

REASONED OPINION

of the European Affairs Committee of the Federal Council

**pursuant to Article 23g (1) of the Austrian Constitution in conjunction with Article 6 of Protocol
No.2 on the application of the principles of subsidiarity and proportionality**

9 May 2017

COM (2016) 861 final

**Proposal for a Directive of the European Parliament and of the Council on the internal market for
electricity (recast) (Text with EEA relevance)**

A. Reasoned Opinion

The project under consideration is incompatible with the principle of subsidiarity.

B. Grounds for Reasoned Opinion

The “Energy Union Package” is the major priority of the European Commission in the field of EU energy policy. This package of legislative proposals presented by the European Commission at the end of 2016/beginning of 2017 contains measures relating to energy efficiency, the further development and integration of renewable sources of energy, eco-design, security of electricity supply, governance of the Energy Union, rules for the energy market, the active role of consumers, and energy prices. The package was also discussed at the Meeting of Ministers of Energy on 27 February 2017 in Brussels. The Federal Council felt that the proposals have to be considered in their entirety and therefore devoted several of its sessions to this topic. This reasoned opinion refers to the Proposal for a Directive of the European Parliament and of the Council on common rules for the internal market in electricity.

Pursuant to Article 13 paragraph 3 of the proposed Regulation, a bidding zone review has to be carried out. While, according to current practice, the transmission network operators participating in the review of a bidding zone configuration design the methods to be used, amend the bidding zone configuration on that basis, and have the amendment approved by the Member States concerned and/or their national regulators (see Art. 32 para. 4 Regulation 2015/1222/EU – CACM Regulation), the decision on the approval of the methods used and the reviewed alternative bidding zone configurations (Art. 13 para. 3 of the proposed Regulation) are to be transferred to ACER and the decision to amend or maintain the bidding zone configuration (Art. 13 para. 4) is to be taken by the European Commission instead of the Member States.

This additional power to be transferred to ACER – as well as the European Commission – is to be viewed in a critical light in terms of subsidiarity, as decisions on the bidding zone configuration are better taken at national or regional level, considering the familiarity of regional bodies with technical conditions on site. Furthermore, the approval of methodologies and the selection of scenarios to be reviewed for alternative configurations are largely decisions of a discretionary nature which, in line with the established jurisprudence of the Court of Justice of the European Union, must not be outsourced to an agency. In accordance with the principle of subsidiarity, the EU is only empowered to act if it can do so more efficiently than the Member States themselves. The powers, which are to be ceded to ACER and/or the European Commission pursuant to Article 13, paragraphs 3 and 4, should better be exercised at national and/or regional level on account of the greater familiarity of regional bodies with local conditions.

Article 2 point 39 of the Directive defines the term “regional operational centres” (ROCs). Articles 31-44 of the Regulation contain further detailed provisions on the ROCs. The added organizational value of the ROCs, in addition to the established service companies of the transmission network operators and to coordination through the European Network of Transmission System Operators for Electricity (ENTSO-E), has not been sufficiently explained by the European Commission. Moreover, from the Federal Council’s perspective, the transfer of national decision-making powers to a supra-regional autonomous body constitutes an undue restriction of national decision-making competences. The power of the ROCs to issue legally binding instructions, as if they were a public authority, e.g. with regard to the sizing of reserve capacity, is a point to be viewed in a particularly critical light, especially given the complete absence of any protection of existing rights. The establishment of ROCs is likely to result in the creation of dual structures that will make the decision-making process more difficult and less efficient. The Federal Council therefore rejects the proposed organizational principle. In this context, Article 5 of the Regulation regulates the regional sizing of balancing capacities and provides

for transmission system operators to be supported by the ROCs. Regional sizing of balancing capacities is rejected in principle, as this constitutes a restriction of national decision-making powers. This form to transfer of competences is incompatible with the principle of subsidiarity.

As a matter of principle, the Federal Council strongly objects to Article 63 of the proposed Regulation, which provides for the power to adopt delegated acts to be conferred to the European Commission. In accordance with the Treaties of the European Union, conferring this power to the EC is only permitted under strictly defined circumstances. The adoption of delegated acts must therefore remain an absolute exception.