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**OPINION OF THE AGENCY FOR THE COOPERATION OF ENERGY
REGULATORS No 06/2014**

of 14 March 2014

**ON THE STATUTES AND RULES OF PROCEDURE ON THE BASIS
OF THE PROPOSED AMENDMENTS TO THE ARTICLES OF
ASSOCIATION OF THE EUROPEAN NETWORK OF TRANSMISSION
SYSTEM OPERATORS FOR GAS**

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 Regulators¹, and, in particular, Article 5 thereof,

HAVING REGARD to 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 1775/2005², and, in particular Article 5 (2) thereof,

HAVING REGARD to the favourable opinion of the Board of Regulators of 19 February 2014, delivered pursuant to Article 15(1) of Regulation (EC) No 713/2009,

WHEREAS:

- (1) On 28 February 2011, the European Network of Transmission System Operators for Gas (hereinafter referred to as “ENTSOG”) submitted its Articles of Association (“AoA”), Rules of Procedure (RoP) and List of Member Companies to the European Commission and to the Agency for the Cooperation of Energy Regulators (hereinafter referred to as “the Agency”), pursuant to Article 5(1) of Regulation (EC) No 715/2009.
- (2) On 23 March 2011, the Agency invited the stakeholder organisations to submit their comments on a draft version of its Opinion by 5 April 2011.
- (3) On 5 May 2011, the Agency issued an Opinion containing a number of recommendations for amendments of the AoA and the RoP.
- (4) The Agency and the Commission recommended ENTSOG to seek their prior Opinion, pursuant to the procedure described in Article 5 of Regulation (EC)

¹ OJ L 211, 14.8.2009, p. 1.

² OJ L 211, 14.8.2009, p. 36.

715/2009, for any subsequent amendment of a substantial nature related to the AoA, RoP and List of Member Companies.

- (5) On the basis of the recommendations issued by the Agency and the Commission, ENTSOG formally adopted its AoA, RoP and List of Member Companies on 6 March 2012.
- (6) On 17 January 2014, ENTSOG informed the Commission and the Agency of its proposal to amend certain provisions of its AoA. The proposed amendments to the AoA concern Article 1 (Rules on Delegation within the Board), Article 4 (scope of ENTSOG's activities), Articles 20(4) and 29(3) (the shortening of the written procedure in exceptional circumstances) and Article 28 (Rules on delegation within the Board).
- (7) The Agency reckoned that only the amendments to Article 4 AoA could be considered as a substantial change or touching upon an essential element of ENTSOG's AoA, as it enlarges the framework within which the organisation will operate.
- (8) On this basis, pursuant to Article 5(2) of Regulation (EC) No 715/2009, the Agency consulted the organisations representing all stakeholders, in particular the system users, including also customers, on the proposed amendments submitted by ENTSOG, with particular regard to Article 4 AoA, but did not receive any comments.
- (9) In the light of ENTSOG's current institutional activities, the Agency considers that it would be useful if Article 4 AoA, which is already subject to amendments, also clarified the duty of its members to cooperate with the Association in order to ensure the fulfilment of ENTSOG's tasks and obligations.
- (10) In addition, when reviewing the proposed amendments of the AoA, the Agency noted that certain recommendations contained in its opinion of 5 May 2011 have not been taken into consideration at the time of the adoption of ENTSOG's AoA and RoP,

HAS ADOPTED THIS OPINION:

The Agency has reviewed the amendments as proposed by ENTSOG with regard to its activities in Article 4 AoA. The proposed changes and evaluation can be summarised as follows.

Amendments proposed by ENTSOG regarding Article 4 AoA

Content of the proposed amendment

According to the current formulation of Article 4(1) AoA, ENTSOG is established, on a non-profit basis, in order to promote the completion and functioning of the internal market and cross-border trade for gas and to ensure the optimal management, coordinated operation and sound technical evolution of the European natural gas

transmission network.

On this basis, it fulfils the TSOs' obligation to cooperate at Community level as defined in Article 4 of Regulation (EC) No 715/2009. To this purpose, ENTSOG may undertake any activity enabling to achieve, directly or indirectly, its scope.

According to the proposed amendment to Articles 4(2) and 4(5) AoA, ENTSOG aims to update the scope of its activities in light of the legal obligations imposed on ENTSOG after the adoption of its Statutes. More in particular, they concern the tasks and obligations to adopt a methodology for a harmonised energy system-wide cost-benefit analysis in accordance with Article 11 of Regulation (EU) No 347/2013.

Assessment

The proposed amendments do not raise any legal issues, but, on the contrary, facilitate an efficient functioning of ENTSOG and make its AoA better aligned with the legal obligations imposed on the organisation following its establishment. Also the consultation of the organisations representing all stakeholders did not reveal any concern.

As a critical observation on the proposal, however, the Agency notes that the proposed amendment to Article 4(2) still remains to some extent limitative in scope. By laying down that "the Association shall fulfil the tasks and obligations imposed *explicitly* to the ENTSO for Gas by EU legislation", the clause prevents ENTSOG to act in conformity with its AoA, if the association has to meet legal obligations which may admittedly not have been laid down explicitly, but which can still be derived from EU legislation and which can be assigned to ENTSOG in light of the spirit, aim, and objectives of EU legislation.

In order for ENTSOG to meet all its legal obligations, either imposed explicitly or those which are derived from EU legislation, the Agency would therefore suggest to rephrase the proposed amendment to Article 4(2) accordingly.

Further, as the objective of the current exercise is to adapt the ENTSOG Statutes to the legal obligations which are currently imposed on ENTSOG and its members, the Agency believes that the Statutes would in addition benefit from the following two amendments, which ENTSOG may have not considered in the past.

Proposed amendment in order for ENTSOG to be ensured of the support of its members to meet the legal obligations

Content of the current provision

As mentioned above, the proposed amendments to Article 4 of ENTSOG's AoA lay down the principle that ENTSOG shall meet its legal tasks and obligations imposed by EU legislation.

However, the cooperation of ENTSOG's member TSOs is vital for ENTSOG's ability to meet its legal obligations. Without the willingness of its members to cooperate with the association and to provide it with all the necessary information, the entire regulatory construction will not function effectively.

ENTSOG's AoA currently contains few provisions laying down the obligations of its members vis-à-vis the association itself. The most relevant article is Article 4(7) AoA, which commits the TSOs to "promote their cooperation at regional level to contribute to the tasks mentioned in Article 4 paragraph 3, 4 and 5". Although the clause is certainly useful, it remains too limited in scope in the light of the current objective to enable ENTSOG to act upon its legal obligations (cooperation at regional level, and only for the tasks mentioned in the paragraphs concerned).

The Agency believes that the obligation of the TSOs to support ENTSOG in meeting its legal obligations is clearly provided in Article 4 of Regulation (EC) No 715/2009, as it obliges the TSOs to "cooperate at Community level through the ENTSO for Gas".

Assessment

However, the procedure for ENTSOG to invoke and to remedy eventual breaches is impractical, cumbersome and thus unlikely ever to be followed. Moreover, the Agency notes that Article 4(1) AoA refers explicitly to Article 4 of Regulation (EC) No 715/2009, by establishing that "the Association fulfils the TSOs' obligation to cooperate at Community level as defined in Article 4 of the Regulation". From this provision one could argue that ENTSOG's AoA actually prevents it from reminding its members of their cooperation obligations under Article 4.

In order to have a complementary mechanism, the Agency would therefore be in favour of two additional clauses on the relationship between ENTSOG and its members. Firstly, the AoA would benefit from a general principle of cooperation between the members and the Association. In addition, it would be useful to have a provision obliging the members to make available all information required by ENTSOG in order to enable the latter to meet its obligations imposed explicitly by or derived from EU legislation.

Such clause would provide ENTSOG with the proper tools to address possible situations where it is facing an unwilling member. If the duty to cooperate with ENTSOG is clearly established in its AoA, any situation where a TSO refuses to cooperate or to follow up on a request from ENTSOG without objective justification could then be considered a "material breach of its duties under the Articles of Association or the Rules of Procedure", which, under Article 9(1) of ENTSOG's AoA, could eventually lead to the exclusion of the member concerned. A clause stating such duty to cooperate would thus give ENTSOG an effective and efficient tool to put pressure on its members.

In order to clarify the different obligations of ENTSOG and its members, the Agency would in addition also suggest to clarify the last sentence of Article 4(1) AoA. It is clear that ENTSOG alone cannot fulfil the TSO's obligation to cooperate at Community level.

More accurately, it is *through* the Association that the *TSOs* fulfil their obligation to cooperate at Union level as defined in Article 4 of the Regulation.

Recommendation of 5 May 2011 with regard to Article 37 AoA – Proposed amendment to the Articles of Association

Content of the current provision

Article 37 AoA describes the procedure for amending the AoA. In case the proposed amendments relate to particular chapters of the AoA, Article 37(1) stipulates that such proposed changes shall first be “submitted by the General Manager to the Commission with the request to provide an opinion on the draft amendment”, for which the Commission is given three months’ time.

Assessment

Articles 5(2) and 5(3) of Regulation (EC) No 715/2009 explicitly requires a prior opinion of the Agency and of the Commission before ENTSOG’s AoA and rules of procedures can enter into force.

As already expressed in the Agency’s Opinion of 5 May 2011, the Agency considers that the duty to seek a prior opinion from the Agency and the Commission also applies to any subsequent substantial modification to the AoA or its RoP.

The current AoA unfortunately only partially implemented this recommendation. The Agency therefore recommends ENTSOG to amend Article 37 AoA in order to comply with the Regulation in full, and to specify hereby the time-frames of respectively 2 or 3 months which the Agency and the Commission have to respect in this regard.

Done at Ljubljana on 14 March 2014.

For the Agency:


Alberto Pototschnig
Director



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