

Introductory remarks on the analysis of subsidiarity and proportionality

General remarks

- 1) The test is based on the Protocol in force at present on the application of the principles of subsidiarity and proportionality (Treaty of Amsterdam).
http://subsidiarity.cor.europa.eu/not_subsi/quoi_subsi/tabid/219/Default.aspx
- 2) The main purpose of the test is not to find cases where Commission documents infringe the principle of subsidiarity or proportionality.

Instead, its purpose is to

- a) make acquaintance with the relevant articles in the Treaty establishing the European Community (TEC, legal basis or basis for remit) and with the content of the Protocol on the application of the principles of subsidiarity and proportionality, and
- b) check whether and to what extent the proposals contained in the Commission texts
 - tally with the provisions laid down in the Treaty articles,
 - comply with the criteria/guidelines laid down in the Protocol, and
 - whether it is clear that the consultations (e.g. in accordance with the first indent of Article 9 of the Protocol) and the checks (e.g. impact assessment in accordance with the third indent of Article 9 of the Protocol) have been carried out properly and adequately by the Commission.

The corresponding legal texts are to be found on the subsidiarity website
<http://subsidiarity.cor.europa.eu/Consulterlesanalysesfaireparvenirlesvôtres/tabid/208/Default.aspx?fieldid=8&dosearch=true>

and on the Commission website

http://ec.europa.eu/energy/electricity/package_2007/index_en.htm

- 3) The analysis approving or rejecting a Commission proposal or a part therefore within the framework of this test must always be based on arguments which relate to the relevant TEC articles (legal basis) or the criteria/guidelines contained in the Protocol. Any assessment not based on such arguments would be in contradiction with the purpose of this test.

The check list to be found on the website therefore does not contain any new points but is based solely on the Protocol's criteria/guidelines, compliance with which has to be ensured by the EU institutions in accordance with Article 1 of the Protocol.

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- 4) Five Commission documents are to be analysed as part of this test.
1. **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 – COM(2007)528**
 2. **Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity – COM(2007)531**
 3. **Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/55/EC concerning common rules for the internal market in natural gas – COM(2007)529**
 4. **Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1775/2005 on conditions for access to the natural gas transmission networks – COM(2007)532**
 5. **Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators – COM(2007)530**

These documents will be adopted under a legislative procedure (co-decision) and they are legally binding.

Additional comments on the documents to be analysed

The following comments are not exhaustive and are only intended as a starting point for more detailed reflections carried out using the Treaty, the Protocol, and the subsidiarity analysis form that you will find on the website.

- This set of legislative proposals aims to achieve a full opening of EU electricity and gas markets. The most important elements of the proposed legislation are:
 1. Unbundling: Effective separation between the operation of electricity and gas transmission networks from supply and generation activities
 2. Regulation: Independent and strengthened national energy regulators
 3. European Agency: Setting up of a European Agency for the Cooperation of Energy Regulators
 4. More cooperation between transmission operators for a more efficient market
 5. Cooperation to reinforce security of supply: Increased transparency obligations on the level of commercial stocks and solidarity
- **Competence allocation.** According to Article 3(1)(u) of the EC Treaty, action by the Community comprises “*measures in the spheres of energy (...)*”. According to Article 3(1)(o) of the same Treaty, action by the Community comprises “encouragement for the establishment and development of trans-European networks”. From your point of view, are the measures contained in these proposals covered by these Treaty articles or would they lead

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the Community to exceed its powers? (See especially Article 5 of the EC Treaty, which states: “*The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein*”.)

- **Necessity Test.** The Commission justifies Community action emphasising that the process of liberalising the electricity and gas market is far from complete and that in practice, far too many of the EU's citizens and businesses lack a real choice of supplier. How do you evaluate the situation in your Member State and Region? Do you agree that the current legal framework is insufficient or do you consider that it would have been better to continue with the existing second package on electricity, which is indeed not yet transposed by Member States?
- **Clear Benefit Test.** The proposals are based on Article 95 of the EC Treaty and will be adopted under the co-decision procedure, in accordance with Article 251 of the same Treaty. Does the principle of subsidiarity apply? Do you agree that the actions taken by Member States under the existing legislation are insufficient? Can the objectives of these new legislative proposals only be achieved by new action on the part of the Community? Do the proposed measures respect fully the responsibility of the Member States for regulating the national energy market?
- **Quality of the arguments provided.** Has the European Commission sufficiently explained why it believes that the legislative proposals are in line with Article 5 of the TEC concerning the implementation of the principles of subsidiarity and proportionality? Is the impact assessment presented by the European Commission complete?
- **Effectiveness Test.** Could the objectives of the proposed legislation be achieved in another way (e.g. more efficient supervision of the transposing of already existing legislative acts)?
- **Effectiveness Test.** Does the efficient unbundling of the electricity and gas markets as proposed by the Commission take into consideration the diversity of situations in the various regions of the Community? Since many regional and local authorities are energy producers (e.g. through participation in energy companies), is the creation of Independent System Operators sufficient as an alternative to a complete unbundling of the electricity and gas markets? Do other alternatives exist?
- **Effectiveness Test.** Can a high-quality provision of electricity and gas supply as services of general (economic) interest be guaranteed under the present proposal? In your view, would the proposed legislation give rise to any difficulties at regional and local level? Have the specific requirements of public service obligations been sufficiently taken into account when drafting the legislative proposals?
- **Effectiveness Test.** The Commission proposals are intended to strengthen the powers of the regulatory authorities and to give them a clear mandate in order to ensure competitive

internal electricity and gas markets within the EU. Considering the role already played by the national competition authorities, how do you see this additional control on competition? What will, in your opinion, be the relation between the regulatory authorities and the national competition authorities?

- **Efficiency Test.** Are the liberalisation measures introduced by the legislative proposals in line with the Article 295 of the EC Treaty which stipulates that "*this Treaty shall in no way prejudice the rules in Member States governing the system of property ownership*"?
- **Minimum Legal Constraint Test.** The proposals underline that the Commission can adopt several binding guidelines to achieve "the necessary degree of harmonisation". Article 6 of the Protocol states that "*Directives (...) while binding upon each Member State to which they are addressed as to the result to be achieved, shall leave to the national authorities the choice of form and methods*". Do you consider that the transfer of the harmonisation powers to the Commission mentioned in the legislative proposals is in line with the Protocol?
- **Minimal Cost Test.** Are the features of these legislative proposals likely to reduce costs for private and industrial customers (including regional and local authorities as contractors) as intended by the Commission? Do these proposals increase investments in strategies to raise energy efficiency? How about the positive effects on climate change? Do falling energy prices promote energy efficiency?
- **Minimal Cost Test.** The Protocol underlines in Article 9 that the Commission *should "take duly into account the need for any burden, whether financial or administrative (...) to be minimised and proportionate to the objective"*. Enforcing full ownership unbundling or creating of independent transmission system operators will lead to extra costs. Proposals such as enhancing the role of national regulators or increasing coordination of regulators at EU level will increase public spending (additional staff, housing, management, IT, creating co-funding and risk sharing arrangements, etc). Which financing or administrative costs are likely to arise for your regional or local authority from these legislative proposals?
- **Minimal Cost Test.** The Protocol refers also to the administrative burden. When providing further measures on consumer issues and energy generation and distribution, regulatory arrangements must be modified. It will comprise the obligation to provide websites with information about comparable prices, protection of unfair selling practices and switching procedures. These activities need of course the time and capacity of the regulator. Do you expect that these activities will increase costs of regulation in your region?
- **Minimal Cost Test.** Some regional and local authorities are shareholders in electricity and gas undertakings. These proposals of the European Commission will therefore undoubtedly have an important impact. What are the increasing costs you anticipate for local and regional authorities?

- **Preparation of the proposal.** Article 9, 1st indent, of the Protocol on the application of the principles of subsidiarity and proportionality obliges the Commission to “*carry out wide-ranging consultations before proposing legislative texts and [to] publish, wherever appropriate, documents concerning these consultations*”. It emerges from the impact assessment provided by the Commission that mainly the Member States, industry interest organisations and NGOs have been consulted. Have the regional and local authorities been sufficiently heard for their diversity to be taken account?
- Are there arguments from the point of view of the principles of subsidiarity and proportionality which should be put forward as regards the present legislative proposals?

Specific comments on the Proposals:

1. **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 – COM(2007)528**
 2. **Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity – COM(2007)531**
- The European Commission (EC) is in favour of **separating network ownership from energy distribution**. As regards energy, certain local and regional authorities who manage or help to manage energy distribution networks may not be able to handle this compulsory unbundling. The CoR¹ has already pointed out that in application of the principle of territorial cohesion special care should be taken to preserve services of general interest in those territories where there would not be no perspective of profits for operators in a liberalised market. Does your region manage energy distribution networks? In that case, how do you think the EC proposal will affect your region? Does your Member State/Region already apply ownership unbundling? If so, what are you experiences?
 - According to **Article 7 of the Protocol** on the application of the principles of subsidiarity and proportionality, the Commission should offer Member States **alternative ways to achieve the objectives** of the measures. In this sense, the Commission proposes to choose between ownership unbundling and setting up independent system operators where the undertaking owning a transmission system is part of a vertically integrated undertaking. Do you agree that the EC proposal is the best option to reach the objectives? Considering that the Commission favours the option of unbundling, what do you think is the better alternative for your region?
 - According to the Protocol, the **Community shall not go beyond what is necessary to achieve the objectives of the Treaty**. The proposal for a Directive states that the Commission will

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CdR 149/2003 and CdR 327/2004.

observe and monitor the European electricity market and its evolution, including aspects such as generation capacity, different sources of electricity generation, transmission and distribution infrastructures, cross-border trade, the investments, wholesale and consumer prices, market liquidity, environmental and efficiency improvements. Do you consider that all these fields are community competence or should it leave more scope for national decision?

- The role of **energy regulators** was already introduced by Directive 2003/54/EC. The new proposal aims to **develop further harmonisation of the powers of the national energy regulators** and to strengthen their independence. What do you think about the suggestions introduced by the European Commission? Do you agree that future EC energy regulators have the power to issue binding decisions on electricity undertakings and to impose effective, appropriate and dissuasive sanctions? Is the detailed legislative proposal on the organisation and tasks of national energy regulators in line with the principle formulated in Article 10 of the TEC according to which Member States remain responsible for implementing EC legislation and the organisation of their own administrative structures?
 - What has been the **experience of your region** so far with national regulators? Will the regional and local authorities that you represent voluntarily agree with regard to the new proposals for national regulators?
 - The EU Commission affirms that 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 networks operators at European and regional level**. How do you foresee this proposal from the point of view of your authorities?
- 3. Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/55/EC concerning common rules for the internal market in natural gas – COM(2007)529**
- 4. Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1775/2005 on conditions for access to the natural gas transmission networks – COM(2007)532**
- Taking into consideration the gas supply crisis in January 2006 when Russia cut gas exports to Ukraine and the gas transit to EU Member States via Ukraine was interrupted, could the measures proposed by these **legislative acts bring an added value** compared to the present relative EU dependence from gas imports? If so, are these measures based on the principles of subsidiarity?
 - Is the setting up a **European Network for Transmission System Operators for Gas**, proposed by Regulation (EC) No 1775/2005 on conditions for access to the natural gas transmission networks, justified in your opinion as regards the division of responsibilities in regulating the national energy markets? Is the idea of setting up a new administrative structure necessary or are the existing structures capable of achieving the objectives proposed by the Commission? Which

financing or administrative costs incumbent on your regional or local authority are likely to arise from this proposals

- In general, are the **cost-benefit** analyses of these new legislative proposals concerning the gas market sufficient?
- In your view, does the proposed cooperation to promote **regional and bilateral solidarity** respect the principles of subsidiarity and proportionality? How about the proposed regulations regarding access to storage and liquefied natural gas (LNG) terminals?

5. Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators – COM(2007)530

- Is setting up an Agency for the Cooperation of Energy Regulators, initiated by the European Union, **justified** in your opinion as regards the division of responsibilities in regulating the national energy markets? Is the idea of setting up a new administrative structure necessary or are the national regulators **capable of achieving the objectives** proposed by the Commission?
- If you consider that the objectives presented in this proposal for a regulation are better achieved at the Community level, could a **network of independent regulators** (“ERGEG+”) be an adequate structure to achieve the objectives?
- **Article 7 of the Protocol** states that *without prejudice to Community legislation, long-established national arrangements should be respected*. Has the Commission taken proper account of the established **role of the national regulators** when drawing up the European Agency? Would it not be enough to strengthen the role of the national regulators and their relations with the Commission and of the national authorities responsible for implementing competition rules?
- Would the setting up of such an agency involve making **changes to the organisation** of the structures and distribution of responsibilities in your Member State? If so, would you find it acceptable that this legislative proposal should cause such changes?
- Are the **tasks** set to this Agency **in line with the objectives** to be achieved?
- In your view, what **advantages or disadvantages** would the setting up of such an Agency have? Do the benefits of such an agency compensate for its cost? Is the administrative monitoring and reporting system composed of the European Networks of Transmission System Operators for Gas and Electricity, the 27 national regulatory authorities, the Agency for the Cooperation of Energy Regulators, the European Commission and the 27 national authorities implementing competition rules fully in line with **Article 9, 3rd indent, of the Protocol** on subsidiarity and proportionality according to which the Commission has to *take due account of the need to ensure that any financial or administrative costs incumbent on the Community, national governments, local*

authorities, economic operators and citizens should be as low as possible and commensurate with the objectives to be achieved". Has the Commission taken this aspect sufficiently into account when proposing the European Agency? Are the financial assessments provided by the Commission sufficient?
