevention, Recycling and Processing of Waste, 1975 O.J. (L 194) 39.

the "polluter must pay" principle by providing that the cost of disposing of waste shall be borne by the generator of the waste.

A number of directives cover waste containing particularly dangerous substances. Directive 78/319 on toxic and dangerous waste applies to waste which requires special treatment in view of the risks which they present to health or the environment.¹¹⁸ These wastes include arsenic, heavy metals, pesticides, chlorinated solvents, pharmaceutical compounds, and asbestos. The hazardous waste Directive follows in principle the same regulatory approach as the framework Directive.

In 1988, the Commission proposed two new directives on hazardous waste which would replace the 1978 Directive, only one of which has been adopted.¹¹⁹ The proposed directives set out precise definitions including lists of groups and types of hazardous wastes and waste with hazardous components. According to the proposal, member states would be required to prohibit the uncontrolled discharge, disposal, and transport of hazardous wastes. They also would be required to subject enterprises producing, holding, or disposing of hazardous wastes to regular inspections and to record-keeping requirements. The proposal also prohibits mixing hazardous wastes with other wastes unless it is a necessary part of waste treatment and establishes more stringent information requirements.

The intra-Community transportation of toxic and dangerous wastes is subject to strict record-keeping requirements.¹²⁰ When toxic and dangerous waste is transported in the course of disposal, it must be accompanied by an identification form containing information on its nature, composition, volume, name and address of the waste producer, name and address of the person taking delivery of the waste, and the location of the site of final disposal. The Community has instituted a regulatory framework for the trans-frontier shipment of hazardous wastes based on authorizations issued by the importing country. The exporting country may object only on the basis of an existing waste disposal plan.

In order to avoid a split of the internal market into waste-generating and waste-disposing countries, the Commission is expected to provide that waste should be disposed of in the nearest suitable centers, making

118. Council Directive 78/319 of 20 March 1978 on Toxic and Dangerous Waste, 1978 O.J. (L 84) 43.

119. Proposal for Council Directive Amending Council Directive 75/442 on Waste, 1988 O.J. (C 295) 3; Council Directive 88/399, 1988 O.J. (C 295) 4 (pending).

120. Council Directive 84/631 of 6 December 1984 on the Supervision and Control within the European Community of the Transfrontier Shipment of Hazardous Waste, 1984 O.J. (L 326) 31.

use of the most appropriate technologies to guarantee a high level of protection for the environment and public health.

Civil liability for damage caused by waste is the subject of a proposed directive based on two SEA principles: preventive action and "the polluter must pay."¹²¹ The proposal applies to all wastes generated in the course of commercial activities, except nuclear waste and pollution due to certain hydrocarbons. The proposal imposes strict liability upon the producer of the waste but does not prevent a waste producer from seeking compensation from negligent third parties (e.g., transporters). If the producer cannot be identified, the holder or disposer will be liable. An importer into the Community of waste from non-Community countries is considered a producer. If several parties are liable, they will be held jointly and severally liable.

The liability system covers damage to individuals, property, and the environment. Liability for damage to the environment is subject to several restrictive conditions. First, only major and persistent damage to the environment creates the basis for liability. Negligible and temporary damage is excluded. Damage must be caused by changes in water, soil, or air conditions including damage to fauna and flora. Punitive damages are not recoverable. Restoration of the status quo is required. Only public authorities have the right to bring legal action, although national laws may give public interest groups the right to sue.¹²²

A plaintiff must prove the damage or injury to the environment according to a "high probability" standard. Thus, the plaintiff must show the overwhelming probability of a causal relationship between the producer's waste and the damage or injury to the environment.

In May 1990, the Council adopted Regulation 1210/90 establishing the European Environment Agency¹²³ in which Community and non-Community countries may participate. The location of the Agency's headquarters has yet to be decided, and the Regulation will not be effective until the day after the decision on the seat of the Agency has been made. In the first two years of its operation, the Agency will simply record, collate, and assess data. After two years, its powers will be reviewed and possibly extended. The European Parliament feels that the

121. Proposal for a Council Directive on Civil Liability for Damage Caused by Waste, COM(89)282 final at 3.

122. *Id.*

123. Council Regulation 1210/90 of 7 May 1990 on the Establishment of the European Environment Agency and the European Environment Information and Observation Network, 1990 O.J. (L 120) 1.

Agency's present powers are insufficient and has asked that the Agency be vested with inspection and control powers.

VIII. CONCLUSION

A number of important steps have been taken that immediately affect the way business will be conducted in Europe after December 31, 1992. The existence of an integrated Community structure and the momentum of the progress that has been made to date will have a self-carrying effect on the program until it is fully accomplished, both at the Community level and the national level. In the energy sector, the goals and priorities of the Commission have been established, though much remains to be accomplished. The remaining tasks in this area will involve significant participation at the national level and the initiatives of each affected industry group.

To be competitive, successful business enterprises within the Community must understand the goals and direction of the Community and actively follow the initiatives of the Commission and enactments of the Council. As a practical matter, companies must develop a proactive approach to the legislative bodies of the national governments to ensure that favorable national legislation is introduced to implement the directives of the Community. The influence of industry on the integration of the energy market cannot be underestimated and should be actively pursued until reasoned policies balancing industry and Community goals are fulfilled at the Community and national levels.

