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**OPINION ON THE ENTSO-E STATUTES, RULES OF  
PROCEDURE AND 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 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. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0015:0035:EN:PDF>
- 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. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0055:0093:EN:PDF>

## Introduction

On 22 December 2010, the European Network of Transmission System Operators for Electricity (ENTSO-E) submitted its Articles of Association (AoA), list of members and Rules of Procedure (Internal Regulations, Consultation Process and Network Code Development Process) to the European Commission, to ACER and to ERGEG, pursuant to Article 5(1) of Regulation (EC) No 714/2009. The AoA, as submitted by ENTSO-E 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 714/2009, ACER is required to provide an opinion to the European Commission on the AoA, list of members and Rules of Procedure (Internal Regulations, Consultation Process and Network Code Development Process), after formally consulting the organisations representing all stakeholders, in particular the system users, including customers.

Accordingly, on 15 March 2011, ACER invited the stakeholder organisations to submit their comments on a draft version of ACER's Opinion by 1 April 2011.

8 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 ENTSO-E's AoA, list of members and Rules of Procedure, save on the following parts.

### 1. Article 6 AoA – Admission of new members

#### 1.1 Content

Article 6 of the AoA describes six conditions which a Transmission System Operator (TSO) must meet in order to be accepted as a new member of ENTSO-E. Membership is not automatically granted upon meeting the conditions. In fact, Article 6 of the AoA states that the General Assembly “may” decide to grant membership if the conditions laid down in the article are fulfilled.

#### 1.2 Concerns

ACER has concerns as regards the discretionary powers given in the AoA to the General Assembly to admit new members and as regards one of the membership criteria<sup>1</sup>.

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<sup>1</sup> One could argue that Article 6 of the AoA does not raise any compliance issue with Regulation (EC) No 714/2009, as it only applies to admission of *new* Members. The TSOs from the EU Member States which are Founding Members are already accepted as ENTSO-E members prior to 3 March 2011. They can thus readily cooperate at ENTSO-E level and meet their legal obligations under Article 4 of Regulation (EC) No 714/2009.

While it may be true that the proposed AoA do not directly cause compliance issues for the TSOs concerned that are currently active in the EU, the issue remains relevant for all TSOs that cannot be considered as Founding Members, either because they still have to be set up, or because their current corporate structure may undergo significant modifications in the future which does not get Assembly approval (cf. Article 6 (2) of the AoA), or because they would legitimately lose their ENTSO-E Membership under Article 9(2) of the AoA and wish to re-apply.

Firstly, the current wording of Article 6 of the AoA (“the Assembly may decide to admit new Members”) grants the General Assembly discretion to admit new Members to ENTSO-E. 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 714/2009. This article obliges all TSOs to “cooperate at Community level through the ENTSO for electricity” as of 3 March 2011. ENTSO-E 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 ENTSO-E after meeting the membership conditions. The discretionary powers conferred to the General Assembly by the current wording of Article 6 of the AoA may therefore prevent TSOs of EU Member States from meeting the requirements of Article 4 of Regulation (EC) No 714/2009, even if they comply with all the membership conditions.

Secondly, the last condition listed in Article 6(1) of the AoA requires the candidate Member to comply “with the technical criteria and standards of the synchronous area to which it is or will be connected, in order to safeguard the stability and quality of operations of that synchronous area”.

Although ACER by no means disagrees with the obligation itself, which echoes the TSO obligations under Directive 2009/72/EC and Regulation (EC) No 714/2009, the requirement may nonetheless not be appropriate as an ENTSO-E membership condition. As mentioned above, Article 4 of Regulation (EC) No 714/2009 requires TSOs to be members of ENTSO-E, as long as they meet the minimum requirements to be qualified as system operators (through certification). In this regard compliance with other technical criteria and standards does not seem to be an appropriate membership criterion.

### *1.3 Proposal*

ACER recognises that the discretionary power given to the General Assembly and the criteria listed in Article 6 of the AoA can be useful and appropriate with respect to TSOs from third countries. Therefore, different approaches to admission of new members could be considered in the case of TSOs operating in EU Member States and in third countries.

An obvious and simple approach would be, for instance, to apply the current wording in Article 6 of the AoA only to membership requests from third countries.

However, the General Assembly should be required to accept TSOs from EU Member States as Members once they meet the first five criteria listed in Article 6(1) 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 ENTSO-E if it were already a member.

Alternatively, a dual ENTSO-E membership could be considered. Indeed, it is possible to argue that “cooperation” in the meaning of Article 4 of Regulation (EC) No 714/2009 does not necessarily have to entail full voting rights for all aspects and activities in which ENTSO-E is engaged.

The Regulation requires TSOs to cooperate in ENTSO-E “in order to promote the completion and functioning of the internal market in electricity and cross-border trade and to ensure the optimal management, coordinated operation and sound technical evolution of the European electricity transmission network”. In theory, a distinction could thus be made between ENTSO-E activities that are covered by the Regulation and those which are not directly

related. Different voting rights and/or membership criteria could be attached to the latter category.

## **2. Article 9 AoA – Exclusion of Members and Observers**

### *2.1 Content*

Article 9(3) of the AoA obliges the General Assembly to suspend the participation and/or voting rights or to exclude a Member altogether “if a state in which a Member operates is (...) under no legal obligation to apply, or is materially delayed in its implementation of Regulation 714/2009 and/or Directive 2009/72/EC”.

### *2.2 Concerns*

ACER points out that the conditions to apply Article 9(3) of the AoA may already currently be met in a number of jurisdictions in which founding ENTSO-E members operate<sup>2</sup>. A strict interpretation of Article 9(3) of the AoA would thus require the General Assembly to suspend or exclude some of its Founding Members, albeit “following an opinion of the European Commission”. This situation may not have been intended.

### *2.3 Proposal*

A “sunset clause” may be added to Article 9(3) of the AoA. The clause could for instance state that the procedure of Article 9(3) of the AoA can be temporarily suspended if there are clear and objective indications that measures are or will be taken shortly to implement Regulation (EC) No 714/2009 and/or Directive 2009/72/EC.

## **3. Article 17 AoA – The Regional Groups and the Voluntary Regional Groups**

### *3.1 Content*

According to Article 17(1)(iv) of the AoA, Regional Groups may submit regional network codes for approval by the Assembly if it so chooses. In such case, the Committee evaluates whether the proposed codes “are in line with the relevant guidelines and codes of the Association”.

### *3.2 Concerns*

The Committee only verifies whether the proposed regional network codes are in conformity with internal ENTSO-E rules (relevant guidelines and codes of the Association). No reference is made to the Network Codes adopted under Regulation (EC) No 714/2009 and the Community-wide ten-year network development plan.

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<sup>2</sup> There is for instance currently no legal obligation to implement or apply the third energy package in most of the Contracting Parties of the Energy Community, which are also Members of ENTSO-E (Cf. the Annual Report 2010 on the implementation of the Acquis under the Treaty establishing the Energy Community, Energy Community Secretariat).

### 3.3 *Proposal*

The Committee should verify whether the proposed regional network codes are also in conformity with the Network Codes adopted under Regulation (EC) No 714/2009 and the Community-wide ten-year network development plan.

## **4. Chapter 2 ENTSO-E Consultation Process – Principles for consultation practices**

### 4.1 *Content*

Chapter 2.4 of ENTSO-E's Consultation Process describes how ENTSO-E will consult stakeholders. It states that, as regards formal consultations, "at least one and usually two months will be set as the consultation period. The maximum consultation period will be three months". The consultation itself will be on reasoned proposals. Information on the impact of the proposals, including relevant economic analysis, will be provided to the extent that is possible.

### 4.2 *Concerns*

During the consultation organised by ACER, some of the stakeholder organisations indicated concerns as regards the duration of the consultation period, and highlighted the need for additional measures allowing them to be more involved and to react more adequately to the proposals. The suggestions submitted by stakeholder organisations span from publishing the consultation schedules well in advance to extending the consultation period itself. Stakeholders are in addition concerned that they would not be provided with sufficient information, either during the consultation itself, or later in the justification of how the stakeholder comments were dealt with.

### 4.3 *Proposal*

ACER acknowledges that the timeframe for drafting the Network Codes is tight and imposes demanding restrictions on all parties involved. Taking this factor into account, ACER considers that the manner in which the current ENTSO-E Consultation Process is formulated strikes a fair balance between the rights of the stakeholders to be closely involved in the process and the duty of ENTSO-E to draft the Network Codes in the given time-frame.

Having noted this, ACER will closely monitor how ENTSO-E will implement the ENTSO-E Consultation Process and the Network Codes Development Process in practice.

In this respect, ACER points out that ENTSO-E should be 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 ENTSO-E to be as transparent as possible about upcoming consultations. It also recommends ENTSO-E to use a two month period as the default consultation period in order to have a meaningful consultation, and to use the one month consultation period only in exceptional circumstances. ENTSO-E should furthermore properly justify - where appropriate through an impact assessment - the approaches adopted in the documents issued for consultation and explain how they deal with the comments received. Chapter 2 should be amended accordingly.

## **5. Chapter 4 – Network Codes Development Process**

### *5.1 Content*

Chapter 4 of ENTSO-E's Network Codes Development Process does not foresee any specific role for the Distribution System Operators (DSOs), other than as a regular stakeholders.

### *5.2 Concerns*

During the consultation organised by ACER, it was pointed out that despite the absence of any specific role for the DSOs, the Network Codes may still affect distribution network operation, and thus directly affect the DSO's role as a system operator.

### *5.3 Proposal*

The Network Code Development Process should include provisions that more closely involve the DSOs for aspects that affect distribution network operation.



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