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Communiqué de presse

Le Conseil Général prend connaissance de l'étude de Frontier Economics

Suite à l'étude de London Economics concernant la structure et le fonctionnement du marché de l'électricité en Belgique dans une perspective européenne (octobre 2004), le Conseil Général de la CREG a demandé une étude supplémentaire concernant les mesures, ou la combinaison de mesures, pouvant être prises au niveau des capacités de production en Belgique afin d'assurer une meilleure répartition de celles-ci et par là-même un meilleur fonctionnement de marché.

La partie économique (évaluation de ces mesures ...) de cette étude a été confiée au consultant anglais Frontier Economics, alors que l'analyse juridique (faisabilité et modalités de mise en oeuvre de telles mesures en Belgique) a été effectuée par le bureau d'avocats de Liedekerke.

Lors d'une réunion extraordinaire du 08 mai 2006, le Conseil Général de la CREG a pris connaissance des deux rapports. Dans les prochaines semaines, les membres du Conseil Général analyseront ces rapports et recommandations. Vous trouverez ci-joint les "executive summary" de ces 2 rapports.

Les rapports mêmes sont disponibles dès à présent sur le site-web de la CREG (www.creg.be):

- étude « Addressing the adverse effects of market power », Frontier Economics, mars 2006 : ARCG-080506-FE ;
- Analyse: "De juridische verantwoording van de door Frontier Economics voorgestelde maatregelen": ARCG-080506-LIE.

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La CREG est l'organisme fédéral de la régulation des marchés du gaz et de l'électricité en Belgique, institué par la loi du 29 avril 1999 relative à l'organisation du marché de l'électricité et la loi du 29 avril 1999 relative à l'organisation du marché du gaz et au statut fiscal des producteurs d'électricité. La CREG a deux rôles essentiels : une mission de conseil auprès des autorités publiques, d'une part, une mission de surveillance et de contrôle de l'application des lois et règlements, d'autre part.

EXECUTIVE SUMMARY BY FRONTIER ECONOMICS

Previous studies of the Belgian wholesale market have indicated that Electrabel is a dominant player on the Belgian market. The supposition that Electrabel is indeed dominant is unlikely to be contentious, given the large share of generating assets in Belgium that are under its ownership and control and the limited import capacity. In the light of this, The CREG has asked Frontier Economics to advise on what measures, or combination of measures, could be used to mitigate Electrabel's dominance and deliver a more competitive market.

While the title of this report is "Addressing the adverse effects of market power" this study has **not** investigated whether there are, in practice, adverse affects arising from Electrabel's dominant position. In order to take a view on this one would need to investigate Electrabel's past and present conduct and this exercise was not included in our scope of work. Instead, this study has focused on what could be done to **remove the ability or incentive** that Electrabel might have to increase prices above the competitive level.

Concerns as to the health of competition in a market can be categorised as either:

- static concerns related to the extent of competition given the existing asset base; or
- dynamic concerns that stem from any barriers to entry that prevent or hinder the competitive development of the market over time through new entry.

While static concerns may be important in their own right, any adverse effects associated with these may be exacerbated if there are also dynamic concerns, preventing new entry from eroding such static problems as may exist.

In this study we have been asked to look at measures to address both static and dynamic concerns. This report examines these measures from a purely economic perspective and does not address any of the legal aspects pertinent to their potential imposition, nor any detailed aspects of implementation.

STATIC CONCERNS - RANGE OF MITIGATING MEASURES

The Terms of Reference for this study invited us to investigate a wide range of potential measures¹, including:

- Virtual Power Plants (VPPs), which are options to call on power at a predetermined exercise price;
- Power Purchase Agreements (PPAs) linking the sale of power to a specific asset; and
- other long terms forward contracts.

Following the inception of the study, members of the steering group also invited us to explore further possible measures, including contract swaps between Electrabel and a generator with capacity outside of Belgium. Since any of these measures could, in principle, be combined with any other in any quantity, there is a potentially infinite array of packages of measures, leading to an unmanageably large requirement for analysis.

However, as we describe in Section 2, in practice all of these contract forms have a similar effect, i.e. they can decrease the extent to which a dominant firm would benefit from a rise in price as a result of the exercise of market power in respect of its remaining plant. As a result, these measures can be viewed as close substitutes for one another from an economic perspective.

This equivalence means that we can conveniently model one type of instrument but can then interpret the results as being a requirement for a level of contract cover that can be met in a wide variety of ways. This aggregate requirement for contract cover could be met in any way that Electrabel found convenient or expedient. This

¹ The CREG asked us not to investigate measures where Electrabel was required to sell any of its assets, requesting that we focus our attention on purely contractual measures instead of measures involving physical divestment.

equivalence is explored further in Section 3, where we look at the three main parameters of contract cover: volume; shape; and duration.

STATIC CONCERNS – MODELLING RESULTS

We have used our SPARK model to analyse the possible effect on wholesale market outcomes of the introduction of measures to curtail Electrabel's market power in the Belgian electricity market. Our modelling approach is discussed in Section 4 and the results presented in Section 5.

Under our base case set of assumptions (described in detail in Section 4), we find that approximately 8 GW of contract cover would be effective in mitigating Electrabel's incentive to exercise its market power. As noted, this aggregate requirement for contract cover could be met in any way which Electrabel found convenient or expedient. We also stress that the analysis we have conducted assumes that Electrabel has no other long term contracts, or other positions that might have the effect of such a contract (for example as a retail position with regulated tariffs). Should Electrabel have existing positions, then these should be netted off from any requirement identified in this report, in order to determine the remaining contract cover that would be needed to address Electrabel's incentive to exercise market power.

In addition we have also analysed cases where we assume that there is entry (incremental independent entry with a total volume of 1.5 GW and 2.5 GW) into the Belgian market. In the face of such entry our analysis suggests that the volume of contract cover required to mitigate Electrabel's market power is reduced. With entry of 1.5 GW we would conclude that total contract cover could be reduced by at least 1 GW. With 2.5 GW, proportionately less contract cover would be sufficient.

Finally, we have analysed the effect of different patterns of import/export over the Belgium-Netherlands interconnector. With increased exports (by ~500 MW) to the Netherlands, contract cover of 8 GW is marginally less effective, but in our view remains sufficient to mitigate Electrabel's incentive to exercise market power for the large majority of the time. In contrast, if exports to the Netherlands were to fall (by ~500 MW) then 8 GW of contract cover would be likely to be highly effective at mitigating Electrabel's incentive to exercise market power and the extent of the contract cover could potentially be reduced. However, we recognise that this would be proportionately the largest capacity release programme by some margin, not only in Europe but world wide. This quantum should only be reached over enough time for markets and participants to adjust.

Taking account of existing long term contract positions

Our analysis has not included any other contracts (or positions that might have the economic effect of a contract) that Electrabel might have in place at present or might put in place. If Electrabel has in place, or could commit to having put in place, such contracts and/or positions, then they should be deducted from the volumes that we report. For example, if Electrabel already has in place contracts with customers of a reasonable duration at a fixed price for 1,000 MW of base load power, then our recommendation would fall from 8 GW to 7 GW, with the volume of baseload product required reduced by 1 GW to reflect this existing contract position. Similarly, if Electrabel were to have in place a peak load contract at a fixed price for 500 MW, this could be deducted from the required volume of peak load product.

DYNAMIC CONCERNS – POLICY OPTIONS TO ADDRESS SITE AVAILABILITY

One of the possible concerns that the CREG has identified as potentially restricting competitive new entry is the pattern of ownership of suitable sites for new generation. Specifically, the concern is that if all (or at least a very high proportion of such suitable sites) are owned or controlled by Electrabel, then Electrabel may be able to foreclose potential new entry by not making any of these sites available to would be new entrants.

There is a range of possible policy measures that could theoretically be adopted either to provide Electrabel with incentives to release sites voluntarily or to require it to do so. These include:

- enforced (or negotiated) release of sites;
- a requirement to auction vacant sites;
- revising the licensing regime to limit the scope for new build by Electrabel;

- resolution of existing issues of market power, thus possibly reducing the benefit of limiting entry;
- putting in place a tax on vacant sites; and
- using other methods to stimulate entry, such as offering centrally held contracts for the provision of new capacity (as has been done in Ireland for example) although this may formally need security of supply to be an issue.

In order to assess which of these options might be preferred it would be necessary to conduct detailed analysis based on a range of data. This has not been possible as we have been unable to obtain the required information within the scope of this assignment.

We understand through discussion with the CREG that Electrabel may have agreed with the Minister to release sites that would allow the construction of 1,500 MW of new entry. This understanding has prompted one of the sensitivities that we have modelled, as described above. However, we have not been provided with any details of this programme. Similarly, we have not been provided with any of the data that might have informed the design this arrangement.

If a release of sites has been agreed with Electrabel and if this route remains open in the future, then it would seem to represent a useful approach to ensuring site release over time. We would advise that the effectiveness of the first step in this policy be assessed before any decision is taken as to whether further site release would be appropriate.

EXECUTIVE SUMMARY BY LIEDEKERKE

Na deze analyse van Frontier Economics heeft de Algemene Raad van de CREG aan advocatenkantoor Liederke Wolters Waelbroeck Kirkpatrick gevraagd om een juridisch advies te verstrekken over de in het rapport van Frontier Economics voorgestelde maatregelen. De vraag rijst met name of maatregelen die ingrijpen in bestaande contracten en/of eigendomsverhoudingen verenigbaar zijn met de bestaande Belgische en Europese regelgeving. Als dat niet het geval zou zijn, moest worden onderzocht hoe, met respect voor het constitutioneel kader (op Belgisch en Europees niveau), nieuwe wettelijke of reglementaire bepalingen in de nodige bevoegdheden zouden kunnen voorzien. Uit het juridisch advies blijkt onder meer wat volgt.

Naar huidig recht beschikken vooral de mededingingsautoriteiten, op Belgisch en Europees niveau (de Raad voor de Mededinging en de Europese Commissie), over de bevoegdheid om zich tegen concentratie van marktmacht te verzetten, in het kader van de controle die zij uitoefenen op concentraties. Zij kunnen bij de goedkeuring van een concentratie ook 'remedies' opleggen. Teneinde de mededinging te beschermen, kunnen die remedies ingrijpen in bestaande contracten en eigendomsverhoudingen. In het verleden legde de Raad voor de Mededinging trouwens reeds 'verbintenissen' op aan partijen die betrokken waren bij fusies in de elektriciteitssector. Zo bijvoorbeeld de openbare verkoop van virtuele capaciteit en de verbintenis om geen nieuwe capaciteit te verwerven. Het is minder zeker of deze autoriteiten dergelijke bevoegdheden hebben wanneer zij optreden tegen een vastgesteld misbruik van machtspositie.

Aan de andere autoriteiten, waaronder de CREG, heeft de wetgever thans (nog) niet de nodige bevoegdheden gegeven om zo'n maatregelen te treffen tegen de marktmacht van elektriciteitsproductiebedrijven. De Minister bevoegd voor energie kent vergunningen toe voor de bouw van installaties voor de productie van elektriciteit. De huidige Elektriciteitswet maakt het de Minister niet mogelijk om in het kader van dat vergunningsbeleid rekening te houden met de marktmacht van de betrokken onderneming. De Elektriciteitswet bevat evenmin bepalingen op grond waarvan een bevoegdheid terzake aan de CREG of aan een andere instantie zou kunnen worden verleend.

De EG-mededingingsregels en de EG-Elektriciteitsrichtlijn lijken niet uit te sluiten dat lidstaten hun autoriteiten de bevoegdheid zouden verlenen om maatregelen te nemen m.b.t. bestaande capaciteit of lopende contracten, teneinde marktmacht te bestrijden.

Ten slotte blijkt dat noch de vrijheid van handel, noch het beginsel van contractuele vrijheid zich in principe zouden verzetten tegen dergelijke maatregelen.

De wetgever en de bevoegde autoriteiten zijn wel gebonden door het evenredigheidsbeginsel (m.a.w. de maatregel mag niet verder gaan dan wat voor het realiseren van een doelstelling van algemeen belang noodzakelijk is), in het bijzonder bij de inperking van het constitutioneel beschermde eigendomsrecht.