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Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**amending Directive 2003/54/EC concerning common rules for the internal market in  
electricity**

(presented by the Commission)

{SEC(2007) xxxx  
SEC(2007) zzzz}

## **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.

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**amending Directive 2003/54/EC concerning common rules for the internal market in electricity**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55, and 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<sup>11</sup>,

Whereas:

- (1) The internal market for electricity, which has been progressively implemented throughout the Community since 1999, aims at delivering real choice for all EU consumers, whether citizens or business, new business opportunities and more cross-border trade, so as to achieve efficiency gains, competitive prices, and higher standards of service, and to contribute to security of supply and sustainability.
- (2) 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>12</sup> has made a significant contribution towards the creation of such an internal market for electricity.
- (3) However, at present, the right to sell electricity in any Member State on equal terms and without discrimination or disadvantages cannot be guaranteed to any company in the Community. In particular, non-discriminatory network access and an equally effective level of regulatory supervision in each Member State do not yet exist, since the current legal framework is insufficient.

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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 176 of 15/07/2003 p. 0037 – 0055.

- (4) The Communication of the Commission of 10 January 2007 entitled "An Energy Policy for Europe"<sup>13</sup> highlighted the importance of completing the internal market in electricity and of creating a level playing field for all electricity companies established in the Community. The Internal Energy Market Communication<sup>14</sup> and the final Report on the Competition Sectoral Enquiry<sup>15</sup> showed that the present rules and measures do not provide the necessary framework for achieving the objective of a well functioning internal market.
- (5) Without effective separation of networks from activities of generation and supply, there is an inherent risk of discrimination not only in the operation of the network but also in the incentives for vertically integrated companies to invest adequately in their networks.
- (6) The rules on legal and functional unbundling currently in place have not led to effective unbundling of the transmission system operators. At its meeting in Brussels on 8 and 9 March 2007, the European Council invited the Commission to develop legislative proposals for the effective separation of supply and generation activities from network operations.
- (7) Only the removal of the inherent incentive for vertically integrated companies to discriminate against competitors as regards network access and investment can ensure effective unbundling. Ownership unbundling, which implies the network owner being appointed as the network operator and being independent from any supply and production interests, is clearly the most effective and stable way to solve the inherent conflict of interest and to ensure security of supply. For this reason, the European Parliament in its Resolution on Prospects for the internal gas and electricity market adopted on 10 July 2007 referred to ownership unbundling at transmission level as 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. Member States should therefore be required to ensure that the same person or persons are not entitled to exercise control, including through minority blocking rights on decisions of strategic importance such as investments, over a production or supply undertaking and, at the same time, hold any interest in or exercise any right over a transmission system operator or transmission system. Conversely, control over a transmission system operator should preclude the possibility of holding any interest in or exercising any right over a supply undertaking.
- (8) Since ownership unbundling requires, in some instances, the restructuring of undertakings, Member States should be granted additional time to apply the relevant provisions. In view of the **vertical links between** the electricity and gas sectors, the unbundling provisions should apply, moreover, across the two sectors.
- (9) To ensure full independence of network operation from supply and generation interests and to prevent exchange of any confidential information, the same person should not be a member of the managing boards of both a transmission system

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<sup>13</sup> COM 2007/001 final.

<sup>14</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>15</sup> Communication from the Commission "Sector Enquiry under Art. 17 of Regulation 1/2003 on the gas and electricity markets (final report)", SEC (2006) 1724

operator and an undertaking performing any of the functions of generation or supply. For the same reason, the same person should not be entitled to appoint members of the managing boards of a transmission system operator and to hold any interest in a supply undertaking.

- (10) The setting up of system operators independent from supply and generation interests should enable vertically integrated companies to maintain their ownership of network assets whilst ensuring an effective separation of interests, provided that the independent system operator performs all the functions of a network operator and detailed regulation and extensive regulatory control mechanisms are put in place.
- (11) Where the undertaking owning a transmission system is part of a vertically integrated undertaking, Member States should therefore be given a choice between ownership unbundling and, as a derogation, setting up system operators which are independent from supply and generation interests. The full effectiveness of the independent system operator solution needs to be assured by way of specific additional rules. To preserve fully the interests of the shareholders of vertically integrated companies, Member States should have the choice of implementing ownership unbundling either by direct divestiture or by splitting the shares of the integrated company into shares of the network company and shares of the remaining supply and generation business, provided that the requirements resulting from ownership unbundling are complied with.
- (12) The implementation of effective unbundling should respect the principle of non-discrimination between the public and private sectors. To this effect, the same person should not be able to exercise any influence, solely or jointly, over the composition, voting or decision of the bodies of both transmission system operators and supply undertakings. Provided that the Member State in question can demonstrate that this requirement is respected, two distinct public bodies could control on the one hand generation and supply activities and on the other transmission activities.
- (13) Full separation of network and supply activities should apply throughout the Community, so that any network operator in the Community or its affiliated companies should be prevented from having any supply or generation activities in any Member State. This should apply equally to EU and non-EU companies. To ensure that network and supply activities throughout the Community are kept separate, regulatory authorities should be empowered to refuse certification to transmission system operators that do not comply with the unbundling rules. To ensure a consistent application across the Community and the respect of the international obligations of the Community, the Commission should have the right to review the decisions on certification taken by the regulatory authorities.
- (14) The safeguarding of energy supply is an essential element of public security and is therefore inherently connected to the efficient functioning of the EU electricity market. Electricity can only reach EU citizens through the network. Functioning electricity markets and in particular the networks and other assets associated with electricity supply are essential for public security, for the competitiveness of the economy and for the well-being of the citizens of the Community. Without prejudice to the international obligations of the Community, the Community considers that the electricity transmission system sector is of high importance to the Community and therefore additional safeguards are necessary regarding the influence of third countries in order to

avoid any threats to Community public order and public security and the welfare of the citizens of the Community. Such measures are also necessary for ensuring compliance with the rules on effective unbundling.

- (15) Non discriminatory access to the distribution network determines downstream access to customers at retail level. The scope for discrimination as regards third party access and investment is however less significant at distribution level than at transmission level because at distribution level congestion and the influence of generation interests are generally less important than at transmission level. Moreover, functional unbundling of distribution system operators became, according to Directive 2003/54, compulsory only as of 1 July 2007 and its effects on the internal market still need to be evaluated. The rules on legal and functional unbundling currently in place can lead to effective unbundling provided they are more clearly defined, properly implemented and closely monitored. To create a level playing field at retail level, the activities of distribution system operators should therefore be monitored so that they are prevented from taking advantage of their vertical integration as regards their competitive position on the market, in particular in relation to small domestic and non-domestic customers.
- (16) Directive 2003/54/EC introduced a requirement for Member States to establish regulators with specific competences. However, experience shows that the effectiveness of regulation is frequently hampered through a lack of independence of regulators from government, and insufficient powers and discretion. For this reason, at its meeting in Brussels on 8 and 9 March 2007, the European Council invited the Commission to develop legislative proposals providing for further harmonisation of the powers and strengthening of the independence of national energy regulators.
- (17) Energy regulators need to be able to take decisions on all relevant regulatory issues if the internal market is to function correctly, and to be fully independent from any other public or private interests.
- (18) Energy regulators should have the power to issue binding decisions on electricity undertakings and to impose effective, appropriate and dissuasive sanctions on electricity undertakings which fail to comply with their obligations. They must also be granted the powers to decide, irrespective of the application of competition rules, on any appropriate measures promoting effective competition necessary for the proper functioning of the market; as well as ensure high standards of universal and public service in compliance with market opening, the protection of vulnerable customers, and that consumer protection measures are fully effective. These provisions should be without prejudice to both the Commission's powers concerning the application of competition rules including the examination of mergers with a Community dimension, and the rules on the internal market such as the free movement of capital.
- (19) The internal electricity market is suffering from a lack of liquidity and transparency hindering the efficient allocation of resources, risk hedging and new entry. Trust in the market, its liquidity and the number of market participants need to increase, and therefore regulatory oversight over undertakings active in the supply of electricity need to be increased. Such requirements should be without prejudice to, and compatible with, the existing Community legislation on financial markets. Energy Regulators and Financial Market Regulators need to cooperate in order to enable each other to have an overview over the markets concerned.

- (20) Prior to adoption by the Commission of guidelines defining further the record keeping requirements, the Agency for the Cooperation of Energy Regulators and the Committee of European Securities Regulators (CESR) should cooperate to investigate and advise the Commission on the content of the guidelines. The Agency and the Committee should also cooperate to further investigate and advise on the question whether transactions in electricity supply contracts and electricity derivatives should be subject to pre and/or post-trade transparency requirements and if so what the content of those requirements should be.
- (21) The public service requirements and the common minimum standards that follow from them need to be further strengthened to make sure that all consumers can benefit from competition. A key aspect in supplying customers is access to consumption data, and consumers must have access to their data so that they can invite competitors to make an offer based on these data. Consumers also should have the right to be properly informed about their energy consumption. Regularly provided information on energy costs will create incentives for energy savings because it will give customers direct feedback on the effects of investment in energy efficiency and change of behaviour.
- (22) In view of the creation of an internal market for electricity, Member States should foster the integration of their national markets and the cooperation of network operators at European and regional level.
- (23) Regulatory authorities should provide information to the market also to permit the Commission to exercise its role of observing and monitoring the European electricity market and its short, medium and long term evolution, including aspects such as generation capacity, different sources of electricity generation, transmission and distribution infrastructures, cross-border trade, the investments, wholesale and consumers prices, market liquidity, environmental and efficiency improvements.
- (24) Since the objectives of the proposed action, namely the creation of a fully operational internal electricity market, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, 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 accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (25) Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity<sup>16</sup> provides the Commission with the possibility of adopting guidelines to achieve the necessary degree of harmonisation. Such guidelines, which are thus binding implementing measures, are a useful tool which can be adapted quickly where necessary.
- (26) The measures necessary for the implementation of Directive 2003/54/EC as amended by this Directive should be adopted in accordance with Council Decision 1999/468/EC

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<sup>16</sup> OJ L 176, 15.7.2003, p. 1.

of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission<sup>17</sup>.

- (27) In particular power should be conferred on the Commission to adopt the guidelines necessary for providing the minimum degree of harmonisation required to achieve the aim of Directive 2003/54/EC. Since those measures are of general scope and are designed to supplement Directive 2003/54/EC by the addition of new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.
- (28) Directive 2003/54/EC should be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

*Article 1*  
*Amendments to Directive 2003/54/EC*

Directive 2003/54/EC is amended as follows:

- (1) Article 2 is amended as follows:

- (a) point 21 is amended as follows:

“21. 'vertically integrated undertaking' means an electricity undertaking, or a group of electricity undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control within the meaning of Article 3(2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings\*, and where the undertaking or group of undertakings perform at least one of the functions of transmission or distribution, and at least one of the functions of generation or supply of electricity;”

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\* OJ L 145, 30.4.2004, p. 1

- (b) The following points 32 to 34 are added:

"32. 'electricity supply contract' means a contract for the supply of electricity, but does not include a electricity derivative;

33. 'electricity derivative' means a financial instrument specified in one of Sections C5, C6, or C7 of Annex I to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments<sup>18</sup>, where that instrument relates to electricity;

34. "control" means any rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

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<sup>17</sup> OJ L184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L200, 22.7.2006, p.11).

<sup>18</sup> OJ L 145, 30.4.2004, p. 1.

- (a) ownership or the right to use all or part of the assets of an undertaking;
- (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking."

(2) In Article 3, the following paragraph 10 is added:

"10. The Commission may adopt guidelines for the implementation of this Article. This measure, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 27b(3)"

(3) The following Article 5a is inserted:

#### "Article 5a

##### Promotion of Regional Cooperation

Member States shall cooperate among themselves for the purpose of integrating their national markets at least at the regional level. In particular, Member States shall promote the cooperation of network operators at a regional level, and foster the consistency of their legal and regulatory framework. The geographical area covered by regional cooperations shall be in line with the definition of geographical areas by the Commission in accordance with Article 2h(3) of Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity<sup>19</sup>."

(4) Article 8 is replaced as follows:

#### "Article 8

##### Unbundling of transmission systems and transmission system operators

1. Member States shall ensure that as from [date of transposition plus one year]:

(a) each undertaking which owns a transmission system acts as a transmission system operator;

(b) the same person or the same persons are not entitled:

(i) to directly or indirectly exercise control over an undertaking performing any of the functions of generation or supply, and to directly or indirectly exercise control or hold any interest in or exercise any right over a transmission system operator or over a transmission system,

or

(ii) to directly or indirectly exercise control over a transmission system operator or over a transmission system, and to directly or indirectly exercise control or hold any

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<sup>19</sup> OJ n° L 176 of 15/07/2003 p. 1.

interest in or exercise any right over an undertaking performing any of the functions of generation or supply;

(c) the same person or the same persons are not entitled to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, of a transmission system operator or a transmission system, and to directly or indirectly exercise control or hold any interest in or exercise any right over an undertaking performing any of the functions of generation or supply;

(d) the same person is not entitled to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of generation or supply and a transmission system operator or a transmission system.

2. The interests and rights referred to in paragraphs 1(b) shall include, in particular:

- (a) the ownership of part of the capital or of the business assets, or
- (b) the power to exercise voting rights, or
- (c) the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, or
- (d) the right to obtain dividends or other shares of the benefits.

3. For the purpose of paragraph 1(b), the notion "undertaking performing any of the functions of production or supply" shall cover "undertaking performing any of the functions of production and supply" within the meaning of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in gas and repealing Directive 98/30/EC\*, and the terms "transmission system operator" and "transmission system" shall cover "transmission system operator" and "transmission system" within the meaning of Directive 2003/55/EC.

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\* OJ L 176, 15.7.2003, p. 57

4. Member States may allow for derogations from paragraphs 1(b) and 1(c) until [date of transposition plus two years], provided that transmission system operators are not part of a vertically integrated undertaking.

5. The obligation set out in paragraph 1(a) is deemed to be fulfilled in a situation where several undertakings which own transmission systems have created a joint venture which acts as a transmission system operator in several Member States for the transmission systems concerned. No other undertaking may be part of the joint venture, unless it has been approved under Article 10 as an independent system operator.

6. Member States shall ensure that commercially sensitive information referred to in Article 12 held by a transmission system operator which was part of a vertically integrated undertaking, and the staff of such a transmission system operator, are not transferred to undertakings performing any of the functions of generation and supply."

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- (5) The following Articles 8a and 8b are inserted:

"Article 8a

Control over transmission system owners and transmission system operators

1. Without prejudice to the international obligations of the Community, transmission systems or transmission system operators shall not be controlled by a person or persons from third countries.
2. An agreement concluded with one or several third countries to which the Community is a party may allow for a derogation from paragraph 1.

Art. 8b

Designation and certification of transmission system operators

1. Undertakings which own a transmission system and which have been certified by the national regulatory authority as having complied with the requirements of Article 8(1) and 8a, pursuant to the certification procedure below, shall be approved and designated as transmission system operators by Member States. The designation of transmission system operators shall be notified to the Commission and published in the Official Journal of the European Union.
2. Without prejudice to the international obligations of the Community, where certification is requested by a transmission system owner or transmission system operator controlled by a person or persons from third countries in compliance with Article 8a, it shall be denied unless the transmission system owner or transmission system operator demonstrate that there is no possibility for the entity concerned to be influenced, in violation of Article 8(1), directly or indirectly by any operator active in the production or supply of gas or electricity or by a third country.
3. Transmission system operators shall notify to the regulatory authority any planned transaction which may require a reassessment of their compliance with Articles 8(1) or 8a.
4. Regulatory authorities shall monitor the continuing compliance of transmission system operators with Articles 8(1) and 8a. They shall open a certification procedure to ensure such compliance:
  - (a) upon notification by the transmission system operator pursuant to paragraph 3;
  - (b) on their own initiative where they have knowledge that a planned change in rights or influence over transmission system owners or transmission system operators may lead to an infringement of Articles 8(1) or 8a, or where they have reason to believe that such an infringement may have occurred; or
  - (c) upon reasoned request from the Commission.
5. The regulatory authorities shall adopt a decision on the certification of a transmission system operator within four months from the date of the notification by the transmission system operator or from the date of the Commission request. After

expiry of this period, the certification is deemed to be granted. The explicit or tacit decision of the regulatory authority may become effective only after the conclusion of the procedure set out in paragraphs 6 to 9 and only if the Commission fails to raise objections against it.

6. The explicit or tacit decision on the certification of a transmission system operator shall be notified without delay to the Commission by the regulatory authority, together with all the relevant information with respect to the decision.

7. The Commission shall examine the notification as soon as it is received. Within two months after receiving a notification, where the Commission finds that the decision of the regulatory authority raises serious doubts as to its compatibility with Articles 8(1), 8a or 8b(2), it shall decide to initiate proceedings. In such a case, it shall invite the regulatory authority and the transmission system operator concerned to submit comments. Where additional information is sought by the Commission, the two-month-period may be extended by two additional months starting from the receipt of the complete information.

8. Where the Commission has decided to initiate proceedings, it shall, within not more than four months of the date of such decision, issue a final decision

(a) not to raise objections against the decision of the regulatory authority;

or

(b) requiring the regulatory authority concerned to amend or withdraw its decision if it considers that Articles 8(1), 8a or 8b(2) have not been complied with.

9. Where the Commission has not taken a decision to initiate proceedings or a final decision within the time-limits set in paragraphs 7 and 8 respectively, it shall be deemed not to have raised objections against the decision of the regulatory authority.

10. The regulatory authority shall comply with the Commission decision to amend or withdraw the certification decision within a period of four weeks and shall inform the Commission accordingly.

11. Regulatory authorities and the Commission may request from transmission system operators and undertakings performing any of the functions of generation of supply any information relevant for the fulfillment of their tasks under this Article.

12. Regulatory authorities and the Commission shall preserve the confidentiality of commercially sensitive information.

13. The Commission shall adopt guidelines setting out the details of the procedure to be followed for the application of paragraphs 6 to 9. This measure designed to amend non-essential elements of this Directive by supplementing it shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 27b(3)."

(6) Article 9 paragraph a shall be replaced as follows.

"(a) ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity, operating, maintaining and developing under economic conditions

secure, reliable and efficient transmission systems with due regard to the environment, and promote energy efficiency and research and innovation notably with respect to ensuring penetration of renewables and dissemination of low carbon technology."

(7) Article 10 shall be deleted.

(8) The following Articles 10 and 10a are inserted:

"Article 10

Independent system operators

1. Where the transmission system belongs to a vertically integrated undertaking on entry into force of this Directive, Member States may grant derogations from Article 8(1), provided that an independent system operator is designated by the Member State upon a proposal from the transmission system owner and subject to approval of such designation by the Commission. Vertically integrated undertakings which own a transmission system may not in any event be prevented from taking steps to comply with Article 8(1).

2. The Member State may approve and designate an independent system operator only where:

- (a) the candidate operator has demonstrated that it complies with the requirements of Article 8(1)(b) to (d);
  - (b) the candidate operator has demonstrated that it has at its disposal the required financial, technical and human resources to carry out its tasks under Article 9;
  - (c) the candidate operator has committed to complying with a ten year network development plan proposed by the regulatory authority;
  - (d) the transmission system owner has demonstrated its ability to comply with its obligations under paragraph 6. To this effect, it shall provide all the draft contractual arrangements with the candidate undertaking and any other relevant entity;
  - (e) the candidate operator has demonstrated its ability to comply with its obligations under Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity\* including the cooperation of transmission system operators at European and regional level.
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\* OJ n° L 176 of 15/07/2003 p. 0001 – 0010.

3. Undertakings which have been certified by the regulatory authority as having complied with the requirements of Articles 8a and 10(2) shall be approved and designated as independent system operators by Member States. The certification procedure in Article 8b shall be applicable.

4. Where the Commission has taken a decision in accordance with the procedure in Article 8b and finds that the regulatory authority has not complied with its decision

within two months, it shall, within a period of six months, designate, on a proposal from the Agency for the Cooperation of Energy Regulators and after having heard the views of the transmission system owner and the transmission system operator, an independent system operator for a period of 5 years. At any time, the transmission system owner may propose to the regulatory authority the designation of a new independent system operator pursuant to the procedure in Article 10(1).

5. Each independent system operator shall be responsible for granting and managing third party access, including the collection of access charges, congestion rents, and payments under the inter transmission system operator compensation mechanism in compliance with Article 3 of Regulation (EC) No 1228/2003, as well as for operating, maintaining and developing the transmission system, and for ensuring the long term ability of the system to meet reasonable demand through investment planning. When developing the network the independent system operator is responsible for planning (including authorisation procedure), construction and commissioning of the new infrastructure. For this purpose, it shall act as a transmission system operator in accordance with this Chapter. Transmission system owners may not be responsible for granting and managing third party access, nor for investment planning.

6. Where an independent system operator has been designated, the transmission system owner shall:

- (a) provide all the relevant cooperation and support to the independent system operator for the fulfilment of its tasks, including in particular all relevant information;
- (b) finance the investments decided by the independent system operator and approved by the regulatory authority, or give its agreement to financing by any interested party including the independent system operator. The relevant financing arrangements shall be subject to approval by the regulatory authority. Prior to this approval, the Regulatory Authority shall consult the asset owner together with other interested parties;
- (c) provide for the coverage of liability relating to the network assets, excluding the liability relating to the tasks of the independent system operator;
- (d) provide guarantees to facilitate financing any network expansions with the exception of those investments where, pursuant to paragraph b, it has given its agreement to financing by any interested party including the independent system operator.

7. In close cooperation with the regulatory authority, the relevant national competition authority shall be granted all relevant powers to effectively monitor compliance of the transmission system owner with its obligations under paragraph 6.

#### Article 10a

##### Unbundling of transmission system owners

1. Transmission system owners, where an independent system operator has been appointed, which are part of vertically integrated undertakings shall be independent

at least in terms of their legal form, organisation and decision making from other activities not relating to transmission.

2. In order to ensure the independence of the transmission system owner referred to in paragraph 1, the following minimum criteria shall apply:

- (a) those persons responsible for the management of the transmission system owner may not participate in company structures of the integrated electricity undertaking responsible, directly or indirectly, for the day-to-day operation of the generation, distribution and supply of electricity;
- (b) appropriate measures must be taken to ensure that the professional interests of persons responsible for the management of the transmission system owner are taken into account in a manner that ensures that they are capable of acting independently;
- (c) transmission system owner shall establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored. The programme shall set out the specific obligations of employees to meet this objective. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme to the regulatory authority and shall be published.

3. The Commission may adopt guidelines to ensure full and effective compliance of the transmission system owner with paragraph 2 of this Article. This measure designed to amend non-essential elements of this Directive by supplementing it shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 27b(3)."

(9) Article 12 is replaced by the following:

#### "Article 12

##### Confidentiality for transmission system operators and transmission system owners

1. Without prejudice to Article 18 or any other legal duty to disclose information, each transmission system operator and transmission system owners shall preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its business, and shall prevent information about its own activities which may be commercially advantageous from being disclosed in a discriminatory manner, and in particular shall not disclose any commercially sensitive information to the remaining parts of the company, unless this is necessary for carrying out a business transaction. In order to ensure the full respect of the rules on information unbundling it must also be ensured that the transmission system owner and the remaining part of the company do not use joint services, apart from purely administrative or IT functions (e.g. no joint legal service).

2. Transmission system operators shall not, in the context of sales or purchases of electricity by related undertakings, abuse commercially sensitive information obtained from third parties in the context of providing or negotiating access to the system."

(10) Article 15 is amended as follows:

(a) In paragraph 2(c), the following sentence shall be added after the first sentence: "In order to fulfill these tasks, the distribution system operator shall have at its disposal the necessary resources including human, technical, financial and physical."

(b) Paragraph 2(d) is amended as follows:

(i) the last sentence is amended as follows: "An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme, hereinafter referred to as 'compliance officer', to the regulatory authority referred to in Article 22a(1) and shall be published.

(ii) The following sentence is added: "The compliance officer shall be fully independent and shall have access to all the necessary information of the distribution system operator and any affiliated companies to fulfill his task."

(c) The following paragraphs 3 and 4 are added:

"3. Where the distribution system operator is part of a vertically integrated undertaking, Member States shall ensure that the activities of the distribution system operator is monitored so that it cannot take advantage of its vertical integration to distort competition. In particular, vertically integrated distribution system operators shall not, in their communication and branding, create confusion in respect of the separate identity of the supply branch of the vertically integrated undertaking.

4. The Commission may adopt guidelines to ensure full and effective compliance of the distribution system operator with paragraph 2 as regards the full independence of the distribution system operator, the absence of discriminatory behaviour, and that supply activities of the vertically integrated undertaking cannot take unfair advantage of its vertical integration. This measure designed to amend non-essential elements of this Directive by supplementing it shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 27b(3)."

(11) Article 17 shall be replaced as follows:

"This directive shall not prevent the operation of a combined transmission and distribution system operator provided it complies, for each of its activities, with the applicable provisions of Articles 8, 10b and 15(1)."

(12) The following Chapter VIIa is inserted after Article 22:

#### "CHAPTER VIIa

#### NATIONAL REGULATORY AUTHORITIES

#### Article 22a

Designation and independence of regulatory authorities

1. Each Member State shall designate a single national regulatory authority.
2. Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently. For this purpose, Member State shall ensure that, when carrying out the regulatory tasks conferred upon it by this Directive, the regulatory authority is legally distinct and functionally independent from any other public or private entity, and that its staff and the persons responsible for its management act independently from any market interest and shall not seek or take instructions from any government or other public or private entity.
3. In order to protect the independence of the regulatory authority, Member States shall in particular ensure that:
  - (a) the regulatory authority has legal personality, budgetary autonomy, and adequate human and financial resources to carry out its duties;
  - (b) its management is appointed for a non renewable fixed term of at least five years, and may only be relieved from office during its term if it no longer fulfills the conditions set out in this Article or it has been guilty of serious misconduct.

#### *Article 22b*

##### *Policy objectives of the regulatory authority*

In carrying out the regulatory tasks specified in this Directive, the regulatory authority shall take all reasonable measures to achieve the following objectives:

- (a) the promotion, in close cooperation with the Agency, regulatory authorities of other Member States and the Commission, of a competitive, secure and environmentally sustainable internal electricity market within the Community, and effective market opening for all consumers and suppliers in the Community;
- (b) the development of competitive and properly functioning regional markets within the Community in view of the achievement of the objective mentioned in point (a);
- (c) the suppression of restrictions to electricity trade between Member States, including the development of appropriate cross border transmission capacities to meet demand, enhance integration of national markets and to enable unrestrained electricity flow across the Community;
- (d) ensuring the development of secure, reliable and efficient systems, promoting energy efficiency, system adequacy, and research and innovation to meet demand and the development of innovative renewable and low carbon technologies, in both short and long term; (e) ensuring that network operators are granted adequate incentives, in both the short and the long term, to increase efficiencies in network performance and foster market integration;

- (f) ensuring the efficient functioning of their national market, and to promote effective competition in cooperation with competition authorities.

### *Article 22c*

#### *Duties and powers of the regulatory authority*

1. The regulatory authority shall have the following duties:

- (a) ensuring compliance of transmission and distribution system operators, and where relevant system owners, as well as of any electricity undertakings, with their obligations under this Directive and other relevant Community legislation, including as regards cross border issues;
- (b) cooperating on cross-border issues with the regulatory authority or authorities of those Member States;
- (c) complying with, and implementing, decisions of the Agency and of the Commission;
- (d) reporting on a yearly basis on its activity and the fulfilment of its duties to the relevant authorities of the Member States, the Agency and the Commission. This report shall cover the steps taken and the results obtained as regards each of the tasks listed in this Article;
- (e) ensuring that there are no cross subsidies between transmission, distribution, and supply activities;
- (f) reviewing investment plans of the transmission system operators, and providing in its annual report an assessment of the investment plan of the transmission system operators as regards its consistency with the European-wide 10-year network development plan mentioned in Article 2c(1) of Regulation (EC) No 1228/2003;
- (g) monitoring network security and reliability, and reviewing network security and reliability rules;
- (h) monitoring the level of transparency, ensuring compliance of electricity undertakings with transparency obligations;
- (i) monitoring the level of market opening and competition at wholesale and retail levels, including on electricity exchanges, household prices, switching rates, disconnection rates and household complaints in an agreed format, as well as any distortion or restriction of competition in cooperation with competition authorities, including providing any relevant information, bringing any relevant cases to the attention of the relevant competition authorities;
- (j) monitoring the time taken by transmission and distribution undertakings to make connections and repairs;

- (k) without prejudice to the competence of other national regulatory authorities, ensuring high standards of universal and public service for electricity, the protection of vulnerable customers, and that consumer protection measures set out in Annex A are effective;
- (l) publishing recommendations, at least on a yearly basis, on compliance of supply tariffs with Article 3;
- (m) ensuring access to customer consumption data, the application of a harmonised format for consumption data and the access to data under paragraph (h) of Annex A;
- (n) monitoring the implementation of rules relating to the roles and responsibilities of transmission system operators, distribution system operators, suppliers and customers and other market parties pursuant to Regulation (EC) 1228/2003;
- (o) monitoring investment in generation capacities in relation to security of supply.

2. In addition to the tasks conferred upon it under paragraph 1, when an independent system operator has been designated under Article 10, the regulatory authority shall:

- (a) monitor the transmission system owner's and the independent system operator's compliance with their obligations under this Article, and issue penalties for non compliance in accordance with paragraph 3(d);
- (b) monitor the relations and communications between the independent system operator and the transmission system owner so as to ensure compliance of the independent system operator with its obligations, and in particular shall approve contracts and act as a dispute settlement authority between the independent system operator and the transmission system owner in respect of any complaint submitted by either party pursuant to paragraph 7;
- (c) without prejudice to the procedure under paragraph 2c of Article 10, for the first ten year network development plan, approve the investments planning and the multi-annual network development plan presented on a yearly basis by the independent system operator;
- (d) ensure that network access tariffs collected by independent system operators include a remuneration for the network owner or network owners that provide for an adequate remuneration of the network assets and of any new investments therein;
- (e) have the powers to carry out inspections at the transmission system owner and independent system operator's premises;
- (f) monitor the use of congestion rents collected by the independent system operator in accordance with Article 6(6) of Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity<sup>20</sup>.

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<sup>20</sup> OJ n° L 176 of 15/07/2003 p. 1.

3. Member States shall ensure that regulatory authorities are granted the powers enabling them to carry out the duties referred to in paragraph 1 and 2 in an efficient and expeditious manner. For this purpose, the regulatory authority shall have at least the following powers:

- (a) to issue binding decisions on electricity undertakings;
  - (b) to carry out in cooperation with the national competition authority investigations of the functioning of electricity markets, and to decide, in the absence of violations of competition rules,, of any appropriate measures necessary and proportionate to promote effective competition and ensure the proper functioning of the market, including virtual power plants;
  - (c) to request any information from electricity undertakings relevant for the fulfilment of its tasks;
  - (d) to impose effective, appropriate and dissuasive sanctions to electricity undertakings not complying with their obligations under this Directive or any decisions of the regulatory authority or of the Agency;
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(e) to have appropriate rights of investigations, and relevant powers of instructions for dispute settlement under paragraphs 7 and 8;

(f) to approve safeguards measures as referred to in Article 24.

4. The regulatory authorities shall be responsible for fixing or approving prior to their entry into force the terms and conditions for:

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

(b) the provision of balancing services.

5. In fixing or approving the tariffs, the regulatory authorities shall ensure that network operators are granted adequate incentive, over both the short and long term, to increase efficiencies, foster market integration and support the related research activities.

6. Regulatory authorities shall have the authority to require transmission and distribution system operators, if necessary, to modify the terms and conditions, including tariffs referred to in this Article, to ensure that they are proportionate and applied in a non-discriminatory manner.

7. Any party having a complaint against a transmission or distribution system operator may refer the complaint to the regulatory authority which, acting as dispute settlement authority, shall issue a decision within two months after receipt of the complaint. This period may be extended by two months where additional information is sought by the regulatory authorities. This period may be extended with the agreement of the complainant. Such a decision shall have binding effect unless and until overruled on appeal.

8. Any party who is affected and who has a right to complain concerning a decision on methodologies taken pursuant to this Article or, where the regulatory authority has a duty to consult, concerning the proposed methodologies, may, at the latest within two months, or a shorter time period as provided by Member States, following publication of the decision or proposal for a decision, submit a complaint for review. Such a complaint shall not have suspensive effect.
9. Member States shall create appropriate and efficient mechanisms for regulation, control and transparency so as to avoid any abuse of a dominant position, in particular to the detriment of consumers, and any predatory behaviour. These mechanisms shall take account of the provisions of the Treaty, and in particular Article 82 thereof.
10. Member States shall ensure that the appropriate measures are taken, including administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons responsible where confidentiality rules imposed by this Directive have not been respected.
11. Complaints referred to in paragraphs 7 and 8 shall be without prejudice to the exercise of rights of appeal under Community and national law.
12. Decisions taken by regulatory authorities shall be motivated.
13. Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of the national regulatory authority has a right of appeal to a body independent of the parties involved.
14. The Commission may adopt guidelines on the implementation by the regulatory authorities of the powers described in this Article. This measure designed to amend non-essential elements of this Directive by supplementing it shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 27b(3)"

#### Article 22d

##### Regulatory regime for cross border issues

1. Regulatory authorities shall closely cooperate and consult with each other, and shall provide each other and the Agency with any information necessary for the fulfilment of their tasks under this Directive. In respect of the information exchanged, the receiving authority shall ensure the same level of confidentiality as that required of the originating authority.
2. Regulatory authorities shall cooperate at least on a regional level to foster the creation of operational arrangements in order to ensure an optimal management of the network, develop joint electricity exchanges and the allocation of cross-border capacity, and to ensure a minimum level of interconnection capacity within the region to allow for effective competition to develop.
3. The Agency shall decide upon the regulatory regime for infrastructure connecting at least two Member States:

- a) upon a joint request from the competent national regulatory authorities, or,
- b) where the competent national regulatory authorities have not been able to reach an agreement on the appropriate regulatory regime within six months from the date the file was brought before the last of these regulatory authorities.

4. The Commission may adopt guidelines on the extent of the duties of the regulatory authorities to cooperate with each other and with the Agency, and on the situations in which the Agency becomes competent to decide upon the regulatory regime for infrastructures connecting at least two Member States. These measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 27b(3).

## Article 22e

### Compliance with Guidelines

1. Any regulatory authority and the Commission may request the opinion of the Agency on the compliance of a decision taken by a regulatory authority with guidelines referred to in this Directive or in Regulation (EC) No 1228/2003.
2. The Agency shall provide its opinion to the regulatory authority which has requested it or to the Commission, respectively, and to the regulatory authority which has taken the decision in question within four months.
3. Where the regulatory authority which has taken the decision does not comply with the Agency's opinion within four months from the date of receipt, the Agency shall inform the Commission.
4. Any regulatory authority may inform the Commission where it considers that a decision taken by a regulatory authority does not comply with guidelines referred to in this Directive or in Regulation (EC) No 1228/2003 within two months from the date of that decision.
5. Where the Commission, within two months after having been informed by the Agency in accordance with paragraph 3 or by a regulatory authority in accordance with paragraph 4, or on its own initiative within three months from the date of the decision finds that the decision of a regulatory authority raises serious doubts as to its compatibility with guidelines referred to in this Directive or in Regulation (EC) No 1228/2003, the Commission may decide to initiate proceedings. In such a case, it shall invite the regulatory authority and the parties to the proceedings before the regulatory authority to submit comments.
6. Where the Commission has decided to initiate proceedings, it shall, within not more than four months of the date of such decision, issue a final decision:
  - (a) not to raise objections against the decision of the regulatory authority;

or

(b) requiring the regulatory authority concerned to amend or withdraw its decision if it considers that guidelines have not been complied with.

7. Where the Commission has not taken a decision to initiate proceedings or a final decision within the time-limits set in paragraphs 5 and 6 respectively, it shall be deemed not to have raised objections against the decision of the regulatory authority.

8. The regulatory authority shall comply with the Commission decision to amend or withdraw their decision within a period of two months and shall inform the Commission accordingly.

9. The Commission shall adopt guidelines setting out the details of the procedure to be followed for the application of this Article. This measure designed to amend non-essential elements of this Directive by supplementing it shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 27b(3).

#### Article 22f Record keeping

1. Member States shall require supply undertakings to keep at the disposal of the national regulatory authority, the national competition authority and the Commission, for at least five years, the relevant data relating to all transactions in electricity supply contracts and electricity derivatives with wholesale customers and transmission system operators.

2. The data shall include details on the characteristics of the relevant transactions such as duration, delivery and settlement rules, the quantity, the dates and times of execution and the transaction prices and means of identifying the wholesale customer concerned, as well as specified details of all unsettled electricity supply contracts and electricity derivatives.

3. The regulatory authority may decide to make available to market participants elements of this information provided that commercially sensitive information on individual market players or individual transactions is not released. This paragraph shall not apply to information about financial instruments which fall within the scope of Directive 2004/39/EC.

4. To ensure the uniform application of this Article, the Commission may adopt guidelines which define the methods and arrangements for record keeping as well as the form and content of the data that shall be kept. These measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 27b(3).

5. With respect to transactions in electricity derivatives of supply undertakings with wholesale customers and transmission system operators, this Article shall only apply once the Commission has adopted the guidelines referred to in paragraph 4.

6. The provisions of this Article shall not create additional obligations vis-à-vis the authorities mentioned in paragraph 1 for entities falling within the scope of Directive 2004/39/EC.

7. In case the authorities mentioned in paragraph 1 need access to data kept by entities falling within the scope of Directive 2004/39/EC, the authorities responsible under that Directive shall provide the authorities mentioned in paragraph 1 with the required data.

(13) Article 23 is deleted.

(14) A new Article 27b is inserted as follows:

"Article 27b

Committee

1. The Commission shall be assisted by a committee.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

3. Where reference is made to this paragraph, Article 5a(1) to (4), and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof."

(15) In Annex A, the following paragraphs shall be added:

"(h) have at their disposal their consumption data, and shall be able to, by explicit agreement and free of charge, give any undertaking with a supply license access to its metering data. The party responsible for data management is obliged to give these data to the undertaking. Member States shall define a format for the data and a procedure for suppliers and consumers to have access to the data. No additional costs can be charged to the consumer for this service.

(i) shall be properly informed every month of actual electricity consumption and costs. No additional costs can be charged to the consumer for this service.

(j) can change supplier at any time in the year, and a customer's account with the previous supplier shall not be settled later than one month following the last supply by this previous supplier."

## *Article 2*

### *Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [18 months after entry into force] at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

They shall apply these provisions from [18 months after entry into force].

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

### *Article 3*

#### *Entry into force*

This Directive shall enter into force on the [...] day following that of its publication in the Official Journal of the European Union.

*Article 4*

This Directive is addressed to the Member States.

Done at Brussels, [...]

*For the European Parliament*

*The President*

[...]

[...]

*For the Council*

*The President*