

Internal market in electricity. Third energy package

2007/0195(COD) - 09/01/2009 - Council position

The Council unanimously adopted its common position in the form of a recast of Directive 2003/54/EC (the current legislative act will therefore be repealed). To the extent possible the Council has followed the Commission's approach regarding an identical treatment of the electricity and gas sectors.

Concerning the 156 amendments adopted by the European Parliament at first reading, the Council has followed the Commission in accepting, in part or in full, 21 amendments and in rejecting 38 other amendments.

Regarding the European Parliament amendments where the Council has deviated from the Commission position, the Council accepted one amendment and rejected 106.

The Council also introduced the following modifications to the Commission proposal:

Effective separation of network operation from generation and supply activities: in addition to the two options proposed by the Commission (ownership unbundling (OU) and the Independent System Operator (ISO)), the Council, in agreement with the Commission, considered it appropriate to introduce a **third option, the Independent Transmission Operator (ITO)**, in the case where a transmission system operator is part of a vertically integrated undertaking (VIU) at the entry into force of the Directive. The three options are on equal footing and will be available for both the electricity and the gas sector.

The ITO-provisions will ensure the effective independence of the operator, its management and the supervisory body and that conflicts of interest are avoided. Moreover, undistorted investment incentives and the development of interconnection infrastructure, as well as fair and non-discriminatory network access, will be ensured.

Additional powers and competences for the regulatory authorities have been added. In addition, a paragraph has been added regarding regional cooperation where ITOs are involved. Finally, the Commission will assess, as part of a general review, the implementation of the ITO option against certain criteria two years after the date of transposition of the Directive.

Level playing field: given the future presence of three different unbundling models on the Community market, provisions establish a number of criteria for measures which Member States have the possibility to take in order to ensure a level playing field.

Certification of Transmission System Operators (TSOs) of the Community and of third countries: the common position has a general Article on certification and one on certification in relation to third countries. This Article ensures on the one hand that TSOs of third countries have to respect the same unbundling rules as Community TSOs. On the other hand, it introduces the criterion of security of energy supply of the Member States and the Community which has to be taken into account when certification is granted.

The main decision on certification will remain with the national regulatory authorities while the Commission is requested to give its opinion on the certification. National regulators must take utmost account of that opinion.

Regulatory authorities: the common position ensures that the principle of a single regulator at national level combined with unique representation (e.g. at the Agency) is compatible with the current existence in some Member States of regulators at regional level or for small and isolated parts of the territory.

While ensuring the independence of the regulatory authorities, the text of the common position also clarifies that this does not mean that regulators are free from judicial control or parliamentary supervision or can ignore broader objectives e.g. on environmental sustainability or on public service obligations.

The common position also ensures that, when carrying out their duties, regulators have the possibility to act, where relevant, in close cooperation with other authorities, such as competition ones, while preserving their independence and without duplicating the tasks (e.g. monitoring) usually carried out by other authorities.

Regulatory regime for cross-border issues: the provisions setting out the role of the Agency have, for legal reasons, been transferred to the Agency Regulation. The Agency will be involved in cross-border issues as a last resort, at the request of national regulators or if national regulators don't reach an agreement within a certain time frame.

Derogations: the Council considered it appropriate to update the text, in particular regarding a derogation from the unbundling provisions for Member States with emergent or isolated markets.

Minority shareholding: the Council considered it appropriate not to exclude minority shareholding of producer/supplier in ownership unbundled TSOs as long as this does not entail any control or any influence of one on the other and cannot lead to a conflict of interest.

Public ownership: the common position contains the possibility to achieve ownership unbundling with two separate public bodies through a provision recognising that two distinct public bodies can be considered as two persons for the purpose of implementing ownership unbundling.

Combined operators: a provision provides that a combined operator can be operated, alternatively, either as an ownership unbundled operator, as an independent System Operator or as an Independent Transmission Operator.