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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 12.1.2009
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2007/0198 (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 withdrawing Regulation (EC) No 1228/2003 of the European Parliament and of the Council on conditions for access to the network for cross-border exchanges in electricity

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1. BACKGROUND

Proposal transmitted to the European Parliament and the Council 19.09.2007
(document COM(2007) 531- 2007/0198/COD) on:

European Economic and Social Committee opinion delivered on: 22.04.08

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: 9.01.2009

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:

3.2.1 Establishment and change of network codes

The common position changes the Commission proposal regarding the process of establishing and changing the network codes. It introduces a new concept of framework guidelines, prepared by the Agency, which have to be applied by the TSOs when drafting European network codes. (see 3.3 for Commission's assessment)

3.2.2 Network Investment Plan

The Commission proposed that ENTSO for Electricity should draw up a network investment plan every two years. The Council has changed this into a non-binding indicative network development plan. (see 3.3 for Commission assessment)

3.2.3 Tariffs

The Commission proposed that tariffs be approved by the regulators ex ante. The Council included the possibility that only the methodology should be established ex ante, which is acceptable to the Commission.

3.2.4 Guidelines

The Commission proposed an extensive list of guidelines, which covered both the existing guidelines, some new topics, and guidelines that will be based on network codes.

The Council has first of all deleted all explicit references to guidelines that are already mentioned in the list of network codes. The Commission can agree with this choice of legal drafting.

However, the Council also deleted the possibility of establishing guidelines. The Commission proposed the possibility of establishing guidelines for retail markets. Member States are asked to define procedures of data exchange and switching, but the Council has moved the article to the Directive. At the same time it has deleted the possibility of establishing guidelines. The Commission can agree to both but considers that it is necessary to keep all remaining guidelines so as to ensure that the system of setting legally binding rules for the internal electricity market works properly.

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

A number of amendments of the European Parliament are reflected in the common position, either with the same wording or in substance. These are as follows:

3.3.1 Power of the Agency to develop framework guidelines and codes

Both the common position of the Council and the amendments by the European Parliament (amendment 32) change the Commission proposal regarding the process of establishing network codes. It introduces a new concept of framework guidelines, prepared by the Agency, which have to be applied by the TSOs when drafting European network codes.

The Commission supports a more clearly defined role for the Agency in the rule-making process. Instead of giving its opinion only after a code has been drafted by the TSOs, the Agency will define the requirements for codes *ex ante* in the form of framework guidelines in a specific area.

The European Parliament also proposes that the Agency should adopt binding network codes (amendment 14), whereas the Council maintains that only the Commission can make the codes binding. The Commission cannot support Parliament's attempt to make the Agency stronger, since it is contradictory to the ruling of the European Court of Justice in the *Meroni* case, which stated that the Commission cannot delegate discretionary powers to another body.

3.3.2 Consultation and monitoring by ENTSO

Both the common position and the amendments of the European Parliament change the Commission proposal regarding consultation and monitoring by ENTSO for electricity. The Common position clarifies the role of ENTSO compared to consultation and monitoring by the Agency. Parliament's amendments are in the same direction but are too restrictive to maintain sufficient scope for ENTSO consultation and monitoring.

3.3.3 Costs of ENTSO

Both the common position and the amendments of the European Parliament add the requirement that the regulatory authorities must approve the costs of ENTSO provided they are reasonable and proportionate.

3.3.4 Use of congestion rents

The Commission proposal provided for mandatory use of congestion rents for either confirming cross-border capacity or for network investment. This is also proposed by the amendment 23 of the Parliament, adding the approval by the Agency for the use of congestion rents for tariff reduction. The common position reintroduced the possibility of using congestion rents to reduce tariffs.

In the Commission's view, the use of congestion rents for tariff reduction weakens the incentive to build new infrastructure using congestion rents. However, the common position establishes a clear priority for the use of congestion rents for confirming cross-border capacity or for network investment over a reduction in network tariffs. The amendment of the Parliament goes into the right direction. The common position combined with the amendment of the Parliament is acceptable to the Commission as a compromise solution.

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

3.4.1 Power of the Agency regarding investment plans

Under the common position, ENTSO adopts an indicative 10-year network development plan. This plan is reviewed by the Agency, which can propose changes to the plan to the Commission and ENTSO. The European Parliament proposes that the Agency should adopt a binding network investment plan, to be prepared by ENTSO. The Commission cannot agree to the Agency's being granted discretionary power to adopt a binding investment plan. The Commission could however support the Agency's adopting a non-binding investment plan, or playing a role in monitoring consistency between the national investment plans as approved by the national regulators and the 10-year network development plan of ENTSO.

3.4.2 Technical cooperation with third countries

Parliament's amendments propose monitoring of technical cooperation with third-country transmission system operators by the national regulatory authorities and the Agency.

3.4.3 Removal of administrative barriers to increase capacity

Parliament's amendments propose that Member States should review their procedures for the removal of administrative barriers to increase interconnection capacity.

4. CONCLUSIONS

The Commission takes the view that the common position maintains the key points of the Commission's proposal. The Commission finds that, on substantive issues, the common position generally strikes a good balance and makes a viable compromise, which will enable the internal gas and electricity market to operate smoothly. The Commission considers, however, that a number of amendments adopted by the European Parliament on first reading should be only be incorporated on second reading.