

Switzerland – EU: How to Square the Circle

The bilateral agreements as they relate to energy law and policy are a topic of on-going discussions and controversies. An update to the recent developments will be at heart of one of the panels during the upcoming 7th St.Gallen International Energy Forum IEF. The IEF will take place in St.Gallen, Switzerland on November 27th and 28th 2014.

The following interview between Dr. Urs Feller (*Attorney-at-Law and Partner, Prager Dreifuss*) and Alexis Lautenberg (*Senior Advisor, Steptoe*) gives you a brief introduction to the topic, outlines some current issues and serves as a perfect outlook about what to expect during the discussions in St.Gallen.

Feller: Could you please explain the current status of the bilateral treaty negotiations in the energy field?

Lautenberg: These negotiations, which started back in 2007, have been influenced, over the period, by a raft of both exogenous and endogenous developments. Basically the process was about adjusting the Swiss policy orientation in the energy field to the regulatory trajectory on the EU side. This has proven to be utterly challenging to the extent that the Swiss side was confronted with a classic case of a moving target. Later on the negotiations were caught up by the growing EU determination to confer to the overall body of sectorial agreements with Switzerland an agreed set of institutional principles. As the work on the latter proceeded, it became clear that there were a series of issues at the interface between the new

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electricity field and vice-versa. While this process proceeded constructively, in reaction to the anti-immigration vote of 9 February, the EU-side decided to freeze the adoption of new agreements in its wake all together. The energy negotiations consequently became the single most directly affected sector.

Hence the well-advanced negotiation had to be handled in order to allow it to move, as close as possible, towards a finalization, it being understood that, under the circumstances, there could be no formal conclusion. This is

the backdrop of the intention to achieve a “technical understanding” by the end of October 2014. This deadline has both institutional and personal reasons. Institutionally the term of the Barroso Commission expires on 31 October 2014 and with it the mandate of Mr Guenther Oettinger, the competent Commissioner for Energy. The latter has played a positive role during the last five years. But the changes in the hierarchy furthermore include the chief negotiator from the Foreign Action Service for the institutional part of the negotiation as well as the negotiator from the Energy Directorate, who coordinated the energy negotiation.

While we understand that the discussions are moving closer to a conclusion it is important to underline two factors. The first one is that even a technical (or virtual) conclusion cannot settle those issues whose solution has to be aligned to the equivalent formulations in the prospective institutional framework agreement. The second factor concerns the status of a “technically” agreed instrument. Since such an undertaking will not have been initialled - let alone signed - it is difficult to assess what sort of concrete incidence it may have. It would probably signal that the two sides have agreed on a common instrument which may facilitate transition measures for areas in which the EU moves ahead in the implementation of the so called 3rd Package before the solution of the more politically inspired impediments.

Feller: What are the main/ remaining hurdles for an institutional agreement?

Lautenberg: The negotiations cover the following core aspects:

- The adoption of the future EU law (*acquis communautaire*) developments in bilateral agreements (for new agreements as well as for some of the existing ones).
- The role and the modalities of surveillance.
- The interpretation of the adopted legislation.
- The role and functioning of the disputes settlement.

Important ground has been covered conceptually on all these areas. Not surprisingly the dispute resolution mechanism is probably the single most important nut to crack.

The EU initially requested to grant the European Court of Justice the right to solely decide on the interpretation of the applied bilateral legislation, arguing that the latter is fundamentally EU law.

Switzerland, in contrast, proposed to use the courts of each respective party to solve disputes over the interpretation of what, in effect, is bilateral legislation

A possible compromise could be the following: The ECJ decides upon the interpretation of EU law proper, that is directly transposed into bilateral treaties, whereas exclusively bilateral legislation would be interpreted by the courts of the respective parties.

A further crucial aspect of the negotiation is about the coverage of the institutional framework treaty. Fundamentally it is about the question whether the new institutional framework should apply to existing bilateral treaties and if so which ones. An interesting issue, in this context, is whether the bilateral Free Trade Agreement of 1972, would also fall among the latter, which seems highly implausible.

Feller: To which extent would the bilateral electricity agreement be regarded as a boilerplate for additional bilateral agreements especially regarding the institutional link?

Lautenberg: This is an interesting question and not easy one to answer. The fact of the matter is that the energy agreement happened to, 1st already be on the negotiating table when the discussions on a new institutional

agreement were launched, and 2nd every sectorial agreement deals with quite different realities. In the case of the energy agreement there are two issues at the interface between the sectorial specificities and the new institutional framework. The first one concerns surveillance. Electricity is supervised at EU-level by ACER, an Agency of the new generation as well as, ultimately, by the European Commission. But as the agency has to establish itself, also and principally in regard to the Member States, one will have to monitor closely the further developments in terms of its remit. It is evident that Switzerland has every interest to be associated, as closely as possible, with this regulator.

But in the case of the electricity negotiation there is another sensitive question which relates to State aids. Here again there are, on the one side, issues linked to competition rules, as defined by the EU. So it would be tricky to impose to the Swiss side the EU competition system via a sectorial agreement. On the other side, the energy agreement aims at allowing Swiss companies into the electricity Single Market, which in turn includes common rules, in particular in the sensitive area of State aids.

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Feller: The electricity provider in Switzerland are mostly state-owned and to a certain extent state-subsidised. Do you see any specific problems for Switzerland and/ or Swiss providers in relation to the European State aids rules?

Lautenberg: Beyond what was just described, whatever the coverage of State aids rules in the specific bilateral energy agreement, the Swiss authorities (at various levels) would not be prevented from a stakeholder's role in those companies. This in turn comprises forms of subsidization of certain economic functions, as appropriate. In this context it is worth recalling that:

- The EU State aids regime defines the requirements of a governance system for public support of economic actors with the aim to avoiding market distortions. The European Commission has considerable discretion in approving State aids measures and, for all practical purposes, makes wide use of its competences. On the other hand, the European Commission has to approve certain forms of

State aid in order to provide for the necessary transparency and legal certainty for Member States as well as the relevant stakeholders.

- Furthermore, in the vast majority of EU Member States, energy suppliers are still, at least partially, state owned due to historical reasons. If you look for example at the major German suppliers you will observe that their stakeholder structure consists, in significant parts, of public institutions. Hence, the situation in Switzerland is not substantially different from the reality in EU Member States.

Against this background, while complex, the State aids issue will ultimately be solved taking into account the above elements. This said, it is important to realize (i) the peculiarities of the Swiss fiscal system, namely at Cantonal level, and (ii) that for Switzerland it would be a first to implement a governance regime for public support measures in such a context. Much depends therefore on how the system will be designed from a technical and operative point of view.

**The 7th St.Gallen IEF is going to take place on November 27th and 28th 2014.
Please refer to www.sg-ief.ch for more information.**