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## **WORKING DOCUMENT**

on a proposal for a regulation (COD) establishing an Agency for the  
Cooperation of Energy Regulators

Committee on Industry, Research and Energy

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## Overview

1. The Commission's proposal for an Agency for the Cooperation of Energy Regulators is critical for the success of the 3rd Energy Package. In the Vidal-Quadras report "Prospects for the internal gas and electricity market" (2007/2089(INI)), the Parliament expressed its firm commitment to establish a strong and effective European regulatory body with the necessary powers to overcome those issues which cannot be solved by national regulators and which hamper the integration and good operation of the internal market.
2. The aim of the 3rd Energy Package is to gradually move the energy market, which up to a decade ago had been based on a monopoly system, from a liberalisation stage towards a stage at which competition is genuine and sustainable.
3. To achieve this purpose the relationship between regulatory processes and market development should be governed by an approach which is:
  - geared to the future state of the market (i.e. a forward-looking approach) in which conditions will be much more competitive and diversified;
  - focused on the implementation of competition law, to minimize as much as possible the *ex-ante* rules applied on a case-by-case basis.
4. These objectives can be pursued at European level, with competitive framework and *ex-ante* rules being harmonised. This means that regulation of the energy sector will be progressively scaled down until the rules applying are competition rules. It must be pointed out that unless an efficient competitive environment is achieved, sector-specific regulation will continue to play a role.
5. But the energy sector will only be brought under a system based primarily on competition rules once it has been established that the industry is no longer a natural monopoly and has become a "normal" industry.
6. The future of the European energy market and its development after the implementation of the 3rd Energy Package will therefore require an important role to be played by the Agency for Cooperation of Energy Regulators. This is why the power and independence of the Agency must be enhanced, over and above the level proposed by the Commission.
7. In discussing this draft Regulation, it must be kept in mind at all times that the 3rd energy package has to be dealt with as a package - with the Agency as a key cross-cutting element. The role, powers and duties we adopt for the Agency in this Regulation will have to be consistent with the other draft Directives and Regulations in the package, and vice versa.

## Independence

8. A key principle behind the 3rd Energy Package is that, working within a clear legal framework, national energy regulators should be as independent as possible from day-to-day political interference.

9. In the same way, the Agency should be as independent as possible in relation to technical matters and have legal, administrative and financial autonomy. It should be a Community body having legal personality and freedom to exercise the tasks which are conferred on it by the Regulation. This strongly implies that it should be able to make binding decisions independently of the Commission, rather than having a purely advisory role.
10. The Commission has argued that Community law - in particular the 'Meroni principle' established in 1958 - prevents them from delegating more power and independence to Agency. Other independent legal experts may take a different view. This issue of legal interpretation is absolutely central to the question of what powers the Agency can have, what decisions it can take, how it should be structured and how independent it can be. Clear legal advice on this question is therefore of primary importance.

### **Powers and Responsibilities**

11. The proposed Agency will provide an EU framework for the effective cooperation of national energy regulators. But it must also have real powers, in order to efficiently handle cross-border situations and contribute to the development of an integrated competitive energy market for the European Union.
12. The Agency's role must be enhanced notably in relation to issues which are at the centre of the regulatory framework and concern the capacity, the security and the adequacy of the EU grid (including its development, maintenance and operation).
13. More consideration needs to be given to the role of the Agency with regard to the tasks vested by the draft electricity and gas Regulations in the European Networks of TSOs (ENTSO).
14. The Agency should arguably have a stronger role in initiating, monitoring and approving proposals by ENTSO - particularly the draft network development plans - to ensure that public interest concerns are fully met.
15. Also, more thought is needed on the Agency's role regarding the initiation, development, validation, implementation and enforcement of the market and technical "codes" for TSOs, and how this role should balance with ENTSO's. The Agency should have a key role to play here, and must unequivocally be involved in specifying the scope and content of the European codes. The Agency's approval should be required on key aspects of these codes.
16. Technical and market codes and other relevant issues (operating processes, investment plans, generation adequacy outlooks, research plans and work plans) are at the heart of the delivering an integrated EU energy market. They will also play a major role in determining the extent to which existing national rules will need to be harmonized and determined by European bodies rather than at national level. The Commission's proposal gives the Agency no decision making powers (only an advisory role) and this raises the question of whether TSOs can be fully responsible for setting rules for themselves.

17. Each well functioning market needs good and clear rules set by institutional third parties, operating in the public interest. The Commission's proposal abdicates this basic principle of economic theory by delegating to market actors (TSO), power and responsibility to set rules for the energy market, introducing *de facto* self-regulation at EU level. Under this proposal it would be impossible for the Agency to undertake a regulatory function at EU level essential to achieve a competitive, sustainable and secure integrated European market.
18. Consideration and clarification is also needed on the way in which the procedures foreseen under the gas and electricity Regulations for exempting new cross-border infrastructure from unbundling requirements will operate. Specifically, what should be the balance of responsibility between the Agency and Commission in deciding whether to grant such exemptions? Shouldn't the Agency make the final decision on such exemptions?
19. Finally, we should explore whether there are other powers the Agency should have, beyond those possibilities raised in the draft Directives and Regulations. For example, we might consider what role the Agency should have in monitoring and providing information on the development of the European energy market, such as the provision of consumer information and market screening (for instance, an "Energy Internal Market Scoreboard", market access monitoring, assessing levels of energy poverty).
20. In undertaking all of its tasks, the Agency should have the primary responsibility to consult the market participants, and at an early stage.

### **Internal Structure**

21. The internal structure of the Agency and the way in which decisions and appointments are made will be critical to its independence. The respective roles of the Commission and national regulators are important here; as is the distribution of tasks between the Agency's Administrative Board, Board of Regulators and Director.
22. The Director has a key regulatory role. Given this, and to ensure his regulatory independence, a key issue is whether the Director should be proposed by the Board or Regulators, in consultation with the Commission. His or her appointment should then be approved by the European Parliament and Council.
23. The Commission's proposal on the Agency has no consistency with regard to the powers, autonomy and independence required by the Commission itself for national energy regulators. Governance arrangements for energy regulation at national level, wherever possible, should be replicated at European level, maintaining the same principles.
24. The role and make-up of the Administrative Board needs careful consideration and changes should be made to the proposed organisation that will improve its effectiveness and avoid any unnecessary expenditure for the EU budget. The Administrative Board should be responsible for accounting issues only. Therefore its composition should be lighter and more streamlined than the Commission's proposal, which foresees twelve people. This number is not proportionate to the structure of the Agency, is almost half of

the number of people sitting in the Board of Regulators, and one fourth of the foreseen staff of the Agency. As well as the issue of independence there is the question of stability. Experience with other European Agencies suggests that membership, dependent on nominations by Member States, changes regularly, affecting long term planning.

25. Finally, and importantly, there is the question of the Agency's relationship with the European Parliament. Both the Director and the Chair of the Board of Regulators should be personally and directly accountable to the European Parliament. Both should report at least once a year to the Parliament, and the Parliament should be able to call them as necessary at other times.

### **Funding**

26. As a Community body, the Agency will need to rely significantly on Community funding. As with all aspects of the Community budget, this should give the European Parliament opportunities to scrutinise its performance and functioning.
27. But, to maintain its independence, it is important that the Agency has access to some funding beyond that received from the Community budget. Articles 18 and 19 of the draft Regulation on the Agency already allow for the collection of fees in relation to decisions on exemptions for cross-border infrastructure from third parties access rule. However we can reasonably foresee that the amount of money coming from this way of funding will be very small. Therefore, we should explore other sources of funding. We should explore whether this right to levy a proportion of its funding from fees (and, if appropriate, fines) from the energy industry should be expanded into other areas of activity. In the European Union already some NRAs have the right to levy a proportion of their funding from fees from the energy industry.