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SUBCOMMITTEE I ON THE FREE MOVEMENT OF GOODS

EEA EFTA Comments to the Commission's Proposal for the third energy market package

I EXECUTIVE SUMMARY

The EEA EFTA States noted the proposal for a third energy market package submitted on 19 September 2007. The EFTA Working Group on Energy Matters was invited to submit comments at its last meeting on 12 December 2007 with the Commission, and we herewith present some preliminary viewpoints.

The EEA EFTA States are positive to the main direction of the proposals in the third energy market package aimed at promoting a well functioning single European energy market. Well functioning electricity and gas markets are essential for suppliers in the European energy market as well as for regional electricity markets, e.g. the Nordic regional electricity market.

The effective unbundling is already the practice in the electricity sector in Norway. The EEA EFTA States would however like to underline the need to take into consideration the special situations in that regard for small and isolated electricity and gas systems which are relevant for both Iceland and Liechtenstein. Additionally, the EEA EFTA States believe that article 8a, which prohibits companies from non-EU Member States to have ownership in network assets within the EU, does not apply to the EEA EFTA States.

The EEA EFTA States noted the discussion on coordination between TSOs in investment planning. The Nordic countries through NORDEL are active in TSO-planning at regional level in the electricity sector. The EEA EFTA States support the regional approach on TSO infrastructure planning. The "bottom-up approach" is therefore sensible, starting at national and regional levels.

The EEA EFTA States believe that further clarification is needed on what is meant by independent national regulators as most regulators operate with some kind of competence delegated from the ministries involved, and also have their budgets adopted by governments and parliaments.

Concerning the new Agency for Cooperation between Energy Regulators, the EEA EFTA States would like to participate fully in the establishment of the new Agency. The EEA EFTA States

would like to emphasise that the new Agency will not be given powers to overrule or intervene in the process between national regulators.

The EEA EFTA States read the proposal on the establishment of ENTSO as a strengthening of the cooperation between TSOs. The EEA EFTA States would like to underline the need for their full membership rights in the new formal mechanism.

The EEA EFTA States read the proposal as strengthening the concept of regional markets. This is positive. The EEA EFTA States would like to point to the successful experience of the integrated Nordic electricity market. It is important to have a continued regional focus in order to secure a further development in a desirable direction within the framework of the EU/EEA internal energy market.

It is the view of the EEA EFTA States that it is feasible to find appropriate EEA solutions to these issues.

II GENERAL

The EEA EFTA States are in the phase of studying and identifying the main elements in the energy market package of 19 September 2007. External hearings with stakeholders have been initiated in individual EEA EFTA States based on the substance of the original proposal. The EFTA Working Group on Energy Matters will carefully look into any major changes during the Council and European Parliament deliberations. A good dialogue with the European Commission and Member States of the EU will be crucial in this context. It is most likely that changes to the proposal will take place. Therefore we want to underline that these viewpoints are provisional and the EEA EFTA States will look into the whole package when it is adopted by the EU with a view to particular concerns that may emerge in an EEA adaptation context.

These EEA EFTA viewpoints refer at this stage basically to the electricity part of the package which means amendments to electricity Directive 2003/54/EC and amendments to Regulation (EC) 1228/2003 as well as the new proposal to establish an Agency for cooperation between Energy Regulators (ACER).

III SPECIFIC COMMENTS

3.1 Effective unbundling

We have noted the main amendments concerning effective unbundling (article 8). In one EFTA State (Norway) the model in the electricity sector is ownership unbundling. The establishment of an unbundled TSO in ownership terms has been a “backbone” in the Norwegian electricity market for several years. This is in line with the Commission’s preferred option for organisational structure in the electricity sector. Separation of supply and production activities from network operation was established in Norway in order to provide the right investment incentives and to hinder conflicts of interest for the TSO, and to secure

non-discriminatory access for the customers of the network. We assume that the present organisational structure in Norway with two separate state-owned companies complies with the new proposed legislation.

Landsnet, a limited liability company, was established to provide the electrical transmission and system operation services in Iceland. Landsnet is the only TSO in Iceland. The company is responsible for the transmission and system operation services of its predecessor, National Power Company (Landsvirkjun), which is the biggest shareholder. Other owners of Landsnet include the Icelandic State Electricity (Rafmagnsveitur ríkisins), Reykjavik Energy (Orkuveita Reykjavíkur) and the Westfjords Power Company (Orkubú Vestfjarða). The aforementioned companies released their transmission system lines and equipment to Landsnet as equity. Landsnet operates in a specially licensed environment and is under the surveillance of the National Energy Authority (NEA). Therefore it can only practice activities necessary to fulfil its duty in accordance with the Law. The Law also stipulates independency of Landsnet from other market participants to ensure equal opportunities on a free electrical market. Landsnet publishes its accounts in its annual report and does also report these accounts in detail to NEA.

The EEA EFTA position is that the energy market package has to take into account the special situations for small and isolated electricity and gas systems which are relevant for Iceland and Lichtenstein. In accordance with the Decision of the EEA Joint Committee, No. 146/2005, of 2 December 2005, Article 26(1) of Directive 2003/54/EC is applicable to Iceland. Iceland is also considered as a small isolated system within the meaning of Article 2 (26). The derogation set out in Article 15 shall therefore apply accordingly.

The new legislation contains drafting which prohibits companies from non-EU Member States from ownership in network assets within the EU. However, it is stated that an agreement concluded with one or several third countries to which the Community is a party may allow for derogation from this provision (article 8a). The EEA EFTA States assume that this derogation clause does apply to EEA EFTA States and that discrimination against the EFTA States will not take place.

3.2 Coordination of TSOs investment planning

The EEA EFTA States have noted the discussion on coordination between TSOs in investment planning. The Nordic countries through NORDEL are active in TSO-planning at regional level in the electricity sector. We think it is very important to keep the regional concept on TSO infrastructure planning in order to secure a beneficial further development of the electricity market in the Northern Region. The “bottom-up approach” is therefore sensible starting at national and regional levels. There are uncertainties concerning the formal roles of the proposed new Agency and the Commission in this process. Notwithstanding the good intentions behind these provisions, questions have been raised on how the reporting of the 10 years investment plans could be used by the Commission.

The proposal amending Regulation 1228/2003 (on cross border electricity trade) does not include any clear indication on how investments in new infrastructure should be financed. In line with previous critical remarks on the inter-TSO-compensation (ITC) mechanism, the EEA EFTA States would like to underline that one should now use the occasion to reassess the whole approach of contributions and receipts in a possible ITC mechanism.

It is of great importance for EEA EFTA States to have a formal role in the proposed ENTSO-organisation on equal terms as the other Nordic countries, as one EFTA country (Norway) is a part of the integrated Nordic electricity market.

3.3 *Independent regulator (national regulatory authorities)*

Concerning the new provisions on guaranteeing independent national regulators, the EEA EFTA States need a better understanding of what is meant by such independence. Most regulators operate with some kind of competence delegated from the ministries involved and also have their budgets adopted by governments and parliaments. We assume on the basis of what we have seen so far that regulatory regimes which have functioned very well can continue to do so.

The EEA EFTA States have, however, noted more specifically that new provisions concerning *independence of the regulatory authority* have been introduced. It is consequently required to have a better understanding/interpretation from the Commission on what is meant by article 22.a (2) concerning in particular “...*independent from any other public or private entity...and not seek or take instructions from any government or other public or private entity.*” The EEA EFTA States observe that most regulators operate in a framework with some kind of government policies, guidelines or instructions. The EEA EFTA States very much support the Energy Council conclusions of 3 December in its concern for accommodating different administrative arrangements. It is also important to clarify what is meant by “*a single national regulatory authority*” (art. 22a (1)).

Clarifications are also needed as regards article 22.a (3) which covers the manner in which the independence is ensured. In particular, we wonder what is meant by *budgetary autonomy*.

What is meant by *management* in article 22a (3b)? Does it include the whole management or only the top manager of the regulator?

In our view there is also a need for clarification as to whether the regulator’s appeal body also should be independent from any public authority, or if this is intended to concern only the regulatory authority.

The amendments in the electricity Directive give more detailed descriptions of *duties and powers of the regulatory authorities* (Article 22c). It is necessary to assess whether the list of tasks is compatible with current competences for regulators.

The proposal, that regulatory authorities should be “*responsible for fixing or approving prior to their entry into force amongst others transmission and distribution tariffs*”, would not be in

line with the practice in the Nordic market where the method is approved prior to its entry into force but not the tariffs themselves. The formulations in current Directive 2003/54/EC are consequently more precise and better than the new amendments proposed in article 22c (4).

The EEA EFTA States foresee that it is necessary to come back with a more profound assessment of these new provisions when we have seen how the issue is developing in the Council and the European Parliament negotiations at their first readings. One proposal, in order to avoid lengthy discussions on what is meant by independence, would be to return to the requirement for independent regulators in Directive 2003/54/EC, which limits independence to that versus commercial market interests and which does not include public entities.

3.4 Agency for Cooperation between Energy Regulators

The proposal to establish a new Agency for the Cooperation of Energy Regulators (ACER) is EEA relevant. Our point of departure is that as close a cooperation as possible, within the framework of EEA, is very important. It is our understanding that the intention of the Commission is to automatically include countries that have concluded agreements with the EU.

At the same time the EEA EFTA States would assess developments in negotiations on this point with the view to achieving a full EFTA participation in the Agency. One has to look into the decisions and competences that would eventually be designated to such an Agency.

One of the tasks for the Agency in the Commission's proposal is to promote regional cooperation between regulators. In the Nordic electricity market today, there is a substantial cooperation between the Nordic regulators through the organisation NordReg on equal terms. One of the EEA EFTA States (Norway) has a central role in this organisation. Since the other countries in the Nordic electricity market will have a formal role in the Agency, it is crucial for further cooperation based on equal terms among regulators in the Nordic region, that EEA EFTA States also are entitled to participate in the Agency.

The EEA EFTA States share the view of many member states of the EU that ACER should not take normative decisions on the future legal framework of the electricity and gas markets.

The EEA EFTA States need to look further into the proposal that ACER shall have the competence on decision making powers on issues related to disagreements on regulatory regimes in cross border trade. There is a wide scope of uncertainty on this point, and developments in the Council and the European Parliament negotiations are crucial for a final position. It is of the utmost importance that the new Agency is not given powers to overrule or intervene in a process between two national regulators. The EEA EFTA States would also question to what extent ACER could take decisions on exemptions granted by national regulators. Furthermore, there is a need for clarification of the role of ACER vis à vis ENTSO. The regulators, on a national level, are the regulatory authority over the TSO's, while ACER seems to have no regulatory authority over the ENTSO-organisation. This organisation might lead to some extent to an unbalance. The EEA EFTA States need more information on the exact division of competences between the national regulators and

authorities and the new Agency in exemption cases. In general, clarification on the exact cases the Agency will treat is required.

Such provisions, giving ACER decision making competence on certain issues would need a particular EEA scrutiny.

3.5 Establishment of ENTSO

The amendments to the Regulation 1228/2003 propose to establish a formal cooperation between Electricity Transmission System Operators in EU. The EEA EFTA States read this proposal as a strengthening of the cooperation between TSOs which is established in ETSO. The EEA EFTA States would like to underline the need for full membership rights in the new formal mechanism to be created. Those TSOs already party to the same regional cooperative structures as NORDEL should have the same position in the new ENTSO.

IV CONCLUDING REMARKS

The EEA EFTA States noted the latest deliberations in the Council on 3 December 2007 and foresee that negotiations of the energy market package could continue until late 2008. The EEA EFTA States would like to reiterate the need to have close contacts with the Commission and the Council (Member States) on important points in the process towards final adoption of the energy market package.