France

NEWS
Review of 1993 energy market

In 1993 an outstanding feature of the energy market was a strong movement in primary electricity, which accounted for 38 per cent of French energy consumption. Its progress has been considerable in the 20 years since 1973, when the contribution of primary electricity was only 7 per cent. Natural gas has also seen its share in the overall demand for energy increase, reaching 13.3 per cent in 1993. This trend is basically due to the tertiary (residential) energy sector. In industry, on the other hand, there has been only a small increase in natural gas, amounting to just 1 per cent. Even so it is a healthy development, bearing in mind the overall fall in demand for energy in the industrial sector.

The contribution of oil to France's energy requirements has suffered another setback, falling from 41.2 per cent in 1992 to 40.4 per cent in 1993, compared to 69 per cent in 1973. Three sectors are mainly responsible for the 1993 fall: petrochemicals, industry and power stations.

The only sector where the need for oil continues to grow is transport, but in 1993 the demand for fuel increased by only 0.7 per cent. In 1993 the transport sector alone accounted for almost 52 per cent of France's total oil consumption. But the year was marked by a fall in the average annual mileage of private motorists and a drop in the fuel consumption of private cars, while road haulage traffic fell by approximately 4.5 per cent.

For the first time since the 1983 fall in energy prices, energy consumption fell in 1993, due particularly to the economic recession, decreasing by 0.5 per cent.

Oil consumption has thus dropped back by 2.5 per cent. Oil remains the most popular source of primary energy in France with 40.4 per cent of the market, as against electricity (38 per cent), gas (13.3 per cent) and coal (6.4 per cent). The transport sector alone accounts for nearly 50 per cent of all oil consumption.

Overall the rate of France's independence in energy, which compares total consumption and national production, showed a decided improvement last year at 51.8 per cent, a result of the fall in demand worldwide, alongside an increase in national production, particularly in nuclear power.

The cost of French energy is likely to remain low in 1994, with the slight rise in the dollar rate and in energy consumption being offset by the continuing fall in the price per barrel. According to the External Economic Affairs section of the Ministry of Economy, the energy deficit is likely to stay at around F.Fr.70,000 million this year, as against F.Fr.69,000 million in 1993, and compared to F.Fr.94,100 million in 1991.

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According to Electricité de France (EDF), 1993 was an excellent year for the 56 nuclear power stations whose output was 350.2 billion kilowatts per hour, the equivalent of 78 per cent of French electricity production.

Germany

LEGISLATION
Energy Economy Law
Draft Bill amends

The German Minister of Economy drafted a Bill which rewrites the Energy Economy Act of 1935 in Article 1 and amends the provision concerning public utilities of the German Act Against Restraints of Competition of 1957 in Article 2. The Bill's purpose is to provide for the secure and reasonably priced supply of gas (and electricity) through fixed mains, compatible with the environment.

The Bill sustains achievements of the 1935 Act which imposed on public utilities the obligation to publish general conditions of sale and to connect and supply any user on his request within the territory of supply. Important modifications relate to the admission of more competition among public utilities through the restriction of the exemption of public utilities from the general application of antitrust law which is provided for by § 103 of the German Act Against Restraints of Competition.

The taking up of the supply of gas

According to the draft Bill, the taking up of the supply of gas of other persons presupposes the authorisation by the competent administrative authority. The authorisation may only be refused, if the applicant is, for personal, technical or economic reasons, not capable to warrant the fulfilment of the legal provisions of the Bill. The draft Bill does not sustain the provision of the 1935 Act according to which public utilities were obliged to notify any projects relating to the construction, renovation, extension or closing down of plants or installations. The authorisation of such projects is already subject to other German laws such as those relating to building permits.

The draft Bill sustains the provision of the 1935 Act according to which the competent administrative authority may request information on technical and economic matters which relate to the obligations deriving from the Act. The draft Bill provides that generally recognised standards of the technique are applicable concerning the safety of constructions and the maintenance of installations. The Bill provides that the compliance with such standards will be assumed, if the technical rules of the German Association for Gas and Water or of comparative authorities of the EU have been observed. Beyond, the Minister of Economy may issue regulations which establish technical and safety requirements and the supervision of their implementation.

General obligation of connection and supply

The draft Bill sustains the statutory obligation of the publishing of general conditions of sale which is applicable if low-pressure gas is distributed to end-users within the territory of supply. Public utilities have to connect and supply anyone under the aforementioned conditions, unless this would not be acceptable for economic reasons. Similar to the Act of 1935 the draft Bill provides that those persons which maintain installations for their own supply of gas cannot claim the benefit of the public utility's general obligation concerning connection and tariffs, but they may claim individual connection and tariffs which are acceptable to the public utility for economic reasons. Since the draft Bill mentions as its purpose that the supply of gas shall be compatible with the environment, it is provided that persons or enterprises may claim the benefit even if they maintain installations for their own supply if they use re-usable energies, for example solar energy.

The Minister of Economy may issue regulations concerning certain conditions of the supply of energy, the conclusion of the contract, its subject-matter, its termination, the rights and obligations of the parties but also concerning the question of whether and to what extent the connection and supply of a partially self-supplying user will be acceptable to the public utility for economic reasons.

Expropriation

The draft Bill states that the expropriation of real property or of rights in real property is possible insofar as it is necessary for a project for the purpose of the supply of energy. The admissibility of the expropriation is determined by the competent public authority. The expropriation laws of the German provinces remain applicable. Different from the 1935 Act the draft Bill does not make the expropriation dependent on the existence of a public interest in the project.

Concession agreements and fees

By a concession a territorial authority grants to a public utility the right of way for the use of public roads and streets to lay fixed mains and to utilise them for the operation of the supply and distribution of gas to end-users. The concession agreement may not exceed the duration of 20 years. Whereas in the present legal system exclusive concession agreements are exempted from the application of the general prohibitions of anti-trust law in § 103(1) clause 2 of the German Act Against Restraints of Competition,[1] the draft Bill states that territorial authorities have to make available on a non-discriminatory basis the right to use public streets for the purpose of the construction and maintenance of fixed mains. Such contracts may not exceed the duration of 20 years. Two years before the expiration of the above-mentioned period, the territorial authority shall publicly announce the imminent expiration of the contract. Should more than one public utility be interested in the public supply, the territorial authority has to make its decision publicly known with the indication of the decisive reasons.

If a concession is not renewed the public utility is obliged to assign the property in the installations which are required for the public supply of gas to its successor organisation against the payment of an economic reasonable compensation. This provision has no parallel in the Act of 1935.

Concerning the fees payable by public utilities to the public authorities for the grant of concessions, the Minister of Economy may issue regulations which establish the admissibility and standards of concession fees, and in particular fix upper limits of the fees with regard to the different classes of customers and utilisations and the different population figures of towns.

Obligation to keep stocks

The draft Bill simplifies the provision contained in the Act of 1935 by stating that the Minister of Economy may issue regulations according to which public utilities may be obligated to keep a stock sufficient to meet their obligations concerning the supply of gas during a period of 30 days.

1 See Vahrenwald, 'Public Utilities for the Supply of Gas and Antitrust Law: § 103 of the German Act Against Restraints of Competition', [1993] 6 OGLTR 174 at 178.

Implementation, supervision and enforcement
Similar to the provision of the Act of 1935 the draft Bill states that the competent administrative authority supervises the implementation of the Act, and if necessary the authority may take the appropriate measures for the enforcement of the Act. Violations of the Act may be punished by the imposition of a fine of up to DM200.000. The Act of 1935 provides for a fine of up to DM50.000.

Public utilities and anti-trust law
Article 2 of the Bill rewrites § 103 of the German Act Against Restraints of Competition in a simplifying manner.[2] In the draft Bill § 103 of the German Act Against Restraints of Competition is shortened from seven to two subsections. Concession agreements by means of which territorial authorities could grant the exclusive right to use public streets for the construction and entertainment of fixed mains to public utilities which thus benefited within certain limits from monopoly protection, are in the draft Bill dealt with by the Energy Economy Act.

The draft § 103(1) of the German Act Against Restraints of Competition obligates a public utility which entertains grids for the supply of gas to conclude a contract for the transmission of gas if the requesting undertaking depends on the transport, because sufficient or other acceptable possibilities for the transport do not exist or cannot be constructed within reasonable time, should the refusal unfairly restrain the undertaking in the sale or acquisition of gas; the refusal is not unfair if the public utility proves that the capacity of the fixed mains are not sufficient, if the conditions offered for the transmission, in particular the payment, are not appropriate, or if the secure and reasonably priced and less-polluting supply of other customers to acceptable conditions becomes impossible, if a shortage of the supply of gas has to be expected in the international markets, or if the transmission is not acceptable for other important reasons.[3]

The draft § 130(2) of the Act Against Restraints of Competition states that orders in the sense of § 37a of the Act, according to which the cartel authority may prohibit the execution of agreements which violate anti-trust law, have to be issued in consultation with the competent supervisory authority.

The draft provides that the Minister of Economy shall examine whether it is appropriate to introduce into the Bill a special legal provision relating to agreements on associated contracts.[4]

Comments: The essential amendments of the German energy law which the draft Bill proposes relate to the careful elimination of those provisions on which the monopolistic structure of public utilities engaged in the supply and distribution of gas is based. Concession agreements by means of which territorial authorities grant rights of way to public utilities must be non-discriminatory and not exceed the duration of 20 years. If the territorial authority decides not to renew the agreement but to grant a concession to another public utility which has offered better contractual conditions, this public utility shall take over the installations constructed and maintained by its predecessor organisation against the payment of a reasonable compensation. It can be expected that the economic reasonableness of the compensation payable by the successor public utility for the acquisition of the installations of its predecessor organisation may lead to controversies between the parties concerned, but this provision will make it possible for competitors and other undertakings to deliver an offer for a concession agreement in the case of the expiration of the initial agreement. The practicability of this regulation which has no parallel in German law and which comes close to an expropriation against the payment of a compensation will be criticised, however, this draft provision may work as an effective tool in order to give newcomers access to the market and to provide a threat to those public utilities which benefit from concessions not to abuse their dominant position.

The admission of more competition in the industry justifies the restriction of those provisions which exempt certain contractual types from the general prohibitions of anti-trust law. The draft Bill does not sustain the exemption from prohibition of agreements on territorial demarcation, price-fixing and agreements on associated contracts in § 103(1) of the German Act on Restraints of Competition of 1957.[5] The elimination of these provisions renders in turn unnecessary the special provisions on the supervision of abusive behaviour of public utilities in subsections 5, 6 and 7 of § 103 of the Act of 1957. The draft regulation according to which a public utility's refusal to conclude a contract for the transmission of gas will be considered unfair is more explicit than the regulation contained in the Act of 1957 and in conformity with the relevant law of the EU. Thus the draft Bill achieves the adaptation of the law to the change in the basic structure of the market due to the increase in the

2 On the existing law, see Vahrenwald, Note 1 above, at 174 to 183.
3 On the law concerning transmissions,see Vahrenwald 'Refusal to Transmit Gas through Fixed Mains: Order of the Court of Appeals of Berlin, 9 June 1993', [1994] 3 OGLTR 93.
4 Presently, agreements on associated contracts are dealt with by § 103(1) clause 4 of the German Act Against Restraints of Competition of 1957. This provision exempts from the prohibition of cartels in the sense of § 1 of the Act such agreements which are concluded by public utilities for a common purpose directed towards the use of fixed mains, see Vahrenwald, Note 1 above, at 179.
5 On these contractual types, see Vahrenwald, Note 1 above, at 176 to 179.

consumption of natural gas and the progress of technology which make it possible to admit more competition and to restrain the privileges enjoyed by public utilities which were previously considered indispensable in order to attract the investments necessary for the construction and maintenance of grids and fixed mains.

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ARBITRATION
New arbitration rules

Arbitration has long been recognised as useful means to deal with potential disputes arising from an international agreement. The insertion of an arbitration clause does provide the parties to an international transaction with a number of advantages. First, it relieves the parties of uncertainty about where and how a dispute will be resolved: failing prior agreement between the parties, it is difficult to predict in advance which forum will resolve their litigation.

The decision to submit contentious matters to arbitration gives the parties a court that they anticipate will be a fair one and where none of them will feel as an outsider. It will also improve the parties' chances that the final decision will be enforceable: the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958, has been ratified (as of 1 October 1993) by 93 countries, while many countries are not parties to international conventions requiring that foreign judgments are recognised, and reliance must be made on principles of comity, a matter of national law.

Finally, by choosing to arbitrate, the parties give themselves the power to define the procedures applicable in the arbitration; a power unknown to normal litigation.

By Law 25 of 5 January 1994 (the Arbitration Act 1994) the Italian Parliament has introduced new rules on arbitration, thus substantially amending the relevant provisions of the Code of Civil Procedure. The new rules, published in the Official Journal of 17 January 1994, came into force 90 days later.

In addition to amending several provisions on domestic arbitration, the Arbitration Act 1994 introduces special rules on international arbitrations, by adding nine new Articles (832 to 840) to the Code of Civil Procedure. The provisions on international arbitration closely mirror those of the New York Convention.

Based on the newly introduced Article 832 of the Code of Civil Procedure, the new rules apply where, at the date of the signature of the arbitration clause or of the agreement referring a dispute to arbitration, at least one of the parties is resident or has its main place of business abroad, or if the controversy relates to contractual obligations a relevant part of which must be performed outside Italy.

Based on Articles 1341 and 1342 of the Civil Code certain clauses (including jurisdiction clauses) inserted in the general terms and conditions of a party must be expressly approved in writing by the other party. However, the new Article 833 of the Code of Civil Procedure exempts arbitration clauses from the above formality. Where the arbitration clause is included in general terms and conditions to which the parties have made reference in their agreement, such clause is valid if the parties knew or should have known it by using their ordinary diligence.

The parties are free to choose the law to be applied by the arbitrators or to state that the arbitrators must adjudge the dispute on the basis of equitable principles. Failing any such choice of governing law, the arbitrators must apply the law which is more closely connected with the agreement. In any event, the arbitrators must take the provisions of the contract and commercial usages in due consideration.

The language of the arbitration, when not expressly indicated by the parties, must be chosen by the arbitrators.

The Arbitration Act 1994 recognises the use of modern telecommunications technologies by authorising arbitrators to meet not only personally, but also by means of a video-telephone conference followed by a subsequent formalisation of the award in writing.

The recognition in Italy of foreign awards takes place by a decree of the President of the Court of Appeal in whose district the party against whom the enforcement is invoked is resident. If that party is not resident in Italy, the Court of Appeal having jurisdiction is that of Rome.

The application must be filed together with the original or a certified copy of the award and of the arbitration clause or the agreement referring the dispute to arbitration. Where the documents are not in Italian, a sworn Italian translation must also be filed.