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Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on common rules for the internal market in electricity**

**(recast)**

(Text with EEA relevance)

{SWD(2016) 410}

{SWD(2016) 411}

{SWD(2016) 412}

{SWD(2016) 413}

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

#### • Reasons for and objectives of the proposal

##### *Policy Context*

European citizens spend a significant part of their income on energy, and energy is an important input for European industry. At the same time, the energy sector plays a key role in the obligation to reduce greenhouse gas emissions in the Union by at least 40% until 2030 with an expected share of 50% of renewables by 2030.

The proposals for a recast of the Directive on common rules for the internal market in electricity, the Regulation on the electricity market and the Regulation establishing a European Union Agency for the Cooperation of Energy Regulators are part of the Commission's broader package of initiatives ("Clean Energy for All Europeans"). The Package comprises the Commission's key proposals to implement the Energy Union, as foreseen in the Energy Union Roadmap<sup>1</sup>. It includes both legislative proposals as well as non-legislative initiatives to create a conducive enabling framework to deliver tangible benefits for citizens, jobs, growth and investments while contributing to all five dimensions of the Energy Union. The key priorities for the package are thus energy efficiency first, the EU's global leadership in renewables, and a fair deal for energy consumers.

Both the European Council<sup>2</sup> and the European Parliament<sup>3</sup> have repeatedly stressed that a well-functioning integrated energy market is the best tool to guarantee affordable energy prices, secure energy supplies and to allow for the integration and development of larger volumes of electricity produced from renewable sources in a cost efficient manner. Competitive prices are essential for achieving growth and consumer welfare in the European Union, and hence are at the heart of EU energy policy. The current electricity market design is based on the rules of the "Third Energy Package"<sup>4</sup>, adopted in 2009. These rules have subsequently been complemented by legislation against market abuses<sup>5</sup> and implementing

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<sup>1</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy COM/2015/080 final.

<sup>2</sup> Outcome of the Council Meeting 3429<sup>th</sup> Meeting, transport, Telecommunications and Energy, 26 November 2015 14632/15, Outcome of the Council Meeting, 3472<sup>nd</sup> Meeting, Transport, Telecommunications and Energy, 6 June 2016 9736/16.

<sup>3</sup> European Parliament Resolution of 13 September 2016 on Towards a new Market Design (P8\_TA(2016)0333).

<sup>4</sup> Directive 2009/72 of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211, 14.8.2009, p. 55–93 (henceforth the "Electricity Directive"); Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity repealing Regulation (EC) No 1228/2003, OJ L 211, 14.8.2009, p. 15–35 (henceforth "Electricity Regulation"); Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators. OJ L 211, 14.8.2009, p. 1–14 (henceforth "ACER Regulation"),

<sup>5</sup> Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency OJ L 326, 8.12.2011, p. 1–16; Commission Implementing Regulation (EU) No 1348/2014 of 17 December 2014 on data reporting implementing Article 8(2) and Article 8(6) of Regulation (EU) No 1227/2011 of the European Parliament and of the Council OJ L 363, 18.12.2014, p. 121–142.

legislation concerning electricity trade and grid operation rules<sup>6</sup>. The EU internal energy market is built on well-established principles, such as the right of access for third parties to electricity grids, free choice of suppliers for consumers, robust unbundling rules, the removal of barriers to cross-border trade, market supervision by independent energy regulators, and the EU-wide cooperation of regulators and grid operators within the Agency for the Cooperation of Energy Regulators (ACER) and the European Network of Transmission System Operators (ENTSO).

The Third Energy Package has brought tangible progress for consumers. It has led to increased liquidity of European electricity markets and significantly increased cross-border trade. Consumers in many Member States can now benefit from more choice. Increased competition notably on wholesale markets helped to keep wholesale prices in check. New consumer rights introduced by the Third Energy Package have clearly improved the position of consumers in energy markets.

New developments have led to fundamental changes in European electricity markets. The share of electricity generated from renewable energy sources (RES-E) has steeply increased. This shift towards RES-E will continue as it is a key condition to fulfil the Union's obligations under the Paris Agreement on climate. The physical nature of RES-E – more variable, less predictable and decentralised than traditional generation – requires an adaptation of market and grid operation rules to the more flexible nature of the market. In parallel, state interventions, often designed in an uncoordinated manner, have led to distortions of the wholesale electricity market, with negative consequences for investments and cross-border trade<sup>7</sup>. Significant changes are also taking place on the technological side. Electricity is traded almost European-wide through so-called "market coupling", jointly organised by power exchanges and transmission system operators. Digitalisation and the rapid development of internet-based metering and trading solutions enable industry, businesses and even households to generate and store electricity, as well as participate in electricity markets via so-called 'demand response' solutions. The electricity market of the next decade will be characterised by more variable and decentralised electricity production, an increased interdependence between Member States and new technological opportunities for consumers to reduce their bills and actively participate in electricity markets through demand response, self-consumption or storage.

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<sup>6</sup> Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency OJ L 326, 8.12.2011, p. 1–16; Commission Regulation (EU) No 543/2013 of 14 June 2013 on submission and publication of data in electricity markets and amending Annex I to Regulation (EC) No 714/2009 of the European Parliament and of the Council OJ L 163, 15.6.2013, p. 1–12; Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management OJ L 197, 25.7.2015, p. 24–72; Commission Regulation (EU) 2016/631 of 14 April 2016 establishing a network code on requirements for grid connection of generators OJ L 112, 27.4.2016, p. 1–68; Commission Regulation (EU) 2016/1388 of 17 August 2016 establishing a Network Code on Demand Connection OJ L 223, 18.8.2016, p. 10–54; Commission Regulation (EU) 2016/1447 of 26 August 2016 establishing a network code on requirements for grid connection of high voltage direct current systems and direct current-connected power park modules OJ L 241, 8.9.2016, p. 1–65; Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a guideline on forward capacity allocation OJ L 259, 27.9.2016, p. 42–68; other Guidelines and network codes have been endorsed Member States' approval and are awaiting adoption.

<sup>7</sup> See Communication from the Commission "Delivering the internal electricity market and making the most of public intervention", C(2013) 7243 final of 5.11.2013.

The present electricity market design initiative thus aims to adapt the current market rules to new market realities, by allowing electricity to move freely to where it is most needed when it is most needed via undistorted price signals, whilst empowering consumers, reaping maximum benefits for society from cross-border competition and providing the right signals and incentives to drive the necessary investments to decarbonise our energy system. It will also give priority to energy efficiency solutions, and contribute to the goal of becoming a world leader in energy production from renewable energy sources, thus contributing to the Union's target to create jobs, growth and attract investments.

#### *Adapting market rules*

The existing market rules are based on the predominant generation technologies of the last decade, i.e. centralised, large-scale fossil fuel-based power plants with limited participation of consumers. As variable RES-E will play an increasing role in the generation mix in future, and consumers should be enabled to participate in the markets if they wish so, the rules need to be adapted. Short-term electricity markets which allow trading RES-E across borders are key for the successful integration of RES-E into the market. This is because most generation from renewables can only be accurately forecasted shortly before the actual production (due to weather uncertainties). The creation of markets which allow participation at short notice before actual delivery (so-called "intraday" or "balancing" markets) are a crucial step to enable RES-E producers to sell their energy at fair terms and it will also increase liquidity in the market. Short-term markets will provide new business opportunities for participants to offer "back-up" energy solutions at times of high demand and scarce renewable generation. This includes the possibility for consumers to shift their demand ("demand response"), storage operators or flexible generators. While dealing with variability in small regions can be very expensive, aggregation of variable production over larger areas could help consumers save significant amounts of money. Yet, integrated short-term markets are still missing.

The shortcomings of the current market arrangements reduce the attractiveness of the energy sector for new investment. An adequately interconnected, market-based energy system in which prices follow market signals will stimulate the necessary investments into generation and transmission in an effective manner and ensure that they are made where they are most needed by the market, thereby minimising the need for state-planned investments.

National market rules (e.g. price caps) and state interventions currently hinder prices from reflecting when electricity is scarce. Furthermore, price zones do not always reflect actual scarcity if poorly configured and instead follow political borders. The new market design aims to improve price signals to drive investment in areas where it is needed most, reflecting grid constraints and demand centres, rather than national borders. Price signals should also allow for adequate remuneration of flexible resources (including demand-response and storage), as these resources rely on rewards for shorter periods of time (e.g. modern gas plants which are only used for peak hours or the reduction of industrial demand at times of peak demand or system stress). Effective price signals also ensure the efficient dispatch of existing generation assets. It is therefore critical to review any existing rules that distort price formation (such as rules prioritising the dispatch of certain installations) in order to activate and fully realise the flexibility potential that the demand side can offer

#### *Putting consumers at the heart of the energy market*

Fully integrating industrial, commercial and residential consumers into the energy system can avoid significant costs for 'backup' generation; costs which consumers would otherwise end up paying. It even allows consumers to benefit from price fluctuations and to earn money

through participation in the market. Activating consumer participation is therefore a prerequisite for managing the energy transition successfully and in a cost-effective way.

Delivering a new deal for energy consumers is a key commitment of the Energy Union. However, current market rules often do not allow consumers to benefit from these new opportunities. Although consumers can generate and store electricity as well as manage their energy consumption more easily than ever, the current design of the retail market prevents them from being able to fully benefit from such opportunities.

In most Member States, consumers have little or no incentive to change their consumption in response to changing prices in the markets, as real-time price signals are not passed on to final consumers. The market design package is an opportunity to deliver on this commitment. More transparent real time price signals will stimulate consumer participation, either individually or through aggregation, and make the electricity system more flexible, facilitating the integration of electricity from renewable energy sources. Besides offering great energy saving potential for households, technological developments mean that appliances and systems, such as smart white electronics, electric vehicles, electric heating, air conditioning and heat pumps in insulated buildings and district heating and cooling, can automatically follow price fluctuations and, on a large scale, offer a significant and flexible contribution to the electricity grid. In order to enable consumers to benefit financially from those new opportunities, they must have access to fit-for-purpose smart systems as well as electricity supply contracts with dynamic prices linked to the spot market. In addition to consumers adjusting their consumption to price signals, new demand services are currently emerging whereby new market actors offer to manage the electricity consumption of a number of consumers by paying them a compensation for their flexibility. Although such services are already encouraged under existing EU legislation, the evidence suggests that these provisions have not been effective in removing the primary market barriers for those service providers to enter the market. Sharpening these provisions is necessary to further encourage such new services.

In many Member States, electricity prices do not follow demand and supply, but are regulated by the public authorities. Price regulation can limit the development of effective competition, discourage investments and the emergence of new market players. The Commission therefore committed in its Energy Union Framework Strategy<sup>8</sup> to phase-out regulated prices below cost and to encourage Member States to establish a road map for the phasing-out of all regulated prices. The new market design aims at ensuring that supply prices are free of any public intervention, and only with duly justified exceptions.

Rapidly falling technology costs mean that more and more consumers are able to reduce their energy bills by using technologies such as rooftop solar panels and batteries. However, self-generation is still hampered by a lack of common rules for 'prosumers'. Appropriate rules could remove these barriers, e.g. by guaranteeing consumers' rights to generate energy for their own consumption and sell surplus into the grid, while taking into account the costs and benefits for the system as a whole (e.g. appropriate participation in grid costs).

Local energy communities can be an efficient way of managing energy at community level by consuming the electricity they generate either directly for power or for (district) heating and cooling, with or without a connection to distribution systems. To ensure that such initiatives can freely develop, the new market design requires Member States to put in place appropriate legal frameworks to enable their activities.

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<sup>8</sup> See Communication "A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy", COM/2015/080.

Today, more than 90% of variable renewable electricity sources are connected to distribution grids. The integration of local generation has in fact contributed to a significant increase in network tariffs for household consumers. In addition, taxes and levies to finance grid extensions and renewables' investments have risen drastically. The new market design and the revision of the Renewables Directive provide an opportunity to address these shortcomings, which can disproportionately impact certain household consumers.

Allowing Distribution System Operators (DSOs) to manage some of the challenges associated with variable generation more locally (e.g. by managing local flexibility resources) could significantly reduce network costs. However, since many DSOs are part of vertically integrated companies which are also active in the supply business, regulatory safeguards are necessary to guarantee the DSOs' neutrality in their new functions, e.g. in terms of data management and when using flexibility to manage local congestions.

Another key driver to competition and consumer engagement is information. Previous Commission consultations and studies have shown that consumers complain about a lack of transparency in electricity markets, reducing their ability to benefit from competition and actively participate in markets. Consumers do not feel informed enough about alternative suppliers, the availability of new energy services and complain about the complexity of offers and procedures for switching suppliers. The reform will also ensure data protection as an increased use of new technologies (notably smart metering systems) will generate a range of energy data carrying high commercial value.

In putting consumers at the heart of the energy market, an essential consideration in the new market design is how to ensure that the most vulnerable in society are protected and that the overall number of energy-poor households will not further increase. With rising levels of energy poverty as well as a lack of clarity on the most appropriate means of tackling consumer vulnerability and energy poverty, the new market design proposal requires Member States to duly measure and regularly monitor energy poverty based on principles defined at EU level. The revised Energy Efficiency and Energy Performance of Building Directives provide for further measures to tackle energy poverty.

#### *Security of electricity supply*

Security of electricity supply is indispensable in modern societies which largely depend on electricity and internet driven systems. It is therefore necessary to assess the ability of the European electricity system to offer sufficient generation and flexibility to ensure reliable electricity supply at all times (resource adequacy). Ensuring security of supply is not only a national obligation, but a key pillar of European energy policy<sup>9</sup>. This is because security of supply can, in a fully interconnected and synchronised network with well-functioning markets, be organised far more efficiently and competitively than on a purely national basis. Grid stability in individual Member States often heavily depends on electricity flows from neighbouring countries and potential security of supply problems therefore usually have a regional impact. For this reason, the most efficient remedies to national generation deficits are often regional solutions, allowing Member States to benefit from generation surpluses in other countries. A coordinated European adequacy assessment should therefore be introduced, following a jointly agreed methodology, in order to obtain a realistic picture of possible generation needs, taking into account the integration of electricity markets and potential flows from other countries. If the coordinated adequacy assessment shows that capacity mechanisms are necessary in certain countries or regions, such mechanisms should be designed so as to minimise distortions to the internal market. Clear and transparent criteria to minimise

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<sup>9</sup> See Article 194(1)(b) TFEU.

distortions of cross-border trade, maximise use of demand response, and reduce impacts affecting decarbonisation should therefore be defined to avoid the risk of fragmented national capacity mechanisms creating new market barriers and undermining competition<sup>10</sup>.

### *Strengthening regional cooperation*

The close interconnection of EU Member States through the common trans-European grid is unique in the world and a great asset when it comes to dealing efficiently with the energy transition. Without the ability to rely on generation or demand resources from other Member States, the costs of the energy transition for consumers would increase significantly. Today, system operation across borders is much more interrelated than it was in the past. This is due to the increase in variable and decentralised generation, together with closer market integration, especially in shorter market time intervals. This also means that national actions by regulators or grid operators can have an immediate effect on other EU Member States. Experience has shown that uncoordinated national decisions can lead to significant costs for European consumers.

The fact that some interconnectors are only used to 25% of their capacities, often due to uncoordinated national limitations, and that Member States have not been able to agree on appropriate price zones illustrates that there is a need for more coordination between Transmission System Operators (TSOs) and regulators. Successful examples of voluntary and mandatory cooperation between TSOs, regulators and governments have shown that regional cooperation can improve market functioning and reduce costs significantly. In certain areas, e.g. for the EU-wide 'market coupling' mechanism, TSO cooperation has already become mandatory, and the system of majority voting on some issues has proven to be successful in areas where voluntary cooperation (leaving each TSO a veto right) did not lead to efficient results for regional problems. Following this successful example, mandatory cooperation should be expanded to other areas in the regulatory framework. To this end, TSOs could decide within 'Regional Operational Centres' (ROCs) on those issues where fragmented and uncoordinated national actions could negatively affect the market and consumers (e.g. in the fields of system operation, capacity calculation for interconnectors, security of supply and risk preparedness).

### *Adapting regulatory oversight to regional markets*

It appears appropriate to also adapt regulatory oversight to the new realities of the market. All main regulatory decisions are currently taken by national regulators, even in cases where a common regional solution is needed. While ACER has been successful in providing a forum for the coordination of national regulators with diverging interests, its main role is currently confined to coordination, advising and monitoring. While market actors increasingly cooperate across borders and decide on certain matters concerning grid operation and electricity trading with qualified majority at a regional or even Union level<sup>11</sup>, there is no equivalent for these regional decision-making procedures at regulatory level. Regulatory oversight therefore remains fragmented, leading to a risk of diverging decisions and unnecessary delays. Strengthening the powers of ACER for those cross-border issues which require a coordinated regional decision would contribute to faster and more effective

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<sup>10</sup> See in this context also the proposal for a Regulation of the European Parliament and the Council on risk preparedness in the electricity sector, covering risks to security of supply related to the management of electricity crisis situations.

<sup>11</sup> See e.g. Article 9 of Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management, OJ L 197, 25.7.2015, p. 24–72.

decision-making on cross-border issues. National regulators, deciding within ACER on those issues through majority voting, would remain fully involved in the process.

It also appears appropriate to better define the role of ENTSO-E in order to strengthen its coordination role and render its decision-making process more transparent.

#### *Text clarifications*

Finally, the recast of the Electricity Regulation, the Agency Regulation and the Electricity Directive will be used to provide some editorial clarifications on some of the existing rules and to restructure some of them in order to make the highly technical rules of the three acts more comprehensible, without touching upon the substance of the provisions.

- **Consistency with other provisions and proposals in the policy area**

The market design initiative is strongly linked to other energy and climate legislative proposals brought forward in parallel. These notably include initiatives to improve Europe's energy efficiency, a renewable energy package, and the overarching initiative addressing governance and reporting mechanisms for the Energy Union. All those initiatives aim at implementing the necessary measures to achieve the objective of a competitive, secure and sustainable Energy Union. The intention of packaging the different initiatives, consisting of multiple legislative and non-legislative levers, is to ensure utmost coherence of the different but closely interlinked policy proposals.

Therefore, although the current proposal is centred on updating market rules so as to make a clean energy transition economically advantageous, these provisions work in synergy with the wider EU climate and energy policy framework. These links are further explained in the Commission's Impact Assessment<sup>12</sup>.

The proposal is closely linked to the proposal for a revised Renewable Energy Directive, providing for a framework to achieve the 2030 renewable target, including also principles in relation to support schemes for renewable energy sources, which would make them more market-oriented, cost-effective and more regionalised in scope in cases where Member States are opting to keep support schemes. Those measures aimed at the integration of renewable energies in the market, such as provisions on dispatching, market-related barriers to self-consumption and other market access rules – previously contained in the Renewable Energy Directive –, have now been integrated in the Electricity Regulation and the Electricity Directive.

The proposal for a Regulation on the Governance of the Energy Union will contribute to ensuring policy coherence by streamlining planning and reporting obligations by Member States so as to better support the convergence towards energy and climate goals set at EU level. As a new planning, reporting and monitoring instrument, it shall provide a temperature gauge on the state of progress from a Member State on the implementation of European-wide market requirements introduced by the present acts.

The proposal for a Regulation on risk preparedness in the electricity sector complements the current proposal, focusing in particular on government actions to manage electricity crisis situations and to prevent short term risks for the electricity system.

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<sup>12</sup> [OP: Please insert Link to Impact Assessment]

The current proposal is closely aligned with the Commission's competition policy in the field of energy. It incorporates notably the results of the Commission's Sector Inquiry on Capacity Mechanisms, ensuring full coherence with the Commission's energy state aid enforcement policy.

- **Consistency with other Union policies**

The proposal seeks to implement key objectives of the Energy Union, as defined in the Framework Strategy for a resilient Energy Union with a forward-looking climate change policy. As already stated above, the details of the package are also in line with the recent global-level engagement by the Union to achieve ambitious climate targets under the agreement found in Paris at the 21<sup>st</sup> UN Conference of the Parties (COP21). The current proposal is mutually reinforcing and complementary to the proposal for the revision of the EU Emissions Trading System made in July 2015.

Further, to the extent that a revision of the electricity market design is aimed at making Europe's energy market more competitive and accessible for new energy technologies, the proposal also contributes to fulfilling the Union's objectives to generate jobs and growth. By offering market opportunities for new technologies, the proposal will spur the uptake of a number of services and products that would give European businesses a first-mover advantage as the clean energy transition advances globally.

## **2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

- **Legal basis**

The legal basis for the proposed measures is Article 194 of the Treaty on the Functioning of the European Union (TFEU), which consolidated and clarified the competences of the EU in the field of energy. According to Article 194 TFEU, the main aims of the EU's energy policy are to: ensure the functioning of the energy market; ensure security of energy supply in the Union; promote energy efficiency and energy saving and the development of new and renewable forms of energy; and promote the interconnection of energy networks.

The present initiative also builds upon a comprehensive set of legislative acts that have been adopted and updated during the past two decades. With the objective of creating an internal energy market, the EU has adopted three consecutive legislative packages between 1996 and 2009, with the overarching aim of integrating markets and liberalising national electricity and gas markets. These provisions cover a wide range of aspects, from market access to transparency, consumer rights and the independence of regulatory authorities, to name a few.

With an eye on existing legislation and the general trajectory of growing energy market integration, the current initiative should thus also be seen as part of an ongoing effort to ensure the integration and effective operation of Europe's energy markets.

Recent calls from the European Council<sup>13</sup> and the European Parliament for action at EU level to complete the European energy market have also created further ground for action.

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<sup>13</sup> In February 2011, the European Council set the objective of completing the internal energy market by 2014 and developing interconnection to end the grid isolation of certain Member States by 2015. In June 2016, the European Council also called for a Single Market Strategy in the field of energy, with action plans to be proposed by the Commission and to be implemented by 2018.

- **Subsidiarity**

The proposed changes to the provisions of the Regulation on electricity markets, the Directive on common rules for the internal electricity market and the Regulation establishing a European Agency for the Cooperation of Energy Regulators are necessary to achieve the purpose of an integrated EU electricity market and cannot be reached at national level in an equally efficient manner. As set out in detail in the evaluation of the recast legislative acts<sup>14</sup>, evidence has shown that isolated national approaches have led to delays in the implementation of the internal energy market, leading to sub-optimal and incompatible regulatory measures, unnecessary duplication of interventions and delays in correcting market inefficiencies. The creation of an internal energy market that delivers competitive and sustainable energy for all cannot be achieved on the basis of fragmented national rules where they concern the trading of energy, the operation of the shared grid and a certain amount of product standardisation.

The increasing interconnection of EU electricity markets requires closer coordination between national actors. National policy interventions in the electricity sector have a direct impact on neighbouring Member States due to energy interdependence and grid interconnections. Ensuring the stability of the grid and its efficient operation is increasingly difficult to do at national level alone, as rising cross-border trade, the uptake of decentralised generation and enhanced consumer participation, all increase the potential for spill-over effects. No state can effectively act alone and the consequences of unilateral action have become more pronounced over time. This general principle applies across the range of measures introduced by the current proposal, whether they concern energy trading, the operation of the grid and consumers' effective participation.

Since common regional issues which require a coordinated decision often have a significant economic impact on individual Member States, past experience has shown that voluntary cooperation, while useful in many areas of cooperation between Member States, has often not been able to overcome technically complex conflicts with significant distributive effects between Member States<sup>15</sup>. Existing voluntary initiatives, such as the Pentalateral Energy Forum, are also limited in their geography, as they only cover parts of the EU electricity market and do not necessarily combine all countries which are physically most closely interconnected.

To illustrate on a concrete example, uncoordinated national policies concerning the principles for distribution tariffs may distort the internal market to an extent that distributed generation or energy storage services will be under very different incentives to participate in the market. With the uptake of new technologies and energy services increasingly traded across borders, EU action has a significant value in ensuring a level playing field and more efficient market outcomes for all parties involved.

The coordinating function of ACER has been adapted to new developments in energy markets, such as the increased need for coordination in times of higher energy flows across borders and the rise of energy production from volatile RES-E. The independent national regulatory authorities (NRAs) play a major role in providing regulatory oversight over their national energy sector. A system which becomes more and more interdependent between the Member States both when it comes to market transactions and system operation requires, however, regulatory oversight beyond national borders. ACER is the body established to provide such regulatory oversight as far as situations are concerned which cover more than

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<sup>14</sup> [OP please add link to Impact assessment – evaluation part].

<sup>15</sup> See e.g. the discussion on congestion management in central Europe, where divergent national interests led to significant delays on the way to more market integration.

two Member States. The main role of ACER as a coordinator of the action of national regulators has been preserved; limited additional competences have been assigned to ACER in those areas where fragmented national decision-making on issues with cross-border relevance would lead to problems or inconsistencies for the internal market. For example, the creation of regional operational centres (ROCs) in the [recast of Regulation 714/2009 as proposed by COM(2016)861/2] calls for supra-national monitoring which needs to be performed by ACER, as the ROCs cover several Member States. Similarly, the introduction of an EU-wide coordinated adequacy assessment in the [recast of Regulation 714/2009 as proposed by COM(2016)861/2] calls for a regulatory approval of its methodology and calculations that may only be attributed to ACER as the adequacy assessment is to be performed across Member States.

While the assignment of new tasks to ACER will require a reinforcement of its staff, the coordinating role of ACER will lead to a lower burden for national authorities, thus freeing up administrative resources at national level. The proposed approach will streamline regulatory procedures (e.g. by introducing direct approval within ACER instead of 28 separate approvals). The coordinated development of methodologies (e.g. concerning adequacy assessment) will reduce the workload for national authorities and avoid extra work resulting from potential problems through non-aligned national regulatory action.

- **Proportionality**

The policy choices covered by the Electricity Regulation, the Electricity Directive and the Agency Regulation seek to adapt the electricity market design to the increasing share of decentralized generation and to ongoing technological developments.

The proposed reforms are strictly oriented on what is indispensable to achieve the necessary progress for the internal market, while leaving utmost competencies and responsibilities for Member States, national regulators and national actors.

Options considering a more far-reaching harmonisation, e.g. by proposing a single independent European energy regulator, a single integrated European transmission system operator or more straightforward prohibitions of state interventions without exemption possibilities have been consistently dismissed in the Impact Assessment. Instead the proposals aim at well-balanced solutions which only restrict the national scope for regulatory action where coordinated action clearly brings more benefits for the consumer.

The policy options adopted are aimed at creating a level playing field amongst all generation technologies and removing market distortions so that, amongst other things, renewable energy sources may compete on an equal footing in the energy market. In addition, all market participants would bear a financial responsibility for keeping the grid in balance. Barriers to services that provide flexibility to the grid, such as demand-response services, will be removed. Further, the measures seek to create a more liquid short-term market, so that price fluctuations can properly reflect scarcity and offer adequate incentives for a flexible grid.

At retail market level, Member States will also be encouraged to progressively phase-out blanket price regulation, starting with prices below cost. Vulnerable consumers can be protected by a transitional price regulation. To further increase competition, the use of contract termination fees will be restricted, so as to encourage switching. Equally, high-level principles shall ensure that energy bills are clear and easy to understand, and non-discriminatory access to consumer data will be granted, all whilst keeping in place general privacy provisions.

In line with the evolution of cross-border trade in electricity and the gradual integration of the market, the institutional framework will be adapted in line with the need for additional

regulatory cooperation and new tasks. ACER is to be given additional tasks, especially in the regional operation of the energy system, all whilst keeping the national regulators' centre role in energy regulation.

All of the options have been extensively checked to meet the requirements of proportionality, in the Impact Assessment accompanying the proposal. It should be noted here that the proposed policies present a compromise between bottom-up initiatives and top-down steering of the market. In keeping with proportionality, the measures do not in any way substitute the role of national governments, NRAs and TSOs in carrying out a variety of critical functions. If anything, national regulators are encouraged to come together more effectively in a regional setting, both formally and informally, to address issues arising from the management of the electricity system at a scale that is commensurate with the scale of the problem.

Far from endorsing a "full harmonisation" approach, the measures seek to create a level playing field for all market players, particularly where market opportunities extend beyond national borders. Ultimately, a certain standardisation of rules and products is essential to the effective trading of electricity across borders; whilst decisions concerning the operation of the grid would lead to sub-optimal market outcomes if left to single Member States and regulators acting in isolation. Direct experience in the formulation and adoption of common network and trading rules (so called "Network Codes" and "Guidelines") since the Third Energy Package of 2009 has shown a clear added value in having regulators and national authorities coming around the table to agree common rules and methodologies, both on high level and technical principles.

There is an increasing competitiveness gap between retail and wholesale markets, with the former still lagging behind in terms of service offer and tangible benefits to consumers. By monitoring energy poverty, transparency and clarity of consumer information and access to data, the proposed measures will not unduly limit national prerogatives.

- **Choice of legal instrument**

The proposal will amend the key legal acts that were part of the Third Energy Package. These include the Electricity Regulation (No 714/2009) and the Electricity Directive (No 2009/72/EC), alongside the Regulation establishing ACER (No 713/2009). The choice of a recast of said legal acts will enhance legal clarity. Recourse to an amending act may have been inadequate to address a wide set of new provisions. The choice of the instrument thus calls for a revision of rules already adopted and implemented, as a natural evolution of current legislation.

### **3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS**

- **Ex-post evaluations/fit-for-purpose checks of existing legislation**

The Commission services have evaluated the performance of the current legislative framework (Third Energy Package) against five set criteria: relevance, effectiveness, efficiency, coherence and EU added value. A stand-alone evaluation has been carried out alongside the Impact Assessment, and the results of the evaluation have been reflected in the problem identification of the impact assessment.

The evaluation found that, overall, the Third Energy Package's aim to increase competition and remove obstacles to cross-border competition in electricity markets has been met. Active enforcement of the legislation has led to positive results for electricity markets and consumers, and markets are in general less concentrated and more integrated than in 2009. As

regards retail markets, the set of new consumer rights introduced by the Third Energy Package have clearly improved the position of the consumer in energy markets.

However, the success of the rules of the Third Energy Package in developing the internal electricity market remains limited in a number of fields, both at the wholesale and the retail level. In general, the evaluation showed that large gains can still be made by an improvement of the market design framework, as shown by untapped general welfare gains and ultimate benefits to consumers. At the level of wholesale markets, barriers to cross-border trade persist and interconnector capacities are rarely fully exploited. These originate, amongst other things, from insufficient cooperation between national grid operators and regulators on the shared use of interconnectors. The national perspective of the parties involved still prevents effective cross-border solutions in many cases and ultimately limits otherwise beneficial cross-border flows. The picture is not the same across all markets and timeframes, with varying degrees of integration across day-ahead, intra-day and balancing markets.

With regards to retail markets, competition performance could be significantly improved. Electricity prices still vary significantly from Member State to Member State for non-market reasons, and prices have risen steadily for households as a result of significant increases in non-contestable charges in recent years; these being network charges, taxes and levies. With regard to consumer protection, rising energy poverty, as well as lack of clarity on the most appropriate means of tackling consumer vulnerability and energy poverty, have been a drag on the further deepening of the internal energy market. Switching-related fees such as contract termination charges continue to constitute a significant financial barrier to consumer engagement. In addition, the high number of complaints related to billing<sup>16</sup> suggests that there is still scope to improve the comparability and clarity of billing information.

In addition to shortcomings in meeting the original objectives sought by the Third Energy Package, a new set of challenges has emerged which had not been envisaged at the time of preparing the Third Energy Package. These include, as mentioned above, the very strong increase of renewable sources in electricity generation, the increase of state interventions in the electricity markets for security of supply purposes, and changes taking place on the technological side. These have all led to significant changes in the way markets operate, especially during the past five years, to a dampening of the positive effect of the reforms for consumers and also an untapped potential from modernisation. This has opened a gap in the existing legislation regarding how to deal with these developments.

In line with the outcome of the evaluation and the related Impact Assessment, the current proposal seeks to close the gap and present an enabling framework to reflect technological developments in the sector as our energy systems' transition to new production and consumption models.

- **Stakeholder consultations**

In preparation for the present initiative, the Commission has conducted several public consultations. These were open to EU citizens and Member States' authorities, energy market participants and their associations, as well as to any other relevant stakeholders, including SMEs and energy consumers.

Three consultations and their respective results shall be highlighted in particular:

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<sup>16</sup> European Commission (2016), ' Second Consumer Market Study on the functioning of retail electricity markets for consumers in the EU ',

1) Resource adequacy related issues were the subject of a public consultation<sup>17</sup> conducted from 15 November 2012 to 7 February 2013, as per the "*Consultation on generation adequacy, capacity mechanisms, and the internal market in electricity*". This was aimed at obtaining stakeholders' views on ensuring resource adequacy and security of electricity supply in the internal market.

The consultation received 148 individual responses from public bodies, industry (both energy producing and consuming) and academia. A detailed chart of responses to the consultation is available online<sup>18</sup>, as well as all individual contributions and a summary of results from the consultation<sup>19</sup>.

2) A public consultation dedicated to electricity retail markets and end-consumers<sup>20</sup> was conducted from 22 January 2014 to 17 April 2014. The Commission received 237 responses to the consultation, with about 20% of submissions coming from energy suppliers, 14% from DSOs, 7% from consumer organisations, and 4% from NRAs. A significant number of individual citizens also participated in the consultation. A full summary of responses is available on the Commission's website<sup>21</sup>.

3) A wide public consultation<sup>22</sup> on a new energy market design was conducted from 15 July 2015 to 9 October 2015.

The Commission received 320 replies to this consultation. About 50% of submissions have come from national or EU-wide industry associations. 26% of answers originated from companies active in the energy sector (suppliers, intermediaries, consumers) and 9% from network operators. 17 national governments and several NRAs also fed back on the consultation. A significant number of individual citizens and academic institutes participated to the consultation as well. A detailed description of stakeholders' opinions under each of the specific policy options is available in the Impact Assessment accompanying this legislative initiative.

- **Collection and use of expertise**

The preparation of the proposed regulation and the Impact Assessment is based on a large body of material, all of which is referenced in the footnotes in the Impact Assessment. These include close to 30 studies and modelling tools, conducted mostly by independent external parties, aimed at assessing specific options under the current proposal. These are listed in full

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<sup>17</sup> European Commission (2012) 'Consultation Paper on generation adequacy, capacity mechanisms and the internal market in electricity'  
[https://ec.europa.eu/energy/sites/ener/files/documents/20130207\\_generation\\_adequacy\\_consultation\\_document.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/20130207_generation_adequacy_consultation_document.pdf)

<sup>18</sup> [https://ec.europa.eu/energy/sites/ener/files/documents/Charts\\_Public%20Consultation%20Retail%20Energy%20Market.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/Charts_Public%20Consultation%20Retail%20Energy%20Market.pdf)

<sup>19</sup> European Commission (2012) Consultation on generation adequacy, capacity mechanisms, and the internal market in electricity  
<https://ec.europa.eu/energy/en/consultations/consultation-generation-adequacy-capacity-mechanisms-and-internal-market-electricity>

<sup>20</sup> European Commission (2014) Consultation on the retail energy market  
<https://ec.europa.eu/energy/en/consultations/consultation-retail-energy-market>

<sup>21</sup> [https://ec.europa.eu/energy/sites/ener/files/documents/Charts\\_Public%20Consultation%20Retail%20Energy%20Market.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/Charts_Public%20Consultation%20Retail%20Energy%20Market.pdf)

<sup>22</sup> European Commission (2015) Consultation on a new Energy Market Design COM(2015) 340 final  
<https://ec.europa.eu/energy/en/consultations/public-consultation-new-energy-market-design>

under Annex V of the Impact Assessment. The studies cover a range of methodologies, with a focus on quantitative estimates of economic and social cost benefit analyses.

In addition, the Commission has also been conducting a sector inquiry into national capacity mechanisms whose interim outcomes were promptly fed into the preparatory phase of the current proposal<sup>23</sup>. The results from these studies have complemented the extensive feedback obtained by stakeholders as described above and, overall, have given the Commission an extensive evidence basis on which to ground the current proposals.

- **Impact assessment**

All proposed measures are supported by the Impact Assessment. The Regulatory Scrutiny Board issued a positive opinion on 7 November 2016. The manner in which the Regulatory Scrutiny Board's views were taken into account is set out in Annex I of the Impact Assessment.

The Impact Assessment looked at a number of policy options for each problem set identified. These problem sets and the alternative routes for intervention are listed below:

*Adapting Market Design to the rise in renewables and technological development:*

The Impact Assessment endorsed an enhancement of current market rules in order to create a level-playing field among all generation technologies and resources by removing existing market distortions. It addresses rules that discriminate between resources and which limit or favour the access of certain technologies to the electricity grid. In addition, all market participants would bear financial responsibility for imbalances caused on the grid and all resources would be remunerated in the market on equal terms. Barriers to demand-response would be removed. The chosen option would also strengthen short-term markets by bringing them closer to real-time in order to provide maximum opportunity to meet flexibility needs and by rendering balancing markets more efficient. The chosen option includes measures that would help pulling all flexible distributed resources concerning generation, demand and storage, into the market via proper incentives and a market framework better adapted to them and measures to better incentivise DSOs.

A non-regulatory approach was dismissed as providing little scope for improving the market and ensuring a level-playing field among resources. Indeed, the current EU regulatory framework in the relevant areas is limited or even non-existent for other areas. Furthermore, voluntary cooperation was deemed not to provide the appropriate level of harmonisation or certainty to the market. Equally, the option of full harmonisation of market rules was also discarded as the changes might breach proportionality principles and would generally be unnecessary given the state of European energy markets at present.

*Addressing future generation investments and uncoordinated capacity mechanisms*

Various policy options going beyond the baseline scenario were assessed, with each option proposing varying degrees of alignment and coordination among Member States at EU level, and a different extent to which market participants would rely on energy market payments.

A so-called 'energy-only market' option would see European markets being sufficiently improved and interconnected that it provides the necessary price signals to spur investments in new resources and in the right places. In such a scenario, no capacity mechanisms would be required any longer.

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<sup>23</sup> Interim Report of the Sector Inquiry on capacity Mechanisms, C(2016) 2107 final.

The chosen option builds on this energy-only market scenario but does not discard the possibility for Member States of using capacity mechanisms, provided however these are based on a shared resource adequacy assessment methodology carried out in full transparency through ENTSO-E and ACER and comply with common design features for better compatibility between national capacity mechanisms and harmonised cross-border cooperation. This option builds on the European Commission Guidelines on state aid for environmental protection and energy 2014-2020, alongside the Sector Inquiry on capacity mechanisms.

A non-regulatory approach was rejected as existing provisions under EU legislation are not sufficiently clear and robust to cope with the challenges facing the European electricity system. In addition, voluntary cooperation may not provide for appropriate levels of harmonisation across all Member States or certainty to the market. Legislation is needed in this area to address the issues in a consistent way. The option in which, based on regional or EU-wide generation adequacy assessments, entire regions or ultimately all EU Member States would be required to roll out capacity mechanisms on a mandatory basis was discarded as being disproportionate.

#### *Under-performance of Retail Markets: slow deployment and low levels of services*

The endorsed option includes a gradual phasing-out by Member States of blanket price regulation by a deadline set in EU legislation, starting with prices below costs. This option allows for transitional price regulation for vulnerable consumers. To increase consumer engagement, the use of contract termination fees is restricted. Consumer confidence in comparison websites is to be fostered through national authorities implementing a certification tool. In addition, high-level principles will ensure that energy bills are clear and easy to understand, through minimum content requirements. Member States are also required to monitor the number of households on energy poverty. Finally, to allow the development of new services by new entrants and energy service companies, non-discriminatory access to consumer data is ensured.

Other options considered, but discarded, included a full harmonization of consumer legislation alongside extensive consumer safeguards; exemptions to price regulation defined at EU level on the basis of either a consumption threshold or a price threshold; a standard data handling model to be enforced and the responsibility assigned to a neutral market actor such as a TSO; all switching fees including contract termination fees would be banned and the content of energy bills partially harmonized; and finally, an EU framework to monitor energy poverty based on an energy efficiency survey done by Member States of the housing stock as well as preventive measures to avoid disconnections are put in place. These options were all discarded on grounds of subsidiarity and proportionality principles. Maintaining the status quo was not considered a viable option either by almost all of the stakeholders consulted.

#### *Improvement of the institutional framework and role of the Agency*

The Third Package institutional framework aims at fostering the cooperation of NRAs as well as between TSOs. Since their establishment, ACER and the ENTSOs have played a key role in the progress towards a functioning internal energy market. However, the recent developments in the European energy markets that are considered in the current Impact Assessment and the subsequent proposals of the Market Design Initiative require an adaptation of the institutional framework. In addition, the implementation of the Third Package has also highlighted areas with room for improvement concerning the framework applicable to ACER and the ENTSOs. In terms of options considered for reforming the institutional framework, a business as usual scenario was discarded for it would open up regulatory and

market surveillance gaps, in line with evolving market provisions introduced elsewhere in this proposal as well as with the ongoing progress at EU level of secondary legislation.

A non-regulatory approach of "stronger enforcement" and voluntary collaboration without any new, additional measures to adapt the institutional framework was considered. Improved enforcement of existing legislation entails the continued implementation of the Third Package and full implementation of network codes and guidelines – as described under option "business as usual" – combined with stronger enforcement. However, stronger enforcement alone would not provide any improvement to the current institutional framework.

A legislative option transforming ACER to something closer to a pan-European regulator was also considered but ultimately discarded. In order for the Agency to perform such a role, it would require a significant reinforcement of ACER's budget and staff as this would make a strong concentration of experts in the Agency necessary. It appears also appropriate to maintain the involvement of national regulators in the Agency's decision-making process and not to substitute systematically majority decisions by national regulators through decisions by the director.

Legislative options to improve ACER on the basis of the existing framework were thus considered. The option endorsed by the Impact Assessment enables the adaptation of the EU institutional framework to the new realities of the electricity system. It also addresses the resulting need for additional regional cooperation and the existing and anticipated regulatory gaps in the energy market, thereby providing for flexibility by a combination of bottom-up and top-down approaches.

In addition, in order to address the existing regulatory gap as regards NRAs' regulatory functions at regional level, the policy initiatives under this option would set out a flexible regional regulatory framework to enhance the regional coordination and decision-making of NRAs. This option would introduce a system of coordinated regional decisions and oversight of certain topics by NRAs of the region (e.g. ROCs and others deriving from the proposed market design initiatives) and would give ACER a role for safeguarding the EU-interest.

### *Fundamental rights*

The present proposal may have an impact on a number of fundamental rights established by the Charter on Fundamental Rights of the EU, in particular: the respect for private and family life (Article 7), the right to protection of personal data (Article 8), the prohibition of discrimination (Article 21), the right to social assistance (Article 34), access to services of general economic interest (Article 36), the integration of a high level of environmental protection (Article 37) and the right to an effective remedy (Article 47).

This is addressed in particular through a number of provisions concerning consumer protection, energy poverty, protection of vulnerable customers, access to services of general economic interest, data protection and privacy.

A summary of the Impact Assessment can be found on the Commission website<sup>24</sup>, alongside the positive opinion of the Regulatory Scrutiny Board.

- **Regulatory fitness and simplification**

The proposal may increase administrative requirements, albeit to a limited extent. For example, by bringing in a level-playing field for all technologies to participate fully in energy

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<sup>24</sup> [OP: Please insert Link to Impact Assessment]

markets, these technologies would have to abide with a number of market compliance requirements that may generate some administrative workload.

The measures envisaged to improve the liquidity and integration of energy markets may also generate some short-term impact to businesses as these would have to adapt for new energy trading arrangements. These are however considered minimal compared to the baseline scenario of no action, as the economic gains of the reform would very largely surpass any short or long-term administrative reorganization.

Equally, the gradual phasing out of regulated prices at Member State level will require NRAs to step up efforts in monitoring markets, ensuring efficient competition and guaranteeing consumer protection. These impacts may be offset by increased consumer engagement, which would naturally act to foster competition in the market.

The range of activities to be performed under the updated institutional setting shall also generate a new set of requirements for engagement at administrative level on the part of national regulators and transmission operators. These include participation within ACER and through the decision-making processes leading to the agreement of methodologies and practices for the smooth trading of energy at the border.

A detailed administrative and economic impact on business and public authorities for each of the policy options considered can be found in chapter 6 of the Impact Assessment.

#### **4. BUDGETARY IMPLICATIONS**

The budgetary impact associated to the proposal under this package concerns the resources of the Agency for the Cooperation of Energy Regulators (ACER) which are described in the Legislative Financial Statement accompanying the Commission proposal for a recast of the Regulation establishing ACER. Essentially, the new tasks to be carried out by ACER, notably as regards the assessment of system adequacy and the establishment of Regional Operation Centres, require a phasing in of up to 18 additional FTE in the Agency in 2020, as well as corresponding financial resources.

#### **5. OTHER ELEMENTS**

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The Commission will monitor the transposition and compliance of the Member States and other actors with the measures that shall be ultimately adopted, and shall take enforcement measures if and when required. In addition, as it has already done in the context of the implementation of the Third Energy Package, the Commission will provide guidance documents providing assistance on the implementation of the adopted measures.

Across monitoring and implementation purposes, the Commission will notably be supported by ACER. The annual reporting by the Agency and parallel evaluations carried out by the Commission, together with the reporting from the Electricity Coordination Group are all part of the provisions in the current initiative. The Agency will be invited to further review its monitoring indicators to ensure their continuing relevance for monitoring progress towards the objectives underlying the present proposals, so that these may be adequately reflected, amongst other things, through ACER's annual market monitoring report document.

Parallel to the proposed initiatives, the Commission will bring forward an initiative concerning the governance of the Energy Union that will streamline the planning, reporting and monitoring requirements. Based on the initiative of the governance of the Energy Union, the current monitoring and reporting requirements of the Commission and Member States in

the Third Energy Package will be integrated in horizontal progress and monitoring reports. More information on the streamlining of the monitoring and reporting requirements can be found in the impact assessment for the governance of the European Union.

A more extensive treatment of monitoring mechanisms and benchmark indicators can be found in Chapter 8 of the Impact Assessment.

## **6. EXPLANATION OF THE SPECIFIC PROVISIONS OF THE PROPOSALS**

### **• Proposal for a Directive of the European Parliament and of the Council on common rules for the internal market in electricity (Recast)**

*Chapter I* of the proposed Directive provides some clarifications to the scope and subject matter of the Directive, emphasising the focus on consumers and the importance of the internal market and its main principles. It provides also for an update of the main definitions used in the Directive.

*Chapter II* of the proposed Directive lays down the general principle that Member States have to ensure that the EU electricity market is competitive, consumer-centred, flexible and non-discriminatory. It emphasises that national measures should not unduly hamper cross-border flows, consumer participation or investments. It further enshrines the principle that supply prices shall be market-based, subject to duly justified exceptions. The chapter also clarifies certain principles relating to the functioning of the EU electricity markets, such as the right to choose a supplier. It also provides for updated rules on possible public service obligations which may be imposed by Member States on energy undertakings under certain circumstances.

Chapter III of the proposed Directive reinforces pre-existing consumer rights and introduces new rights that aim at putting consumers at the heart of the energy markets by ensuring that they are empowered and better protected. It sets rules on clearer billing information and on certified comparison tools. It contains provisions ensuring that consumers are able to freely choose and change suppliers or aggregators, are entitled to a dynamic price contract and are able to engage in demand response, self-generation and self-consumption of electricity. It entitles every consumer to request a smart meter equipped with a minimum set of functionalities. It also improves pre-existing rules on the consumers' possibility to share their data with suppliers and service providers by clarifying the role of the parties responsible for data management and by setting a common European data format to be developed by the Commission in an implementing act. It also aims to ensure that energy poverty is addressed by Member States. It further requires Member States to define frameworks for independent aggregators and for demand response along principles that enable their full participation in the market. It defines a framework for local energy communities which may engage in local energy generation, distribution, aggregation, storage, supply or energy efficiency services. It further provides some clarifications to pre-existing provisions on smart meters, single points of contacts, and rights to out-of-court settlement, universal service and vulnerable consumers.

Chapter IV of the proposed Directive provides for some clarifications concerning the tasks of DSOs, notably relating to the activities of DSOs concerning the procurement of network services to ensure flexibility, the integration of electrical vehicles and data management. It also clarifies the role of DSOs with respect to storage and recharging points for electric vehicles.

Chapter V of the proposed Directive summarises the general rules applicable to TSOs, largely based on existing text, providing only some clarifications concerning ancillary services and the new Regional Operational Centres.

Chapter VI of the proposed Directive, setting out the rules on unbundling as developed in the Third Energy Package, remains unchanged as concerns the main substantive rules on unbundling, notably with respect to the three regimes for TSOs (ownership unbundling, independent system operator and independent transmission operator), as well as with respect to the provisions on TSO designation and certification. It only provides a clarification on the possibility for TSOs to own storage or to provide ancillary services.

Chapter VII of the proposed Directive contains the rules on establishment, scope of powers and duties as well as rules of functioning of the independent national energy regulators. The proposal notably emphasises the obligation of regulators to cooperate with neighbouring regulators and ACER in case issues of cross-border relevance are concerned and updates the list of tasks of regulators, inter alia with respect to the supervision of the newly created Regional Operational Centres.

Chapter VIII of the proposed Directive changes some general provisions, inter alia on derogations to the Directive, exercise of delegated powers by the Commission and the Committee established under comitology rules pursuant to Regulation (EU) No 182/2011

The new Annexes to the proposed Directive set out more requirements on comparison tools, billing and billing information and amends pre-existing requirements for smart meters and their roll-out.

- **Proposal for a Regulation of the European Parliament and of the Council on the internal electricity market (Recast)**

Chapter I of the proposed Regulation sets out the scope and subject matter and the definitions of terms used in it. It emphasises the importance of undistorted market signals to provide for increased flexibility, decarbonisation and innovation and updates and complements the main definitions used in the Regulation.

Chapter II of the proposed Regulation introduces a new Article which sets out the key principles to be respected by national energy legislation in order to allow for a functioning internal electricity market. It also sets out the main legal principles for electricity trading rules within different trading timeframes (balancing, intraday, day-ahead and forward markets), including principles for price formation. It clarifies the principle of balancing responsibility and provides for a framework for more market compatible rules for the dispatch and curtailment of generation and demand response, including conditions for any exceptions thereof.

Chapter III of the proposed Regulation describes the process to define bidding zones in a coordinated manner, in line with the review process created in Regulation 1222/2015 establishing a Guideline on Capacity Calculation and Congestion Management<sup>25</sup>. In order to address the persisting problem of significant national limitations to cross-border electricity flows, the conditions for such exceptional limitations are clarified, notably by rules that shall ensure that electricity imports and exports are not restricted by national actors for economic reasons. This Chapter further contains amendments to pre-existing principles for transmission and distribution network tariffs and sets a procedure for fostering the progressive convergence

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<sup>25</sup> Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management OJ L 197, 25.7.2015, p. 24–72.

of transmission and distribution tariff methodologies. It also sets out amended rules for the usage of congestion rents.

Chapter IV of the proposed Regulation sets out new general principles for addressing resource adequacy concerns by Member States in a coordinated manner. It sets out principles and a procedure for the development of a European resource adequacy assessment to better determine the need for capacity mechanisms and, if appropriate, the setting of a reliability standard by Member States. It clarifies how and under which conditions capacity mechanisms can be introduced in a market-compatible manner. It also clarifies market compatible design principles for capacity mechanisms, including rules for the participation of capacity located in another Member State and for interconnection usage. It sets out how Regional Operational Centres, national TSOs, the ENTSO for electricity and national regulators via ACER will be involved in the development of technical parameters for the participation of capacities located in another Member State as well as the operational rules for their participation.

Chapter V of the proposed Regulation sets out the tasks and duties of the ENTSO for Electricity and the monitoring tasks of ACER in this regard whilst clarifying its duty to act independently and for the European good. It defines the mission of Regional Operational Centres and provides for criteria and a procedure for defining system operation regions covered by each Regional Operational Centre and the coordination functions that these centres perform. It also sets out working and organisational arrangements, consultation requirements, requirements and procedures for the adoption of decisions and recommendations and their revision, the composition and responsibilities of the management board and liability arrangements of Regional Operational Centres. The chapter also incorporates rules on the connection of cogeneration units, previously included in Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency. The rules on a ten-year network development plan, inter-transmission system operator compensation, information exchange and certification remain largely unchanged.

Chapter VI of the proposed Regulation sets up a European entity for DSOs, defines a procedure for its establishment and its tasks including with regard to the consultation of stakeholders. It also provides detailed rules on the cooperation between DSOs and TSOs with regard to the planning and operation of their networks.

Chapter VII of the proposed Regulation sets out pre-existing powers and rules for the Commission to adopt delegated acts in the form of network codes or guidelines. It provides for clarifications as to the legal nature and the adoption of network codes and guidelines and enlarges their possible content to areas such as distribution tariff structures; rules for the provision of non-frequency ancillary services; demand response, energy storage and demand curtailment rules; cyber security rules; rules regarding to Regional Operational Centres; and, the curtailment of generation and redispatch of generation and demand. It simplifies and streamlines the procedure for the elaboration of electricity network codes and gives national regulators the possibility to decide within ACER on issues concerning the implementation of network codes and guidelines. It also includes the European entity for DSOs and other stakeholders more closely in the procedure of the development of proposals for electricity network codes.

Chapter VIII of the proposed Regulation sets out the final provisions of the proposed Regulation. It includes the pre-existing rules for the exemption of new direct current interconnectors from certain requirement of the Electricity Directive and Regulation whilst clarifying the procedure for subsequent amendments made by NRAs thereof.

The Annex to the proposed Regulation defines in more detail the functions attributed to the Regional Operational Centers created by the Regulation.

- **Proposal for a Regulation of the European Parliament and of the Council establishing a European Union Agency for the Cooperation of Energy Regulators (recast)**

In general, the rules concerning ACER are proposed to be adapted to the "Common Approach" EU on decentralised agencies agreed between the European Parliament, the Council of the EU and the European Commission (Common Approach)<sup>26</sup>. Keeping limited deviations from the "Common Approach" is, however, warranted for ACER at the present stage.

Chapter I of the proposed Regulation describes the role, objectives and tasks of ACER and the type of acts that it can adopt, and provides for rules on consultations and monitoring. The list of tasks has been updated to include ACER's duties in the field of wholesale market supervision and cross-border infrastructure which were attributed to ACER subsequent to the adoption of the Regulation.

With respect to the adoption of electricity network codes, ACER is given more responsibility in elaborating and submitting the final proposal for a network code to the Commission, while maintaining ENTSO-E's role as a technical expert. The proposal also includes a formal place for DSOs to be represented at EU level, notably in the development of network code proposals, in line with an increase in their responsibilities. The Agency is given the competence to decide on terms, methodologies and algorithms for the implementation of electricity network codes and guidelines.

For tasks in a regional context concerning only a limited number of national regulators, a regional decision-making process is introduced. Accordingly, the Director would have to give his opinion on whether the issue in question is primarily of regional relevance. If the Board of Regulators agrees that this is the case a regional sub-committee of the Board of Regulators should prepare the decision in question which would finally be taken or rejected by the Board of Regulators itself. Otherwise the Board of Regulators would decide without the intervention of a regional sub-committee.

The Chapter also defines a number of new tasks for ACER concerning the coordination of certain functions related to the Regional Operational Centres within the Agency, concerning the supervision of Nominated Electricity Market Operators and related to the approval of methods and proposal related to generation adequacy and risk preparedness.

Chapter II of the proposed Regulation contains organisational rules relating to the Administrative Board, the Board of Regulators, the Director, the Board of Appeal and, as a new provision, on the Agency's working groups. While adapting several individual provisions to the Common Approach EU on decentralised agencies or to the new Council voting rules, the main features of the existing governance structure, in particular the Board of Regulators, are preserved.

This deviation of ACER, from the Common Approach is justified as follows:

The main objectives of European Electricity Policy, security of supply, affordability of electricity and decarbonisation could be reached most cost effectively by an integrated European electricity market. Accordingly, the electricity transmission infrastructure is progressively interconnected, increasing volumes of electricity are traded cross border, generation capacities are shared at a European scale and the transmission system is operated

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<sup>26</sup> See joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies of 19.7.2012.

taking regional, cross-border aspects into account. The present legislative packages further enhance these trends which are expected to result in efficiencies to the benefit of European customers.

A precondition for the creation of an internal electricity market is the opening of the sector to competition. As in other sectors of economy as well, the opening of the electricity market required new regulations, in particular with regard to the transmission and distribution system, and regulatory oversight. To this effect, independent regulatory authorities were put in place. These entities remain with a particular responsibility when it comes to overseeing national and European rules applicable to the electricity sector.

However, with the increasing cross-border trade and system operation which takes the regional and European context into account, NRAs were required to increasingly coordinate their action with NRAs from other Member States. ACER was designed to become the platform for this interaction and fulfils this duty since its creation in 2011. The body within the Agency where most opinions, recommendations and decisions of the Agency are prepared, together with ACER staff, is thus the Board of Regulators comprising senior representatives of the NRAs and a non-voting representative of the Commission. The first years of the existence of the Agency have shown that the Board of Regulators managed to contribute effectively to the fulfilment of the tasks of the Agency.

Since energy markets are still largely regulated at national level, national regulators are actors with a key role for energy markets. The main role of ACER is not the execution of delegated regulatory Commission competencies, but the coordination of the regulatory decisions of independent national regulators. The present legislative proposal still largely preserves this distribution of roles. The current structure strikes a fine-tuned balance of powers between the different actors, having regard to the special features of the developing internal energy market. Changing the balance at this stage might risk jeopardising the implementation of the policy initiatives in the legislative proposals and thereby would pose obstacles to the further integration of the energy market which is the main purpose of the present proposal. It therefore appears as premature to transfer decision-making powers to a Management Board as provided for in the Common Approach. Instead it seems rather appropriate to keep the current structure which ensures that the national regulators act without any direct intervention of EU institutions or Member States in the specific matters. At the same time, the overall work of the regulators remains subject to the approval of the EU institutions via programming, budgetary and strategic documents. EU institutions are also involved in administrative matters. As a consequence, it is not proposed to change the set-up and operation of the existing Board of Regulators.

Likewise, it is not proposed to adapt the concept of the Administrative Board to the model of the Common Approach Management Board. The Agency's Administrative Board in its existing composition proved to be particularly effective and efficient over the last years. Its operation is assured by representatives of the European Parliament, the Council and the Commission.

Even though at this stage, the Commission does not find it appropriate to adapt the governance structure of the Agency fully to the Common Approach, it will continue to monitor if the described deviations from the Common Approach are still justified, with the next evaluation scheduled for 2021 which in addition to an assessment of the Agency's objectives, mandate and tasks will have a particular focus on the governance structure of the Agency.

Chapter III of the proposed Regulation contains financial provisions. Several individual provisions are proposed to be adapted to the Common Approach on decentralised agencies.

Chapter IV of the proposed Regulation updates several individual provisions in line with the Common Approach and contains otherwise largely unchanged provisions on staff and liability.

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↓ 2009/72/EC (adapted)

2016/0380 (COD)

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**concerning  on  common rules for the internal market in electricity and repealing  
~~Directive 2003/54/EC~~**

**(recast)**

(Text with EEA relevance)

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↓ 2009/72/EC (adapted)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty ~~establishing the European Community~~  on the Functioning of the European Union  , and in particular ~~Article 47(2)~~ and Article ~~55 and 95~~  194(2)  thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>27</sup>,

Having regard to the opinion of the Committee of the Regions<sup>28</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

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↓ 2009/72/EC (adapted) recital 1

- (1) The internal market in electricity, which has been progressively implemented throughout the ~~Community~~  Union  since 1999, aims, by organising competitive electricity markets across country borders, to deliver real choice for all consumers of the European Union, be they citizens or businesses, new business opportunities, competitive prices, efficient investment signals, higher standards of service, and to contribute to security of supply and sustainability.

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<sup>27</sup> OJ C 211, 19.8.2008, p. 23.

<sup>28</sup> OJ C 172, 5.7.2008, p. 55.

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↓ 2009/72/EC (adapted) recital 2  
⇒ new

- (2) Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 ~~concerning common rules for the internal market in electricity~~<sup>29</sup> ⇒ and Directive 2009/72/EC of the European Parliament and of the Council ⇐ ~~has~~ have made a significant contribution towards the creation of such an internal market in electricity. ⇒ However, Europe's energy system is in the middle of a profound change. The common goal to decarbonise the energy system creates new opportunities and challenges for market participants. At the same time, technological developments allow for new forms of consumer participation and cross-border cooperation. There is a need to adapt the Union market rules to a new market reality ⇐.

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↓ new

- (3) The Energy Union Framework Strategy sets out the vision of an Energy Union with citizens at its core, where citizens take ownership of the energy transition, benefit from new technologies to reduce their bills, participate actively in the market, and where vulnerable consumers are protected.

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↓ new

- (4) The Communication from the Commission of 15 July 2015 'Delivering a new deal for energy consumers'<sup>30</sup> put forward the Commission's vision for a retail market that better serves energy consumers, including by better linking wholesale and retail markets. Taking advantage of new technology, new and innovative energy service companies should enable all consumers to fully participate in the energy transition, managing their consumption to deliver energy efficient solutions which save them money and contribute to overall reduction of energy consumption.

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↓ new

- (5) The Communication from the Commission of 15 July 2015 'Launching the public consultation process on a new energy market design'<sup>31</sup> highlighted that the move away from generation in large central power plants towards de-centralized production from renewable energy sources and decarbonized markets requires an adaptation of the current rules of electricity trading and changes to the existing market roles. It underlined needs to organise electricity markets in a more flexible manner and to fully integrate all market players – including renewable energy producers, new energy service providers, energy storage and flexible demand.

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<sup>29</sup> ~~OJ L 176, 15.7.2003, p. 37–56.~~

<sup>30</sup> COM (2015) 339 final of 15.7.2015.

<sup>31</sup> COM (2015) 340 final of 15.7.2015.

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↓ new

- (6) Apart from the new challenges, the Directive seeks also to address the persisting obstacles to the completion of the internal market in electricity. Refined regulatory framework needs to contribute to overcoming the current problems of fragmented national markets which are still often determined by a high degree of regulatory interventions. Such interventions have led to obstacles to the sale of electricity on equal terms as well as higher costs in comparison to solutions based on cross-border cooperation and market-based principles.

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↓ new

- (7) Consumers are essential to achieving the flexibility necessary to adapt the electricity system to variable, distributed renewable generation. Technological progress in grid management and renewable generation has unlocked many opportunities for consumers, and healthy competition on retail markets will be essential to ensuring the market-driven deployment of innovative new services that cater to the consumers' changing needs and abilities, while increasing system flexibility. By empowering consumers to participate in the energy market more, and participate in new ways, citizens should benefit from the internal market in electricity and the Union's renewable targets should be attained.

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↓ 2009/72/EC recital 3

- (8) The freedoms which the Treaty guarantees the citizens of the Union — inter alia, the free movement of goods, the freedom of establishment and the freedom to provide services — are achievable only in a fully open market, which enables all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers.

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↓ 2009/72/EC recital 57

- (9) Promoting fair competition and easy access for different suppliers ~~and fostering capacity for new electricity generation~~ should be of the utmost importance for Member States in order to allow consumers to take full advantage of the opportunities of a liberalised internal market in electricity.

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↓ 2009/72/EC recital 8

⇒ new

- (10) In order to secure competition and the supply of electricity at the most competitive price, Member States and national regulatory authorities should facilitate cross-border access for new suppliers of electricity from different energy sources as well as for new providers of power generation ⇒ ,storage and demand response. ⇐

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↓ 2009/72/EC recital 60

- (11) Securing common rules for a true internal market and a broad supply of electricity accessible to all should also be one of the main goals of this Directive. To that end, undistorted market prices would provide an incentive for cross-border interconnections and for investments in new power generation while leading, in the long term, to price convergence.

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↓ 2009/72/EC recital 56

- (12) Market prices should give the right incentives for the development of the network and for investing in new electricity generation.

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↓ 2009/72/EC recital 22  
(adapted)

- (13) ~~Under this Directive~~ Different types of market organisation ~~will~~ exist in the internal market in electricity. The measures that Member States could take in order to ensure a level playing field should be based on overriding requirements of general interest. The Commission should be consulted on the compatibility of the measures with the Treaty and ~~Community~~  Union  law.

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↓ new

- (14) Member States should maintain a wide discretion to impose public service obligations on electricity undertakings in pursuing objectives of general economic interest. Member States should ensure that household customers and, where Member States deem it appropriate, small enterprises, enjoy the right to be supplied with electricity of a specified quality at clearly comparable, transparent and competitive prices. Nevertheless, public service obligations in the form of supply price regulation constitute a fundamentally distortive measure that often leads to the accumulation of tariff deficits, limitation of consumer choice, poorer incentives for energy saving and energy efficiency investments, lower standards of service, lower levels of consumer engagement and satisfaction, restriction of competition as well as fewer innovative products and services on the market. Consequently, Member States should apply other policy tools, and in particular targeted social policy measures, to safeguard the affordability of electricity supply to their citizens. Interventions in price setting should only be applied in limited exceptional circumstances. A fully liberalised retail electricity market would stimulate price and non-price competition among existing suppliers and incentivise new market entries therefore improving consumers' choice and satisfaction.

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↓ 2009/72/EC recital 45 (adapted)

- (15) ~~Member States should ensure that household customers and, where Member States deem it appropriate, small enterprises, enjoy the right to be supplied with electricity of a specified quality at clearly comparable, and transparent and reasonable prices. In order to ensure the maintenance of the high standards of public service in the~~  Union ~~Community,~~ all measures taken by Member States to achieve the objective of this Directive should be regularly notified to the Commission. The Commission should regularly publish a report analysing measures taken at national level to achieve public service objectives and comparing their effectiveness, with a view to making recommendations as regards measures to be taken at national level to achieve high public service standards. ~~Member States should take the necessary measures to protect vulnerable customers in the context of the internal market in electricity. Such measures may differ according to the particular circumstances in the Member States in question and may include specific measures relating to the payment of electricity bills, or more general measures taken in the social security system. Where universal service is also provided to small enterprises, measures to ensure that such universal service is provided may differ according to whether they are aimed at household customers or small enterprises.~~

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↓ 2009/72/EC recital 47

- (16) It should be possible for Member States to appoint a supplier of last resort. That supplier may be the sales division of a vertically integrated undertaking, which also performs the functions of distribution, provided that it meets the unbundling requirements of this Directive.

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↓ 2009/72/EC recital 48 (adapted)

- (17) It should be possible for measures implemented by Member States to achieve the objectives of social and economic cohesion to include, in particular, the provision of adequate economic incentives, using, where appropriate, all existing national and ~~Community~~  Union ~~Community~~  tools. Such tools may include liability mechanisms to guarantee the necessary investment.

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↓ 2009/72/EC recital 49 (adapted)

- (18) To the extent to which measures taken by Member States to fulfil public service obligations constitute State aid under Article ~~87(1)~~  107(1) ~~88(3)~~  of the Treaty, there is an obligation under Article ~~88(3)~~  108(3) ~~89(3)~~  of the Treaty to notify them to the Commission.

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↓ 2009/72/EC recital 52 (adapted)  
⇒ new

- (19) Clear and comprehensible information should be made available to consumers concerning their rights in relation to the energy sector. The Commission ~~should establish~~ ☒ has established ☒, after consulting relevant stakeholders including Member States, national regulatory authorities, consumer organisations and electricity undertakings, an ~~accessible, user-friendly~~ energy consumer checklist providing consumers with practical information about their rights. That checklist should be ⇒ maintained up to date ⇐ provided to all consumers and ~~should be~~ made publicly available.

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↓ 2009/72/EC recital 52 (adapted)  
⇒ new

- (20) Clear and comprehensible information should be made available to consumers concerning their rights in relation to the energy sector. The Commission ~~should establish~~ ☒ has established ☒, after consulting relevant stakeholders including Member States, national regulatory authorities, consumer organisations and electricity undertakings, an ~~accessible, user-friendly~~ energy consumer checklist providing consumers with practical information about their rights. That checklist should be ⇒ maintained up to date, ⇐ provided to all consumers and ~~should be~~ made publicly available.

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↓ new

- (21) At present, several factors impede consumers from accessing, understanding and acting upon the various sources of market information available to them. To that end, the comparability of offers should be improved and barriers to switching minimised to the greatest practicable extent without unduly limiting consumer choice.

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↓ new

- (22) Customers are still being charged a broad range of fees directly or indirectly as a result of switching energy supplier. Such fees make calculating the best product or service more difficult and diminish the immediate financial advantage of switching. Although removing such fees may limit consumer choice by eliminating products based on rewarding consumer loyalty, restricting their use further should improve consumer welfare, consumer engagement and competition in the market.

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↓ new

- (23) Independent comparison tools including websites are an effective means for customers to assess the merits of different energy offers available on the market. Search costs are lower as they no longer need to collect information from individual suppliers and

service providers. Such tools can provide the right balance between the need for information to be clear and concise and the need for it to be complete and comprehensive. They should aim at including the broadest possible range of available offers, and at covering the market as completely as is feasible so as to give the customer a representative overview. They can also reduce search costs as customers will not need to collect information separately from individual suppliers and service providers. It is crucial that the information given on such tools be trustworthy, impartial and transparent.

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↓ 2009/72/EC recital 54

- (24) Greater consumer protection is guaranteed by the availability of effective means of dispute settlement for all consumers. Member States should introduce speedy and effective complaint handling procedures.

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↓ new

- (25) All consumers should be able to benefit from directly participating in the market, in particular by adjusting their consumption according to market signals and in return benefit from lower electricity prices or other incentive payments. The benefits of this active participation are likely to increase over time when electric vehicles, heat pumps and other flexible loads become more competitive. Consumers should be enabled to participate in all forms of demand response and therefore should have the possibility to opt for having a smart metering system and a dynamic electricity pricing contract. This should allow them to adjust their consumption according to real time price signals that reflect the value and cost of electricity or transportation in different time periods, while Member States should ensure a reasonable exposure of consumers to the wholesale price risk. Member States should also ensure that those consumers who choose not to actively engage in the market are not penalised but instead their informed decision making on the options available to them should be facilitated in the manner that is the most suitable for domestic market conditions.

- (26) All customer groups (industrial, commercial and households) should have access to the energy markets to trade their flexibility and self-generated electricity. Customers should be allowed to make full use of the advantages of aggregation of production and supply over larger regions and benefit from cross-border competition. Aggregators are likely to play an important role as intermediaries between customer groups and the market. Transparent and fair rules should be established to also allow independent aggregators to fulfil this role. Products should be defined on all organised energy markets, including ancillary services and capacity markets so as to encourage the participation of demand response.

- (27) The 'European Strategy for Low Emission Mobility'<sup>32</sup> stresses the need for the decarbonisation of the transport sector and the reduction of its emissions especially in urban areas and highlights the important role that electro-mobility can play in contributing to these objectives. Moreover, the deployment of electro-mobility constitutes an important element of the energy transition. Market rules set out in this

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<sup>32</sup> SWD(2016) 244 final

Directive should therefore contribute to creating favourable conditions for electric vehicles of all kinds. In particular, they should safeguard the effective deployment of publicly accessible and private recharging points for electric vehicles and ensure the efficient integration of vehicle charging into system operation.

(28) Demand response will be pivotal to enable smart charging of electric vehicles and thereby enable the efficient integration of electric vehicles into the electricity grid which will be crucial for the decarbonisation of transport.

(29) Consumers should be able to consume, store and/or sell self-generated electricity to the market. New technology developments will facilitate these activities in the future. However, existing legal and commercial barriers exist including for example disproportionate fees for internally consumed electricity, obligations to feed self-generated electricity to the energy system, administrative burdens such as for self-generators who sell electricity to the system to comply with the requirements for suppliers, etc. All these obstacles that prevent consumers from self-generating and from consuming, storing or selling self-generated electricity to the market should be removed while it should be ensured that self-generating consumers contribute adequately to system costs.

(30) Distributed energy technologies and consumer empowerment have made community energy and energy cooperatives an effective and cost-efficient way to meet citizens' needs and expectations regarding energy sources, services and local participation. Community energy offers an inclusive option for all consumers to have a direct stake in producing, consuming and or sharing energy between each other within a geographically confined community network that may operate in an isolated mode or be connected to the public distribution network. Community energy initiatives focus primarily on providing affordable energy of a specific kind such as renewable energy, for their members or shareholders rather than prioritising profit-making like a traditional energy company. By directly engaging with consumers community energy initiatives are demonstrating their potential in facilitating the up-take of new technologies and consumption patterns, including smart distribution grids and demand response, in an integrated manner. Community energy can also advance energy efficiency at household level and help fight energy poverty through reduced consumption and lower supply tariffs. Community energy also enables certain groups of household consumers to participate in the energy market who otherwise might not have been able to do so. Where they have been successfully operated such initiatives have delivered economic, social and environmental value to the community that goes beyond the mere benefits derived from the provision of energy services. Local energy communities should be allowed to operate on the market on a level-playing field without distorting competition. Household consumers should be allowed to voluntarily participate in a community energy initiative as well as to leave, without losing access to the network operated by the community energy initiative or their rights as consumers. Access to a local energy community's network should be granted on fair and cost-reflective terms.

(31) Energy bills and annual statements are an important means through which customers are informed. As well as data on consumption and costs, they can also convey other information that helps consumers to compare their current deal with other offers. However, considering that bill-related disputes are a very common source of consumer complaints, a factor which contributes to persistently low levels of consumer satisfaction and engagement in the energy sector, it is necessary to make bills and annual statements clearer and easier to understand, as well as to ensure that bills

contain all the information necessary to enable consumers to regulate their energy consumption, compare offers and switch suppliers.

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↓ 2009/72/EC recital 27

- (32) Member States should encourage the modernisation of distribution networks, such as through the introduction of smart grids, which should be built in a way that encourages decentralised generation and energy efficiency.
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↓ new

- (33) Engaging consumers requires appropriate incentives and technologies such as smart metering. Smart metering systems empower consumers as they allow them to receive accurate and near-real time feedback on their energy consumption or generation allowing them to manage it better, participate in and reap benefits from demand side response programmes and other services, and lower their electricity bill. Smart metering also enables distribution system operators to have better visibility of their networks, and consequently reduce their operation and maintenance costs and pass those savings to the distribution tariffs which are ultimately borne by consumers.
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↓ 2009/72/EC recital 55

⇒ new

- (34) ⇒ When it comes to deciding at national level on the smart metering deployment ⇐, it should be possible to base this on an economic assessment. Should that assessment conclude that the introduction of such metering systems is economically reasonable and cost-effective only for consumers with a certain amount of electricity consumption, Member States should be able to take that into account when proceeding with implementation.
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↓ new

- (35) Member States that are not systematically rolling out smart metering should give the possibility to consumers to benefit, upon request and under fair and reasonable conditions, and by providing them with all the relevant information, from the installation of an electricity smart meter. Where consumers do not have smart meters, they should be entitled to meters that fulfil the minimum requirements necessary to provide them with the billing information specified in this Directive.

- (36) In order to assist consumers' active participation in the electricity market, the smart metering systems to be deployed by Member States in their territory should be interoperable, not represent a barrier to switching of supplier, and should be equipped with fit-for-purpose functionalities that allow consumers to have near-real time access to their consumption data, modulate their energy consumption and, to the extent that the supporting infrastructure permits, offer their flexibility to the network and to energy services companies, be rewarded for it, and achieve savings in their electricity bill.

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↓ 2009/72/EC recital 50 (adapted)  
⇒ new

- (37) ~~The public service requirements, including as regards the universal service, and the common minimum standards that follow from them need to be further strengthened to make sure that all consumers, especially vulnerable ones, are able to benefit from competition and fair prices. The public service requirements should be defined at national level, taking into account national circumstances; Community law should, however, be respected by the Member States. The citizens of the Union and, where Member States deem it appropriate, small enterprises, should be able to enjoy public service obligations, in particular with regard to security of supply, and reasonable prices. A key aspect of supplying customers is access to objective and transparent consumption data. Thus, consumers should have access to their consumption data and associated prices and services costs so that they can invite competitors to make an offer based on those data. Consumers should also have the right to be properly informed about their energy consumption. Prepayments ⇒ should not place a disproportionate disadvantage at their users, while ⇐ reflect the likely consumption of electricity and~~ different payment systems should be non-discriminatory. Information on energy costs provided to consumers frequently enough will create incentives for energy savings because it will give customers direct feedback on the effects of investment in energy efficiency and change of behaviour. In this respect, full implementation of Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services<sup>33</sup> will help consumer to reduce their energy costs.

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↓ new

- (38) Currently different models for the management of data have been developed or are under development in the Member States following the deployment of smart metering systems. Independently of the data management model it is important that Member States put in place transparent rules under which data can be accessed under non-discriminatory conditions and ensure the highest level of cybersecurity and data protection as well as the impartiality of the entities which handle data.

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↓ 2009/72/EC recital 45 (adapted)

- (39) ~~Member States should ensure that household customers and, where Member States deem it appropriate, small enterprises, enjoy the right to be supplied with electricity of a specified quality at clearly comparable, transparent and reasonable prices. In order to ensure the maintenance of the high standards of public service in the Community, all measures taken by Member States to achieve the objective of this Directive should be regularly notified to the Commission. The Commission should regularly publish a report analysing measures taken at national level to achieve public service objectives and comparing their effectiveness, with a view to making recommendations as regards~~

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<sup>33</sup> OJ L 114, 27.4.2006, p. 64.

~~measures to be taken at national level to achieve high public service standards.~~ Member States should take the necessary measures to protect vulnerable and energy poor customers in the context of the internal market in electricity. Such measures may differ according to the particular circumstances in the Member States in question and may include social or energy policy measures relating to the payment of electricity bills, investment in residential energy efficiency or consumer protection such as disconnection safeguards. Where universal service is also provided to small enterprises, measures to ensure that such universal service is provided may differ according to whether they are aimed at customers or small enterprises.

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↓ new

(40) Energy services are fundamental to safeguard the well-being of the Union citizens. Adequate warmth, cooling, lighting and the energy to power appliances are essential services to guarantee a decent standard of living and citizens' health. Furthermore, access to these energy services empowers European citizens to fulfil their potential and it enhances social inclusion. Energy poor households are unable to afford these energy services due to a combination of low income, high energy expenditure and poor energy efficiency of their homes. Member States should collect the right information to monitor the number of households in energy poverty. Accurate measurement should assist Member States to identify those households affected by energy poverty in order to provide targeted support. The Commission should actively support the implementation of the provisions on energy poverty by facilitating the sharing of good practices between Member States.

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↓ 2009/72/EC recital 53 (adapted)  
⇒ new

(41) ~~Energy poverty is a growing problem in the Community.~~ Member States which are affected ⇒ by energy poverty ⇐ and which have not yet done so should therefore develop national action plans or other appropriate frameworks to tackle energy poverty ⇒ this problem ⇐, aiming at decreasing the number of people suffering such situation. Low income, high energy expenditure, and poor energy efficiency of homes are relevant factors in designing indicators for the measurement of energy poverty. In any event, Member States should ensure the necessary energy supply for vulnerable ⇒ and energy poor ⇐ customers. In doing so, an integrated approach, such as in the framework of ⇒ energy and ⇐ social policy, could be used and measures could include social policies or energy efficiency improvements for housing. At the very least, this Directive should allow national policies in favour of vulnerable ⇒ and energy poor ⇐ customers.

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↓ new

(42) Distribution system operators have to cost-efficiently integrate new electricity generation especially generating installations using renewable energy sources and new loads such as heat pumps and electric vehicles. For this purpose distributions system operators should be enabled and incentivised to use services from distributed energy

resources such as demand response and energy storage, based on market procedures, in order to efficiently operate their networks and avoid costly network expansions. Member States should put in place appropriate measures such as national network codes and market rules, and incentivise distribution system operators through network tariffs which do not create obstacles to flexibility or to the improvement of energy efficiency in the grid. Member States should also introduce network development plans for distribution systems in order to support the integration of generating installations using renewable energy sources, facilitate the development of storage facilities and the electrification of the transport sector, and provide to system users adequate information regarding the foreseen expansions or upgrades of the network, as currently such procedure does not exist in the majority of Member States.

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↓ 2009/72/EC recital 26

- (43) Non-discriminatory access to the distribution network determines downstream access to customers at retail level. ~~The scope for discrimination as regards third-party access and investment, however, is less significant at distribution level than at transmission level where congestion and the influence of generation or supply interests are generally greater than at distribution level. The rules on legal and functional unbundling currently in place can lead to effective unbundling provided they are more clearly defined, properly implemented and closely monitored.~~ To create a level playing field at retail level, the activities of distribution system operators should therefore be monitored so that they are prevented from taking advantage of their vertical integration as regards their competitive position on the market, in particular in relation to household and small non-household customers.
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↓ 2009/72/EC recital 30

- (44) Where a closed distribution system is used to ensure the optimal efficiency of an integrated energy supply requiring specific operational standards, or a closed distribution system is maintained primarily for the use of the owner of the system, it should be possible to exempt the distribution system operator from obligations which would constitute an unnecessary administrative burden because of the particular nature of the relationship between the distribution system operator and the users of the system. Industrial, commercial or shared services sites such as train station buildings, airports, hospitals, large camping sites with integrated facilities or chemical industry sites can include closed distribution systems because of the specialised nature of their operations.
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↓ 2009/72/EC recital 8

- (45) In order to secure competition and the supply of electricity at the most competitive price, Member States and national regulatory authorities should facilitate cross-border access for new suppliers of electricity from different energy sources as well as for new providers of power generation.

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↓ 2009/72/EC recital 9

- (46) Without effective separation of networks from activities of generation and supply (effective unbundling), there is an inherent risk of discrimination not only in the operation of the network but also in the incentives for vertically integrated undertakings to invest adequately in their networks.

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↓ 2009/72/EC recital 11

- (47) Only the removal of the incentive for vertically integrated undertakings to discriminate against competitors as regards network access and investment can ensure effective unbundling. Ownership unbundling, which implies the appointment of the network owner as the system operator and its independence from any supply and production interests, is clearly an effective and stable way to solve the inherent conflict of interests and to ensure security of supply. For that reason, the European Parliament, in its resolution of 10 July 2007 on prospects for the internal gas and electricity market<sup>34</sup> referred to ownership unbundling at transmission level as the most effective tool ~~by which~~ to promote investments in infrastructure in a non-discriminatory way, fair access to the network for new entrants and transparency in the market. Under ownership unbundling, Member States should therefore be required to ensure that the same person or persons are not entitled to exercise control over a generation or supply undertaking and, at the same time, exercise control or any right over a transmission system operator or transmission system. Conversely, control over a transmission system or transmission system operator should preclude the possibility of exercising control or any right over a generation or supply undertaking. Within those limits, a generation or supply undertaking should be able to have a minority shareholding in a transmission system operator or transmission system.

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↓ 2009/72/EC recital 12

- (48) Any system for unbundling should be effective in removing any conflict of interests between producers, suppliers and transmission system operators, in order to create incentives for the necessary investments and guarantee the access of new market entrants under a transparent and efficient regulatory regime and should not create an overly onerous regulatory regime for national regulatory authorities.

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↓ 2009/72/EC recital 14

- (49) Since ownership unbundling requires, in some instances, the restructuring of undertakings, Member States that decide to implement ownership unbundling should be granted additional time to apply the relevant provisions. In view of the vertical links between the electricity and gas sectors, the unbundling provisions should apply across the two sectors.

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<sup>34</sup> OJ C 175 E, 10.7.2008, p.206.

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↓ 2009/72/EC recital 15

- (50) Under ownership unbundling, to ensure full independence of network operation from supply and generation interests and to prevent exchanges of any confidential information, the same person should not be a member of the managing boards of both a transmission system operator or a transmission system and an undertaking performing any of the functions of generation or supply. For the same reason, the same person should not be entitled to appoint members of the managing boards of a transmission system operator or a transmission system and to exercise control or any right over a generation or supply undertaking.

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↓ 2009/72/EC recital 16

- (51) The setting up of a system operator or a transmission operator that is independent from supply and generation interests should enable a vertically integrated undertaking to maintain its ownership of network assets whilst ensuring effective separation of interests, provided that such independent system operator or such independent transmission operator performs all the functions of a system operator and detailed regulation and extensive regulatory control mechanisms are put in place.

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↓ 2009/72/EC (adapted) recital 17

- (52) Where, on 3 September 2009, an undertaking owning a transmission system ~~is~~ was ~~is~~ part of a vertically integrated undertaking, Member States should therefore be given a choice between ownership unbundling and setting up a system operator or transmission operator which is independent from supply and generation interests.

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↓ 2009/72/EC recital 18

- (53) To preserve fully the interests of the shareholders of vertically integrated undertakings, Member States should have the choice of implementing ownership unbundling either by direct divestiture or by splitting the shares of the integrated undertaking into shares of the network undertaking and shares of the remaining supply and generation undertaking, provided that the requirements resulting from ownership unbundling are complied with.

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↓ 2009/72/EC recital 19

- (54) The full effectiveness of the independent system operator or independent transmission operator solutions should be ensured by way of specific additional rules. The rules on the independent transmission operator provide an appropriate regulatory framework to guarantee fair competition, sufficient investment, access for new market entrants and the integration of electricity markets. Effective unbundling through the independent transmission operator provisions should be based on a pillar of organisational

measures and measures relating to the governance of transmission system operators and on a pillar of measures relating to investment, connecting new production capacities to the network and market integration through regional cooperation. The independence of the transmission operator should also, inter alia, be ensured through certain ‘cooling-off’ periods during which no management or other relevant activity giving access to the same information as could have been obtained in a managerial position is exercised in the vertically integrated undertaking. ~~The independent transmission operator model of effective unbundling is in line with the requirements laid down by the European Council at its meeting on 8 and 9 March 2007.~~

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↓ 2009/72/EC recital 21

- (55) A Member State has the right to opt for full ownership unbundling in its territory. Where a Member State has exercised that right, an undertaking does not have the right to set up an independent system operator or an independent transmission operator. Furthermore, an undertaking performing any of the functions of generation or supply cannot directly or indirectly exercise control or any right over a transmission system operator from a Member State that has opted for full ownership unbundling.
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↓ 2009/72/EC recital 23

- (56) The implementation of effective unbundling should respect the principle of non-discrimination between the public and private sectors. To that end, the same person should not be able to exercise control or any right, in violation of the rules of ownership unbundling or the independent system operator option, solely or jointly, over the composition, voting or decision of the bodies of both the transmission system operators or the transmission systems and the generation or supply undertakings. With regard to ownership unbundling and the independent system operator solution, provided that the Member State in question is able to demonstrate that the requirement is complied with, two separate public bodies should be able to control generation and supply activities on the one hand and transmission activities on the other.
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↓ 2009/72/EC (adapted) recital 24

- (57) Fully effective separation of network activities from supply and generation activities should apply throughout the ~~Community~~ ☒ Union ☒ to both ~~Community~~ ☒ Union ☒ and non-~~Community~~ ☒ Union ☒ undertakings. To ensure that network activities and supply and generation activities throughout the ~~Community~~ ☒ Union ☒ remain independent from each other, regulatory authorities should be empowered to refuse certification to transmission system operators that do not comply with the unbundling rules. To ensure the consistent application of those rules across the ~~Community~~ ☒ Union ☒, the regulatory authorities should take utmost account of the Commission’s opinion when the former take decisions on certification. To ensure, in addition, respect for the international obligations of the ~~Community~~

⊗ Union ⊗, and solidarity and energy security within the Community  
⊗ Union ⊗, the Commission should have the right to give an opinion on certification in relation to a transmission system owner or a transmission system operator which is controlled by a person or persons from a third country or third countries.

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↓ 2009/72/EC recital 31

- (58) Authorisation procedures should not lead to an administrative burden disproportionate to the size and potential impact of electricity producers. Unduly lengthy authorisation procedures may constitute a barrier to access for new market entrants.
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↓ 2009/72/EC recital 34

- (59) Energy regulators need to be able to take decisions in relation to all relevant regulatory issues if the internal market in electricity is to function properly, and to be fully independent from any other public or private interests. This precludes neither judicial review nor parliamentary supervision in accordance with the constitutional laws of the Member States. In addition, approval of the budget of the regulator by the national legislator does not constitute an obstacle to budgetary autonomy. The provisions relating to the autonomy in the implementation of the allocated budget of the regulatory authority should be implemented in the framework defined by national budgetary law and rules. While contributing to the independence of the national regulatory authority from any political or economic interest through an appropriate rotation scheme, it should be possible for Member States to take due account of the availability of human resources and of the size of the board.
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↓ 2009/72/EC recital 36

- (60) National regulatory authorities should be able to fix or approve tariffs, or the methodologies underlying the calculation of the tariffs, on the basis of a proposal by the transmission system operator or distribution system operator(s), or on the basis of a proposal agreed between those operator(s) and the users of the network. In carrying out those tasks, national regulatory authorities should ensure that transmission and distribution tariffs are non-discriminatory and cost-reflective, and should take account of the long-term, marginal, avoided network costs from distributed generation and demand-side management measures.
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↓ 2009/72/EC recital 37  
→<sub>1</sub> 2009/72/EC recital 38

- (61) Energy regulators should have the power to issue binding decisions in relation to electricity undertakings and to impose effective, proportionate and dissuasive penalties on electricity undertakings which fail to comply with their obligations or to propose that a competent court impose such penalties on them. →<sub>1</sub> To this end, regulatory authorities should be able to request relevant information from electricity

undertakings, make appropriate and sufficient investigations and settle disputes. ← Energy regulators should also be granted the power to decide, irrespective of the application of competition rules, on appropriate measures ensuring customer benefits through the promotion of effective competition necessary for the proper functioning of the internal market in electricity. ~~The establishment of virtual power plants — electricity release programmes whereby electricity undertakings are obliged to sell or to make available a certain volume of electricity or to grant access to part of their generation capacity to interested suppliers for a certain period of time — is one of the possible measures that can be used to promote effective competition and ensure the proper functioning of the market. Energy regulators should also be granted the power to contribute to ensuring high standards of universal and public service in compliance with market opening, to the protection of vulnerable customers, and to the full effectiveness of consumer protection measures. Those provisions should be without prejudice to both the Commission’s powers concerning the application of competition rules including the examination of mergers with a Community dimension, and the rules on the internal market such as the free movement of capital. The independent body to which a party affected by the decision of a national regulator has a right to appeal could be a court or other tribunal empowered to conduct a judicial review.~~

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↓ 2009/72/EC recital 37 (adapted)

- (62) ~~Energy regulators should have the power to issue binding decisions in relation to electricity undertakings and to impose effective, proportionate and dissuasive penalties on electricity undertakings which fail to comply with their obligations or to propose that a competent court impose such penalties on them. Energy regulators should also be granted the power to decide, irrespective of the application of competition rules, on appropriate measures ensuring customer benefits through the promotion of effective competition necessary for the proper functioning of the internal market in electricity. The establishment of virtual power plants — electricity release programmes whereby electricity undertakings are obliged to sell or to make available a certain volume of electricity or to grant access to part of their generation capacity to interested suppliers for a certain period of time — is one of the possible measures that can be used to promote effective competition and ensure the proper functioning of the market. Energy regulators should also be granted the power to contribute to ensuring high standards of universal and public service in compliance with market opening, to the protection of vulnerable customers, and to the full effectiveness of consumer protection measures. Those provisions should be without prejudice to both the Commission’s powers concerning the application of competition rules including the examination of mergers with a Community~~ ☒ Union ☒ dimension, and the rules on the internal market such as the free movement of capital. The independent body to which a party affected by the decision of a national regulator has a right to appeal could be a court or other tribunal empowered to conduct a judicial review.
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↓ 2009/72/EC recital 63  
⇒ new

- (63) Under [recast of Regulation 714/2009 as proposed by COM(2016)861/2] Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on

~~conditions for access to the network for cross border exchanges in electricity~~ <sup>(44)</sup>, the Commission may adopt Guidelines ~~Guidelines~~ ⇨ or Network Codes ⇩ to achieve the necessary degree of harmonisation. Such Guidelines ⇨ or Network Codes ⇩, which constitute binding implementing measures, are, also with regard to certain provisions of this Directive, a useful tool which can be adapted quickly where necessary.

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⇩ new

(64) Member States and the Energy Community Contracting Parties should closely cooperate on all matters concerning the development of an integrated electricity trading region and should take no measures that endanger the further integration of electricity markets or security of supply of Member States and Contracting Parties.

(65) This Directive should be read together with [recast of Regulation 714/2009 as proposed by COM(2016)861/2] which lays down key principles of the new market design for electricity which will enable better reward for flexibility, provide adequate price signals and ensure the development of functioning integrated short-term markets. [recast of Regulation 714/2009 as proposed by COM(2016)861/2] also sets out new rules in various areas including capacity mechanisms and cooperation between transmission system operators.

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⇩ 2009/72/EC recital 62 (adapted)

(66) Since the objective of this Directive, namely the creation of a fully operational internal electricity market, cannot be sufficiently achieved by the Member States and can therefore be better achieved at ~~Community~~ ☒ Union ☒ level, the ~~Community~~ ☒ Union ☒ may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty ☒ on the European Union ☒. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

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⇩ 2009/72/EC recital 68

(67) This Directive respects the fundamental rights, and observes the principles, recognised in particular by the Charter of Fundamental Rights of the European Union.

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⇩ new

(68) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive amendment as compared to the earlier Directive. The obligation to transpose the provisions which are unchanged arises under the earlier Directive.

(69) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents <sup>35</sup>, Member States have

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<sup>35</sup> OJ C 369, 17.12.2011, p. 14.

undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

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↓ new

(70) This Directive should be without prejudice to the obligations of the Member States relating to the time-limit for the transposition into national law and the date of application of the Directive set out in Annex X

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↓ 2009/72/EC recital 67  
⇒ new

(71) Given the scope of the amendments made to ~~Directive 2003/54/EC~~ <sup>⇒ Directive 2009/72/EC of the European Parliament and of the Council<sup>36</sup></sup> ~~herein~~, it is desirable, for reasons of clarity and rationalisation, that the provisions in question should be recast by bringing them all together in a single text in a new Directive.

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↓ 2009/72/EC recital 5

~~A secure supply of electricity is of vital importance for the development of European society, the implementation of a sustainable climate change policy, and the fostering of competitiveness within the internal market. To that end, cross-border interconnections should be further developed in order to secure the supply of all energy sources at the most competitive prices to consumers and industry within the Community.~~

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↓ 2009/72/EC recital 59

~~The development of a true internal market in electricity, through a network connected across the Community, should be one of the main goals of this Directive and regulatory issues on cross-border interconnections and regional markets should, therefore, be one of the main tasks of the regulatory authorities, in close cooperation with the Agency where relevant.~~

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↓ 2009/72/EC recital 7

~~The Communication of the Commission of 10 January 2007 entitled ‘An Energy Policy for Europe’ highlighted the importance of completing the internal market in electricity and of creating a level playing field for all electricity undertakings established in the Community. The Communications of the Commission of 10 January 2007 entitled ‘Prospects for the~~

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<sup>36</sup> OJ L 211, 14.8.2009, p. 55–93.

~~internal gas and electricity market' and 'Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report)' showed that the present rules and measures do not provide the necessary framework for achieving the objective of a well-functioning internal market.~~

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↓ 2009/72/EC recital 4

~~However, at present, there are obstacles to the sale of electricity on equal terms and without discrimination or disadvantages in the Community. In particular, non-discriminatory network access and an equally effective level of regulatory supervision in each Member State do not yet exist.~~

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↓ 2009/72/EC recital 41

~~Member States or, where a Member State has so provided, the regulatory authority, should encourage the development of interruptible supply contracts.~~

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↓ 2009/72/EC recital

~~A well-functioning internal market in electricity should provide producers with the appropriate incentives for investing in new power generation, including in electricity from renewable energy sources, paying special attention to the most isolated countries and regions in the Community's energy market. A well-functioning market should also provide consumers with adequate measures to promote the more efficient use of energy for which a secure supply of energy is a precondition.~~

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↓ 2009/72/EC recital 32

~~Further measures should be taken in order to ensure transparent and non-discriminatory tariffs for access to networks. Those tariffs should be applicable to all system users on a non-discriminatory basis.~~

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↓ 2009/72/EC recital 20

~~In order to develop competition in the internal market in electricity, large non-household customers should be able to choose their suppliers and enter into contracts with several suppliers to secure their electricity requirements. Such customers should be protected against exclusivity clauses the effect of which is to exclude competing or complementary offers.~~

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↓ 2009/72/EC recital 51

~~Consumer interests should be at the heart of this Directive and quality of service should be a central responsibility of electricity undertakings. Existing rights of consumers need to be strengthened and guaranteed, and should include greater transparency. Consumer protection should ensure that all consumers in the wider remit of the Community benefit from a competitive market. Consumer rights should be enforced by Member States or, where a Member State has so provided, by the regulatory authorities.~~

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↓ 2009/72/EC recital 29

~~To avoid imposing a disproportionate financial and administrative burden on small distribution system operators, Member States should be able, where necessary, to exempt the undertakings concerned from the legal distribution unbundling requirements.~~

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↓ 2009/72/EC recital 28

~~In the case of small systems it may be necessary that the provision of ancillary services is ensured by transmission system operators interconnected with small systems.~~

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↓ 2009/72/EC recital 10

~~The rules on legal and functional unbundling as provided for in Directive 2003/54/EC have not, however, led to effective unbundling of the transmission system operators. At its meeting on 8 and 9 March 2007, the European Council therefore invited the Commission to develop legislative proposals for the ‘effective separation of supply and generation activities from network operations’.~~

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↓ 2009/72/EC recital 13

~~The definition of the term ‘control’ is taken from Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)<sup>37</sup>.~~

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↓ 2009/72/EC recital 43

~~Nearly all Member States have chosen to ensure competition in the electricity generation market through a transparent authorisation procedure. However, Member States should ensure the possibility to contribute to security of supply through the launching of a tendering procedure or an equivalent procedure in the event that sufficient electricity generation~~

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<sup>37</sup> OJ L 24, 29.1.2004, p. 1

capacity is not built on the basis of the authorisation procedure. Member States should have the possibility, in the interests of environmental protection and the promotion of new infant technologies, of tendering for new capacity on the basis of published criteria. Such new capacity includes, inter alia, electricity from renewable energy sources and combined heat and power.

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↓ 2009/72/EC recital 33

Directive 2003/54/EC introduced a requirement for Member States to establish regulators with specific competences. However, experience shows that the effectiveness of regulation is frequently hampered through a lack of independence of regulators from government, and insufficient powers and discretion. For that reason, at its meeting on 8 and 9 March 2007, the European Council invited the Commission to develop legislative proposals providing for further harmonisation of the powers and strengthening of the independence of national energy regulators. It should be possible for those national regulatory authorities to cover both the electricity and the gas sectors.

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↓ 2009/72/EC recital 38

Any harmonisation of the powers of national regulatory authorities should include the powers to provide incentives to electricity undertakings, and to impose effective, proportionate and dissuasive penalties on electricity undertakings or to propose that a competent court impose such penalties. Moreover, regulatory authorities should have the power to request relevant information from electricity undertakings, make appropriate and sufficient investigations and settle disputes.

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↓ 2009/72/EC recital 61

Regulatory authorities should also provide information on the market to permit the Commission to exercise its role of observing and monitoring the internal market in electricity and its short, medium and long term evolution, including aspects such as generation capacity, different sources of electricity generation, transmission and distribution infrastructure, quality of service, cross border trade, congestion management, investments, wholesale and consumer prices, market liquidity and environmental and efficiency improvements. National regulatory authorities should report to the competition authorities and the Commission those Member States in which prices impair competition and proper functioning of the market.

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↓ 2009/72/EC recital 42

All Community industry and commerce, including small and medium sized enterprises, and all citizens of the Union that enjoy the economic benefits of the internal market should also be able to enjoy high levels of consumer protection, and in particular household customers and, where Member States deem it appropriate, small enterprises should also be able to enjoy public service guarantees, in particular with regard to security of supply and reasonable tariffs, for reasons of fairness, competitiveness and, indirectly, to create employment. Those

~~customers should also have access to choice, fairness, representation and dispute settlement mechanisms.~~

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↓ 2009/72/EC recital 45

~~Member States should ensure that household customers and, where Member States deem it appropriate, small enterprises, enjoy the right to be supplied with electricity of a specified quality at clearly comparable, transparent prices. In order to ensure the maintenance of the high standards of public service in the Community, all measures taken by Member States to achieve the objective of this Directive should be regularly notified to the Commission. The Commission should regularly publish a report analysing measures taken at national level to achieve public service objectives and comparing their effectiveness, with a view to making recommendations as regards measures to be taken at national level to achieve high public service standards. Member States should take the necessary measures to protect vulnerable customers in the context of the internal market in electricity. Such measures may differ according to the particular circumstances in the Member States in question and may include specific measures relating to the payment of electricity bills, or more general measures taken in the social security system. Where universal service is also provided to small enterprises, measures to ensure that such universal service is provided may differ according to whether they are aimed at household customers or small enterprises.~~

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↓ 2009/72/EC recital 46

~~Respect for the public service requirements is a fundamental requirement of this Directive, and it is important that common minimum standards, respected by all Member States, are specified in this Directive, which takes into account the objectives of consumer protection, security of supply, environmental protection and equivalent levels of competition in all Member States. It is important that the public service requirements can be interpreted on a national basis, taking into account national circumstances and subject to the respect of Community law.~~

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↓ 2009/72/EC recital 50

~~The public service requirements, including as regards the universal service, and the common minimum standards that follow from them need to be further strengthened to make sure that all consumers, especially vulnerable ones, are able to benefit from competition and fair prices. The public service requirements should be defined at national level, taking into account national circumstances; Community law should, however, be respected by the Member States. The citizens of the Union and, where Member States deem it appropriate, small enterprises, should be able to enjoy public service obligations, in particular with regard to security of supply, and reasonable prices. A key aspect of supplying customers is access to objective and transparent consumption data. Thus, consumers should have access to their consumption data and associated prices and services costs so that they can invite competitors to make an offer based on those data. Consumers should also have the right to be properly informed about their energy consumption. Prepayments should reflect the likely consumption of electricity and different payment systems should be non-discriminatory. Information on energy costs~~

~~provided to consumers frequently enough will create incentives for energy savings because it will give customers direct feedback on the effects of investment in energy efficiency and change of behaviour. In this respect, full implementation of Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services<sup>38</sup> will help consumers to reduce their energy costs.~~

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↓ new

~~In order to provide the minimum degree of harmonisation required to achieve the aim of this Directive, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of items referred to under Article 59 and 61. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of the delegated acts.~~

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↓ 2009/72/EC recital 64 and 65

~~The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission~~

~~In particular, the Commission should be empowered to adopt the Guidelines necessary for providing the minimum degree of harmonisation required to achieve the aim of this Directive. Since those measures are of general scope and are designed to amend non-essential elements of this Directive, by supplementing it with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.~~

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↓ 2009/72/EC recital 66

~~In accordance with point 34 of the Interinstitutional Agreement on better law-making<sup>39</sup> Member States are encouraged to draw up, for themselves and in the interest of the Community, their own tables, illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.~~

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<sup>38</sup> OJ L 114, 27.4.2006, p. 64.

<sup>39</sup> OJ C 321, 31.12.2003, p. 1.

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↓ 2009/72/EC recital 25

~~The security of energy supply is an essential element of public security and is therefore inherently connected to the efficient functioning of the internal market in electricity and the integration of the isolated electricity markets of Member States. Electricity can reach the citizens of the Union only through the network. Functioning electricity markets and, in particular, the networks and other assets associated with electricity supply are essential for public security, for the competitiveness of the economy and for the well-being of the citizens of the Union. Persons from third countries should therefore be allowed to control a transmission system or a transmission system operator only if they comply with the requirements of effective separation that apply inside the Community. Without prejudice to the international obligations of the Community, the Community considers that the electricity transmission system sector is of high importance to the Community and therefore additional safeguards are necessary regarding the preservation of the security of supply of energy to the Community to avoid any threats to public order and public security in the Community and the welfare of the citizens of the Union. The security of supply of energy to the Community requires, in particular, an assessment of the independence of network operation, the level of the Community's and individual Member States' dependence on energy supply from third countries, and the treatment of both domestic and foreign trade and investment in energy in a particular third country. Security of supply should therefore be assessed in the light of the factual circumstances of each case as well as the rights and obligations arising under international law, in particular the international agreements between the Community and the third country concerned. Where appropriate the Commission is encouraged to submit recommendations to negotiate relevant agreements with third countries addressing the security of supply of energy to the Community or to include the necessary issues in other negotiations with those third countries.~~

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↓ 2009/72/EC recital 35

~~In order to ensure effective market access for all market players, including new entrants, non-discriminatory and cost-reflective balancing mechanisms are necessary. As soon as the electricity market is sufficiently liquid, this should be achieved through the setting up of transparent market-based mechanisms for the supply and purchase of electricity, needed in the framework of balancing requirements. In the absence of such a liquid market, national regulatory authorities should play an active role to ensure that balancing tariffs are non-discriminatory and cost-reflective. At the same time, appropriate incentives should be provided to balance the in-put and off-take of electricity and not to endanger the system. Transmission system operators should facilitate participation of final customers and final customers' aggregators in reserve and balancing markets.~~

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↓ 2009/72/EC recital 39 and 40

~~The internal market in electricity suffers from a lack of liquidity and transparency hindering the efficient allocation of resources, risk hedging and new entry. There is a need for~~

~~enhancement of competition and security of supply through facilitated integration of new power plants into the electricity network in all Member States, in particular encouraging new market entrants. Trust in the market, its liquidity and the number of market participants needs to increase, and, therefore, regulatory oversight of undertakings active in the supply of electricity needs to be increased. Such requirements should be without prejudice to, and compatible with, existing Community law in relation to the financial markets. Energy regulators and financial market regulators need to cooperate in order to enable each other to have an overview over the markets concerned.~~

~~Prior to the adoption by the Commission of Guidelines defining further the record-keeping requirements, the Agency for the Cooperation of Energy Regulators established by Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (<sup>40</sup>) (the 'Agency'), and the Committee of European Securities Regulators (the 'CESR'), established by Commission Decision 2009/77/EC (<sup>41</sup>), should confer and advise the Commission in regard to their content. The Agency and the CESR should also cooperate to investigate further and advise on whether transactions in electricity supply contracts and electricity derivatives should be subject to pre or post trade transparency requirements and, if so, what the content of those requirements should be.~~

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↓ 2009/72/EC recital 44

~~In the interests of security of supply, the balance between supply and demand in individual Member States should be monitored, and such monitoring should be followed by a report on the situation at Community level, taking account of interconnection capacity between areas. Such monitoring should be carried out sufficiently early to enable appropriate measures to be taken if security of supply is compromised. The construction and maintenance of the necessary network infrastructure, including interconnection capacity, should contribute to ensuring a stable electricity supply. The maintenance and construction of the necessary network infrastructure, including interconnection capacity and decentralised electricity generation, are important elements in ensuring a stable electricity supply.~~

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↓ 2009/72/EC recital 58

~~With a view to creating an internal market in electricity, Member States should foster the integration of their national markets and the cooperation of system operators at Community and regional level, also incorporating isolated systems forming electricity islands that persist in the Community.~~

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<sup>40</sup> OJ L 211, 14.8.2009, p.1.

<sup>41</sup> OJ L 025, 29.1.2009, p.18.

HAVE ADOPTED THIS DIRECTIVE:

## CHAPTER I

### SUBJECT MATTER, ~~SCOPE~~ AND DEFINITIONS

#### *Article 1*

#### **Subject matter ~~and scope~~**

This Directive establishes common rules for the generation, transmission, distribution ⇒, storage ⇐ and supply of electricity, together with consumer protection provisions, with a view to ~~improving and~~ ⇒ creating truly integrated ⇐ ~~integrating~~ competitive ⇒, consumer-centered and flexible ⇐ electricity markets in the ~~Community~~ ⇔ Union ⇔. ⇒ Using the advantages of an integrated market, the Directive aims at ensuring affordable energy prices for consumers, a high degree of security of supply and a smooth transition towards a decarbonised energy system ⇐. It lays down ~~the~~ ⇒ key ⇐ rules relating to the organisation and functioning of the ⇔ European ⇔ electricity sector, ⇒ in particular rules on consumer empowerment and protection, on ⇐ open access to the ⇒ integrated ⇐ market, ⇒ on third party access to transmission and distribution infrastructure, unbundling rules, and on independent national energy regulators. ⇐ ~~the criteria and procedures applicable to calls for tenders and the granting of authorisations and the operation of systems. It also lays down universal service obligations and the rights of electricity consumers and clarifies competition requirements.~~

#### *Article 2*

#### **Definitions**

For the purpose of this Directive, the following definitions apply:

1. 'customer' means a wholesale or final customer of electricity;

2. 'wholesale customer' means a natural or legal person purchasing electricity for the purpose of resale inside or outside the system where he is established;

3. 'final customer' means a customer purchasing electricity for his own use;

4. 'household customer' means a customer purchasing electricity for his own household consumption, excluding commercial or professional activities;

5. 'non-household customer' means a natural or legal person purchasing electricity which is not for their own household use and includes producers ⇒ industrial customers, small and medium sized enterprises, businesses ⇐ and wholesale customers;

~~12. 'eligible customer' means a customer who is free to purchase electricity from the supplier of his choice within the meaning of Article 33;~~

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↓ new

6. 'active customer' means a customer or a group of jointly acting customers who consume, store or sell electricity generated on their premises, including through aggregators, or participate in demand response or energy efficiency schemes provided that these activities do not constitute their primary commercial or professional activity;

7. 'local energy community' means: an association, a cooperative, a partnership, a non-profit organisation or other legal entity which is effectively controlled by local shareholders or members, generally value rather than profit-driven, involved in distributed generation and in performing activities of a distribution system operator, supplier or aggregator at local level, including across borders;

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↓ 2009/72/EC

~~198.~~ 'supply' means the sale, including resale, of electricity to customers;

~~329.~~ 'electricity supply contract' means a contract for the supply of electricity, but does not include an electricity derivative;

~~3310.~~ 'electricity derivative' means a financial instrument specified in points 5, 6 or 7 of Section C of Annex I to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments<sup>42</sup>, where that instrument relates to electricity;

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↓ new

11. 'dynamic electricity price contract' means an electricity supply contract between a supplier and a final customer that reflects the price at the spot market or at the day ahead market at intervals at least equal to the market settlement frequency;

12. 'contract termination fee' means any charge or penalty imposed on customers by suppliers or aggregators for withdrawing from an electricity supply or service contract;

13. 'switching related fee' means any charge or penalty imposed on customers by suppliers or system operators directly or indirectly for changing suppliers, including contract termination fees;

14. 'aggregator' means a market participant that combines multiple customer loads or generated electricity for sale, for purchase or auction in any organised energy market;

15. 'independent aggregator' means an aggregator that is not affiliated to a supplier or any other market participant;

16. 'demand response' means the change of electricity load by final customers from their normal or current consumption patterns in response to market signals, including time-variable electricity prices or incentive payments, or in response to acceptance of the final customer's

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<sup>42</sup> [Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments \(OJ L 145, 30.4.2004, p. 1\).](#)

bid, alone or through aggregation, to sell demand reduction or increase at a price in organised markets as defined in Commission Implementing Regulation (EU) No 1348/2014<sup>43</sup>;

17. 'conventional meter' means an analogue meter or an electronic meter with no capability to both transmit and receive data;

18. 'smart metering system' means an electronic system that can measure energy consumption, providing more information than a conventional meter, and can transmit and receive data for information, monitoring and control purposes, using a form of electronic communication;

19. 'interoperability' means, in the context of smart metering, the ability of two or more energy or communication networks, systems, devices, applications or components to interwork, to exchange and use information in order to perform required functions;

20. 'near-real time' means, in the context of smart metering, the time, usually down to seconds, that elapses between data recording and their automated processing and transmission for use or information purposes;

21. 'best available techniques' means, in the context of data protection and security in a smart metering environment, the most effective and advanced stage in the development of activities and their methods of operation, which indicates the practical suitability of particular techniques, designed to prevent or mitigate risks on privacy, personal data and security, for providing in principle the basis for complying with the Union data protection framework;

↓ 2009/72/EC  
⇒ new

~~522.~~ 'distribution' means the transport of electricity on high-voltage, medium-voltage and low-voltage distribution systems with a view to its delivery to customers, but does not include supply;

~~623.~~ 'distribution system operator' means a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the distribution system in a given area and, where applicable, its interconnections with other systems and for ensuring the long-term ability of the system to meet reasonable demands for the distribution of electricity;

~~2024.~~ 'energy efficiency ~~demand side management~~' means ⇒ the ratio of output of performance, service, goods or energy, to input of energy ⇐ ~~a global or integrated approach aimed at influencing the amount and timing of electricity consumption in order to reduce primary energy consumption and peak loads by giving precedence to investments in energy efficiency measures, or other measures, such as interruptible supply contracts, over investments to increase generation capacity, if the former are the most effective and economical option, taking into account the positive environmental impact of reduced energy consumption and the security of supply and distribution cost aspects related to it;~~

~~3025.~~ '⇒ energy from ⇐ renewable energy sources' means ⇒ energy from ⇐ renewable non-fossil energy sources ⇒, in particular ⇐ (wind, solar ⇒ (solar thermal and solar photovoltaic) ⇐, geothermal ⇒ energy, ambient heat, hydropower and tide, ocean ⇐, wave

<sup>43</sup> Commission Implementing Regulation (EU) No 1348/2014 of 17 December 2014 on data reporting implementing Article 8(2) and Article 8(6) of Regulation (EU) No 1227/2011 of the European Parliament and the Council on wholesale energy market integrity and transparency (OJ L 363, 18.12.2014, p. 121).

⇒ energy, and combustible renewables: biofuels, bioliquids, biogas, solid biofuels and combustible wastes of renewable origin ⇐, ~~tidal, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases~~);

~~3126.~~ 'distributed generation' means generation plants connected to the distribution system;

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⇓ new

27. 'recharging point' means an interface that is capable of charging one electric vehicle at a time or exchanging a battery of one electric vehicle at a time;

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⇓ 2009/72/EC (adapted)

⇒ new

~~328.~~ 'transmission' means the transport of electricity on the extra high-voltage and high-voltage interconnected system with a view to its delivery to final customers or to distributors, but does not include supply;

~~429.~~ 'transmission system operator' means a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity;

~~430.~~ 'system user' means a natural or legal person supplying to, or being supplied by, a transmission or distribution system;

~~431.~~ 'generation' means the production of electricity;

~~432.~~ 'producer' means a natural or legal person generating electricity;

~~433.~~ 'interconnector' means ⇐ a transmission line which crosses or spans a border between bidding zones, between Member States or, up to the border of EU jurisdiction, between Member States and third countries ⇐ ~~equipment used to link electricity systems~~;

~~444.~~ 'interconnected system' means a number of transmission and distribution systems linked together by means of one or more interconnectors;

~~455.~~ 'direct line' means either an electricity line linking an isolated generation site with an isolated customer or an electricity line linking an electricity producer and an electricity supply undertaking to supply directly their own premises, subsidiaries and ~~eligible~~ customers;

~~25.~~ ~~'long term planning' means the planning of the need for investment in generation and transmission and distribution capacity on a long term basis, with a view to meeting the demand of the system for electricity and securing supplies to customers;~~

~~2636.~~ 'small isolated system' means any system with consumption of less than 3 000 GWh in the year 1996, where less than 5 % of annual consumption is obtained through interconnection with other systems;

~~2737.~~ 'micro isolated system' means any system with consumption less than 500 GWh in the year 1996, where there is no connection with other systems;

~~16.~~ ~~'economic precedence' means the ranking of sources of electricity supply in accordance with economic criteria;~~

~~1738~~. 'ancillary service' means a service necessary for the operation of a transmission or distribution system ⇒ including balancing and non-frequency ancillary services but not congestion management ⇐ ;

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↓ new

39. 'non-frequency ancillary service' means a service used by a transmission or distribution system operator for steady state voltage control, fast reactive current injections, inertia and black start capability;

40. 'regional operational centre' means the regional operational centre as defined in Article 32 of the [recast of Regulation 714/2009 as proposed by COM(2016)861/2].

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↓ 2009/72/EC

~~2041~~. 'integrated electricity undertaking' means a vertically or horizontally integrated undertaking;

~~2142~~. 'vertically integrated undertaking' means an electricity undertaking or a group of electricity undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission or distribution, and at least one of the functions of generation or supply of electricity;

~~2243~~. 'related undertaking' means affiliated undertakings, within the meaning of Article 2(12) of Directive 2013/34/EU of the European Parliament and of the Council<sup>44</sup> ~~41 of the Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 44(2)(g) (13) of the Treaty on consolidated accounts (14), and/or associated undertakings, within the meaning of Article 33(1) of that Directive, and/or~~ undertakings which belong to the same shareholders;

~~2344~~. 'horizontally integrated undertaking' means an undertaking performing at least one of the functions of generation for sale, or transmission, or distribution, or supply of electricity, and another non-electricity activity;

~~3445~~. 'control' means rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

- (1) ownership or the right to use all or part of the assets of an undertaking;
- (2) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking;

~~3546~~. 'electricity undertaking' means any natural or legal person carrying out at least one of the following functions: generation, transmission, distribution, supply, or purchase of electricity, which is responsible for the commercial, technical or maintenance tasks related to those functions, but does not include final customers;

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<sup>44</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

~~24. 'tendering procedure' means the procedure through which planned additional requirements and replacement capacity are covered by supplies from new or existing generating capacity;~~

~~2847.~~ 'security' means both security of supply and provision of electricity, and technical safety;

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↓ new

48. 'energy storage' means, in the electricity system, deferring an amount of the electricity that was generated to the moment of use, either as final energy or converted into another energy carrier.

49. 'balancing responsible party' means market participants financially responsible for imbalances who have not delegated their responsibility pursuant to Article 4(1) [recast of Regulation 714/2009 as proposed by COM(2016)861/2].

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↓ 2009/72/EC

## CHAPTER II

# GENERAL RULES FOR THE ORGANISATION OF THE SECTOR

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↓ new

### Article 3

#### **Competitive, consumer-centered, flexible and non-discriminatory electricity market**

1. Member States shall ensure that their national legislation does not unduly hamper cross-border flows of electricity, consumer participation including through demand-side response, investments into flexible energy generation, energy storage, the deployment of electro-mobility or new interconnectors, and that electricity prices reflect actual demand and supply.
  2. Member States shall ensure that no undue barriers exist for market entry and market exit of electricity generation and electricity supply undertakings.
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↓ 2009/72/EC Article 33

⇒ new

### Article ~~433~~

#### **Free choice of electricity supplier**

- ~~3.~~ Member States shall ensure that all customers are free to purchase electricity from the supplier of their choice.

~~until 1 July 2004, the eligible customers as specified in Article 19(1) to (3) of Directive 96/92/EC. Member States shall publish by 31 January each year the criteria for the definition of those eligible customers;~~

~~from 1 July 2004, all non-household customers;~~

~~from 1 July 2007, all customers.~~

~~To avoid imbalance in the opening of electricity markets:~~

~~contracts for the supply of electricity with an eligible customer in the system of another Member State shall not be prohibited if the customer is considered as eligible in both systems involved; and~~

~~where transactions as described in point (a) are refused because the customer is eligible in only one of the two systems, the Commission may, taking into account the situation in the market and the common interest, oblige the refusing party to execute the requested supply at the request of the Member State where the eligible customer is located.~~

↓ new

#### Article 5

### Market based supply prices

1. Electricity suppliers shall be free to determine the price at which they supply electricity to customers. Member States shall take appropriate actions to ensure effective competition between electricity suppliers.
2. Member States shall ensure the protection of energy poor or vulnerable customers in a targeted manner by other means than public interventions in the price-setting for the supply of electricity.
3. By way of derogation from paragraphs 1 and 2, Member States who apply public interventions in price setting for the supply of electricity for energy poor or vulnerable household customers at the date of entry into force of this Directive may continue to apply such public interventions during five years from the entry into force of this Directive. Such public interventions shall pursue a general economic interest, be clearly defined, transparent, non-discriminatory, verifiable and guarantee equal access for Union electricity companies to customers. The interventions shall not go beyond what is necessary to achieve the general economic interest which they pursue, be limited in time and proportionate as regards their beneficiaries.
4. After the period referred to in paragraph 3, Member States may still apply public interventions in the price-setting for the supply of electricity for vulnerable household customers in so far as it is strictly necessary for reasons of extreme urgency. Such interventions shall comply with the conditions set out in paragraph 3.

Member States shall notify the measures taken in accordance with the first subparagraph to the Commission within one month after adoption and may apply them immediately. The notification shall be accompanied by an explanation why other instruments could not sufficiently address the situation and how the beneficiaries and the duration of the measure have been determined. The notification shall be considered as complete if, within two months from its receipt, or from the receipt of any additional information requested, the Commission does not request any further information.

The Commission may take a decision asking the national authorities to amend or withdraw the measures within two months from receipt of a complete notification where it considers that the requirements set out in the first subparagraph are not fulfilled. The decision-making period can be extended with the consent of both the Commission and the Member State concerned.

The public intervention applied on the basis of this paragraph shall be deemed valid as long as the Commission has not taken a Decision asking the national authorities to amend or withdraw the measure.

↓ 2009/72/EC (adapted)  
⇒ new

*Article ~~632~~*  
**Third-party access**

1. Member States shall ensure the implementation of a system of third party access to the transmission and distribution systems based on published tariffs, applicable to all ~~eligible~~ customers and applied objectively and without discrimination between system users. Member States shall ensure that those tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article ~~59~~ ~~37~~ and that those tariffs, and the methodologies — where only methodologies are approved — are published prior to their entry into force.
2. The transmission or distribution system operator may refuse access where it lacks the necessary capacity. Duly substantiated reasons ~~must~~ ~~⊗~~ shall ~~⊗~~ be given for such refusal, in particular having regard to Article ~~39~~, and based on objective and technically and economically justified criteria. Member States or, where Member States have so provided, the regulatory authorities shall ensure that those criteria are consistently applied and that the system user who has been refused access can make use of a dispute settlement procedure. The regulatory authorities shall also ensure, where appropriate and when refusal of access takes place, that the transmission or distribution system operator provides relevant information on measures that would be necessary to reinforce the network. ⇒ Such information shall be provided in all cases when access for recharging points was denied. ⇐ The party requesting such information may be charged a reasonable fee reflecting the cost of providing such information.

*Article ~~734~~*  
**Direct lines**

1. Member States shall take the measures necessary to enable:
  - (a) all electricity producers and electricity supply undertakings established within their territory to supply their own premises, subsidiaries and ~~eligible~~ customers through a direct line; ~~and~~
  - (b) all ~~eligible~~ customers within their territory to be supplied through a direct line by a producer and supply undertakings.

2. Member States shall lay down the criteria for the grant of authorisations for the construction of direct lines in their territory. Those criteria shall be objective and non-discriminatory.
3. The possibility of supplying electricity through a direct line as referred to in paragraph 1 of this Article shall not affect the possibility of contracting electricity in accordance with Article ~~7~~ 32.
4. Member States may issue an authorisation to construct a direct line subject either to the refusal of system access on the basis, as appropriate, of Article ~~7~~ 32 or to the opening of a dispute settlement procedure under Article ~~60~~ 37.
5. Member States may refuse to authorise a direct line if the granting of such an authorisation would obstruct ~~the~~ application of ~~the~~ provisions on public service obligations pursuant to ~~Article 9~~ 3. Duly substantiated reasons shall be given for such refusal.

#### *Article ~~87~~*

#### **Authorisation procedure for new capacity**

1. For the construction of new generating capacity, Member States shall adopt an authorisation procedure, which shall be conducted in accordance with objective, transparent and non-discriminatory criteria.
2. Member States shall lay down the criteria for the grant of authorisations for the construction of generating capacity in their territory. In determining appropriate criteria, Member States shall consider:
  - (a) the safety and security of the electricity system, installations and associated equipment;
  - (b) the protection of public health and safety;
  - (c) the protection of the environment;
  - (d) land use and siting;
  - (e) the use of public ground;
  - (f) energy efficiency;
  - (g) the nature of the primary sources;
  - (h) the characteristics particular to the applicant, such as technical, economic and financial capabilities;
  - (i) the contribution of the generating capacity to meeting the overall ~~Community~~ ~~Union~~ target of at least a 20 % share of energy from renewable sources in the ~~Community~~ ~~Union~~ 's gross final consumption of energy in 2020 referred to in Article 3(1) of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources<sup>45</sup>; and
  - (j) ~~the~~ the contribution of generating capacity to reducing emissions.

<sup>45</sup> Directive 2009/28/EC of the European Parliament and the Council of 23 April 2009 on the promotion of the use of energy sources (OJ L 140, 5.6.2009, p. 16).

3. Member States shall ensure that specific authorisation procedures exist for small decentralised and/or distributed generation, which take into account their limited size and potential impact.

Member States may set guidelines for that specific authorisation procedure. National regulatory authorities or other competent national authorities including planning authorities shall review those guidelines and may recommend amendments thereto.

Where Member States have established particular land use permit procedures applying to major new infrastructure projects in generation capacity, Member States shall, where appropriate, include the construction of new generation capacity within the scope of those procedures and shall implement them in a non-discriminatory manner and within an appropriate time-frame.

4. The authorisation procedures and criteria shall be made public. Applicants shall be informed of the reasons for any refusal to grant an authorisation. Those reasons shall be objective, non-discriminatory, well-founded and duly substantiated. Appeal procedures shall be made available to the applicant.

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↓ new

#### Article 9

### Public service obligations

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↓ 2009/72/EC Article 3.1

1. Member States shall ensure, on the basis of their institutional organisation and with due regard to the principle of subsidiarity, that, without prejudice to paragraph 2, electricity undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in electricity, and shall not discriminate between those undertakings as regards either rights or obligations.

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↓ 2009/72/EC (adapted) Article 3.2  
⇒ new

2. Having full regard to the relevant provisions of the Treaty, in particular Article ~~86~~ ~~106~~ thereof, Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection. Such obligations shall be clearly defined, transparent, non-discriminatory, verifiable and shall guarantee equality of access for electricity undertakings of the ~~Community~~ Union to national consumers. ~~In relation to security of supply, energy efficiency/demand-side management and for the fulfilment of environmental goals and goals for energy from renewable sources, as referred to in this paragraph, Member States may introduce the implementation of~~

~~long term planning, taking into account the possibility of third parties seeking access to the system.~~ ⇒ Public service obligations which concern the price setting for the supply of electricity shall comply with the requirements set out in Article 5. ⇐

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↓ 2009/72/EC (adapted) Article 3.6

3. ~~6~~ Where financial compensation, other forms of compensation and exclusive rights which a Member State grants for the fulfilment of the obligations set out in paragraphs ~~2 and 3~~ ⇔ 2 or for the provision of universal service as set out in Article 27 ⇔ are provided, this shall be done in a non-discriminatory and transparent way.
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↓ 2009/72/EC Article 15

4. ~~15~~ Member States shall, upon implementation of this Directive, inform the Commission of all measures adopted to fulfil universal service and public service obligations, including consumer protection and environmental protection, and their possible effect on national and international competition, whether or not such measures require a derogation from this Directive. They shall inform the Commission subsequently every two years of any changes to such measures, whether or not they require a derogation from this Directive.
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↓ 2009/72/EC (adapted) Article 3.14

5. Member States may decide not to apply the provisions of Articles ~~6, 7 and 8~~ ~~7, 8, 32 and/or 34~~ insofar as their application would obstruct the performance, in law or in fact, of the obligations imposed on electricity undertakings in the general economic interest and insofar as the development of trade would not be affected to such an extent as would be contrary to the interests of the ⇔ Union ⇔ ~~Community~~. The interests of the ~~Community~~ ⇔ Union ⇔ include, inter alia, competition with regard to ~~eligible~~ customers in accordance with this Directive and Article ~~86~~ ⇔ 106 ⇔ of the Treaty.

## ~~CHAPTER III~~

### ~~GENERATION~~

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#### ~~Article 8~~

##### ~~Tendering for new capacity~~

~~1. Member States shall ensure the possibility, in the interests of security of supply, of providing for new capacity or energy efficiency/demand-side management measures through a tendering procedure or any procedure equivalent in terms of transparency and non-discrimination, on the basis of published criteria. Those procedures may, however, be launched only where, on the basis of the authorisation procedure, the generating capacity to be built or the energy efficiency/demand-side management measures to be taken are insufficient to ensure security of supply.~~

~~2. Member States may ensure the possibility, in the interests of environmental protection and the promotion of infant new technologies, of tendering for new capacity on the basis of published criteria. Such tendering may relate to new capacity or to energy efficiency/demand-side management measures. A tendering procedure may, however, be launched only where, on the basis of the authorisation procedure the generating capacity to be built or the measures to be taken, are insufficient to achieve those objectives.~~

~~3. Details of the tendering procedure for means of generating capacity and energy efficiency/demand-side management measures shall be published in the Official Journal of the European Union at least six months prior to the closing date for tenders.~~

~~The tender specifications shall be made available to any interested undertaking established in the territory of a Member State so that it has sufficient time in which to submit a tender.~~

~~With a view to ensuring transparency and non-discrimination, the tender specifications shall contain a detailed description of the contract specifications and of the procedure to be followed by all tenderers and an exhaustive list of criteria governing the selection of tenderers and the award of the contract, including incentives, such as subsidies, which are covered by the tender. Those specifications may also relate to the fields referred to in Article 7(2).~~

~~4. In invitations to tender for the requisite generating capacity, consideration must also be given to electricity supply offers with long-term guarantees from existing generating units, provided that additional requirements can be met in this way.~~

~~5. Member States shall designate an authority or a public or private body independent from electricity generation, transmission, distribution and supply activities, which may be a regulatory authority referred to in Article 35(1), to be responsible for the~~

~~organisation, monitoring and control of the tendering procedure referred to in paragraphs 1 to 4 of this Article. Where a transmission system operator is fully independent from other activities not relating to the transmission system in ownership terms, the transmission system operator may be designated as the body responsible for organising, monitoring and controlling the tendering procedure. That authority or body shall take all necessary steps to ensure confidentiality of the information contained in the tenders.~~

↓ new

## CHAPTER III

# CONSUMER EMPOWERMENT AND PROTECTION

↓ 2009/72/EC (adapted)

### Article 10~~3~~

#### ⊗ Basic contractual rights ⊗

- ~~4.~~ Member States shall ensure that all customers are entitled to have their electricity provided by a supplier, subject to the supplier's agreement, regardless of the Member State in which the supplier is registered, as long as the supplier follows the applicable trading ~~and balancing~~ rules. In this regard, Member States shall take all measures necessary to ensure that administrative procedures do not discriminate against supply undertakings already registered in another Member State.

~~5. Member States shall ensure that:~~

- ~~Where a customer, while respecting contractual conditions wishes to change supplier, the change is effected by the operator(s) concerned within three weeks; and~~
- ~~Customers are entitled to receive all relevant consumption data.~~

~~Member States shall ensure that the rights referred to in points (a) and (b) are granted to customers in a non-discriminatory manner as regards cost, effort or time.~~

↓ 2009/72/EC Annex I.1  
(adapted)  
⇒ new

- ~~2.~~ 1. Without prejudice to ⊗ Union ⊗ Community rules on consumer protection, in particular ~~Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts~~ ⇒ Directive 2011/83/EU of the European Parliament and of the Council<sup>46</sup> ⇐ and ~~Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer~~

<sup>46</sup> OJ L 304, 22.11.2011, p. 64–88

~~contracts~~<sup>(47)</sup>, Member States shall ensure ~~the measures referred to in Article 3 are to ensure~~ that customers:

- (a) have a right to a contract with their electricity service provider that specifies:
  - the identity and address of the supplier,
  - the services provided, the service quality levels offered, as well as the time for the initial connection,
  - the types of maintenance service offered,
  - the means by which up-to-date information on all applicable tariffs and maintenance charges may be obtained,
  - the duration of the contract, the conditions for renewal and termination of services and of the contract ~~and whether withdrawal from the contract without charge is permitted~~,
  - any compensation and the refund arrangements which apply if contracted service quality levels are not met, including inaccurate and delayed billing,
  - the method of initiating procedures for settlement of disputes in accordance with Article 26 point (f),
  - information relating to consumer rights, including on the complaint handling and all of the information referred to in this point, clearly communicated through billing or the electricity undertaking's web site.

Conditions shall be fair and well-known in advance. In any case, this information should be provided prior to the conclusion or confirmation of the contract. Where contracts are concluded through intermediaries, the information relating to the matters set out in this point shall also be provided prior to the conclusion of the contract;

- (b) are given adequate notice of any intention to modify contractual conditions and are informed about their right ~~of withdrawal~~ ⇒ to dissolve the contract ⇐ when the notice is given. ~~Service providers~~ ⇒ Suppliers ⇐ shall notify their ~~subscribers~~ ⇒ customers ⇐ directly of any ~~increase~~ ⇒ adjustment ⇐ in ~~charges~~ ⇒ the supply price as well as of the reasons and preconditions for the adjustment and its scope ⇐, at an appropriate time no later than one normal billing period ~~after the increase~~ ⇒ before the adjustment ⇐ comes into effect in a transparent and comprehensible manner. Member States shall ensure that customers are free to withdraw from contracts if they do not accept the new ⇒ contractual ⇐ conditions ⇒ or adjustments in the supply price ⇐ notified to them by their electricity ⇒ supplier ⇐ ~~service provider~~;
- (c) receive transparent information on applicable prices and tariffs and on standard terms and conditions, in respect of access to and use of electricity services;
- (d) are offered a wide choice of payment methods, which do not unduly discriminate between customers. ~~Prepayment systems shall be fair and adequately reflect likely consumption~~. Any difference in ⇒ charges related to payment methods shall reflect the relevant costs incurred by the supplier ⇐ ~~terms and conditions shall reflect the costs to the supplier of the different payment systems~~.

<sup>47</sup> OJ L 95, 21.4.1993, p. 29–34

- (e) ~~Prepayment systems shall~~ ⇒ are not placed at an excessive disadvantage in comparison to the average market price by the prepayment systems. ⇐
- (f) ⇒ are offered fair and transparent ⇐ general terms and conditions ~~shall be fair and transparent.~~ They ⇒ general terms and conditions ⇐ shall be given in clear and comprehensible language and shall not include non-contractual barriers to the exercise of customers' rights, for example excessive contractual documentation. Customers shall be protected against unfair or misleading selling methods;
- ~~(e) are not charged for changing supplier;~~
- (g) ~~(f) benefit from transparent, simple and inexpensive procedures for dealing with their complaints. In particular, all consumers shall have the right to a good standard of service and complaint handling by their electricity service provider. Such out-of-court dispute settlements procedures shall enable disputes to be settled fairly and promptly, preferably within three months, with provision, where warranted, for a system of reimbursement and/or compensation. They should, wherever possible, be in line with the principles set out in Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (3);~~ ⇒ have the right to a good standard of service and complaint handling by their electricity service provider. Electricity service providers shall handle complaints in a simple, fair and prompt manner. ⇐
- (h) when having access to universal service under the provisions adopted by Member States pursuant to Article ~~27~~ ~~3(3)~~, are informed about their rights regarding universal service;
- ~~h) have at their disposal their consumption data, and shall be able to, by explicit agreement and free of charge, give any registered supply undertaking access to its metering data. The party responsible for data management shall be obliged to give those data to the undertaking. Member States shall define a format for the data and a procedure for suppliers and consumers to have access to the data. No additional costs shall be charged to the consumer for that service;~~
- ~~(i) are properly informed of actual electricity consumption and costs frequently enough to enable them to regulate their own electricity consumption. That information shall be given by using a sufficient time frame, which takes account of the capability of customer's metering equipment and the electricity product in question. Due account shall be taken of the cost efficiency of such measures. No additional costs shall be charged to the consumer for that service;~~
- (i) ⇒ are given adequate information on alternatives to disconnection sufficiently in advance before the planned disconnection. These alternatives may refer to sources of support to avoid disconnection, alternative payment plans, debt management advice or disconnection moratorium and should not constitute an extra cost to customers. ⇐
- (j) ~~(i)~~ receive a final closure account following any change of electricity supplier no later than six weeks after the change of supplier has taken place.

↓ new

#### Article 11

### Entitlement to a dynamic price contract

1. Member States shall ensure that every final customer is entitled, on request, to a dynamic electricity price contract by his supplier.
2. Member States shall ensure that final customers are fully informed by the suppliers of the opportunities and risks of such dynamic electricity price contract.
3. Member States, through their National Regulatory Authorities, shall monitor and report annually, for at least a ten-year period after such contracts become available, on the main developments of such contracts including market offers, the impact on consumers' bills and specifically the level of price volatility, and on consumers' sensitivity to the level of financial risk.

#### *Article 12*

### **Right to switch supplier and rules on switching-related fees**

1. Member States shall ensure that a customer wishing to change supplier, while respecting contractual conditions, is entitled to such change within three weeks.
2. Member States shall ensure that customers are not charged any switching-related fees.
3. By way of derogation from paragraph 2, Member States may choose to permit suppliers to charge contract termination fees to customers willingly terminating fixed term supply contracts before their maturity. Such fees may only be charged if customers receive a demonstrable advantage from these contracts. In addition, such fees shall not exceed the direct economic loss to the supplier of the customer terminating the contract, including the cost of any bundled investments or services already provided to the customer as part of the contract.
4. Member States shall ensure that the right to switch suppliers is granted to customers in a non-discriminatory manner as regards cost, effort or time.

#### *Article 13*

### **Contract with an aggregator**

1. Member States shall ensure that, where a final customer wishes to conclude a contract with an aggregator, such engagement shall not require the consent of the final customer's supplier.
2. Member States shall ensure that a final customer wishing to terminate the contract with an aggregator, while respecting contractual conditions, is entitled to such termination within three weeks.
3. Member States shall ensure that final customers terminating a fixed term contract with an aggregator before its maturity are not charged any termination fee that exceeds the direct economic loss to the aggregator, including the cost of any bundled investments or services already provided to the final customer as part of the contract.
4. Member States shall ensure that final customers are entitled to receive all relevant demand response data or data on supplied and sold electricity at least once per year.

5. Member States shall ensure that the rights referred to in paragraphs 1, 2, 3 and 4 are granted to final customers in a non-discriminatory manner as regards cost, effort or time.

#### *Article 14*

#### **Comparison tools**

1. Member States shall ensure that customers have access, free of charge, to at least one tool comparing the offers of suppliers that meets the certification criteria set out in Annex I. The comparison tools may be operated by any entity, including private companies and public authorities or bodies. Customers should be informed of the availability of such tools.
2. Member States shall appoint an independent competent authority responsible for certifying comparison tools and ensuring that certified comparison tools continue to meet the criteria set out in Annex I.
3. Member States may require the comparison tools referred to in paragraph 1 to include comparative determinants relating to the nature of the services offered by the suppliers.
4. Any tool comparing the offers of suppliers shall be eligible to apply for certification in accordance with this Article on a voluntary and non-discriminatory basis.

#### *Article 15*

#### **Active customers**

1. Member States shall ensure that final customers:
  - (a) are entitled to generate, store, consume and sell self-generated electricity in all organised markets either individually or through aggregators without being subject to disproportionately burdensome procedures and charges that are not cost reflective;
  - (b) are subject to cost reflective, transparent and non-discriminatory network charges, accounting separately for the electricity fed into the grid and the electricity consumed from the grid, in line with Article 59.
- 1.1. The energy installation required for the activities of the active customer may be managed by a third party for installation, operation, including metering and maintenance.

#### *Article 16*

#### **Local energy communities**

1. Member States shall ensure that local energy communities:
  - (a) are entitled to own, establish, or lease community networks and to autonomously manage them;
  - (b) can access all organised markets either directly or through aggregators or suppliers in a non-discriminatory manner;

- (c) benefit from a non-discriminatory treatment with regard to their activities, rights and obligations as final customers, generators, distribution system operators or aggregators;
  - (d) are subject to fair, proportionate and transparent procedures and cost reflective charges;
  - (e) where relevant, may conclude agreements with the distribution system operator to which their network is connected on the operation of the community network
2. Member States shall provide an enabling regulatory framework that ensures that:
- (a) participation in a local energy community is voluntary;
  - (b) shareholders or members of a local energy community shall not lose their rights as household customers or active customers;
  - (c) shareholders or members are allowed to leave a local energy community; in such cases Article 12 shall apply;
  - (d) Article 8 paragraph 3 applies to generating capacity installed by local energy communities as long as such capacity can be considered small decentralised or distributed generation;
  - (e) provisions of Chapter IV apply to local energy communities that perform activities of a distribution system operator;
  - (f) where relevant, a local energy community may conclude an agreement with a distribution system operator to which their network is connected on the operation of the local energy community's network;
  - (g) where relevant system users that are not shareholders or members of the local energy community connected to the distribution network operated by a local energy community shall be subject to fair and cost-reflective network charges. If such system users and local energy communities cannot reach an agreement on network charges, both parties may request the regulatory authority to determine the level of network charges in a relevant decision;
  - (h) where relevant local energy communities are subject to appropriate network charges at the connection points between the community network and the distribution network outside the energy community. Such network charges shall account separately for the electricity fed into distribution network and the electricity consumed from the distribution network outside the local energy community in line with Article 59 paragraph 8.

#### *Article 17*

#### **Demand response**

1. Member States shall ensure that national regulatory authorities encourage final customers, including those offering demand response through aggregators, to participate alongside generators in a non-discriminatory manner in all organised markets.
2. Member States shall ensure that transmission system operators and distribution system operators when procuring ancillary services, treat demand response providers, including independent aggregators, in a non-discriminatory manner, on the basis of their technical capabilities.

3. Member States shall ensure that their regulatory framework encourages the participation of aggregators in the retail market and that it contains at least the following elements:
  - (a) the right for each aggregator to enter the market without consent from other market participants;
  - (b) transparent rules clearly assigning roles and responsibilities to all market participants;
  - (c) transparent rules and procedures for data exchange between market participants that ensure easy access to data on equal and non-discriminatory terms while fully protecting commercial data;
  - (d) aggregators shall not be required to pay compensation to suppliers or generators;
  - (e) a conflict resolution mechanism between market participants.
4. In order to ensure that balancing costs and benefits induced by aggregators are fairly assigned to market participants, Member States may exceptionally allow compensation payments between aggregators and balancing responsible parties. Such compensation payments must be limited to situations where one market participant induces imbalances to another market participant resulting in a financial cost.

Such exceptional compensation payments shall be subject to approval by the national regulatory authorities and monitored by the Agency.
5. Member States shall ensure access to and foster participation of demand response, including through independent aggregators in all organised markets. Member States shall ensure that national regulatory authorities or, where their national legal system so requires, transmission system operators and distribution system operators in close cooperation with demand service providers and final customers define technical modalities for participation of demand response in these markets on the basis of the technical requirements of these markets and the capabilities of demand response. Such specifications shall include the participation of aggregators.

#### *Article 18*

### **Billing and billing information**

1. Member States shall ensure that bills fulfil the minimum requirements for billing and billing information as set out in Annex II. The information contained in bills shall be correct, clear, concise and presented in a manner that facilitates comparison by consumers.
2. Member States ensure that final customers receive all their bills and billing information for energy consumption free of charge and that bills are clear, accurate and easy to understand.
3. Billing shall take place on the basis of actual consumption at least once a year. Billing information shall be made available at least once every three months, upon request or where the final customers have opted to receive electronic billing or else twice a year.

This obligation may be fulfilled by a system of regular self-reading by the final customers whereby they communicate readings from their meter to the supplier.

Only when the final customer has not been provided a meter reading for a given billing interval may billing be based on estimated consumption or a flat rate.

4. Where final customers have meters that allow remote reading by the operator, accurate billing information based on actual consumption shall be provided at least once a month.
5. Member States shall require that, to the extent that information on the energy billing and historical consumption is available, it is made available, at the request of the final customer, to a supplier or service provider designated by the consumer in accordance with point 3 of Annex II.
6. Member States shall ensure that final customers are offered the option of electronic billing information and bills and that they receive, on request, a clear and understandable explanation of how their bill was derived, especially where bills are not based on actual consumption.
7. Member States may lay down that, at the request of the final customers, the information contained in these bills shall not be considered to constitute a request for payment. In such cases, Member States shall ensure that suppliers offer flexible arrangements for payments.
8. Member States shall require that information and estimates for energy costs are provided to final customers on demand in a timely manner and in an easily understandable format.

↓ 2009/72/EC (adapted) Article 3.10

~~10. Member States shall implement measures to achieve the objectives of social and economic cohesion and environmental protection, which shall include energy efficiency/demand side management measures and means to combat climate change, and security of supply, where appropriate. Such measures may include, in particular, the provision of adequate economic incentives, using, where appropriate, all existing national and Community tools, for the maintenance and construction of the necessary network infrastructure, including interconnection capacity.~~

↓ 2009/72/EC (adapted)  
⇒ new

*Article 319*

⊗ Smart metering ⊗

1. ~~10~~ In order to promote energy efficiency ⇒ and empower customers ⇐, Member States or, where a Member State has so provided, the regulatory authority shall strongly recommend that electricity undertakings ⇒ and aggregators ⇐ optimise the use of electricity, ~~for example inter alia~~ by providing energy management services, developing innovative pricing formulas, or introducing ⇒ interoperable ⇐ ~~intelligent~~ ⇒ smart ⇐ metering systems or smart grids, where appropriate.

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↓ new

2. Member States shall ensure the implementation of smart metering systems in their territories that shall assist the active participation of customers in the electricity market. Such implementation may be subject to a cost-benefit assessment which shall be undertaken according to the principles laid down in Annex III.
3. Member States that proceed with deployment shall adopt and publish the minimum functional and technical requirements for the smart metering systems to be rolled out in their territories in line with the provisions laid down in Article 20 and Annex III. Member States shall ensure the interoperability of these smart metering systems as well as their connectivity with consumer energy management platforms. To this respect, Member States shall have due regard to the use of relevant available standards including those enabling interoperability, best practices and the importance of the development of the internal market in electricity.
4. Member States that proceed with smart metering deployment shall ensure that final customers contribute to the associated costs of the roll-out in a transparent and non-discriminatory manner. Member States shall regularly monitor this deployment in their territories to track the evolution of costs and benefits for the whole value chain, including the delivery of net benefits to consumers.
5. When the deployment of smart metering is negatively assessed as a result of cost-benefit assessment referred to in paragraph 2, Member States shall ensure that this assessment is revised periodically in response to changes in the underlying assumptions and to technology and market developments. Member States shall notify to the responsible Commission services the outcome of their updated economic assessment as it becomes available.

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↓ new

#### *Article 20*

### **Smart metering functionalities**

Where smart metering is positively assessed as a result of cost-benefit assessment referred to in Article 19(2), or systematically rolled out, Member States shall implement smart metering systems in accordance with European standards, the provisions in Annex III, and in line with the following principles:

- (a) the metering systems accurately measure actual electricity consumption and provide to final customers information on actual time of use. That information shall be made easily available and visualised to final customers at no additional cost and at near-real time in order to support automated energy efficiency programmes, demand response and other services;
- (b) the security of the smart metering systems and data communication is ensured in compliance with relevant European Union security legislation having due regard of the best available techniques for ensuring the highest level of cybersecurity protection;

- (c) the privacy and data protection of final customers is ensured in compliance with relevant Union data protection and privacy legislation;
  - (d) meter operators shall ensure that the meter or meters of active customers who self-generate electricity can account for electricity put into the grid from the active customers' premises;
  - (e) if final customers request it, metering data on their electricity input and off-take shall be made available to them, via a local standardised communication interface and/or remote access, or to a third party acting on their behalf, in an easily understandable format as provided for in Article 24, allowing them to compare deals on a like-for-like basis;
  - (f) appropriate advice and information shall be given to final customers at the time of installation of smart meters, in particular about their full potential with regard to meter reading management and the monitoring of energy consumption, and on the collection and processing of personal data in accordance with the applicable Union data protection legislation;
  - (g) smart metering systems shall enable final customers to be metered and settled at the same time resolution as the imbalance period in the national market.
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↓ new

#### *Article 21*

#### **Entitlement to a smart meter**

1. Where smart metering is negatively assessed as a result of cost-benefit assessment referred to in Article 19(2), nor systematically rolled out, Member States shall ensure that every final customer is entitled to have installed or, where applicable, to have upgraded, on request and under fair and reasonable conditions, a smart meter that complies with the following requirements:
  - (a) is equipped where technically feasible with functionalities referred to in Article 20, or with a minimum set of functionalities to be defined and published by Member States at national level and in line with the provisions in Annex III,
  - (b) is interoperable and able to deliver the desired connectivity of the metering infrastructure with consumer energy management systems in near-real time.
2. In the context of a customer request for a smart meter pursuant to paragraph 1, Member States or, where a Member State has so provided, the designated competent authorities shall:
  - (a) ensure that the offer to the final customer requesting the installation of a smart meter explicitly states and clearly describes:
    - the functions and interoperability that can be supported by the smart meter and the services that are feasible as well as the benefits that can be realistically attained by having that smart meter at that moment in time;
    - any associated costs to be borne by the final customer;

- (b) ensure that it is installed within a reasonable time and no later than three months after the customer's request;
- (c) regularly, and at least every two years, review and make publicly available the associated costs, and trace their evolution as a result of technology developments and potential metering system upgrades.

#### *Article 22*

### **Conventional metering**

1. Where final customers do not have smart meters, Member States shall ensure that they are provided with individual conventional meters that accurately measure their actual consumption.
2. Member States shall ensure that final customers are able to easily read their conventional meters, either directly or indirectly through an on-line interface or through another appropriate interface.

#### *Article 23*

### **Data management**

1. When setting up the rules regarding the management and exchange of data, Member States or, where a Member State has so provided, the designated competent authorities shall specify the eligible parties which may have access to data of the final customer with their explicit consent in accordance with Regulation (EU) 2016/679. For the purpose of this Directive, data shall include metering and consumption data as well as data required for consumer switching. Eligible parties shall include at least customers, suppliers, transmission and distribution system operators, aggregators, energy service companies, and other parties which provide energy or other services to customers.
2. Member States shall organise the management of data in order to ensure efficient data access and exchange. Independently of the data management model applied in each Member State, the party or parties responsible for data management shall provide to any eligible party with the explicit consent of the final customer, access to the data of the final customer. Eligible parties should have at their disposal in a non-discriminatory manner and simultaneously the requested data. Access to data shall be easy, while relevant procedures shall be made publicly available.
3. Member States or, where a Member State has so provided, the designated competent authorities shall authorise and certify the parties which are managing data in order to ensure that these parties comply with the requirements of this Directive. Without prejudice to the tasks of the data protection officers under Regulation (EU) 2016/679<sup>48</sup>, Member States may decide to require from parties managing data the appointment of compliance officers who shall be responsible for monitoring the implementation of measures taken by the relevant parties for ensuring non-

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<sup>48</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1)

discriminatory access to data and compliance with the requirements of this Directive. Compliance officers or bodies designated pursuant Article 35(2)(d) may be required to fulfil the obligations of this paragraph.

*Article 24*  
**Data format**

1. Member States shall define a common data format and a transparent procedure for eligible parties to have access to the data listed under paragraph 1 of Article 23, in order to promote competition in the retail market and avoid excessive administrative costs for the eligible parties.
2. The Commission, by means of implementing acts adopted in accordance with the advisory procedure referred to in Article 68, shall determine a common European data format and non-discriminatory and transparent procedures for accessing the data, listed under paragraph 1 of Article 23, that will replace national data format and procedure adopted by Member States in accordance with paragraph 1. Member States shall ensure that market participants apply a common European data format.
3. No additional costs shall be charged to final customers for access to their data. Member States shall be responsible for setting the relevant costs for access to data by eligible parties. Regulated entities which provide data services shall not profit from that activity.

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↓ 2009/72/EC (adapted) recital 12

*Article 25*  
**Single points of contact**

~~12~~ Member States shall ensure the provision of single points of contact to provide customers with all necessary information concerning their rights, current legislation and the means of dispute settlement available to them in the event of a dispute. Such contact points may be part of general consumer information points.

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↓ 2009/72/EC (adapted)

~~16. The Commission shall establish, in consultation with relevant stakeholders including Member States, the national regulatory authorities, consumer organisations, electricity undertakings and, building on the progress achieved to date, social partners, a clear and concise energy consumer checklist of practical information relating to energy consumer rights. Member States shall ensure that electricity suppliers or distribution system operators, in cooperation with the regulatory authority, take the necessary steps to provide their consumers with a copy of the energy consumer checklist and ensure that it is made publicly available.~~

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↓ 2009/72/EC (adapted)  
⇒ new

*Article ~~3~~ 26*

**⊗ Right to out-of-court dispute settlement ⊗**

~~13.~~ Member States shall ensure that ~~an independent mechanism such as an energy ombudsman or a consumer body is in place in order to ensure efficient treatment of complaints and out-of-court dispute settlements.~~ ⇒ customers have access to simple, fair, transparent, independent, effective and efficient out-of-court dispute resolution mechanisms for the settlement of disputes concerning rights and obligations established under this Directive. Where the costumer is a consumer within the meaning of the Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC <sup>49</sup>, such out-of-court mechanisms shall comply with the quality requirements established in Directive 2013/11/EU and provide, where warranted, for a system of reimbursement and/or compensation ⇐.

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↓ 2009/72/EC  
⇒ new

*Article ~~3~~ 27*

**⇒ Universal service ⇐**

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↓ 2009/72/EC (adapted)

- ~~3.~~ Member States shall ensure that all household customers, and, where Member States deem it appropriate, small enterprises (namely enterprises with fewer than 50 occupied persons and an annual turnover or balance sheet not exceeding EUR 10 million), enjoy universal service, that is the right to be supplied with electricity of a specified quality within their territory at ⊗ competitive ⊗ ~~reasonable,~~ easily and clearly comparable, transparent and non-discriminatory prices. To ensure the provision of universal service, Member States may appoint a supplier of last resort. Member States shall impose on distribution companies an obligation to connect customers to their network under terms, conditions and tariffs set in accordance with the procedure laid down in Article 59(6) ~~37(6).~~ ~~Nothing in this~~ Directive shall ⊗ not ⊗ prevent Member States from strengthening the market position of the household, small and medium-sized consumers by promoting the possibilities of voluntary aggregation of representation for that class of consumers.
- The first ~~sub~~ paragraph shall be implemented in a transparent and non-discriminatory way and shall not impede ~~the opening of the market~~ ⊗ the free choice of supplier ⊗ provided for in Article ~~4~~ 33.

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<sup>49</sup> OJ L 165, 18.6.2013, p. 63–79

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↓ 2009/72/EC  
⇒ new

*Article ~~28~~ 28*

⇒ **Vulnerable customers** ⇐

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↓ 2009/72/EC

1. ~~7.~~ Member States shall take appropriate measures to protect final customers and shall, in particular, ensure that there are adequate safeguards to protect vulnerable customers. In this context, each Member State shall define the concept of vulnerable customers which may refer to energy poverty and, inter alia, to the prohibition of disconnection of electricity to such customers in critical times. Member States shall ensure that rights and obligations linked to vulnerable customers are applied. In particular, they shall take measures to protect customers in remote areas. They shall ensure high levels of consumer protection, particularly with respect to transparency regarding contractual terms and conditions, general information and dispute settlement mechanisms. ~~Member States shall ensure that the eligible customer is in fact able easily to switch to a new supplier. As regards at least household customers, those measures shall include those set out in Annex I.~~
  2. ~~8.~~ Member States shall take appropriate measures, such as formulating national energy action plans, providing benefits in social security systems to ensure the necessary electricity supply to vulnerable customers, or providing for support for energy efficiency improvements, to address energy poverty where identified, including in the broader context of poverty. Such measures shall not impede the effective opening of the market set out in Article ~~4 33~~ or market functioning and shall be notified to the Commission, where relevant, in accordance with the provisions of ~~Article 9(4) paragraph 15 of this Article~~. Such notification may also include measures taken within the general social security system.
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↓ new

*Article 29*

**Energy poverty**

Member States shall define a set of criteria for the purposes of measuring energy poverty. Member States shall continuously monitor the number of households in energy poverty and shall report on the evolution of energy poverty and measures taken to prevent it to the Commission every two years as part of their Integrated National Energy and Climate Progress Reports in accordance with Article 21 of [Governance Regulation as proposed by COM(2016)759].

~~Article 4~~

**Monitoring of security of supply**

~~Member States shall ensure the monitoring of security of supply issues. Where Member States consider it appropriate, they may delegate that task to the regulatory authorities referred to in Article 35. Such monitoring shall, in particular, cover the balance of supply and demand on the national market, the level of expected future demand and envisaged additional capacity being planned or under construction, and the quality and level of maintenance of the networks, as well as measures to cover peak demand and to deal with shortfalls of one or more suppliers. The competent authorities shall publish every two years, by 31 July, a report outlining the findings resulting from the monitoring of those issues, as well as any measures taken or envisaged to address them and shall forward that report to the Commission forthwith.~~

~~Article 5~~

**Technical rules**

~~The regulatory authorities where Member States have so provided or Member States shall ensure that technical safety criteria are defined and that technical rules establishing the minimum technical design and operational requirements for the connection to the system of generating installations, distribution systems, directly connected consumers' equipment, interconnector circuits and direct lines are developed and made public. Those technical rules shall ensure the interoperability of systems and shall be objective and non-discriminatory. The Agency may make appropriate recommendations towards achieving compatibility of those rules, where appropriate. Those rules shall be notified to the Commission in accordance with Article 8 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services <sup>(16)</sup>.~~

~~Article 6~~

**Promotion of regional cooperation**

- ~~1. Member States as well as the regulatory authorities shall cooperate with each other for the purpose of integrating their national markets at one or more regional levels, as a first step towards the creation of a fully liberalised internal market. In particular, the regulatory authorities where Member States have so provided or Member States shall promote and facilitate the cooperation of transmission system operators at a regional level, including on cross-border issues, with the aim of creating a competitive internal market in electricity, foster the consistency of their legal, regulatory and technical framework and facilitate integration of the isolated systems forming electricity islands that persist in the Community. The geographical areas covered by such regional cooperation shall include cooperation in geographical areas defined in accordance with Article 12(3) of Regulation (EC) No 714/2009. Such cooperation may cover other geographical areas.~~
- ~~2. The Agency shall cooperate with national regulatory authorities and transmission system operators to ensure the compatibility of regulatory frameworks between the regions with the aim of creating a competitive internal market in electricity. Where~~

~~the Agency considers that binding rules on such cooperation are required, it shall make appropriate recommendations.~~

~~3. Member States shall ensure, through the implementation of this Directive, that transmission system operators have one or more integrated system(s) at regional level covering two or more Member States for capacity allocation and for checking the security of the network.~~

~~4. Where vertically integrated transmission system operators participate in a joint undertaking established for implementing such cooperation, the joint undertaking shall establish and implement a compliance programme which sets out the measures to be taken to ensure that discriminatory and anticompetitive conduct is excluded. That compliance programme shall set out the specific obligations of employees to meet the objective of excluding discriminatory and anticompetitive conduct. It shall be subject to the approval of the Agency. Compliance with the programme shall be independently monitored by the compliance officers of the vertically integrated transmission system operators.~~

## **CHAPTER IV**

### **DISTRIBUTION SYSTEM OPERATION**

#### *Article 30*

#### **Designation of distribution system operators**

Member States shall designate or shall require undertakings that own or are responsible for distribution systems to designate, for a period of time to be determined by Member States having regard to considerations of efficiency and economic balance, one or more distribution system operators. ~~Member States shall ensure that distribution system operators act in accordance with Articles 25, 26 and 27.~~

#### *Article 31*

#### **Tasks of distribution system operators**

1. The distribution system operator shall be responsible for ensuring the long-term ability of the system to meet reasonable demands for the distribution of electricity, for operating, maintaining and developing under economic conditions a secure, reliable and efficient electricity distribution system in its area with due regard for the environment and energy efficiency.
2. In any event, it must not discriminate between system users or classes of system users, particularly in favour of its related undertakings.
3. The distribution system operator shall provide system users with the information they need for efficient access to, including use of, the system.
4. A Member State may require the distribution system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources ~~or waste~~ or producing combined heat and power, ⇨ in accordance with Article 11 [recast of Regulation 714/2009 as proposed by COM(2016)861/2] ⇐.

5. Each distribution system operator shall procure the energy it uses to cover energy losses and ~~reserve capacity~~ ⇨ the non-frequency ancillary services ⇩ in its system according to transparent, non-discriminatory and market based procedures, whenever it has such a function. ~~That requirement shall be without prejudice to using electricity acquired under contracts concluded before 1 January 2002.~~ ⇨ Unless justified by a cost-benefit analysis, the procurement of non-frequency ancillary services by a distribution system operator shall be transparent, non-discriminatory and market-based ensuring effective participation of all market participants including renewable energy sources, demand response, energy storage facilities and aggregators, in particular by requiring regulatory authorities or distribution system operators in close cooperation with all market participants, to define technical modalities for participation in these markets on the basis of the technical requirements of these markets and the capabilities of all market participants ⇩.

~~6. Where a distribution system operator is responsible for balancing the distribution system, rules adopted by it for that purpose shall be objective, transparent and non-discriminatory, including rules for the charging of system users of their networks for energy imbalance. Terms and conditions, including rules and tariffs, for the provision of such services by distribution system operators shall be established in accordance with Article 37(6) in a non-discriminatory and cost-reflective way and shall be published.~~

~~7. When planning the development of the distribution network, energy efficiency/demand side management measures or distributed generation that might supplant the need to upgrade or replace electricity capacity shall be considered by the distribution system operator.~~

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⇩ new

#### Article 32

### **Tasks of distribution system operators in the use of flexibility**

1. Member States shall provide the necessary regulatory framework to allow and incentivise distribution system operators to procure services in order to improve efficiencies in the operation and development of the distribution system, including local congestion management. In particular, regulatory frameworks shall enable distribution system operators to procure services from resources such as distributed generation, demand response or storage and consider energy efficiency measures, which may supplant the need to upgrade or replace electricity capacity and which support the efficient and secure operation of the distribution system. Distribution system operators shall procure these services according to transparent, non-discriminatory and market based procedures.

Distribution system operators shall define standardised market products for the services procured ensuring effective participation of all market participants including renewable energy sources, demand response, and aggregators. Distribution system operators shall exchange all necessary information and coordinate with transmission system operators in order to ensure the optimal utilisation of resources, ensure the secure and efficient operation of the system and facilitate market development.

Distribution system operators shall be adequately remunerated for the procurement of such services in order to recover at least the corresponding expenses, including the necessary information and communication technologies expenses, including expenses which correspond to the necessary information and communication infrastructure.

2. The development of a distribution system shall be based on a transparent network development plan that distribution system operators shall submit every two years to the regulatory authority. The network development plan shall contain the planned investments for the next five to ten years, with particular emphasis on the main distribution infrastructure which is required in order to connect new generation capacity and new loads including re-charging points for electric vehicles. The network development plan shall also demonstrate the use of demand response, energy efficiency, energy storage facilities or other resources that distribution system operator is using as an alternative to system expansion.

The regulatory authority shall consult all current or potential system users on the network development plan. The regulatory authority shall publish the result of the consultation process on the proposed investments.

Member States may decide not to apply this obligation to integrated undertakings serving less than 100 000 connected consumers, or serving isolated systems.

### *Article 33*

#### **Integration of electro-mobility into the electricity network**

1. Member States shall provide the necessary regulatory framework to facilitate the connection of publicly accessible and private recharging points to the distribution networks. Member States shall ensure that distribution system operators cooperate on a non-discriminatory basis with any undertaking that owns, develops, operates or manages recharging points for electric vehicles, including with regard to connection to the grid.
2. Member States may allow distribution system operators to own, develop, manage or operate recharging points for electric vehicles only if the following conditions are fulfilled:
  - (a) other parties, following an open and transparent tendering procedure, have not expressed their interest to own, develop, manage or operate recharging points for electric vehicles;
  - (b) the regulatory authority has granted its approval.
3. Articles 35 and 56 shall apply to distribution system operators engaged in ownership, development, operation or management of recharging points.
4. Member States shall perform at regular intervals or at least every five years a public consultation in order to re-assess the potential interest of market parties to own, develop, operate or manage recharging points for electric vehicles. In case the public consultation indicates that third parties are able to own, develop, operate or manage such points, Member States shall ensure that distribution system operators' activities in this regard are phased-out.

**Tasks of distribution system operators in data management**

Member States shall ensure that all eligible parties have non-discriminatory access to data under clear and equal terms. In Member States where smart metering systems have been implemented according to Article 19 and distribution system operators are involved in data management, compliance programmes as set in Article 35(2)(d) shall include specific measures in order to exclude discriminatory access to data from eligible parties as provided for in Article 23. Where distribution system operators are not subject to Article 35(1), (2) and (3), Member States shall take all necessary measures to ensure that the vertically integrated undertaking do not have privileged access to data for the conduct of its supply activity.

↓ 2009/72/EC

Article ~~35~~ 26

**Unbundling of distribution system operators**

1. Where the distribution system operator is part of a vertically integrated undertaking, it shall be independent at least in terms of its legal form, organisation and decision making from other activities not relating to distribution. Those rules shall not create an obligation to separate the ownership of assets of the distribution system operator from the vertically integrated undertaking.
2. In addition to the requirements under paragraph 1, where the distribution system operator is part of a vertically integrated undertaking, it shall be independent in terms of its organisation and decision-making from the other activities not related to distribution. In order to achieve this, the following minimum criteria shall apply:
  - (a) those persons responsible for the management of the distribution system operator must not participate in company structures of the integrated electricity undertaking responsible, directly or indirectly, for the day-to-day operation of the generation, transmission or supply of electricity;
  - (b) appropriate measures must be taken to ensure that the professional interests of the persons responsible for the management of the distribution system operator are taken into account in a manner that ensures that they are capable of acting independently;
  - (c) the distribution system operator must have effective decision-making rights, independent from the integrated electricity undertaking, with respect to assets necessary to operate, maintain or develop the network. In order to fulfil those tasks, the distribution system operator shall have at its disposal the necessary resources including human, technical, physical and financial resources. This should not prevent the existence of appropriate coordination mechanisms to ensure that the economic and management supervision rights of the parent company in respect of return on assets, regulated indirectly in accordance with Article ~~37~~59(6), in a subsidiary are protected. In particular, this shall enable the parent company to approve the annual financial plan, or any equivalent instrument, of the distribution system operator and to set global limits on the levels of indebtedness of its subsidiary. It shall not permit the parent company to give instructions regarding day-to-day operations, nor with respect to individual decisions concerning the construction or upgrading of

distribution lines, that do not exceed the terms of the approved financial plan, or any equivalent instrument; and

- (d) the distribution system operator must establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored. The compliance programme shall set out the specific obligations of employees to meet that objective. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme, the compliance officer of the distribution system operator, to the regulatory authority referred to in Article ~~35~~57(1) and shall be published. The compliance officer of the distribution system operator shall be fully independent and shall have access to all the necessary information of the distribution system operator and any affiliated undertaking to fulfil his task.
3. Where the distribution system operator is part of a vertically integrated undertaking, the Member States shall ensure that the activities of the distribution system operator are monitored by regulatory authorities or other competent bodies so that it cannot take advantage of its vertical integration to distort competition. In particular, vertically integrated distribution system operators shall not, in their communication and branding, create confusion in respect of the separate identity of the supply branch of the vertically integrated undertaking.
4. Member States may decide not to apply paragraphs 1, 2 and 3 to integrated electricity undertakings serving less than 100000 connected customers, or serving small isolated systems.

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↓ new

#### Article 36

### **Ownership of storage facilities**

1. Distribution system operators shall not be allowed to own, develop, manage or operate energy storage facilities.
2. By way of derogation from paragraph 1, Member States may allow distribution system operators to own, develop, manage or operate storage facilities only if the following conditions are fulfilled:
- (a) other parties, following an open and transparent tendering procedure, have not expressed their interest to own, develop, manage or operate storage facilities;
- (b) such facilities are necessary for the distribution system operators to fulfil its obligations under this regulation for the efficient, reliable and secure operation of the distribution system; and
- (c) the regulatory authority has assessed the necessity of such derogation taking into account the conditions under points (a) and (b) of this paragraph and has granted its approval.
3. Articles 35 and Article 56 shall apply to distribution system operators engaged in ownership, development, operation or management of energy storage facilities.

4. Regulatory authorities shall perform at regular intervals or at least every five years a public consultation in order to re-assess the potential interest of market parties to invest, develop, operate or manage energy storage facilities. In case the public consultation indicates that third parties are able to own, develop, operate or manage such facilities, Member States shall ensure that distribution system operators' activities in this regard are phased-out.

↓ 2009/72/EC (adapted)

*Article ~~37~~ 27*

**Confidentiality obligation of distribution system operators**

Without prejudice to Article ~~55~~ 30 or any other legal duty to disclose information, the distribution system operator must preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its business, and shall prevent information about its own activities which may be commercially advantageous being disclosed in a discriminatory manner.

*Article ~~38~~ 28*

**Closed distribution systems**

1. Member States may provide for national regulatory authorities or other competent authorities to classify a system which distributes electricity within a geographically confined industrial, commercial or shared services site and does not, without prejudice to paragraph 4, supply household customers, as a closed distribution system if:
  - (a) for specific technical or safety reasons, the operations or the production process of the users of that system are integrated; or
  - (b) that system distributes electricity primarily to the owner or operator of the system or their related undertakings.
2. Member States may provide for national regulatory authorities to exempt the operator of a closed distribution system from:
  - (a) the requirement under Article 31 ~~25~~(5) to procure the energy it uses to cover energy losses and reserve capacity in its system according to transparent, non-discriminatory and market based procedures;
  - (b) the requirement under Article 6 ~~32~~(1) that tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 59 (1) ~~37~~.
3. Where an exemption is granted under paragraph 2, the applicable tariffs, or the methodologies underlying their calculation, shall be reviewed and approved in accordance with Article 59 paragraph 1 ~~37~~ upon request by a user of the closed distribution system.
4. Incidental use by a small number of households with employment or similar associations with the owner of the distribution system and located within the area

served by a closed distribution system shall not preclude an exemption under paragraph 2 being granted.

↓ new

5. Closed distribution systems shall be considered as distribution systems for the purpose of the Directive.

↓ 2009/72/EC (adapted)  
⇒ new

Article ~~39~~ ~~29~~

### Combined operator

Article ~~26~~ ~~35~~(1) shall not prevent the operation of a combined transmission and distribution system operator provided that operator complies with Articles ~~9~~ ~~43~~(1), or ~~44~~ ~~43~~ and ~~45~~ ~~44~~, or Section 3 ~~Chapter V~~ or falls under Article ~~44~~ ~~66~~(2).

## Chapter ~~IV~~ V

### ⊠ GENERAL RULES APPLICABLE TO THE ⊠ TRANSMISSION SYSTEM ~~OPERATION~~ ⊠ OPERATOR ⊠

Article ~~40~~ ~~12~~

### Tasks of transmission system operators

1. 1. Each transmission system operator shall be responsible for:
  - (a) ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity, operating, maintaining and developing under economic conditions secure, reliable and efficient transmission systems with due regard to the environment ⇒, in close cooperation with neighbouring transmission system operators and distribution system operators and transparency ⇐;
  - (b) ensuring adequate means to meet ~~service~~ ⊠ its ⊠ obligations;
  - (c) contributing to security of supply through adequate transmission capacity and system reliability;
  - (d) managing electricity flows on the system, taking into account exchanges with other interconnected systems. To that end, the transmission system operator shall be responsible for ensuring a secure, reliable and efficient electricity system and, in that context, for ensuring the availability of all necessary ancillary services, including those provided by demand response ⇒ and energy storage ⇐, insofar as such availability is independent from any other transmission system with which its system is interconnected;

- (e) providing to the operator of any other system with which its system is interconnected sufficient information to ensure the secure and efficient operation, coordinated development and interoperability of the interconnected system;
  - (f) ensuring non-discrimination as between system users or classes of system users, particularly in favour of its related undertakings;
  - (g) providing system users with the information they need for efficient access to the system; and
  - (h) collecting congestion rents and payments under the inter-transmission system operator compensation mechanism, in compliance with Article ~~46~~ 43 of [recast of Regulation 714/2009 as proposed by COM(2016)861/2], granting and managing third-party access and giving reasoned explanations when it denies such access, which shall be monitored by the national regulatory authorities; in carrying out their tasks under this Article transmission system operators shall primarily facilitate market integration.
- 

↓ new

- (i) procuring ancillary services from market participants to ensure operational security.
  - (j) adopting a framework for the cooperation and coordination between regional operational centres.
2. Member States may provide that one or several responsibilities listed under points (a) to (j) of paragraph 1 be assigned to a transmission system operator other than the one which owns the transmission system to which the concerned responsibilities would otherwise be applicable. The transmission system operator to which the tasks are assigned shall be certified as ownership unbundled and fulfil the requirements provided for in Article 43, but does not have to own the transmission system it is responsible for. The transmission system operator which owns the transmission system shall fulfil the requirements provided for in Chapter IV and be certified in accordance with 43.
3. In performing the tasks listed in paragraph 1, the transmission system operator shall take into account the functions performed by the regional operational centres and cooperate as necessary with neighbouring transmission system operators.
4. In performing the task described in paragraph 1(i), the transmission system operator shall ensure that the procurement of balancing services and, unless justified by a cost-benefit analysis, non-frequency ancillary services, is:
- (a) transparent, non-discriminatory and market-based;
  - (b) ensures effective participation of all market participants including renewable energy sources, demand response, energy storage facilities and aggregators, in particular by requiring regulatory authorities or transmission system operators in close cooperation with all market participants, to define technical modalities for participation in these markets on the basis of the technical requirements of these markets and the capabilities of all market participants.
5. Transmission system operators shall not own assets that provide ancillary services safe under the conditions set out in Article 54.

## Article 15

### Dispatching and balancing

- ~~1. Without prejudice to the supply of electricity on the basis of contractual obligations, including those which derive from the tendering specifications, the transmission system operator shall, where it has such a function, be responsible for dispatching the generating installations in its area and for determining the use of interconnectors with other systems.~~
- ~~2. The dispatching of generating installations and the use of interconnectors shall be determined on the basis of criteria which shall be approved by national regulatory authorities where competent and which must be objective, published and applied in a non-discriminatory manner, ensuring the proper functioning of the internal market in electricity. The criteria shall take into account the economic precedence of electricity from available generating installations or interconnector transfers and the technical constraints on the system.~~
- ~~3. A Member State shall require system operators to act in accordance with Article 16 of Directive 2009/28/EC when dispatching generating installations using renewable energy sources. They also may require the system operator to give priority when dispatching generating installations producing combined heat and power.~~
- ~~4. A Member State may, for reasons of security of supply, direct that priority be given to the dispatch of generating installations using indigenous primary energy fuel sources, to an extent not exceeding, in any calendar year, 15 % of the overall primary energy necessary to produce the electricity consumed in the Member State concerned.~~
- ~~5. The regulatory authorities where Member States have so provided or Member States shall require transmission system operators to comply with minimum standards for the maintenance and development of the transmission system, including interconnection capacity.~~
- ~~6. Transmission system operators shall procure the energy they use to cover energy losses and reserve capacity in their system according to transparent, non-discriminatory and market-based procedures, whenever they have such a function.~~
- ~~7. Rules adopted by transmission system operators for balancing the electricity system shall be objective, transparent and non-discriminatory, including rules for charging system users of their networks for energy imbalance. The terms and conditions, including the rules and tariffs, for the provision of such services by transmission system operators shall be established pursuant to a methodology compatible with Article 37(6) in a non-discriminatory and cost-reflective way and shall be published.~~

↓ 2009/72/EC (adapted)

⇒ new

## Article 41 ~~46~~

### **Confidentiality and transparency requirements for transmission system operators and transmission system owners**

8. Without prejudice to Article 5530 or any other legal duty to disclose information,

each transmission system operator and each transmission system owner shall preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its activities, and shall prevent information about its own activities which may be commercially advantageous from being disclosed in a discriminatory manner. In particular it shall not disclose any commercially sensitive information to the remaining parts of the undertaking, unless this is necessary for carrying out a business transaction. In order to ensure the full respect of the rules on information unbundling, Member States shall ensure that the transmission system owner and the remaining part of the undertaking do not use joint services, such as joint legal services, apart from purely administrative or IT functions.

9. Transmission system operators shall not, in the context of sales or purchases of electricity by related undertakings, misuse commercially sensitive information obtained from third parties in the context of providing or negotiating access to the system.
10. Information necessary for effective competition and the efficient functioning of the market shall be made public. That obligation shall be without prejudice to preserving the confidentiality of commercially sensitive information.

#### *Article ~~42~~<sup>3</sup>*

### **Decision-making powers regarding the connection of new power plant to the transmission system**

11. The transmission system operator shall establish and publish transparent and efficient procedures for non-discriminatory connection of new power plants  $\Rightarrow$  and energy storage facilities  $\Leftarrow$  to the transmission system. Those procedures shall be subject to the approval of national regulatory authorities.
12. The transmission system operator shall not be entitled to refuse the connection of a new power plant  $\Rightarrow$  or energy storage facility  $\Leftarrow$  on the grounds of possible future limitations to available network capacities, such as congestion in distant parts of the transmission system. The transmission system operator shall supply necessary information.
13. The transmission system operator shall not be entitled to refuse a new connection point, on the ground that it will lead to additional costs linked with necessary capacity increase of system elements in the close-up range to the connection point.

## **⊗ Chapter VI UNBUNDLING OF TRANSMISSION SYSTEM OPERATORS ⊗**

### **⊗ SECTION 1 OWNERSHIP UNBUNDLING ~~AND CERTIFICATION~~ ⊗**

#### *Article ~~43~~<sup>9</sup>*

### **⊗ Ownership ⊗ ~~Unbundling of transmission systems and transmission system~~**

## operators

1. Member States shall ensure that ~~from 3 March 2012:~~
  - (a) each undertaking which owns a transmission system acts as a transmission system operator;
  - (b) the same person or persons are entitled neither:
    - (c) directly or indirectly to exercise control over an undertaking performing any of the functions of generation or supply, and directly or indirectly to exercise control or exercise any right over a transmission system operator or over a transmission system; nor
    - (d) directly or indirectly to exercise control over a transmission system operator or over a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of generation or supply;
    - (e) the same person or persons are not entitled to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, of a transmission system operator or a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of generation or supply; and
    - (f) the same person is not entitled to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of generation or supply and a transmission system operator or a transmission system.
2. The rights referred to in points (b) and (c) of paragraph 1 shall include, in particular:
  - (a) the power to exercise voting rights;
  - (b) the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking; or
  - (c) the holding of a majority share.
3. For the purpose of paragraph 1(b), the notion ‘undertaking performing any of the functions of generation or supply’ shall include ‘undertaking performing any of the functions of production and supply’ within the meaning of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 ~~concerning common rules for the internal market in natural gas~~<sup>50</sup>, and the terms ‘transmission system operator’ and ‘transmission system’ shall include ‘transmission system operator’ and ‘transmission system’ within the meaning of that Directive.
- ~~4. Member States may allow for derogations from points (b) and (c) of paragraph 1 until 3 March 2013, provided that transmission system operators are not part of a vertically integrated undertaking.~~
4. ~~5.~~ The obligation set out in paragraph 1(a) shall be deemed to be fulfilled in a situation where two or more undertakings which own transmission systems have created a joint venture which acts as a transmission system operator in two or more Member States for the transmission systems concerned. No other undertaking may be

<sup>50</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas (OJ L 211, 14.8.2009, p. 94)~~136~~

part of the joint venture, unless it has been approved under Article ~~44~~ ~~43~~ as an independent system operator or as an independent transmission operator for the purposes of ~~Section 3~~ ~~Chapter V~~.

5. ~~6~~ For the implementation of this Article, where the person referred to in points (b), (c) and (d) of paragraph 1 is the Member State or another public body, two separate public bodies exercising control over a transmission system operator or over a transmission system on the one hand, and over an undertaking performing any of the functions of generation or supply on the other, shall be deemed not to be the same person or persons.
6. ~~7~~ Member States shall ensure that neither commercially sensitive information referred to in Article ~~41~~ ~~46~~ held by a transmission system operator which was part of a vertically integrated undertaking, nor the staff of such a transmission system operator, is transferred to undertakings performing any of the functions of generation and supply.
7. ~~8~~ Where on 3 September 2009, the transmission system belongs to a vertically integrated undertaking a Member State may decide not to apply paragraph 1.

In such case, the Member State concerned shall either:

- (a) designate an independent system operator in accordance with Article ~~44~~ ~~43~~; or
  - (b) comply with the provisions of ~~Section 3~~ ~~Chapter V~~.
8. ~~9~~ Where, on 3 September 2009, the transmission system belongs to a vertically integrated undertaking and there are arrangements in place which guarantee more effective independence of the transmission system operator than the provisions of ~~Section 3~~ ~~Chapter V~~, a Member State may decide not to apply paragraph 1.
  - ~~9~~ ~~10~~ Before an undertaking is approved and designated as a transmission system operator under paragraph 9 of this Article, it shall be certified according to the procedures laid down in Article ~~40~~ ~~52~~(4), (5), and (6), of this Directive and in Article ~~3~~ ~~48~~ of [recast of Regulation 714/2009 as proposed by COM(2016)861/2], pursuant to which the Commission shall verify that the arrangements in place clearly guarantee more effective independence of the transmission system operator than the provisions of ~~Section 3~~ ~~Chapter V~~.
  10. ~~11~~ Vertically integrated undertakings which own a transmission system shall not in any event be prevented from taking steps to comply with paragraph 1.
  11. ~~12~~ Undertakings performing any of the functions of generation or supply shall not in any event be able to directly or indirectly take control over or exercise any right over unbundled transmission system operators in Member States which apply paragraph 1.

## ⊠ SECTION 2

### INDEPENDENT SYSTEM OPERATOR ⊠

#### *Article ~~44~~ ~~43~~*

#### **Independent system operator**

1. Where the transmission system belongs to a vertically integrated undertaking on 3 September 2009, Member States may decide not to apply Article ~~43~~ ~~9~~(1) and designate an independent system operator upon a proposal from the transmission system owner. Such designation shall be subject to approval by the Commission.

2. The Member State may approve and designate an independent system operator only where:
  - (a) the candidate operator has demonstrated that it complies with the requirements of Article ~~43~~ 43(1)(b), (c) and (d);
  - (b) the candidate operator has demonstrated that it has at its disposal the required financial, technical, physical and human resources to carry out its tasks under Article ~~40~~ 40 ~~12~~;
  - (c) the candidate operator has undertaken to comply with a ten-year network development plan monitored by the regulatory authority;
  - (d) the transmission system owner has demonstrated its ability to comply with its obligations under paragraph 5. To that end, it shall provide all the draft contractual arrangements with the candidate undertaking and any other relevant entity; and
  - (e) the candidate operator has demonstrated its ability to comply with its obligations under [recast of Regulation 714/2009 as proposed by COM(2016)861/2] including the cooperation of transmission system operators at European and regional level.
3. Undertakings which have been certified by the regulatory authority as having complied with the requirements of Article ~~53~~ 53 ~~11~~ and paragraph 2 of this Article shall be approved and designated as independent system operators by Member States. The certification procedure in either Article ~~52~~ 52 ~~10 of this Directive~~ and Article ~~483~~ of [recast of Regulation 714/2009 as proposed by COM(2016)861/2] or in Article ~~53~~ 53 ~~11~~ of this Directive shall be applicable.
4. Each independent system operator shall be responsible for granting and managing third-party access, including the collection of access charges, congestion charges, and payments under the inter-transmission system operator compensation mechanism in compliance with Article ~~46~~ 46 ~~13~~ of [recast of Regulation 714/2009 as proposed by COM(2016)861/2], as well as for operating, maintaining and developing the transmission system, and for ensuring the long-term ability of the system to meet reasonable demand through investment planning. When developing the transmission system, the independent system operator shall be responsible for planning (including authorisation procedure), construction and commissioning of the new infrastructure. For this purpose, the independent system operator shall act as a transmission system operator in accordance with this ~~Section~~ Chapter. The transmission system owner shall not be responsible for granting and managing third-party access, nor for investment planning.
5. Where an independent system operator has been designated, the transmission system owner shall:
  - (a) provide all the relevant cooperation and support to the independent system operator for the fulfilment of its tasks, including in particular all relevant information;
  - (b) finance the investments decided by the independent system operator and approved by the regulatory authority, or give its agreement to financing by any interested party including the independent system operator. The relevant financing arrangements shall be subject to approval by the regulatory authority. Prior to such approval, the regulatory authority shall consult the transmission system owner together with the other interested parties;
  - (c) provide for the coverage of liability relating to the network assets, excluding the liability relating to the tasks of the independent system operator; and

- (d) provide guarantees to facilitate financing any network expansions with the exception of those investments where, pursuant to point (b), it has given its agreement to financing by any interested party including the independent system operator.
- 6. In close cooperation with the regulatory authority, the relevant national competition authority shall be granted all relevant powers to effectively monitor compliance of the transmission system owner with its obligations under paragraph 5.

*Article ~~45~~ 44*

**Unbundling of transmission system owners**

- 1. A transmission system owner, where an independent system operator has been appointed, which is part of a vertically integrated undertaking shall be independent at least in terms of its legal form, organisation and decision making from other activities not relating to transmission.
- 2. In order to ensure the independence of the transmission system owner referred to in paragraph 1, the following minimum criteria shall apply:
  - (a) persons responsible for the management of the transmission system owner shall not participate in company structures of the integrated electricity undertaking responsible, directly or indirectly, for the day-to-day operation of the generation, distribution and supply of electricity;
  - (b) appropriate measures shall be taken to ensure that the professional interests of persons responsible for the management of the transmission system owner are taken into account in a manner that ensures that they are capable of acting independently; and
  - (c) the transmission system owner shall establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored. The compliance programme shall set out the specific obligations of employees to meet those objectives. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme to the regulatory authority and shall be published.

~~3. The Commission may adopt Guidelines to ensure full and effective compliance of the transmission system owner with paragraph 2 of this Article. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 46(2).~~

**CHAPTER V Section 3**

**INDEPENDENT TRANSMISSION OPERATOR**

*Article ~~46~~ 47*

**Assets, equipment, staff and identity**

- 1. Transmission system operators shall be equipped with all human, technical, physical and financial resources necessary for fulfilling their obligations under this Directive and carrying out the activity of electricity transmission, in particular:

- (a) assets that are necessary for the activity of electricity transmission, including the transmission system, shall be owned by the transmission system operator;
  - (b) personnel, necessary for the activity of electricity transmission, including the performance of all corporate tasks, shall be employed by the transmission system operator;
  - (c) leasing of personnel and rendering of services, to and from any other parts of the vertically integrated undertaking shall be prohibited. A transmission system operator may, however, render services to the vertically integrated undertaking as long as:
  - (d) the provision of those services does not discriminate between system users, is available to all system users on the same terms and conditions and does not restrict, distort or prevent competition in generation or supply; and
  - (e) the terms and conditions of the provision of those services are approved by the regulatory authority;
  - (f) without prejudice to the decisions of the Supervisory Body under Article ~~49~~ 20, appropriate financial resources for future investment projects and/or for the replacement of existing assets shall be made available to the transmission system operator in due time by the vertically integrated undertaking following an appropriate request from the transmission system operator.
2. The activity of electricity transmission shall include at least the following tasks in addition to those listed in Article ~~40~~ 12:
- (a) the representation of the transmission system operator and contacts to third parties and the regulatory authorities;
  - (b) the representation of the transmission system operator within the European Network of Transmission System Operators for Electricity (ENTSO for Electricity);
  - (c) granting and managing third-party access on a non-discriminatory basis between system users or classes of system users;
  - (d) the collection of all the transmission system related charges including access charges, ~~balancing charges for ancillary services such as purchasing of services (balancing costs, energy for losses)~~ ⇒ and ancillary services charges ⇐ ;
  - (e) the operation, maintenance and development of a secure, efficient and economic transmission system;
  - (f) investment planning ensuring the long-term ability of the system to meet reasonable demand and guaranteeing security of supply;
  - (g) the setting up of appropriate joint ventures, including with one or more transmission system operators, power exchanges, and the other relevant actors pursuing the objectives to develop the creation of regional markets or to facilitate the liberalisation process; and
  - (h) all corporate services, including legal services, accountancy and IT services.

3. Transmission system operators shall be organised in a legal form as referred to in Article 1 of Directive 2009/101/EC of the European Parliament and of the Council <sup>51</sup> ~~Council Directive 68/151/EEC~~ <sup>(19)</sup>.
4. The transmission system operator shall not, in its corporate identity, communication, branding and premises, create confusion in respect of the separate identity of the vertically integrated undertaking or any part thereof.
5. The transmission system operator shall not share IT systems or equipment, physical premises and security access systems with any part of the vertically integrated undertaking nor use the same consultants or external contractors for IT systems or equipment, and security access systems.
6. The accounts of transmission system operators shall be audited by an auditor other than the one auditing the vertically integrated undertaking or any part thereof.

*Article 47 ~~48~~*

**Independence of the transmission system operator**

1. Without prejudice to the decisions of the Supervisory Body under Article 49 ~~20~~, the transmission system operator shall have:
  - (a) effective decision-making rights, independent from the vertically integrated undertaking, with respect to assets necessary to operate, maintain or develop the transmission system; and
  - (b) the power to raise money on the capital market in particular through borrowing and capital increase.
2. The transmission system operator shall at all times act so as to ensure it has the resources it needs in order to carry out the activity of transmission properly and efficiently and develop and maintain an efficient, secure and economic transmission system.
3.  The vertically integrated undertaking and its  ~~sub~~ sub ~~subsidiaries of the vertically integrated~~ undertaking performing functions of generation or supply shall not have any direct or indirect shareholding in the transmission system operator. The transmission system operator shall neither have any direct or indirect shareholding in any subsidiary of the vertically integrated undertaking performing functions of generation or supply, nor receive dividends or any other financial benefit from that subsidiary.
4. The overall management structure and the corporate statutes of the transmission system operator shall ensure effective independence of the transmission system operator in compliance with this Chapter. The vertically integrated undertaking shall not determine, directly or indirectly, the competitive behaviour of the transmission system operator in relation to the day to day activities of the transmission system operator and management of the network, or in relation to activities necessary for the

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<sup>51</sup> Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent (OJ L 258, 1.10.2009, p. 11) ~~19~~.

preparation of the ten-year network development plan developed pursuant to Article ~~51~~ 22.

5. In fulfilling their tasks in Article ~~40~~ 12 and Article ~~46~~ 17(2) of this Directive, and in complying with ~~☒~~ obligations set out in ~~☒~~ ~~Articles 14, 15 and 16~~ of [of recast of Regulation 714/2009 as proposed by COM(2016)861/2], transmission system operators shall not discriminate against different persons or entities and shall not restrict, distort or prevent competition in generation or supply.
6. Any commercial and financial relations between the vertically integrated undertaking and the transmission system operator, including loans from the transmission system operator to the vertically integrated undertaking, shall comply with market conditions. The transmission system operator shall keep detailed records of such commercial and financial relations and make them available to the regulatory authority upon request.
7. The transmission system operator shall submit for approval by the regulatory authority all commercial and financial agreements with the vertically integrated undertaking.
8. The transmission system operator shall inform the regulatory authority of the financial resources, referred to in Article ~~46~~ 17(1)(d), available for future investment projects and/or for the replacement of existing assets.
9. The vertically integrated undertaking shall refrain from any action impeding or prejudicing the transmission system operator from complying with its obligations in this Chapter and shall not require the transmission system operator to seek permission from the vertically integrated undertaking in fulfilling those obligations.
10. An undertaking which has been certified by the regulatory authority as being in compliance with the requirements of this Chapter shall be approved and designated as a transmission system operator by the Member State concerned. The certification procedure in either Article ~~52~~ 10 of this Directive and [Article ~~3~~ 48 of of Regulation 714/2009 as proposed by COM(2016)861/2] or in Article ~~53~~ 11 of this Directive shall apply.

#### *Article ~~48~~ 19*

#### **Independence of the staff and the management of the transmission system operator**

1. Decisions regarding the appointment and renewal, working conditions including remuneration, and termination of the term of office of the persons responsible for the management and/or members of the administrative bodies of the transmission system operator shall be taken by the Supervisory Body of the transmission system operator appointed in accordance with Article ~~49~~ 20.
2. The identity and the conditions governing the term, the duration and the termination of office of the persons nominated by the Supervisory Body for appointment or renewal as persons responsible for the executive management and/or as members of the administrative bodies of the transmission system operator, and the reasons for any proposed decision terminating such term of office, shall be notified to the regulatory authority. Those conditions and the decisions referred to in paragraph 1 shall become binding only if the regulatory authority has raised no objections within three weeks of notification.

The regulatory authority may object to the decisions referred to in paragraph 1 where:

- (a) doubts arise as to the professional independence of a nominated person responsible for the management and/or member of the administrative bodies; or
  - (b) in the case of premature termination of a term of office, doubts exist regarding the justification of such premature termination.
3. No professional position or responsibility, interest or business relationship, directly or indirectly, with the vertically integrated undertaking or any part of it or its controlling shareholders other than the transmission system operator shall be exercised for a period of three years before the appointment of the persons responsible for the management and/or members of the administrative bodies of the transmission system operator who are subject to this paragraph.
  4. The persons responsible for the management and/or members of the administrative bodies, and employees of the transmission system operator shall have no other professional position or responsibility, interest or business relationship, directly or indirectly, with any other part of the vertically integrated undertaking or with its controlling shareholders.
  5. The persons responsible for the management and/or members of the administrative bodies, and employees of the transmission system operator shall hold no interest in or receive any financial benefit, directly or indirectly, from any part of the vertically integrated undertaking other than the transmission system operator. Their remuneration shall not depend on activities or results of the vertically integrated undertaking other than those of the transmission system operator.
  6. Effective rights of appeal to the regulatory authority shall be guaranteed for any complaints by the persons responsible for the management and/or members of the administrative bodies of the transmission system operator against premature terminations of their term of office.
  7. After termination of their term of office in the transmission system operator, the persons responsible for its management and/or members of its administrative bodies shall have no professional position or responsibility, interest or business relationship with any part of the vertically integrated undertaking other than the transmission system operator, or with its controlling shareholders for a period of not less than four years.
  8. Paragraph 3 shall apply to the majority of the persons responsible for the management and/or members of the administrative bodies of the transmission system operator.

The persons responsible for the management and/or members of the administrative bodies of the transmission system operator who are not subject to paragraph 3 shall have exercised no management or other relevant activity in the vertically integrated undertaking for a period of at least six months before their appointment.

The first subparagraph of this paragraph and paragraphs 4 to 7 shall be applicable to all the persons belonging to the executive management and to those directly reporting to them on matters related to the operation, maintenance or development of the network.

*Article ~~49~~ ~~20~~*  
**Supervisory Body**

1. The transmission system operator shall have a Supervisory Body which shall be in charge of taking decisions which may have a significant impact on the value of the assets of the shareholders within the transmission system operator, in particular decisions regarding the approval of the annual and longer-term financial plans, the level of indebtedness of the transmission system operator and the amount of dividends distributed to shareholders. The decisions falling under the remit of the Supervisory Body shall exclude those that are related to the day to day activities of the transmission system operator and management of the network, and to activities necessary for the preparation of the ten-year network development plan developed pursuant to Article ~~51~~~~22~~.
2. The Supervisory Body shall be composed of members representing the vertically integrated undertaking, members representing third party shareholders and, where the relevant legislation of a Member State so provides, members representing other interested parties such as employees of the transmission system operator.
3. The first subparagraph of Article ~~48~~~~19~~(2) and Article ~~48~~~~19~~(3) to (7) shall apply to at least half of the members of the Supervisory Body minus one.

Point (b) of the second subparagraph of Article ~~48~~~~19~~(2) shall apply to all the members of the Supervisory Body.

*Article ~~50~~ ~~21~~*  
**Compliance programme and compliance officer**

1. Member States shall ensure that transmission system operators establish and implement a compliance programme which sets out the measures taken in order to ensure that discriminatory conduct is excluded, and ensure that the compliance with that programme is adequately monitored. The compliance programme shall set out the specific obligations of employees to meet those objectives. It shall be subject to approval by the regulatory authority. Without prejudice to the powers of the national regulator, compliance with the program shall be independently monitored by a compliance officer.
2. The compliance officer shall be appointed by the Supervisory Body, subject to the approval by the regulatory authority. The regulatory authority may refuse the approval of the compliance officer only for reasons of lack of independence or professional capacity. The compliance officer may be a natural or legal person. Article ~~48~~~~19~~(2) to (8) shall apply to the compliance officer.
3. The compliance officer shall be in charge of:
  - (a) monitoring the implementation of the compliance programme;
  - (b) elaborating an annual report, setting out the measures taken in order to implement the compliance programme and submitting it to the regulatory authority;
  - (c) reporting to the Supervisory Body and issuing recommendations on the compliance programme and its implementation;

- (d) notifying the regulatory authority on any substantial breaches with regard to the implementation of the compliance programme; and
  - (e) reporting to the regulatory authority on any commercial and financial relations between the vertically integrated undertaking and the transmission system operator.
4. The compliance officer shall submit the proposed decisions on the investment plan or on individual investments in the network to the regulatory authority. This shall occur at the latest when the management and/or the competent administrative body of the transmission system operator submits them to the Supervisory Body.
  5. Where the vertically integrated undertaking, in the general assembly or through the vote of the members of the Supervisory Body it has appointed, has prevented the adoption of a decision with the effect of preventing or delaying investments, which under the ten-year network development plan was to be executed in the following three years, the compliance officer shall report this to the regulatory authority, which then shall act in accordance with Article ~~51~~22.
  6. The conditions governing the mandate or the employment conditions of the compliance officer, including the duration of its mandate, shall be subject to approval by the regulatory authority. Those conditions shall ensure the independence of the compliance officer, including by providing him with all the resources necessary for fulfilling his duties. During his mandate, the compliance officer shall have no other professional position, responsibility or interest, directly or indirectly, in or with any part of the vertically integrated undertaking or with its controlling shareholders.
  7. The compliance officer shall report regularly, either orally or in writing, to the regulatory authority and shall have the right to report regularly, either orally or in writing, to the Supervisory Body of the transmission system operator.
  8. The compliance officer may attend all meetings of the management or administrative bodies of the transmission system operator, and those of the Supervisory Body and the general assembly. The compliance officer shall attend all meetings that address the following matters:
    - (a) conditions for access to the network, as defined in [recast of Regulation 714/2009 as proposed by COM(2016)861/2], in particular regarding tariffs, third party access services, capacity allocation and congestion management, transparency, ~~balancing~~  $\Rightarrow$  ancillary services  $\Leftarrow$  and secondary markets;
    - (b) projects undertaken in order to operate, maintain and develop the transmission system, including interconnection and connection investments;
    - (c) energy purchases or sales necessary for the operation of the transmission system.
  9. The compliance officer shall monitor the compliance of the transmission system operator with Article ~~41~~6.
  10. The compliance officer shall have access to all relevant data and to the offices of the transmission system operator and to all the information necessary for the fulfilment of his task.
  11. After prior approval by the regulatory authority, the Supervisory Body may dismiss the compliance officer. It shall dismiss the compliance officer for reasons of lack of independence or professional capacity upon request of the regulatory authority.
  12. The compliance officer shall have access to the offices of the transmission system operator without prior announcement.

**Network development and powers to make investment decisions**

1. ~~Every year~~ ⇒ At least every two years ⇐ , transmission system operators shall submit to the regulatory authority a ten-year network development plan based on existing and forecast supply and demand after having consulted all the relevant stakeholders. That network development plan shall contain efficient measures in order to guarantee the adequacy of the system and the security of supply.
2. The ten-year network development plan shall in particular:
  - (a) indicate to market participants the main transmission infrastructure that needs to be built or upgraded over the next ten years;
  - (b) contain all the investments already decided and identify new investments which have to be executed in the next three years; and
  - (c) provide for a time frame for all investment projects.
3. When elaborating the ten-year network development plan, the transmission system operator shall make reasonable assumptions about the evolution of the generation, supply, ⇒ energy storage, ⇐ consumption and exchanges with other countries, taking into account investment plans for regional and ☒ Union ☒ ~~Community~~-wide networks.
4. The regulatory authority shall consult all actual or potential system users on the ten-year network development plan in an open and transparent manner. Persons or undertakings claiming to be potential system users may be required to substantiate such claims. The regulatory authority shall publish the result of the consultation process, in particular possible needs for investments.
5. The regulatory authority shall examine whether the ten-year network development plan covers all investment needs identified during the consultation process, and whether it is consistent with the non-binding ☒ Union ☒ ~~Community~~-wide ten-year network development plan (☒ Union ☒ ~~Community~~-wide network development plan) referred to in [Article 27(b) ~~8(3)(b)~~ of recast of Regulation 714/2009 as proposed by COM(2016)861/2]. If any doubt arises as to the consistency with the ~~Community~~ ☒ Union ☒ -wide network development plan, the regulatory authority shall consult the Agency. The regulatory authority may require the transmission system operator to amend its ten-year network development plan.
6. The regulatory authority shall monitor and evaluate the implementation of the ten-year network development plan.
7. In circumstances where the transmission system operator, other than for overriding reasons beyond its control, does not execute an investment, which, under the ten-year network development plan, was to be executed in the following three years, Member States shall ensure that the regulatory authority is required to take at least one of the following measures to ensure that the investment in question is made if such investment is still relevant on the basis of the most recent ten-year network development plan:
  - (a) to require the transmission system operator to execute the investments in question;
  - (b) to organise a tender procedure open to any investors for the investment in question;or

- (c) to oblige the transmission system operator to accept a capital increase to finance the necessary investments and allow independent investors to participate in the capital.

Where the regulatory authority has made use of its powers under point (b) of the first subparagraph, it may oblige the transmission system operator to agree to one or more of the following:

- (d) financing by any third party;  
(e) construction by any third party;  
(f) building the new assets concerned itself;  
(g) operating the new asset concerned itself.

The transmission system operator shall provide the investors with all information needed to realise the investment, shall connect new assets to the transmission network and shall generally make its best efforts to facilitate the implementation of the investment project.

The relevant financial arrangements shall be subject to approval by the regulatory authority.

8. Where the regulatory authority has made use of its powers under the first subparagraph of paragraph 7, the relevant tariff regulations shall cover the costs of the investments in question.

#### ✠ SECTION 4

### DESIGNATION AND CERTIFICATION OF TRANSMISSION SYSTEM OPERATORS ✠

#### *Article 52 ~~40~~*

#### **Designation and certification of transmission system operators**

1. Before an undertaking is approved and designated as transmission system operator, it shall be certified according to the procedures laid down in paragraphs 4, 5, 6 of this Article and in Article ~~3~~ 49 of [recast of Regulation 714/2009 as proposed by COM(2016)861/2].
2. Undertakings which ~~own a transmission system and which~~ have been certified by the national regulatory authority as having complied with the requirements of Article ~~43~~ 9, pursuant to the certification procedure below, shall be approved and designated as transmission system operators by Member States. The designation of transmission system operators shall be notified to the Commission and published in the *Official Journal of the European Union*.
3. Transmission system operators shall notify to the regulatory authority any planned transaction which may require a reassessment of their compliance with the requirements of Article ~~43~~ 9.
4. Regulatory authorities shall monitor the continuing compliance of transmission system operators with the requirements of Article ~~43~~ 9. They shall open a certification procedure to ensure such compliance:
  - (a) upon notification by the transmission system operator pursuant to paragraph 3;
  - (b) on their own initiative where they have knowledge that a planned change in rights or influence over transmission system owners or transmission system operators may

lead to an infringement of Article ~~439~~, or where they have reason to believe that such an infringement may have occurred; or

- (c) upon a reasoned request from the Commission.
5. The regulatory authorities shall adopt a decision on the certification of a transmission system operator within a period of four months from the date of the notification by the transmission system operator or from the date of the Commission request. After expiry of that period, the certification shall be deemed to be granted. The explicit or tacit decision of the regulatory authority shall become effective only after the conclusion of the procedure set out in paragraph 6.
  6. The explicit or tacit decision on the certification of a transmission system operator shall be notified without delay to the Commission by the regulatory authority, together with all the relevant information with respect to that decision. The Commission shall act in accordance with the procedure laid down in [Article ~~3-48~~ of recast of Regulation 714/2009 as proposed by COM(2016)861/2].
  7. The regulatory authorities and the Commission may request from transmission system operators and undertakings performing any of the functions of generation or supply any information relevant for the fulfilment of their tasks under this Article.
  8. Regulatory authorities and the Commission shall preserve the confidentiality of commercially sensitive information.

#### *Article ~~53~~ ~~11~~*

#### **Certification in relation to third countries**

1. Where certification is requested by a transmission system owner or a transmission system operator which is controlled by a person or persons from a third country or third countries, the regulatory authority shall notify the Commission.  
  
The regulatory authority shall also notify to the Commission without delay any circumstances that would result in a person or persons from a third country or third countries acquiring control of a transmission system or a transmission system operator.
2. The transmission system operator shall notify to the regulatory authority any circumstances that would result in a person or persons from a third country or third countries acquiring control of the transmission system or the transmission system operator.
3. The regulatory authority shall adopt a draft decision on the certification of a transmission system operator within four months from the date of notification by the transmission system operator. It shall refuse the certification if it has not been demonstrated:
  - (a) that the entity concerned complies with the requirements of Article ~~439~~; and
  - (b) to the regulatory authority or to another competent authority designated by the Member State that granting certification will not put at risk the security of energy supply of the Member State and the ~~Community~~  Union . In considering that question the regulatory authority or other competent authority so designated shall take into account:

- the rights and obligations of the ~~Community~~ ☒ Union ☒ with respect to that third country arising under international law, including any agreement concluded with one or more third countries to which the ~~Community~~ ☒ Union ☒ is a party and which addresses the issues of security of energy supply;
  - the rights and obligations of the Member State with respect to that third country arising under agreements concluded with it, insofar as they are in compliance with ~~Community~~ ☒ Union ☒ law; and
  - other specific facts and circumstances of the case and the third country concerned.
4. The regulatory authority shall notify the decision to the Commission without delay, together with all the relevant information with respect to that decision.
  5. Member States shall provide for the regulatory authority or the designated competent authority referred to in paragraph 3(b), before the regulatory authority adopts a decision on the certification, to request an opinion from the Commission on whether:
    - (a) the entity concerned complies with the requirements of Article ~~439~~; and
    - (b) granting certification will not put at risk the security of energy supply to the ~~Community~~ ☒ Union ☒ .
  6. The Commission shall examine the request referred to in paragraph 5 as soon as it is received. Within a period of two months after receiving the request, it shall deliver its opinion to the national regulatory authority or, if the request was made by the designated competent authority, to that authority.
 

In preparing the opinion, the Commission may request the views of the Agency, the Member State concerned, and interested parties. In the event that the Commission makes such a request, the two-month period of shall be extended by two months.

In the absence of an opinion by the Commission within the period referred to in the first and second subparagraphs, the Commission shall be deemed not to raise objections to the decision of the regulatory authority.
  7. When assessing whether the control by a person or persons from a third country or third countries will put at risk the security of energy supply to the ~~Community~~ ☒ Union ☒ , the Commission shall take into account:
    - (a) the specific facts of the case and the third country or third countries concerned; and
    - (b) the rights and obligations of the ~~Community~~ ☒ European Union ☒ with respect to that third country or third countries arising under international law, including an agreement concluded with one or more third countries to which the ~~Community~~ ☒ Union ☒ is a party and which addresses the issues of security of supply.
  8. The national regulatory authority shall, within a period of two months after the expiry of the period referred to in paragraph 6, adopt its final decision on the certification. In adopting its final decision the national regulatory authority shall take utmost account of the Commission’s opinion. In any event Member States shall have the right to refuse certification where granting certification puts at risk the Member State’s security of energy supply or the security of energy supply of another Member State. Where the Member State has designated another competent authority to assess paragraph 3(b), it may require the national regulatory authority to adopt its final decision in accordance with the assessment of that competent authority. The national

regulatory authority's final decision and the Commission's opinion shall be published together. Where the final decision diverges from the Commission's opinion, the Member State concerned shall provide and publish, together with that decision, the reasoning underlying such decision.

9. Nothing in this Article shall affect the right of Member States to exercise, in compliance with ~~Community~~  Union  law, national legal controls to protect legitimate public security interests.

~~10. The Commission may adopt Guidelines setting out the details of the procedure to be followed for the application of this Article. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 46(2).~~

10. ~~10.~~ This Article, with exception of paragraph 3(a), shall also apply to Member States which are subject to a derogation under Article ~~66~~44.

↓ new

#### Article 54

### **Ownership of storage and provision of ancillary services by transmission system operators**

1. Transmission system operators shall not be allowed to own, manage or operate energy storage facilities and shall not own directly or indirectly control assets that provide ancillary services.
2. By way of derogation from paragraph 1, Member States may allow transmission system operators to own, manage or operate storage facilities and provide non-frequency ancillary services if the following conditions are fulfilled:
  - (a) other parties, following an open and transparent tendering procedure, have not expressed their interest to own, control, manage or operate such facilities offering storage and/or non-frequency ancillary services to the transmission system operator;
  - (b) such facilities or non-frequency ancillary services are necessary for the transmission system operators to fulfil its obligations under this regulation for the efficient, reliable and secure operation of the transmission system and they are not used to sell electricity to the market; and
  - (c) the regulatory authority has assessed the necessity of such derogation taking into account the conditions under points (a) and (b) of this paragraph and has granted its approval.
3. The decision to grant derogation shall be notified to the Agency and the Commission along with relevant information about the request and the reasons for granting the derogation.
4. The transmission system operator shall perform at regular intervals or at least every five years a public consultation for the required storage services in order to assess the potential interest of market parties to invest in such facilities and terminate its own storage activities in case third parties can provide the service in a cost-effective manner.

~~CHAPTER VII~~ **Section 5**  
**Unbundling and transparency of accounts**

*Article ~~55~~ <sup>30</sup>*

**Right of access to accounts**

1. Member States or any competent authority they designate, including the regulatory authorities referred to in Article ~~57~~<sup>35</sup>, shall, insofar as necessary to carry out their functions, have right of access to the accounts of electricity undertakings as set out in Article ~~56~~<sup>31</sup>.
2. Member States and any designated competent authority, including the regulatory authorities, shall preserve the confidentiality of commercially sensitive information. Member States may provide for the disclosure of such information where this is necessary in order for the competent authorities to carry out their functions.

*Article ~~56~~ <sup>31</sup>*

**Unbundling of accounts**

1. Member States shall take the necessary steps to ensure that the accounts of electricity undertakings are kept in accordance with paragraphs 2 and 3.
  2. Electricity undertakings, whatever their system of ownership or legal form, shall draw up, submit to audit and publish their annual accounts in accordance with the rules of national law concerning the annual accounts of limited liability companies adopted pursuant to ~~⊗~~ Directive 2013/34/EU of the European Parliament and of the Council<sup>52</sup> ~~⊗~~ ~~the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 44(2)(g)~~<sup>53</sup> ~~of the Treaty on the annual accounts of certain types of companies~~<sup>54</sup>.
- Undertakings which are not legally obliged to publish their annual accounts shall keep a copy of these at the disposal of the public in their head office.
3. Electricity undertakings shall, in their internal accounting, keep separate accounts for each of their transmission and distribution activities as they would be required to do if the activities in question were carried out by separate undertakings, with a view to avoiding discrimination, cross-subsidisation and distortion of competition. They shall also keep accounts, which may be consolidated, for other electricity activities not relating to transmission or distribution. ~~Until 1 July 2007, they shall keep separate~~

<sup>52</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19)

<sup>53</sup> The title of Directive 78/660/EEC has been adjusted to take account of the renumbering of the Articles of the Treaty establishing the European Community in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 54(2)(g)

<sup>54</sup> OJ L 222, 14.8.1978, p. 11

~~accounts for supply activities for eligible customers and supply activities for non-eligible customers.~~ Revenue from ownership of the transmission or distribution system shall be specified in the accounts. Where appropriate, they shall keep consolidated accounts for other, non-electricity activities. The internal accounts shall include a balance sheet and a profit and loss account for each activity.

4. The audit referred to in paragraph 2 shall, in particular, verify that the obligation to avoid discrimination and cross-subsidies referred to in paragraph 3 is respected.

## ~~CHAPTER VIII~~

## ~~ORGANISATION OF ACCESS TO THE SYSTEM~~

### CHAPTER VII ~~IX~~ NATIONAL REGULATORY AUTHORITIES

↓ 2009/72/EC (adapted)

#### *Article ~~5735~~*

#### **Designation and independence of regulatory authorities**

1. Each Member State shall designate a single national regulatory authority at national level.
2. Paragraph 1 ~~of this Article~~ shall be without prejudice to the designation of other regulatory authorities at regional level within Member States, provided that there is one senior representative for representation and contact purposes at ~~Community~~  Union  level within the Board of Regulators of the Agency in accordance with Article ~~14~~(1) of [recast of Regulation 713/2009 as proposed by COM(2016)863/2].
3. By way of derogation from paragraph 1 ~~of this Article~~, a Member State may designate regulatory authorities for small systems on a geographically separate region whose consumption, in 2008, accounted for less than 3 % of the total consumption of the Member State of which it is part. This derogation shall be without prejudice to the appointment of one senior representative for representation and contact purposes at ~~Community~~  Union  level within the Board of Regulators of the Agency in compliance with [Article 19 ~~14~~(1) of recast of Regulation 713/2009 as proposed by COM(2016)863/2].
4. Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently. For this purpose, Member State shall ensure that, when carrying out the regulatory tasks conferred upon it by this Directive and related legislation, the regulatory authority:
  - (a) is legally distinct and functionally independent from any other public or private entity;
  - (b) ensures that its staff and the persons responsible for its management:
    - (i) act independently from any market interest; and

(ii) do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks. This requirement is without prejudice to close cooperation, as appropriate, with other relevant national authorities or to general policy guidelines issued by the government not related to the regulatory powers and duties under Article ~~59~~<sup>37</sup>.

5. In order to protect the independence of the regulatory authority, Member States shall in particular ensure that:

- (a) the regulatory authority can take autonomous decisions, independently from any political body, and has separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties; and
- (b) the members of the board of the regulatory authority or, in the absence of a board, the regulatory authority's top management are appointed for a fixed term of five up to seven years, renewable once;

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↓ new

(c) the members of the board of the regulatory authority or, in the absence of a board, the regulatory authority's top management are appointed based on objective, transparent and published criteria, in an independent and impartial procedure, which ensures that the candidates have the necessary skills and experience for any relevant position in the national regulatory authority and that parliamentary hearings are held;

(d) conflict of interest provisions are in place and confidentiality obligations extend beyond the end of the mandate of the members of the board of the regulatory authority or, in the absence of a board, the regulatory authority's top management in the national regulatory authority;

(e) the members of the board of the regulatory authority or, in the absence of a board, the regulatory authority's top management can be dismissed only based on transparent criteria in place.

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↓ 2009/72/EC

In regard to point (b) of the first subparagraph, Member States shall ensure an appropriate rotation scheme for the board or the top management. The members of the board or, in the absence of a board, members of the top management may be relieved from office during their term only if they no longer fulfil the conditions set out in this Article or have been guilty of misconduct under national law.

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| ↓ 2009/72/EC (adapted)<br>⇒ new |
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Article ~~5836~~

**General objectives of the regulatory authority**

In carrying out the regulatory tasks specified in this Directive, the regulatory authority shall take all reasonable measures in pursuit of the following objectives within the framework of their duties and powers as laid down in Article ~~5937~~, in close consultation with other relevant national authorities including competition authorities ⇒ and authorities from neighbouring countries, including third countries ⇐ as appropriate, and without prejudice to their competencies:

- (a) promoting, in close cooperation with the Agency, regulatory authorities of other Member States and the Commission, a competitive, ⇒ flexible, ⇐ secure and environmentally sustainable internal market in electricity within the ~~Community~~ ☒ Union ☒, and effective market opening for all customers and suppliers in the ~~Community~~ ☒ Union ☒ and ensuring appropriate conditions for the effective and reliable operation of electricity networks, taking into account long-term objectives;
- (b) developing competitive and properly functioning regional ⇒ cross-border, ⇐ markets within the ~~Community~~ ☒ Union ☒ in view of the achievement of the objectives referred to in point (a);
- (c) eliminating restrictions on trade in electricity between Member States, including developing appropriate cross-border transmission capacities to meet demand and enhancing the integration of national markets which may facilitate electricity flows across the ~~Community~~ ☒ Union ☒;
- (d) helping to achieve, in the most cost-effective way, the development of secure, reliable and efficient non-discriminatory systems that are consumer oriented, and promoting system adequacy and, in line with general energy policy objectives, energy efficiency as well as the integration of large and small-scale production of electricity from renewable energy sources and distributed generation in both transmission and distribution networks ⇒ and in facilitating their operation in relation to other energy networks of gas or heat ⇐ ;
- (e) facilitating access to the network for new generation capacity ⇒ and energy storage facilities ⇐ , in particular removing barriers that could prevent access for new market entrants and of electricity from renewable energy sources;
- (f) ensuring that system operators and system users are granted appropriate incentives, in both the short and the long term, to increase efficiencies ⇒ , especially energy efficiency, ⇐ in system performance and foster market integration;

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| ↓ 2009/72/EC (adapted)<br>⇒ new |
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- (g) ~~(g)~~ ensuring that customers benefit through the efficient functioning of their national market, promoting effective competition and helping to ensure consumer protection;

- (h) ~~(h)~~ helping to achieve high standards of universal and public service in electricity supply, contributing to the protection of vulnerable customers and contributing to the compatibility of necessary data exchange processes for customer switching.

Article 59 ~~37~~

**Duties and powers of the regulatory authority**

1. The regulatory authority shall have the following duties:
- (a) fixing or approving, in accordance with transparent criteria transmission or distribution tariffs ~~or~~ ~~and~~ and ~~and~~ their methodologies;
- (b) ensuring compliance of transmission and distribution system operators and, where relevant, system owners, as well as of any electricity undertakings ~~and~~ and other market participants, ~~with~~ with their obligations under this Directive ~~and~~, the [recast of Regulation 714/2009 as proposed by COM(2016)861/2], the network codes adopted pursuant to Article 55 [recast of Regulation 714/2009 as proposed by COM(2016)861/2], and the guidelines adopted pursuant to Article 57 of [recast of Regulation 714/2009 as proposed by COM(2016)861/2] ~~and~~ and other relevant ~~Community~~ ~~Union~~ ~~legislation~~, including as regards cross-border issues;
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↓ new

- (c) approving products and procurement process for non-frequency ancillary services;
- (d) implementing the network codes and Guidelines adopted pursuant to Article 55 to 57 of the [recast of Regulation 714/2009 as proposed by COM(2016)861/2] through national measures or, where so required, coordinated regional or Union-wide measures ;
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↓ 2009/72/EC  
⇒ new

- (e) ~~(e)~~ cooperating in regard to cross-border issues with the regulatory authority or authorities of the Member States concerned and with the Agency, ~~in~~ in particular through participation in the work of the Agency's Board of Regulators pursuant to Article 20 of [recast of Regulation 713/2009 as proposed by COM(2016)863/2] ~~and~~;
- (f) ~~(f)~~ complying with, and implementing, any relevant legally binding decisions of the Agency and of the Commission;
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↓ new

- (g) ensuring that interconnector capacities are made available to the utmost extent pursuant to Article 14 of [recast of Regulation 714/2009 as proposed by COM(2016)861/2];

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↓ 2009/72/EC (adapted)  
⇒ new

- (h) ~~eu~~ reporting annually on its activity and the fulfilment of its duties to the relevant authorities of the Member States, the Agency and the Commission. Such reports shall cover the steps taken and the results obtained as regards each of the tasks listed in this Article;
- (i) ~~fu~~ ensuring that there are no cross-subsidies between transmission, distribution, and supply activities;
- (j) ~~eu~~ monitoring investment plans of the transmission system operators, and providing in its annual report an assessment of the investment plans of the transmission system operators as regards their consistency with the ~~Community~~  Union  -wide network development plan referred to in Article ~~8(3(b))~~ 27(1)(b) of the [recast of Regulation 714/2009 as proposed by COM(2016)861/2] ~~Regulation (EC) No 714/2009~~; such assessment may include recommendations to amend those investment plans;

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↓ new

- (k) measuring the performance of the TSOs and DSOs in relation to the development of a smart grid that promotes energy efficiency and the integration of RES based on a limited set of Union-wide indicators, and publish a national report every 2 years, including recommendations for improvement where necessary;

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↓ 2009/72/EC (adapted)  
⇒ new

- (l) ~~fu~~ setting or approving standards and requirements for quality of service and supply or contributing thereto together with other competent authorities and monitoring compliance with and reviewing the past performance of network security and reliability rules and ~~setting or approving standards and requirements for quality of service and supply or contributing thereto together with other competent authorities~~;
- (m) ~~fu~~ monitoring the level of transparency, including of wholesale prices, and ensuring compliance of electricity undertakings with transparency obligations;
- (n) ~~fu~~ monitoring the level and effectiveness of market opening and competition at wholesale and retail levels, including on electricity exchanges, prices for household customers including prepayment systems, switching rates, disconnection rates, charges for and the execution of maintenance services, and complaints by household customers, as well as any distortion or restriction of competition, including providing any relevant information, and bringing any relevant cases to the relevant competition authorities;
- (o) ~~fu~~ monitoring the occurrence of restrictive contractual practices, including exclusivity clauses which may prevent large non-household customers from contracting simultaneously with more than one supplier or restrict their choice to do

so, and, where appropriate, informing the national competition authorities of such practices;

- (p) ~~n) respecting contractual freedom with regard to interruptible supply contracts and with regard to long-term contracts provided that they are compatible with Community law and consistent with Community policies;~~
- (q) ~~m)~~ monitoring the time taken by transmission and distribution system operators to make connections and repairs;
- (r) ~~n)~~ helping to ensure, together with other relevant authorities, that the consumer protection measures, ~~including those set out in Annex I,~~ are effective and enforced;
- (s) ~~o)~~ publishing recommendations, at least annually, in relation to compliance of supply prices with Article 5 ~~3,~~ and providing these to the competition authorities, where appropriate;
- (t) ~~p)~~ ensuring access to customer consumption data, the provision, for optional use, of an easily understandable harmonised format at national level for consumption data, and prompt access for all customers to such data pursuant to ~~Article 24 and Article 35 under point (h) of Annex I;~~  Article 24 and Article 35  ~~under point (h) of Annex I;~~
- (u) ~~q)~~ monitoring the implementation of rules relating to the roles and responsibilities of transmission system operators, distribution system operators, suppliers and customers and other market parties pursuant to [recast of Regulation 714/2009 as proposed by COM(2016)861/2] ~~Regulation (EC) No 714/2009;~~
- (v) ~~r)~~ monitoring investment in generation  and storage  capacities in relation to security of supply;
- (w) ~~s)~~ monitoring technical cooperation between ~~Community~~  Union  and third-country transmission system operators;
- (x) ~~v)~~ ~~monitoring the implementation of safeguards measures as referred to in Article 42; and~~
- (y) contributing to the compatibility of data exchange processes for the most important market processes at regional level.

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- (z) monitoring the availability of comparison websites, including comparison tools that fulfil the criteria in Article 14.

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2. Where a Member State has so provided, the monitoring duties set out in paragraph 1 may be carried out by other authorities than the regulatory authority. In such a case, the information resulting from such monitoring shall be made available to the regulatory authority as soon as possible.

While preserving their independence, without prejudice to their own specific competencies and consistent with the principles of better regulation, the regulatory authority shall, as appropriate, consult transmission system operators and, as

appropriate, closely cooperate with other relevant national authorities when carrying out the duties set out in paragraph 1.

Any approvals given by a regulatory authority or the Agency under this Directive are without prejudice to any duly justified future use of its powers by the regulatory authority under this Article or to any penalties imposed by other relevant authorities or the Commission.

↓ 2009/72/EC (adapted)  
⇒ new

3. ~~4~~ Member States shall ensure that regulatory authorities are granted the powers enabling them to carry out the duties referred to in ~~☒~~ this Article ~~☒~~ paragraphs ~~1, 3 and 6~~ in an efficient and expeditious manner. For this purpose, the regulatory authority shall have at least the following powers:
- (a) to issue binding decisions on electricity undertakings;
  - (b) to carry out investigations into the functioning of the electricity markets, and to decide upon and impose any necessary and proportionate measures to promote effective competition and ensure the proper functioning of the market. Where appropriate, the regulatory authority shall also have the power to cooperate with the national competition authority and the financial market regulators or the Commission in conducting an investigation relating to competition law;
  - (c) to require any information from electricity undertakings relevant for the fulfilment of its tasks, including the justification for any refusal to grant third-party access, and any information on measures necessary to reinforce the network;
  - (d) to impose effective, proportionate and dissuasive penalties on electricity undertakings not complying with their obligations under this Directive or any relevant legally binding decisions of the regulatory authority or of the Agency, or to propose that a competent court impose such penalties. This shall include the power to impose or propose the imposition of penalties of up to 10 % of the annual turnover of the transmission system operator on the transmission system operator or of up to 10 % of the annual turnover of the vertically integrated undertaking on the vertically integrated undertaking, as the case may be, for non-compliance with their respective obligations pursuant to this Directive; and
  - (e) appropriate rights of investigations and relevant powers of instructions for dispute settlement under paragraphs 11 and 12.
4. ~~3~~ In addition to the duties conferred upon it under paragraph 1 ~~and 3~~ of this Article, when an independent system operator has been designated under Article ~~44~~ ~~43~~, the regulatory authority shall:
- (a) monitor the transmission system owner's and the independent system operator's compliance with their obligations under this Article, and issue penalties for non-compliance in accordance with paragraph ~~3~~ ~~4~~(d);
  - (b) monitor the relations and communications between the independent system operator and the transmission system owner so as to ensure compliance of the independent system operator with its obligations, and in particular approve contracts and act as a dispute settlement authority between the independent system operator and the

transmission system owner in respect of any complaint submitted by either party pursuant to paragraph 11;

- (c) without prejudice to the procedure under Article ~~4413~~(2)(c), for the first ten-year network development plan, approve the investments planning and the multi-annual network development plan presented ⇒ at least every two years ⇐ ~~annually~~ by the independent system operator;
- (d) ensure that network access tariffs collected by the independent system operator include remuneration for the network owner or network owners, which provides for adequate remuneration of the network assets and of any new investments made therein, provided they are economically and efficiently incurred;
- (e) have the powers to carry out inspections, including unannounced inspections, at the premises of transmission system owner and independent system operator; and
- (f) monitor the use of congestion charges collected by the independent system operator in accordance with [Article ~~17(2)~~~~16(6)~~ of recast of Regulation 714/2009 as proposed by COM(2016)861/2].

5. In addition to the duties and powers conferred on it under paragraphs 1 and ~~3~~~~4~~ of this Article, when a transmission system operator has been designated in accordance with Chapter ~~XV~~, the regulatory authority shall be granted at least the following duties and powers:

- (a) to issue penalties in accordance with paragraph 4(d) for discriminatory behaviour in favour of the vertically integrated undertaking;
- (b) to monitor communications between the transmission system operator and the vertically integrated undertaking so as to ensure compliance of the transmission system operator with its obligations;
- (c) to act as dispute settlement authority between the vertically integrated undertaking and the transmission system operator in respect of any complaint submitted pursuant to paragraph 11;
- (d) to monitor commercial and financial relations including loans between the vertically integrated undertaking and the transmission system operator;
- (e) to approve all commercial and financial agreements between the vertically integrated undertaking and the transmission system operator on the condition that they comply with market conditions;
- (f) to request justification from the vertically integrated undertaking when notified by the compliance officer in accordance with Article ~~5021~~(4). Such justification shall, in particular, include evidence to the end that no discriminatory behaviour to the advantage of the vertically integrated undertaking has occurred;
- (g) to carry out inspections, including unannounced ones, on the premises of the vertically integrated undertaking and the transmission system operator; and
- (h) to assign all or specific tasks of the transmission system operator to an independent system operator appointed in accordance with Article ~~4413~~ in case of a persistent breach by the transmission system operator of its obligations under this Directive, in particular in case of repeated discriminatory behaviour to the benefit of the vertically integrated undertaking.

6. The regulatory authorities shall  $\Rightarrow$ , except in cases where the Agency is competent to fix and approve the terms and conditions or methodologies for the implementation of network codes and guidelines under Chapter VII of [recast of Regulation 714/2009 as proposed by COM(2016)861/2] pursuant to Article 5(2) of [recast of Regulation 713/2009 as proposed by COM(2016)863/2] because of their coordinated nature,  $\Leftarrow$  be responsible for fixing or approving sufficiently in advance of their entry into force at least the  $\Rightarrow$  national  $\Leftarrow$  methodologies used to calculate or establish the terms and conditions for:
- (a) connection and access to national networks, including transmission and distribution tariffs or their methodologies. Those tariffs or methodologies shall allow the necessary investments in the networks to be carried out in a manner allowing those investments to ensure the viability of the networks;
  - (b) the provision of ~~balancing~~  $\Rightarrow$  ancillary  $\Leftarrow$  services which shall be performed in the most economic manner possible and provide appropriate incentives for network users to balance their input and off-takes. The ~~balancing~~  $\Rightarrow$  ancillary  $\Leftarrow$  services shall be provided in a fair and non-discriminatory manner and be based on objective criteria; and
  - (c) access to cross-border infrastructures, including the procedures for the allocation of capacity and congestion management.
7. The methodologies or the terms and conditions referred to in paragraph 6 shall be published.

~~8. In fixing or approving the tariffs or methodologies and the balancing services, the regulatory authorities shall ensure that transmission and distribution system operators are granted appropriate incentive, over both the short and long term, to increase efficiencies, foster market integration and security of supply and support the related research activities.~~

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$\Downarrow$  new

8. With a view to increasing transparency in the market and provide to all interested parties all necessary information, decisions or proposals for a decision concerning transmission and distribution tariffs as referred in Article 60(12), regulatory authorities shall make available to market parties the detailed methodology and underlying costs used for the calculation of the relevant network tariffs.

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$\Downarrow$  2009/72/EC

9. The regulatory authorities shall monitor congestion management of national electricity systems including interconnectors, and the implementation of congestion management rules. To that end, transmission system operators or market operators shall submit their congestion management rules, including capacity allocation, to the national regulatory authorities. National regulatory authorities may request amendments to those rules.

Article 60 ~~37~~

⊗ **Decisions and complaints** ⊗

1. ~~10.~~ Regulatory authorities shall have the authority to require transmission and distribution system operators, if necessary, to modify the terms and conditions, including tariffs or methodologies referred to in this Article, to ensure that they are proportionate and applied in a non-discriminatory manner ⇒ , in line with Article 16 of [recast of Regulation 714/2009 as proposed by COM(2016)861/2] ⇐. In the event of delay in the fixing of transmission and distribution tariffs, regulatory authorities shall have the power to fix or approve provisional transmission and distribution tariffs or methodologies and to decide on the appropriate compensatory measures if the final transmission and distribution tariffs or methodologies deviate from those provisional tariffs or methodologies.
2. ~~11.~~ Any party having a complaint against a transmission or distribution system operator in relation to that operator's obligations under this Directive may refer the complaint to the regulatory authority which, acting as dispute settlement authority, shall issue a decision within a period of two months after receipt of the complaint. That period may be extended by two months where additional information is sought by the regulatory authority. That extended period may be further extended with the agreement of the complainant. The regulatory authority's decision shall have binding effect unless and until overruled on appeal.
3. ~~12.~~ Any party who is affected and who has a right to complain concerning a decision on methodologies taken pursuant to this Article or, where the regulatory authority has a duty to consult, concerning the proposed tariffs or methodologies, may, at the latest within two months, or a shorter time period as provided by Member States, following publication of the decision or proposal for a decision, submit a complaint for review. Such a complaint shall not have suspensive effect.
4. ~~13.~~ Member States shall create appropriate and efficient mechanisms for regulation, control and transparency so as to avoid any abuse of a dominant position, in particular to the detriment of consumers, and any predatory behaviour. Those mechanisms shall take account of the provisions of the Treaty, and in particular Article 82 thereof.
5. ~~14.~~ Member States shall ensure that the appropriate measures are taken, including administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons responsible where confidentiality rules imposed by this Directive have not been respected.
6. ~~15.~~ Complaints referred to in paragraphs 11 and 12 shall be without prejudice to the exercise of rights of appeal under ~~Community~~ ⊗ Union ⊗ or national law.
7. ~~16.~~ Decisions taken by regulatory authorities shall be fully reasoned and justified to allow for judicial review. The decisions shall be available to the public while preserving the confidentiality of commercially sensitive information.

8. ~~17~~ Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government.

Article ~~61~~<sup>38</sup>

⊗ **Regional cooperation between regulators on** ~~⊗ Regulatory regime for~~ **cross-border issues**

1. Regulatory authorities shall closely consult and cooperate with each other  $\Rightarrow$ , in particular within the Agency,  $\Leftarrow$  and shall provide each other and the Agency with any information necessary for the fulfilment of their tasks under this Directive. In respect of the information exchanged, the receiving authority shall ensure the same level of confidentiality as that required of the originating authority.
2. Regulatory authorities shall cooperate at least at a regional level to:
- (a) foster the creation of operational arrangements in order to enable an optimal management of the network, promote joint electricity exchanges and the allocation of cross-border capacity, and to enable an adequate level of interconnection capacity, including through new interconnection, within the region and between regions to allow for development of effective competition and improvement of security of supply, without discriminating between supply undertakings in different Member States;

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$\Downarrow$  new

- (b) coordinate the joint oversight of entities performing functions at regional level;
- (c) coordinate, in cooperation with other involved authorities, the joint oversight of national, regional and European-wide adequacy assessments;

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$\Downarrow$  2009/72/EC (adapted)  
 $\Rightarrow$  new

- (d) coordinate the development of all network codes and Guidelines for the relevant transmission system operators and other market actors ; and
- (e) coordinate the development of the rules governing the management of congestion.
3. National regulatory authorities shall have the right to enter into cooperative arrangements with each other to foster regulatory cooperation.
4. The actions referred to in paragraph 2 shall be carried out, as appropriate, in close consultation with other relevant national authorities and without prejudice to their specific competencies.
5. The Commission ~~may~~  $\otimes$  is empowered  $\otimes$  to adopt  $\Rightarrow$  delegated acts in accordance with Article 66 to establish  $\Leftarrow$  ~~Guidelines~~ guidelines on the extent of the duties of the regulatory authorities to cooperate with each other and with the Agency. ~~Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 46(2).~~

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↓ new

*Article 62*

**Duties and powers of regulatory authorities with respect to regional operational centres**

1. The regional regulatory authorities of the geographical area where a regional operational centre is established shall, in close coordination with each other:
  - (a) approve the statutes and rules of procedure;
  - (b) approve the annual budget;
  - (c) approve the cooperative decision-making process;
  - (d) assess if the regional operational centre has the appropriate competences, resources and impartiality to carry out independently the functions and tasks assigned to it, including security, liability and contingency arrangements;
  - (e) ensure its compliance with the obligations under this Regulation and other relevant Union legislation, notably as regards cross-border issues;
  - (f) monitor the performance of their functions and report annually to the Agency in this respect.
2. Member States shall ensure that regulatory authorities are granted the powers enabling them to carry out the duties referred to in paragraph 1 in an efficient and expeditious manner. For this purpose, the regulatory authorities shall have at least the following powers:
  - (a) to request information from regional operational centres;
  - (b) to carry out inspections, including unannounced inspections, at the premises of regional operational centres;
  - (c) to issue joint binding decisions on regional operational centres.

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↓ 2009/72/EC (adapted)  
⇒ new

*Article 63 ~~39~~*

**Compliance with the ⇒ network codes and ⇐ Guidelines**

1. Any regulatory authority and the Commission may request the opinion of the Agency on the compliance of a decision taken by a regulatory authority with the ⇒ network codes and ⇐ Guidelines referred to in this Directive or in [recast of Regulation 714/2009 as proposed by COM(2016)861/2] ~~Regulation (EC) No 714/2009~~.
2. The Agency shall provide its opinion to the regulatory authority which has requested it or to the Commission, respectively, and to the regulatory authority which has taken the decision in question within three months from the date of receipt of the request.

3. Where the regulatory authority which has taken the decision does not comply with the Agency's opinion within four months from the date of receipt of that opinion, the Agency shall inform the Commission accordingly.
4. Any regulatory authority may inform the Commission where it considers that a decision relevant for cross-border trade taken by another regulatory authority does not comply with the  $\Rightarrow$  network codes and  $\Leftarrow$  Guidelines referred to in this Directive or in [recast of Regulation 714/2009 as proposed by COM(2016)861/2] ~~Regulation (EC) No 714/2009~~ within two months from the date of that decision.
5. Where the Commission, within two months after having been informed by the Agency in accordance with paragraph 3, or by a regulatory authority in accordance with paragraph 4, or on its own initiative, within three months from the date of the decision, finds that the decision of a regulatory authority raises serious doubts as to its compatibility with the  $\Rightarrow$  network codes and  $\Leftarrow$  Guidelines referred to in this Directive or in [recast of Regulation 714/2009 as proposed by COM(2016)861/2] ~~Regulation (EC) No 714/2009~~, the Commission may decide to examine the case further. In such a case, it shall invite the regulatory authority and the parties to the proceedings before the regulatory authority to submit observations.
6. Where the Commission takes a decision to examine the case further, it shall, within four months of the date of such decision, issue a final decision:
  - (a) not to raise objections against the decision of the regulatory authority; or
  - (b) to require the regulatory authority concerned to withdraw its decision on the basis that ~~that~~ the  $\Rightarrow$  the network codes and  $\Leftarrow$  ~~g~~Guidelines have not been complied with.
7. Where the Commission has not taken a decision to examine the case further or a final decision within the time-limits set in paragraphs 5 and 6 respectively, it shall be deemed not to have raised objections to the decision of the regulatory authority.
8. The regulatory authority shall comply with the Commission decision to withdraw their decision within a period of two months and shall inform the Commission accordingly.
9. The Commission ~~may~~  $\boxtimes$  is empowered to  $\boxtimes$  adopt  $\Rightarrow$  delegated acts in accordance with Article 66 to establish  $\Leftarrow$  ~~g~~Guidelines setting out the details of the procedure to be followed for the application of this Article. ~~Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 46(2).~~

*Article 64 40*  
**Record keeping**

1. Member States shall require supply undertakings to keep at the disposal of the national authorities, including the national regulatory authority, the national competition authorities and the Commission, for the fulfilment of their tasks, for at least five years, the relevant data relating to all transactions in electricity supply contracts and electricity derivatives with wholesale customers and transmission system operators.
2. The data shall include details on the characteristics of the relevant transactions such as duration, delivery and settlement rules, the quantity, the dates and times of execution and the transaction prices and means of identifying the wholesale customer

concerned, as well as specified details of all unsettled electricity supply contracts and electricity derivatives.

3. The regulatory authority may decide to make available to market participants elements of that information provided that commercially sensitive information on individual market players or individual transactions is not released. This paragraph shall not apply to information about financial instruments which fall within the scope of Directive 2004/39/EC.

~~4. To ensure the uniform application of this Article, the Commission may adopt Guidelines which defining the methods and arrangements for record keeping as well as the form and content of the data that shall be kept. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 46(2).~~

4. ~~5.~~ With respect to transactions in electricity derivatives of supply undertakings with wholesale customers and transmission system operators, this Article shall apply only once the Commission has adopted the Guidelines referred to in paragraph 4.
5. ~~6.~~ The provisions of this Article shall not create additional obligations towards the authorities referred to in paragraph 1 for entities falling within the scope of Directive 2004/39/EC.
6. ~~7.~~ In the event that the authorities referred to in paragraph 1 need access to data kept by entities falling within the scope of Directive 2004/39/EC, the authorities responsible under that Directive shall provide them with the required data.

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↓ 2009/72/EC

## ~~CHAPTER X~~

### ~~RETAIL MARKETS~~

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↓ 2009/72/EC

#### ~~Article 41~~

##### ~~Retail markets~~

~~In order to facilitate the emergence of well functioning and transparent retail markets in the Community, Member States shall ensure that the roles and responsibilities of transmission system operators, distribution system operators, supply undertakings and customers and if necessary other market participants are defined with respect to contractual arrangements, commitment to customers, data exchange and settlement rules, data ownership and metering responsibility.~~

~~Those rules shall be made public, be designed with the aim to facilitate customers' and suppliers' access to networks, and they shall be subject to review by the regulatory authorities or other relevant national authorities.~~

~~Large non-household customers shall have the right to contract simultaneously with several suppliers.~~

↓ 2009/72/EC

## ~~CHAPTER VIII~~

### ~~FINAL PROVISIONS~~

↓ 2009/72/EC (adapted)

#### ~~Article 42~~

#### ~~Safeguard measures~~

~~In the event of a sudden crisis in the energy market and where the physical safety or security of persons, apparatus or installations or system integrity is threatened, a Member State may temporarily take the necessary safeguard measures.~~

~~Such measures must cause the least possible disturbance in the functioning of the internal market and must not be wider in scope than is strictly necessary to remedy the sudden difficulties which have arisen.~~

~~The Member State concerned shall, without delay, notify those measures to the other Member States, and to the Commission, which may decide that the Member State concerned must amend or abolish such measures, insofar as they distort competition and adversely affect trade in a manner which is at variance with the common interest.~~

#### ~~Article 65~~<sup>43</sup>

#### **Level playing field**

1. Measures that the Member States may take pursuant to this Directive in order to ensure a level playing field shall be compatible with the Treaty, notably Article ~~36~~ <sup>30</sup> thereof, and with ~~Community~~ <sup>Union</sup> law.
2. The measures referred to in paragraph 1 shall be proportionate, non-discriminatory and transparent. Those measures may be put into effect only following the notification to and approval by the Commission.
3. The Commission shall act on the notification referred to in paragraph 2 within two months of the receipt of the notification. That period shall begin on the day following receipt of the complete information. In the event that the Commission has not acted within that two-month period, it shall be deemed not to have raised objections to the notified measures.

## Article ~~66~~ 44

### Derogations

1. Member States which can demonstrate, ~~after this Directive has been brought into force,~~ that there are substantial problems for the operation of their small isolated systems, may apply for derogations from the relevant provisions of Chapters II, IV, V, and Section 4 of Chapter VI ~~IV, VI, VII, and VIII,~~ as well as Chapter III, in the case of micro isolated systems, as far as refurbishing, upgrading and expanding existing capacity are concerned, which may be granted to them by the Commission. The Commission shall inform the Member States of those applications before taking a decision, taking into account respect for confidentiality. That decision shall be published in the *Official Journal of the European Union*.
2. Article ~~43~~ 43 shall not apply to Cyprus, ~~Luxembourg~~ and/or Malta. In addition, Articles 7 and 36 ~~26, 32 and 33~~ shall not apply to Malta.

For the purposes of Article 43 ~~43~~(1)(b), the notion ‘undertaking performing any of the functions of generation or supply’ shall not include final customers who perform any of the functions of generation and/or supply of electricity, either directly or via undertakings over which they exercise control, either individually or jointly, provided that the final customers including their shares of the electricity produced in controlled undertakings are, on an annual average, net consumers of electricity and provided that the economic value of the electricity they sell to third parties is insignificant in proportion to their other business operations.

## ~~Article 45~~

### ~~Review procedure~~

~~In the event that in the report referred to in Article 47(6) the Commission reaches the conclusion that given the effective manner in which network access has been carried out in a Member State — which gives rise to fully effective, non-discriminatory and unhindered network access — certain obligations imposed by this Directive on undertakings (including those with respect to legal unbundling for distribution system operators) are not proportionate to the objective pursued, the Member State in question may submit a request to the Commission for exemption from the requirement in question.~~

~~Such request shall be notified, without delay, by the Member State to the Commission, together with all the relevant information necessary to demonstrate that the conclusion reached in the report on effective network access being ensured will be maintained.~~

~~Within three months of its receipt of a notification, the Commission shall adopt an opinion with respect to the request by the Member State concerned, and where appropriate, submit proposals to the European Parliament and to the Council to amend the relevant provisions of this Directive. The Commission may propose, in the proposals to amend this Directive, to exempt the Member State concerned from specific requirements, subject to that Member State implementing equally effective measures as appropriate.~~

## ~~Article 46~~

### ~~Committee~~

- ~~1. The Commission shall be assisted by a committee.~~

~~2. Where reference is made to this paragraph, Article 5a(1) to (4), and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.~~

~~Article 47~~  
~~Reporting~~

~~1. The Commission shall monitor and review the application of this Directive and submit an overall progress report to the European Parliament and the Council for the first time by 4 August 2004, and thereafter on an annual basis. The progress report shall cover at least:~~

~~(a) the experience gained and progress made in creating a complete and fully operational internal market in electricity and the obstacles that remain in this respect, including aspects of market dominance, concentration in the market, predatory or anti-competitive behaviour and the effect thereof in terms of market distortion;~~

~~(b) the extent to which the unbundling and tariffication requirements contained in this Directive have been successful in ensuring fair and non-discriminatory access to the Community's electricity system and equivalent levels of competition, as well as the economic, environmental and social consequences of the opening of the electricity market to customers;~~

~~(c) an examination of issues relating to system capacity levels and security of supply of electricity in the Community, and in particular the existing and projected balance between demand and supply, taking into account the physical capacity for exchanges between areas;~~

~~(d) special attention will be given to measures taken in Member States to cover peak demand and to deal with shortfalls of one or more suppliers;~~

~~(e) the implementation of the derogation provided under Article 26(4) with a view to a possible revision of the threshold;~~

~~(f) a general assessment of the progress achieved with regard to bilateral relations with third countries which produce and export or transport electricity, including progress in market integration, the social and environmental consequences of the trade in electricity and access to the networks of such third countries;~~

~~(g) the need for possible harmonisation requirements that are not linked to the provisions of this Directive; and~~

~~(h) the manner in which Member States have implemented in practice the requirements regarding energy labelling contained in Article 3(9), and the manner in which any Commission recommendations on that issue have been taken into account.~~

~~Where appropriate, the progress report may include recommendations as regards, in particular, the scope and modalities of labelling provisions, including the way in which reference is made to existing reference sources and the content of those sources, and, notably, how information relating to environmental impact, as regards at least CO<sub>2</sub> emissions, and radioactive waste, resulting from electricity generation from different energy sources could be made available in a transparent, easily accessible and comparable manner throughout the Community, how the measures taken by the Member States to control the accuracy of the information provided by suppliers could be streamlined, and which measures could counteract the negative effects of market dominance and market concentration.~~

- ~~2. Every two years, the progress report referred to in paragraph 1 shall also include an analysis of the different measures taken in the Member States to meet public service obligations, together with an examination of the effectiveness of those measures and, in particular, their effects on competition in the electricity market. Where appropriate, the report may include recommendations as to the measures to be taken at national level to achieve high public service standards, or measures intended to prevent market foreclosure.~~
- ~~3. The Commission shall, by 3 March 2013, submit, as part of the general review, to the European Parliament and the Council, a detailed specific report outlining the extent to which the unbundling requirements under Chapter V have been successful in ensuring full and effective independence of transmission system operators, using effective and efficient unbundling as a benchmark.~~
- ~~4. For the purpose of its assessment under paragraph 3, the Commission shall take into account in particular the following criteria: fair and non-discriminatory network access, effective regulation, the development of the network to meet market needs, undistorted incentives to invest, the development of interconnection infrastructure, effective competition in the energy markets of the Community and the security of supply situation in the Community.~~
- ~~5. Where appropriate, and in particular in the event that the detailed specific report referred to in paragraph 3 determines that the conditions referred to in paragraph 4 have not been guaranteed in practice, the Commission shall submit proposals to the European Parliament and the Council to ensure fully effective independence of transmission system operators by 3 March 2014.~~
- ~~6. The Commission shall, by 1 January 2006, forward to the European Parliament and Council, a detailed report outlining progress in creating the internal electricity market. That report shall, in particular, consider:~~
  - ~~– the existence of non-discriminatory network access,~~
  - ~~– effective regulation,~~
  - ~~– the development of interconnection infrastructure and the security of supply situation in the Community,~~
  - ~~– the extent to which the full benefits of the opening of markets are accruing to small enterprises and household customers, notably with respect to public service and universal service standards,~~
  - ~~– the extent to which markets are in practice open to effective competition, including aspects of market dominance, market concentration and predatory or anti-competitive behaviour,~~
  - ~~– the extent to which customers are actually switching suppliers and renegotiating tariffs,~~
  - ~~– price developments, including supply prices, in relation to the degree of the opening of markets; and,~~
  - ~~– the experience gained in the application of this Directive as far as the effective independence of system operators in vertically integrated undertakings is concerned and whether other measures in addition to functional independence and separation of accounts have been developed which have effects equivalent to legal unbundling.~~

~~Where appropriate, the Commission shall submit proposals to the European Parliament and the Council, in particular to guarantee high public service standards.~~

~~Where appropriate, the Commission shall submit proposals to the European Parliament and the Council, in particular to ensure full and effective independence of distribution system operators before 1 July 2007. When necessary, those proposals shall, in conformity with competition law, also concern measures to address issues of market dominance, market concentration and predatory or anti-competitive behaviour.~~

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↓ new

#### *Article 67*

### **Exercise of the delegation**

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The power to adopt delegated acts referred to in Article 61 and Article 63 shall be conferred on the Commission for an undetermined period of time from the (OP: please insert the date of entry into force).
3. The delegation of power referred to in Article 61 and 63 may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated act already in force.
4. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016.
5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
6. A delegated act adopted pursuant to Article 61 and 63 shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

#### *Article 68*

### **Committee procedure**

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.

*Article 69*  
**Reporting**

The Commission shall monitor and review the application of this Directive and submit an overall progress report to the European Parliament and the Council as an annex to the State of the Energy Union Report referred to in [Article 29 of Governance Regulation as proposed by COM (2016) 549].

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↓ 2009/72/EC (adapted)

*Article ~~49~~ 70*  
**Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with ~~this Directive~~  Articles [...] and Annexes (...)  by  (...)  ~~3 March 2011~~. They shall ~~forthwith inform~~  immediately communicate the text of those provisions to  the Commission ~~thereof~~.

[They shall apply those measures from  (...)  ~~3 March 2011~~, with the exception of Article 11, which they shall apply from ~~3 March 2013~~.]

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication.  They shall also include a statement that references in existing laws, regulations and administrative provisions to the Directive repealed by this Directive shall be construed as references to this Directive.  ~~The methods of making~~  Member States shall determine how  such reference  is to be made and how that statement is to be formulated  ~~shall be laid down by Member States~~.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article ~~71~~ 48*  
**Repeal**

Directive ~~2003/54/EC~~  2009/72/EC  is repealed  with effect  from ~~3 March 2011~~  [...],  without prejudice to the obligations of Member States ~~concerning~~  relating to  the ~~deadlines~~  time-limits  for  the  transposition  into national law  and  the dates of  application of the ~~said~~ Directive  set out in Annex (...) .

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table  set out  in Annex IV.

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↓ 2009/72/EC (adapted)

*Article ~~7250~~*  
**Entry into force**

This Directive shall enter into force on the ~~20th~~  twentieth  day following  that of  its publication in the *Official Journal of the European Union*.

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↓ 2009/72/EC

*Article ~~7351~~*  
**Addressees**

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*