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**OPINION ON THE ENTSOG STATUTES, RULES OF
PROCEDURE AND THE LIST OF MEMBERS**

5 May 2011

Related Documents

- 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. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0001:0014:EN:PDF>
- 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. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0036:0054:EN:PDF>
- 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. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0094:0136:en:PDF>

Introduction

On 28 February 2011, the European Network of Transmission System Operators for Gas (ENTSOG) submitted its Articles of Association (AoA), Rules of Procedure (RoP) and List of Member Companies to the European Commission and to ACER, pursuant to Article 5(1) of Regulation (EC) No 715/2009. The AoA and RoP submitted by ENTSOG to ACER already take into account and integrate the comments previously made by the European Commission and the Council of European Energy Regulators (CEER).

According to Article 5(2) of Regulation (EC) No 715/2009, ACER is required to provide an opinion to the European Commission on the AoA, RoP and List of Member Companies, after formally consulting the organisations representing all stakeholders, in particular the system users, including customers.

Accordingly, on 23 March 2011, ACER invited the stakeholder organisations to submit their comments on a draft version of ACER's Opinion by 5 April 2011.

2 stakeholder organisations submitted their input. An evaluation of their contributions can be found in the annex to this Opinion. Where relevant and appropriate, this Opinion takes the comments received into account.

ACER has no reservations on the AoA, the RoP or the list of members, save on the following articles.

1. Article 1 AoA - Definitions

1.1 Content

Article 1(42) of the AoA contains the definition of a Transmission System Operator (TSO). However, the definition only refers to undertakings designated as TSOs in accordance with the provisions of Article 10 of Directive 2009/73/EC. TSO designation on the basis of Articles 11, 14 and 18 of Directive 2009/73/EC is not taken into account.

1.2 Concerns

TSOs that are designated pursuant to Articles 14 or 18 of Directive 2009/73/EC do not meet the criteria of Article 1(42) of the AoA. Legal uncertainty also exists as to whether a TSO certified in compliance with the procedure set by Article 11 of Directive 2009/73/EC can meet the TSO definition used by ENTSOG. In all these cases, Article 1(42) of the AoA prevents or may prevent the TSOs concerned from meeting their legal obligation to join ENTSOG pursuant to Article 4 of Regulation (EC) No 715/2009.

1.3 Proposal

In order to avoid legal uncertainty, the definition should refer in general terms to (the designation of) TSOs as defined in Directive 2009/73/EC, without explicitly mentioning the articles.

2. Article 7 AoA – Admission of new members

2.1 Content

Article 7 of the AoA contains a single criterion of ENTSOG membership: candidate members need to be designated as a TSO by an EU Member State in order to join ENTSOG¹. However, even if this condition is fulfilled, the TSOs are not automatically granted membership. In fact, Article 7 of the AoA states that, in this case, the General Assembly “may” decide to grant membership.

2.2 Concerns

ACER has concerns as regards the discretionary powers given in the AoA to the General Assembly to admit new members². The current wording of Article 7 of the AoA (“the Assembly may decide to admit new Members”) grants the General Assembly discretion to admit new Members in ENTSOG. The General Assembly has the choice to decide whether or not a TSO can join the Association.

However, the General Assembly’s discretionary powers may be contrary to Article 4 of Regulation (EC) No 715/2009. The provisions contained in this article oblige all TSOs to “cooperate at Community level through the ENTSO for Gas” as of 3 March 2011. ENTSOG membership is thus not an option but a legal obligation for TSOs: it represents an institutional framework for inter-TSO cooperation. As a corollary, TSOs should also have the right to be admitted to ENTSOG after meeting the membership conditions. The current wording of Article 7 of the AoA may prevent TSOs of EU Member States from meeting the requirements of Article 4 of Regulation (EC) No 715/2009.

2.3 Proposal

As membership of ENTSOG is not a choice but a legal obligation for TSOs, the role of the General Assembly with respect to accepting TSOs as Members should be limited to verifying whether or not the candidate Member has been designated as a TSO in one of the EU Member States. In this respect, the wording “may” in Article 7 of the AoA may be inappropriate. If the conditions are met, the General Assembly should accept the TSOs as members.

However, the legal obligation for TSOs to join ENTSOG does not exempt them from respecting the rules that govern this association. The reasons for excluding Members, listed in Article 9 of the AoA, are justified and do not raise any concern.

It would therefore be acceptable if ENTSOG were to complement the membership criteria of Article 7 of the AoA with the criteria laid down in Article 9 of the AoA.

¹ A transitional provision is laid down in Article 43 of the AoA, which applies until September 2012.

² One could argue that Article 7 of the AoA does not raise any compliance issue with Regulation (EC) No 715/2009, as it only applies to admission of *new* Members. The TSOs from the EU Member States which are founding Members are already accepted as ENTSOG members prior to 3 March 2011. They can thus readily cooperate at ENTSOG level and meet their legal obligations under Article 4 of Regulation (EC) No 715/2009.

It is correct that the proposed AoA do not directly cause compliance issues for the TSOs concerned that are currently active in the EU. However, the issue remains relevant for all TSOs that cannot be considered as founding Members, e.g. because they still have to be set up, or because they would legitimately lose their ENTSOG Membership under Article 9 of the AoA and wish to re-apply.

The General Assembly should thus be required to accept TSOs from EU Member States as Members once they meet the criteria of Article 7 of the AoA, unless a candidate TSO is in a situation which, according to Article 9 of the AoA, would lead to its exclusion from ENTSOG if it were already a member.

Article 7(3) of the AoA requires the General Assembly to justify any refusal of membership. Also this phrasing should not be interpreted broadly. The reasons invoked should be strictly related to the membership criteria mentioned in Article 7 and the exclusion criteria mentioned in Article 9 of the AoA.

3. Article 37 AoA – Amendments to the Articles of Association

3.1 Content

Article 37 of the AoA describes the procedure for amending the AoA. Modifications to the AoA are adopted when the voting requirements are met, unless they concern amendments to the purpose of the Association. In this case, the modifications only enter into force after publication of the approval of the modification by Belgian Royal Decree³. Article 37 of the AoA does not require any opinion of the European Commission, nor of ACER.

3.2 Concerns

Article 5(2) and (3) of Regulation (EC) No 715/2009 explicitly requires a prior opinion of ACER and of the European Commission before ENTSOG's statutes and rules of procedures can enter into force.

It seems only logical that a similar procedure is also followed for any subsequent substantial modification to the statutes or rules of procedure⁴.

3.3 Proposal

Article 37 of the AoA should require ENTSOG to submit the proposal for any substantial modification to the European Commission and to ACER for an opinion.

4. Article 43 AoA – Transitional provisions

4.1 Content

Article 43 of the AoA exempts the founding members from the requirement of being designated as a TSO. With respect to new members, the article allows the General Assembly also to admit legal persons "having applied for designation and being expected to be designated in the near future as a TSO by a Member State".

³ Art. 50(3) *jo.* 51(3) of the Belgian Act of 27 June 1921 on non-profit associations, international non-profit associations and foundations, as amended.

⁴ A prior opinion of ACER and of the European Commission should not be required for subsequent modifications of the membership list, as the original membership list is already covered by the current opinions of ACER and the European Commission and ACER's opinion will be issued on any future modification of the ENTSOG Statutes, including the criteria for admitting new members.

4.2 Concerns

On the basis of this article, operators are treated differently depending on whether they are founding members or new members of the organisation. Whereas founding members do not have to comply with the designation requirement, new members are obliged to fully comply with this requirement or, at the very least, have to submit a proof of reasonable expectations to be designated in the near future. This approach infringes the principle of equal treatment.

Furthermore, candidate members may even temporarily be impeded from joining ENTSOG⁵, as Directive 2009/73/EC only obliges TSOs to be certified as compliant with the unbundling requirements by 3 March 2012 (or even 3 March 2013 in specific cases). TSOs operating in the EU may thus be prevented from meeting their obligation to join ENTSOG pursuant to Article 4 of Regulation (EC) No 715/2009, which is clearly contrary to the role of ENTSOG in promoting TSO cooperation within the framework defined by the Third Package.

4.3 Proposal

The transitional provisions of Article 43 of the AoA should not only apply to ENTSOG's founding members, but also to all new candidate members which are operating in the EU and which need to be certified in due time pursuant to Directive 2009/73/EC.

5. Article 4 AoA – Purpose and Activities Article 27 RoP – Annual Work Programme Article 29 RoP – Community-wide Network Development Plan

5.1 Content

Article 4 of the AoA and Articles 27 and 29 of the RoP aim to implement particular provisions of Regulation (EC) No 715/2009, but remain silent on particular aspects.

Article 4(6) of the AoA states that ENTSOG will monitor and analyse the implementation of Network Codes. This article reflects ENTSOG's obligation under Article 8(8) of Regulation (EC) No 715/2009.

Articles 27 and 29 of the RoP describe the procedures for adopting the Annual Work Programme and the Community-wide Network Development Plan. These articles do not require ENTSOG to submit the documents to ACER.

5.2 Concerns

Article 8(8) of Regulation (EC) No 715/2009 requires ENTSOG to monitor the implementation not only of the Network Codes but also of the Guidelines⁶. Article 8(8) of Regulation (EC) No

⁵ E.g., if the Member State, in which the candidate member is operating, has not yet implemented the unbundling provisions and the General Assembly is not willing to invoke the more lenient approach of Article 43 AoA, the candidate member is currently prevented from joining ENTSOG, as the candidate will not be able to demonstrate TSO designation as required in Article 7 of the AoA.

⁶ In Article 8(8) of Regulation (EC) No 715/2009, ENTSOG's monitoring task relates to "the implementation of the network codes and the Guidelines adopted by the Commission in accordance with Article 6(11)". However, Article 6(11) of the Regulation only mentions the adoption of the network codes by the Commission, and does not refer to Guidelines. Nonetheless, Article 23 of Regulation (EC) No 715/2009 does cover the Guidelines adopted by the European Commission.

715/2009 also obliges ENTSOG to report its monitoring results to ACER, but this reporting duty is not foreseen in Article 4(6) of the AoA.

Article 9(2) of Regulation (EC) No 715/2009 requires ENTSOG to submit the draft Community-wide network development plan and the draft annual work programme to ACER for an opinion. This is not foreseen in ENTSOG's Rules of Procedure, although it does foresee such procedure for the draft Network Codes⁷.

5.3 *Proposal*

Article 4(6) of the AoA should broaden ENTSOG's monitoring tasks so that it also covers the Guidelines. It should also require ENTSOG to report its monitoring results to ACER.

Articles 27 and 29 of the RoP should require ENTSOG to submit the draft Annual Work Programme and the Community-wide Network Development Plan to ACER for its opinion.

6. Article 26 RoP – Consultations, stakeholder interactions

6.1 *Content*

Article 26 of the RoP describes how ENTSOG will consult the stakeholders. The article does not detail any given timeframe for the market consultation. As regards the formal consultation process, it states that ENTSOG shall publish the documents subject to consultation at least on its website and notify all registered stakeholders and interested parties of the consultation, asking for feedback on the documents.

6.2 *Concerns*

During the consultation organised by ACER, concerns were raised as regards the duration of the consultation period and the need for additional measures allowing the stakeholders to react more adequately to the proposals.

6.3 *Proposal*

ACER acknowledges that the timeframe for drafting the Network Codes is tight and imposes demanding restrictions on all parties involved.

Taking this into account, ACER recommends that ENTSOG is mindful of the stakeholders' concerns when drafting the Network Codes and organising the consultations. More in particular, ACER emphasises the importance of having prior informal consultations, and encourages ENTSOG to be as transparent as possible about upcoming consultations. It also recommends ENTSOG to use a two month period as a default consultation period in order to have a meaningful consultation, and to use a one month consultation period only in exceptional circumstances. ENTSOG should furthermore properly justify - where appropriate through an impact assessment - the approaches adopted in the documents issued for

ACER considers that Article 8(8) of Regulation (EC) No 715/2009 should be read and interpreted in conjunction with Article 23 of the Regulation, in order for the reference to the Guidelines to be meaningful. A similar approach applies in this respect also to the Guidelines reference in Article 9(1), last paragraph, of Regulation (EC) No 715/2009.

⁷ Cf. Article 28(7) of the RoP.

consultation and explain how they deal with the comments received. Article 26 of the RoP should be modified accordingly.



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