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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 12.1.2009  
COM(2008) 908 final

2007/0197 (COD)

**COMMUNICATION FROM THE COMMISSION  
TO THE EUROPEAN PARLIAMENT**

**pursuant to the second subparagraph of Article 251(2) of the EC Treaty**

**concerning the**

**common position of the Council on the adoption of a Regulation of the European  
Parliament and of the Council establishing an Agency for the Cooperation of Energy  
Regulators**

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**1. BACKGROUND**

Proposal transmitted to the European Parliament and the Council      19.09.2007  
(document COM(2007) 530 - 2007/0197/COD) on:

European Economic and Social Committee opinion delivered on:      22.04.2008

Committee of the Regions opinion delivered on:      10.04.08

European Parliament opinion (first reading) delivered on:      18.06.2008

Common position adopted by unanimity on:      [09.01.2009]

**2. AIM OF THE COMMISSION PROPOSAL**

This proposal is part of the third legislative package for an internal EU gas and electricity market ("Third Package"), which includes two Directives and three Regulations.

The main objective of the package is to put in place the regulatory framework needed to make market opening fully effective and create a single EU gas and electricity market in the interest of the citizens and of the industry of the European Union. This will help to keep prices as low as possible and increase standards of service and security of supply.

This is done through the following main measures:

- more effective regulatory oversight by independent national regulators;
- establishment of an Agency to ensure effective cooperation between national regulators and take decisions on all relevant cross-border issues;
- compulsory cooperation between network operators to harmonise all rules relating to the transport of energy across Europe and to coordinate investment planning;
- effective unbundling of the generation and transmission of energy so as to eliminate any conflict of interests, promote network investment and prevent any discriminatory behaviour;
- increased transparency and better functioning of the retail market;

- increased solidarity and regional cooperation between Member States to ensure greater security of supply.

### **3. COMMENTS ON THE COMMON POSITION**

#### **3.1. General comments**

The common positions adopted by the Council on the five texts that make up the Third Package contain all the essential components of the Commission's proposal that are needed to ensure the proper functioning of the internal gas and electricity market and, more generally, to achieve the essential objectives set out above. It can therefore be generally supported by the Commission (see 3.2 below).

The first reading focused on obtaining agreement within the Council. The amendments adopted by the European Parliament were therefore not formally incorporated into the common position. Negotiations to this end will take place during the second reading. Some amendments adopted by the European Parliament are however taken into account in the common position (see 3.3 below). The Commission considers that a number of the amendments that are not covered should be taken into account in the second reading (see 3.4 below).

#### **3.2. Specific comments**

The main changes from the Commission's proposal are as follows:

The common position includes provisions designed to balance working relations between the Agency, the European Networks of Transmission System Operators (ENTSOs) and the Commission as regards **the establishment and monitoring of network codes**.<sup>1</sup>

1. Article 6(4), second subparagraph: The Agency shall submit a draft non-binding framework Guideline to the Commission, setting out clear and objective principles for the development of network codes. This Guideline frames the network codes without taking away the autonomy of the ENTSOs to draft the codes.
2. Article 6(4), third and fourth subparagraphs: The Agency shall provide a justified opinion to the ENTSOs on the draft network codes prepared by the latter. Once the Agency is satisfied that the network codes adhere to the relevant framework Guideline, it shall submit them to the Commission and may recommend their adoption. Where the ENTSOs fail to develop a network code the Commission may ask the Agency to prepare a draft network code.
3. Article 6(5) and (6): The Agency shall monitor the implementation of the network codes by the ENTSOs and report to the Commission.

Under the Commission proposal, the Agency could take **individual decisions on the basis of Guidelines** adopted by the comitology procedure after entry into force of the Third Package,

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<sup>1</sup> The overall system of establishing network codes is set out in Article 6 of the common position on a Regulation on conditions for access to the network for cross-border exchanges in electricity and the corresponding common position on cross-border exchanges in gas.

i.e. on issues not initially envisaged in the Directives and/or the Regulations. This should give a certain amount of flexibility to the assignment of the Agency in the context of a steadily evolving internal gas and electricity market. The common position deletes the reference to Guidelines in Article 7(1) and thereby restricts the scope of the Commission and the Agency to react to market developments.

The Council has limited substantially the powers of the Agency as laid down in Article 9, to the effect that the Agency should grant exemptions (e.g. from the unbundling requirements of cross-border transmission systems) only as a *last resort*. This change limits the regulatory oversight of the Agency on **cross-border issues** substantially.

According to the common position, the **Administrative Board** (AB) will have 6 members (5 Council, 1 Commission) rather than the 12 members (6 Council, 6 Commission) proposed by the Commission. This change does not observe the principle of equal representation of the two branches of the Community executive within the AB. The respective European Parliament amendment (No 44) is more balanced.

The Council enhances the powers of the **Board of Regulators** (BoR) at the expense of the Director (Articles 15(2), 14(1) and 16(3)). The Agency is an independent Community body represented by the Director. The Director should have the necessary authority and powers to head the Agency. These powers would be substantially limited if the BoR, representing the national regulatory authorities, had the powers conferred upon it by the common position.

### **3.3. Aspects of the common position reflecting the European Parliament's amendments**

The substance of the following amendments, or parts of them, is taken into account by the common position: No 19 on issuing recommendations to Transmission System Operators (TSOs), No 23 regarding the drafting of guidelines establishing principles for the harmonisation of network rules and the recommendation to the Commission where TSOs have failed to implement a network code, No 40 on the consultation of market participants, consumers and end-users, No 44 on the downscaling of the Administrative Board (AB) from 12 to 6 members, No 45 on the Director of the Agency and the Chairman of the Board of Regulators (BoR) attending meetings of the AB, Nos 47 and 48 on the independence of the members of the AB, No 49 on the incompatibility of membership of the AB and the BoR, No 51 on the role of the BoR when appointing the Director, No 53 regarding the publication of the work programme of the Agency, No 54 regarding the disciplinary power of the AB in consultation with the BoR over the Director, No 58 regarding the voting rules of the BoR, No 59 on the content of the rules of procedure of the BoR, No 64 regarding the assessment preceding the possible extension of the Director's term of office and the requirement of the AB to consult the BoR before extending the Director's term of office, No 65 strengthening the role of the BoR, No 66 regarding the right of the European Parliament to call on the Director of the Agency to report on the performance of his duties, and No 68 on the stipulation that the call for interest to become a member of the Board of Appeal has to be made public.

### **3.4. European Parliament amendments approved by the Commission but not endorsed by the Council**

The Commission can accept – in some cases subject to more precise wording or redrafting – in full or at least in part the majority of the European Parliament's amendments. This concerns the following key issues:

Parliament proposes to include the following in the list of tasks of the Agency: the promotion of interregional cooperation between energy markets (No 19), the coordination of communication between EU TSOs and third-country TSOs (No 24), the provision of an opinion to the Commission, the Member States and the regulatory authorities in question on the compliance of a decision of a regulatory authority with EC energy legislation (Nos 32 and 33) and the monitoring of certain developments in the gas and electricity markets (Nos 35 and 41).

Parliament also proposes that the Agency should take suspensory decisions in relation to TSOs which fail to implement network codes (No 26), that it should monitor the authorisation process for the construction of new cross-border infrastructure (No 27) and that it should calculate the capacity of TSOs for such systems (No 28). The Commission could in principle accept the assignment of the above powers to the Agency, provided these powers are not genuine discretionary and provided the Agency only adopts individual decisions applying Community standards to specific cases and exercises these powers under clearly defined conditions.

The Commission accepts the task of the Administrative Board to adopt an annual report on developments in the gas and electricity markets (No 43).

#### **4. CONCLUSIONS**

The common position preserves the key points of the Commission's proposal. On substantive issues it strikes a good balance and makes a viable compromise, which will enable the internal gas and electricity market to operate smoothly. A stronger oversight role should, however, be given to the Commission and to the Agency to ensure harmonised application of the Third Package and to guarantee a smooth functioning internal market. The Commission therefore supports the common position but strongly recommends that the Commission's and the Agency's supervisory role be reinforced. The Commission also considers that a number of amendments adopted by the European Parliament on first reading should only be incorporated on second reading.