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Committee of the Regions

Subsidiarity Monitoring Network

**Consultation on the 3rd Energy Package
Report**

Part I: Summary of main results	2
Part II: Subsidiarity Proportionality Analysis / Results of the Test	6
I. 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	6
II. 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	13
III. 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	14
IV. 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	15
V. Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators – COM(2007)530	16

Note

This report was drawn up under the authority of the President and the First Vice President of the Committee of the Regions, in accordance with the decision of the CoR Bureau [CdR 86/2007 item 6b].

Part I : SUMMARY OF MAIN RESULTS

The consultation on *Further measures (3rd package) to support the creation of the electricity and gas internal market*¹ was launched on 19 September and ran until 23 November 2007.

Participants were asked to prepare on the basis of the subsidiarity/proportionality protocol an analysis of the EC legislative documents submitted for consultation.

Participants in the consultation

Five regional parliaments² and five regional governments³ took part in the consultation. A further contribution is expected from the French Senate. The contributions to the consultation show that various political and administrative actors at regional level were involved in the analysis of the EC documents. Meetings were organised within the framework of the consultation and in-depth political discussions and exchanges of views on the European energy policy took place at the political level in partner organisations.

MAIN RESULTS OF THE CONSULTATION

Part II contains a more detailed and wide-ranging account. The full contributions of partners can be accessed via the subsidiarity monitoring network (<http://subsidiarity.cor.europa.eu/>)

Legal basis and competence allocation

Most of the partners feel that the European Commission has chosen the correct legal basis for the proposed measures. While the current Treaties do not provide specific legal bases for energy policy, the European Union has previously based its legislative proposals for the internal energy market on Article 95 TEC and proposals for other energy-related issues on Article 308 TEC.

The partners agree that the responsibility for energy policy and trans-European networks is shared between the Community and the Member States and that, therefore, the principles of subsidiarity and proportionality apply. However, they recall that under the current Treaties *"only the internal market for energy is a shared Community power, whereas energy policy as such is exclusive to the Member States"*.

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

² Parliament of the Brussels-Capital Region, Lower Saxony State Parliament, Basque Autonomous Parliament, State Parliament of Vorarlberg, State Parliament of Carinthia

³ Bavarian State Government, Government of the State of Hessen, Basque Government, Regional Government of the Azores, Austrian State Governors' Conference

Moreover, some partners think that the European Commission failed to take into account Article 299 (2) TEC, as energy policy has to give consideration to the special characteristics and constraints of outermost regions. Other partners claim that the Commission failed to correctly apply Article 295 TEC on the systems of property ownership in its draft legislation on "ownership unbundling" (see below).

Compliance with Subsidiarity: Targeted assistance versus new legislation

While the Commission justifies Community action by emphasising that the process of liberalising the electricity and gas market is far from complete, most partners feel that the Commission proposals go too far. The majority of partners point out that measures were taken in this field in 2003 and that it would be more useful to better enforce the current legal framework than create a new legislative framework.

Member States and their regions should have been given adequate time to correctly implement EU legislation and the Community should now aim to direct targeted assistance at those Member States and regions that have not yet fully transposed the existing legislation. This targeted assistance should also take into account the specific features of regions and in particular the micro isolated networks (islands, remote rural areas, mountain areas etc.)

Compliance with Subsidiarity: Unbundling

With its proposals for unbundling, the Commission aims to effectively separate electricity and gas transmission from supply and generation activities. While a minority of the partners agrees that Community action presents an added value by coordinating Member States' actions, others consider that the lack of Community action would not conflict with the requirements of the Treaty and that it would therefore not be necessary or beneficial.

These partners also underline that the Commission has not presented any adequate qualitative or quantitative proof based on clear economic indicators that there is a need for "forced" ownership unbundling.

Furthermore, three Partners consider that forced ownership unbundling and the creation of independent system operators would conflict with the right of Member States to govern their system of property ownership (Article 295 TEC).

Partners who oppose the forced ownership unbundling agree that the proposals limit the scope of national decisions and do not respect existing national arrangements which are working effectively and would therefore be in conflict with Article 7 of the Protocol on Subsidiarity and Proportionality. The proposals would therefore imply an unjustified shift of existing national/regional competences to the European level.

The partners also raise the argument that the Commission proposal fails to take action in order to preserve services of general interest in the field of energy. In that connection other partners underline that there are territories/regions that cannot bear the full brunt of liberalisation policy.

Compliance with Subsidiarity : National Regulatory Authorities and the European Agency

The Commission suggests reinforcing national regulatory authorities, setting up an independent mechanism for regulators to cooperate and to take decisions and establishing an independent Agency for the Cooperation of Energy Regulators.

In accordance with the CoR position taken in September 2007⁴ the partners almost unanimously reject the idea of setting up the European agency and consider that this proposal is not justified as regards the division of responsibilities in regulating the energy markets. The idea of setting up a new administrative structure is considered unnecessary and bureaucratic as many partners feel that national regulators are capable of achieving the objectives proposed by the Commission. Some partners underline that the Commission has not proved that existing cooperation within ERGEG is inefficient and that it should therefore continue.

Many partners feel that even though in general Community action is necessary, the specific features of the different Member States and their regions should have been taken into consideration in order to make the proposals more targeted. According to some partners, the proposals relating to the creation of a single independent national regulator would conflict with the constitutional and legal system of their Member States and would meet with opposition from these countries.

These partners also criticise the detailed description of the tasks and organisation of the national regulatory authority in the legislative proposal, which they regard, from a subsidiarity point of view, as going too far, since the organisation of their administrative structures remains an exclusive competence of Member States.

It is also pointed out that Community action should be limited to the institutional control of the energy markets by the European Commission (within the framework of competition law) and that this control should take place only when there is a transnational issue of gas or electricity but without interfering in the national distribution. The partners consider that the Commission has not taken proper account of the established role of the national regulators and many partners suggest that the Commission's proposals should aim to strengthen their cooperation and their relations with the Commission rather than create a new agency.

Furthermore, it is stressed that the creation of a new agency would not solve problems that the Commission wants to tackle by putting forward this proposal. Partners also ask why the Community, whose aim is overall deregulation, is proposing the creation of this agency which would clearly lead to more bureaucracy and result in financial and administrative costs for all actors involved (the Community, national governments, local and regional authorities, economic operators and citizens).

⁴ CdR 111/2007 fin

Compliance with Subsidiarity: More cooperation between Transmission System Operators – Commission Guidelines

The Commission is proposing new legislation to formalise the cooperation between transmission network operators. Many partners feel that the existing structures are sufficient for achieving the Commission's objectives.

It is also underlined that the Community's priority should be to increase the interconnection and interoperability of national networks. At the same time, sufficient scope for action should be left to Member States. Furthermore, many partners feel that some guidance from the Community would be enough and thus also oppose the idea of giving the Commission the right to set binding implementation guidelines.

Partners emphasise the regional aspect of energy transmission by stating that there is no doubt that the cooperation of transmission system operators on a European level must be complemented at regional level, in order to ensure real practical progress, optimum network management and appropriate investment planning and delivery. The regulatory framework should promote, coordinate and develop regional initiatives between transmission system operators and regulatory authorities.

Compliance with the Proportionality principle

One partner, who in general does not see major problems as regards subsidiarity, nevertheless believes that the proposed legislation goes too far and suggests that the Community should only give "some guidance" and therefore opt for a framework directive which would leave Member States more scope for action.

Evaluation of the preparation for the legislative proposals

The Commission has presented an impact analysis to support the legislative proposals. All partners agree that the assessment is insufficient and that it completely omits the regional and local dimension. Partners are of the opinion that the Commission has considerably diminished the quality and clarity of its own proposals by not addressing the local and regional dimension at all. Indeed, in many Member States regional and local authorities are the political levels that effectively transpose and implement European legislation.

Several partners doubt that the conclusions of the consultation on the 1st energy package have been properly taken into account by the European Commission.

Several partners failed to find the text on the EC website and those who retrieved it found it difficult to read and understand.

PART II: Subsidiarity/Proportionality Analysis: Results of the Test

This part contains a summary of the comments of the 10 network partners on the 5 consultation documents. The full contributions can be accessed via the subsidiarity monitoring network (<http://subsidiarity.cor.europa.eu>)

Legislative proposals regarding electricity

I. 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

This proposal sets out legislation seeking to fully open up the EU electricity market.

1. Legal basis (questions 1 and 2 of the analysis grid)

As there is no specific legal basis for energy policy in the EC Treaty, partners mention different legal bases. All of them agree that measures to liberalise the different national and the European energy markets are a competence shared between the European Community and the Member States. Some partners, however, draw attention to the fact that several of the proposed measures would have to take into account other articles than those relevant to the establishment and functioning of the internal market.

According to **Article 3(1)(u)** TEC, action by the Community comprises “*measures in the spheres of energy (...)*” and **paragraph (o)** of the same article states that action by the Community comprises “*encouragement for the establishment and development of trans-European networks*”⁵.

Most partners⁶ consider the proposals to be based on Article 95 TEC, which concerns the establishment and functioning of the internal market. They underline that the Directive refers also to both section 2 of Article 47 TEC concerning the taking-up and pursuit of activities as self-employed persons within the framework of the right of establishment, and to Article 55 TEC concerning services.

The **Regional Government of the Azores** mentions **Articles 154 and 155 TEC**, on Trans-European networks, and insists that “*the main action of the Community should be to increase the interconnection and interoperability of national networks, as well as the access to this network*”. Therefore enough scope for action should be left to Member States. In addition this partner deplores the fact that Article 299(2) TEC has not been taken into account.⁷ The partner believes that the proposal does not consider that “*there is a need to connect the insular and outermost regions to*

⁵ See contribution of Brussels Parliament.

⁶ See contributions of Hessische Staatskanzlei, Basque Government, Basque Parliament, Bayerische Staatsregierung, Kärntner Landtag, Landeshauptleutekonferenz and Vorarlberger Landtag.

⁷ The article states that the European Community shall adopt specific measures aimed in particular at laying down the conditions of application of the present Treaty to the outermost regions (French overseas departments, Azores, Madeira and the Canary Islands), including common policies. The Community will do so “without undermining the integrity and the coherence of the Community legal order, including the internal market and common policies”.

central regions of the Community." The proposal for a Directive amends Directive 2003/54/EC. The partner stresses that when amending the 2003 Directive, the Commission should have taken into account its Decision 2004/920/CE derogating some parts of Directive 2003/54/EC for the Azores.

The **Kärntner Landtag, the Vorarlberger Landtag and the Landeshauptleutekonferenz representing the 9 Austrian regions** point out that the legislative proposals are in general based on the correct legal bases (Articles 47(2), 55 and 95 TEC). However, as regards "ownership unbundling" and the creation of "independent system operators" Article 295 TEC should be taken into consideration. Article 295 TEC states that "*this treaty shall in no way prejudice the rules in Member States governing the system of property ownership*". The partners also deem that in not respecting this Treaty article on ownership unbundling the European Community would not respect the Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the protection of property.

The **Basque Government** finds it regrettable that no mention was made of **Article 153** TEC on consumer protection. The lack of a legal basis for energy is emphasized by the **Basque Parliament and Government**, which explain the changes foreseen in the Lisbon Treaty. They will involve the establishment of a more explicit legal basis for European energy policy (Article 176 A).

The aforementioned existing legal bases relate to sectors where the Community and its Member States enjoy shared competences⁸. Therefore, both the principles of subsidiarity and proportionality are of relevance.

In this context the **Basque Government** stresses that "*only the internal market for energy is a shared Community power, whereas energy policy as such is exclusive to the Member States*". The **Regional Government of the Azores** also underlines that Member States are the competent authority to readjust their own national energy policies, taking into consideration their specific features.

2. Compliance with the subsidiarity principle (Questions 3 to 5)

2.1. Criteria of necessity and added value of the Community action.

The **Brussels Parliament, the Basque Government and Parliament** are of the opinion that the current legislative proposals are necessary and "*would bring about a clarification and balancing of the energy market, of supply and, in short, of the power conditions and of the position of the user.*"

The **Regional Government of the Azores** believes that EU legislation would be necessary but underlines that this should be restricted to "*only some guidance from the Community*" as Member States need sufficient scope for action to restructure the electric markets, something which could be achieved only by national measures. This partner therefore suggests restricting EU action to a framework directive.

The **Hessische Staatskanzlei, the Bayerische Staatsregierung, the Kärntner Landtag, the Vorarlberger Landtag and the Landeshauptleutekonferenz** point out that measures were taken in

⁸ Brussels Parliament, Basque Government, Basque Parliament, Azores Government, Hessische Staatskanzlei, Bayerische Staatsregierung, Kärntner Landtag, Landeshauptleutekonferenz and Vorarlberger Landtag.

this field in 2003 and consider that it would be necessary and more useful to enforce the current legal framework than to propose new EU legislation. The enforcement of the existing legislation would be sufficient to produce the needed added value at European level.

Therefore the **Kärntner Landtag**, the **Vorarlberger Landtag** and the **Landeshauptleutekonferenz** are also of the view that the lack of new Community action would not conflict with the requirements of the Treaty. Furthermore, they consider that the Directive goes too far, from the point of view of subsidiarity, since the proper transposition of existing EU legislation and the cross-border cooperation within the framework of ERGEG would be enough to achieve the Treaty objectives.

These partners also underline a discrepancy between the present Commission proposals and the EU's overall deregulation efforts. They note that enough coordination fora already exist (e.g. Florence Forum, Madrid Forum, the Pentalateral Energy Forum and ERGEG), where collaboration between Member States in energy policy is efficient and well organized.

The **Bayerische Staatsregierung** and the **Hessische Staatskanzlei** do not believe that the Commission has sufficiently proved the necessity of "forced ownership unbundling". Neither would the Directives present a convincing solution as regards the equal treatment of private and public networks. Therefore the proposals are seen as unnecessary and going too far.

Targeted assistance (Question 3.2.2)

Most partners⁹ agree that even though European action is in general necessary in this field, the specific nature of the Member States should have been considered in order to make the proposals more focussed. Moreover, since legislation in the same field was approved by the Commission in 2003, Member States should have been given adequate time and assistance to correctly implement it.

Therefore, several contributors¹⁰ share the view that the Community should focus more on directing targeted assistance at those Member States that have not yet transposed the existing legislation and in doing so should take duly into account the specific nature of the regions.

On this point, the **Bayerische Staatsregierung** and the **Regional Government of the Azores** come up with an identical observation. They both mention that the specific nature of micro-isolated networks (islands, remote rural areas, mountain areas) should have been taken into account by the Commission. For such networks, which would *de facto* be unable to benefit from a common energy market, compensatory measures should be proposed (e.g. investments in renewable energies). The European regulatory system would also have to take into consideration these specific regional conditions.

⁹ Vorarlberger Landtag, Kärntner Landtag, Landeshauptleutekonferenz, Hessische Staatskanzlei, Azores Government, Brussels Parliament.

¹⁰ Vorarlberger Landtag, Hessische Staatskanzlei, Azores Government, Kärntner Landtag and Landeshauptleutekonferenz.

2.2. Minimal Scope test

Considering that each Member State has its own specific features and national or regional arrangements, some partners have given examples of how the present proposal would conflict with their Member State's organization and/or their legal system.

The **Brussels Parliament**, the **Hessische Staatskanzlei**, the **Bayerische Staatsregierung**, the **Vorarlberger Landtag**, the **Landeshauptleutekonferenz**, the **Kärntner Landtag** and the **Government of the Azores** find it regrettable that the Commission has not considered/respected national, regional and local specificities in putting forward this proposal. While the Azores finds it regrettable that the specific features of regions with legislative powers have not been taken into account, Brussels, Hessen and Bavaria note that a single national regulatory authority per Member State would conflict with the German and Belgian constitutional system (and undermine existing good practices at regional level) which requires the existence of more than one regulatory authority.

Hessen and Bavaria also consider the proposal to be at odds with their internal legal system as it prescribes a fully independent national regulator which would exempt regulatory authorities from the normal legal control system (Rechtsaufsicht) which exists for every administration in Germany.

The parliaments of **Vorarlberg and Kärnten as well as the Landeshauptleutekonferenz** are also afraid that the implementation of the proposal would undermine existing good practice at regional level in the area of regulating energy markets.

The **Kärntner Landtag**, the **Landeshauptleutekonferenz**, the **Voralberger Landtag**, the **Government of the Azores**, the **Hessische Staatskanzlei** and the **Bayerische Staatsregierung** agree that the Directive limits the scope of national decisions considerably, and are afraid that overly prescriptive follow-up guidelines from the Commission could entail an unjustified shift of competences to the European level. **Bavaria** also draws attention to the possibility that via such implementing guidelines as foreseen in the Directive, the competences of the European Parliament and Council could be bypassed. (This would also mean that the CoR would be deprived of a say on these guidelines.)

As regards strengthening the existing national regulatory authorities, the **Bayerische Staatsregierung** deems it unnecessary for the EU legislator to give detailed instructions (new Chapter VIIa of the Directive) on how to organise this authority. This would interfere with the exclusive competence of Member States to organise their own administrative structures.

The **Hessische Staatsregierung** insists that the EU legislative proposals should be limited to questions of transnational transport of electricity and gas.

2.3. Quality of the arguments provided (Question 6)

Most partners feel that the case made by the Commission for the compatibility of the proposed measures with the subsidiarity principle is insufficient¹¹, inadequate or non-existent¹². The Basque Government and Parliament request that the Commission ensure that *"on future occasions the arguments respond to specific data and are not simple general statements"*

Although **Article 4 of the Protocol** on the application of the principles of subsidiarity and proportionality stipulates that *"the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators"*, several contributors¹³ note that the Community proposal was not based on quantitative indicators.

The **Hessische Staatskanzlei** and **Brussels Parliament** consider that the proposed Directives do not sufficiently refer to the subsidiarity principle. The **Bayerische Staatsregierung** states that in general not enough arguments have been put forward by the Commission to prove that the goal of reinforcing competition in the electricity market can be achieved through this proposed legislation. There is already legislation in this field and it is argued that new legislation will only entail more bureaucracy. Bavaria recognises, however, that the proposals properly explain the need for certain transnational elements and the agency for the cooperation of energy regulators.

The **Regional Government of the Azores** thinks that the proposals are in general adequately explained but insists that regional specific conditions should have been taken into consideration when developing and justifying the proposal.

The **Kärntner Landtag**, **Landeshauptleutekonferenz** and **Voralberger Landtag** consider that by not dealing with services of general interest, climate change and sustainability, the proposed Directive is going in the wrong direction and gives the market the wrong focus.

3. Complying with the proportionality principle (Questions 7-12)

As the **Bayerische Staatsregierung**, the **Hessische Staatskanzlei**, the **Kärntner Landtag**, the **Voralberger Landtag** and the **Landeshauptleutekonferenz** consider the legislative proposal to be unnecessary according to the subsidiarity principle and think that existing EU legislation should be better enforced by better targeted assistance, they believe that there is no need for an analysis of proportionality.

3.1 Effectiveness and Efficiency Test

¹¹ Hessische Staatskanzlei, Azores Government, Bayerische Staatsregierung, Kärntner Landtag, Landeshauptleutekonferenz and Voralberger Landtag.

¹² Basque Government and Parliament.

¹³ Brussels Parliament, Hessische Staatskanzlei.

The **Regional Government of the Azores** points out that the Directive goes too far and that the objectives could be better achieved in another way. Indeed, Europe should only have given "*certain guidance*" which should have been enough to accomplish the outlined goal.

On the other hand, the **Basque Government and Parliament** agree that in general (despite the fact that some aspects have not been appropriately considered) the measures are adequate and necessary to meet the intended objectives. The **Basque Government** mentions for example the functional separation of transmission operators, the separation of distribution and supply activities in the energy sectors, independence and cooperation of national energy regulators, strengthening of interconnections, improvements to infrastructure, effective development and transparency in relation to energy transactions in national markets. The Parliament and Government, however, also identify shortcomings. According to them "*the insufficient European mechanisms to ensure the development of interconnections or the absence of real common security approaches*" have not been sufficiently considered in the proposed Directives.

3.2. Minimum Legal Constraint Test

Almost all partners¹⁴ agree with the choice of a Directive as instrument (although as it has been noted above, not all partners share the view that new legislation in this field is necessary).

The **Azores** believes that a framework directive would have been preferable and remarks that "*there is not any explanation why other regulatory methods have not been selected*".

The **Bayerische Staatsregierung** thinks that a Directive is not the simplest option and that it will entail increased bureaucracy.

As already mentioned above a significant number of partners¹⁵ remark that the proposed binding Commission guidelines to be introduced following the adoption of the Directive leave very little scope for national action. This "guideline competence" is therefore regarded as going too far .

3.3 Cost of implementing the proposal

Although the Commission makes no mention of this, a number of partners pointed out that the implementation of this legislation would place an extra burden on Member States and on their local and regional authorities.

The **Brussels Parliament** mentions the indirect additional burden for the public social services providing electricity to parts of the population in less favourable circumstances.

The **Bayerische Staatsregierung** and the **Hessische Staatskanzlei** refer to the increased European bureaucracy which would accompany the (legislative or technical) changes in Member States, given

¹⁴Brussels Parliament, Kärntner Landtag, Landeshauptleutekonferenz, Vorarlberger Landtag, Bayerische Staatsregierung, Hessische Staatskanzlei and Azores Government.

¹⁵ Bayerische Staatsregierung, Hessische Staatskanzlei, Kärntner Landtag, Landeshauptleutekonferenz, Vorarlberger Landtag and Azores Government.

that the proposed Directives do not take into account the regional level and do not, for example, respect the current structure of the regulatory authorities in Germany.

The **Azores Government** and the **Bayerische Staatsregierung** underline the costs for "small markets" and find it regrettable that their specific features have not been addressed in the proposed Directives.

The **Kärntner Landtag**, the **Vorarlberger Landtag** and the **Landeshauptleutekonferenz** believe that the proposed legislation is not necessary, and that therefore all related burdens are unjustified.

4. Preparations for the proposal for a recommendation (Questions 13)

All partners agree that in future, the European Commission will have to give the regional dimension greater consideration when drawing up its proposals, especially in key policy fields such as energy. Indeed, in not adequately addressing the local and regional dimension the Commission itself is undermining the quality and clarity of its own proposal on the third energy package. This can also be interpreted as one very important reason for the so far very inadequate and incomplete implementation of the current EU legislation in Member States.

4.1 Consultation

Most partners¹⁶ refer to the consultation launched after the adoption of the Communication on "*An Energy Policy for Europe*" of January 2007¹⁷. Nevertheless, partners primarily question whether the conclusions of the consultation have been taken into account and to what extent regional and local authorities have participated. In this connection, the **Niedersächsischer Landtag** underlines the importance of regional and local levels since it is those regions which effectively transpose and implement European legislation. Finally, nearly all partners¹⁸ deplore the fact that regional and local aspects were not taken into consideration during the consultation phase.

4.2 Impact assessment

An impact assessment has been carried out and most partners were aware of this, although some of them¹⁹ indicate that they have never seen it as it has not been forwarded by the CoR. References to this study published on the European Commission website are seen as insufficient and a more public dissemination would have been favoured by the **Brussels Parliament**.

The general concern of contributors²⁰ is that in the existing impact assessment local and regional aspects have not been addressed at all and that current national arrangements are not being respected.

¹⁶ Basque Government and Parliament, Bruxelles Parliament, Hessische Staatskanzlei, Kärntner Landtag, Landeshauptleutekonferenz and Vorarlberger Landtag.

¹⁷ COM (2007) 1

¹⁸ Basque Government and Parliament, Azores Government, Bayerische Staatsregierung, Hessische Staatskanzlei, Kärntner Landtag, Vorarlberger Landtag and Landeshauptleutekonferenz.

¹⁹ Bayerische Staatsregierung and Azores Government.

²⁰ Hessische Staatskanzlei, Kärntner Landtag, Landeshauptleutekonferenz, Vorarlberger Landtag and Azores Government.

In this regard, the **Regional Government of the Azores** deplores the fact that no consideration has been given to Article 299 (2) TEC, which stresses that the special characteristics and constraints of the outermost regions should be taken into account by EC legislation.

II. 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

This proposal seeks to formalise and increase coordination and cooperation between electricity transmission systems operators ("TSO's").

The summary for proposal COM (2007) 528 applies mutatis mutandis (Please see above). The Hessische Staatskanzlei did not submit a specific analysis for this proposal.

2. Compliance with the subsidiarity principle (question 3 to 5)

2.1. Criteria of necessity and added value of the Community action

The **Kärntner Landtag**, the **Vorarlberger Landtag** and the **Landeshauptleutekonferenz** consider that the Regulation goes too far since existing EU legislation is being accurately transposed and cross-border cooperation within the framework of the European Transmission System Operators (ETSO) is working well and this should be enough to achieve the objectives. They think that Member States have not been given enough time to implement Regulation 1228/2003/EC. In fact, it is mentioned that in the current situation, further legislation creating a parallel structure at EU level would significantly hinder ongoing cooperation within ETSO. Only if it became evident and was proved that the cooperation within ETSO is not effective, would measures at EU level be welcome²¹.

On the other hand, the **Regional Government of the Azores** believes that the lack of EU legislation in this field could damage the interests of Member States and welcomes the establishment of The European Network for Transmission System Operators for Electricity and in particular the proposed procedure for the establishment of an annual work programme by this network, the harmonization of technical and market codes and the close supervision of the market operators by the Community.

2.2. Minimal Scope test

As with the other documents, there are concerns regarding the compatibility of the proposed measures with established national arrangements.²²

The **Basque Government**, although not voicing any explicit concern on the matter, draws attention to the regional dimension of TSO cooperation. It insists that "*there is no doubt that the cooperation of transmission system operators on a European level must be complemented at a regional level, in order to ensure real practical progress, optimum network management and appropriate investment*

²¹ Kärntner Landtag, Landeshauptleutekonferenz and Vorarlberger Landtag.

²² For example Brussels Parliament.

planning and delivery. The regulatory framework should promote, coordinate and develop regional initiatives between transmission system operators and regulatory authorities".

2.3. Quality of the arguments provided.

The **Regional Government of the Azores** thinks that for this legislative proposal the arguments provided are adequate and cover both quantitative and qualitative factors.

3. Complying with the proportionality principle (Question 7-12)

3.1 Effectiveness and Efficiency Test

From the point of view of effectiveness, several partners²³ think that the means employed by the Commission to achieve the objective are not suitable and go beyond what is necessary.

The **Landeshauptleutekonferenz** and the **Voralberger Landtag** propose that it would have been more effective and efficient to address TSO cooperation through "*soft law measures*".

The **Regional Government of the Azores** considers the measures proposed by the Regulation suitable and appropriate, but at the same time regards the proposed European Network of Transmission Systems Operators to be too dependent on the proposed Energy Regulators Agency.

III. 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

This proposal sets out legislation seeking to fully open up the EU gas market.

The summary for proposal COM (2007) 528 applies mutatis mutandis (Please see above).
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2. Compliance with the subsidiarity principle (Questions 3 to 5)

2.1. Criteria of necessity and added value of the Community action.

The **Regional Government of the Azores** believes that the lack of EU legislation in this field could damage the interests of Member States but cautions at the same time that "*the form of action [...] should emphasise the role of the Member States, as well as local and regional authorities*".

²³ Azores Government, Kärntner Landtag, Landeshauptleutekonferenz and Voralberger Landtag .

2.3. Quality of the arguments provided (Question 6)

The **Regional Government of the Azores** recognises that qualitative arguments have been mentioned, but it also notes that *"in these arguments the advantages of greater Community action have been overrated"*.

3. *Complying with the proportionality principle (Questions 7-12)*

3.1 Effectiveness and Efficiency Test

From the point of view of effectiveness, most partners²⁴ think that the means employed by the Commission to achieve the objective of an internal market in electricity are not suitable and go beyond what is necessary.

The **Regional Government of the Azores** stresses that the work of national regulators should not be underestimated in its effectiveness and that more Community action should be implemented only when it has been proved necessary. More independence should be given to the national regulators.

IV. 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

This proposal sets out legislation seeking to fully open up the EU gas market.

The summary for proposal COM (2007) 528 applies mutatis mutandis (Please see above) The Hessische Staatskanzlei, Kärntner Landtag, Vorarlberger Landtag, and Landeshauptleutekonferenz did not submit an analysis for this proposal.

2. *Compliance with the subsidiarity principle (Question 3 to 5)*

2.1. Criteria of necessity and added value of the Community action.

The **Regional Government of the Azores** seems ready to accept more far-reaching EU legislation in the field of the liberalisation of the gas market than in the field of electricity and regards the EU legislative proposal therefore as necessary.

2.2. Minimal Scope test

The **Basque Government** insists that *"there is no doubt that the cooperation of transmission system operators on a European level must be complemented at a regional level, in order to ensure real practical progress, optimum network management and appropriate investment planning and delivery."*

²⁴ Azores Government, Kärntner Landtag, Landeshauptleutekonferenz, Vorarlberger Landtag, Hessische Staatskanzlei and Bayerische Staatsregierung.

The regulatory framework should promote, coordinate and develop regional initiatives between transmission system operators and regulatory authorities".

3. Complying with the proportionality principle (Questions 7 to 12)

The summary for proposal COM (2007) 528 applies mutatis mutandis and with the following changes (Please see above)

3.1 Effectiveness and Efficiency Test

The **Bayerische Staatsregierung** questions the need to extend the regulation to new segments of the energy market like the access to LNG terminals. It also draws attention to the question of whether such a new regulation would in future act as a disincentive for investment in infrastructure and security of supply in the gas sector.

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

This proposal seeks to establish a European regulatory authority.

The summary for proposal COM (2007) 528 applies mutatis mutandis and with the following changes (Please see above)

2. Compliance with the subsidiarity principle (Questions 3 to 5)

2.1. Criteria of necessity and added value of the Community action.

The **Basque Government and Parliament** and the **Brussels Parliament** welcome the Commission's proposal and consider it necessary in order to better coordinate the actions of Member States. Following the logic of the arguments already summarized for document COM(2007)528, most partners²⁵ describe the legislative proposal for the creation of the Agency as an infringement of the subsidiarity principle. The legislative proposal would not be necessary and would therefore go too far. **Hessen** adds that the European Community legislator should only have something to say in relation to the transport of energy but not regarding the regulation of the networks.

The **Azores** even points out that "*the proposal for a European regulator is clearly exaggerated*", and also refers to the CoR position established in the CoR opinion on the energy package.

²⁵ Hessische Staatskanzlei, Bayerische Staatsregierung, Azores Government, Kärntner Landtag, Vorarlberger Landtag and Landeshauptleutekonferenz.

2.2. Minimal Scope test

The **Hessische Staatskanzlei** underlines that Community action should be limited to the institutional control of the energy markets via the European Commission. This control should take place only for transnational issues of gas or electricity but without interfering in the national distribution.

The **Kärntner Landtag**, the **Vorarlberger Landtag** and the **Landeshauptleutekonferenz** are of the opinion that the creation of a new Agency will not solve any problems. They believe that only a political consensus and reinforced cooperation between Member States could help to resolve existing problems with the energy markets. Since this cooperation already exists within the ERGEG, and its lack of efficiency has not been proved, they propose continuing with this cooperation instead of creating the agency proposed by the Commission. The creation of the agency would be unnecessary and therefore go too far.

The **Basque Government and the Basque Parliament** agree with the proposal to create the agency. They consider, however, that the Regulation will also affect the competences of the regions with legislative powers. They therefore ask for direct cooperation between the agency and the regional authorities. (*"In order for the end user to be able to choose their supplier, free competition must exist and also be effective. For this reason cooperation with the authorities holding this power is needed, which implies the possible participation of state and autonomous (regional) bodies depending on the budgets existing in each case."*)

2.3. Quality of the arguments provided (Question 6)

The **Landeshauptleutekonferenz** states that the Commission is sending out mixed signals as, on the one hand, it is pursuing the goal of deregulation, while on the other hand proposing the creation of new agencies resulting in additional European bureaucracy.

3. *Complying with the proportionality principle (Question 7-12)*

3.3 Cost of implementing the proposal

As most partners ²⁶ question the need to establish an agency, they are also united in their rejection of the extra financial and administrative burdens this would entail.

²⁶ Bayerische Landesregierung, Hessische Staatskanzlei, Azoren Government, Kärntner Landtag, Landeshauptleutekonferenz and Vorarlberger Landtag.