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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, XXX  
COM(2007) YYY final

2007/aaa (COD)

Unofficial Version

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**establishing an Agency for the Cooperation of Energy Regulators**

(PRESENTED BY THE COMMISSION)

{SEC(2007) XXX}  
{SEC(2007) ZZZ}

## **EXPLANATORY MEMORANDUM**

Electricity and gas are at the heart of the Europe's well-being. Without a competitive and efficient European electricity and gas market, Europe's citizens will pay excessive prices for what is one of their most fundamental daily needs. The electricity and gas market is also essential for Europe's competitiveness as energy is an important input for European industry.

Furthermore, a competitive and efficient electricity and gas market is a pre-condition to tackle climate change. Only with a functioning market is it possible to develop an effectively functioning emissions trading mechanism and a renewable energy industry that will meet the ambitious objective, agreed by the European Council of ensuring that the EU's energy mix is sourced 20% from renewable energy sources by 2020.

Finally, a competitive EU-wide electricity and gas market is crucial to ensure the security of Europe's energy supply, as only a Europe-wide and competitive market generates the right investment signals and offer fair network access for all potential investors, and provides real and effective incentives to both network operators and generators to invest the billions of Euros that will be needed in the EU over the next two decades.

The process of liberalising the electricity and gas market started about 10 years ago. During these 10 years, many of Europe's citizens have benefited from more choice and more competition, with improved service and security. The assessment carried out by the Commission and Europe's energy regulators has however demonstrated that the process of developing real competitive markets is far from complete. In practice, far too many of the EU's citizens and businesses lack a real choice of supplier. Market fragmentation along national borders, a high degree of vertical integration and high market concentration are at the root of the lack of a truly internal market.

Since the entry into force of the present electricity and gas Directives in July 2003, the Commission has constantly monitored their implementation and their effects on the market, and it has been in regular contact with all stakeholders concerned. In particular, the Commission has, every year, published its benchmarking report on the implementation of the internal electricity and gas market. It has organised the Electricity Regulatory Forum of Florence and the Gas Regulatory Forum of Madrid bringing together on a regular basis ministries, national regulatory authorities, the Commission, transmission system operators, suppliers, traders, consumers, trade unions, network users and power exchanges.

At the end of 2005, the Hampton Court European Council called for a true European Energy Policy. In response to this call the Commission published on 8 March 2006 a Green Paper on developing a common, coherent European Energy Policy. The public consultation yielded 1680 responses. Already in 2005, the Commission started an inquiry into competition in gas and electricity markets. The energy inquiry responded to concerns voiced by consumers and new entrants in the sector about the development of wholesale gas and electricity markets and limited choice for consumers. The Final Report of the inquiry was adopted by the Commission together with a comprehensive package of measures, to propose a new Energy Policy for Europe on 10 January 2007.

The Commission Communication of 10 January 2007 entitled "An Energy Policy for Europe"<sup>1</sup> highlighted the importance of completing the internal market in electricity and natural gas. It was backed by a comprehensive internal market report, the final results of the competition sector inquiry and in-depth reviews of the situation of the national electricity and gas market. In parallel, the Commission has carried out an impact assessment to assess policy options related to the completion of the internal gas and electricity market. The impact assessment included a stakeholder consultation. A total of 339 questionnaires were filled out by organisations having their roots in 19 countries. In addition 73 questionnaires were received by organisations not connected to a particular country. Interviews were conducted with 56 additional stakeholders, mainly companies which could be affected by the unbundling of their assets or increased transparency requirements.

The 2007 Spring European Council invited the Commission to propose further measures, such as:

- the effective separation of supply and production activities from network operation;
- the further harmonisation of the powers and enhanced independence of the national energy regulators;
- the establishment of an independent mechanism for cooperation among national regulators;
- the creation of a mechanism for transmission system operators to improve the coordination of networks operation and grid security, cross-border trade and grid operation; and
- greater transparency in energy market operations.

The European Council also underlined the need to strengthen security of supply in a spirit of solidarity between Member States.

In its Resolution on Prospects for the internal gas and electricity market adopted on 10 July 2007, the European Parliament expressed strong political support for a common energy policy, considering that "transmission ownership unbundling is the most effective tool to promote investments in infrastructures in a non-discriminatory way, fair access to the grid for new entrants and transparency in the market". Parliament underlined, however, that other measures were also necessary and that the differences between the electricity and gas markets might call for differing implementation arrangements. Parliament also called for enhanced "cooperation between national regulators at EU level, through an EU entity, as a way to promote a more European approach to regulation on cross-border issues".

The Council of European Energy Regulators (CEER) welcomed the Commission's Communication of 10 January, and strongly endorsed the call for new EU legislation to put the single energy market project back on track. On 6 June 2007, the European Energy Regulators published a set of six papers taking position on the main issues in the new energy legislation. They supported in particular the Commission's proposals for a strengthened independent regulatory oversight at national and EU level, and for effective unbundling of the

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<sup>1</sup> COM(2007) 1 final.

transmission networks. The regulators clearly recommended that ownership unbundling of transmission should, in principle, be the model required in new EU legislation and should apply to both electricity and gas.

These elements were taken fully into consideration in drawing up the current proposals, which are summarised below.

## **1. EFFECTIVE SEPARATION OF SUPPLY AND PRODUCTION ACTIVITIES FROM NETWORK OPERATIONS**

### **1.1. Existing unbundling provisions are not sufficient to ensure a well-functioning market**

Existing legislation requires that network operations be legally and functionally separated from supply and generation or production activities. Member States have complied with this requirement by applying different organisational structures. Several Member States have created a totally separate company for network operation, while others have created a legal entity within an integrated company. The requirements of legal and functional unbundling have made a positive contribution to the emergence of competitive electricity and gas markets in several Member States.

However, experience has shown that where the transmission system operator is a legal entity within an integrated company, three types of problems arise.

Firstly, the transmission system operator may treat its affiliated companies better than competing third parties. In fact, integrated companies may use network assets to make entry more difficult for competitors. The underlying reason is that legal and functional unbundling do not solve the fundamental conflict of interest within integrated companies, whereby the supply and production interests aim to maximise their sales and market share while the network operator is obliged to offer non-discriminatory access to competitors. This inherent conflict of interest is almost impossible to control by regulatory means as the independence of the transmission system operator within an integrated company is impossible to monitor without an excessively burdensome and intrusive regulation.

Secondly, under the current unbundling rules, non-discriminatory access to information cannot be guaranteed as there is no effective means of preventing transmission system operators releasing market sensitive information to the generation or supply branch of the integrated company.

Thirdly, investment incentives within an integrated company are distorted. Vertically integrated network operators have no incentive for developing the network in the overall interests of the market and hence for facilitating new entry at generation or supply levels; on the contrary, they have an inherent interest to limit new investment when this will benefit its competitors and bring new competition onto the incumbent's "home market". Instead, the investment decisions made by vertically integrated companies tend to be biased to the needs of supply affiliates. Such companies seem particularly disinclined to increase interconnection or gas import capacity and thereby boosting competition in the incumbent's home market to the detriment of the internal market.

To sum up, a company that remains vertically integrated has an in-built incentive both to under-invest in new networks (fearing that such investments would help competitors to thrive

in “its” home market) and - wherever possible - to privilege its own sales companies when it comes to network access. This damages the EU's competitiveness and its security of supply and prejudices the attainment of its climate change and environmental objectives.

Investment figures from recent years show this: vertically integrated companies have, for example, reinvested significantly less of their receipts from cross-border congestion rents in new interconnectors than fully unbundled ones. Effective unbundling removes the kind of distorted investment incentives typical of vertically integrated transmission system operators. It thus promotes security of supply. The Commission has observed that effective unbundling of transmission system operators promotes TSO investment activity. The Member States concerned have subsequently attracted new infrastructure investors that, for example, build terminals for liquefied natural gas (LNG).

Moreover, the price of electricity on different markets in recent years shows the benefits of ownership unbundling: over the last 10 years, vertically integrated companies have raised prices more, and maintained higher prices, than fully unbundled ones.

## **1.2. More effective unbundling of transmission system operators is therefore clearly necessary.**

The concrete proposal in this respect makes it clear that the preferred option of the Commission remains ownership unbundling. In practice this means that Member States must ensure that the same person or persons cannot exercise control over a supply undertaking and, at the same time, hold any interest in or exercise any right over a transmission system operator or transmission system. This provision also applies *vice versa*, that is, control over a transmission system operator precludes the possibility of holding any interest in or exercising any right over a supply undertaking.

This option allows for a situation in which the same person, for example a pension fund, holds non-controlling minority interests in both a transmission system operator and a supply undertaking. However, such a minority shareholder cannot have blocking rights in both undertakings, nor can it appoint members of their boards, nor can any person be a member of the boards of both undertakings. This option, making a clear ownership separation between transmission system operators and any supply undertakings, is the most effective and stable way of achieving effective unbundling of the transmission network and thus of solving the inherent conflict of interest.

In order to implement this option, Member States may choose the following arrangement which may help to fully preserve the interests of the shareholders of vertically integrated companies. The shares of the vertically integrated company may be divided into shares of the company owning the transmission system on the one hand and shares of the supply company on the other. Subsequently, these shares may be attributed to the shareholders of the previously vertically integrated company.

Whilst the Commission considers that ownership unbundling remains the preferred option it does however provide an alternative option for Member States that choose not to go down this path. This option must, however, provide the same guarantees regarding independence of action of the network in question and the same level of incentives on the network to invest in new infrastructure that may benefit competitors. This option, a derogation from the basic ownership unbundling approach, is known as the "Independent System Operator". This option enables vertically integrated companies to retain the ownership of their network assets, but

requires that the transmission network itself is managed by an independent system operator - an undertaking or entity entirely separate from the vertically integrated company - that performs all the functions of a network operator. In addition, to ensure that the operator remains and acts truly independently of the vertically integrated company, regulation and permanent regulatory monitoring must be put in place.

In some instances, vertically integrated energy companies may be forced to dispose of some of their assets, notably their transmission networks, or to hand over the operation of such assets to a third party, in order to comply with the proposed requirements of effective unbundling. But there does not appear to be any alternative to the options proposed if we are to ensure the full independence of the TSOs.

The two options apply in the same manner to the electricity and gas sector. Although the Commission recognises that progress towards ownership unbundling generally speaking is currently more advanced in the electricity sector in the EU, the Commission has found no convincing argument to justify different treatment of the two sectors. In particular, the fundamental conflict of interest between the supply and production activities on the one hand and network operation and development on the other applies equally to both sectors. Moreover, the key to concluding long-term supply agreements with upstream gas producers is not the ownership of the network but the existence of a strong customer base. The EU will undoubtedly remain a highly attractive gas supply market irrespective of the ownership structure of the purchasing companies which, once effectively unbundled, will be able to compete for gas on an equal footing. The Commission recognises, moreover, that gas transportation, as opposed to electricity transmission, involves the physical movement of gas molecules through pipelines. The TSO therefore has a greater degree of control in defining the direction of flows and the capacity utilisation in the system. This means that effective unbundling of the gas networks is at least as important as for the electricity networks.

However, with a view to encouraging investment in new energy infrastructures by supply and production companies, the present proposal includes the possibility of a temporary derogation to ownership unbundling rules for the construction of new infrastructure. This exemption will be applied on a case by case basis, taking into account in the economics of the new investment, the internal market objectives and the security of supply objective.

In keeping with Article 295 EC, the proposal applies in the same way to publicly and privately owned companies. This means that irrespective of its public or private nature, no person or group of persons would be able alone or jointly to influence the composition of the boards, the voting or decision making of either transmission system operators or the supply or production companies. This ensures that where supply or production activities are in public ownership, the independence of a publicly owned transmission system operator is still guaranteed; but these proposals do not require state owned companies to sell their network to a privately owned company. For instance, to comply with this requirement, any public entity or the State could transfer the rights (which provide the “influence”) to another publicly or privately owned legal person. The important thing is that in all cases where unbundling is carried out, the Member State in question must demonstrate that in practice, the results are truly effective and that the companies operate entirely separate from one another, providing a real level-playing field across the whole of the EU.

Finally, for Member States that have no gas or electricity transmission networks but only a distribution network, the provisions on the ownership unbundling of transmission networks do not apply

### **1.3. Third country aspects**

The present proposal requires the effective unbundling of transmission system operators and supply and production activities not only at national level but throughout the EU. It means in particular that no supply or production company active anywhere in the EU can own or operate a transmission system in any Member State of the EU. This requirement applies equally to EU and non-EU companies.

The package contains safeguards to ensure that in the event that companies from third countries wish to acquire a significant interest or even control over an EU network, they will have to demonstrably and unequivocally comply with the same unbundling requirements as EU companies. The Commission can intervene where a purchaser cannot demonstrate both its direct and indirect independence from supply and generation activities.

Furthermore, well functioning markets and networks are essential for the competitiveness of the economy and for the well-being of the citizens. The goal of the current proposal is to promote competition in the European energy markets and to promote the proper functioning of these markets. In this light it is imperative - without prejudice to the international obligations of the Community - to ensure that all economic operators active on European energy markets respect and act in accordance with market investor principles. Therefore, the Commission proposes a requirement that third country individuals and countries cannot acquire control over a Community transmission system or transmission system operator unless this is permitted by an agreement between the EU and the third country. The aim is guarantee that companies from third countries respect the same rules that apply to EU based undertakings in both letter and spirit - not to discriminate against them. Finally, the Commission will also hold a rapid and in-depth review of the wider aspects of the EU's external policy in energy, and will make the results of that work public.

Concluding on the important question of unbundling, the present proposals for effective unbundling are a necessary and decisive step to achieving EU-wide market integration. It may ultimately help to create supra-national transmission system operators as the operators are no longer held back by mutual distrust. But at the same time, if supra-national transmission operators were created without ensuring their full independence, competition between affiliated supply and production companies would likely be weakened due to the risk of collusion. In the absence of effective unbundling such cooperation would therefore give rise to competition concerns. Notably, the present proposals include several additional measures to promote EU market integration, relating in particular to improved cooperation among transmission system operators.

## **2. ENHANCED POWERS AND INDEPENDENCE OF NATIONAL REGULATORS**

### **2.1. Strong national regulators to oversee the running of electricity and gas markets**

The existing electricity and gas Directives require Member States to establish regulatory authorities. In several Member States, Regulatory authorities are well-established bodies with substantial powers and resources, allowing them to ensure proper market regulation. In other Member States, regulatory authorities have only recently been established and their powers are weaker or dispersed over different bodies. The comprehensive country reviews carried out by the Commission have revealed this lack of uniformity and in many cases the weakness of the regulatory authority.

The experience of Member States whose markets have been open for several years, and of other utility sectors open to competition, clearly indicates that strong regulators are necessary for a properly functioning market, in particular as regards the use of network infrastructures.

For these reasons, the present proposal aims to strengthen the powers of the regulatory authorities. First, they would be given a clear mandate to cooperate at European level, in close cooperation with the Agency for the Cooperation of Energy Regulators and the Commission, to ensure competitive, secure and environmentally sustainable internal electricity and gas markets within the European Union, and effective market opening for all consumers and suppliers.

Second, it is proposed to strengthen their market regulation powers, in particular in the following areas:

- monitoring compliance of transmission and distribution system operators with third party access rules, unbundling obligations, balancing mechanisms, congestion and interconnection management;
- reviewing the investment plans of the transmission system operators, and providing in its annual report an assessment of how far the transmission system operators' investment plans are consistent with the European-wide 10-year network development plan; monitoring network security and reliability, and reviewing network security and reliability rules;
- monitoring transparency obligations;
- monitoring the level of market opening and competition, and promoting effective competition, in cooperation with competition authorities; and
- ensuring that consumer protection measures are effective.

Electricity and gas differ fundamentally from other traded goods because they are network-based products that are impossible or costly to store. This makes them sensitive to market abuse and regulatory oversight over undertakings active in the electricity and gas market need to be increased. Regulators therefore need to have access to information on the operational decisions of the companies. It is proposed to oblige companies to keep record of the data related to their operational decision for five years at the disposal of national regulatory authorities, as well as at the disposal of competition authorities and the Commission, so that these authorities are able to control effectively allegations of market abuse. This will limit the scope of market abuse, increase the trust in the market, and thereby stimulate trade and competition.

Some types of traders (e.g. banks) already have such obligations under the Markets in Financial Instruments Directive, and they should not have double obligations. Therefore the record keeping obligations should be without prejudice to, and compatible with, the existing Community legislation on financial markets. Regulators of the energy market and the financial markets, need to cooperate in order to enable each other to have an overview over the markets concerned. Prior to adoption of guidelines defining record keeping requirements, the Agency for the Cooperation of Energy Regulators and the Committee of European Securities Regulators (CESR) are invited to cooperate and advise the Commission on the content of the guidelines.

To enable them to perform their duties, regulatory authorities would be given the powers to investigate, to request all necessary information and to impose dissuasive sanctions. They are also requested to take full account of energy efficiency objectives while performing their regulatory functions.

## **2.2. Demonstrable independence of regulators brings market confidence**

The independence of regulatory authorities is a key principle of good governance and a fundamental condition for market confidence. Existing legislation calls for regulatory authorities to be wholly independent of the interests of the gas and electricity industry. However, it does not specify how such independence can be demonstrably ensured, and it does not guarantee independence from short-term political interests.

As underlined by the 2007 Spring European Council conclusions and by the European Parliament, strengthening national energy regulators' independence is therefore a priority.

It is proposed that the regulatory authority be legally distinct and functionally independent of any other public or private entity, and that its staff and any member of its decision-making body act independently of any market interest and neither seek nor take instruction from any government or other public or private entity. For that purpose, it is proposed that regulatory authorities have legal personality, budgetary autonomy, appropriate human and financial resources and independent management.

## **3. AN INDEPENDENT MECHANISM FOR NATIONAL REGULATORS TO COOPERATE AND TAKE DECISIONS: THE AGENCY FOR THE COOPERATION OF ENERGY REGULATORS**

### **3.1. The positive experience of ERGEG needs to develop into a formal cooperation structure**

Although the internal market for energy has developed considerably, a regulatory gap remains on cross-border issues. In order to tackle this issue, the Commission initiated self-regulatory forums like the Florence (electricity) forum and the Madrid (gas) forum. These forums bring stake holders together in order to strengthen cooperation.

In addition, an independent advisory group on electricity and gas, called the "European Regulators Group for Electricity and Gas" (ERGEG) was established by the Commission in 2003 to facilitate consultation, coordination and cooperation between the national regulatory authorities in the Member States, and between these authorities and the Commission, with a view to consolidating the internal market in electricity and natural gas. ERGEG is composed of representatives of the national regulatory authorities.

ERGEG activities over recent years have made a very positive contribution to the completion of the internal market in gas and electricity by issuing non-binding guidelines and addressing recommendations and opinions to the Commission. Nevertheless, the initiation of self-regulatory forums and setting up of ERGEG has not resulted in the real push towards the development of common standards and approaches that is necessary to make cross-border trade and the development of first regional markets, and ultimately, a European energy market a reality.

As time has progressed the energy sector has become more complex and detailed, and involves to a greater extent different financial interests. The present approach within ERGEG,

which in practice usually requires the agreement of 27 regulators and more than 30 transmission system operators to reach agreement, is not producing sufficient results. It has led to a number of non-binding codes and efforts to reach agreement on common approaches through "gradual convergence" but has not led to real decisions on the difficult issues that now need to be taken.

At present the technical rules that electricity companies must operate under, "grid-codes", differ enormously between Member States and often even within a single Member State. These need to undergo a process of convergence and then harmonisation if we are to integrate energy markets in the EU. .

The Commission has evaluated the different options for organising the required tasks, including whether the Commission would be able to pursue these tasks itself. Harmonising these issues, as well as making progress on new infrastructure, is not a task that typically falls within the Commission's sphere of activities. The Commission has actually never carried out such an activity. It requires the specialist expertise in the 27 national regulatory agencies (NRAs) to work together; it is they that need to agree on amending their national grid codes. In practice, only a body emanating from the national regulators can catalyse all the necessary resources of national regulators that is fundamental to achieving success on these issues. The Agency can through its Regulatory Board – which consists of NRAs- call upon the staff of these NRAs. The Commission is not in that position.

The Commission has concluded that the tasks required could be best fulfilled by a separate entity, independent and outside the Commission. Both the European Council in the spring of 2007 as well as recent European Parliament resolutions, endorsed this conclusion<sup>2</sup>.

The creation of a more powerful network of national energy regulators was therefore considered. The network of competition authorities created in 2004 under Council Regulation No 01/2003 provides a model. Nevertheless, this would necessitate the creation of autonomous powers for the Commission in the energy sector (currently these powers only exist in the area of competition rules). The powers of the NRAs should, in any event, be reinforced and harmonised.

Furthermore, the model of the system of European Central Banks could be applicable, but it lacks a legal basis in the Treaty. Such a model would simply require an amendment of the Treaty.

The Commission therefore came to the conclusion that if an independent body should be established which can make proposals to the Commission regarding decisions that involve substantive decisions and take individual regulatory decisions which are binding on third parties concerning detailed technical issues that are delegated to them, the only solution would be to establish an Agency.

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<sup>2</sup> The European Council agrees in its conclusions to the establishment of an independent mechanism for national regulators to cooperate and take decisions on important cross-border issues, whereas the adopted Vidal Quadras report states that the EP "Welcomes the Commission's proposal to enhance cooperation between national regulators at EU level, through a EU entity, as a way to promote a more European approach to regulation on cross-border issues; underlines that the Commission should play a determining role, whilst not undermining the independence of regulators; believes that decisions by the regulators should be made on specifically defined technical and trade issues and on an informed basis considering, when appropriate, the views of TSOs and other relevant stakeholders, and should be legally binding;".

The main proposed tasks would complement at European level the regulatory tasks performed by the national regulators. The structure should provide a framework for national regulators to cooperate, a regulatory review of the cooperation between transmission operators and scope for taking individual decisions concerning infrastructure in the territory of more than one Member State. This analysis reflects the principles defined by the Commission in the draft inter-institutional agreement on the operating framework for the European regulatory agencies<sup>3</sup>, in particular as regards the power to adopt individual decisions which are legally binding on third parties.

The following proposal draws also on the "ERGEG+" option mentioned in the Commission Communication of 10 January 2007 "An Energy Policy for Europe"<sup>4</sup>.

### **3.2. Main tasks of the proposed Agency for the Cooperation of Energy Regulators**

The Agency would complement at European level the regulatory tasks performed at national level by the regulatory authorities by:

- *Providing a framework for national regulators to cooperate.* It is proposed to improve the handling of cross-border situations. The Agency will lay down procedures for cooperation between national regulators, in particular as regards the exchange of information and the apportionment of competence where more than one Member State is involved. This framework will also promote regional cooperation between national regulators.
- *Regulatory oversight of the cooperation between transmission system operators.* The Agency will have responsibility for monitoring and reviewing the activities of the European Network of Transmission System Operators for Electricity and of the European Network of Transmission System Operators for Gas. In particular, it will be involved in the setting of priorities through the Networks' work programme, in the review of their 10-year investment plan, and in the preparation of technical and market codes. The review of the investment plan is without prejudice to the transmission system operators' liability for technical failures as defined under national law. As regards the technical and market codes, the Agency will be empowered to ask transmission system operators to modify their drafts or to tackle more specific issues in detail. It will also be able to recommend that the Commission make these codes legally binding where voluntary implementation by transmission system operators proves to be insufficient or not suited to certain issues. The Agency may recommend modifying the transmission operators' draft or recommend additional provisions to the Commission. In practice, this mechanism will take the form of a constructive and continuous dialogue between the Agency, transmission system operators and the Commission. The involvement of the Agency will be the key to ensuring that cooperation among transmission system operators proceeds in an efficient and transparent way to the benefit of the internal market.
- *Individual decision powers.* With a view to handling specific cross-border issues, it is proposed to vest the Agency with individual decision powers on exemption<sup>5</sup> requests concerning infrastructure assets of European interest and to decide on the regulatory regime applicable to infrastructure within the territory of more than one Member State. In addition, the Agency would be able to take specific decisions on individual technical issues

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<sup>3</sup> COM(2005)59 final

<sup>4</sup> OJ C [...], [...], p. [...].

<sup>5</sup> As defined in Article 22 of Directive 2003/55/EC and in article 7 of Regulation (EC) No 1228/2003

when these are granted to the Agency under specific Guidelines adopted pursuant to the gas and electricity Directives, under a comitology procedure.

- *General advisory role.* The Agency would in general have an advisory role vis-à-vis the Commission as regards market regulation issues and could issue non-binding guidelines to publicise good practices among the national regulators. On a case-by-case basis, it would also have the power to review, in the light of implementing measures adopted by the Commission in application of Community legislation in the gas and electricity sector, any decisions taken by a national regulatory authority that directly impact on the internal market and provide an opinion to the Commission.

Even though its powers cannot be extended to cover normative decisions (such as the formal adoption of obligatory guidelines) the new Agency will overall play a crucial role in the development and implementation of European gas and electricity market rules.

### **3.3. Governance of the proposed Agency for the Cooperation of Energy Regulators**

The institutional setting and governance principles of the Agency for the Cooperation of Energy Regulators are in principle based on standard rules and practices for Community regulatory agencies.

However, the necessary independence of regulatory functions needs to be taken into account. For that purpose, besides the Administrative Board responsible for all administrative and budgetary matters, it is proposed to create a Board of Regulators, responsible for all regulatory matters and decisions. The Director, appointed by the Administrative Board, after consulting the Regulatory Board, will be chosen from a shortlist adopted by the Commission. The Director will represent the Agency and shall be responsible for the day-to-day management. In addition, the structure of the Agency foresees in a Board of Appeal, which is competent to handle appeals against decisions adopted by the Agency.

### **3.4. Financial aspects**

It is proposed that the Agency should have, given its tasks, a limited staff of 40-50 people. This assessment is based on an extensive analysis of the staff requirements of national regulatory authorities and a careful analysis of the minimum resources necessary to carry out the tasks proposed, in particular in the light of possibilities for synergies in harnessing the resources within national regulatory authorities to assist the work of the agency. The proposed staff is in line with these authorities' needs.<sup>6</sup> As mentioned above, if the Commission were to endeavour to perform the Agencies' tasks, the number of staff required would be much higher.

The total annual costs of the Agency are estimated at approximately €6-7 million per year, of which €5 million for staff expenditure (taking as the average per person the cost of European Commission staff, i.e. €0.117 million per year, which includes expenditures associated with buildings and related administrative expenditures), €1 million operational costs (meetings, studies, as well as translation, publication and public relations costs) and the rest for capital expenditures (relating to the acquisition of movable property and associated expenditure) and mission expenditures.

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<sup>6</sup> An organigram will be attached to the Explanatory Memorandum.

The Agency's annual costs will be covered by Community grants. The Agency has limited revenues stemming from fees to be paid by third parties which are charged when the Agency takes certain decisions.

### **3.5. The role of the Commission**

There are in principle three different safeguards to secure the Commission's position and role as a guardian of the Treaty.

First of all, if the Agency takes a decision, such a decision would only be binding for specific technical situations explicitly foreseen in the Regulation and Directives or provided on a case-by-case basis by binding Guidelines. The Agency would have no political discretion outside this framework.

Secondly, if TSO cooperation or decisions by NRAs threaten effective competition and the efficient functioning of the market, the Commission shall immediately be informed by the Agency and can adopt subsequently the necessary measures to remedy the situation. The Commission may also choose to act on its own initiative.

Third, where a substantive decision needs to be taken, this can only be done by the Commission. In these cases the Agency has a preparatory and advisory role only. The Commission Legal Service has scrutinised the text carefully in this respect to ensure that the Agency has no power of discretionary substantive decision.

Furthermore, it would be for the Commission, through the adoption of binding Guidelines to further specify and lay down the role of the Agency.

## **4. EFFICIENT COOPERATION BETWEEN TRANSMISSION SYSTEM OPERATORS**

### **4.1. Strong cooperation between transmission system operators is necessary for electricity and gas market integration**

For market integration to take place, there also needs to be effective cooperation among transmission system operators (TSOs) and a clear and stable regulatory framework, including regulatory coordination. Network access rules and operational rules need to be compatible, there has to be effective exchange of information between transmission system operators and a good coordination of new investment to increase interconnection capacities. Transmission system operators in gas and electricity already cooperate voluntarily in existing structures such as the European Transmission System Operators (ETSO) and Gas Transmission Europe (GTE). They cooperate on operational issues at regional level and participate in technical bodies such as the Union for the Co-ordination of Transmission of Electricity (UCTE) and the European Association for the Streamlining of Energy Exchange (EASEE-Gas). These multi-layer cooperation initiatives have made a significant contribution to the internal market and have boosted the efficiency and the safety of the networks.

However, this voluntary cooperation has shown its limits for example in the form of network incidents and electricity black-outs due to poor coordination of network operation or missing links in the electricity and gas networks, and difficulties in proposing or agreeing common technical standards. It is therefore proposed to task the transmission operators with strengthening their cooperation in a number of key areas, focusing on the following main issues.

- *Development of market and technical “codes”*. For the integration of the electricity and gas markets a coherent set of technical and market codes are needed. Today, these codes exist on a national basis or through recommendations of organisations such as UCTE or EASEE-gas. The problem with the current situation is threefold: firstly the existing rules do not cover all areas that need to be harmonised in order to make an integrated market function, secondly the national codes are often not compatible with each other and thirdly they are often not legally binding or enforceable. Examples of these codes are UCTE operational handbook for security and reliability of the electricity transmission networks and EASEE-gas recommendations on gas qualities.
- The proposal preserves the voluntary process of the transmission system operators as a pragmatic way of developing detailed technical and market codes. These codes are often technically complicated and there needs to be an efficient process to amend them when necessary. The proposal adds a strong regulatory oversight on the content and on monitoring of compliance and enforcement of these rules by national regulatory authorities, the Agency, and/or the Commission, depending on the nature of the proposal in question. In case the transmission system operators are not able to agree on necessary technical and market codes or do not implement them, these rules can be proposed and adopted through the comitology procedure on the proposal of the Commission.
- In total, the present proposal defines eleven main areas of cooperation. The annual work programmes of the European Network of transmission system operators (see chapter 1.2), prepared in consultation with all stakeholders and the new Agency for the Cooperation of Energy Regulators (see chapter 3), will set priorities and specify in more detail what technical and market codes are needed. Cooperation between transmission system operators should also include implementation monitoring of the technical and market codes.
- *Research and innovation activities of common interest*: TSO cooperation should establish a framework to identify, finance and manage research and innovation activities necessary driving the sound technical development and evolution of the European electricity and gas networks, in particular to promote security of supply and energy efficiency and to enable penetration of low carbon technologies.
- *Coordination of grid operation*. TSO cooperation includes the common operation of networks according to the agreed market and technical codes. It also refers to the exchange of network operational information and the coordinated publication of information on network access, for example through a common transparency platform.
- *Investment planning*. So as to make sufficient transmission capacity available to meet demand and to integrate national markets, network operators would need coordinated long-term planning of system development with a view to planning network investments and monitoring the development of transmission network capacities. The idea is that the European Networks of transmission system operators will publish network development plans, to include the integrated network modelling, scenario development and an assessment of the resilience and deliverability of the integrated system. These development plans should be sufficiently forward looking (e.g. at least 10 years) so as to allow for the early identification of investment gaps, more especially with cross border capacities in mind.

For the last two of these tasks in particular, regional initiatives play a positive role in market integration. The cooperation of transmission system operators at European level should indeed be complemented at regional level, in order to ensure real practical progress, optimum management of the network<sup>7</sup> and appropriate investment planning and delivery. The regulatory framework should promote, coordinate and develop regional initiatives between transmission system operator and regulatory authorities, as happens with the Regional Initiatives led by ERGEG and initiatives such as the Pentalateral forum in Northwest Europe and as recommended by major stakeholders like Eurelectric.

#### **4.2. An improved cooperation mechanism**

It is important for the transmission system operators' cooperation structures to be fully recognised at European level as having the authority to carry out the above tasks. For that purpose, the Commission will formally designate the European Networks of (gas and electricity) transmission system operators in charge of these tasks.

As companies, transmission system operators must be transparent about the way they cooperate. They may build on existing structures such as GTE and ETSO. However, the tasks and responsibilities required of the transmission system operators will mean a need for a central and permanent cooperation structure both in terms of organisation and practical tools for planning and operating the networks.

The Agency for the Cooperation of Energy Regulators will monitor how the European Network of transmission system operators carries out the tasks conferred upon it.

Involvement and consultation of stakeholders, such as producers, suppliers, customers and distribution system operators will be developed as standard practice by the transmission system operators from the beginning of their work on a specific subject. For that purpose, stakeholders will be consulted on any draft market and technical code prepared by the transmission system operators and they will be able to comment on the annual work programme of the transmission system operators. The Agency will oversee that consultation is done properly.

### **5. IMPROVING THE FUNCTIONING OF THE MARKET**

The present proposal also aims at improving the legislative framework to facilitate third party access to key infrastructures, to increase transparency on the market, to enhance market integration and to improve access to retail customers.

#### **5.1. Exemption regime**

The current legislation allows major new infrastructure to be exempt from regulated third party access rules for a pre-determined period. Several infrastructures have been completed or are under way, including gas and electricity interconnectors and LNG facilities that have made use of this possibility. This has helped to take forward projects which benefit security of supply and competition. At the same time, experience so far shows that project developers, regulators and the Commission could benefit from a streamlined procedure for applying for

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<sup>7</sup> For example, in electricity, it is clear that the setting of technical codes needs to be determined for each synchronous area for some issues.

and granting exemptions as well as a clarification of some of the conditions. Therefore, the Commission proposes to formulate guidelines to assist applicants and regulators in applying the conditions for an exemption. To ensure that exempted infrastructure can nevertheless be used optimally by the market, it is proposed to make general the minimum requirements for the allocation of capacity and congestion management provisions for the new infrastructure that have so far been applied on a case-by-case basis.

## **5.2. Transparency**

The internal electricity and gas market is suffering from a lack of liquidity and transparency hindering the efficient allocation of resources, limiting risk hedging possibilities and blocking new entrants. Trust in the market, its liquidity and the number of market participants need to increase, by increasing the information that is available to the market.

Current requirements on transparency focus on publication of capacity of the network, so that market participants are able to see if capacity is available and if all available capacity is being offered to the market. However, market participants also need to have equal access to information that determines wholesale price movements.

Currently, incumbents who are responsible for the largest part of the gas and electricity flows, and who own the majority of the assets in the market, have more and better access to information than new entrants. In electricity, there are requirements in the form of guidelines attached to the regulation setting out transparency requirements on the generation of electricity, but they are not sufficient, and in gas no such requirements exist at the moment. Therefore it is proposed to extend the transparency requirements to cover gas stocks, forecasts of demand and supply, costs for balancing the network and trading.

The correct and full application of these requirements needs to be controlled and monitored by the national regulatory authorities, so their powers need to be strengthened accordingly.

On the issue of transparency regarding derivatives and financial instruments and with respect to which these proposals do not provide for additional requirements on the companies concerned, the Commission will examine this issue in detail and reach a conclusion towards the middle of 2008. The Agency for the Cooperation of Energy Regulators and the Committee of European Securities Regulators are invited to cooperate to further investigate and advise on the question whether transactions in gas and electricity supply contracts and gas and electricity derivatives should be subject to pre and/or post-trade transparency requirements.

## **5.3. Access to storage**

The existing Directive on the internal gas market provides that where storage is an essential facility in order to be able to supply customers, storage operators have to give access to third parties. Member States have the choice to ensure access to these storage facilities either through conditions defined by the regulator or by obliging storage system operators to negotiate access conditions with customers. The requirements in the Directive are limited to the principles, and leave a great deal of freedom to the Member States in defining their regulatory framework. Body was subsequently given to these principles through the Madrid Forum, where all stakeholders agreed to voluntary 'Guidelines for Good Third Party Access Practice for Storage System Operators' (GGPSSO). However, ERGEG has concluded that overall implementation of these guidelines is poor.

For them to be effectively applied, the Commission proposes four measures:

- Make the principles in the guidelines legally binding and allow for detailed implementation of the guidelines through comitology;
- Establish legal and functional unbundling of storage system operators who are part of supply undertakings;
- Enhance the powers of national regulatory authorities to oversee access to storage;
- Require clarity on the regulatory regime that is applied to storage facilities.

To make the guidelines legally binding, the Regulation will be extended to define how storage system operators must offer third party access services, and how they should allocate capacity and manage congestion. It will also define the transparency requirements and propose measures to enable a secondary market in storage capacity to develop. These rules should ensure that all storage that is available to third parties is offered to the market in a non-discriminatory and transparent manner, and that capacity-hoarding is strongly discouraged. These rules shall also serve to ensure consistency with the proposed minimum requirements on exempted infrastructure.

By requiring legal and functional unbundling of storage system operators, effective access to storage will be greatly enhanced. The fact that currently, when suppliers need storage, they have to contact their competitors to contract their storage need, does not enhance market confidence and is a serious barrier for new entrants. Requiring unbundled storage operators will improve this situation and it will enable competitors and regulators to check that all available storage capacity is offered to the market.

The Commission proposes to erase the ambiguity that exists on the proportion of storage capacity that is offered to the market, requiring that all Member States need to define criteria when and how third party access to storage applies and this has to be made public. The regulator consequently has the task to control if these criteria are applied correctly to all storages.

#### **5.4. Access to LNG terminals**

The role of LNG in the supply of gas to the European Union is becoming ever more important, and a lot of investment in LNG terminals is planned or under way. For that reason, transparent rules on access to LNG terminals are needed. Regulators have identified the need, and ERGEG has prepared guidelines with a goal create a common approach to third party access for LNG terminals.

Although many LNG terminals constructed have used the possibilities to be exempted from third party access and regulatory intervention under Article 22 of the Directive, there are also LNG terminals for which third party access rules apply. -Since the current Directive only imposes a general requirement that access has to be regulated, this leaves room to diverging interpretations among Member States. Moreover, an exemption under Article 22 is always temporary, and when the exempted period has passed, LNG terminals will become regulated. Therefore the Commission proposes to impose more clearly defined third party access rules to LNG terminals. To make the guidelines legally binding, the Regulation will be extended to define how LNG terminal operators should offer third party access services, and how they should allocate capacity and manage congestion. It will also define the transparency requirements and propose measures to enable a secondary market in terminal-capacity to

develop. These rules shall also serve to ensure consistency with the proposed minimum requirements on exempted infrastructure.

### **5.5. Long-term supply agreements**

Downstream bilateral supply agreements provide an opportunity to energy intensive industries to obtain more predictable prices. However, such agreements risk foreclosing the downstream market by preventing consumers from switching and thus limiting competition. To reduce uncertainty on the market, the Commission will, in the coming months, provide guidance in an appropriate form on the compliance of downstream bilateral long-term supply agreements with EC competition law.

### **5.6. A framework for the gradual establishment of a European retail market**

Neither in the electricity nor the gas market is it yet possible to speak of a European retail market (households and small enterprises), as customers, assuming they have a choice, are still obliged to choose a supplier established in the same country. Establishing a true European end-user market is the ultimate goal of the internal electricity and gas markets: it is necessary for creating competitive markets and for achieving maximum efficiency. Liberalisation in the retail market is important to ensure that all EU citizens are able to benefit from competition. If liberalisation applied only to large customers, European households would end up subsidising their industry and investment signals for new generation and supply would be distorted. From 1 July 2007, all retail markets in the EU have opened up to competition, but in practice many consumers are tied to their historic suppliers because an appropriate legal framework had not been put in place as required. A European retail market can only be created gradually. To stimulate this process the Commission is considering setting up a retail forum by analogy with the positive experience of the Florence and Madrid Forums. This forum would allow to focus on specific retail issues, and it should serve as a platform for all stakeholders to promote the establishment of an EU wide retail market. The forum would provide guidance for the proposed obligations on the Member States and the regulatory authorities to establish clear rules on competition in the retail market, with a view to gradually harmonising the market rules to allow cross-border retail markets.

Well-functioning retail markets will also play a very important role in increasing people's awareness of domestic energy consumption and the cost of energy, as all measures to reduce CO<sub>2</sub>-emissions and increase energy efficiency require action from households. Competition over supply to households will enhance people's energy-awareness. However, current practices whereby consumers only receive the final bill for their consumption after a year do not create such awareness, neither does it enable suppliers to develop competitive services that distinguish between households with specific needs. Suppliers therefore need to give more information to ensure that customers get more frequent information on their energy consumption and costs.

It is obvious that freedom of choice for consumers must be accompanied by strong guarantees on the rights of the customers. Vulnerable customers have already a high degree of protection in the current directive to ensure that they will have access to the energy they need to lead a normal life. These measures have however been incorrectly applied in some countries, and to clarify the framework, the Commission proposes to define binding guidelines. At the same time, the Commission proposes to strengthen the rights of all customers, among others by giving them the right to change supplier at any time and requiring energy companies that bills are settled within a month after a consumer switches supplier.

Finally, the Commission has come to the conclusion that for Distribution System Operators (DSOs) the current legal and functional unbundling rules are sufficient. It does not therefore propose to extend the ownership unbundling rules outlined in chapter 4 above to DSOs.

## **6. COOPERATION TO REINFORCE SECURITY OF SUPPLY**

### **6.1. Security of supply monitoring by transmission system operators**

It is important to ensure that the electricity and gas systems can meet demand even in peak times. In the case of electricity, this is only possible when there is enough generation capacity (generation adequacy) and the network is capable of transporting the energy from generators to final consumers (network adequacy). In the case of gas, sufficient import and storage capacity need to be in place.

The directive 2005/89/EC requires the national regulators, with the help of the transmission system operators, to report yearly to the Commission on security of electricity supply. Directive 2004/67/EC requires Member States to report on the security of gas supply situation and on the regulatory framework to enhance investment in infrastructure. The proposed amendments to Regulations 1228/2003 and 1775/2005 give the task of making system adequacy forecasts for every summer and winter as well for the long term to the Network of European Transmission System Operators. A European outlook is necessary to take into account the possibilities to export and import electricity and gas in peak demand conditions. Due to the cross-border electricity and gas flows within the internal market, the outlook needs to be carried out at the European level.

### **6.2. Cooperation of Member States**

EU legislation has two instruments dealing with security of gas supply. First, Directive 2003/55/EC introduced general monitoring obligations for the Member States. Second, Directive 2004/67/EC specifically concerns measures to safeguard security of gas supply. This later directive establishes the Gas Coordination Group and defines a "Community mechanism" in the event of supply disruption.

These instruments provide for a coordination platform. They do not define quantitative objectives as regards security of supply, nor do they impose any obligation as regards gas stocks. Finally, they do not provide a framework for regional cooperation in case of severe supply disruptions.

Directive 2004/67/EC was only recently transposed by the Member States. Its Article 10 provides for the Commission to report by 19 May 2008 on its implementation and in particular on the effectiveness of its instruments and that it may issue further proposals concerning security of supply. In particular, this report will address security of supply measures in relation to gas stocks.

For that reason, as a first step, the present proposals do not modify Directive 2004/67/EC and only address two issues:

- *Increased transparency obligations on the level of commercial stocks.* Each storage operator would have the obligation to publish on a daily basis the amount of working gas it has in its facilities. This obligation would considerably increase mutual confidence for regional and bilateral assistance in case of severe supply disruptions.

- *Solidarity* It is proposed that Member States cooperate in order to promote regional and bilateral solidarity. This cooperation is intended to cover situations which would be likely to result in severe disruptions of gas supply affecting a Member State. Examples of this coordination are the streamlining of national measures to deal with emergencies and the elaboration of practical modalities for mutual assistance. The Commission will adopt guidelines for regional solidarity cooperation, if needed.

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Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**establishing an Agency for the Cooperation of Energy Regulators**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission<sup>8</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>9</sup>,

Having regard to the opinion of the Committee of the Regions<sup>10</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

- (1) The Communication of the Commission of 10 January 2007 entitled "An Energy Policy for Europe"<sup>11</sup> highlighted the importance of completing the internal market in electricity and natural gas. Improving the regulatory framework at Community level was identified as a key measure to achieve this objective.
- (2) An independent advisory group on electricity and gas, called the "European Regulators Group for Electricity and Gas" (ERGEG) was established by Commission Decision 2003/796/EC<sup>12</sup> to facilitate consultation, coordination and cooperation between the regulatory bodies in Member States, and between these bodies and the Commission, with a view to consolidating the internal market in electricity and natural gas. This group is composed of representatives of the national regulatory authorities established pursuant to Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC<sup>13</sup> and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC<sup>14</sup>.

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<sup>8</sup> OJ C [...], [...], p. [...].

<sup>9</sup> OJ C [...], [...], p. [...].

<sup>10</sup> OJ C [...], [...], p. [...].

<sup>11</sup> OJ C [...], [...], p. [...].

<sup>12</sup> OJ L 296, 14.11.2003, p. 34.

<sup>13</sup> OJ L 176, 15.07.2003, p.37.

<sup>14</sup> OJ L 176, 15.7.2003, p.57.

- (3) The work undertaken by ERGEG since its establishment has made a positive contribution to the internal market in electricity and gas. However, it is widely recognised by the sector, and has been proposed by ERGEG itself, that voluntary cooperation between national regulatory authorities should now take place within a Community structure with clear competences and with the power to adopt individual regulatory decisions in a number of specific cases.
- (4) The European Council in the spring of 2007 invited the Commission to propose measures to set up an independent mechanism for national regulators to co-operate.
- (5) On the basis of the impact assessment of the resource requirements for a central entity, it was concluded that an independent central entity offered a number of long-term advantages over other options. An Agency for the Cooperation of Energy Regulators, hereinafter referred to as 'the Agency', should therefore be established.
- (6) The Agency should ensure that regulatory functions performed at national level by the national regulatory authorities in accordance with Directive 2003/54/EC and Directive 2003/55/EC are properly coordinated and, where necessary, completed at the Community level. To that end, it is necessary to guarantee the independence of the Agency, its technical and regulatory capacities and its transparency and efficiency.
- (7) The Agency should monitor the cooperation between transmission system operators in the electricity and gas sectors as well as the execution of the tasks of the European Network of Transmission System Operators for electricity and the European Networks of Transmission System Operators for Gas. The involvement of the Agency is essential in order to ensure that the cooperation between transmission system operators proceeds in an efficient and transparent way for the benefit of the internal market.
- (8) It is appropriate to provide a framework within which national regulatory authorities are able to cooperate. This framework should facilitate the uniform application of the legislation on the internal market for electricity and gas throughout the Community. As regards situations concerning more than one Member State, the Agency should be granted the power to adopt individual decisions. This power should cover the regulatory regime for infrastructure connecting at least two Member States, exemptions from the internal market rules for new electricity interconnectors and new gas infrastructures located in more than one Member State.
- (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.
- (10) The Agency should also be able to issue non-binding guidelines to assist regulatory authorities and market players in sharing good practices.
- (11) The structure of the Agency should be adapted to meet the specific needs of energy regulation. In particular the specific role of the national regulatory authorities and their independence needs to be taken fully into account

- (12) The Administrative Board should have the necessary powers to establish the budget, check its implementation, draw up internal rules, adopt financial regulations and appoint the Director.
- (13) The Agency should have the necessary powers to perform the regulatory functions in an efficient and above all independent manner. The independence of regulatory authorities is not only a key principle of good governance but also and a fundamental condition to ensure market confidence. Reflecting the situation on a national level, the Board of Regulators should therefore act independently from any market interest and shall not seek or take instructions from any government or other public or private entity.
- (14) Where the Agency has decision-making powers, interested parties should, for reasons of procedural economy, be granted a right of appeal to a Board of Appeal, which should be part of the Agency, but independent from its administrative and regulatory structure.
- (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 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<sup>15</sup>
- (16) The Agency should have highly professional staff. In particular, it should benefit from the competence and experience of staff seconded by the national regulatory authorities, the Commission and the Member States. The Staff Regulations of Officials of the European Communities, the regulations applicable to other servants of the European Communities and the rules adopted jointly by the European Community institutions for the purpose of applying these regulations should apply to the staff of the Agency. The Administrative Board, in agreement with the Commission, should adopt the necessary implementing measures.
- (17) The Agency should apply the general rules regarding public access to documents held by Community bodies. The Administrative board should establish the practical measures to protect commercially sensitive data and personal data.
- (18) Participation of third countries in the work of the Agency should be possible in accordance with appropriate agreements to be concluded by the Community.
- (19) Since the objectives of the proposed action, cooperation of national regulatory authorities at Community level, cannot be sufficiently achieved by the Member States and can therefore, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In

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<sup>15</sup> OJ L 357, 31.12.2002, p. 72.

accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives,

HAVE ADOPTED THIS REGULATION:

### *Article 1*

#### *Establishment*

An Agency for the Cooperation of Energy Regulators, hereinafter referred to as ‘the Agency’ is established for the purpose of complementing at Community level the regulatory tasks performed at national level by the regulatory authorities mentioned in Article 22a of Directive 2003/54/EC and Article 24a of Directive 2003/55/EC, and, where necessary, to coordinate their action.

### *Article 2*

#### *Legal status and seat*

1. The Agency shall be a Community body with legal personality.
2. In each Member State, the Agency shall enjoy the most extensive legal capacity accorded to legal persons under national law. It may, in particular, acquire or dispose of movable and immovable property and be a party to legal proceedings.
3. The Agency shall be represented by its Director.
4. The seat of the Agency shall be located in [place]. Until its premises are ready, it will be hosted on Commission premises.

### *Article 3*

#### *Composition*

The Agency shall comprise:

- (a) an Administrative Board, which shall exercise the responsibilities set out in Article 10;
- (b) a Board of Regulators, which shall exercise the responsibilities set out in Article 12;
- (c) a Director, who shall exercise the responsibilities set out in Article 14;
- (d) a Board of Appeal, which shall exercise the responsibilities set out in Article 16.

## *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.

## *Article 5*

### *General tasks*

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.

## *Article 6*

### *Tasks as regards the cooperation of transmission system operators*

1. The Agency shall provide an opinion to the Commission on the draft statutes, list of members and draft rules of procedure of the European Network of Transmission System Operators for Electricity in accordance with Articles 2b(2) of Regulation (EC) No 1228/2003 and on those of the European Network of Transmission System Operators for Gas in accordance with Article 2b(2) of Regulation (EC) No 1775/2005.
2. The Agency shall monitor the execution of the tasks of the European Network of Transmission System Operators for Electricity as provided for in Article 2d of Regulation (EC) No 1228/2003 and of the European Network of Transmission System Operators for Gas as provided for Article 2d of Regulation (EC) No 1775/2005.
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.
4. The Agency shall provide a duly justified opinion to the Commission where it considers that the draft annual work programme or the draft 10-year investment plan submitted to it in accordance with Article 2d(2) of Regulation (EC) No 1228/2003 and Article 2d(2) of Regulation (EC) No 1775/2005 do not ensure non-discrimination, effective competition and the efficient functioning of the market.

5. The Agency shall provide a duly justified opinion to the Commission, in accordance with Article 2e(2) of Regulation (EC) No 1228/2003 and Article 2e(2) of Regulation (EC) No 1775/2005 where it considers that a technical or market code does not ensure non-discrimination, effective competition and the efficient functioning of the market, that a technical or market code has not been adopted within a reasonable period of time or that the transmission system operators fail to implement a technical or market code.
6. The Agency shall monitor the regional cooperation of transmission system operators referred to in Article 2h of Regulation (EC) No 1228/2003 and Article 2h of Regulation (EC) No 1775/2005.

## *Article 7*

### *Tasks as regards the national regulatory authorities*

1. The Agency shall adopt individual decisions on technical issues where these decisions are provided for in Guidelines pursuant to Directive 2003/54/EC, Directive 2003/55/EC, Regulation (EC) No 1228/2003 or Regulation (EC) No 1775/2005.
2. The Agency may, in accordance with its work programme or at the request of the Commission, adopt non-binding guidelines to assist regulatory authorities and market players in sharing good practice.
3. The Agency shall promote cooperation between the national regulatory authorities and between regulatory authorities at regional level. Where the Agency considers that binding rules on such cooperation are required, it shall make the appropriate recommendations to the Commission.
4. The Agency shall provide an opinion, at the request of any regulatory authority or of the Commission, on whether a decision taken by a regulatory authority complies with the Guidelines referred to in Directive 2003/54/EC, Directive 2003/55/EC, Regulation (EC) No 1228/2003 or Regulation (EC) No 1775/2005.
5. Where a national regulatory authority does not comply with the opinion of the Agency as referred to in paragraph (4) within four months from the date of receipt, the Agency shall inform the Commission.
6. When a national regulatory authority encounters, in a specific case, difficulties with the application of the Guidelines referred to in Directive 2003/54/EC, Directive 2003/55/EC, Regulation (EC) No 1228/2003 or Regulation (EC) No 1775/2005, it may ask the Agency for an opinion. The Agency shall deliver its opinion after consulting the Commission within four months.
7. The Agency shall decide on the regulatory regime for infrastructure connecting at least two member States, in accordance with Article 22d(3) of Directive 2003/54/EC and Article 24d(3) of Directive 2003/55/EC.

## *Article 8*

### *Other tasks*

1. The Agency may grant exemptions, as provided for in Article 7(4)(a) of Regulation (EC) No 1228/2003. The Agency may also grant exemptions as provided for in Article 22(3)(a) of Directive 2003/55/EC where the infrastructure concerned is located in the territory of more than one Member State.
2. The Agency shall propose an independent system operator in accordance with Article 10(4) of Directive 2003/54/EC and Article 9(4) of Directive 2003/55/EC.

## *Article 9*

### *Administrative Board*

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.
2. The Administrative Board shall appoint its Chairperson and its Vice-Chairperson from among its members. The Vice-Chairperson shall automatically replace the Chairperson if the latter is not in a position to perform his duties. The term of office of the Chairperson and of the Vice-Chairperson shall be two and a half years and shall be renewable. In any event, however, the term of office of the Chairperson and that of the Vice-Chairperson shall expire the moment they cease to be members of the Administrative Board.
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 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.
4. Decisions of the Administrative Board shall be adopted on the basis of a majority two-thirds majority of the members present.
5. Each member shall have one vote. The rules of procedure shall set out in greater detail the arrangements governing voting, especially the conditions whereby one member can act on behalf of another and also, where appropriate, the rules governing quorums.

## *Article 10*

### *Tasks of the Administrative Board*

1. The Administrative Board shall, after having consulted the Board of Regulators, appoint the Director in accordance with Article 13(2).
2. The Administrative Board shall appoint the members of the Board of Regulators in accordance with Article 11(1).
3. The Administrative Board shall appoint the members of the Board of Appeal in accordance with Article 15(1).
4. The Administrative Board shall adopt, before 30 September each year, and after consulting the Commission and after approval by the Board of Regulators in accordance with Article 12(3), the work programme of the Agency for the coming year and shall transmit it to the European Parliament, the Council and the Commission. The work programme shall be adopted without prejudice to the annual budgetary procedure.
5. The Administrative Board shall exercise its budgetary powers in accordance with Articles 18 to 21.
6. The Administrative Board shall decide, after having obtained the agreement of the Commission, whether to accept any legacies or donations or grants from other Community sources.
7. The Administrative Board shall exercise disciplinary authority over the Director.
8. The Administrative Board shall, where necessary, draw up the Agency's staff policy pursuant to Article 25(2).
9. The Administrative Board shall adopt the special provisions on right of access to the documents of the Agency, in accordance with Article 27.
10. The Administrative Board shall adopt the annual report on the activities of the Agency, referred to in Article 15(9), and shall transmit it to the European Parliament, the Council, the Commission, the European Economic and Social Committee and the Court of Auditors by 15 June at the latest. This report shall contain an independent section, approved by the Board of Regulators, concerning the regulatory activities of the Agency during the year considered.
11. The Administrative Board shall adopt its own rules of procedure.

### *Article 11*

#### *Board of Regulators*

1. The Board of Regulators shall be composed of one representative per Member State from the regulatory authorities, as mentioned in Article 22a of Directive 2003/54/EC and Article 24a of Directive 2003/55/EC, and one non-voting representative of the Commission. The national regulatory authorities shall nominate one alternate per Member State.

2. The Board of Regulators shall elect a Chairperson and a Vice-Chairperson from among its members. The Vice-Chairperson shall replace the Chairperson if the latter is not in a position to perform his or her duties. The term of office of the Chairperson and of the Vice-Chairperson shall be two and a half years and shall be renewable. In any event, however, the term of office of the Chairperson and that of the Vice-chairperson shall expire the moment they cease to be members of the Board of Regulators.
3. The Board of Regulators shall act by a majority of two-thirds of its members. Each member or alternate shall have one vote.
4. The Board of Regulators shall adopt its Rules of procedure.
5. When carrying out the tasks conferred upon it by this Regulation, the Board of Regulators shall act independently and shall not seek or take instructions from any government of a Member State or from any public or private interest.
6. The Board of Regulators' secretarial services shall be provided by the Agency.

## *Article 12*

### *Tasks of the Board of Regulators*

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.
2. 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 shall reach this decision on the basis of a majority of three quarters of its members.
3. The Board of Regulators shall, in accordance with Article 10(4) and Article 14(6) and in line with the draft budget established according to Article 20(1), approve the work programme of the Agency for the coming year and present it before the 1 September for adoption by the Administrative Board.
4. The Board of Regulators shall approve the independent section on regulatory activities of the annual report, as provided for in Article 10(10) and Article 14(8).

## *Article 13*

### *Director*

1. The Agency shall be managed by its Director, who shall act independently in the exercise of his functions. Without prejudice to the respective powers of the Commission, the Administrative Board and the Board of Regulators, the Director shall not seek or accept any instruction from any government or from any body.
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.

3. The Director's term of office shall be five years. In the course of the nine months preceding the end of this period, the Commission shall undertake an evaluation. In the evaluation, the Commission shall assess in particular:
  - (e) the performance of the Director;
  - (f) the Agency's duties and requirements in the coming years.
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.
5. The Administrative Board shall inform the European Parliament about its intention to extend the Director's term of office. Within a month before the extension of his/her term of office, the director may be invited to make a statement before the competent committee of the Parliament and answer questions put before its members.
6. If the term of office is not extended, the Director shall remain in office until the appointment of his/her successor.
7. The Director may be removed from office only upon a decision by the Administrative Board, after consulting the Board of Regulators. The Administrative Board shall reach this decision on the basis of a majority of three quarters of its members.
8. The European Parliament and the Council may call upon the Director to submit a report on the performance of his duties.

#### *Article 14*

##### *Tasks of the Director*

1. The Director shall be responsible for representing the Agency and shall be in charge of its management.
2. The Director shall prepare the work of the Administrative Board. He or she shall participate, without having the right to vote, in the work of the Administrative Board.
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.
4. The Director shall be responsible for implementing the annual work programme of the Agency under the guidance of the Board of Regulators and under the administrative control of the Administrative Board.

5. The Director shall take the necessary measures, notably the adoption of internal administrative instructions and the publication of notices, to ensure the functioning of the Agency in accordance with this Regulation.
6. Each year the Director shall prepare a draft work programme of the Agency for the following year, and submit it to the Board of Regulators and to the Commission before 30 June of that year.
7. The Director shall make an estimate of the revenue and expenditure of the Agency pursuant to Article 20 and shall implement the budget of the Agency pursuant to Article 21.
8. Each year the Director shall prepare a draft annual report with a section on the regulatory activities of the Agency and a section on financial and administrative matters.
9. With regard to the staff of the Agency, the Director shall exercise the powers provided for in Article 25(3).

#### *Article 15*

##### *Board of Appeal*

1. The Board of Appeal shall be composed of six members and six alternates selected from among current or former senior staff of the national regulatory authorities, competition authorities or other national or Community institutions with relevant experience in the energy sector. The Board of Appeal designates its Chairperson. The decisions of the Board of Appeal shall be adopted on the basis of a qualified majority of at least four out of its six members. The Board of Appeal shall be convened when necessary.
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.
3. The term of office of the members of the Board of Appeal shall be five years. This term shall be renewable. The members of the Board of Appeal shall be independent in making their decisions; they shall not be bound by any instructions. They may not perform any other duties in the Agency, in its Administrative Board or in its Board of Regulators. A member of the Board of Appeal may not be removed during his or her term of office, unless he or she has been found guilty of serious misconduct, and the Administrative Board, after consulting the Board of Regulators, takes a decision to this effect.
4. Members of the Board of Appeal may not take part in any appeal proceedings if they have any personal interest therein, or if they have previously been involved as representatives of one of the parties to the proceedings, or if they participated in the decision under appeal.
5. If, for one of the reasons mentioned in paragraph 4 or for any other reason, a member of a Board of Appeal considers that a fellow member should not take part in any

appeal proceedings, the member shall inform the Board of Appeal accordingly. A member of the Board of Appeal may be objected to by any party to the appeal proceedings on any of the grounds mentioned in paragraph 4, or if suspected of partiality. An objection cannot be based on the nationality of members nor shall it be admissible if, while being aware of a reason for objecting, the party to the appeal proceedings has taken a procedural step.

6. The Board of Appeal shall decide as to the action to be taken in the cases specified in paragraphs 4 and 5 without the participation of the member concerned. For the purposes of taking that decision, the member concerned shall be replaced on the Board of Appeal by his alternate, unless the alternate finds himself in a similar situation. Should this be the case, the Chairperson shall designate a replacement from among the available alternates.

## *Article 16*

### *Appeals*

1. Any natural or legal person may appeal against a decision as referred to in Articles 7 and 8 and which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person.
2. The appeal, together with the statement of grounds thereof, shall be filed in writing at the Agency within two months of the notification of the decision to the person concerned, or, in the absence thereof, of the day on which within two months the Agency has published its decision. The Board of Appeal shall decide upon the appeal within two months after the appeal has been lodged.
3. An appeal lodged pursuant to paragraph 1 shall not have suspensory effect. The Board of Appeal may, however, if it considers that circumstances so require, suspend the application of the contested decision.
4. If the appeal is admissible, the Board of Appeal shall examine whether it is well founded. It shall invite the parties as often as necessary to the appeal proceedings to file observations on notifications issued by itself or on communications from the other parties to the appeal proceedings, within specified time limits. Parties to the appeal proceedings shall be entitled to make an oral presentation.
5. The Board of Appeal may, within the terms of this Article, exercise any power which lies within the competence of the Agency, or it may remit the case to the competent body of the Agency. The latter shall be bound by the decision of the Board of Appeal.
6. The Board of Appeal shall adopt its rules of procedure.

## *Article 17*

### *Actions before the Court of First Instance and the Court of Justice*

1. An action may be brought before the Court of First Instance of the Court of Justice, in accordance with article 230 of the Treaty, contesting a decision taken by the Board of Appeal or, in case where no right lies before the Board , by the Agency.
2. Should the Agency fail to take a decision, proceedings for failure to act may be brought before the Court of First Instance or the Court of Justice in accordance with Article 232 of the Treaty.
3. The Agency shall be required to take the necessary measures to comply with the judgment of the Court of First Instance or the Court of Justice.

#### *Article 18*

##### *Budget of the Agency*

1. The revenues of the Agency shall consist notably of:
  - (a) a subsidy from the Community, entered in the general budget of the European Communities (Commission Section);
  - (b) the fees paid to the Agency pursuant to Article 19;
  - (c) any voluntary contribution from the Member States or from their regulatory authorities;
  - (d) any legacies, donations or grants as mentioned in Article 10(6).
2. The expenditure shall cover staff, administrative, infrastructure, and operational expenses.
3. Revenue and expenditure shall be in balance.
4. All Agency revenue and expenditure shall be the subject of forecasts for each financial year, coinciding with the calendar year, and shall be entered in its budget.

#### *Article 19*

##### *Fees*

1. Fees shall be due to the Agency for requesting an exemption decision pursuant to Article 8(1).
2. The above mentioned fees shall be set by the Commission.

#### *Article 20*

##### *Establishment of the budget*

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.

2. The estimate shall be transmitted by the Commission to the European Parliament and to the Council (hereinafter referred to as the budgetary authority) together with the preliminary draft general budget of the European Communities.
3. On the basis of the estimates, the Commission shall enter in the preliminary draft general budget of the European Communities the forecasts it considers necessary in respect of the establishment plan and the amount of the grant to be charged to the general budget in accordance with Article 272 of the Treaty.
4. The budgetary authority shall adopt the establishment plan for the Agency.
5. The budget of the Agency shall be drawn up by the Administrative Board. It shall become final after the final adoption of the general budget of the European Communities. Where necessary, it shall be adjusted accordingly.
6. The Administrative Board shall, without delay, notify the budgetary authority of its intention to implement any project which may have significant financial implications for the funding of its budget, in particular any project relating to property such as the rental or purchase of buildings. It shall inform the Commission thereof. If either branch of the budget authority intends to issue an opinion, it shall within two weeks after receipt of the information on the building project notify the Agency of its intention to issue such an opinion. Failing a reply, the agency may proceed with the planned operation.

#### *Article 21*

##### *Implementation and control of the budget*

1. The Director shall act as authorising officer and shall implement the Agency's budget.
2. By 1 March at the latest following the completion of each financial year, the Agency accounting officer shall forward to the Commission's accounting officer and the Court of Auditors the provisional accounts, accompanied by the report on budgetary and financial management over the financial year. The Agency accounting officer shall also send the report on budgetary and financial management to the European Parliament and the Council by 31 March of the following year at the latest. The Commission's accounting officer shall then consolidate the provisional accounts of

the institutions and decentralised bodies in accordance with Article 128 of Regulation (EC, Euratom) No 1605/2002<sup>16</sup>.

3. By 31 March at the latest following the completion of each financial year, the Commission's accounting officer shall forward the provisional accounts of the Agency, accompanied by the report on budgetary and financial management over the financial year, to the Court of Auditors. The report on budgetary and financial management over the financial year shall also be forwarded to the European Parliament and the Council.
4. After receiving the observations of the Court of Auditors on the provisional accounts of the Agency in accordance with the provisions of Article 129 of Regulation (EC, Euratom) No 1605/2002, the Director, acting on his own responsibility, shall draw up the final accounts of the Agency and transmit them, for opinion, to the Administrative Board.
5. The Administrative Board shall deliver an opinion on the final accounts of the Agency.
6. The Director shall transmit these final accounts, accompanied by the opinion of the Administrative Board, no later than 1 July following the completion of the financial year, to the European Parliament, the Council, the Commission and the Court of Justice.
7. The final accounts shall be published.
8. The Director shall send the Court of Auditors a reply to the latter's observations by 15 October at the latest. He shall also send a copy of this reply to the Administrative Board and the Commission.
9. The Director shall submit to the European Parliament, at the latter's request and as provided for in Article 146(3) of Regulation (EC, Euratom) No 1605/2002, any information necessary for the smooth running of the discharge procedure for the financial year in question.
10. The European Parliament, following a recommendation from the Council acting on a qualified majority, shall, before 15 May of the year N + 2, grant a discharge to the Director for the implementation of the budget for the financial year N.

## *Article 22*

### *Financial rules*

The financial rules applicable to the Agency shall be drawn up by the Administrative Board after consultation with the Commission. Those rules may deviate from Commission Regulation (EC, Euratom) No 2343/2002 if the specific operational needs for the functioning of the Agency so require and only with the prior agreement of the Commission.

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<sup>16</sup> OJ L 248, 16.9.2002, p. 1.

## *Article 23*

### *Anti-fraud measures*

1. For the purposes of combating fraud, corruption and other illegal acts, the provisions of Regulation (EC) No 1073/1999<sup>17</sup> shall apply to the Agency without any restriction.
2. The Agency shall accede to the Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF)<sup>18</sup> and shall immediately adopt appropriate provisions for all staff of the Agency.
3. The funding decisions and the agreements and the implementing instruments resulting from them shall explicitly stipulate that the Court of Auditors and OLAF may, if need be, carry out on-the-spot checks on the beneficiaries of monies disbursed by the Agency as well as on the staff responsible for allocating these monies.

## *Article 24*

### *Privileges and immunities*

The Protocol on Privileges and Immunities of the European Communities shall apply to the Agency.

## *Article 25*

### *Staff*

1. The Staff Regulations of Officials of the European Communities, the Conditions of employment of other servants of the European Communities and the rules adopted jointly by the European Community institutions for the purpose of applying these staff regulations and conditions of employment shall apply to the staff of the Agency.
2. The Administrative Board, in agreement with the Commission, shall adopt the necessary implementing measures, in accordance with the arrangements provided for in Article 110 of the Staff Regulations of officials of the European Communities.
3. In respect of its staff, the Agency shall exercise the powers conferred on the appointing authority by the Staff Regulations of officials of the European Communities and on the authority entitled to conclude contracts by the Conditions of Employment of other servants of the European Communities.

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<sup>17</sup> OJ L 136, 31.5.1999, p. 1.

<sup>18</sup> OJ L 136, 31.5.1999, p. 15.

4. The Administrative Board may adopt provisions to allow national experts from Member States to be employed on secondment at the Agency.

## *Article 26*

### *Liability of the Agency*

1. In the case of non-contractual liability, the Agency shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its staff in the performance of their duties. The Court of Justice of the European Communities shall have jurisdiction in any dispute over the remedying of such damage.
2. The personal financial liability and disciplinary liability of Agency staff towards the Agency shall be governed by the relevant provisions applying to the staff of the Agency.

## *Article 27*

### *Access to documents*

1. Regulation (EC) No 1049/2001<sup>19</sup> shall apply to documents held by the Agency.
2. The Administrative Board shall adopt practical measures for applying Regulation (EC) No 1049/2001 within six months from the date of entry into force of this Regulation.
3. Decisions taken by the Agency pursuant to Article 8 of Regulation (EC) No 1049/2001 may be the subject of a complaint to the Ombudsman or of proceedings before the Court of Justice, in accordance with the conditions laid down in Articles 195 and 230 respectively of the Treaty.

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<sup>19</sup> OJ L 145, 31.5.2001, p. 43.

*Article 28*

*Participation of third countries*

The Agency shall be open to the participation of countries which are not members of the European Union and which have concluded agreements with the Community to this effect. Under the relevant provisions of these agreements, arrangements shall be made specifying, in particular, the nature, scope and procedural aspects of the involvement of these countries in the work of the Agency, including provisions relating to financial contributions and to staff.

*Article 29*

*Language arrangements*

1. The provisions of Regulation No 1 of 15 April 1958 shall apply to the Agency.
2. The Administrative Board shall decide on the internal language arrangements for the Agency.
3. The translation services required for the functioning of the Agency shall be provided by the Translation Centre for the Bodies of the European Union.

*Article 30*

*Evaluation*

1. The Commission shall carry out an evaluation of the activities of the Agency. This shall cover the results achieved by the Agency and its working methods, in relation with its objective, mandate and tasks defined in this Regulation and in its annual work programmes.
2. The first evaluation report shall be presented by the Commission to the European Parliament and the Council at the latest four years after the first Director has taken up his or her duties. The Commission shall then present an evaluation report at least every five years.

*Article 31*

*Entry into force and transitory measures*

1. This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.
2. Articles 5, 6, 7 and 8 shall apply as from... [*18 months after entry into force of this Regulation*].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, [ ...]

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

## Annex 1

### LEGISLATIVE FINANCIAL STATEMENT

**Policy area(s): TRANSPORT AND ENERGY**

**Activity(ies): Internal market in energy**

**TITLE OF OPERATION: AGENCY FOR THE COOPERATION OF ENERGY REGULATORS**

#### **1. BUDGET LINE(S) + TITLE(S)**

Under Chapter 06 ...

Creation of the appropriate structure for the Agency for the Cooperation of Energy Regulators (regulatory agency), i.e:

- creation of an item 06 entitled “Agency for the Cooperation of Energy Regulators”
- creation of an item 06 XX XX – entitled “Agency for the Cooperation of Energy Regulators” – Grant Titles 1 and 2
- creation of an item 06 XX XX – entitled “Agency for the Cooperation of Energy Regulators” – Grant Title 3

The choice of article and items, under Chapter 06 03, will be determined under the budget procedure for 2009.

#### **2. OVERALL FIGURES**

##### **2.1 Allocation for the action:**

An annual allocation is included in the appropriations entered under Article XXX for the year 2009 and for the subsequent years.

##### **2.2 Period of application**

The action will be of unlimited duration (annual grant).

##### **2.3 Overall multiannual estimate on expenditure:**

- a) Schedule of commitment appropriations / payment appropriations (financial intervention)

in €millions

Year	2009	2010	2011	2012	Subsequent financial years
Commitment appropriations	1,970	3,940	6,084	6,314	6,434
Payment appropriations	1,970	3,940	6,084	6,314	6,434

#### **2.4 Compatibility with financial programming and the financial perspective**

x Proposal compatible with existing financial programming (2007/2013)

#### **2.5 Financial impact on revenue**

x No financial implications

### **3. BUDGET CHARACTERISTICS**

Type of expenditure		New	Participation EFTA	Participation applicant countries	Heading Financial Perspective
NCE	DA/NDA	YES	YES	YES	No 1.a

#### **4. LEGAL BASIS**

EC Treaty: Article 95

#### **5. DESCRIPTION AND GROUNDS**

##### **5.1 Need for Community intervention**

###### *5.1.1 Objectives pursued*

The EC has already adopted a series of measures<sup>20</sup> to create an Internal Energy Market intended to deliver real choice for all EU consumers, be they citizens or business, new business opportunities and more cross-border trade. The Internal Energy Market Communication<sup>21</sup> and the final Report on the Competition Sectoral Enquiry<sup>22</sup> demonstrate

<sup>20</sup> Including the second market opening Directives, the Regulations aimed at harmonising the technical standards necessary to make cross-border trade work in practice, and the Directives on security of supply.

<sup>21</sup> Communication of the Commission to the European Parliament and the Council on prospects for the internal gas and electricity market - COM(2006) 841.

<sup>22</sup> Communication from the Commission "Sector Enquiry under Article 17 of Regulation (EC) No 1/2003 on the gas and electricity markets (final report)" - COM(2006) 851.

that the present rules and measures have not yet achieved these objectives. The Communication of the Commission of 10 January 2007 entitled "An Energy Policy for Europe"<sup>23</sup> set the objective of creating a European Gas and Electricity Grid and a truly competitive European-wide energy market. One key element in achieving this objective is the improvement of market regulation at national and European level and in particular effective cooperation of national regulatory authorities taking the form of a "new single body at Community level".

An independent advisory group on electricity and gas, called the "European Regulators Group for Electricity and Gas" (EREG) was established by the Commission in 2003 to facilitate consultation, coordination and cooperation between the regulatory bodies in Member States, and between these bodies and the Commission. EREG activities over recent years made a very positive contribution to the completion of the internal market in gas and electricity. However, most stakeholders, including the regulators themselves, consider that the development of the internal markets calls for a formal mechanism to enable national regulators to cooperate and take decisions on important cross-border issues.

The nature of the tasks to be devolved to such a mechanism leads to the conclusion that it can only take the form of a regulatory agency. This analysis reflects the principles defined by the Commission in the Draft inter-institutional agreement on the operating framework for the European regulatory agencies<sup>24</sup>, in particular the possibility to adopt individual decisions which are legally binding on third parties.

#### *5.1.2 Measures taken in connection with ex ante evaluation*

The Commission evaluated the impact of setting up an agency against a number of criteria. First of all, the problem to be resolved and the need to be met were assessed.

National energy regulators have competences to regulate their *national* markets. Nevertheless, the integration of each national market in order to build the EU internal market now require sanction at EU level for certain types of decisions, and there is a consensus among the stakeholders on this. Most stakeholders, including the regulators themselves, consider that the development of the internal markets calls for a formal mechanism for national regulators to cooperate and take decisions on important cross-border issues.

Secondly, the added value of Community action and alternatives to the creation of a European regulatory agency were assessed. The question asked was questioned whether these new tasks could have been pursued by the Commission itself. Regulatory activities require highly technical skills, notably knowledge of the physics of the grid, levels of investment needed in the sector (generation and transmission), a scale of access tariffs and a dispute settlement mechanism. These tasks require very specific technical expertise that the Commission does not have. Acquiring the necessary expertise would probably require a new directorate within the Commission. In addition, this option would transform the Commission's institutional role towards more of a technical body without generating any benefit from such activities. Other systems, like the model of the System of European Central Banks, might be feasible. This option looks attractive but lacks a legal basis, such as an Article in the Treaty, for energy. The creation of a more powerful network of national energy regulators was considered, like the Network of Competition Authorities created by the Commission in 2004 on the basis of the

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<sup>23</sup> OJ C [...], [...], p. [...].

<sup>24</sup> COM(2005)59 final

new Council anti-trust regulation n°01/2003. In that system, national competition authorities do not exert a collective decision power, but apply precise rules to define the competent authority, the exchange of information and procedures. The Commission exerts a general evocation power and may take over a case, for instance if two national regulators have conflicting views. However, this system works in relation with the autonomous powers of the Commission in the competition sector. The Commission does not have such autonomous decision powers as for regulating energy markets (beyond competition issues) and would therefore not have the same leverage on the network.

Having assessed these alternative models, the conclusion was drawn that the nature of the tasks to be devolved to such a mechanism are such that the only option is a regulatory agency having the power to adopt individual decisions which are legally binding on third parties. This option is also based on the assumption that the powers available to national regulators will be reinforced and harmonised.

## **5.2 Actions envisaged and arrangements for budget intervention**

With a view to achieving its objectives, the Agency will carry out the following measures:

- *Providing a framework for national regulators to cooperate.* It is proposed to improve the handling of cross-border situations. The Agency will set rules and procedures for the cooperation between national regulators, in particular as regards the exchange of information and the apportionment of competence in cases affecting more than one Member State.
- *Regulatory review of the cooperation between transmission system operators.* It is proposed that the cooperation among transmission system operators, in particular as regards the development of market and technical codes, the coordination of grid operation and investment planning, shall be reviewed by the Agency. For that purpose, draft measures to be adopted jointly by the transmission system operators, or by several of them, would be submitted to the Agency which would provide an opinion to the transmission system operators if these measures did not ensure non-discrimination, effective competition or the efficient functioning of the market. In practice, this mechanism shall take the form of a constructive dialogue between transmission system operators, the Commission only intervening as a last resort.
- *Individual decision powers.* In a limited number of cases, it is proposed to entrust the Agency with individual decision powers. Such is the case for handling exemption<sup>25</sup> requests concerning infrastructure assets of European interest.
- *General advisory role.* The Agency would also have an advisory role towards the Commission as regards market regulation issues, and, without prejudice to the tasks conferred to the transmission system operators; it may issue non-binding guidelines to disseminate good practices among the national regulators.

All Agency revenues and expenditures are the subject of forecasts for each financial year, coinciding with the calendar year, and are entered in its budget.

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<sup>25</sup> As defined in Article 22 of Directive 2003/55/EC and in article 7 of Regulation (EC) No 1228/2003.

The budget is balanced in terms of revenue and expenditure. Without prejudice to other resources and dues yet to be defined, revenue accruing to the Agency includes a Community grant entered in the general budget of the European Community in order to ensure a balance between revenue and expenditure.

In particular, Agency expenditure covers staff remuneration, administrative and infrastructure expenditure, operating costs and expenditure associated with the functioning of the Board of regulators and the Board of Appeal.

### **5.3 Methods of implementation**

The legal status of the Agency should be such as to enable it to act as a legal person in the discharge of its tasks.

An Administrative Board will serve as the Agency's financial and administrative control unit, made up of 12 members. Six are appointed by the Commission, and six by the Council. The term of office is five years, renewable once.

The Agency is headed by a Director appointed by the Administrative Board for a period of five years, renewable once. The Director is the legal representative of the Agency.

The Agency's decisions are adopted by the Board of Regulators. In order to keep decision making independent of the executive (the Administrative Board), there must be a separate Board of Regulators. The Board of Regulators will be composed of the Director and of one representative per Member State. The representatives of the Member State come from a regulatory authority of that Member State.

Finally, the decisions adopted by the Agency are subject to appeal. Appeals can be made before the Board of Appeal, which has 6 members.

## **6. FINANCIAL IMPACT**

### **6.1 Method of calculating the total cost of the action** *(To be determined by DG BUDG and DG ADMIN)*

The Agency's annual costs will be covered by the Community grants. The various types of expenditure can be analysed as follows:

### Staff expenditure

The proposed budget is based on an estimated staff of 48. Total annual staff expenditure is estimated at €5.184 million, taking as the average the cost of European Commission staff, i.e. €0.117 million per year, which includes expenditure associated with buildings and related administrative expenditure (mailing charges, telecommunications, IT, etc.).

Staff expenditure will cover recruitment costs from 2009. The staff expenditure estimate is based on the following recruitment plan:

	<u>Recruitment</u>	<u>Total staff</u>
<u>First semester 2009</u>	+10	10
<u>Second semester 2009</u>	+10	20
<u>First semester 2010</u>	+10	30
<u>Second semester 2010</u>	+10	40
<u>First semester 2011</u>	+8	48

### Capital expenditure

Expenditure relating to the acquisition of movable property and associated expenditure will cover €0,350 million in the first two years. For the following years, a sum of €0.05 million per year has been set aside to cover additional costs. This item may vary in relation with the facilities provided by the host Member State.

### Operating costs

These costs cover meetings and studies, as well as translation, publication and public relations costs. Based on preliminary estimates, these operating costs come to €1 million per year.

## Mission expenditure

In order to discharge its tasks, the Agency will need to organise trips both inside and outside the EU (transport and accommodation costs). The mission expenses budget is estimated to come to €0.150 million per year when the Agency is fully operational. These estimates are based on actual average mission expenses costs attributed to DG TREN. They may vary in relation to the location of the seat of the Agency.

### **6.2 Breakdown by elements of the action**

Commitment appropriations in million euros (at current prices)

Breakdown/ categories	Year 2009	Year 2010	Year 2011	Year 2012	Subsequent financial years
Staff expenditure	1,755	4,095	5,616	5,616	5,616,050
Equipment	0,150	0,200	0,050	0,050	1,000
Operating expenditure	0,150	0,400	0,700	0,900	
Mission expenditure	0,050	0,100	0,150	0,180	0,200
Total	2,105	4,795	6,516	6,746	6,866

### **6.3 Schedule of commitment appropriations / payment appropriations**

in millions of euros

Years <i>et seq.</i>	2009	2010	2011	2012	Subsequent years
Commitment appropriations	1,970	3,940	6,084	6,314	6,434
Payment appropriations	1,970	3,940	6,084	6,314	6,434

## **7. FOLLOW-UP AND EVALUATION**

The management of the funds entrusted to the Agency comes under the control of the Court of Auditors (Article 14), the European Parliament (Article 14) and the European Anti-Fraud Office (Article 16).

## **8. ANTI-FRAUD MEASURES**

See point 7 above.