



**COUNCIL OF  
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**DRAFT STATEMENT OF THE COUNCIL'S REASONS**

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Subject : Common position adopted by the Council on ... with a view to 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  
- Draft statement of the Council's reasons

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**DRAFT STATEMENT OF THE COUNCIL'S REASONS**

## DRAFT STATEMENT OF THE COUNCIL'S REASONS

### I. INTRODUCTION

1. On 19 September 2007, the Commission presented a proposal for a Directive amending Directive 2003/54/EC, based on Articles 47(2), 55 and 95 of the Treaty, together in a package with four other proposals concerning the internal energy market.
2. The Committee of the Regions and the European Economic and Social Committee delivered their opinions on the complete package on 10<sup>1</sup> and 22 April 2008<sup>2</sup> respectively.
3. The European Parliament adopted its Opinion<sup>3</sup> at first reading on 18 June 2008, approving 156 amendments. The Commission did not present a modified proposal.
4. On , the Council adopted its Common Position in accordance with Article 251 of the Treaty, in the form of a recast directive.

### II. OBJECTIVE OF THE PROPOSAL

5. The proposal is part of the third internal energy market package, together with the Regulation on conditions for access to the network for cross-border exchanges in electricity, the Directive concerning common rules for the internal market in natural gas, the Regulation on conditions for access to the natural gas transmission networks, and the Regulation establishing an Agency for the Cooperation of Energy Regulators. It aims at completing the internal electricity market by introducing in particular:
  - provisions regarding the effective separation of transmission from generation and supply activities, including a procedure for the certification of transmission system operators of the Community as well as from third countries;

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<sup>1</sup> OJ C 172, 5.7.2008, p. 55.

<sup>2</sup> OJ C 211, 19.8.2008, p. 23.

<sup>3</sup> OJ C....

- provisions aiming at improving the independence of national energy regulators and at harmonising their powers at Community level;
- provisions aiming at improving regional cooperation;
- provisions improving the functioning of the energy market.

### III. ANALYSIS OF THE COMMON POSITION

#### 6. **General Remarks**

6.1. The Council has considered it more effective, more transparent and coherent with Directive 2003/54/EC as well as more reader friendly to recast the provisions of the Directive. However, in doing this, the Council has as a general principle fully respected the amending proposal of the Commission in the sense that it has not opened any other provision not being part of the Commission proposal, unless changes were necessary following from the changes introduced by the Council to the proposal, changed references resulting from the renumbering of the Articles etc. To the extent possible the Council has followed the Commission's approach regarding an identical treatment of the electricity and gas sectors.

The Commission has accepted all the changes introduced by the Council to its proposal.

6.2. Concerning the *156 amendments adopted by the European Parliament*, the Council has followed the Commission in

- accepting the following 21 amendments:  
fully (sometimes with redrafting): 33, 50, 68, 119, and 137;  
partly/in principle/in spirit: 5, 10, 35, 95, 97, 98, 101, 105, 111, 125, 127, 129, 130, 133, 135, and 138;

and

- rejecting the following 38 amendments: 3, 7, 9, 13, 154, 168, 27, 28, 31, 32, 37, 156, 51 - 53, 62 - 64, 67, 69, 75, 76, 78, 81, 91, 96, 103, 104, 169, 116, 157, and 139 - 145, on grounds of substance and/or of form.

6.3. The Council has deviated from the Commission position in

- accepting one amendment: 90

and

- rejecting the following 106 amendments: 1, 2, 4, 6, 8, 11, 12, 14 - 26, 29, 30, 34, 36, 38, 39, 155, 41, 42, 44 - 48, 54 - 61, 65, 66, 70 - 74, 77, 79, 80, 82 - 89, 92 - 94, 99, 100, 102, 106 - 110, 112 - 115, 117, 118, 120 - 124, 126, 128, 131, 132, 134, 136, 146 - 153.

## 7. Specific Remarks:

7.1. Regarding the *EP amendments* where the Council has deviated from the *Commission position*:

- a) The Council has accepted amdt 90 because it is as the EP of the opinion that it is not appropriate to take decisions through committee procedure on DSO activities and independence.
- b) The Council has rejected the 106 amendments listed above (point 6.3.) on the following grounds:
  - i) The amendments concern provisions which are not part of the Commission proposal; those amendments have been rejected as a question of principle (see above under 6.1): amdts 1, 2, 4, 8, 16, 17 - 19, 21, 24, 29, 30, 34, 36, 38, 39, 155, 41, 42, 44 - 48, 56 - 60, 71 - 74, 77, 79, 80, 83 - 88, 92 - 94, 146 - 149.
  - ii) The amendments do not have added value, mainly because the issues are (partly) sufficiently covered by other parts of the text: amdt 14 is already (partly) covered by recitals 30 and 31; amdt 26 is referring to a recital which is giving a non-exhaustive list of examples; amdt 65: the issue is sufficiently covered by Art. 9; amdt 66: the issue is covered by Art. 47 on reporting; amdt 82: the issue is sufficiently covered by Articles 16 and 29; amdt 99: the issue is sufficiently covered by Art. 36(6-8); amdt 100: details on cross-border cooperation are already laid down in Art. 37; amdt 102: the first part is sufficiently covered by Art. 10 on certification of TSOs, the second part by Art. 36(6-8); amdt 110: the power of regulators to impose sanctions is already reflected in Art. 36(4) - see also below under vi); amdt 117 is already covered by Art. 36(6); amdt 124: the issue is sufficiently covered by Art. 36(1)(h); amdt 131: the issue is covered in a general way by Art. 35(c) and Art. 16 of the electricity Regulation; amdt 153 is covered by point j of the Annex.

- iii) The amendments introduce text which is not appropriate or necessary in this Directive or which is not in line with the scope of the Directive: 12, 61, 106 - 108, 109, 113, 114, 121, 134, 136, 150 - 152.
- iv) The amendment is introducing a recital which does not have a corresponding Article: amdts 6, 15, 20.
- v) The Council considers that the list of duties and powers of the regulatory authorities as in Art. 36 of the common position is sufficient; the following amendments go (partly) beyond the tasks the Council is attributing to the regulators: amdts 112, 115 (which is also partly covered by Art. 40 on retail markets transferred from the electricity Regulation), 118 (which is also partly covered by Art. 36(4)), 120 - 123, 128, 132.
- vi) The amendments introduce text which does not correspond to the role which the Council is giving to the Agency: 11, 23, 55, 110, 126.
- vii) The amendment introduces text which does not correspond to the role which the Council is attributing to TSOs: amdt 70.
- viii) The Council is of the view that the common position reflects sufficiently the aim of regional cooperation; amdts 22, 25 and 54 are therefore not necessary.
- ix) The Council considers that it is up to Member States to decide to which authority they delegate the task of monitoring DSO activities and therefore does not accept amdt 89.

7.2 Concerning the *Commission proposal*, the Council has introduced certain other modifications (of substance and/or of form); the main ones are set out below.

- a) *Effective separation of network operation from generation and supply activities:*  
 In addition to the two options proposed by the Commission (ownership unbundling (OU) and the Independent System Operator (ISO)), the Council, in agreement with the Commission, considered it appropriate to introduce a third option, the Independent Transmission Operator (ITO), for the case a transmission system operator is part of a vertically integrated undertaking (VIU) at the entry into force of the Directive (new Chapter V with the Articles 17 - 23, corresponding recitals 15 and 16). The three options are on equal footing and will be available for both the electricity and the gas sector.

The ITO-provisions will ensure the effective independence of the operator (Arts. 17 and 18), its management (Art. 19) and the supervisory body (Art. 20) and that conflicts of interest are avoided. The setting up of a compliance programme and compliance officer (Art. 21) is also contributing to this aim. Moreover, undistorted investment incentives and the development of interconnection infrastructure (Art. 22) as well as fair and non-discriminatory network access (Art. 23) will be ensured.

Additional powers and competences for the regulatory authorities have been added in Art. 36(5) in order to ensure compliance with the provisions of Chapter V. In addition, two paragraphs have been added to Art. 6 regarding regional cooperation where ITOs are involved. Finally, Art. 47 on reporting provides in paragraphs 3 to 5 that the Commission will assess, as part of a general review, the implementation of the ITO option against certain criteria two years after the date of transposition of the Directive.

The ITO provisions of the common position aim at balancing concerns on the scope, timeframe and enforceability of the ITO-option with preserving the financial interest of the VIU and keeping it workable. That is one of the reasons why the Council has not considered it appropriate to introduce provisions on a trustee.

In order to take account of cases where arrangements are in place for a transmission system belonging to a VIU which guarantee more effective independence of the TSO than the provisions of Chapter V, an additional provision has been introduced in Article 9(9).

*b) Level playing field*

Linked to the future presence of three different unbundling models on the Community market is the introduction of a so-called level playing field clause in Article 42, together with the corresponding recital 17. It gives notably a number of criteria for measures which Member States have the possibility to take in order to ensure a level playing field.

c) *Certification of TSOs of the Community and of third countries:*

The common position has two Articles on certification of TSOs: a general one ([Article 10](#)), and one on certification in relation to third countries ([Article 11](#)) which has replaced Article 8a of the Commission proposal. Article 11 ensures on the one hand that TSOs of third countries have to respect the same unbundling rules as Community TSOs; on the other hand, it introduces the criterion of security of energy supply of the Member States and the Community which has to be taken into account when certification is granted.

In addition, the Council has considered it appropriate to transfer the part of the certification procedure which sets out the role of the Commission in this procedure to a new Article 3 of the electricity Regulation. Moreover, the main decision on certification will remain with the national regulatory authorities while the Commission is requested to give its opinion on the certification. National regulators must take utmost account of that opinion.

d) *Regulatory authorities*

The Council has introduced two additional paragraphs to [Article 34](#) which ensure that the principle of a single regulator at national level combined with unique representation (e.g. at the Agency) is compatible with the current existence in some Member States of regulators at regional level or for small and isolated parts of the territory ([Art. 34\(2+3\)](#)). While ensuring the independence of the regulatory authorities, the text of the common position also clarifies that this does not mean that regulators are free from judicial control or parliamentary supervision ([recital 27](#)) or can ignore broader objectives e.g. on environmental sustainability or on public service obligations ([Art. 34\(4\)](#)).

The common position also ensures that, when carrying out their duties, regulators have the possibility to act, where relevant, in close cooperation with other authorities, such as competition ones, while preserving their independence and without duplicating the tasks (e.g. monitoring) usually carried out by other authorities ([Art. 36\(2\)](#)).

e) *Regulatory regime for cross-border issues:*

The paragraphs setting out the role of the Agency (Article 37, paragraphs 3 and (partly) 4) have, for legal reasons, been transferred to the Agency Regulation (new Article 8). The Agency will be involved as a last resort, at the request of national regulators or if national regulators don't reach an agreement within a certain time frame.

f) *Retail markets:*

The Council has considered it appropriate to redraft the Article on retail markets, taking *i.a.* out the cross border reference, and transfer it from the electricity Regulation (Art. 7a of the Commission proposal) to the Directive (new Article 40).

g) *Derogations*

In the light of the recast, the Council considered it appropriate to update Article 44, in particular regarding a derogation from the unbundling provisions for small Member States.

Moreover, a clarification has been added to Article 44(2) regarding the notion "undertaking performing any of the functions of generation or supply" for the case of net final customers that also perform, in a marginal way, the functions of generation/supply of electricity.

h) *Other points:*

- The Council considered it appropriate not to exclude *minority shareholding of producer/supplier in ownership unbundled TSOs* as long as this does not entail any control or any influence of one on the other and cannot lead to a conflict of interest (Article 9(2)).
- The common position contains, with respect to *public ownership*, the possibility to achieve ownership unbundling with two separate public bodies through a provision recognising that two distinct public bodies can be considered as two persons for the purpose of implementing ownership unbundling (Article 9(6)).

- Some technical drafting changes have been made to clarify the provision on *combined operators* (Article 28). This provision allows that a combined operator can be operated, alternatively, either as an ownership unbundled operator, as an Independent System Operator or as an Independent Transmission Operator.
  - Recital 30 introduces and explains the notion of *virtual power plants* as one of the possible measures to promote effective competition.
  - Finally, in line with the recast format, the Council has introduced a new Article to *repeal* the current legislative act (Art. 48)
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