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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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- Progress towards completing the Internal Energy Market

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COMMISSION STAFF WORKING DOCUMENT

Enforcement of the Third Internal Energy Market Package

Accompanying the document

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

Progress towards completing the Internal Energy Market

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The aim of the present annex¹ is to present the Commission policy towards enforcement of the Third Internal Energy Market Package (hereinafter "Third Energy Package"),² as well as to highlight the main actions and results in this respect.

The Commission policy towards ensuring compliance with the Third Energy Package

The Member States had to transpose the Electricity Directive 2009/72/EC and the Gas Directive 2009/73/EC, which are a fundamental part of the Third Energy Package, by 3 March 2011 and to apply them from that date. The Directives set out key rules necessary for a proper functioning of the electricity and gas markets. The new or reinforced requirements concerning the unbundling of networks, the independence and the powers of national regulators and the functioning of retail markets via enhanced consumer protection measures represent major developments compared to the provisions of the Second Energy Package adopted in 2003. Important rules for the operation of the markets are also set out in the Electricity Regulation (EC) No 714/2009 and in the Gas Regulation (EC) No 715/2009, also part of the Third Energy Package and applicable as from 3 March 2011.

Full and correct implementation and application of the Third Energy Package is therefore essential for the successful completion of the Internal Energy Market and has always been a priority for the Commission. Accordingly, the Commission has been systematically taking all necessary measures in order to assist the Member States in fulfilling their obligations and to address cases where the national legislations or practices have fallen short of the Third Energy Package requirements.

In particular, given the highly legally and technically complex nature of the Third Energy Package, the Commission has been available to discuss draft measures and technical solutions with the national authorities on an on-going basis since its adoption. Such cooperation has proven efficient to prevent deficiencies at national level at an early stage as well as to resolve existing incompatibilities. In order to facilitate the implementation of the Third Energy Package, the Commission has also issued a number of interpretative notes, providing guidance to national authorities and stakeholders concerned.³

¹ The present report reflects the situation as of 22 September 2014.

² The Third Energy Package comprises *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 2003/54/EC*, OJ L 211, 14.08.2009, p. 55; *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 and repealing Directive 2003/55/EC*, OJ L 211, 14.08.2009, p. 94; *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 and repealing Regulation (EC) No 1228/2003*, OJ L 211, 14.08.2009, p. 15; *Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005*, OJ L 211, 14.08.2009, p. 36; *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, 14.08.2009, p. 1.

³ Available at http://ec.europa.eu/energy/gas_electricity/interpretative_notes/interpretative_note_en.htm.

At the same time, the Commission has resorted to formal legal action (including infringement procedures) where it has identified failures of the Member States to comply with their obligations and no satisfactory or timely solutions have been provided by the national authorities.

In this respect, in order to oversee the full and correct implementation of the Third Energy Package by the Member States, the Commission follows two main priorities:

As a *first step*, the Commission focused on ensuring the *full transposition* of the Electricity and Gas Directives, given the considerable delays of the Member States to adopt the necessary acts introducing their requirements into national law. As a result of the Commission's action national legislation transposing fully the Directives is now in place in all except 2 Member States.

The existence of national frameworks has allowed the Commission to move to the *second step*, i.e. take action to address *incorrect transposition or bad application* of the Third Energy Package on national level.

More details of the two main directions of the Commission action are presented below.

Action for ensuring full transposition of the Third Energy Package Directives

From the beginning the Commission has taken a very proactive approach in ensuring that the national legislations introduce all requirements of the Electricity and Gas Directives. Following the expiry of the transposition deadline on 3 March 2011 it has systematically assessed all the national transposition measures notified by the Member States in order to verify whether they *fully transpose* the Directives, i.e. whether they contain rules corresponding to all Directives' provisions (so-called "non-transposition check").⁴

Full and timely transposition of the Directives has been a challenge for the vast majority of the Member States. In fact, at the end of the transposition deadline none of the Member States had achieved full transposition.

In September 2011, assessment of the received notifications indicated that the situation was still not satisfactory. In order to urge the Member States to put the necessary legal framework in place without further delay, the Commission opened 38 infringement proceedings against 19 Member States for not transposing or for transposing only partially the Directives.

As a result of this Commission action, the Member States speeded up considerably their transposition efforts and in 2012 and 2013 the Commission received a high number of notifications of national measures. Based on the assessment of these measures it was possible to terminate many of the infringement procedures as the national legislation necessary for full transposition of the Directives was put in place.

⁴ In some cases, the number of notified transposition measures for a Directive comprised over 100 legal acts notified by the national authorities.

The Commission followed up on the unresolved cases in 2012 by sending reasoned opinions. Ultimately, as of October 2012, the Commission started to refer cases to the Court of Justice. So far the Commission has referred 15 cases to Court.⁵ In 12 of these cases the Member States⁶ took the necessary steps to put the legislation in place after the referral and thus managed to avoid a judgment under Article 260(3) TFEU.⁷

As of 22 September 2014 infringement proceedings for partial transposition of the Electricity and/or Gas Directives are pending against two Member States, one of which has recently adopted further transposition measures, under examination by the Commission.⁸

Action for ensuring correct transposition and application of the Third Energy Package

In addition to ensuring that national legislation fully transposing the Electricity and Gas Directives is in place, the Commission has started to identify and resolve problems concerning *incorrect transposition or bad application* of the Third Energy Package rules by the Member States (so-called "non-conformity" problems).⁹

To this end, the Commission has again taken a proactive approach. It is conducting on its own initiative a **systematic non-conformity assessment** of the national transposition measures, completed so far for almost all 28 Member States.¹⁰

This assessment has been initiated once a Member State has achieved if not full, at least substantial transposition of the Directives.¹¹ The assessment has targeted in particular those violations which have the *highest impact on the functioning of the internal market*. This includes as a matter of principle the three areas of the Directives which have been subject to core developments, compared to the Second Energy Package, i.e. unbundling, independence, powers and duties of the national regulatory authorities and consumer protection. Other

⁵ Poland, Slovenia, Finland, Bulgaria, Estonia, UK, Romania (for each of these Member States as regards both the Electricity and Gas Directives) and Ireland (as regards the Electricity Directive).

⁶ UK, Bulgaria, Poland, Finland, Slovenia and Estonia (for each as regards both the Electricity and Gas Directives).

⁷ This provision, a novelty in the Treaty on the Functioning of the European Union, allows the Commission to propose to the Court to impose financial penalties on the Member States in non-transposition procedures at the stage of first referral to the Court.

⁸ These are the cases against Romania (as regards both the Electricity and Gas Directives) and Ireland (as regards the Electricity Directive). On 17 September 2014 Romania has adopted amendments to its Electricity and Gas Law, relevant for the transposition of the Directives. The Commission is examining whether these measures fully transpose the Directives and will decide on the pending infringement cases accordingly.

⁹ These include cases where the national legislation transposes the requirements of the Third Energy Package in a complete manner but incorrectly (e.g. it subjects them to conditions the Third Energy Package does not envisage) or the national law fully and correctly implements the EU rules but is poorly applied in practice.

¹⁰ The assessment requires a lot of resources given the high number and complexity of acts adopted by the Member States to implement the Third Energy Package as well as the quite frequent changes that the national laws undergo. The timing of the final outcome of such assessment depends also on whether further amendments of the national legislation take place.

¹¹ Thus the countries which have achieved full transposition first have been subject to non-conformity assessment first.

pertinent issues, for example, such relating to the application of the Electricity and Gas Regulations, have been also addressed in the assessment on a case-by-case basis, depending on the specificities of the national legislation and situation (e.g. rules related to tariffs, interconnectors, etc.).

On this basis the Commission has opened EU Pilot cases¹² against several Member States in order to clarify and discuss the potential non-conformity problems with the national authorities. Where the Commission concludes that the national law or practice is not in conformity with the Third Energy Package requirements and the discussions with the Member State have failed to resolve the issue, it has initiated and will continue to initiate infringement procedures in order to urge the Member States to correct the incompatibilities.

So far 9 such systematic non-conformity EU Pilot cases have been initiated and 1 of them has resulted in an infringement procedure.¹³ Further EU Pilot cases and, if necessary, infringement procedures will follow in 2014.

In parallel to these systematic non-conformity procedures, the Commission has also acted on **an ad-hoc** basis. This type of action targets a specific non-conformity problem of which the Commission becomes aware (via complaints from individuals or undertakings¹⁴ or based on its own assessment) and which needs to be urgently raised with the Member State concerned.

Here again, the Commission first opens an EU Pilot case against the Member State. In some cases these EU Pilot case have been already sufficient to persuade the Member States to correct their legislation or practices.

Where this has not been the case, the Commission has opened infringement procedures. For example, the Commission launched 2 such infringement procedures in 2012 in order to address national import and export restrictions relating to electricity and gas.¹⁵

¹² EU Pilot is a system via which the Commission and the Member States discuss possible violations of EU law concerning incorrect transposition or bad application of the *acquis*. An EU Pilot case will be closed, if the discussions with the Member State bring a satisfactory outcome, or could give rise to an infringement procedure (by sending to the Member State a letter of formal notice), if the Commission concludes that a violation of EU law by the Member State is in place. More information on the EU Pilot's application is available at http://ec.europa.eu/eu_law/infringements/application_monitoring_en.htm

¹³ Luxembourg. Information on the letter of formal notice issued is available at http://ec.europa.eu/eu_law/eulaw/decisions/dec_20140328.htm

¹⁴ Contacts with the national energy regulators, including complaints from these bodies, are another important source of information for the Commission in identifying possible deficiencies at national level.

¹⁵ An infringement procedure was opened in 2012 against Spain for violation of the Electricity Regulation (EC) No 714/2009 and was closed in 2013 due to compliance. In 2012 the Commission also opened an infringement procedure against Romania concerning restrictions for the export of gas which is on-going. Information on the procedural steps decided by the Commission in the cases is available at http://ec.europa.eu/eu_law/infringements/infringements_decisions_en.htm and http://europa.eu/rapid/press-release_MEMO-14-470_en.htm.

At present 9 such EU Pilot cases on ad-hoc issues are on-going and might result in further infringement procedures. They concern a variety of issues such as tariff rules, potential export and import restrictions, independence requirements for the national regulator, etc.

Concluding comments

Effective implementation and application for the Third Energy Package requirements is crucial for fully ensuring open and competitive electricity and gas markets which create a level-playing field for all market players. The Commission has been systematically addressing identified deficiencies on the part of the Member States to timely and fully comply with their obligations for the implementation and application of the Third Energy Package. The Commission has consistently sought resolution of such problems, via close cooperation with the Member States and resorting to infringement action, where necessary. However, the full and correct implementation of the Third Energy Package rules in the EU will mainly depend on the willingness of the Member States to comply with their obligations under EU law. The Commission will continue to monitor compliance with these obligations by means of appropriate enforcement action.