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SUBSIDIARITY/PROPORTIONALITY ASSESSMENT

Subsidiarity Monitoring Unit

Document no.	COM(2007) 1 final
Title	<i>Commission Communication "An Energy Policy for Europe"</i> <i>Nature of document:</i> non-legislative
Date of adoption by the Commission	10-01-2007
Draft CoR opinion	DEVE (Rapporteur: Mr Bernd Vögerle AT/PES)
Treaty articles invoked	None.
Detailed subsi analysis	NO

1. Legal bases/justification for action by the EU

The Commission document submitted for analysis must be studied in the light of the conclusions of the Brussels European Council of 8 and 9 March 2007. These two documents embody a collective awareness of the related problems of renewable energy and global warming.

In the absence of any legislative measures, the analysis will restrict itself to putting forward recommendations on measures currently in preparation, so that the Commission remains vigilant as regards respecting the principles of subsidiarity and proportionality.

As the document is a communication, no legal basis is invoked. However, it concerns fields where the Community may intervene, namely energy policy¹, trans-European networks², the internal market³ and development cooperation⁴. Responsibility for energy policy, trans-European networks and the internal market are shared with the Member States, and development cooperation policy comes under supplementary terms of reference. Therefore, the principles of subsidiarity and proportionality apply.

¹ Articles 3(1)(u), 174 and 175 of the EC Treaty.

² Articles 3(1)(o), 154, 155 and 156 of the EC Treaty.

³ Articles 3(1)(c) and 14 of the EC Treaty.

⁴ Articles 3(1)(r), 177 and 179 of the EC Treaty.

2. Respect for the principle of subsidiarity

This communication is justified, because it meets the criteria of Article 5 of the Protocol on the application of the principles of subsidiarity and proportionality:

- on the one hand, the issue has transnational aspects (for example, energy consumption is a prime source of air pollution and the energy problems of one state can have repercussions for the other Member States);
- moreover, action by the Community offers clear advantages (for example, an internal energy market may reduce the dependence of certain Member States on a single gas supplier, and coordinating action by the Member States to reduce greenhouse gases will make it possible to achieve the critical mass necessary to guide research, innovation and investment in a direction that is favourable to environmental protection).

2.1 Free choice of energy mix

Key point

However, however interesting the ideas of this communication on the share of the various energy resources are, it is advisable to recall clearly that "*measures significantly affecting a Member State's choice between different energy resources and the general structure of its energy supply*" have to be **adopted unanimously by the Council**, "*after consulting (...) the Committee of the Regions*" (Article 175(2)(c) of the EC Treaty).

Moreover, the Committee of the Regions has already underlined that "*in keeping with the subsidiarity principle, the choice of energy mix must remain with the Member States*"⁵.

Key point

The requirement of unanimity is a constraint, but it is also an opportunity for the Commission: it will make for greater commitment by the Member States, and therefore a greater chance of success for the recommended measures.

2.2 Tax measures

Key point

The Commission also suggests the "*coherent use of taxation to achieve more efficient use of energy*" (point 3.4 of the communication). It is worth recalling here that tax measures have to be **adopted unanimously by the Council** after consulting, inter alia, the Committee of the Regions, which means that particular attention should be paid to the principle of subsidiarity (Article 175(2)(a) of the EC Treaty).

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Opinion CdR 150/2006, point 1.10.

2.3 Regulation of the internal energy market

Key point

In its opinion of 11 October 2006⁶, the Committee of the Regions already rejected *"the idea of setting up new administrative structures such as a 'European energy regulator', as national regulators are capable of achieving the objectives proposed by the Commission"*.

This opposition arises in particular from Article 7 of the Protocol on the application of the principles of subsidiarity and proportionality, which stipulates that *"Community measures should leave as much scope for national decision as possible"*.

Key point

The Commission also recognises in this communication that an intermediate solution, i.e. a European network of independent regulators ("EREGG + "), would be sufficient.

It therefore seems worth recalling now the Committee's opposition to the setting-up of a single body at Community level. Under the terms of the principle of subsidiarity, this single body could be set up only in the event of the failure of the "EREGG +".

3. Simplification of standards

As it did in its opinion of 16 February 2006 on the Green Paper on energy efficiency, the Committee of the Regions should stress that *"further energy-efficiency rules for the Member States must not be drawn up too hastily."*⁷ On the contrary it could stress the advisability of simplification.

4. Respect for the principle of proportionality

One has to ask how an energy policy that complies with the principle of proportionality is to be implemented. A not inconsiderable role is played by regional and local authorities (RLAs). The European Commission itself stresses in its communication of 11 January 2006⁸ that *"the diversity in terms of history, geography, climate, administrative and legal conditions calls for locally developed, tailor-made solutions for the urban environment"*, and that *"application of the subsidiarity principle, where action should be taken at the most effective level, also implies acting at the local level"*.

⁶ Opinion CdR 150/2006, point 1.16.

⁷ Opinion CdR 216/2005, point 1.6.

⁸ Communication from the Commission to the Council and the European Parliament on a thematic strategy for the urban environment, COM(2005) 718, 11 January 2006.

4.1 **Unbundling network ownership and energy distribution**

The provision aiming to separate network ownership from energy distribution has to be examined in the light of the local conditions which may be met on the ground in the Union. Indeed, the Committee of the Regions has already pointed out⁹ that care should be taken to preserve services of general interest on certain territories which cannot bear the full brunt of a liberalisation policy. As regards energy, certain RLAs which manage or help to manage energy distribution networks may not be able to handle this compulsory unbundling.

Key point

The Commission suggests in particular that *"the provisions regarding the unbundling of distribution activities - which presently exempt distributors with less than 100 000 customers from most of the unbundling requirements - need to be re-examined"* (point 3.1.1 of the communication). The Committee should stress that the removal of these provisions¹⁰ would cause difficulties, according to the terms of these directives, for "small isolated systems", and would lead to a risk of inequality between territories.

Key point

More generally, **to avoid any ambiguity, the Committee could point out that the Community does not have the power to impose privatisation.** Indeed, Article **295 of the EC Treaty** stipulates that *"this Treaty shall in no way prejudice the rules in Member States governing the system of property ownership"*.

4.2. **National action plans to promote renewable energy resources**

Key point

The Commission suggests that it should be notified of any national action plans to promote renewable energy resources. **Member States could be explicitly requested to consult RLAs on the relevance of such plans.**

This seems particularly opportune, since there is now a political consensus on recognising the importance of the four levels of governance levels in the European Union: the Berlin Declaration of 25 March 2007¹¹ solemnly states that *"tasks are shared between the European Union, the Member States and their regions and local authorities"*.

⁹ Points 2.1.2 and 2.1.3 of the opinion CdR 149/2003 of 20 November 2003 on the Green Paper on the services of general interest (COM (2003) 270), and point 1.7 of the opinion CdR 327/2004 of 23 February 2005 on the Commission Communication on the White Paper on services of general interest (COM(2004) 374).

¹⁰ Last subparagraph of Article 15 of Directive 2003/54/EC and of Article 13 of Directive 2003/55/EC.

¹¹ Signed by the president of the European Council, the president of the European Parliament and the president of the European Commission.

Asking the Member States to consult the RLAs on the relevance of such action plans would, among other things, be the best means of respecting Article 9 indent 3 of the Protocol on the application of the principles of subsidiarity and proportionality, concerning the optimisation of costs at all levels.

Key point

Lastly, it would be consistent with the Commission Communication on a thematic strategy for the urban environment¹², under which *"it is widely recognised that the most successful local authorities (...) use long-term and strategic action plans"*. **If the Commission asks Member States and RLAs simultaneously to draw up action plans, it would be logical to ask the states to coordinate their plans with those of the RLAs.** The Commission also explicitly states in this communication that *"obligations imposed at local, regional, national or European level (e.g. land-use, noise, air quality) can be more effectively implemented at the local level when integrated into a local strategic management framework"*.

4.3 Reduction of greenhouse gases

Similarly, as regards reducing greenhouse gas emissions by 20%, no details are given on the effort to be made by RLAs to achieve this objective, or on the linkage to be set up between the national and local level. For example, the document does not seem to realise that street lighting is the responsibility of municipalities in the vast majority of Member States, and that any policy aiming to save energy in this area has to go through the municipalities. Moreover, as regards research into energy, which in several states is either a regional or a shared responsibility, the text does not put forward any alternative to national action, even though Article 7 of the Protocol on the application of the principles of subsidiarity and proportionality states that *"where appropriate (...) Community measures should provide Member States with alternative ways to achieve the objectives of the measures"*.

4.4 Energy saving in transport

Key point

The Commission recommends *"exploiting the significant energy efficiency potential in transportation, using a variety of measures including legislation as necessary"* (point 4 of the communication). This is likely to generate costs for RLAs, which have many responsibilities in the field of public transport. Therefore, and in accordance with Article 9 indent 3 of the Protocol on the application of the principles of subsidiarity and proportionality, the Commission should continue its **support for regional and local self-government as regards the provision of this service of general interest.**

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Communication from the Commission to the Council and to the European Parliament on a thematic strategy for the urban environment, COM(2005) 718, 11 January 2006.

4.5 **Trans-European energy delivery networks**

The same support is necessary for the funding of trans-European networks for delivering energy (point 3.1.4 of the communication), which are the responsibility of local authorities in several Member States.

4.6 **Energy Observatory Office**

Key point

Still pursuant to Article 9 indent 3 of the protocol, energy policy could be monitored directly by the Commission. That would avoid creating a new structure called the "Energy Observatory Office", which is likely to generate higher costs, more bureaucracy and reduce the direct responsibility of the Commission.

5. **Procedure for preparing the communication**

Consulting RLAs does not obviously appear to be part of the policy recommended by the Commission, even though it is necessary, for example when developing regional energy markets. In fact inter-network links and taking into account the needs of isolated regions are key areas for the exchange of good practices between RLAs, which are used to dealing with such issues.

Admittedly, the Commission organised consultations on the basis of a Green Paper¹³, on which the Committee issued an opinion¹⁴. But, as has been pointed out (point 2.3 of this analysis), insufficient account was taken of this opinion.

More generally, none of the documents summarising the impact studies and the various consultations emanating from the Commission mention issues related to RLAs or the application of the principles of subsidiarity and proportionality.

Key point

It is therefore vital to ask the Commission to see that the legislative proposals resulting from this communication are sufficiently justified in terms of the principles of subsidiarity and proportionality. At the end of the day they will have to be the subject of an impact assessment based on the regional and local dimension, in accordance with the Impact Assessment Guidelines that the European Commission itself issued in 2005¹⁵. Indeed, according to point III.5.2 of these Guidelines, "*in order to comply with the principle of subsidiarity, (...) policy options should also be ranked according to the financial and administrative burden falling upon (...) regional and local authorities*".

13 COM(2006) 105.

14 Opinion CdR 150/2006.

15 15 June 2005, SEC(2005) 791.