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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 12.1.2009
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2007/0199 (COD)

**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT**

pursuant to the second subparagraph of Article 251(2) of the EC Treaty

concerning the

**common position of the Council on the adoption of a Regulation of the European
Parliament and of the Council withdrawing Regulation (EC) No 1775/2005 on conditions
for access to the natural gas transmission networks**

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1. BACKGROUND

Proposal transmitted to the European Parliament and the Council 19.09.2007
(document COM(2007) 528 - 2007/0195/COD) on:

European Economic and Social Committee opinion delivered on: 22.04.08

Committee of the Regions opinion delivered on: 10.04.08

European Parliament opinion (first reading) delivered on: 9.07.2008

Common position adopted by unanimity on: [09.01.2009]

2. AIM OF THE COMMISSION PROPOSAL

This proposal is part of the third legislative package for an internal EU gas and electricity market ("Third Package"), which includes two Directives and three Regulations.

The main objective of the package is to put in place the regulatory framework needed to make market opening fully effective and create a single EU gas and electricity market in the interest of the citizens and of the industry of the European Union. This will help to keep prices as low as possible and increase standards of service and security of supply.

This is done through the following main measures:

- more effective regulatory oversight by independent national regulators;
- establishment of an Agency to ensure effective cooperation between national regulators and take decisions on all relevant cross-border issues;

- compulsory cooperation between network operators to harmonise all rules relating to the transport of energy across Europe and to coordinate investment planning;
- effective unbundling of the generation and transmission of energy so as to eliminate any conflict of interests, promote network investment and prevent any discriminatory behaviour;
- increased transparency and better functioning of the retail market;
- increased solidarity and regional cooperation between Member States to ensure greater security of supply.

3. COMMENTS ON THE COMMON POSITION

3.1. General comments

The common positions adopted by the Council on the five texts that make up the Third Package contain all the essential components of the Commission's proposal that are needed to ensure the proper functioning of the internal gas and electricity market and, more generally, to achieve the essential objectives set out above. It can therefore be generally supported by the Commission (see 3.2 below).

The first reading focused on obtaining agreement within the Council. The amendments adopted by the European Parliament were therefore not formally incorporated into the common position. Negotiations to this end will take place during the second reading. Some amendments adopted by the European Parliament are however taken into account in the common position (see 3.3 below). The Commission considers that a number of the amendments that are not covered should be taken into account in the second reading (see 3.4 below).

3.2. Specific comments

The main changes from the Commission's proposal are as follows:

3.2.1 Establishment and change of network codes

The common position changes the Commission proposal regarding the process of establishing and changing the network codes. It introduces a new concept of framework guidelines, prepared by the Agency, which have to be applied by the TSOs when drafting European network codes. (see 3.3 for Commission's assessment)

3.2.2 Network Investment Plan

The Commission proposed that ENTSOG should draw up a network investment plan every two years. The Council has changed this into a non-binding indicative network development plan. (see 3.3 for Commission assessment)

3.2.3 Costs of ENTSO

The Council adds the requirement for the regulatory authorities to approve the costs of ENTSO if they are reasonable and proportionate. The Commission can accept this amendment

if it is added that this approval of costs is ex ante, so as to prevent regulatory uncertainty for the TSO regarding compensation of costs for participation in ENTSO.

3.2.4 Tariffs

The Commission proposed that tariffs should be established independently for entry and exit points. The Council included a two-year implementation period for Member States to comply, which is acceptable to the Commission.

3.2.5 Transparency in the use of storage facilities

The Commission proposed full transparency in the use of storage and LNG facilities. The Council has amended the article, stating that storage system operators may be exempted from publishing information on storage use if there is only one storage user, if publication would damage his commercial position and if the regulator approves non-publication. (see 3.3 for Commission assessment)

3.2.6 Guidelines

The Commission proposed an extensive list of guidelines, which covered both the existing guidelines, a number of new topics, and guidelines that will be based on network codes.

The Council has first of all deleted all explicit references to guidelines that are already mentioned in the list of network codes. The Commission can agree with this choice of legal drafting.

However, the Council also deleted certain options in the guidelines:

- The Commission proposed the possibility of issuing guidelines on retail markets. Member States are asked to define procedures for data exchange and switching, but the Council has moved the article to the Directive. At the same time it has deleted the possibility of issuing guidelines. The Commission can agree to both.
- The Commission proposed the possibility of issuing guidelines on secondary markets for LNG and storage. The Council has deleted this option. The Commission considers this deletion to be unacceptable as secondary markets play an important role in optimising infrastructure use, both for transmission, storage and LNG, and therefore rules for all three could become necessary in the future.

3.3. Aspects of the common position reflecting the European Parliament's amendments

A number of amendments of the European Parliament are reflected in the common position, either with the same wording or in substance. These are as follows:

3.3.1 Power of the Agency to develop framework guidelines and codes

Both the common position of the Council and the amendments by the European Parliament (amendment 50) change the Commission proposal regarding the process of establishing network codes. It introduces a new concept of framework guidelines, prepared by the Agency, which have to be applied by the TSOs when drafting European network codes.

The Commission supports a more clearly defined role for the Agency in the rule-making process. Instead of giving its opinion only after a code has been drafted by the TSOs, the Agency will define the requirements for codes ex ante in the form of framework guidelines in a specific area.

The European Parliament also proposes that the Agency should adopt binding network codes (amendment 51/rev), whereas the Council maintains that only the Commission can make the codes binding. The Commission cannot support Parliament's attempt to make the Agency stronger, since it is contradictory to the ruling of the European Court of Justice in the Meroni case, which stated that the Commission cannot delegate discretionary powers to another body.

3.3. Consultation and monitoring by ENTSO

Both the common position and an amendment of the European Parliament change the Commission proposal regarding consultation by ENTSO for gas. The common position clarifies the role of ENTSO compared to consultation by the Agency. Parliament's amendment (amendment 22) is in the same direction but it is too restrictive to maintain sufficient scope for ENTSO consultation and monitoring.

3.3.3 Transparency and confidentiality

The Commission proposed full transparency in the use of storage and LNG facilities. The Council has amended the article, stating that storage system operators may be exempted from publishing information on storage use if there is only one storage user, if publication would damage his commercial position and if the regulator approves non-publication. Parliament has proposed the inclusion of an article (amendment 42) that allows storage and LNG system operators not to publish data if this would be in breach of confidentiality.

In the Commission's view the amendment by Parliament is not restrictive enough and gives preference to confidentiality over transparency, whereas a competitive market requires transparency to be the rule and confidentiality the exception. The Council's amendment is acceptable for this particular case of single users of storage facilities, as these are usually small storage facilities that system operators manage primarily for their own use. The possibility of being exempted from transparency obligations is rightly limited to cases of single storage users, as the market can be assumed to know that some of these (small) storage sites have only one user. Publication could therefore damage their commercial position of the capacity-holder of the storage, especially if competitors develop storage facilities in new markets.

3.4. European Parliament amendments approved by the Commission but not endorsed by the Council

The Commission can accept – in some cases subject to more precise wording or redrafting - in full or at least in part the majority of the amendments adopted by Parliament. This concerns the following main issues.

3.4.1 Power of the Agency regarding Investment Plans

Under the common position, ENTSO adopts an indicative 10-year network development plan. This plan is reviewed by the Agency, which can propose changes to the plan to the Commission and ENTSO. The European Parliament proposes that the Agency should adopt a

binding network investment plan, to be prepared by ENTSO. The Commission cannot agree to the Agency's being granted discretionary power to adopt a binding investment plan. The Commission could however support the Agency's adopting a non-binding investment plan, or playing a role in monitoring consistency between the national investment plans as approved by the national regulators and the 10-year network development plan of ENTSO.

3.4.2 Powers of the national regulatory authorities

Parliament has proposed extending the powers of regulatory authorities, by increasing their role in control over capacity allocation and congestion management for storage and LNG (amendment 41), as well as their role in enforcement of the Regulation (amendments 39, 46).

4. CONCLUSIONS

The Commission takes the view that the common position maintains the key points of the Commission's proposal. The Commission finds that, on substantive issues, the common position generally strikes a good balance and makes a viable compromise, which will enable the internal gas and electricity market to operate smoothly. The Commission considers, however, that a number of amendments adopted by the European Parliament on first reading should be only be incorporated on second reading.