

**OPINION OF THE AGENCY FOR THE COOPERATION OF ENERGY  
REGULATORS No 06/2018**

**of 1 October 2018**

**ON THE TEMPLATE FOR THE MAIN TERMS AND CONDITIONS  
COVERING CONTRACTUAL PROVISIONS WHICH ARE NOT  
AFFECTED BY FUNDAMENTAL DIFFERENCES IN PRINCIPLES OF  
NATIONAL LAW OR JURISPRUDENCE, FOR THE OFFER OF BUNDLED  
CAPACITY PRODUCTS**

THE AGENCY FOR THE COOPERATION OF ENERGY REGULATORS,

Having regard to 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<sup>1</sup> (“Regulation 713/2009”), and, in particular, Articles 6 and 17(3) thereof,

Having regard to Commission Regulation (EU) No 2017/459 establishing a Network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013 (“CAM NC” or “Regulation 2017/459”), and, in particular, Article 20(3),

Whereas:

**1. INTRODUCTION**

- (1) Regulation (EU) 2017/459 affects the existing transmission system operators’ (“TSOs”) transport contracts for bundled capacity products (“contracts” or “transport contracts”). These bundled capacity products are of great importance for the EU energy sector and for the further harmonisation of the provision governing the operation of this sector at EU level, respecting, however, the discretionary margin permitted in the transposition of the Third Energy Package in the different Member States.
- (2) In pursuit of this purpose, Article 20 of the CAM NC promotes the alignment of the main terms and conditions for the offer of bundled capacity products. The procedure established under this provision determines ENTSOG’s obligation to create a catalogue of the main terms and conditions in the transport contracts. This should be done following a consultation of stakeholders, by analysing existing transport contracts, identifying and categorising differences in relation to the main terms and conditions and the reasons for such differences, and publishing its findings in a report.

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<sup>1</sup> OJ L211, 14.8.2009, p. 1.

- (3) On 5 January 2018, within the term provided by Article 20(1) of the CAM NC, ENTSOG published its Report (“ENTSOG Report”<sup>2</sup>). The ENTSOG Report highlighted the wide range of differences in the main terms and conditions of existing transport contracts, which ENTSOG claims to be due to the particularities of the national legal frameworks and the structure and regulation of national gas markets.
- (4) On 5 July 2018, after the public consultation on the draft template regarding the main terms and conditions of contracts for the offer of bundled capacity, ENTSOG submitted to the Agency for the Cooperation of Energy Regulators (the “Agency”), in compliance with Article 20(2) of the CAM NC, its template for the main terms and conditions covering contractual provisions which are not affected by fundamental differences in principles of national law or jurisprudence for the offer of bundled capacity products (the “Template” or “ENTSOG Template”).
- (5) In view of the ENTSOG Report and taking into account the opinions of the national regulatory authorities (“NRAs”), the Agency is to issue an opinion on the Template, which will be taken into consideration by ENTSOG before publishing the final template for the main terms and conditions (the “Final Template”).
- (6) The Agency took due account of the opinions of the NRAs, received in response to a draft of this Opinion, pursuant to Article 20(3) of the CAM NC.
- (7) The Agency acknowledges and appreciates the significant work undertaken by ENTSOG in developing the Template. In particular, the Agency recognises the important role that ENTSOG has played in analysing all national legislative texts including the main terms and conditions in the contracts for bundled capacities, as well as the legal systems and sector specific regulatory frameworks governing those texts. This work has never been done before. This detailed analysis has enabled achieving an overview of the specificities of national legal systems and markets with respect to transport contracts, facilitating the identification of the main terms and conditions that may be harmonised. For this purpose, ENTSOG’s categorisation and treatment of the information received during the public consultation is of great importance.

## 2. PROCEDURE

- (8) On 5 January 2018, ENTSOG published its *Report on Transport Contract Main Terms and Conditions Differences: Article 20, (EU) 2017/459 (CAP0776-17)* (the “ENTSOG Report”), wherein it provided a catalogue of the main terms and conditions in the transport contract(s) of the transmission system operators for bundled capacity products (the “transport contracts” or the “contracts”) and it analysed existing transport contracts, identified and categorised differences in relation to the main terms and conditions and the reasons for such differences.

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<sup>2</sup> Report on Transport Contracts Main Terms and Conditions Differences Article 20, (EU) 2017/459, issued by ENTSOG on 5 January 2018, with reference CAP0776-17.

- (9) Additionally, on 12 April 2018 ENTSOG published the draft Template of the Contract Main terms and conditions for the offer of bundled capacity products in accordance with Article 20 of the CAM NC for consultation. The consultation remained open until 30 April 2018.
- (10) On 2 May 2018, ENTSOG sent its Evaluation of Responses to this consultation to the Agency.
- (11) On 5 July 2018, in compliance with Article 20(2) of the CAM NC, ENTSOG provided the Agency with the Template of the Contract Main terms and conditions for the offer of bundled capacity products in accordance with Article 20 of the CAM NC.
- (12) The Agency consulted the NRAs, providing them with the opportunity to express their views on the ENTSOG Report and Template, as well as on a draft of this Opinion. It received feedback, delivered in meetings and in writing.

### **3. ASSESSMENT OF THE ENTSOG TEMPLATE**

#### **3.1 Desirable degree of harmonisation and content of the Template**

- (13) The ENTSOG Template is to be adopted under Article 20(2) of Regulation 2017/459. According to this provision, this document should include the main terms and conditions covering contractual provisions which are not affected by fundamental differences in principles of national law or jurisprudence for the offer of bundled capacity products.
- (14) The CAM NC is adopted under Articles 6(11) and 7(3) of Regulation (EC) 715/2009, which allow the Commission to adopt measures designed to amend non-essential elements of Regulation (EC) 715/2009 by supplementing it. This Regulation, in turn, was adopted under Article 114 of the Treaty on the Functioning of the European Union (“TFEU”), the subsidiary legal basis for promoting the approximation (harmonisation) of Member States’ laws, to pursue the objectives of Article 26 TFEU, i.e. to ensure the establishment and functioning of the internal market. In this light, the European Union is generally competent to promote the harmonisation of the terms under which bundled capacity products are offered across the Member States, to the extent that the differing characteristics of such offers create obstacles to the proper functioning of the internal market, subject to the principles of subsidiarity and proportionality. It is in the European Union’s and the Member States’ interest, and also in the interest of undertakings active on these markets, to ensure the removal of unnecessary barriers to the functioning of the internal market arising from disparities in national contractual frameworks and practices that are not the result of fundamental differences between the legal systems. To the extent possible, this should be done via a network code amendment, following the applicable legislative procedure.
- (15) The ENTSOG Template is not meant to be a binding document. TSOs may use it, subject to NRAs’ approval (Article 20(4) of the CAM NC). Thus, the Template is, by definition, a soft-law document. Since the document does not impose harmonisation, but merely

promotes it, its scope and content are not strictly limited by the need carefully to assess the sphere of European Union competences.

- (16) While not compulsory as a document, the template should be a useful document allowing the pursuit of the goals of Regulations (EU) 2017/459 and (EC) 715/2009 effectively, while staying within the limits imposed, namely respecting fundamental differences in principles of national law or jurisprudence.
- (17) The Agency considers that the contents of the Template do not always go as far as it would be desirable. The clauses should be as detailed as reasonably possible, within the scope of the Template's specific objectives and the applicable legal limits, to maximise its usefulness. The Template's content should not be based on the lowest common denominator, but instead aim at promoting steps forward. In this respect, the Agency believes that, whenever appropriate, the Template should go beyond the suggestion of a minimum degree of harmonisation and put forward best practices and suggestions/alternatives. The Agency encourages ENTSOG to arrive at suggestions of best practices by using the analysis of existing practices in its Report and, in consultation with the Agency, identifying those, which best suit or contribute to the goals of Regulations (EU) 2017/459 and (EC) 715/2009.
- (18) Because several of the clauses are not specific to the gas transport or energy sectors, the work of developing best practices and fostering the adoption of uniform international drafting of provisions has already been undertaken in other instances and could be used by ENTSOG in this context. The proposed drafting for several of the clauses discussed below – especially in Section 3.6 – could, thus, be inspired by the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) and on the Principles of International Commercial Contract (PICC) developed by the International Institute for the Unification of Private Law (UNIDROIT).
- (19) The greater the level of detail in defining harmonised terms and conditions, or a limited number of variants, the wider the scope for optimised solutions that may be followed by the TSOs (subject to NRAs' approval) when drafting their transport contracts. This approach would ensure the expansion of the Template's potential benefits and positive impact.
- (20) In order to contribute to this goal, the Agency's Opinion will go beyond the letter of the Template itself and discuss additional content resulting, *inter alia*, from the ENTSOG Report and other preparatory information, and from public consultations. Taking these broader sources into account, the analysis that follows will sometimes suggest that the Template go beyond a minimalistic approach limited to the main terms and conditions, all the while keeping in mind the limits resulting from fundamental differences between legal systems.

### **3.2 Formal aspects of the ENTSOG Template**

- (21) Considering the objectives of the Template and the substantive approach discussed above, the Agency believes that the Template's usefulness and its contribution to achieving its goals would be increased if it were drafted, to the extent possible, in a manner more directly corresponding to contractual provisions, i.e. in a format providing wording which could be used in transport contracts. To this end, and although it is beyond the scope of this Opinion, an example of such wording is included in Section 3.5.11 (when analysing the Clause "entry into force").
- (22) Within the spirit of the previous paragraph, it would be useful if each provision were formulated as an obligation/right with one or several specified addressee(s). For example, using the word 'should' in the template is unclear (see for example the wording of Section 9 under Clause 7 'Capacity allocation other rules').
- (23) Finally, the Agency considers that references, suggestions and explanations regarding the relevant clauses included in the Template, which are not meant to feature as actual contract clauses, could be included with a different formatting option / colour. This would allow more clearly in distinguishing the clauses of the Template from the instructions, suggestions or explanations regarding their use or features.

### **3.3 Structure for the assessment of the ENTSOG Template**

- (24) In view of the above, and considering that not all the main terms and conditions provided in the ENTSOG Report have been included in the Template, but bearing in mind the goals and guiding principles of the Agency's Opinion, as stated above, the Agency has divided its analysis into three different types of main terms and conditions:
- Mandatory clauses containing main terms and conditions which should be harmonised.
  - Clauses referring to main terms and conditions which can be largely harmonised and for which, to the extent that they are not, it is advisable, when appropriate, to provide best practices.
  - Clauses referring to main terms and conditions which have been adequately considered not suitable for harmonisation in the Template, but that should be included in the transport contracts according to national law (and for which, when appropriate, it is advisable to provide best practices).

### **3.4 Mandatory clauses containing main terms and conditions which should be harmonised**

#### **3.4.1 Parties (included in the Template under Clause 2)**

- (25) This Clause aims at informing about the identity of the contracting parties.

- (26) The Agency agrees with the content given to this Clause within the Template and the information of the parties requested therein (which is limited to the information relevant for the purposes of the contract), while TSOs remain free to add any other information relating to the network user (“Network User”) which may be deemed necessary for the object and purposes of the contract.

#### 3.4.2 Confidentiality (included in the Template under Clause 10)

- (27) This Clause aims at determining which information shared by the parties within the scope of the transport contract should be deemed subject to confidentiality obligations, as well as regulating specific aspects of these obligations (such as their term and extent).
- (28) The Agency agrees that this Clause should be harmonised in what concerns the definition of the information to be considered confidential and, consequently, subject to confidentiality obligations imposed upon the parties to the transport contract.
- (29) In this regard, although the Agency agrees with the actual content proposed within the Template, it also considers that ENTSOG could be more ambitious and include more details referring to the regulation of the confidentiality obligations, such as the causes for their termination and/or expiration, circumstances in which the confidential information may be disclosed (in order to be more encompassing) and persons to whom that information may eventually be disclosed.

### **3.5 Clauses referring to main terms and conditions which can be largely harmonised and for which, to the extent that they are not, it is advisable, when appropriate, to provide best practices**

#### 3.5.1 Object (included in the Template under Clause 3)

- (30) The purpose of this Clause is to determine the scope of application of the contract and the services covered by it.
- (31) The Agency agrees with the content given to this Clause under the Template, although some issues could be dealt with in greater detail.
- (32) The general object and scope of the contract, as well as the main services to be provided by the TSO under the framework provided by the contract, can and should be harmonised as far as they are linked to bundled capacity, without prejudice to the provisions contained in the Clause relating to “main rights and obligations”.
- (33) As a best practice, the Agency suggests that ENTSOG recommend that the TSOs include a list of other services to be provided by the TSOs under the contract, when applicable. In addition, the Agency deems it advisable to state that the information provided regarding the determination of the object of the contract should be limited to the

information necessary for that purpose and to the extent foreseen in the applicable regulations.

### 3.5.2 Definitions (included in the Template under Clause 4)

- (34) This Clause aims at defining the terms used in the contract and in all other contractual documents annexed thereto.
- (35) The Template determines the definitions of the contractual terms by reference to certain EU Directives and Regulations. Although the Agency agrees with the chosen option of listing the definitions by referring to those provided by applicable EU legislation, the Agency recommends including the entire definition, as provided under the corresponding Directive or Regulation, followed by a reference to the relevant article in the EU Directive or Regulation (“EU Regulations”), which may also serve as a safeguard against future amendments thereof.
- (36) However, in certain cases, it may be impossible to include in the contract certain definitions that are regulated by national law, rather than by EU Regulations. Nevertheless, the Agency suggests that ENTSOG includes all definitions that are determined by reference to EU Regulations, leaving out only the definitions which are impossible to harmonise due to their regulation by national law.

### 3.5.3 Permits and Licences (not included in the Template)

- (37) This Clause would be aimed at determining the administrative permits and licences required for a shipper to become a Network User, to reserve capacity and to sign the contract with the TSO and, where applicable, the required permits and licences to be obtained by the TSOs. It might also refer to legal requirements for licences by a public authority or administrative procedures such as registration of the Network User by the TSO.
- (38) Although the Agency agrees that the permitting and licensing aspects are largely linked to national administrative legislations, there are certain aspects of this Clause, relating to TSO and Network Users obligations and licensing and registration requirements, that may be partially harmonised and others for which best practices could be suggested.
- (39) In this sense, the Template can include the obligation of both TSOs and Network Users to have been granted all permits and licences required for their activities, according to EU Regulations and national legislation, and to comply with the conditions and obligations imposed therein, without it being necessary to list those permits and licences, nor those conditions and obligations, nor the authorities granting those permits and licences, nor the procedure by which they are granted.
- (40) In addition, the Agency deems it advisable to harmonise, or at least to put forward best practices, regarding the licensing conditions and registration obligations in the relevant registries or booking platforms, in order to grant the shipper the right to sell the gas, to

contribute to the reduction of entry barriers into the national energy markets. To the extent that requirements of registration with the TSO are found to be superfluous in this context, ENTSOG could promote harmonisation across Member States by suggesting removal of such requirements.

#### 3.5.4 Main rights and obligations (included in the Template under Clause 5)

- (41) The purpose of this Clause is to determine the main rights and obligations of the parties under the contract.
- (42) Considering that the main rights and obligations of the parties to the contract are governed by contractual freedom, the Agency agrees with the wording of this Clause in the Template, providing the minimum content to be included in the corresponding contractual provisions.
- (43) Regarding the last bullet point (responsibility of the Network User for fulfilling the gas quality specifications) the Agency suggests that the Template distinguish between the different obligations that may apply at production entry points and interconnection entry points. The Agency also suggests that the Template specifies the obligations of the TSO for both cases.
- (44) As a best practice, the Agency suggests that all the rights and obligations listed or foreseen in the corresponding contracts be defined within that contract, and not by reference to other contractual documents, EU Regulations or national law.

#### 3.5.5 Capacity allocation (included in the Template under Clause 6)

- (45) This Clause (and its different sections), in its current drafting, aims at merely explaining how firm capacity is allocated for standardised products.
- (46) The wording of the Clause summarises the EU Regulation (and some best practices) on this matter. Therefore, the Agency agrees with most of the aspects included in the Clause, but there are some elements to be considered by ENTSOG which would improve the usefulness of this Clause and would make the goal of greater harmonisation on nomination rules easier to achieve. The following suggestions are generally applicable to all the sections of Clause 6 of the Template and also to Clause 7 (capacity allocation other rules).
- (47) The starting point must be the EU Regulations (mainly the CAM NC) which contain extensive provisions in this regard. Therefore, in those aspects fully covered by EU Regulations, the Template should provide the respective sections of the clauses in a direct manner (in a format providing wording which could be used in transport contracts), determining or setting out the respective rules, to contribute to a greater degree of harmonisation.



- (48) In those aspects which are not fully covered by EU Regulations, the Agency suggests that the Template include a contractual wording containing specific proposals, either based on the mechanisms followed by the majority of TSOs in their contracts (if technically possible and appropriate, on the basis of ENTSOG's experience) or on existing best practices allowing a few well selected options. Thus, although there would be room for national specificities (in those elements not fully covered by EU Regulations) and such specific national rules would have to be complied with, the Template would provide TSOs with guidance, encouraging harmonisation even in aspects which are not regulated at EU level.
- (49) In what concerns specific sections of this Clause, the Agency agrees with Section 1 on "standard capacity products". However, as this issue has already been harmonised under the CAM NC, a reference thereto should be added (especially to Article 9), to ensure clarity as to the applicable legal framework and the source of legal obligations.
- (50) The Agency generally agrees with Section 2 on "start and end time of the capacity products", but considers that the Template should be explicit that the start and end times of the capacity products offered in the auctions is in line with the Gas Day, as defined in Article 3(16) of the CAM NC.
- (51) The Agency agrees with Section 3 on "booking platform(s)". It is not advisable to specify one or several booking platforms to be used. It may, however, be useful to make it clearer that the platform chosen must be capable of ensuring compliance with the applicable normative requirements, especially those resulting from the CAM NC.
- (52) The Agency also agrees with Sections 4 and 5 on "auction dates" and "publication of the allocation results of the auctions".
- (53) Finally, the Agency considers that ENTSOG could be more ambitious in covering the range of diverging approaches across the Member States. More specifically, by including optional provisions to be used, whenever relevant, to define other products falling within the scope of the contract, such as conditional or interruptible capacity products. Because some Member States also have a practice of including additional conditions, such as concluding balancing or portfolio contracts in order to use booked capacity<sup>3</sup>, it would be important to clarify that, if such conditions apply they must be specified in the contract. ENTSOG should also consider providing examples of best practices of such conditions.

#### 3.5.6 Capacity allocation other rules (included in the Template under Clause 7)

- (54) This Clause aims at setting out rules on oversubscription, capacity surrender, assignment, transfer of use and the capacity conversion model.

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<sup>3</sup> For example, they carry out a prior test of communication channels, or include booked capacity at entry/exit points into balancing groups or assign it to portfolio codes.

- (55) The general comments included in Section 3.5.5 above are also applicable to this Clause, with one important clarification. Contrary to the extensive provisions contained in EU Regulations on “capacity allocation rules”, this Clause and the aspects covered by it are not regulated in an extensive manner by EU Regulations. It would thus be important to include a reference to the Guideline on Congestion Management Procedures (“CMP Guidelines”), drafted in such a way as to stress its relevance for the various Sections of this Clause.
- (56) Generally, this heading collects issues with significant differences in the practices applied. However, even when harmonisation proves to be not advisable, it is possible to put forward best practices, to contribute to the approximation between practices and options across the Member States.
- (57) Regarding the deadlines foreseen in this Clause, and as it is mentioned in the following paragraphs (mainly, those dealing with “capacity surrender lead times” and “lead time for assignment of capacity on secondary market”), the Agency is aware that most of them follow what is expressly established under EU Regulations. However, the Agency encourages ENTSOG to include ambitious deadlines whenever these are not explicitly mentioned in EU Regulations, to allow for a better functioning of the internal gas market, while recognising that this could more efficiently be achieved via amendment to the CAM NC.
- (58) The Agency considers that Section 1 of this Clause on “order of capacity to be sold” could be more ambitious when defining the order of the capacity offered by a TSO applying Firm-Day-Ahead Use-it-or-lose-it, by setting out a suggested order of different additional capacity, instead of simply referring to individual NRA’s decisions. Compliance with the NRAs’ decisions should be in any case safeguarded.
- (59) Section 2, on “capacity products subject to capacity surrender”, is an example of how several clauses are drafted to provide a guide to the obligations arising from EU Regulations, rather than as contractual provisions. The same content could easily be provided in the form of a clause, which could be copy-pasted into contracts. Furthermore, ENTSOG could go further than merely setting a minimum standard, and propose best practices as to the other capacity products which could also be subject to capacity surrender, specifically daily products.
- (60) Section 3 on “capacity surrender lead times” has been amended in a positive direction since the draft Template of 12 April and seems to attempt to strike a reasonable balance between putting forward best practices and allowing for different realities across the Member States. A lead time more consistent with best practices may, however, be the CAM Business Requirements Specification (“CAM BRS”) deadline set at 10:00 D-1. Additionally, it would be useful to go beyond the mere reference to the possibility of shorter lead times when TSO internal procedures allow for it (as it has been shown that systems may be in place to allow two hours lead time), and to suggest that the shortest lead time possible should be applied, so as to maximise efficiency and minimise barriers to the functioning of the market.

- (61) The current drafting of Section 4, on “notification requirements for capacity surrender”, is not entirely clear. More importantly, it would be useful to suggest best practices (beyond merely dissuading the use of paper form) or, at least, to establish principles or objectives to guide TSOs in choosing between the different options of communication channels, whenever possible within the applicable regulatory framework, considering their specific context and the need to avoid the creation of superfluous barriers to trade arising from differing options. In this sense, most of the transport contracts analysed by ENTSOG in its ENTSOG Report use booking platforms or TSO electronic information systems in this context. ENTSOG could provide examples from provisions of those contracts suitable from its perspective. At the same time, ENTSOG could expressly prioritise the channels deemed more suitable.
- (62) The Agency agrees with the approach in Section 5, on “allocation rules for capacity surrender”, which takes a step towards the promotion of best practices by choosing the timestamp principle over the *pro rata* approach.
- (63) In what concerns Section 6, on “rights and obligations in case of capacity surrender”, the expression “keep payment obligation” should be revised to clarify to whom this obligation should be kept. It would be useful to refer to the CMP Guidelines (“*The network user shall retain its rights and obligations under the capacity contract until the capacity is reallocated by the transmission system operator and to the extent the capacity is not reallocated by the transmission system operator*”). It would also be important to put forward best practices in what concerns remarketing procedures, given the discrepancies identified between the Member States.
- (64) The drafting of Section 7 “capacity products subject to Oversubscription and Buy-Back” could be clarified by providing, e.g.: “The capacity products subject to Oversubscription measures, if applicable, may be: ...”. Since significant divergences between TSOs have been identified in what concerns buyback procedures and price setting, it should be considered whether best practices could be provided in this regard.
- (65) Section 8, on “lead time for assignment of capacity on secondary market”, is subject to similar considerations and recommendations as provided above for Section 3. These provisions seem to fall somewhat short of the goal, by not recommending the use of electronic form for these communications, and by setting somewhat long lead times. Once again, the Template should aim at promoting well-functioning markets, by recommending that lead times be as short as feasible. In terms of clarifying drafting, the expressions “request for the TSO(s)’s approval...” should be replaced with “request the TSO(s)’s approval...”.
- (66) In Section 9, on “lead time for confirmation by the TSO of assignment of capacity”, the use of the words “should give its approval”, in the first sentence, suggests that the approval may be rejected even if all necessary TSO-specific conditions are met, and should be replaced with “gives its approval”. A significant margin of uncertainty seems to be left by the drafting of the provision in what concerns lead time for confirmation by

the TSO, and it would be advisable to suggest a swifter response procedure as a best practice.

- (67) Section 10, on “assignment of contract’s rights and obligations of the involved network users towards the TSO”, should be drafted in such a way not to require reading the title of the provision in order to understand its content. As it stands, the first sentence is only intelligible if it is assumed that it refers to the situations described in the title.
- (68) It is commendable that Section 11, on “transfer of use”, has been added in the final version of the Template, to take into account this specificity of several Member States. In accordance with the general recommendation made above in paragraph (16), the reference in the title “where offered by the TSO” could be replaced with a different formatting option, harmonised throughout the document (e.g., text in italics, and a footnote explaining the provision will only be relevant where the practice is allowed by the TSO).
- (69) The Agency agrees with the content of Section 12, on “secondary trading rules regarding bundled capacity”. Generally, on secondary trading, in line with the annotation to Section 4, it would be advisable to suggest best practices in what concerns the choice between different communication channels. In this sense, most of the transport contracts (or national legislation) which regulates this aspect choose online platforms and indeed it seems advisable to prioritise this channel. Given that there are diverging approaches between TSOs as to other conditions which must be met by secondary trading participants (“*rules regarding reselling of bundled capacity*” or “*requirements / conditions set by the TSOs for Network Users for participation in secondary trading*”<sup>4</sup>), the Template should be more ambitious and suggest those practices followed by some transport contracts, which ENTSOG considers suitable to this end.
- (70) Section 13, on “capacity conversion service”, used to be Section 6 of the Chapter on capacity allocation rules in the draft Template of 12 April. The previous location did more to stress that this is an issue largely harmonised under the CAM NC. Given that ENTSOG’s capacity conversion model does not apply to daily bundled capacity, and that there is a discrepancy in approaches between TSOs in this regard, the Template could be an opportunity to foster an extension of the capacity conversion service to this timeframe, or at least to take into account this possibility.

### 3.5.7 Nomination (included in the Template under Clause 8)

- (71) This Clause establishes the obligation and conditions for the Network User to indicate to the TSO the quantity to inject or to withdraw from the network (prior to the injection of gas into the system).

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<sup>4</sup> Following the terminology/wording used in the ENTSOG Report. For instance, according to the ENTSOG Report those requirements are in connection with “registered by the TSO”, “creditworthiness check”, etc.

- (72) As in the case of Clause 6, on “capacity allocation rules”, the wording of this Clause summarises EU Regulations on this matter. Therefore, the Agency agrees with most of the aspects included therein, but there are some elements to be considered by ENTSOG which would improve the usefulness of this Clause and would make it easier to achieve the goal of greater harmonisation on nomination rules. The following suggestions are generally applicable to all Sections of Clause 8 of the Template.
- (73) Again, the starting point must be EU Regulations (mainly Commission Regulation (EU) No 312/2014 of 26 March 2014 establishing a Network Code on Gas Balancing of Transmission Networks - “BAL NC” - and the CAM NC) which provide extensive rules regarding nomination. Therefore, in those aspects fully covered by EU Regulations, the Template should provide a contractual wording which would involve a high degree of harmonisation. To this end, the Agency suggests that the wording used in this Clause be a contractual wording that the TSOs can follow in its entirety, avoiding wordings that are closer to lists of items to be included in the contract or summaries of the applicable provisions of EU Regulations.
- (74) As for aspects which are not fully covered by EU Regulations, the Agency suggests that the Template include a contractual wording containing proposals for each of these, either based on the mechanisms followed by the majority of TSOs in their contracts (if technically possible and appropriate, on the basis of ENTSOG’s experience) or on existing best practices (for instance, it would be appropriate to suggest a specific default nomination rule, taking into account that it must be agreed by the adjacent TSOs and that a number of contracts do not expressly regulate this issue). Thus, although there would be room for national specificities (in those elements not fully covered by EU Regulations), the Template should provide TSOs with guidance, encouraging harmonisation even in aspects which are not regulated in EU Law.
- (75) Regarding the deadlines foreseen in this Clause, the Agency is aware that most of them follow what is expressly established under EU Regulations. However, the Agency encourages ENTSOG to include ambitious deadlines whenever these are not expressly mentioned in EU Regulations, to foster a better functioning of the gas market.
- (76) Finally, regarding Section 5 on “single nomination of bundled capacity”, the Agency considers that this issue is essential in the context of this Template. Therefore, although this procedure must be established by the relevant TSO in cooperation with the adjacent TSO, it is important to make clear the obligation of the TSOs of jointly offering bundled capacity products in line with the principles established in the CAM NC and the BAL NC.

#### 3.5.8 Maintenance (included in the Template under Clause 9)

- (77) The purpose of this Clause is to determine the procedural aspects of interruptions and maintenance.

- (78) The Agency agrees with the general ideas as presented in this Clause, regarding notification of maintenance works and the prior notice with which those notifications have to be made, despite not having been drafted in a contractual style. In this regard, the Agency considers that these aspects should be harmonised and included in the Template. Notification is even more needed when works are planned and can be announced to the Network Users affected by them with a reasonable prior notice.
- (79) Consequently, the Template could be more ambitious in its wording of this Clause, including more aspects and contractual details of what should be included therein. In this regard, although some aspects concerning maintenance are not easily harmonised, the Agency considers that it would be practical to include certain best practices concerning, among others, (i) periods and timing during which maintenance works can be performed, (ii) publicity for future and ongoing maintenance works (it is advisable that a maintenance schedule be published online, including locations and timings); (iii) situations which justify restrictions that may affect the performance of maintenance works, (iv) treatment and consequences of the interruptions and capacity reductions caused by maintenance works (such as compensations, penalties, etc.), and (v) mechanism for the attribution of the capacity reductions linked to maintenance works.
- (80) The Agency recommends that TSOs' actions taken in this respect comply with transparency rules, such as Article 4 of Regulation (EU) 1227/2011, on the obligation to publish inside information.

#### 3.5.9 Prices and tariffs (not included in the Template)

- (81) This Clause would provide the payable fixed or floating price for booked bundled capacity and potential fees and adjustments. In the case of floating prices, it should include the method used to determine them and the timing and manner by which they are published.
- (82) Considering the analysis made by ENTSOG in its Report, there is a great variety of pricing provisions throughout the EU, due to the possibility of applying different pricing systems of a given capacity product.
- (83) Consequently, since national specificities lead to such variety, the Agency considers that harmonisation is not suitable in this Clause. However, the Template should provide a basic draft for this Clause, which must be included in all contracts, and if it is not possible to suggest different alternatives for wording depending on the different possible approaches. It should at least include the main principles derived from EU Law in this regard, particularly references to requirements deriving from Regulation (EU) 2017/460 ("TAR NC"). Thus, the Clause should specify if the price is fixed or floating, and where and when it is to be published.

### 3.5.10 Termination (not included in the Template)

- (84) This Clause would aim at regulating the end of a substantial part of the contract (partial termination) or of the entire contract. This Clause does not refer to the termination of specific capacity reservations/services, since the latter does not affect the end of substantial parts of the transport contract or of the transport contract as a whole.
- (85) The Agency considers that this Clause should be largely harmonised (although affected, to some extent, by principles of national law or jurisprudence) and included in the Template, bearing in mind the term of the corresponding transport contract, which can be either defined or undefined. Consequently, this Clause should regulate the ordinary termination of the contract, as well as early termination of the contract, and extraordinary causes or breaches of the contract that may enable the parties to terminate the contract. In addition, regardless of grounds for termination, the required prior notice to the counterparty shall always be mentioned. Finally, this Clause should also foresee the possibility to use a remedy period in order to avoid the termination of the contract in certain specific cases in which the breaches of the contract do not immediately lead to the termination of the contract.
- (86) The Agency agrees with ENTSOG's conclusion that no renewal of the contract should be foreseen for the set-term transport contracts.

### 3.5.11 Entry into force (included in the Template under Clause 11)

- (87) This Clause regulates the specific moment when the contract comes into effect and starts its validity term.
- (88) Despite understanding the difficulty to harmonise this matter, the Agency considers that the Template provides only a general explanation of the purpose of this Clause, instead of providing a wording to be used in the contracts. Therefore, the Template should foresee a clause regarding the contract's entry into force, drafting its wording with the corresponding gaps to be filled in accordance with national regulatory frameworks and the exercise of the parties' contractual freedom. Consequently, the parties may determine the entry into force, for instance, either at the date of the signature of the contract, or at a different specific date, already determined by the contract or to be determined by the parties, or even by subjecting the entry into force to certain conditions.
- (89) An example of a wording would be the following: *"This Contract shall enter into force [on the day of its signature / on a specific date]"*. In case the entry into force is subject to the fulfilment of a specific condition (such as the deposit of a guarantee), this wording can be completed adding *"This Contract shall enter into force [on a specific date] subject to the fulfilment by the Network User of [condition] prior to that date which shall be evidenced by [method to evidence the fulfilment of the condition precedent]"*.

**3.6 Clauses referring to main terms and conditions which have been adequately considered not suitable for harmonisation in the Template, but that should be included in the transport contracts according to national law (and for which, when appropriate, it is advisable to provide best practices)**

**3.6.1 Liability (not included in the Template)**

- (90) The purpose of this Clause would be to identify the liabilities of the parties under the contract for damages or personal injuries, possible limits to such liabilities, type of damages and financial compensations.
- (91) The liability regime under each contract is governed by national civil law principles which, according to the ENTSOG Report, differ substantially from one Member State to another.
- (92) However, any contract must deal with the liability regime and, therefore, it should be foreseen in the Template, at least as a subject to be covered in the contract.

**3.6.2 Suspension, interruption and emergency (not included in the Template)**

- (93) This Clause would determine the situations (such as delay of payment, maintenance, emergency situations, etc.) in which the TSO is entitled to ask for the suspension (permanent or temporary suspension of rights and obligations under the contract) or interruption (temporary unavailability of capacity products) / reduction (reduction of capacity products but not total unavailability) of the services, or to take any other necessary measures, dealing also specifically with the situations of emergency (understood as any emergency or security incident that does not fall under the scope of incidents and cases dealt with under *force majeure*).
- (94) Despite agreeing with the lack of harmonisation of this matter, as it is closely linked to the national legal framework, the Agency considers that the Template should provide a basic draft for a clause regarding these situations. The inclusion of such a clause in the Template would serve to remind the TSOs and the Network Users that this matter has to be regulated under their contracts.
- (95) In addition, the Agency stresses that emergency events should be clearly distinguished from *force majeure* events, and, consequently, both clauses and their provisions should be analysed jointly and drafted bearing in mind the limits and definitions contained in both of them.

**3.6.3 Creditworthiness (not included in the Template)**

- (96) This Clause would be aimed at determining the creditworthiness (credit rating) requirements imposed on the Network User.



- (97) The Agency agrees with the lack of harmonisation of this matter, since the determination of the creditworthiness requirements (understood as the result of the credit risk assessment of the Network User carried out by the TSO) can be affected by fundamental differences in principles of national law.
- (98) However, the Agency suggests including a proposal of wording for this Clause in the Template, to remind the TSOs and the Network Users that this matter may need to be regulated under their contracts, namely taking into account Article 14(3) of Regulation (EC) 715/2009. Such a Clause should determine, among others, the credit risk assessment method to which the Network User will be subject and the financial guarantees the Network User may be obliged to present to the TSO.

#### 3.6.4 Force majeure (not included in the Template)

- (99) This Clause would be aimed at defining the list of unforeseen or fortuitous events beyond the control of the parties and their consequences (such as, but not limited to, the release of the parties from part or all their obligations stemming from the contract).
- (100) The Agency agrees with the lack of harmonisation of this matter, as it is closely linked to national civil law (and therefore affected by fundamental differences in principles of national law or jurisprudence). However, considering the importance of the regulation of *force majeure* events, the Agency considers that the Template should foresee a Clause on this matter, drafting its wording with the corresponding gaps to be filled in according to national regulatory frameworks, and providing a list that may function as best practices. The Clause should contain the basic conditions for *force majeure*, and the main events considered *force majeure*, and suggest consequences that may derive from a *force majeure* event (such as suspension of certain obligations under the contract, termination of the contract, etc.) as well as the procedure to be followed if one of these events occurs.
- (101) In this sense, the Agency suggests that it is of utmost importance to include such a Clause in the Template, to remind the TSOs and the Network Users that this matter has to be regulated under their contracts.
- (102) In addition, the Agency stresses that the Clause on “*force majeure*” should be analysed and drafted in combination with the Clause regarding “suspension, interruption and emergency”, as these two Clauses, together, provide a set of tools that a TSO may use in order to deal with exceptional circumstances.

#### 3.6.5 Hardship (not included in the Template)

- (103) A hardship Clause would regulate the effects and consequences on the contract of circumstances which, while not preventing a party or the parties to the contract from performing its obligations, fundamentally alter the economic balance of the contract.

- (104) The Agency agrees with the lack of harmonisation of this matter, since, although it is foreseen by most of the Member States, it is closely linked to national civil law and its regulation varies from one country to another, being affected by fundamental differences in principles of national law and jurisprudence. Thus, several Member States may choose not to include a hardship or step out Clause, and their approach to the content thereof may also vary significantly in accordance with their respective national legal order.
- (105) Nevertheless, the Template should foresee a Clause regarding hardship, drafting its wording with the corresponding gaps to be filled in according to national frameworks.

#### 3.6.6 Amendments (not included in the Template)

- (106) This Clause would regulate under which conditions the contract can be modified.
- (107) Despite agreeing with the lack of harmonisation of this matter, the Agency considers that the Template should foresee a Clause regarding possible future amendments of the contract, drafting its wording with the corresponding gaps to be filled in according to national frameworks.

#### 3.6.7 Applicable law (not included in the Template)

- (108) This Clause would determine the Law governing the contract.
- (109) The Agency agrees with not harmonising this Clause, since it is a matter determined by the specific national legal regime that will apply.
- (110) In the Template, there is no reference to an applicable law Clause. However, the Agency suggests that the Template foresee the necessity to include such a Clause in the contracts, so that all contracts foresee their own applicable law, even if that reference is made generally to the fact that the relevant national legislation shall apply, as well as any other EU legislation applicable to the matters included under the contract.

#### 3.6.8 Jurisdiction (not included in the Template)

- (111) The purpose of this Clause would be to govern dispute resolution by setting out the competent jurisdiction in case a litigation is initiated by any of the parties or by defining alternative dispute resolution mechanisms.
- (112) Therefore, the Agency agrees that this Clause should not be harmonised with a precise wording in the Template, since it is affected by fundamental differences in the principles of national law and in national jurisprudence. Those differences include the judicial organisation of the countries (general competence of the courts, exclusive competence of a specific court according to aspects such as territory or matter) and the admissibility of arbitration.

(113) However, the Agency suggests that the Template foresee the necessity to include in the contracts a Clause on jurisdiction, whereby it is determined which dispute resolution mechanism will apply to the said contract. It should also recommend the inclusion of a prior amicable attempt at dispute resolution, before starting the formal dispute resolution mechanism (either by a judicial procedure or an arbitration procedure). In addition, the Agency considers that, when admissible under national law, it would be recommendable to allow parties the freedom to choose the dispute resolution mechanism they want to include under their contracts.


**HAS ADOPTED THE PRESENT OPINION:**

1. ENTSOG has fulfilled its obligation under Article 20(2) of the CAM NC by producing and submitting to the Agency its template for the main terms and conditions covering contractual provisions that are not affected by fundamental differences in principles of national law or jurisprudence for the offer of bundled capacity products.
2. The Agency is of the view that the Template does not always go as far as would be desirable. In particular, the Agency recommends that the template is enhanced by providing its content in a form ready to be used in contracts across the Union and by elaborating best practices.
3. Moreover, the Agency draws ENTSOG's attention on the observations formulated in the recitals of this Opinion.

This Opinion is addressed to ENTSOG.

Done at Ljubljana on 1 October 2018.

For the Agency:

  
Alberto Pototschnig  
Director *ad interim*