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Regulatory and Energy Assistance

The Third Liberalization Package issued by the EC on 9-19-07 REAP Summary

The Third Liberalization Package issued by the EC on September 19, 2007, consists of amendments to the electricity directive, the regulation on access to the network for cross-border exchanges, and a Proposal for establishing an Agency for the Cooperation of Energy Regulators.

The amendments to the Electricity and Gas Directives contain two very controversial provisions:

1. Where a company owns a transmission system in either gas or electricity as part of a vertically integrated undertaking, the company has a choice between ownership unbundling and, as a derogation, setting up system operators that are independent from supply and production interests. Regarding ownership unbundling, the Member States have the choice of either divesting or splitting shares of the integrated company into shares of the network company and shares of the remaining supply and production business.

It is understood that the Package must be approved by the European Parliament and the Member States. Given the open opposition to this provision by powerful interests,¹ its passage may be questionable.

2. The Amendments bar a foreign company from owning a majority share in either gas pipelines or electricity networks unless a reciprocal agreement is in place between the EU and the foreign country. (It is understood that this means that such agreement would give EU companies access to the foreign country's market as well.)

This provision is most likely targeted again Gazprom, which is purchasing interests in the EU, without Russia allowing access to the networks or customers in Russia.

The other provisions of the Third Liberalization Package address:

- Enhanced powers and independence of national regulators. Among the provisions regarding independent, neither commissioners nor staff can seek or take instruction from any government or other public or private entity.

¹ E.ON of Germany, one of the largest utilities, said "separating networks doesn't increase competition, doesn't lead to higher investment in networks and doesn't lead to lower prices;" the package received a skeptical reception in Berlin; and the French Finance Minister said that Paris "will do everything we can with other opponents to oppose any unbundling." *International Herald Tribune*, September 20, 2007.

- A proposed Agency for the Cooperation of Energy Regulators that has specifically defined competencies, created from the national regulators. The Agency provides a framework for national regulators to cooperate; would have regulatory oversight of the cooperation between TSOs; only has individual decision powers with regard to cross-border issues, requests for exemption from the requirement of third party access; and decide on the regulatory regime applicable to infrastructure within the territory of more than one Member State.

The EC will retain its role in that (i) the Agency will have no political discretion outside specific technical situations explicitly foreseen in the Regulations and Directives; if TSO cooperation or decisions by National Regulatory Authorities threaten competition; and where a substantive decision needs to be taken, the Agency will have only a preparatory and advisory role, with the EC making the decision.

A previous proposal for a European Energy Regulator in the EC's green paper issued in March, 2006, created a flurry of fierce resistance by a number of Member States. Here, the EC has carefully delineated the powers of the Agency, which probably answers the previous objections.

- The designation of the European Networks of gas and electricity TSOs to be in charge of strengthening the cooperation between TSOs in 11 different areas.
- Other provisions address:
 - increasing the requirements for transparency to cover gas stocks, forecasts of demand and supply and costs for balancing the network and trading;
 - making guidelines for third party access to storage and LNG terminals mandatory; and
 - the Commission's definition of binding guidelines for vulnerable customer programs.
- Finally, the EC intends to provide guidance in an appropriate form of downstream bilateral long-term supply agreements, so that the EC competition law will be observed.

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