CREG's dissenting opinion regarding the INFRASTRUCTURE REPORT of the CEER

During its meeting of May, 12th, 2005, the General Assembly of the Council of European Energy Regulators (CEER) approved the Report of the Infrastructure Task Force, entitled "Investments in gas infrastructures and the role of EU national regulatory authorities".

On three issues of the Report, the Belgian federal energy regulator, CREG, could not agree to the text, because the text is too vague. Therefore, the CREG decided to make a dissenting opinion to the Report which, as stated in the CEER-Statutes, is to be communicated together with the decision taken.

1: the issue of LT contracts

The first amendment relates to long-term (LT) contracts. Most cases of exemptions are linked to LT ship-or-pay-contracts. Granting an exemption implicitly or explicitly involves the acceptance of these LT contracts. Therefore CREG considers it essential to give guidance, in the report, about the criteria relevant to an assessment whether a LT contract is acceptable or not.

Therefore, the following text should have been added to the report:

> "In competition law, contracts of more than five years in which exclusivity is granted to a party (such as the allocation of an amount of capacity) fall in principle foul of Article 81 EC Treaty and require specific justification. With respect to the gas sector, the contractual period for upstream gas supply contracts may be longer than in traditional markets. In the context of safeguarding security of natural gas supply, Article 2.1 of Council Directive 2004/67/EC defines "long term gas supply contracts" as gas supply contracts with a duration of more than 10 years. However, such definition does not imply that market players are not restricted in determining the duration of their supply agreements. The compatibility of these contracts (and their duration) with EC competition law remains to be evaluated, while taking into account the specific circumstances of the case (including security of supply considerations) and the particular market conditions. The assessment should pay particular attention to the foreclosure effects of the agreement to (short and long-term) competition. The length of the duration of the contracts should also be proportionate. The project's depreciation period or the financial risks may thereby be taken into account."

2: the issue of passing on the risks

The second amendment relates to the risks associated with LT ship-or-pay contracts. The document extensively and repeatedly proposes as "incentive for investment" an increased (or "enhanced") reward on invested capital. CREG considers that it is essential for the right balance of the document that the limits and pitfalls of such a mechanism are sufficiently explained. If specific investment incentives are granted, they should reflect the project risk, both in their scope as in their beneficiary. In particular, when the project risk is shifted to the shippers via long term ship-or-pay contracts, the incentive should be aimed at reducing the risk for these shippers.

Therefore, the following text should have been added to the report:

"It is important that incentives are targeted to alleviate the risk or to compensate for higher risks. In case of long term ship-or-pay contracts, most of the investment risk is shifted from the infrastructure owner to the shipper. This is typically demonstrated by the experience that the investment decision is conditional to the signature of the ship-or-pay contracts. Those who really promote the investment are the shippers. If the owner applies a higher rate of return, this leads to higher tariffs for the system users. These higher tariffs increase the commercial risk for the shipper and consequently discourage the investment.

3: the issue of passing on the risks in vertically integrated undertakings

The third amendment relates to the specific risks which exist when new infrastructure projects are submitted by vertically integrated undertakings. An enhanced rate of return could allow a vertically integrated undertaking which enjoys a dominant position on the market to increase the gas prices to the end consumer without substantial loss of market share. Such incentive would not comply with the principle, mentioned in the report, to avoid increasing or protecting dominant players.

Therefore, the following text should have been added to the report:

> "In the case of vertically integrated undertakings[1] an enhanced rate of return could seem to be broadly neutral: the higher cost for the shipper causes higher profits for the owner of the infrastructure who is part of the same industrial group. However, if this vertical integrated company has a dominant position, it increase its gas prices to the end consumer without substantial loss of market share. The incentive would, thus, not comply with the above mentioned principle, namely to avoid increasing or protecting dominant players."

[1] Wording to be in line with the definition within the directive 2003/55/EC of "vertically integrated undertaking" being a natural gas undertaking or a group of undertakings whose mutual relationships are defined in Article 3(3) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings and where the undertaking/group concerned is performing at least one of the functions of transmission, distribution, LNG or storage, and at least one of the functions of production or supply of natural gas.