



EUROPEAN COMMISSION

Brussels, 25.7.2017
C(2017)5213 final

Dear President,

The Commission would like to thank the Bundesrat for its Reasoned Opinions on the proposal for a Regulation of the European Parliament and of the Council on the internal market for electricity (recast) {COM(2016) 861 final} and on the proposal for a Directive of the European Parliament and of the Council on common rules for the internal market in electricity (recast) {COM(2016) 864 final}.

The proposals are part of the "Clean Energy for All Europeans" package, adopted by the Commission in order to establish a stable and forward-looking regulatory framework to meet upcoming energy challenges. The measures included in the package focus on the following three main objectives: energy efficiency first, achievement of a global leadership in renewable energies and a fair deal for consumers.

The Commission takes seriously the concerns expressed by the Bundesrat in its Reasoned Opinions. It would like to recall, however, that the proposals aim at creating a new framework for cross-border cooperation, which can legally and practically only be achieved at European level. Furthermore national policy interventions in the electricity sector have a direct impact on neighbouring Member States. This is valid even more now than in the past as the increasing cross-border trade, the spread of decentralised generation and more enhanced consumer participation increase spill-over effects. Moreover, electricity networks in most of the European Union are closely meshed, with large synchronous areas operating at identical frequencies and core system operation tasks depending on efficient cross-border cooperation, resulting in structural interdependencies and direct impacts of national measures on a wider area. No Member State can effectively act alone and the externalities of unilateral action have become more important. On that basis the Commission finds that the proposals duly respect the subsidiarity principle.

In response to the more detailed comments in the Reasoned Opinions relating to the substantial elements of the proposals, the Commission would like to refer the Bundesrat to the attached annex.

*Mr Edgar MAYER
President of the Bundesrat
Dr Karl Renner-Ring 3
A – 1017 WIEN*

The points made in this reply are based on the initial proposals presented by the Commission which are currently in the legislative process involving both the European Parliament and the Council.

The Commission hopes that the clarifications provided in this reply address the issues raised by the Bundesrat and looks forward to continuing the political dialogue in the future.

Yours faithfully,

*Frans Timmermans
First Vice-President*

*Miguel Arias Cañete
Member of the Commission*

ANNEX

The Commission has carefully considered each of the substantial issues raised by the Bundesrat in its Reasoned Opinions and is pleased to offer the following clarifications:

As regards the Bundesrat's concerns on the proposal for a Regulation on the internal market for electricity

1. Configuration of bidding zones

The Commission is well aware that the definition of bidding zones is a sensitive question. As regards competence, it is important to underline that the current EU legislation provides for substantive requirements on bidding zone configuration. In its decision in case 39351 – Swedish Interconnectors¹, the Commission found already in 2010 that the single Swedish bidding zone had discriminatory effects on cross-border trade and required modification pursuant to Article 102 of the Treaty on the Functioning of the European Union. Sweden has since introduced a system with four different bidding zones. In addition to requirements under competition law, Annex 1.7 to Regulation (EC) 714/2009² sets out substantive requirements for the definition of bidding zones. These include the provision that negative impacts on the internal market need to be minimized and interconnection capacity shall not be limited in order to solve internal congestion. Finally, Article 32 of Commission Regulation (EU) 2015/1222³ sets out a coherent process for the review of the existing bidding zones. Thus, the definition of bidding zones is already subject to extensive substantive and procedural requirements under EU law.

These requirements are based on the importance of well-designed bidding zones for the effective functioning of the internal market for electricity. Structural congestions, which are neither resolved by infrastructure developments nor addressed in a non-discriminatory manner by allocating capacities at a bidding zone border, pose a serious threat to market functioning. This includes serious impacts on other Member States, such as congestion inside their grid, reduced cross-border capacities and risks for network stability. As regards market functioning, bidding zones with significant internal structural congestion distort investment signals, and result in dispatch decisions which do not address actual supply and demand. The Commission maintains that network development is the optimal solution to structural congestion, and supports Austria in its efforts undertaken in this regard. However, until network developments address the issues, there is a need for alternative solutions. Given the significant cross-border impact of bidding zones, their optimal definition cannot be resolved by any one Member State alone.

¹ Commission Decision of 14 April 2010 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement of the European Economic Area in case Case 39351 – Swedish Interconnectors.

² Regulation (EC) No 714/2009 of the European Parliament and of the Council of 15 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, OJ L 211, 14.8.2009, p.15-35.

³ Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management, OJ L 197, 25.7.2015, p. 24-72.

The Bundesrat also voices its concerns regarding the process for defining the assumptions and methodology used by the transmission system operators participating in the bidding zone review. The Commission recalls that Article 32(4) of Commission Regulation (EU) 2015/1222 provides that national regulatory authorities of the concerned region need to approve and may amend methodology and assumptions for a bidding zone review, but pursuant to Article 9(11) of that Regulation, the Agency for the Cooperation of Energy Regulators becomes responsible for this decision should the regulatory authorities not be able to agree. In that regard, the proposal aims to streamline this process by directly providing the Agency with the task of approving and/or amending methodologies and assumptions. The Commission believes that this would contribute to increased transparency and quicker processes on this important issue. At the same time, it is important to underline that the national regulatory authorities remain fully involved in the process, as the decision inside the Agency requires their approval in the Board of Regulators.

The Commission is also convinced that the powers granted to the Agency for the Cooperation of Energy Regulators in the proposal are fully in line with the requirements of the case-law of the Court of Justice, in particular as any discretion is closely circumscribed by the criteria set out in the proposal as well as in Commission Regulation (EU) 2015/1222.

2. Regional operational centres

The challenges that the EU electricity system will be facing in the medium to long term are pan-European and cannot be addressed and optimally managed by individual transmission system operators, rendering the current legal framework no longer suited to the reality of the dynamic and variable nature of the future electricity system. Enhancing the regional set-up is therefore a crucial element when building the market design of the future.

To avoid that inefficient solutions are applied at regional level because of a lack of agreement between transmission system operators, it is necessary to have a regional entity that can act in the interest of the whole region. This is particularly necessary regarding congestion management.

The regional operational centres will not result in parallel structures to the European network of transmission system operators for electricity. Whereas the European network of transmission system operators for electricity fulfils important governance tasks on a European level, in particular as regards the process for the creation of network codes and guidelines, the proposal on regional operational centres aims at ensuring effective cooperation between transmission system operators on a regional level on technical tasks.

On almost all tasks attributed to regional operational centres in the proposal, existing legislation already requires coordination in decision-making among transmission system operators. In this regard, the Commission would like to point out, first, that the functions to be carried out by the regional operational centres for which they would have decision-making power would take place in the day-ahead and intraday timeframes. Hence, such functions

exclude real time operation of the system. Second, the proposal requires the active participation of the transmission system operators of the system operation region. Third, the "cooperative decision-making procedure" laid down in the proposal sets out a number of safeguards, such as the possibility for regional operational centres to review the decision if the transmission system operators of the region express concerns or the possibility for these operators to deviate from the parameters of the decision if they consider that implementing it may compromise the safe operation of the system.

3. Delegated acts

The Commission notes the Bundesrat's objection to the proposed delegation of powers in Article 63 of the proposed Regulation and its statement that the adoption of delegated acts must remain an absolute exception.

The Commission's approach to the delegation of power is based on the principle that acts adopted through a legislative procedure best ensure the democratic legitimacy envisaged by the Treaty. However, properly used, delegated powers are an integral tool of better law-making, contributing to simple and up-to-date legislation and its efficient and swift implementation. Therefore, the Commission would only propose empowerments for delegated acts where they concern non-essential elements and are justified, namely when it is not possible or less efficient or effective to include the relevant elements directly in the basic legislative act.

In order to make the Regulation fully operational, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union has been deemed necessary. The delegations of power in the proposal provide for clear and concise criteria, giving limited discretion to the Commission. The Commission would involve Member States in the preparation of these acts and would ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and the Council.

In that regard the Commission would like to recall that the adoption of detailed provisions via the comitology procedure has played a key role in the past in furthering the integration of the internal electricity market. In an area such as energy markets, with so many technical requirements, technical legislation is essential to achieve sufficient regulatory control, agreement on cross-border issues and further market integration.

4. Energy mix

The Commission considers that the proposal for a Regulation leaves sufficient flexibility for Member States to determine their energy mix as guaranteed by Article 194 of the Treaty on the Functioning of the European Union. In line with the spirit of the Paris Agreement, the objective of Article 23(4) of the proposed Regulation is to help the progressive decarbonisation of the European power sector.

As regards the Bundesrat's concerns on the proposal for a Directive on common rules for the internal market in electricity

1. Unbundling

As regards the Bundesrat's concerns on Articles 40, 43 and 52 of the proposal, the Commission wishes to stress that the proposal does not introduce "restrictions" (Einschränkungen) in the existing unbundling models. The Commission would be pleased to provide further clarification on these provisions.

2. Dynamic price contracts

As regards the provision on access to a dynamic price contract laid out in the Directive, the Commission would like to underline that the proposal aims at improving the functioning of the retail energy market in line with Article 194 of the Treaty on the Functioning of the European Union, as also explained in the Impact Assessment accompanying the proposal. On that basis, the Commission remains of the opinion that the proposal duly respects the subsidiarity principle.