



EUROPEAN COMMISSION

*Brussels, 6.7.2017
C(2017) 4454 final*

Dear President,

The Commission would like to thank the Bundestag 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 Regulation of the European Parliament and of the Council establishing a European Union Agency for the Cooperation of Energy Regulators (recast) {COM(2016) 863 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 further integration of European energy markets is a central prerequisite for achieving the objectives of the package. This requires both adapting the rules governing the electricity market and adapting the competences and functioning of the Agency for the Cooperation of Energy Regulators (ACER).

The Commission welcomes the Bundestag's broad support for strengthening the European internal energy market and its support for the Agency as a valuable coordination and advisory body for national energy regulators. It also takes seriously the concerns expressed by the Bundestag in its reasoned opinion.

In the Commission's view, the proposals fully respect the principle of subsidiarity. 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, even more so than in the past as the increasing cross-border trade, the spread of decentralised generation and more enhanced consumer participation increases spill-over effects. No Member State can effectively act alone and the externalities of unilateral action have become more important. This naturally calls for some adaptations to the existing electricity market legislation.

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In response to the comments in the reasoned opinion relating to the substance of the proposals, the Commission would like to refer the Bundestag to the attached annex.

The proposals are currently in the legislative process involving both the European Parliament and the Council. The Commission remains hopeful that an agreement will be reached in the near future.

The Commission hopes that the clarifications provided in this reply address the issues raised by the Bundestag 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 substantive issues raised by the Bundestag in its reasoned opinion and is pleased to offer the following clarifications:

1. Configuration of bidding zones

The Commission is well aware that the question of bidding zones is highly sensitive in Germany. Structural congestions which are not resolved by infrastructure developments pose a serious threat to the functioning of the European internal energy market. This includes serious impacts on other Member States, such as congestion inside their grid, reduced cross-border capacities etc. The Commission maintains that network development is the optimal solution to structural congestion. However, should network development not address the issues within an adequate timeframe, there is a need for alternative solutions. Given the significant cross-border impact, the optimal definition of bidding zones cannot be resolved by any one Member State alone. In that context, the Commission is well-placed to take all relevant aspects into consideration for an appropriate decision.

2. Delegated acts

The Bundestag considers the proposed delegation of powers in the proposal as too comprehensive and as an impediment to being able to properly perform a subsidiarity check.

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 foreseen 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, that is to say 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 on the internal market for electricity 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 recent years in furthering the integration of the internal electricity market. In a field like energy markets with so many technical requirements, technical legislation is essential to achieve sufficient regulatory control, achieve agreement on cross-border issues and further market integration.

3. 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, alone, rendering the current legal framework no longer suited to the reality of the dynamic and variable nature of the future electricity system. Enhancing regional cooperation is therefore a crucial element when building the market design of the future.

To ensure better security of supply and to avoid that inefficient solutions are applied at regional level because of a lack of appropriate coordination or agreement between transmission system operators, it is necessary to have a regional entity that can act in the interest of the whole region. For example, this is particularly necessary regarding congestion management at borders.

For almost all tasks attributed to regional operational centres in the proposal, existing legislation already requires coordination in decision-making between transmission system operators. The proposal includes only very limited issues on which the Regional Operational Centres decide. None of these decisions interfere with the transmission system operators' core activity related to system security as all decisions are about coordination of issues which can be agreed weeks or months ahead of actual operations.

4. On the extension of the powers and responsibilities of the Agency:

As regards the extension of the competences of the Agency, the reference to regulatory issues of “cross-border relevance” in Article 6 of the proposal was not intended to give the Agency an unlimited competence. It rather reflects the role already played by the Agency today in its arbitration role in cases where national regulatory authorities cannot agree on a matter, in particular pursuant to network codes. The current role of the Agency goes frequently beyond infrastructure matters.

Regarding the wording added under Article 14 of the proposal, this is a simple clarification which follows the case-law of the Court of Justice of the European Union (the so-called post Meroni jurisprudence). The case-law of the Court has set many limitations to the powers that may be granted to EU Agencies.

Regarding the changes proposed in Article 5(2), the Commission wishes to underline that this decision-making process is only applicable to the development of proposals for terms and conditions or methodologies for the implementation of network codes and guidelines. The current procedure is lengthy and cumbersome. It has proved to be inefficient, taking place in two rounds: the proposal has first to be approved by each national regulatory authority. Then, as soon as one authority disagrees, the decision must be taken by the Agency, through its Board of Regulators where all national regulators are represented. The Commission's proposal aims at streamlining the procedure, giving the decision-making power directly to the Agency, without having to go through every national regulatory authority's approval. It does

not create new powers for the Agency in this field as the agency was already involved on the basis of the current procedure foreseen in the network codes and guidelines.

Deciding on the configuration of the regional operational centres (Article 8(2) of the proposal) requires the coordination of national regulatory authorities. The best place for such coordination is the Agency. This is why the Commission suggested that the Agency should decide on the geographical configuration of regional operational centres.

As regards the concerns raised by the Bundestag on the Agency's competences in regional matters, the Commission wishes to stress that the procedure foreseen in Article 7 of the proposal only applies to decisions on terms, conditions or methodologies foreseen in network codes and guidelines adopted pursuant to Article 5(2) of the Regulation. Currently, these network codes and guidelines foresee individual decisions by each national regulatory authority and a decision by the Agency only when the national authorities cannot agree. The Commission proposal suggests a simplification of the procedure, conferring the power to decide directly to the Board of Regulators where the national regulators are represented. When matters are considered of regional relevance, a regional subgroup would be able to submit a recommendation on the matter to the Board of Regulators. This recommendation should be followed by the Board of Regulators.

5. On the decision-making processes of the Agency

As regards decision-making in the Board of Regulators, the current rules require a two-thirds majority with each country having one vote (no weighing of votes). By proposing a simple majority rule the Commission seeks to facilitate decision-making and to align with voting rules applied in other EU Agencies. In addition, the high two-thirds threshold has created blockages in the past and prevented the Agency for the Cooperation of Energy Regulators from taking important decisions in the interest of the internal energy market.

The Commission recalls that the "one member-one vote" principle is also applied by the College of Commissioners and is thus something not uncommon in the executive branch of European institutions. The Agency is part of this executive branch and not a legislative body.

As regards the drafting of the decision of the Agency by its director, this right has always existed in the Regulation governing the Agency and has been confirmed on several occasions by the Commission. This is common practice in all EU Agencies. The wording proposed is a simple clarification of the current situation.