

# EUROPEAN PARLIAMENT

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*Committee on Industry, Research and Energy*

**2007/0197(COD)**

11.2.2008

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## **DRAFT REPORT**

on the proposal for a regulation of the European Parliament and of the Council  
establishing an Agency for the Cooperation of Energy Regulators  
(COM(2007)0530 – C6-0318/2007 – 2007/0197(COD))

Committee on Industry, Research and Energy

Rapporteur: Renato Brunetta

### ***Symbols for procedures***

- \* Consultation procedure  
*majority of the votes cast*
- \*\*I Cooperation procedure (first reading)  
*majority of the votes cast*
- \*\*II Cooperation procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\* Assent procedure  
*majority of Parliament's component Members except in cases  
covered by Articles 105, 107, 161 and 300 of the EC Treaty and  
Article 7 of the EU Treaty*
- \*\*\*I Codecision procedure (first reading)  
*majority of the votes cast*
- \*\*\*II Codecision procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\*III Codecision procedure (third reading)  
*majority of the votes cast, to approve the joint text*

(The type of procedure depends on the legal basis proposed by the Commission.)

### ***Amendments to a legislative text***

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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## DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on the proposal for a regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators (COM(2007)0530 – C6-0318/2007 – 2007/0197(COD))**

**(Codecision procedure: first reading)**

*The European Parliament,*

- having regard to the Commission proposal to the European Parliament and the Council (COM(2007)0530),
  - having regard to Articles 251(2) and 95 of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C6-0318/2007),
  - having regard to Rule 51 of its Rules of Procedure,
  - having regard to the report of the Committee on Industry, Research and Energy and the opinions of the Committee on Budgets, the Committee on Economic and Monetary Affairs and the Committee on the Internal Market and Consumer Protection (A6-0000/2008),
1. Approves the Commission proposal as amended;
  2. Calls on the Commission to refer the matter to Parliament again if it intends to amend the proposal substantially or replace it with another text;
  3. Instructs its President to forward its position to the Council and Commission.

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Text proposed by the Commission

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Amendments by Parliament

### Amendment 1 Recital 9

(9) Since the Agency has an overview of the national regulatory authorities, it should have an advisory role towards the Commission as regards market regulation issues. It should also be required to inform the Commission where it finds that the cooperation between transmission system operators does not produce the results which are needed or that a national regulatory authority whose decision has violated guidelines is not willing to comply with the Agency's *opinion*.

(9) Since the Agency has an overview of the national regulatory authorities, it should have an advisory role towards the Commission as regards market regulation issues. It should also be required to inform the Commission where it finds that the cooperation between transmission system operators does not produce the results which are needed or that a national regulatory authority whose decision has violated guidelines is not willing to comply with the Agency's *opinions*,

*recommendations and decisions.*

*Justification*

*The Agency should have the necessary powers to perform its important regulatory functions in an efficient manner.*

Amendment 2  
Recital 10

(10) The Agency should also be able to issue **non**-binding guidelines to assist regulatory authorities and market players in sharing good practices.

(10) The Agency should also be able to issue binding guidelines to assist regulator authorities and market players in sharing good practices.

*Justification*

*The Agency should have the necessary powers to perform its important regulatory function to ensure cross-border co-operation in an efficient manner.*

Amendment 3  
Recital 10 a (new)

***(10a) The Agency should where appropriate consult interested parties and provide them with a reasonable opportunity to comment on the proposed measures, such as draft network codes and rules.***

*Justification*

*Appropriate consultation of stakeholders should be a key part of the Agency's work. Public consultations in the framework of the drafting of measures, such as draft network codes and rules, should be done by the Agency and not by the ENTSOs.*

Amendment 4  
Recital 15

(15) The Agency should be financed mainly from the general budget of the European Communities, by fees and by **voluntary** contributions. In particular, the resources currently pooled by regulatory authorities for their cooperation at

(15) The Agency should be financed mainly from the general budget of the European communities, by fees and contributions. In particular, the resources currently pooled by regulatory authorities for their cooperation at European level

European level should continue to be available to the Agency. The Community budgetary procedure should remain applicable as far as any subsidies chargeable to the general budget of the European Communities are concerned. Moreover, the auditing of accounts should be undertaken by the Court of Auditors in accordance with Article 91 of Commission Regulation (EC, Euratom) No 2343/2002 of 23 December 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities.

should continue to be available to the Agency. The Community budgetary procedure should remain applicable as far as any subsidies chargeable to the general budget of the European Communities are concerned. Moreover, the auditing of accounts should be undertaken by the Court of Auditors in accordance with Article 91 of Commission Regulation (EC, Euratom) No 2343/2002 of 23 December 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities.

*Justification*

*The possibility of voluntary contributions could bring into question the transparency and independence of the Agency.*

Amendment 5  
Recital 15 a (new)

***(15a) Immediately after the start-up of the Agency, its budget shall be subject to ongoing assessment by the budgetary authority on the basis of its ongoing workload and performance. This assessment should determine whether sufficient human and financial resources are being made available. The budget shall ensure that the best standards of efficiency are met.***

*Justification*

*It is essential to keep expenditure and human resource requirements under review.*

Amendment 6  
Recital 18 a (new)

***(18a) The Commission shall submit to the European Parliament and to the Council***

***no more than four years from the effective start of the operation of the Agency and every five years thereafter a report on its specific tasks and the results achieved, accompanied by appropriate proposals.***

*Justification*

*It is essential to keep the effectiveness of the Agency under review, and provide scope for revision if necessary at a later date.*

Amendment 7  
Article 2, paragraph 4

4. The seat of the Agency shall be located in **[place]**. Until its premises are ready, it will be hosted on Commission premises.

4. The seat of the Agency shall be located in **Brussels**. Until its premises are ready, it will be hosted on Commission premises.

*Justification*

*Brussels is the best place to host the Agency. It will reduce travel expenses and ensure easier contact with DG TREN and the European Networks of Transmission System Operators that will continue to be based in Brussels, as well as other important stakeholder associations. ERGEG is currently based in Brussels and has proven to work efficiently. Brussels is the European capital having the best connections with all the other EU capitals.*

Amendment 8  
Article 4

**Type of acts** of the Agency

The Agency **may**:

- (a) issue opinions addressed to transmission system operators;
- (b) issue opinions addressed to regulatory authorities;
- (c) issue opinions and recommendations addressed to the Commission;
- (d) take **individual** decisions in specific cases referred to in Articles 7 and 8;

**Tasks** of the Agency

The Agency **shall, in the furtherance of its purpose as defined in Article 1:**

- (a) issue opinions, **recommendations and decisions** addressed to transmission system operators, **in relation to all technical matters pertaining to the good functioning of the internal market;**
- (b) issue opinions addressed to regulatory authorities;
- (c) issue opinions and recommendations addressed to the Commission, **the European Parliament or the Council;**
- (d) take decisions in specific cases referred to in Article **6, 7, 8, 8a, 8b and 8c;**



- (e) provide a framework for national regulators to cooperate;*
- (f) overview the execution of the tasks of the ENTSOs;*
- (g) establish economic and technical terms and conditions for the development of codes and rules drafted by the ENTSOs and to approve them to ensure efficient and secure functioning of the internal market;*
- (h) set methodologies and tariffs for inter-TSO European compensation mechanisms, based on an assessment of actual costs to TSOs;*
- (i) undertake EU-wide public consultations on the above mentioned issues.*

#### *Justification*

*The Commission proposal does not provide an EU framework for the effective cooperation of NRAs. The Agency must have real powers, in order to efficiently handle cross-border issues. The Agency must have a stronger role in initiating, monitoring and approving the draft measures by TSOs to ensure that public interest concerns are fully met. The Agency should also have a key role to play in the implementation of the codes of the Network Transmission Operators and how they are enforced. Overall, the Agency must be involved in specifying the scope and the content of the EU codes.*

#### Amendment 9 Article 5

The Agency may, upon a request from the Commission or on its own initiative, provide an opinion to the Commission on all issues related to the purpose for which it has been established.

The Agency may, upon a request from the Commission, ***the European Parliament or the Council*** or on its own initiative, provide an opinion to the Commission, ***the European Parliament or the Council***, on all issues related to the purpose for which it has been established.

#### *Justification*

*In line with the proposed Amendment to article 4 par c), the European Parliament and the Council must be added to the list of those who may receive opinions from the Agency.*

#### Amendment 10 Article 6, paragraph 3

3. The Agency **may provide an opinion to** the European **Network** of Transmission System Operators for Electricity as provided for in **Article 2d(2)** of Regulation (EC) No 1228/2003 and **to the European Network of Transmission System Operators for Gas as provided for in Article 2d(2)** of Regulation (EC) No 1775/2005 **on the technical or market codes, on the draft annual work programme and the draft 10-year investment plan.**

3. The Agency **shall approve the codes and the 10-year investment plan of** the European **Networks** of Transmission System Operators for Electricity **and Gas, referred to** in **Article 2c** of Regulation (EC) No 1228/2003 and in **Article 2c** of Regulation (EC) No 1775/2005, **ensuring non-discrimination, effective competition and the efficient and secure functioning of the market.**

#### *Justification*

*The network codes and draft 10-year investment plan should be subject to the approval of the Agency. It is necessary to avoid self regulation at EU level. It is a duty of the national regulatory authority to approve the investment plans of the TSOs. Therefore at EU level, the Agency should approve the EU-wide 10 year investment plan. Investors need a clear and predictable regulatory framework. Therefore, it is important that investment plans are subject to the approval of Regulators, who are free from commercial and political interference.*

#### Amendment 11

Article 6, paragraph 3 a (new)

**3a. The 10-year investment plans shall contain provisions for the transition to smart grids within 10 years of the entry into force of this regulation. The Agency and the National Regulatory Authorities shall be consulted on the transmission system operators' progress towards the development of smart grids. To this end an incremental timetable shall be set, with the goal to complete.**

#### *Justification*

*Smart grid technology represents an important development, which needs to be taken duly into account in the 10-year investment plan.*

#### Amendment 12

Article 6, paragraph 3 b (new)

**3b. The Commission should prepare a mandate, to guide the ENTSOs in the**

***preparation of codes and other tasks set out under Article 2c of Regulation (EC) No 1228/2003 and in Article 2c of Regulation (EC) No 1775/2005 which relate to the technical operation of networks. The Agency, at its own initiative or at the request of the Commission, shall prepare mandatory guidelines to advise the Commission on the preparation of the mandate. The ENTSOs should draft codes and undertake its other tasks in a way that meets the objectives and any criteria set out in this mandate. The Agency shall adopt the draft codes prepared by ENTSOs.***

#### *Justification*

*To guide ENTSOs in the development of codes and other critical tasks, the Commission should develop a mandate which sets out the objectives and any criteria that these codes/ tasks should meet. This will ensure that ENTSOs focus on priority issues that deliver a truly competitive EU market. The Agency should play a key role in the preparation of this mandate. This mandate should only cover technical issues - whilst codes relating to the technical operation should be left for ENTSOs to prepare (and, as technical issues, require the approval of the Agency) ENTSOs should not set market rules.*

#### Amendment 13

Article 6, paragraph 3 c (new)

***3c. The Commission shall adopt codes as provided for under Article 2c of Regulation (EC) No 1228/2003 and in Article 2c of Regulation (EC) No 1775/2005 in areas which relate mainly to competition and market rules, rather than the technical operation of networks. The ENTSOs shall not adopt codes in these areas. The Agency shall, at its own initiative or at the request of the Commission, prepare mandatory guidelines in order to advise the Commission in preparing these codes.***

#### *Justification*

*ENTSO should not set market rules. As these issues relate to competition they should be prepared by the Commission, which should seek advice from the Agency.*

Amendment 14  
Article 6, paragraph 6a (new)

***6a. Costs arising for TSOs from decisions or opinions taken by the Agency shall be recovered through national transmission tariff systems, unless these costs are due to violation or non compliance of duties assigned to TSOs in accordance with this Regulation, Regulation (EC) No 1228/2003 or Regulation (EC) No 1775/2005.***

Amendment 15  
Article 8, paragraph 2 a (new)

***2a. The Agency shall take on specific additional tasks which relate to its purpose at the request of the Commission.***

*Justification*

*The Commission should be able to request the Agency to undertake any additional specific task within its general remit which may be considered to contribute to meeting the objectives of the Community regulatory framework for the cooperation of energy regulators.*

Amendment 16  
Article 8 a (new)

***Article 8a***

***Time limit for decisions***

***8a. If the Agency doesn't adopt a decision in the matters where the Agency has, according to this Regulation, binding powers, within the maximum time-limit of three months from the date of the request by the interested parties, the decision shall be taken by the European Commission.***

*Justification*

*To avoid institutional paralysis within the Agency, a default mechanism is introduced for the final decision to be devolved to the European Commission in case of severe delay.*

Amendment 17  
Article 8 b (new)

**Article 8b**

**Consultation and transparency**

- 1. Before adopting measures, the Agency shall, , where appropriate, consult interested parties and give them a reasonable opportunity to comment on the proposed measure . The results of the consultation procedure shall be made public.**
- 2. The Agency shall carry out its activities with a high level of transparency.**
- 3. The Agency shall ensure that the public and any interested parties are given objective, reliable and easily accessible information, in particular with regard to the results of its work, where appropriate.**
- 4. The Agency shall lay down in its internal rules of procedure the practical arrangements for implementing the transparency rules referred to in paragraphs 2 and 3.**

*Justification*

*Public consultation at EU level is currently undertaken by ERGEG. Therefore the Agency should inherit this task, as ERGEG already has well established rules and experience in carrying out public consultations. The Agency will continue to act in the interest of all market participants.*

Amendment 18  
Article 8 c (new)

**Article 8c**

**Monitoring and reporting on the energy sector**

- 1. The Agency shall monitor developments in the gas and electricity markets, and in particular the retail prices of gas and electricity and the observance of consumers' rights set out in Directive 2003/55/EC and Directive 2003/54/EC.**

**2. The Agency shall publish an annual report on developments in the gas and electricity markets, including consumer issues, in which it shall identify any remaining barriers to the completion of the internal market for electricity and gas.**

**3. When publishing its annual report, the Agency may submit to the European Parliament and to the Commission, , an opinion on the measures that might be taken to remove any barriers as referred to in paragraph 2.**

*Justification*

*The Agency would have a role to provide an annual report on the development of the electricity and gas market, with the ability to issue recommendations on measures to be taken to improve the liberalisation of energy markets.*

Amendment 19  
Article 9, paragraph 1

1. The Administrative Board shall be composed of **twelve** members. **Six** shall be appointed by the Commission, **and six** by the Council. The term of office shall be five years, renewable once.

1. The Administrative Board shall be composed of **five** members. **Two** shall be appointed by the Commission, **two** by the Council **and one by the European Parliament**. The term of office shall be five years, renewable once.

*Justification*

*In order to work in a much efficient way the Administrative Board shall be composed of five members: two appointed by the Commission, two by the Council and one by the European Parliament.*

Amendment 20  
Article 9, paragraph 3

3. Meetings of the Administrative Board shall be convened by its Chairperson. The Director of the Agency shall participate in the deliberations unless the Administrative Board decides otherwise. The Administrative Board shall meet at least twice a year in ordinary session. It shall also meet at the initiative of its Chairperson, at the request of the

3. Meetings of the Administrative Board shall be convened by its Chairperson. The Director **and the Chairperson of the Board of Regulators** of the Agency shall participate in the deliberations **without any right to vote**, unless the Administrative Board decides otherwise. The Administrative Board shall meet at least twice a year in ordinary session. It shall

Commission or at the request of at least **a third** of its members. The Administrative Board may invite any person with potentially relevant opinions to attend its meetings in the capacity of an observer. The members of the Administrative Board may, subject to the rules of procedure, be assisted by advisers or by experts. The Administrative Board's secretarial services shall be provided by the Agency.

also meet at the initiative of its Chairperson, at the request of the Commission or at the request of at least **two** of its members. The Administrative Board may invite any person with potentially relevant opinions to attend its meetings in the capacity of an observer. The members of the Administrative Board may, subject to the rules of procedure, be assisted by advisers or by experts. The Administrative Board's secretarial services shall be provided by the Agency.

#### *Justification*

*To ensure better coordination among the different Boards of the Agency is necessary to include in the deliberations the Director of the Agency and the Chairperson of the Board of Regulators, without right to vote. The Board of Regulators will be materially affected by the decisions of the Administrative Board.*

#### Amendment 21 Article 9, paragraph 5 a (new)

***5a. The members of the Administrative Board shall undertake to act independently in the public interest and shall make a yearly public written declaration of commitments and of interests which might be considered prejudicial to their independence.***

#### *Justification*

*This amendment is needed in order to guarantee independence of the members of the Administrative Board.*

#### Amendment 22 Article 10, paragraph 1

1. The Administrative Board shall, ***after having consulted the Board of Regulators***, appoint the Director in accordance with Article 13(2).

1. The Administrative Board shall appoint the Director in accordance with Article 13(2).

*Justification*

*In accordance with the proposed amendment to article 13(2).*

Amendment 23  
Article 10, paragraph 2

**2. The Administrative Board shall appoint ~~the members of the Board of Regulators~~ in accordance with Article 11(1).**

*Justification*

*To ensure independence of the Agency the Administrative Board should not be responsible for the appointment of the members of the Board of Regulators.*

Amendment 24  
Article 10, paragraph 11 a (new)

**11a. The Administrative Board shall carry out its tasks independently, objectively and in the public interest.**

*Justification*

*To ensure independence of the Agency the Administrative Board should also act independently without seeking instruction from national government or from any other stakeholder.*

Amendment 25  
Article 11, paragraph 1 a (new)

**1a. Each National Regulatory Authority will be responsible for appointing its representative to the Board of Regulators and the alternate.**

*Justification*

*It needs to be made explicit that National Regulators are directly responsible for appointing their representatives, rather than the Administrative board.*

Amendment 26  
Article 11, paragraph 3



3. The Board of Regulators shall act by a majority of two-thirds of its members. **Each member or alternate shall have one vote.**

3. The Board of Regulators shall act by a majority of two-thirds of its members. **The votes of its members shall be weighted as set out in Article 205 (2) of the EC Treaty.**

*Justification*

*EREG currently takes decisions following this voting principle. It makes sense that the Board of Regulators should do so too, and take decisions which take into account the different population represented by each Regulator.*

Amendment 27  
Article 12, paragraph 1

1. The Board of Regulators shall provide **an** opinion to the Director before the adoption of the opinions, recommendations and decisions referred to in Articles 5, 6, 7 and 8. In addition, the Board of Regulators, within its field of competence, shall provide guidance to the Director in the execution of the Director's tasks.

1. The Board of Regulators shall provide **a justified** opinion to the Director before the adoption of the opinions, recommendations and decisions referred to in Articles 5, 6, 7, 8, **8a, 8b and 8c**. In addition, the Board of Regulators, within its field of competence, shall provide guidance to the Director in the execution of the Director's tasks.

*Justification*

*The Director has a key regulatory role. Given this, and to ensure his regulatory independence he or she should first receive a fully justified opinion from the Board of Regulators.*

Amendment 28  
Article 12, paragraph 2

1. The Board of Regulators **shall deliver an opinion on the candidate to be appointed** as Director in accordance with Article 10(1) and Article 13(2). The Board still reach this decision on the basis of a majority of three quarters of its members.

1. The Board of Regulators shall **propose to the Administrative Board a list of at least two candidates for appointment** as Director in accordance with Article 10(1) and Article 13(2). The Board still reach this decision on the basis of a majority of three quarters of its members.

*Justification*

*See the justification of the proposed amendment to article 13 (2).*

Amendment 29  
Article 13, paragraph 2

2. The Director shall be appointed by the Administrative Board, on the basis of merit as well as skills and experience, from a list of at least two candidates proposed by the **Commission**, following a call for expression of interest. Before appointment, the candidate selected by the Administrative Board may be invited to make a statement before the competent committee of the European Parliament and answer questions put by its members.

2. The Director shall be appointed by the Administrative Board, on the basis of merit as well as skills and experience **relevant to the energy sector**, from a list of at least two candidates proposed by **the Board of Regulators**, following a call for expression of interest. Before appointment, the candidate selected by the Administrative Board shall be invited to make a statement before the competent committee of the European Parliament and answer questions put by its members.

#### *Justification*

*In order to balance the powers within the current structure of the Agency the list of candidates is proposed by the Board of Regulators and not by the Commission.*

#### Amendment 30 Article 13, paragraph 4

4. The Administrative Board, **acting on a proposal from** the Commission, taking into account the evaluation report and only in those cases where it can be justified by the duties and requirements of the Agency, may extend the term of office of the Director once for not more than three years.

4. The Administrative Board, **after consulting the Board of Regulators and** the Commission, taking into account the evaluation report and only in those cases where it can be justified by the duties and requirements of the Agency, may extend the term of office of the Director once for not more than three years.

#### *Justification*

*Given that the Board of Regulators has an essential role in the appointment of the Director, it should be consulted on any extension to his term of office. To preserve its independence, the Administrative Board should be able to extend his term of office without waiting for a proposal from the Commission.*

#### Amendment 31 Article 14, paragraph 3

3. The Director adopts the opinions, recommendations and decisions referred to in Articles 5, 6, 7 and 8, **subject to the assent** of the Board of Regulators.

3. The Director adopts the opinions, recommendations and decisions referred to in Articles 5, 6, 7, 8, **8a, 8b and 8c after receiving a justified opinion** of the Board of Regulators.

*Justification*

*See the justification of the proposed amendment to article 12 (1).*

Amendment 32  
Article 15, paragraph 2

2. The members of the Board of Appeal shall be appointed by the Administrative Board, on a proposal from the Commission, following a call for expression of interest, after consultation of the Board of Regulators.

2. The members of the Board of Appeal shall be appointed by the Administrative Board, on a proposal from the Commission, following a call for expression of interest, after consultation of the Board of Regulators. ***Before appointment, the candidates selected by the Administrative Board shall make a statement before the competent committee of the European Parliament and answer questions put by its members.***

*Justification*

*It is important to have a democratic control over the appointment of the Board of Appeal at least by a hearing at European Parliament.*

Amendment 33  
Article 18, paragraph 1, point (c)

***(c) any voluntary contribution from the Member States or from their regulatory authorities;***

***(c) resources pooled by regulatory authorities for their cooperation at EU level;***

*Justification*

*In order to guarantee the full autonomy and independence of the Agency, it must be granted an autonomous budget. Consequently, it must be avoided that the Member States contribute in a different and voluntary manner.*

Amendment 34  
Article 19, paragraph 1

1. Fees shall be due to the Agency for requesting an exemption decision pursuant to Article 8(1).

1. Fees shall be due to the Agency for requesting an exemption decision pursuant to Article 8(1) ***or specific or special advice, recommendations, decisions or monitoring tasks towards the European Network of Transmission System***

***Operators for Electricity or the European  
Network of Transmission System  
Operators for Gas.***

*Justification*

*To increase the financial autonomy of the Agency and given the problem of the reduced EU budget, it is suggested that the provisions for seeking financing from the market are extended.*

Amendment 35  
Article 20, paragraph 1

1. By 15 February of each year at the latest, the Director shall draw up a preliminary draft budget covering the operational expenditure and the programme of work anticipated for the following financial year, and shall forward this preliminary draft to the Administrative Board, together with a list of provisional posts. Each year the Administrative Board shall, on the basis of the draft prepared by the Director, make an estimate of revenue and expenditure of the Agency for the following financial year. This estimate, including a draft establishment plan, shall be transmitted by the Administrative Board to the Commission by 31 March at the latest. Prior to adoption of the estimate, the draft prepared by the Director shall be transmitted to the Regulatory Board, which may deliver *an* opinion on the draft.

1. By 15 February of each year at the latest, the Director shall draw up a preliminary draft budget covering the operational expenditure and the programme of work anticipated for the following financial year, and shall forward this preliminary draft to the Administrative Board, together with a list of provisional posts. Each year the Administrative Board shall, on the basis of the draft prepared by the Director, make an estimate of revenue and expenditure of the Agency for the following financial year. This estimate, including a draft establishment plan, shall be transmitted by the Administrative Board to the Commission by 31 March at the latest. Prior to adoption of the estimate, the draft prepared by the Director shall be transmitted to the Regulatory Board, which may deliver *a justified* opinion on the draft.

*Justification*

*The Director has a key regulatory role. Given this, and to ensure his regulatory independence he or she should first receive a fully justified opinion from the Board of Regulators.*

## EXPLANATORY STATEMENT

### **Introduction**

In the course of debate on this Regulation, the Rapporteur has become more convinced of the need to move beyond the Commission's proposals for the Agency for the Co-operation of Energy Regulators, and create an Agency with more independence and decision-making powers.

It is the Rapporteur's opinion that, if it is to contribute effectively to the development of an integrated competitive energy market for the European Union, the Agency will need more extensive powers, independent of the Commission, to handle cross-border situations and deliver effective cooperation between TSOs and national energy regulators.

Therefore, the proposed Amendments in this draft report suggest significant new decision-making powers for the Agency - in particular over the development of technical codes and the investment plans of the ENTSOs - and greater regulatory and financial independence.

However, with greater power and independence should come greater accountability - to Parliament and to key stakeholders. Therefore, to balance its new powers, the Rapporteur proposes to significantly increase the Agency's requirement to consult, its transparency, and its accountability to Parliament.

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 Parliament adopts for the Agency in this Regulation will have to be consistent with the other draft Directives and Regulations in the package - in particular as they relate to the powers and responsibilities of the ENTSOs.

### **Legal Issues: Institutional Balance and Powers of the Agency**

The European Parliament understands the importance of the principle of institutional balance that the European Commission, through Treaty, is charged to defend.

In producing this draft report, the Rapporteur has been aware of the key legal principles set out in case law by the European Court of Justice in the 1958 Meroni judgement (and other cases):

- that a delegating authority cannot confer on another body powers different from those possessed by the delegator under the Treaty, and not subject to the same duties; and
- that it is not possible to delegate powers involving a wide margin of discretion between many different objectives and tasks, so shifting responsibilities and escaping political control.

On this basis, existing European Agencies have been mainly endowed with information and coordination tasks, with the ability to exercise decision-making powers (with legally binding impacts on third parties) being restricted only to individual cases.

But every Agency has its own institutional setting, and their remit must be developed first and foremost with a view to the needs of the specific sectors in which they are to operate. This is the approach we must take in designing this new Agency for the energy sector.

Overall, the Rapporteur's belief is that the core Meroni principles are not affected by the nature of his proposed amendments.

The idea that the Agency, under the proposals set out in this report, will have a wide margin of discretionary power is questionable. The situation is completely different from the one addressed in the Meroni case, in which the delegated authority had to weigh “eight different aims”. The Agency will take decisions which require highly technical evaluations; it will not exercise the sort of discretion that requires a choice between many different and conflicting public interests.

In fact, the functions entrusted to the Agency in accordance with Article 4 as amended, do not involve general regulatory powers nor a general freedom of evaluation that can be equated to the development (even in part) of 'energy policy'. In these proposed amendments the possibility of adopting binding decisions is limited to individual decisions or rules concerning strictly technical matters needed to ensure an efficient and safe functioning of the internal energy market.

The amendments to Article 6, paragraph 3, illustrate this approach: the Agency is empowered only to approve codes (prepared by ENTSO) which relate to the technical operation of the network. On the other hand it only gives advice to the Commission on codes which relate mainly to competition and market rules. Whilst the approval of purely technical codes is an appropriate, purely technical task for the Agency; the Commission rightly takes on responsibility for Market codes, as they relate to competition policy.

The principles established in the Meroni case must therefore be seen in context, rather than being applied in a simplistic, overly conservative manner. In the case of the Agency for the Co-operation of Energy Regulators (whose legal base is Article 95 EC) they require a more careful re-evaluation.

### **Governance and Structure of the Agency**

The proposed changes to the structure and operation of the Agency are designed to secure the most effective balance between the needs for regulatory independence on one hand, and appropriate political control on the other. A key principle for the Rapporteur is that the independence of an Agency is critical not only for its effectiveness but also for its credibility.

With that in mind, the Amendments proposed by the Rapporteur introduce the following key changes:

- **A stronger role for the Board of Regulators and the Parliament in the appointment of the Director.** The Director is still appointed by Administrative Board, but on the basis of a list of at least 2 names nominated by the Board of Regulators, rather than the Commission.

- **A more efficient and transparent Administrative Board.** Membership is streamlined considerably, with 5 members in total - 2 each nominated by the Commission and Council; but also a nominated representative of the European Parliament, to ensure that the legislature's views are reflected. Members will be required to undertake to act independently and make a declaration of commitments and interests that might prejudice that independence.
- **A time-limit is introduced to ensure speedy decision-making by the Agency.** The Agency will be required to make decisions within a fixed time limit - three months is suggested. If a decision is not forthcoming within that time, the decision reverts to the Commission. This will avoid institutional paralysis and uncertainty for the market. It also provides the Commission with an appropriate mechanism for supervision and control.
- **Increased financial independence for the Agency.** There is increased scope for the Agency to raise finances from the marketplace (in return for services rendered/ decisions made) and national regulators.

In general, these proposals will strengthen the regulatory independence of the Agency, whilst ensuring effective political accountability. In particular, the Agency's accountability to Parliament will be strengthened.

### **Consultation, Monitoring and Reporting**

The proper way to confer of binding power to the Agency (in a step which will further enhance its compatibility with the Meroni principles) is to build up an adequate legal framework that guarantees that all affected parties will be consulted; gives the Agency a clearly stated duty of transparency; and, in particular, extends the accountability (through information provision and reporting) of the Agency towards the European Parliament.

To this end, the proposed new articles 8b (new) and 8c (new) would include in the proposed regulation precise requirements for ACER:

- **to carry out consultations with all the parties concerned in any measures undertaken under the Regulation;**
- **to ensure a high level of transparency, and provide easy access to information,** through clear arrangements laid down in its Rules of Procedure; and
- **to monitor developments in gas and electricity markets - particularly consumer issues - and produce an annual report for the attention of the Parliament and the Commission,** setting out (if appropriate) proposals for action to improve the opening of markets.

### **Conclusion**

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.

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; and
- focused on the implementation of competition law, to minimize as much as possible the *ex-ante* rules applied on a case-by-case basis.

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.

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.

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.