



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 15 October 2008**

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**NOTE**

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| No. Cion prop: | 13046/07 ENER 223 CODEC 950  |
| Subject:       | Proposal for a Regulation of the European Parliament and of the Council<br>establishing an Agency for the Cooperation of Energy Regulators<br>- Draft common position of the Council |

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Delegations will find attached a revised version of the above proposal, as agreed by the TTE Council on 10 October 2008.

The recitals and Articles and the references in the text of the Articles have been renumbered where necessary.

This document will be the basis for legal-linguistic revision in view of the common position.

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**establishing an Agency for the Cooperation of Energy Regulators**

**(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission<sup>1</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>2</sup>,

Having regard to the opinion of the Committee of the Regions<sup>3</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

- (1) 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 natural gas. Improving the regulatory framework at Community level was identified as a key measure to achieve this objective.
- (2) An independent advisory group on electricity and gas, called the "European Regulators Group for Electricity and Gas" (ERGEG) was established by Commission Decision 2003/796/EC<sup>4</sup> to facilitate consultation, coordination and cooperation between the regulatory bodies in Member States, and between these bodies and

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<sup>1</sup> OJ C , , p. .

<sup>2</sup> OJ C , , p. .

<sup>3</sup> OJ C , , p. .

<sup>4</sup> OJ L 296, 14.11.2003, p. 34.

the Commission, with a view to consolidating the internal market in electricity and natural gas. This group is composed of representatives of the national regulatory authorities established pursuant 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 <sup>1</sup> and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas <sup>2</sup>.

- (3) The work undertaken by ERGEG since its establishment has made a positive contribution to the internal market in electricity and gas. However, it is widely recognised by the sector, and has been proposed by ERGEG itself, that voluntary cooperation between national regulatory authorities should now take place within a Community structure with clear competences and with the power to adopt individual regulatory decisions in a number of specific cases.
- (4) The European Council of March 2007 invited the Commission to propose measures to set up an independent mechanism for national regulators to co-operate.
- (5) On the basis of the impact assessment of the resource requirements for a central entity, it was concluded that an independent central entity offered a number of long-term advantages over other options. An Agency for the Cooperation of Energy Regulators, hereinafter referred to as "the Agency", should therefore be established.
- (6) The Agency should ensure that regulatory functions performed at national level by the national regulatory authorities in accordance with Directive [2003/54/EC] and Directive [2003/55/EC] are properly coordinated and, where necessary, completed at the Community level. To that end, it is necessary to guarantee the independence of the Agency, its technical and regulatory capacities and its transparency and efficiency.
- (7) The Agency should monitor the regional cooperation between transmission system operators in the electricity and gas sectors as well as the execution of the tasks of the European Network of Transmission System Operators for electricity (hereinafter referred to as ENTSO for Electricity) and the European Networks of Transmission System Operators for Gas (hereinafter referred to as ENTSO for Gas). The involvement of the Agency is essential in order to ensure that the cooperation between transmission system operators proceeds in an efficient and transparent way for the benefit of the internal market.

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<sup>1</sup> OJ L 176, 15.07.2003, p. 37.

<sup>2</sup> OJ L 176, 15.7.2003, p. 57.

- (8) The Agency has an important role in developing framework guidelines to which network codes must adhere. It is also considered appropriate for the Agency, and consistent with its purpose, to have a role in reviewing draft network codes (both when created and upon modification) to ensure their adherence to the framework guidelines, before it may recommend them to the Commission for adoption.
- (9) It is appropriate to provide a framework within which national regulatory authorities are able to cooperate. This framework should facilitate the uniform application of the legislation on the internal market for electricity and gas throughout the Community. As regards situations concerning more than one Member State, the Agency should be granted the power to adopt individual decisions. This power should cover the regulatory regime for electricity and gas infrastructure connecting at least two Member States, exemptions from the internal market rules for new electricity interconnectors and new gas infrastructures located in more than one Member State.
- (10) Since the Agency has an overview of the national regulatory authorities, it should have an advisory role towards the Commission as regards market regulation issues. It should also be required to inform the Commission where it finds that the cooperation between transmission system operators does not produce the results which are needed or that a national regulatory authority whose decision has violated guidelines is not willing to comply with the Agency's opinion.
- (11) The Agency should also be able to issue non-binding guidelines to assist regulatory authorities and market players in sharing good practices.
- (12) The structure of the Agency should be adapted to meet the specific needs of energy regulation. In particular the specific role of the national regulatory authorities and their independence needs to be taken fully into account.
- (13) The Administrative Board should have the necessary powers to establish the budget, check its implementation, draw up internal rules, adopt financial regulations and appoint the Director. A rotation system should be used for the renewal of the members of the Administrative Board who are appointed by the Council so as to ensure a balanced participation of Member States over time.

- (14) The Agency should have the necessary powers to perform the regulatory functions in an efficient and above all independent manner. The independence of regulatory authorities is not only a key principle of good governance but also and a fundamental condition to ensure market confidence. Without prejudice to its members acting on behalf of their respective national authorities, the Board of Regulators should therefore act independently from any market interest and shall not seek or take instructions from any government or other public or private entity.
- (15) Where the Agency has decision-making powers, interested parties should, for reasons of procedural economy, be granted a right of appeal to a Board of Appeal, which should be part of the Agency, but independent from its administrative and regulatory structure. In the interest of continuity, the appointment or renewal of the members of the Board of Appeal should allow for partial replacement of that Board.
- (16) The Agency should be financed mainly from the general budget of the European Union, by fees and by voluntary contributions. In particular, the resources currently pooled by regulatory authorities for their cooperation at European level should continue to be available to the Agency. The Community budgetary procedure should remain applicable as far as any subsidies chargeable to the general budget of the European Union are concerned. Moreover, the auditing of accounts should be undertaken by the Court of Auditors in accordance with Article 91 of Commission Regulation (EC, Euratom) No 2343/2002 of 19 November 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities<sup>1</sup>.
- (17) The Agency should have highly professional staff. In particular, it should benefit from the competence and experience of staff seconded by the national regulatory authorities, the Commission and the Member States. The Staff Regulations of Officials of the European Communities and the Conditions of employment of other servants of the European Communities (hereinafter referred to as “the Staff Regulations” and “the Conditions of

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<sup>1</sup> OJ L 357, 31.12.2002, p. 72.

employment” respectively) laid down in Regulation (EEC, Euratom, ECSC) No 259/68<sup>1</sup> and the rules adopted jointly by the European Community institutions for the purpose of applying these regulations should apply to the staff of the Agency. The Administrative Board, in agreement with the Commission, should adopt the necessary implementing measures.

- (18) The Agency should apply the general rules regarding public access to documents held by Community bodies. The Administrative board should establish the practical measures to protect commercially sensitive data and personal data.
- (19) Participation of third countries which are not members of the European Community in the work of the Agency should be possible in accordance with appropriate agreements to be concluded by the Community.
- (20) Since the objectives of this Regulation, cooperation of national regulatory authorities at Community level, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives,

HAVE ADOPTED THIS REGULATION:

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<sup>1</sup> OJ L 56, 4.3.1968, p. 1. Regulation as last amended by Regulation (EC, Euratom) No 1558/2007 (OJ L 340, 22.12.2007, p. 1).

## *Article 1*

### *Establishment*

An Agency for the Cooperation of Energy Regulators, hereinafter referred to as ‘the Agency’ is established for the purpose of assisting the regulatory authorities mentioned in Article 34 of Directive [2003/54/EC] and Article 38 of Directive [2003/55/EC] in exercising at Community level the regulatory tasks performed at national level and, where necessary, to coordinate their action.

## *Article 2*

### *Legal status*

1. The Agency shall be a Community body with legal personality.
2. In each Member State, the Agency shall enjoy the most extensive legal capacity accorded to legal persons under national law. It may, in particular, acquire or dispose of movable and immovable property and be a party to legal proceedings.
3. The Agency shall be represented by its Director.
4. Until the premises of the Agency are ready, it will be hosted on Commission premises.

## *Article 3*

### *Composition*

The Agency shall comprise:

- (a) an Administrative Board, which shall exercise the responsibilities set out in Article 12;
- (b) a Board of Regulators, which shall exercise the responsibilities set out in Article 14;
- (c) a Director, who shall exercise the responsibilities set out in Article 16;
- (d) a Board of Appeal, which shall exercise the responsibilities set out in Article 18.

## *Article 4*

### *Type of acts of the Agency*

The Agency may:

- (a) issue opinions addressed to transmission system operators;
- (b) issue opinions addressed to regulatory authorities;
- (c) issue opinions and recommendations addressed to the Commission;
- (d) take individual decisions in specific cases referred to in Articles 7 and 9.

## *Article 5*

### *General tasks*

The Agency may, upon a request from the Commission or on its own initiative, provide an opinion to the Commission on all issues related to the purpose for which it has been established.

## *Article 6*

### *Tasks as regards the cooperation of transmission system operators*

1. The Agency shall provide an opinion to the Commission on the draft statutes, list of members and draft rules of procedure of the European Network of Transmission System Operators for Electricity in accordance with Article 5(2) of Regulation (EC) No [1228/2003] and on those of the European Network of Transmission System Operators for Gas in accordance with Article 5(2) of Regulation (EC) No [1775/2005].
2. The Agency shall monitor the execution of the tasks of the European Network of Transmission System Operators for Electricity as provided for in Article 9 of Regulation (EC) No [1228/2003] and of the European Network of Transmission System Operators for Gas as provided for Article 9 of Regulation (EC) No [1775/2005].



3. The Agency may provide an opinion:
- to the European Network of Transmission System Operators for Electricity as provided for in Article 9(2) of Regulation (EC) No [1228/2003] and to the European Network of Transmission System Operators for Gas as provided for in Article 9(2) of Regulation (EC) No [1775/2005] on the draft annual work programme and the draft non-binding 10-year network development plan, and
  - to the European Network of Transmission System Operators for Electricity as provided for in Article 8(1)(a) of Regulation (EC) No [1228/2003] and to the European Network of Transmission System Operators for Gas as provided for in Article 8(1)(a) of Regulation (EC) No [1775/2005] on the draft network codes.
4. The Agency shall provide a duly justified opinion as well as recommendations to the European Network of Transmission System Operators and to the Commission where it considers that the draft annual work programme or the draft non-binding 10-year network development plan submitted to it in accordance with Article 9(2) of Regulation (EC) No [1228/2003] and Article 9(2) of Regulation (EC) No [1775/2005] do not ensure non-discrimination, effective competition and the efficient functioning of the market or a sufficient level of cross-border interconnection open to third party access.

The Agency shall submit a draft framework guideline to the Commission where requested to do so under Article 6(2) of Regulation (EC) No [1228/2003] and Article 6(2) of Regulation (EC) No [1775/2005]. The Agency shall review the draft framework guideline and re-submit it to the Commission where requested to do so under Article 6(4) of Regulation (EC) No [1228/2003] and Article 6(4) of Regulation (EC) No [1775/2005].

The Agency shall provide a justified opinion to the European Network of Transmission System Operators on the draft network code in accordance with Article 6(7) of Regulation (EC) No [1228/2003] and Article 6(7) of Regulation (EC) No [1775/2005].

The Agency shall submit the draft network code to the Commission and may recommend that it be adopted in accordance with Article 6(9) of Regulation (EC) No [1228/2003] and Article 6(9) of Regulation (EC) No [1775/2005]. The Agency shall prepare and submit a draft network code to the Commission where requested to do so under Article 6(10) of Regulation (EC) No 1228/2003 and Article 6(10) of Regulation (EC) No [1775/2005].

5. The Agency shall provide a duly justified opinion to the Commission, in accordance with Article 9(1) of Regulation (EC) No [1228/2003] and Article 9(1) of Regulation (EC) No [1775/2005] where the European Network of Transmission System Operators has failed to implement a network code elaborated under Article 8(2) of Regulation (EC) No [1228/2003] and Article 8(2) of Regulation (EC) No [1775/2005] or a network code which has been established in accordance with Article 6(1) to (10) of those Regulations but which has not been adopted by the Commission under Article 6(11) of those Regulations.
6. The Agency shall monitor the regional cooperation of transmission system operators referred to in Article 12 of Regulation (EC) No [1228/2003] and Article 12 of Regulation (EC) No [1775/2005], and take due account of the outcome of this cooperation when formulating its opinions, recommendations and decisions.

#### *Article 7*

##### *Tasks as regards the national regulatory authorities*

1. The Agency shall adopt individual decisions on technical issues where these decisions are provided for in Directive [2003/54/EC], Directive [2003/55/EC], Regulation (EC) No [1228/2003] or Regulation (EC) No [1775/2005].
2. The Agency may, in accordance with its work programme or at the request of the Commission, adopt non-binding guidelines to assist regulatory authorities and market players in sharing good practice.

3. The Agency shall promote cooperation between the national regulatory authorities and between regulatory authorities at regional level, and take due account of the outcome of this cooperation when formulating its opinions, recommendations and decisions. Where the Agency considers that binding rules on such cooperation are required, it shall make the appropriate recommendations to the Commission.
4. The Agency shall provide an opinion, at the request of any regulatory authority or of the Commission, on whether a decision taken by a regulatory authority complies with the Guidelines referred to in Directive [2003/54/EC], Directive [2003/55/EC], Regulation (EC) No [1228/2003] or Regulation (EC) No [1775/2005].
5. Where a national regulatory authority does not adequately follow up the opinion of the Agency as referred to in paragraph 4 within four months from the date of receipt, the Agency shall inform the Commission.
6. When a national regulatory authority encounters, in a specific case, difficulties with the application of the Guidelines referred to in Directive [2003/54/EC], Directive [2003/55/EC], Regulation (EC) No [1228/2003] or Regulation (EC) No [1775/2005], it may ask the Agency for an opinion. The Agency shall deliver its opinion after consulting the Commission within four months.
7. The Agency shall decide on the terms and conditions for access and operational security for infrastructure connecting at least two member States, in accordance with Article 8.

#### *Article 8*

##### Terms and conditions for access and operational security for cross border infrastructure

1. For infrastructure connecting or that might connect at least two Member States, the Agency shall decide upon those regulatory issues that fall within the competence of national regulatory authorities, which may include the terms and conditions for access and operational security, only

- (a) where the competent national regulatory authorities have not been able to reach an agreement within six months from the date the file was brought before the last of these regulatory authorities, or
- (b) upon a joint request from the competent national regulatory authorities.

The competent national regulatory authorities may jointly request that the period referred to in littera (a) is extended by a period of maximum six months.

When preparing its decision the Agency shall consult the national regulatory authorities and TSOs concerned and be informed of the proposals and observations of all the TSOs concerned.

2. The terms and conditions for access of the infrastructure referred to in paragraph 1 shall include:
  - a) procedure for capacity allocation,
  - b) time frames for allocation,
  - c) sharing of congestion revenues,
  - d) charges levied on the users of the infrastructure as referred to in article 17(1)(d) of Regulation [1228/2003] and article 35(1)(d) of Directive [2003/55/EC].
3. Where a case has been referred to the Agency under paragraph 1, the Agency:
  - a) shall provide its decision within at most 6 months of referral
  - b) may, if necessary, provide an interim decision to ensure that security of supply or operational security for the infrastructure in question is protected
4. The Commission may adopt guidelines on the situations in which the Agency becomes competent to decide upon the terms and conditions for access and operational security of the infrastructure referred to in paragraph 1 . These measures, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 31 of this Regulation.

## *Article 9*

### *Other tasks*

1. The Agency may as a last resort grant exemptions, as provided for in Article 17(5) of Regulation (EC) No [1228/2003]. The Agency may also grant exemptions as provided for in Article 35(3) of Directive [2003/55/EC] where the infrastructure concerned is located in the territory of more than one Member State.
2. The Agency shall provide an opinion, upon request by the Commission in accordance with Article 3(1)(b) of Regulation [1228/2003] or Article 3(1)(b) of Regulation [1775/2005], on decisions of national regulatory authorities on certification.

## *Article 10*

### *Consultations*

In carrying out its tasks the Agency shall consult extensively and at an early stage with market participants, TSOs, consumers, end-users and, where relevant, competition authorities, without prejudice to their respective competence, in an open and transparent manner, in particular when its tasks concern TSOs.

## *Article 11*

### *Administrative Board*

1. The Administrative Board shall be composed of *six* members. Each member shall have an alternate. One member and his/her alternate shall be appointed by the Commission, and five and their alternates by the Council. The term of office shall be four years, renewable once. For the first mandate this term shall be six years for half of the members.
2. The Administrative Board shall appoint its Chairperson and its Vice-Chairperson from among its members. The Vice-Chairperson shall automatically replace the Chairperson if the latter is not in a position to perform his duties. The term of office of the Chairperson and of the Vice-Chairperson shall be two years and shall be renewable once. In any event, however, the term of office of the Chairperson and that of the Vice-Chairperson shall expire the moment they cease to be members of the Administrative Board.

3. Meetings of the Administrative Board shall be convened by its Chairperson. The Chairperson of the Board of Regulators, or their nominee from that Board, and the Director of the Agency shall participate in the deliberations unless the Administrative Board decides otherwise as regards the Director. The Administrative Board shall meet at least twice a year in ordinary session. It shall also meet at the initiative of its Chairperson, at the request of the Commission or at the request of at least a third of its members. The Administrative Board may invite any person with potentially relevant opinions to attend its meetings in the capacity of an observer. The members of the Administrative Board may, subject to the rules of procedure, be assisted by advisers or by experts. The Administrative Board's secretarial services shall be provided by the Agency.
4. Decisions of the Administrative Board shall be adopted on the basis of a two-third majority of the members present.
5. Each member shall have one vote. The rules of procedure shall set out in greater detail:
  - the arrangements governing voting, especially the conditions whereby one member can act on behalf of another and also, where appropriate, the rules governing quorums
  - the arrangements governing the rotation applicable for the renewal of the members of the Board who are appointed by the Council so as to ensure a balanced participation of Member States over time.
6. A member of the Administrative Board cannot be member of the Board of Regulators.
7. The members of the Administrative Board shall undertake to act independently in the public interest. For this purpose, they shall make a declaration of commitments and a declaration of interests indicating either the absence of any interest which may be considered prejudicial to their independence or any direct or indirect interest which might be considered prejudicial to their independence. Those declarations shall be made public, annually and in writing.

## *Article 12*

### *Tasks of the Administrative Board*

1. The Administrative Board shall, after having consulted the Board of Regulators and obtained its assent in accordance with Article 14(2), appoint the Director in accordance with Article 15(2).
2. The Administrative Board shall formally appoint the members of the Board of Regulators in accordance with Article 13(1).
3. The Administrative Board shall formally appoint the members of the Board of Appeal in accordance with Article 17(1).
4. The Administrative Board shall ensure that the Agency carries out its mission and performs the tasks assigned to it in accordance with this Regulation.
5. The Administrative Board shall adopt, before 30 September each year, and after consulting the Commission and after approval by the Board of Regulators in accordance with Article 14(3), the work programme of the Agency for the coming year and shall transmit it to the European Parliament, the Council and the Commission. The work programme shall be adopted without prejudice to the annual budgetary procedure and shall be made public.
6. The Administrative Board shall adopt and, if necessary, revise a multi-annual programme. The revision shall be based on an evaluation report, made by an independent external expert at the request of the Administrative Board. These documents shall be made public.
7. The Administrative Board shall exercise its budgetary powers in accordance with Articles 20 to 23.

8. The Administrative Board shall decide, after having obtained the agreement of the Commission, whether to accept any legacies or donations or grants from other Community sources or any voluntary contribution from the Member States or from their regulatory authorities. The opinion that the Board shall deliver pursuant to Article 23(5) shall explicitly address the sources of funding listed in this paragraph.
9. The Administrative Board, in consultation with the Board of Regulators, shall exercise disciplinary authority over the Director.
10. The Administrative Board shall, where necessary, draw up the Agency's staff policy pursuant to Article 27(2).
11. The Administrative Board shall adopt the special provisions on right of access to the documents of the Agency, in accordance with Article 29.
12. The Administrative Board shall adopt and publish the annual report on the activities of the Agency, referred to in Article 16(8), and shall transmit it to the European Parliament, the Council, the Commission, the European Economic and Social Committee and the Court of Auditors by 15 June at the latest. This report shall contain an independent section, approved by the Board of Regulators, concerning the regulatory activities of the Agency during the year considered.
13. The Administrative Board shall adopt and publish its own rules of procedure.

### *Article 13*

#### *Board of Regulators*

1. The Board of Regulators shall be composed of:
  - senior representatives of the regulatory authorities, as mentioned in Article 34 of Directive [2003/54/EC] and Article 38 of Directive [2003/55/EC], and one alternate per Member State from current senior staff of these authorities, and



- one non-voting representative of the Commission.
2. The Board of Regulators shall elect a Chairperson and a Vice-Chairperson from among its members. The Vice-Chairperson shall replace the Chairperson if the latter is not in a position to perform his or her duties. The term of office of the Chairperson and of the Vice-Chairperson shall be two and a half years and shall be renewable. In any event, however, the term of office of the Chairperson and that of the Vice-chairperson shall expire the moment they cease to be members of the Board of Regulators.
  3. The Board of Regulators shall act by a two-third majority of its members *present*. Each member or alternate shall have one vote.
  4. The Board of Regulators shall adopt and publish its Rules of procedure. The rules of procedure shall set out in greater detail the arrangements governing voting, especially the conditions whereby one member can act on behalf of another and also, where appropriate, the rules governing quorums. The rule of procedures may foresee specific working methods for the consideration of issues arising in the context of regional cooperation initiatives.
  5. When carrying out the tasks conferred upon it by this Regulation and without prejudice to its members acting on behalf of their respective regulatory authority, the Board of Regulators shall act independently and shall not seek or take instructions from any government of a Member State or from any public or private interest.
  6. The Board of Regulators' secretarial services shall be provided by the Agency.

#### *Article 14*

##### *Tasks of the Board of Regulators*

1. The Board of Regulators shall provide an opinion to the Director *on* the opinions, recommendations and decisions referred to in Articles 5, 6, 7 and 9 that are considered for adoption. In addition, the Board of Regulators, within its field of competence, shall provide guidance to the Director in the execution of the Director's tasks.

2. The Board of Regulators shall deliver an opinion on the candidate to be appointed as Director in accordance with Article 12(1) and Article 15(2). The Board shall reach this decision on the basis of a three-quarter majority of its members.
3. The Board of Regulators shall, in accordance with Article 12(5) and Article 16(6) and in line with the draft budget established according to Article 22(1), approve the work programme of the Agency for the coming year and present it before 1 September for adoption by the Administrative Board.
4. The Board of Regulators shall approve the independent section on regulatory activities of the annual report, as provided for in Article 12(12) and Article 16(8).

### *Article 15*

#### *Director*

1. The Agency shall be managed by its Director, who shall act in accordance with the guidance referred to in Article 14(1) and, where foreseen in this Regulation, the opinions of the Board of Regulators. Without prejudice to the respective roles of the Administrative Board and the Board of Regulators in relation to the tasks of the Director, the Director shall not seek or accept any instruction from any government, the Commission or from any body.
2. The Director shall be appointed by the Administrative Board following the assent of the Board of Regulators, on the basis of merit as well as skills and experience, from a list of at least three candidates proposed by the Commission, following a public call for expression of interest. Before appointment, the candidate selected by the Administrative Board may be invited to make a statement before the competent committee of the European Parliament and answer questions put by its members.
3. The Director's term of office shall be five years. In the course of the nine months preceding the end of this period, the Commission shall undertake an assessment addressing in particular:
  - (a) the performance of the Director;
  - (b) the Agency's duties and requirements in the coming years.

The assessment concerning littera (b) shall be carried out with the assistance of an independent external expert.

4. The Administrative Board, acting on a proposal from the Commission, taking into account the assessment report and the opinion on the Board of Regulators on this assessment and only in those cases where it can be justified by the duties and requirements of the Agency, may extend the term of office of the Director once for not more than three years.
5. The Administrative Board shall inform the European Parliament about its intention to extend the Director's term of office. Within a month before the extension of his/her term of office, the Director may be invited to make a statement before the competent committee of the Parliament and answer questions put before its members.
6. If the term of office is not extended, the Director shall remain in office until the appointment of his/her successor.
7. The Director may be removed from office only upon a decision by the Administrative Board, after having obtained the assent of the Board of Regulators. The Administrative Board shall reach this decision on the basis of a three-quarter majority of its members.
8. The European Parliament and the Council may call upon the Director to submit a report on the performance of his duties.

## *Article 16*

### *Tasks of the Director*

1. The Director shall be responsible for representing the Agency and shall be in charge of its management.
2. The Director shall prepare the work of the Administrative Board. He or she shall participate, without having the right to vote, in the work of the Administrative Board.
3. The Director shall adopt and publish the opinions, recommendations and decisions referred to in Articles 5, 6, 7 and 9, that have received\_ the assent of the Board of Regulators.
4. The Director shall be responsible for implementing the annual work programme of the Agency under the guidance of the Board of Regulators and under the administrative control of the Administrative Board.

5. The Director shall take the necessary measures, notably the adoption of internal administrative instructions and the publication of notices, to ensure the functioning of the Agency in accordance with this Regulation.
6. Each year the Director shall prepare a draft work programme of the Agency for the following year, and submit it to the Board of Regulators and to the Commission before 30 June of that year.
7. The Director shall make an estimate of the revenue and expenditure of the Agency pursuant to Article 22 and shall implement the budget of the Agency pursuant to Article 23.
8. Each year the Director shall prepare a draft annual report with a section on the regulatory activities of the Agency and a section on financial and administrative matters.
9. With regard to the staff of the Agency, the Director shall exercise the powers provided for in Article 27(3).

#### *Article 17*

##### *Board of Appeal*

1. The Board of Appeal shall be composed of six members and six alternates selected from among current or former senior staff of the national regulatory authorities, competition authorities or other national or Community institutions with relevant experience in the energy sector. The Board of Appeal designates its Chairperson. The decisions of the Board of Appeal shall be adopted on the basis of a qualified majority of at least four out of its six members. The Board of Appeal shall be convened when necessary.
2. The members of the Board of Appeal shall be appointed by the Administrative Board, on a proposal from the Commission, following a public call for expression of interest, after consultation of the Board of Regulators.

3. The term of office of the members of the Board of Appeal shall be five years. This term shall be renewable. The members of the Board of Appeal shall be independent in making their decisions; they shall not be bound by any instructions. They may not perform any other duties in the Agency, in its Administrative Board or in its Board of Regulators. A member of the Board of Appeal may not be removed during his or her term of office, unless he or she has been found guilty of serious misconduct, and the Administrative Board, after consulting the Board of Regulators, takes a decision to this effect.
4. Members of the Board of Appeal may not take part in any appeal proceedings if they have any personal interest therein, or if they have previously been involved as representatives of one of the parties to the proceedings, or if they participated in the decision under appeal.
5. If, for one of the reasons mentioned in paragraph 4 or for any other reason, a member of a Board of Appeal considers that a fellow member should not take part in any appeal proceedings, the member shall inform the Board of Appeal accordingly. A member of the Board of Appeal may be objected to by any party to the appeal proceedings on any of the grounds mentioned in paragraph 4, or if suspected of partiality. An objection cannot be based on the nationality of members nor shall it be admissible if, while being aware of a reason for objecting, the party to the appeal proceedings has taken a procedural step.
6. The Board of Appeal shall decide as to the action to be taken in the cases specified in paragraphs 4 and 5 without the participation of the member concerned. For the purposes of taking that decision, the member concerned shall be replaced on the Board of Appeal by his alternate, unless the alternate finds himself in a similar situation. Should this be the case, the Chairperson shall designate a replacement from among the available alternates.
7. The members of the Board of Appeal shall undertake to act independently in the public interest. For this purpose, they shall make a declaration of commitments and a declaration of interests indicating either the absence of any interest which may be considered prejudicial to their independence or any direct or indirect interest which might be considered prejudicial to their independence. Those declarations shall be made public, annually and in writing.

## *Article 18*

### *Appeals*

1. Any natural or legal person, including national regulatory authorities, may appeal against a decision as referred to in Articles 7, 8 and 9 and which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person.
2. The appeal, together with the statement of grounds thereof, shall be filed in writing at the Agency within two months of the notification of the decision to the person concerned, or, in the absence thereof, of the day on which within two months the Agency has published its decision. The Board of Appeal shall decide upon the appeal within two months after the appeal has been lodged.
3. An appeal lodged pursuant to paragraph 1 shall not have suspensory effect. The Board of Appeal may, however, if it considers that circumstances so require, suspend the application of the contested decision.
4. If the appeal is admissible, the Board of Appeal shall examine whether it is well founded. It shall invite the parties as often as necessary to the appeal proceedings to file observations on notifications issued by itself or on communications from the other parties to the appeal proceedings, within specified time limits. Parties to the appeal proceedings shall be entitled to make an oral presentation.
5. The Board of Appeal may, within the terms of this Article, exercise any power which lies within the competence of the Agency, or it may remit the case to the competent body of the Agency. The latter shall be bound by the decision of the Board of Appeal.
6. The Board of Appeal shall adopt and publish its rules of procedure.
7. The decisions taken by the Board of Appeal shall be published by the Agency.

## *Article 19*

### *Actions before the Court of First Instance and the Court of Justice*

1. An action may be brought before the Court of First Instance or the Court of Justice, in accordance with Article 230 of the Treaty, contesting a decision taken by the Board of Appeal or, in cases where no right lies before the Board, by the Agency.
2. Should the Agency fail to take a decision, proceedings for failure to act may be brought before the Court of First Instance or the Court of Justice in accordance with Article 232 of the Treaty.
3. The Agency shall be required to take the necessary measures to comply with the judgment of the Court of First Instance or the Court of Justice.

## *Article 20*

### *Budget of the Agency*

1. The revenues of the Agency shall consist notably of:
  - (a) a subsidy from the Community, entered in the general budget of the European Communities (Commission Section);
  - (b) the fees paid to the Agency pursuant to Article 21;
  - (c) any voluntary contribution from the Member States or from their regulatory authorities, as mentioned in Article 12(8);
  - (d) any legacies, donations or grants as mentioned in Article 12(8).
2. The expenditure shall cover staff, administrative, infrastructure, and operational expenses.
3. Revenue and expenditure shall be in balance.
4. All Agency revenue and expenditure shall be the subject of forecasts for each financial year, coinciding with the calendar year, and shall be entered in its budget.

## *Article 21*

### *Fees*

1. Fees shall be due to the Agency for requesting an exemption decision pursuant to Article 9(1).
2. The above mentioned fees shall be set by the Commission.

## *Article 22*

### *Establishment of the budget*

1. By 15 February of each year at the latest, the Director shall draw up a preliminary draft budget covering the operational expenditure and the programme of work anticipated for the following financial year, and shall forward this preliminary draft to the Administrative Board, together with a list of provisional posts. Each year the Administrative Board shall, on the basis of the draft prepared by the Director, make an estimate of revenue and expenditure of the Agency for the following financial year. This estimate, including a draft establishment plan, shall be transmitted by the Administrative Board to the Commission by 31 March at the latest. Prior to adoption of the estimate, the draft prepared by the Director shall be transmitted to the Regulatory Board, which may deliver an opinion on the draft.
2. The estimate shall be transmitted by the Commission to the European Parliament and to the Council (hereinafter referred to as the budgetary authority) together with the preliminary draft general budget of the European Communities.
3. On the basis of the estimates, the Commission shall enter in the preliminary draft general budget of the European Communities the forecasts it considers necessary in respect of the establishment plan and the amount of the grant to be charged to the general budget in accordance with Article 272 of the Treaty.
4. The budgetary authority shall adopt the establishment plan for the Agency.
5. The budget of the Agency shall be drawn up by the Administrative Board. It shall become final after the final adoption of the general budget of the European Communities. Where necessary, it shall be adjusted accordingly.



6. The Administrative Board shall, without delay, notify the budgetary authority of its intention to implement any project which may have significant financial implications for the funding of its budget, in particular any project relating to property such as the rental or purchase of buildings. It shall inform the Commission thereof. If either branch of the budget authority intends to issue an opinion, it shall within two weeks after receipt of the information on the building project notify the Agency of its intention to issue such an opinion. Failing a reply, the agency may proceed with the planned operation.

### *Article 23*

#### *Implementation and control of the budget*

1. The Director shall act as authorising officer and shall implement the Agency's budget.
2. By 1 March at the latest following the completion of each financial year, the Agency accounting officer shall forward to the Commission's accounting officer and the Court of Auditors the provisional accounts, accompanied by the report on budgetary and financial management over the financial year. The Agency accounting officer shall also send the report on budgetary and financial management to the European Parliament and the Council by 31 March of the following year at the latest. The Commission's accounting officer shall then consolidate the provisional accounts of the institutions and decentralised bodies in accordance with Article 128 of Regulation (EC, Euratom) No 1605/2002<sup>1</sup>.
3. By 31 March at the latest following the completion of each financial year, the Commission's accounting officer shall forward the provisional accounts of the Agency, accompanied by the report on budgetary and financial management over the financial year, to the Court of Auditors. The report on budgetary and financial management over the financial year shall also be forwarded to the European Parliament and the Council.
4. After receiving the observations of the Court of Auditors on the provisional accounts of the Agency in accordance with the provisions of Article 129 of Regulation (EC, Euratom) No 1605/2002, the Director, acting on his own responsibility, shall draw up the final accounts of the Agency and transmit them, for opinion, to the Administrative Board.

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<sup>1</sup> OJ L 248, 16.9.2002, p. 1.

5. The Administrative Board shall deliver an opinion on the final accounts of the Agency.
6. The Director shall transmit these final accounts, accompanied by the opinion of the Administrative Board, no later than 1 July following the completion of the financial year, to the European Parliament, the Council, the Commission and the Court of Justice.
7. The final accounts shall be published.
8. The Director shall send the Court of Auditors a reply to the latter's observations by 15 October at the latest. He shall also send a copy of this reply to the Administrative Board and the Commission.
9. The Director shall submit to the European Parliament, at the latter's request and as provided for in Article 146(3) of Regulation (EC, Euratom) No 1605/2002, any information necessary for the smooth running of the discharge procedure for the financial year in question.
10. The European Parliament, following a recommendation from the Council acting on a qualified majority, shall, before 15 May of the year N + 2, grant a discharge to the Director for the implementation of the budget for the financial year N.

#### *Article 24*

##### *Financial rules*

The financial rules applicable to the Agency shall be drawn up by the Administrative Board after consultation with the Commission. Those rules may deviate from Commission Regulation (EC, Euratom) No 2343/2002 if the specific operational needs for the functioning of the Agency so require and only with the prior agreement of the Commission.

#### *Article 25*

##### *Anti-fraud measures*

1. For the purposes of combating fraud, corruption and other illegal acts, the provisions of Regulation (EC) No 1073/1999<sup>1</sup> shall apply to the Agency without any restriction.

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<sup>1</sup> OJ L 136, 31.5.1999, p. 1.

2. The Agency shall accede to the Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF)<sup>1</sup> and shall immediately adopt appropriate provisions for all staff of the Agency.
3. The funding decisions and the agreements and the implementing instruments resulting from them shall explicitly stipulate that the Court of Auditors and OLAF may, if need be, carry out on-the-spot checks on the beneficiaries of monies disbursed by the Agency as well as on the staff responsible for allocating these monies.

#### *Article 26*

#### *Privileges and immunities*

The Protocol on Privileges and Immunities of the European Communities shall apply to the Agency.

#### *Article 27*

#### *Staff*

1. The Staff Regulations of Officials of the European Communities, the Conditions of employment of other servants of the European Communities and the rules adopted jointly by the European Community institutions for the purpose of applying these staff regulations and conditions of employment shall apply to the staff of the Agency, including its Director.
2. The Administrative Board, in agreement with the Commission, shall adopt the necessary implementing measures, in accordance with the arrangements provided for in Article 110 of the Staff Regulations of officials of the European Communities.
3. In respect of its staff, the Agency shall exercise the powers conferred on the appointing authority by the Staff Regulations of officials of the European Communities and on the authority entitled to conclude contracts by the Conditions of Employment of other servants of the European Communities.

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<sup>1</sup> OJ L 136, 31.5.1999, p. 15.

4. The Administrative Board may adopt provisions to allow national experts from Member States to be employed on secondment at the Agency.

#### *Article 28*

##### *Liability of the Agency*

1. In the case of non-contractual liability, the Agency shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its staff in the performance of their duties. The Court of Justice of the European Communities shall have jurisdiction in any dispute over the remedying of such damage.
2. The personal financial liability and disciplinary liability of Agency staff towards the Agency shall be governed by the relevant provisions applying to the staff of the Agency.

#### *Article 29*

##### *Access to documents*

1. Regulation (EC) No 1049/2001<sup>1</sup> shall apply to documents held by the Agency.
2. The Administrative Board shall adopt practical measures for applying Regulation (EC) No 1049/2001 within six months from the date of entry into force of this Regulation.
3. Decisions taken by the Agency pursuant to Article 8 of Regulation (EC) No 1049/2001 may be the subject of a complaint to the Ombudsman or of proceedings before the Court of Justice, in accordance with the conditions laid down in Articles 195 and 230 respectively of the Treaty.

#### *Article 30*

##### *Participation of third countries*

1. The Agency shall be open to the participation of countries which are not members of the European Union and which have concluded agreements with the Community, whereby they have adopted and are applying Community law in the field of energy and, if relevant, of environment and competitiveness.

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<sup>1</sup> OJ L 145, 31.5.2001, p. 43.

2. Under the relevant provisions of these agreements, arrangements shall be made specifying, in particular, the nature, scope and procedural aspects of the involvement of these countries in the work of the Agency, including provisions relating to financial contributions and to staff.

#### Article 31

##### 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 32

##### *Language arrangements*

1. The provisions of Regulation No 1 of 15 April 1958 shall apply to the Agency.
2. The Administrative Board shall decide on the internal language arrangements for the Agency.
3. The translation services required for the functioning of the Agency shall be provided by the Translation Centre for the Bodies of the European Union.

#### Article 33

##### *Evaluation*

1. The Commission, with the assistance of an independent external expert, shall carry out an evaluation of the activities of the Agency. This shall cover the results achieved by the Agency and its working methods, in relation with its objective, mandate and tasks defined in this Regulation and in its annual work programmes.
2. The Board of Regulators shall receive the findings of the evaluation and issue recommendations regarding changes to this Regulation, the Agency and its working methods to the Commission, which may forward them, together with its own opinion as well as appropriate proposals, to the European Parliament and the Council.

3. The first evaluation report shall be presented by the Commission to the European Parliament and the Council at the latest four years after the first Director has taken up his or her duties. The Commission shall then present an evaluation report at least every five years.

*Article 34*

*Entry into force and transitory measures*

1. This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.
2. Articles 5, 6, 7, 8, 9 and 10 shall apply as from [18 months after entry into force of this Regulation].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, [ ...]

*For the European Parliament*  
*The President*

*For the Council*  
*The President*