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DRAFT OPINION

of the Committee on Economic and Monetary Affairs

for the Committee on Industry, Research and Energy

on the proposal for a directive of the European Parliament and of the Council amending Directive 2003/54/EC concerning common rules for the internal market in electricity
(COM(2007)0528 – C6-0316/2007 – 2007/0195(COD))

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SHORT JUSTIFICATION

Current situation

The European legislator decided in 1996, in its first "energy package", to gradually liberalise the then monopoly-based European energy system. In its 2003 "second package" Parliament and Council decided to extend market opening to all consumers by mid-2007, thereby giving detailed provisions on the regulatory approach. However, the European markets for gas and electricity still show dysfunctions concerning fair access to transmission grids, interconnection between national energy markets (cross border interconnections) and the maintenance of security of supply.

The current Commission proposal, the "third energy package", therefore suggests several measures as to how to overcome these dysfunctions and to move forward in the creation of a fully integrated internal market.

Unbundling provisions

It goes without saying that legal, functional and management unbundling provisions, as provided by the "second energy package", are of fundamental importance and must be implemented effectively in all Member States. However, the discussion on the future design of the internal market sometimes seems to be centred too exclusively on the possible merits of unbundling provisions. It is doubtful if ownership unbundling (OU) as practiced in certain Member States, where it has been developed as part of national competition law, can be used as a model for the whole of the EU. In fact, the Commission impact assessment does not provide enough evidence to conclude that OU is really the *most appropriate* measure to both, increase competition and to create a functioning internal market. Furthermore, it could cause problems in Member States concerning the protection of property rights as laid down in their respective constitutions. That is why we suggest giving Member States the option to choose a regulatory model which is most appropriate to their own economy. Apart from OU and Independent Systems Operators (ISO), the two models contained in the original Commission proposal, a comprehensive *third option*, elaborated by several Member States, is proposed.

This should lead to an internal market where different models could coexist. All models would be subject to strict regulation at EU level through the Agency for the Cooperation of Energy Regulators (ACER) in close cooperation with the National Regulatory Agencies (NRAs) as well as the national and EU competition authorities. This approach could ensure transparent and fair access to the grid and provide a liberalized EU energy market.

Transparent access to the transmission networks and investment opportunities

Transmission System Operators (TSOs) should be responsible for transparent non-discriminatory procedures for connection to the grids. These procedures should be approved by NRAs. TSOs should be obliged to provide all necessary information to all interested companies seeking to connect new power plants (including nuclear ones), transport the electricity through the TSO's grids or invest in the transmission systems interconnections (thereby enhancing security of supply). Regional cooperation could be promoted for better

and smoother coordination within and between the regions by NRAs and ACER.

A balanced regulatory approach: ENTSO, NRAs, ACER, Commission

The right regulatory balance, in particular if Members States opt for models other than OU, plays the most important role in the creation of an internal energy market. In order to protect the public interest it seems crucial that the NRAs as well as ACER dispose of the highest degree possible of independence, bereft of any political or business interference.

Furthermore, it must be guaranteed that the regulatory model is coherent, disposing of a clear-cut repartition of competencies and responsibilities. It is in this regard that the Commission proposal does not give a satisfactory answer: It foresees, on the one hand, to assign ACER an almost purely advisory role, leaving it very limited scope to take individual decisions which are legally binding on third parties. On the other hand however, very wide scope is given to the European Network of Transmission System Operators (ENTSO), which means that TSOs are assigned a role of "para self-regulation", a role which TSOs, following their various position papers, are not inclined to assume. The entire approach leads to a regulatory framework which is unclear and unbalanced, leaving ACER in a very weak position vis-à-vis both, the Commission and ENTSO.

Finally, it is questionable from Parliament's point of view whether, as foreseen by the Commission, such a big number of key regulatory issues should be dealt with by Comitology procedure.

The Regional Approach

In its proposal the Commission does not seem to back the idea of Regional markets wholeheartedly. However, regional markets could be a viable *intermediary* step to the creation of a fully integrated European energy market. The creation of Regional Systems Operators (RSOs) would be a strong vector to provide investment for transmission systems and, in particular, cross border interconnections, thereby improving security of supply. RSOs should provide regional investment plans which should be monitored by NRAs and ACER to guarantee effective coordination.

In order to enhance the role of Regional Markets, ACER could establish "regional committees" (similar to the ones of the Agency's forerunner, ERGEG) which could be responsible for "Regional regulatory supervision".

AMENDMENTS

The Committee on Economic and Monetary Affairs calls on the Committee on Industry, Research and Energy, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1
ARTICLE 1, POINT 3 A (new)
Article 7a (new) (Directive 2003/54/EC)

(3a) The following Article 7a is inserted:

„Article 7a

In order to ensure the independence of transmission system operator (TSOs)s Member States shall ensure that as from [date of transposition plus one year] vertically integrated undertakings have to comply either with the provisions of points (a) to (d) of Article 8(1) on ownership unbundling (OU) and Article 10 on independent system operators (ISO) or with the following provisions of Article 10b on effective and efficient unbundling (EEU).“

Amendment 2
ARTICLE 1, POINT 8
Article 10 b (new) (Directive 2003/54/EC)

„Article 10b

Effective and efficient unbundling of transmission systems

I ASSETS, EQUIPMENT, STAFF AND IDENTITY

1. TSOs shall be equipped with all human, physical and financial resources of the vertically integrated undertaking necessary for the regular business of electricity transmission , in particular:

(i) Assets that are necessary for the regular business of electricity transmission shall be owned by the TSO;

(ii) Personnel necessary for the regular business of electricity transmission shall be

¹ Not yet published in OJ.

employed by the TSO;

(iii) Leasing of personnel and rendering of services, from and to any branch of the vertically integrated undertaking performing functions of generation or supply, shall be limited to cases with no discriminatory potential and be subject to approval by national regulatory authorities in order to exclude competition concerns and conflicts of interest;

(iv) Appropriate financial resources for future investment projects shall be kept available in due time.

2. The activities deemed necessary for the regular business of electricity transmission mentioned in paragraph 2 shall at least include:

- representation of the TSO and contacts to third parties and the regulatory authorities;*
- granting and managing third party access;*
- collection of the access charges, congestion rents and payments under the inter transmission system operator compensation mechanism in compliance with Article 3 of Regulation (EC) No. 1228/2003;*
- operation, maintenance and development of the transmission system;*
- investment planning ensuring the long-term ability of the system to meet reasonable demand and guaranteeing security of supply;*
- legal services;*
- accountancy and IT services.*

3. TSOs shall be organised in the legal form of a joint-stock company.

4. The TSO shall have its own corporate identity, significantly different from the vertically integrated undertaking with separate branding, communication and

premises

5. TSOs accounts shall be audited by another auditor than the one auditing the vertically integrated undertaking and all its affiliated companies.

II INDEPENDENCE OF THE TSO MANAGEMENT, CHIEF EXECUTIVE OFFICER / EXECUTIVE BOARD

6. Decisions on the appointment and on any premature termination of the employment of the chief executive officer / members of the executive board of the TSO and the respective contractual agreements of the employment and its termination shall be notified to the regulatory authority or any other competent national public authority. These decisions and agreements may become binding only if, within a period of three weeks time after notification, to the regulatory authority or any other competent national public authority has not used its right of veto. A veto may be issued in cases of appointment and respective contractual agreements if serious doubts arise as to the professional independence of the nominated chief executive officer / member of the executive board, or in the case of premature terminations of employment and respective contractual agreements, if serious doubts, exist regarding the reasoning for this measure.

7. Effective rights of appeal to the regulatory authority or another competent national public authority or to a court shall be guaranteed for any complaints by the management of the TSO against premature terminations of their employment.

8. After termination of employment in the TSO, chief executive officers / members of the executive board shall not participate in any branch of the vertically integrated undertaking performing functions of generation or supply for a period of not less than three years.

9. The chief executive officer / members of the executive board shall not hold any interest in or receive any compensation from any undertaking of the vertically integrated company other than the TSO. His/their remuneration shall in no part depend on activities of the vertically integrated undertaking other than those of the TSO.

10. The chief executive officer or the members of the executive board of the TSO may not bear responsibility, directly or indirectly, in the day-to-day operation of any other branch of the vertically integrated undertaking.

11. Without prejudice to the provisions above, the TSO shall have effective decision-making rights, independent from the integrated electricity undertaking, with respect to assets necessary to operate, maintain or develop the network. This should not prevent the existence of appropriate coordination mechanisms to ensure that the economic and management supervision rights of the parent company in respect of return on assets, regulated indirectly in accordance with Article 22c, in a subsidiary are protected. In particular, this shall enable the parent company to approve the annual financial plan, or any equivalent instrument, of the TSO and to set global limits on the levels of indebtedness of its subsidiary. It shall not permit the parent company to give instructions regarding day-to-day operations, nor with respect to individual decisions concerning the construction or upgrading of transmission lines, that do not exceed the terms of the approved financial plan, or any equivalent instrument.

III SUPERVISORY BOARD / BOARD OF DIRECTORS

12. Chairmen of the supervisory board/board of directors of the TSO shall not participate in any branch of the vertically integrated undertaking

performing functions of generation or supply.

13. The supervisory boards / boards of directors of TSOs shall include independent members, appointed for a term of at least five years. Their appointment shall be notified to the regulatory authority/ or any other competent national public authority and become binding under the conditions described in paragraph 6.

14. For the purposes of paragraph 13, a member of the supervisory board / board of directors of a TSO shall be deemed independent if he is free of any business or other relationship with the vertically integrated undertaking, its controlling shareholders or the management of either, that creates a conflict of interest such as to impair his judgement, in particular:

(a) has not been an employee of any branch of the vertically integrated undertaking performing functions of generation and supply in five years prior to their appointment as supervisory board / board of directors member;

(b) does not hold any interest in and does not receive any compensation from the vertically integrated undertaking or any of its affiliates except the TSO;

(c) does not hold any relevant business relationship with any branch of the vertically integrated company performing functions of energy supply during his appointment as supervisory board / board of directors member ;

(d) is not a member of the executive board of a company in which the vertically integrated undertaking appoints members of the supervisory board / board of directors.

IV COMPLIANCE OFFICER

15. Member States shall ensure that TSOs establish and implement a compliance programme which sets out measures taken

to ensure that discriminatory conduct is excluded. The programme shall set out the specific obligations of employees to meet this objective. It shall be subject to approval of the regulatory authority or any other competent national public authority. Compliance of the program shall be independently monitored by the compliance officer. The regulatory authority shall have the power to impose sanctions in case of inappropriate implementation of the compliance program.

16. The chief executive officer / executive board of the TSO shall appoint a person or a body as a compliance officer in charge of :

(i) monitoring the implementation of the compliance programme;

(ii) elaborating an annual report, setting out the measures taken in order to implement the compliance programme and submitting it to the regulatory authority;

(iii) issuing recommendations on the compliance programme and its implementation.

17. The independence of the compliance officer shall be guaranteed in particular by the terms of his employment contract.

18. The compliance officer shall have the opportunity to regularly address the supervisory board/board of directors of the TSO, of the vertically integrated undertaking and the regulatory authorities.

19. The compliance officer shall assist to all sessions of the supervisory board / board of directors of the TSO that address the following areas:

(i) conditions for access and connection to the grid, including the collection of access charges, congestion rents, and payments under the inter transmission system operator compensation mechanism in compliance with Article 3 of Regulation (EC) No 1228/2003;

(ii) projects undertaken in order to operate, maintain and develop the transmission grid system, including interconnection and connection investments;

(iii) balancing rules, including reserve power rules;

(iv) energy purchases in order to cover energy losses.

20. During these sessions, he shall prevent information about generators' or suppliers' activities which may be commercially advantageous from being disclosed in a discriminatory manner to the supervisory board/board of directors.

21. The compliance officer shall have access to all relevant books, records and offices of the TSO and to all the necessary information for the fulfilment of his task for the proper performance of his duties.

22. The compliance officer shall be nominated and removed by the chief executive officer / executive board only after prior approval by the regulatory authority.

V GRID DEVELOPMENT AND POWERS TO MAKE INVESTMENT DECISIONS

TSOs shall elaborate a 10-year network development plan at least every 2 years. They shall provide efficient measures in order to guarantee system adequacy and security of supply.

23. The 10-year network development plan shall in particular:

(a) indicate to market participants the main transmission infrastructures that ought to be built over the next ten years.

(b) contain all the investments already decided and identify new investments for which an implementation decision has to be taken in the next three years.

24. In order to elaborate this 10-year network development plan, each TSO makes reasonable hypothesis about the

evolution of generation, consumption and exchanges with other countries, and takes into account regional and European-wide existing network investment plans. TSO shall submit in due time the draft to the competent national body.

25. The competent national body shall consult all relevant network users on the basis of a draft for the 10-year network development plan in an open and transparent manner and may publish the result of the consultation process, in particular possible needs for investments.

26. The competent national body shall examine whether the 10-year network development plan covers all investment needs identified in the consultation. This authority may oblige the TSO to amend his plan.

27. Competent national body as referred to in paragraphs 24, 25 and 26, may be the national regulatory authority, any other competent national public authority or a network development trustee constituted by TSOs. In the latter case, TSOs shall submit the drafts of the statutes, of the list of members and of the rules of procedure for approval by the competent national public authority.

28. If the TSO rejects to implement a specific investment listed in the 10-year network development plan to be executed in the next three years, Members States shall ensure that the regulatory authority or any other competent national public authority has the competence for one of the following measures, either:

1. request by all legal means the TSO to execute his investment obligations using his financial capacities, or,

2. invite independent investors to tender for a necessary investment in a transmission system and may oblige the TSO :

- to agree to financing by any third

party,

- to agree to building by any third party or to build the respective new assets, and

- to operate the respective new asset.

The relevant financial arrangements shall be subject to the approval of the regulatory authority or any other competent national authority.

In both cases, tariff regulation shall allow for revenues that cover the costs of such investments.

29. The competent national public authority shall monitor and evaluate the implementation of the investment plan.

VI DECISION MAKING POWERS REGARDING THE CONNECTION OF NEW POWER PLANTS TO THE TRANSMISSION GRID

30. TSOs shall be obliged to establish and publish transparent and efficient procedures for non-discriminatory connection of new power plants to the grid. Those procedures shall be subject to the approval of national regulatory authorities or any other competent national public authority.

31. TSOs shall not be entitled to refuse the connection of a new power plant on the grounds of possible future limitations to available network capacities, e.g. congestion in distant parts of the transmission grid. The TSO shall be obliged to supply necessary information.

32. TSOs shall not be entitled to refuse a new connection point, on the sole ground that it will lead to additional costs linked with necessary capacity increase of grid elements in the close-up range to the connection point.

VII REGIONAL COOPERATION

33. When cooperation between several countries at a regional level encounters

significant difficulties, following the joint request of these countries the Commission may designate, in agreement with all the Member States concerned, a regional coordinator.

34. The regional coordinator shall promote at regional level cooperation between regulatory authorities and any other competent public authorities, network operators, power exchanges, grid users and market parties. In particular, he shall:

(a) promote new efficient investments in interconnections. To this end, he shall assist TSOs while elaborating their regional interconnection plan and contribute to the coordination of their investment decisions and, where appropriate, of their open season procedure;

(b) promote the efficient and safe use of the networks. To this end, he shall contribute to the coordination between TSOs, national regulatory authorities and other competent national public authorities with the elaboration of common allocation and common safeguard mechanisms;

(c) submit a report to the Commission and Member states concerned every year on the progress achieved in the region and on any difficulty or obstacle that may hinder progress.“

Amendment 3

ARTICLE 1, POINT 12

Article 22a, paragraph 3, point (b) (Directive 2003/54/EC)

(b) its management is appointed for a ***non renewable fixed term of at least five years***, and may only be relieved from office during its term if it no longer fulfills the conditions set out in this Article or it has been guilty of serious misconduct.

(b) its management is appointed for a ***term of at least five years renewable only once, (or up to ten years, non-renewable)*** and may only be relieved from office during its term if it no longer fulfills the conditions set out in this Article or it has been guilty of serious misconduct.

Justification

A 5-year term of office of the national regulator should be renewable once, given the long-term nature and need for stability in the energy market; longer appointments should be non-renewable.

Amendment 4

ARTICLE 1, POINT 12

Article 22c, paragraph 1, point (g) (Directive 2003/54/EC)

(g) monitoring network security and reliability, and reviewing network security and reliability rules;

(g) monitoring network security and reliability, ***setting or approving standards and requirements for quality of service and supply*** and reviewing ***performances for quality of service and supply***, network security and reliability rules;

Justification

Some national regulatory authorities have already this duty to monitor the functioning of the electricity market also in terms of quality of supply and services to consumers, who will then have a real benefit from more consistent and transparent regulation.

Amendment 5

ARTICLE 1, POINT 12

Article 22c, paragraph 4, point (a) (Directive 2003/54/EC)

(a) connection and access to national networks, including transmission and distribution tariffs. These tariffs shall allow the necessary investments in the networks to be carried out in a manner allowing these investments to ensure the viability of the networks;

(a) connection and access to national networks, including transmission and distribution tariffs ***and their methodologies, or alternatively, the methodologies and their monitoring for setting or approving the transmission and distribution tariffs.*** These tariffs shall allow the necessary investments in the networks to be carried out in a manner allowing these investments to ensure the viability of the networks;

Justification

It is appropriate to ensure that the national regulatory authorities are responsible for setting or approving; transmission and distribution tariffs and their methodologies, or alternatively, the methodologies for setting or approving the transmission and distribution tariffs including the monitoring of the application of the methodologies for the setting of tariffs.

Amendment 6
ARTICLE 1, POINT 12
Article 22c, paragraph 13 (Directive 2003/54/EC)

13. Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of the national regulatory authority has a right of appeal to a body independent of the parties involved.

13. Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of the national regulatory authority has a right of appeal to a ***national judicial body or other national independent authority***, independent of the parties involved ***and of any government***.

Justification

Independence and integrity of NRA decisions should be undertaken by an independent and neutral body, such as the Courts, which is not subject to private or political influence in line also with Article 22a par 2 which sets out the independence of regulatory authorities from any other public or private entity, market interests or governments. Having appeals go through the Courts helps to establish the independence of regulatory decisions from political interference. This is also necessary given that in some countries local municipalities are involved in these decisions.

Amendment 7
ARTICLE 1, POINT 12
Article 22d, paragraph 2 a (new) (Directive 2003/54/EC)

2a. Regulatory authorities shall have the right to enter into agreements with other EU regulatory authorities to foster regulatory cooperation.

Justification

Regulatory authorities need to be empowered under their national legislation to establish agreements with other EU regulatory authorities in order to foster greater regulatory cooperation and consistency.