

Make or break time for EU energy package

There is precious little time left for the EU to adopt the all-important Third Energy Package. Almost unnoticeably, liberalisation has slipped down the priorities list of the Council of Ministers. Are we headed for a spectacular failure?

| by *Hughes Belin*

Life goes on but things in Brussels are moving slightly faster than elsewhere because in Brussels institutional deadlines are taken seriously. Every movement is subject to the close scrutiny of the watchful eye of stakeholders ready to pounce on the slightest false manoeuvre, indiscretion or sign that might give a clue as to the possible outcome of negotiations between the European Parliament, the Council of Ministers and the European Commission. The legislative energy package that was intended to resolve all problems in the gas and electricity markets was proposed by the Commission on 19 September 2007 after long drawn out negotiations. It should be remembered that the Commission's role is merely to propose legislation that will bring improvements to the internal market, the European Union's very *raison d'être*. It does not actually decide on the final text except in exceptional cases where it has exclusive competence. By the very nature of the inter-institutional

discussions that follow, a proposal will be weakened in certain areas and strengthened in others. Every clause of the draft proposal will be pulled apart and debated by the Council of Ministers, as the 27 EU member states strive to reach agreement and of course do everything within their power to limit government obligations and the administrative burden engendered by the new laws.

Within the European Parliament, things work differently. As representatives of the people, members of the European Parliament will attempt to strengthen the clauses contained in the draft proposals, unless of course, the numerous lobbies that hang around the European Parliament manage to convince them to drop any potentially controversial clauses.

This means that after the Commission has made a proposal, the Parliament and the Council will examine it and establish their respective positions separately. These positions then need to be merged

into one and compromises made. The highly sensitive energy dossier is about to reach this stage.... soon but not just yet because although the Parliament adopted the reports on the five proposed texts on first reading at the end of June and the beginning of July, the Council of Ministers has not yet agreed on its position.

Germany plays for time |

Berlin is the strongest opponent of the proposed energy package and Angela Merkel is the most influential European leader. Within the Council, Germany is the only country that is deliberately trying to delay the Council drawing up a common position. Of course, it would be possible via the qualified majority system to force Germany into the minority but the question is whether it would be wise to vote against Germany which, after all, holds one of the key markets for the liberalisation of the energy market in Europe. 'Once we have broken the German stronghold, there will



Neelie Kroes, EU commissioner . Photo: Michiel Wijnbergh / Hollandse Hoogte

be nothing to stop energy liberalisation in Europe', an optimistic and influential official close to the file confided to EER.

So what will Germany's strategy be? Will it be able to concede on two important dossiers both of which represent a threat to the competitiveness of its industry: energy liberalisation and the energy-climate package? This is the conundrum facing the French presidency because it has no choice but to reach agreement on the energy package if Europe is to be ready for the Climate Change Conference in Copenhagen at the end of 2009.

A glance at the Council's programme for the next 18 months, a document which was published very discreetly at the end of June, reveals that the post-Kyoto climate negotiations are stated as being 'the overriding priority' and the deadlines already noted in black and white: 'agreement on these proposals as a coherent package before the end of 2008 and consequently allow for their adoption

within the current legislative term, at the latest early in 2009'. It would therefore be fair to assume that it is the number 1 priority for the French presidency. Moreover, the dossier has to be completed

swiftly as possible', which although it's not proof, does at least indicate a certain loss of interest, compared to climate issues.

But to get the Germans to agree, Sarkozy is going to have to make concessions in other

The negotiations may prove to be too difficult for the French presidency

in time because failure to do so will lay the blame directly on the French presidency and Nicolas Sarkozy in particular. The idea is inconceivable!

So what does the Council's strategy document have to say about liberalisation? Not much, just a single paragraph among the numerous pages dedicated to climate and other current issues. This single paragraph ends, however, with an invitation 'to reach final agreement on the 3rd internal energy market package as

areas and there he is walking on thin ice. He will have to manage the susceptibility of other EU member states such as the Netherlands, the United Kingdom and Spain where full unbundling already exists. Those countries are therefore likely to push for the adoption of the energy package, but not at any price: such an unbundling must be strong enough otherwise they would not support the liberalisation package. Failing to adopt it would obviously suit Germany.



EU commissioner Andris Piebalgs. Photo: Thierry Monasse.

So piece-meal compromises will have to be negotiated, both within the Council and with the Parliament. But this strategy has its perils, because it is too easy for those who prefer no agreement to a bad one to block them. Consequently the negotiations may prove to be too difficult for the French presidency which may then choose to focus on the more crucial climate package. After all, France does not much like the Third Package either. As one diplomat put it, 'It is in France's interest to look as if it is working while actually achieving nothing'.

Are we on schedule? |

In June, there was still talk of agreement being possible after a single reading within the European Parliament. This would require that the Council and the Parliament be on the same wavelength and that both institutions would agree

straight away and adopt the texts rather than debate the issues separately. But the first reading in the Parliament took place without taking into account the Council's guidelines, which, as it happened, turned out to be very different. Thus agreement will have to be reached in a second reading at the beginning of next year. The Parliament has a very busy schedule before April 2009 which is the last plenary session of the legislature. Failing that, with the European elections scheduled for June next year, everything will be back to square one and the adoption of the new texts will be pushed back by a year and a half.

Well informed observers have made their calculations: the Council's common position (the equivalent of first reading in the parliament) will have to be adopted by 10 October, the date of the next Energy Council. If not, it will be too late to launch

informal negotiations with the European Parliament and to reach a formal agreement that may be adopted before the end of the legislature. This will be difficult as the council and the Parliament hold very different positions. Even the slightest change could result in the whole lot collapsing.

Elements of discord |

As part of the fragile compromise reached by the Council in June – which Germany interprets in its own way – European energy ministers agreed on a series of principles. On the subject of unbundling (the most sensitive one), the Council agreed to propose a third option which involves setting up Independent Transmission System Operators (ITO). This option would be made available to member states where the transmission system is owned by a vertically integrated company on the

date on which the Directive enters into force and would allow these companies to maintain ownership of (gas and electricity) transmission systems on condition that they are managed by an ITO.

This solution will primarily interest countries where the state-controlled incumbent still dominates the market: France, Bulgaria, Slovakia, the Czech Republic and Germany, even though Eon and RWE have publicly declared that they intend to sell a section of their network activities. In the gas sector, certain member states feel that it is important that they be allowed to hang on to their gas pipelines: Gazprom is on the lookout to buy transmission grids in Western Europe, the only link missing for the Russian giant to be able to attack the distribution market.

The provisions guarantee the effective independence of the ITO, its management and operation and that of its controlling body. This will prevent any conflict of interest as well as guaranteeing equal and non-discriminatory access to the network. Investment will receive a boost, as will the development of interconnections. The ITO will be given independent access to resources required for its smooth operation and regulators will be granted extra powers to be able to monitor the ITOs. Two years after the system has been put into place the Commission will evaluate the system and if necessary make proposals to guarantee the independence of the TSOs.

comes to the powers granted to regulators. While the Parliament backed and even strengthened the Commission's proposals by an overwhelming majority, the Council made every effort to unravel them. In concrete terms the Parliament feels that the proposed European Regulators' Agency should be a super regulator with extensive powers whereas for the Council, it is nothing but an almost empty shell with little power.

For the Council the regulators' agency should play a purely consultative role whereas the Parliament would like it to be involved in the finalising of the grid codes. The idea is that the newly created organisation of European TSOs should propose the grid codes and network rules, which should then be adopted by the regulators' agency. This transfer of sovereignty is unacceptable for the Council which wants to maintain the status quo with grid codes being approved at national level. The European Parliament wants an Agency that has a key role in setting guidelines for the energy market and is also fully accountable - reporting regularly to the EP and with an EP vote on the Director. The Council, on the other hand, feels that the regulator Agency should only deal with questions that involve at least two member states, these will generally be cross-border issues such as the mandates relating to the use of interconnections. The question is particularly sensitive in Germany which

will be particularly attentive in this domain because a charter of consumer rights is currently being drafted by the European Commission based on the future electricity and gas directives, but it will be non-binding. This means that only the directives can actually improve the rights of energy consumers.

In addition, the dossier has now become very technical and certain points, such as the clause on third countries, have been voluntarily left aside - for the time being. This 'Gazprom clause' aims at preventing non-EU integrated operators from acquiring European networks, by placing them on an equal footing with European operators, thereby forcing them to unbundle or to conclude agreements with EU authorities to be able to buy transmission assets. A complex and sensitive point which no one wants to talk about.

But for the time being, member states cannot even agree on the interpretation of the compromise signed by the 27 ministers in Brussels on 6 June. The first few days in September were spent trying to reach consensus with October just around the corner when informal negotiations with the European Parliament will have to be launched. It's always possible that MEPs, tired of the relentless debates, will give in to pressure from the Council. Even Claude Turmes in our interview (see separate article) speaks of the possibility of the Parliament backing down on the question of full unbundling. But the final result may be a text with which no one will be happy. 'We would then need to start thinking about the 4th liberalisation package to set right the errors of the previous ones', said one MEP mockingly.

When the Barroso Commission was inaugurated four years ago, all stakeholders were well aware of the shortcomings and abuses within the single electricity and gas markets. The president took his time to introduce new legislation, the Slovenian presidency (first semester 2008) allowed itself to be taken for a ride and today the French presidency finds itself in an impossible situation. But, for the time being nobody has dared to voice the possibility of failure. ■

Nobody has dared to voice the possibility of failure

It would appear that the Parliament is prepared to accept this option for the gas sector but not for the electricity sector. In fact it seems that for the latter, the Parliament has opted for full unbundling as the only solution whereas in the gas sector it has allowed the possibility of choosing between full unbundling and the ITO.

But this is not the only source of discord between the Council and Parliament: they are also diametrically opposed when it

is very reluctant to transfer its powers to regulators.

The Parliament has also significantly increased protection measures for consumers and vulnerable clients but the Council is reluctant to develop this chapter any further. These measures would require operators to provide more clarity in invoices and offers, to be more respectful of consumers in business practices and to be more transparent with regard to energy sources, costs and prices. The Parliament