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COMMISSION OF THE EUROPEAN COMMUNITIES

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2007/0195 (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 Directive of the European
Parliament and of the Council concerning common rules for the internal market in
electricity and repealing Directive 2003/54/EC**

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1. BACKGROUND

Proposal transmitted to the European Parliament and the Council 19.09.2007
(document COM(2007) 528 - 2007/0195/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: [09.01.2008]

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 Effective unbundling

The Common position endorses three options for effective unbundling, for gas and electricity.

The Ownership Unbundling option and the Independent System Operator (ISO) option are adopted. The European Parliament's amendments gave strong support to ownership unbundling which the Commission continues to regard as the best solution.

In its common position, the Council has included a third option, the Independent Transmission Operator (ITO), which allows transmission system operators (TSOs) to remain part of integrated undertakings but provides for detailed rules on autonomy, independence and investment, plus a specific revision clause which can lead to legislative proposals. The Commission considers that these detailed rules permit an acceptable degree of effective unbundling and that the ITO option is therefore acceptable as part of a general compromise provided that such option is not weaker than in the common position and contains the strongest possible features a political compromise will allow. Contrary to the Commission's

proposal, minority shareholding is allowed under Ownership Unbundling, but with no voting rights, which ensures that any cross-influence is avoided.

Under all options, the TSO has to be certified by the national regulator. The common position however removes the binding oversight role of the Commission in the certification procedure, providing instead for an obligation for national regulators to "take the utmost account" of the Commission's position.

The common position also provides for an article that allows Member States to take measures to ensure a level playing field provided these measures are proportionate, non-discriminatory and transparent, and comply with the EC Treaty. These measures may only be put into effect following approval by the Commission. In the Commission's view, this provision strikes the right balance between recognising that several models of unbundling could exist in the internal energy market, and allowing Member States to ensure a level playing field within each of their territories as regards these different models. It can therefore be accepted.

As regards the "Third Country Clause", the Commission proposal provided for the need for an international agreement to allow investors from third countries to acquire control of EU transmission networks. Third country investors also had to comply with the rules on ownership unbundling subject to binding Commission oversight. In the Common position, an agreement with a third country is no longer a prerequisite to allow control by an investor from the third country concerned. Under the certification procedure, in addition to ensuring compliance with any of the three unbundling options, the Member State has to refuse certification if this puts at risk the security of energy supply of the Member State concerned or of the Community. The national authority must consult the Commission and take the "utmost account" of its opinion. The common position preserves the essential objectives of the Commission's proposal and is therefore acceptable as part of an overall compromise.

3.2.2 National regulators

In substance, the Commission's proposal is endorsed with the creation of national regulators independent of government and with extensive powers over both the networks and the supply markets.

Softening of the Commission's proposal includes powers that do not concern the core tasks of network regulation, such as renewables and research development policies, security of supply, and public service obligations. Limits are put on independence that do not affect the core principle, e.g. obligation to respect the role of other competent authorities in, for example, environmental sustainability or public service obligations, legislative control on budget, judicial control, and possible renewal of the management of the regulator.

The common position overall preserves the essence of the Commission's proposal and is acceptable. As indicated below, the common position would benefit from the insertion of amendments from the European Parliament clarifying and completing the role of the national regulators.

3.2.3 Guidelines adopted under the Comitology procedure

Guidelines are made non-compulsory and some are removed (on public service obligations, the powers and duties of national regulators, retail markets, and effective unbundling for system operation at distribution level). The remaining guidelines are absolutely essential.

3.2.4 Derogations

The Council introduced general derogations for small/isolated systems for Cyprus, Luxembourg and Malta.

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: amendment 33 on the definition of electricity undertakings, amendment 35 on the definition of virtual power plants, amendment 68 on the application of unbundling to public entities, amendment 119 on monitoring of the implementation of safeguards measures, and amendments 50 and 137 on guidelines for public service obligations and power of regulatory authorities.

The following amendments are also partially covered by the common position: amendments 54 and 138 on greater regional cooperation, amendment 95 on the independence of national regulators, amendment 98 on the duties of national regulators, and amendments 129 and 130 on the methodology for approving tariffs.

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 amendments adopted by Parliament. This concerns the following main issues.

3.4.1 Role of regulators

The Commission generally supports amendments from the Parliament that strengthen the role and independence of the national regulators (e.g. approval and enforcement of TSOs' annual investment plans, enforcement of consumer protection measures, monitoring of restrictive contractual practices, strong rules and intervention to restore competition on supply markets, autonomous financing of regulators).

Long-term contracts are acceptable provided they comply with competition rules, but they will not be encouraged as they have a potential foreclosing effect on the market. Whilst price caps may be useful in exceptional cases and under clearly defined conditions, it is preferable not to include a specific legislative provision in the current context of regulated prices that will prevent market opening in many Member States.

The principles behind amendments relating to the promotion of energy efficiency can generally be supported. However the specific amendment calling for a pure obligation to introduce pricing formulas which increase in the case of greater levels of consumption cannot be accepted. Given the complexity and economic consequences of such an obligation, and because there are alternative ways of achieving the same result that are preferable, the market should be free to establish its own pricing formulas.

3.4.2 Consumer rights

The Commission generally supports European Parliament amendments that increase consumer rights. This concerns in particular the extension of Annex A, the obligation on

suppliers to set adequate prepayment bills, the cross-recognition of supply licences between Member States, the appointment of a single point of contact at national level to provide consumers with all the necessary information concerning their rights, and the appointment of an Ombudsman at national level. The proposal to roll out smart meters within a 10-year period can also in principle be supported although its precise scope and drafting would need to be carefully reviewed.

As regards an Energy Consumers Charter, the Commission recognises that information for the consumer is crucial to the operation of the supply market. The Commission has developed an information tool in the form of a European Energy Consumer Checklist, which aims to provide information to consumers on their rights. The Citizen's Energy Forum is the driving force for establishing competitive retail markets and ensuring the protection of energy consumers in the EU. The Checklist is being developed by the Forum. The Consumers Charter would be based on Annex A of the Directives and on general consumer protection directives and therefore has no additional legal value. Furthermore, for legal reasons, the Charter cannot be incorporated into the directives as it duplicates existing rights. The Commission therefore cannot support amendments that aim to incorporate an Energy Consumers Charter into the Directive. The Commission could however agree to a review clause providing for a report from the Commission on the implementation of Annex A measures within three years of application of the directive.

The Commission also supports the aim of amendments regarding the role of distribution system operators. However, the proposals need to be considered in further detail to ensure that they are practical and achievable.

The current rules on universal service should not be changed. Universal service of electricity supply should remain an option for Member States for small enterprises and there should be no obligation to provide electricity at cost-based prices. The Commission cannot therefore support Parliament's request for a universal service for small enterprises at cost-based prices.

3.4.3 Fight against energy poverty

The European Parliament calls for an obligation on Member States to take measures to address energy poverty in their National Energy Action Plans. These should ensure that the number of people suffering from energy poverty decreases, that pensioners and disabled people cannot be disconnected in winter, and that energy poverty has to be defined at national level, in line with an EC definition based on the capacity to heat houses to World Health Organisation standards.

The Commission did not propose to change the current legal framework, which already includes an obligation on Member States to protect vulnerable customers.

Energy poverty is not a concept that has been used in all Member States and measures to address poverty require all aspects of energy and social policy to be taken into account. The Commission believes that using energy policy as the sole tool would distort the operation of the market for energy. Member States have the freedom to define vulnerable consumers with reference to those experiencing energy poverty. The Commission could therefore support an obligation on Member States to define energy poverty within the confines of a definition of vulnerable consumers at national level, but does not support a definition of energy poverty at EC level.

The Commission further believes that an obligation at EC level to ensure that the number of people suffering from energy poverty decreases would be inappropriate as it fails to recognise the broad policy response needed to address this issue. The Commission could however support a general objective to reduce the number of people suffering from energy poverty.

The Commission could also support an obligation on Member States to ensure specific protection of pensioners and disabled people in winter and to report to the Commission on the measures adopted in this regard. The Commission also generally supports those Member States that have fulfilled their obligation to define vulnerable consumers, where appropriate, with reference to the avoidance of disconnection, but believes that an absolute prohibition would be going too far.

3.4.4 Other issues

Amendments proposed by the European Parliament which underline the obligations of TSOs on congestion management, investment in new capacity and transparency are generally acceptable to the Commission. The Commission can also support the requirement of greater cooperation between TSOs in the operation of their systems although the wording of these provisions needs to be clarified.

Parliament wants to allow Member States to grant derogations to third-party access rules for industrial sites. The Commission supports in principle the derogation for industrial sites, which would also cover airports and railways. The proposed EP amendment goes too far, however, in exempting industrial sites from almost all obligations applying to TSOs and DSOs. An acceptable solution could be a derogation limited to the most burdensome administrative obligations, i.e. ex ante tariff approval by regulators.

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.