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from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

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to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European
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- Note on references to Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market in Directive 2004/8/EC of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market

Delegations will find attached Commission document SWD(2012) 13 final.

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COMMISSION STAFF WORKING PAPER

NOTE ON REFERENCES TO DIRECTIVE 2001/77/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 27 SEPTEMBER 2001 ON THE PROMOTION OF ELECTRICITY PRODUCED FROM RENEWABLE ENERGY SOURCES IN THE INTERNAL ELECTRICITY MARKET IN DIRECTIVE 2004/8/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 11 FEBRUARY 2004 ON THE PROMOTION OF COGENERATION BASED ON A USEFUL HEAT DEMAND IN THE INTERNAL ENERGY MARKET

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1. Issue description and aim of the present note

Several Member States have addressed enquiries to the European Commission concerning the current Union grid system legal framework for electricity from high-efficiency cogeneration and, in particular, the interpretation of Article 8(1) of *Directive 2004/8/EC*¹.

Article 8(1) of Directive 2004/8/EC refers, with regard to the transmission and distribution of electricity produced from high-efficiency cogeneration, to the rules laid down in Article 7(1), (2) and (5) of *Directive 2001/77/EC*².

Article 7 of Directive 2001/77/EC was deleted with effect from 1 April 2010 by Article 26(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*³. This has given rise to the question of how Article 8(1) of Directive 2004/8/EC is to be interpreted and applied from 1 April 2010 onwards and whether there has been any change in the grid system legal framework for electricity from high-efficiency cogeneration.

The Commission's services note that Article 8(1) is not the only provision in Directive 2004/8/EC whereby a cross-reference to Directive 2001/77/EC is made. Article 3 of Directive 2004/8/EC refers, in regard to the applicable definitions, to the '*relevant definitions*' in Directive 2001/77/EC. The definitions in Directive 2001/77/EC are set out in Article 2 thereof. The latter was also deleted with effect from 1 April 2010 by Article 26(1) of *Directive 2009/28/EC*.

Therefore, in the interest of legal certainty and ensuring consistent application of Union law, the Commission's services consider it necessary to remove any possible ambiguity concerning the reading, after 1 April 2010, of cross-references to Directive 2001/77/EC mentioned in Directive 2004/8/EC. To this end, this note clarifies the correct interpretation of Articles 3 and 8(1) of Directive 2004/8/EC and thus provides guidance to the Member States on their application.⁴ The note serves only clarification purposes and does not create any new rules of law. Finally, it is noted that authoritative interpretation of Union law falls ultimately within the competence of the Court of Justice of the European Union.

¹ OJ L 52, 21.2.2004, p. 50.

² OJ L 283, 27.10.2001, p. 33.

³ OJ L 140, 5.6.2009, p. 16.

⁴ In this context, to the extent necessary, clarification of the reference in Article 8(1) of Directive 2004/8/EC to 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 and repealing Directive 96/92/EC is also provided.

2. Legal framework

Article 3 of Directive 2004/8/EC, entitled ‘Definitions’ provides:

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

[...]

In addition, the relevant definitions in Directive 2003/54/EC and in Directive 2001/77/EC shall apply.’

Article 2 of Directive 2001/77/EC, entitled ‘Definitions’, provides:

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

(a) ‘renewable energy sources’ shall mean renewable non-fossil energy sources (wind, solar, geothermal, wave, tidal, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases);

(b) ‘biomass’ shall mean the biodegradable fraction of products, waste and residues from agriculture (including vegetal and animal substances), forestry and related industries, as well as the biodegradable fraction of industrial and municipal waste;

(c) ‘electricity produced from renewable energy sources’ shall mean electricity produced by plants using only renewable energy sources, as well as the proportion of electricity produced from renewable energy sources in hybrid plants also using conventional energy sources and including renewable electricity used for filling storage systems, and excluding electricity produced as a result of storage systems;

(d) ‘consumption of electricity’ shall mean national electricity production, including autoproduction, plus imports, minus exports (gross national electricity consumption).

[...]

Article 8 of Directive 2004/8/EC, entitled ‘Electricity grid system and tariff issues’, refers in its paragraph 1 to, *inter alia*, certain provisions of Article 7 of Directive 2001/77/EC, entitled ‘Grid system issues’.

According to Article 8(1) of Directive 2004/8/EC:

‘For the purpose of ensuring the transmission and distribution of electricity produced from high-efficiency cogeneration the provisions of Article 7(1), (2) and (5) of Directive 2001/77/EC as well as the relevant provisions of Directive 2003/54/EC shall apply.’

Before deletion by Article 26(1) of Directive 2009/28/EC, Article 7(1), (2) and (5) of Directive 2001/77/EC read as follows:

‘1. Without prejudice to the maintenance of the reliability and safety of the grid, Member States shall take the necessary measures to ensure that transmission system operators and distribution system operators in their territory guarantee the transmission and distribution of electricity produced from renewable energy sources. They may also provide for priority access to the grid system of electricity produced from renewable energy sources. When dispatching generating installations, transmission system operators shall give priority to generating installations using renewable energy sources insofar as the operation of the national electricity system permits.

2. Member States shall put into place a legal framework or require transmission system operators and distribution system operators to set up and publish their standard rules relating to the bearing of costs of technical adaptations, such as grid connections and grid reinforcements, which are necessary in order to integrate new producers feeding electricity produced from renewable energy sources into the interconnected grid.

These rules shall be based on objective, transparent and non-discriminatory criteria taking particular account of all the costs and benefits associated with the connection of these producers to the grid. The rules may provide for different types of connection.

[...]

5. Member States shall put into place a legal framework or require transmission system operators and distribution system operators to set up and publish their standard rules relating to the sharing of costs of system installations, such as grid connections and reinforcements, between all producers benefiting from them.

The sharing shall be enforced by a mechanism based on objective, transparent and non-discriminatory criteria taking into account the benefits which initially and subsequently connected producers as well as transmission system operators and distribution system operators derive from the connections.'

According to Article 26(1) of Directive 2009/28/EC:

'In Directive 2001/77/EC, Article 2, Article 3(2), and Articles 4 to 8 shall be deleted with effect from 1 April 2010'.

According to Article 48 of *Directive 2009/72/EC 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*⁵:

'Directive 2003/54/EC is repealed from 3 March 2011 [...] References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.'

Taking into account the above legal framework, the Commission's services confirm that after 1 April 2010, Articles 3 and 8(1) of Directive 2004/8/EC are to be interpreted and applied as outlined below.

3. Correct interpretation of Article 3 and Article 8(1) of Directive 2004/8/EC

The definitions in Article 3 of Directive 2004/8/EC, and the regime of transmission and distribution of electricity from high-efficiency cogeneration in Article 8(1) thereof, are set out by means of cross-references to provisions of Directive 2001/77/EC. Those cross-references represent a choice of a legal drafting technique used by the Union legislator.

The reference in Article 8(1) of Directive 2004/8/EC to Article 7 of Directive 2001/77/EC reflects the Union legislator's intention to accord certain treatment to the transmission and distribution of electricity from high-efficiency cogeneration. At the time of adoption of Directive 2004/8/EC, the Union legislator had decided to treat equally, as far as transmission and distribution is concerned, electricity from renewable energy sources and electricity from high-efficiency cogeneration, and to make the regime laid down in Article 7(1), (2) and (5) of Directive 2001/77/EC applicable to both kinds of electricity. To this end, the Union legislator decided to simply use a cross-reference to some provisions of Article 7 of Directive 2001/77/EC instead of copying their wording into Article 8(1) of Directive 2004/8/EC with the necessary replacement of references to '*electricity produced from renewable energy sources*' by references to '*electricity from high-efficiency cogeneration*'.

Such an approach has been followed in Article 3 of Directive 2004/8/EC as well. The Union legislator decided, instead of copying the definitions contained in Article 2 of Directive 2001/77/EC that are relevant to the application of Directive 2004/8/EC, simply to refer to the '*relevant definitions [...] in Directive 2001/77/EC*'.

It follows from the above that the reference in Article 3 of Directive 2004/8/EC to the '*relevant definitions*' of Directive 2001/77/EC should be understood as indirectly incorporating into the text of Article 3 the relevant definitions set out in Article 2 of Directive 2001/77/EC. The reference to Article 7 of Directive 2001/77/EC in Article 8(1) of Directive

⁵ OJ L 211, 14.8.2009, p. 5.

2004/8/EC is to be read as indirectly incorporating into the latter the text of Article 7(1), (2) and (5) of Directive 2001/77/EC, modified as appropriate (that is to say, by replacing ‘*electricity produced from renewable energy sources*’ with ‘*electricity from high-efficiency cogeneration*’). As a result of the cross-referencing used the Union legislator has created a legal framework for the transmission and distribution of electricity from high-efficiency cogeneration, which incorporates all the rights and obligations set out in Article 7(1), (2) and (5) of Directive 2001/77/EC, even if those are not formally reproduced in the text of Article 8(1) of Directive 2004/8/EC.

The implications of the deletion of Articles 2 and 7 of Directive 2001/77/EC (as of 1 April 2010) for the regime set out under Directive 2004/8/EC by means of the above cross-references should be considered from the viewpoint of the Union legislator’s intention as regards that regime at the time of adoption of Directive 2009/28/EC.

Article 26(1) of Directive 2009/28/EC deleted, *inter alia*, Articles 2 and 7 of Directive 2001/77/EC with effect from 1 April 2010. However, neither Article 26(1) nor any other provision of Directive 2009/28/EC indicates an intention on the part of the Union legislator to amend or partially delete the set of definitions made applicable for the purposes of Directive 2004/8/EC, *inter alia*, by means of a cross-reference to Directive 2001/77/EC. Similarly, while Directive 2009/28/EC strengthens the framework for integration into the grid of electricity from renewable sources in comparison to the one established under Directive 2001/77/EC⁶, it reveals no intention of the Union legislator to amend the legal framework for the transmission and distribution of electricity from high-efficiency cogeneration, already laid down under Directive 2004/8/EC.

Consequently, the deletion of Articles 2 and 7 of Directive 2001/77/EC by Directive 2009/28/EC with effect from 1 April 2010 has not amended the system of applicable legal definitions and/or the regime of transmission and distribution of electricity from high-efficiency cogeneration, set out under Articles 3 and 8(1) of Directive 2004/8/EC, respectively. After 1 April 2010, the provisions of Directive 2001/77/EC to which Articles 3 and 8(1) of Directive 2004/8/EC refer should continue to be read into the texts of Articles 3 and 8(1) of Directive 2004/8/EC.

Concerning specifically Member States’ enquiries on the grid system rules applicable to electricity from high-efficiency cogeneration, the Commission’s services confirm that after 1 April 2010, the legal framework remains the same as defined in Article 7(1), (2) and (5) of Directive 2001/77/EC for electricity produced from renewable energy sources. In the interest of utmost certainty the Commission’s services consider it appropriate hereby to reiterate the rules of this framework.

4. Grid system legal framework for electricity from high-efficiency cogeneration after 1 April 2010

For the purpose of ensuring the transmission and distribution of electricity produced from high-efficiency cogeneration:

⁶ See Recital 64 of Directive 2009/28/EC.

(i) Member States shall continue to take the necessary measures to ensure that transmission and distribution system operators in their territory guarantee the transmission and distribution of electricity from high-efficiency cogeneration;

(ii) Member States may still provide for priority access to the grid system of this electricity;

(iii) when dispatching generating installations, transmission system operators shall still give priority to generating installations using high-efficiency cogeneration insofar as the operation of the national electricity system permits;

(iv) Member States continue to be obliged to put into place a legal framework or require transmission system operators and distribution system operators to set up and publish their standard rules relating to the bearing of costs of technical adaptations, such as grid connections and grid reinforcements, which are necessary in order to integrate new producers feeding electricity produced from high-efficiency cogeneration into the interconnected grid. These rules shall continue to be based on objective, transparent and non-discriminatory criteria, taking particular account of all the costs and benefits associated with the connection of these producers to the grid. The rules may provide for different types of connection;

(v) Member States continue to be obliged to put into place a legal framework or require transmission system operators and distribution system operators to set up and publish their standard rules relating to the sharing of costs of system installations, such as grid connections and reinforcements, between all producers benefiting from them. The sharing shall continue to be enforced by a mechanism based on objective, transparent and non-discriminatory criteria taking into account the benefits which initially and subsequently connected producers as well as transmission system operators and distribution system operators derive from the connections;

(vi) instead of the reference to '*relevant provisions*' of 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 and repealing Directive 96/92/EC⁷, the relevant provisions of Directive 2009/72/EC shall apply as from 3 March 2011 due to Article 48 of that Directive which provides that '*references to the repealed Directive shall be construed as references to this Directive*'. In particular, instead of Articles 11(3)⁸ and 14(4)⁹ of Directive 2003/54/EC, the respective provisions of Articles 15(3)¹⁰ and 25(4)¹¹ of Directive 2009/72/EC shall apply as from 3 March 2011.

For clarification purposes, it should be noted that the grid system legal framework as outlined above should apply to all high-efficiency cogeneration regardless of the size of the cogeneration unit or the fuel used.

⁷ OJ L 176, 15.7.2003, p. 37.

⁸ '*Member States may require the system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources or waste or producing combined heat and power*'.

⁹ '*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*'.

¹⁰ '*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*'.

¹¹ '*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*'.

The rules applicable to high-efficiency cogeneration under Directive 2004/8/EC should be without prejudice to the obligations of Member States regarding the grid access rules for electricity produced from renewable energy sources as established by Article 16 of Directive 2009/28/EC. These rules apply regardless of whether the electricity from renewable sources was produced by means of cogeneration or high-efficiency cogeneration or separate electricity generation.

The order of priority between electricity from high-efficiency cogeneration and electricity produced from renewable energy sources when both have priority dispatch should be decided in view of the requirements relating to the maintenance of the reliability and the safety of the grid, based on transparent and non-discriminatory criteria defined by the competent national authorities in accordance with Article 8(1) of Directive 2004/8/EC as interpreted by this note and Article 16 of Directive 2009/28/EC.

5. Conclusion

The Commission's services confirm that after 1 April 2010, the reference to the '*relevant definitions*' of Directive 2001/77/EC in Article 3 of Directive 2004/8/EC should continue to be read as incorporating in the text of the latter the respective definitions of Directive 2001/77/EC.

The Commission's services further confirm that after 1 April 2010, the reference to Article 7 of Directive 2001/77/EC in Article 8(1) of Directive 2004/8/EC should continue to be read as incorporating in the text of the latter the provisions of Article 7(1), (2) and (5) of Directive 2001/77/EC, as appropriate. The correct application of Article 8(1) of Directive 2004/8/EC should be based on such reading of the provision.

Finally, the Commission's services wish to draw attention to the recently adopted Commission *Proposal for a Directive of the European Parliament and of the Council on energy efficiency and amending and subsequently repealing Directives 2004/8/EC and 2006/32/EC* (COM (2011) 370).¹² The proposal provides for the repeal of Directive 2004/8/EC, contains a list of applicable definitions (Article 2) and sets out rules on the transmission and distribution of electricity produced from high-efficiency cogeneration (Article 12 and Annex XII),¹³ which are more stringent than the regime currently existing under Directive 2004/8/EC.

¹² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0370:FIN:EN:PDF>

¹³ COM(2011) 370, p. 27 and p. 56.