

**NOTICE OF**  
**PUBLIC CONSULTATION of 7 June 2019**  
**PC-2019-G-04**

**Consultation is open from 7 June 2019 to 1 July 2019**

The Agency for the Cooperation of Energy Regulators (“the Agency”) invites third parties to submit their views with respect to the Agency’s proceeding to decide on the compliance programme as submitted to the Agency by Balansys S.A. (“Balansys”).

**1. The proposal**

**1.1 The proposed legal basis**

According to the proposal, Balansys would act as gas balancing operator for balancing in the BeLux area, which would cover the integrated H-gas market of Luxembourg and Belgium and the L-gas market in Belgium. Balansys is a joint undertaking owned in equal shares by Fluxys Belgium (“Fluxys”), the ownership unbundled transmission system operator (“TSO”) in Belgium, and Creos Luxembourg (“Creos”), the exempted vertically integrated transmission system operator in Luxembourg.

Balansys would perform the following activities:

- the market-based balancing of the BeLux area, i.e. (a) aggregating the balancing positions of the shippers on the respective grids of Creos Luxembourg and Fluxys Belgium and on the Zeebrugge Trading Point (ZTP) and communicating such balancing positions to the shippers as well as the aggregated balancing position of the overall market area, (b) purchasing and selling gas for balancing purposes, and (c) invoicing balancing charges to the shippers;
- the regulatory tasks of drafting, designing and submitting the Balancing Agreement, Balancing Code, Balancing Programme and Balancing Tariff to ILR and CREG, within their scope of competence, and concluding a Balancing Agreement with each shipper.

The TSOs Fluxys and Creos would delegate the above-mentioned balancing responsibilities to Balansys, which would henceforth act in its own name and on its own behalf.

Balansys bases its request for a decision on its proposed compliance programme on Article 7(4) of 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.

The fact that the parents of Balansys are an ownership unbundled TSO and an exempted vertically integrated TSO, and the choice of the parent TSOs to delegate their balancing responsibilities to this joint undertaking,<sup>1</sup> raises two potential issues with respect to the proposed legal basis, which the Agency currently views as follows.

#### *Scope of Article 7(4) of Directive 2009/73/EC*

Article 7 of Directive 2009/73/EC aims to foster regional cooperation amongst TSOs “at one or more regional levels, as a first step towards the creation of a fully liberalised market”. For this purpose, National Regulatory Authorities (“NRAs”) or Member States should facilitate such cooperation. The article lists in particular three underlying regulatory objectives: (i) the creation of a competitive internal market in natural gas, (ii) increasing the consistency of the legal, regulatory and technical framework, and (iii) integrating the isolated systems forming gas islands.

Article 7(4) of Directive 2009/73/EC requires that, in case vertically integrated TSOs enter into a joint undertaking established for implementing such cooperation, a compliance programme should be established by this joint undertaking, setting out the measures to be taken to ensure that discriminatory and anticompetitive conduct is excluded.

Whilst Article 7(4) of Directive 2009/73/EC only foresees the case of joint undertakings set up by vertically integrated TSOs, it is the Agency’s view that there does not seem to be a valid reason why this article, and the compliance programme requirement, would not similarly also apply if only one of the parents is a vertically integrated TSO. If this were not the case, it could prevent further regional market integration between TSOs, and thus go counter the objectives set by the article itself in situations where there would actually be less risk for the joint undertaking to engage in discriminatory and anticompetitive conduct, since the other parent TSO would be ownership unbundled and thus not have any direct or indirect links with any undertaking performing any of the functions of production or supply.

Similarly, the Agency also considers that Article 7(4) of Directive 2009/73/EC also applies where one of the parents is an exempted vertically integrated TSO. Article 7(1) of Directive 2009/73/EC explicitly cites the facilitation of the integration of isolated systems forming gas islands as one of the objectives of the article. As the isolation of its domestic gas grid was

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<sup>1</sup> The level of TSO responsibility may vary depending on whether the TSO mandates or delegates this task to the entity.

#### *Delegation*

In principle, when a company delegates its responsibility or competence to take certain actions to another entity, this responsibility or competence is carried over to this other entity. Following the delegation, the delegated entity would henceforth act in its own name and on its own responsibility. In administrative law, such delegation can only take place if allowed by the legislator.

#### *Mandate*

Alternatively, a company may decide to mandate another entity to carry out a particular task. Under such legal construct, the mandated entity performs those functions on behalf of the company. The responsibility and control over the particular task remains in such case with the company.

In the current case, as will be discussed below, the delegation would lead to a situation of concurrent responsibility, where the parent TSO retains responsibility alongside the delegated entity, Balansys.

arguably a constituent element for granting the exemption regime to Luxembourg, an interpretation that would prevent the Luxembourgian TSO from seeking regional cooperation with a TSO in a neighbouring market would be incoherent and inconsistent with the overall aim of Article 7.

### *Concurrent responsibility*

Although the balancing activities transferred to Balansys are tasks that Commission Regulation (EU) No 312/2014 assigns to TSOs, Balansys itself does not intend to apply for TSO certification, but instead acts as ‘balancing operator’ for balancing in the BeLux area.

In this respect, the parties refer to the possibility to transfer balancing responsibilities to another entity as laid down in Article 4(4) of Commission Regulation (EU) No 312/2014 of 26 March 2014 establishing a Network Code on Gas Balancing of Transmission Networks<sup>2</sup> (“the Balancing Network Code”), and the relevant provisions in Belgium and Luxembourgian law implementing this article of the network code.

It is true that the Balancing Network Code allows for a transfer of responsibilities to another entity, which would act under the regulatory framework foreseen in national legislation. Yet, the Network Code is a delegated act of the Gas Regulation and cannot contain any rule that would change any essential elements of the Regulation or the Directive (such as the fact that the balancing duties fall under the ultimate responsibility of a TSO). Article 4(4) of the Balancing Network Code cannot be interpreted as allowing the Member State to deviate from the obligations of the Third Package by adopting a national law which requires the entity to comply only with some (but not all) relevant TSO duties, whilst no longer holding the delegating TSO responsible for the balancing activities.

This seems, however, not to be the case in the current situation. In the submitted proposal, the TSOs Fluxys and Creos recognise that, together with Balansys, they are concurrently liable and responsible for the good performance of the tasks delegated to Balansys.

Balansys’ proposed regulatory set-up reflects the regulatory regime that is explicitly allowed in Article 13(1) of the Electricity Balancing Guideline (Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing), which makes clear that a TSO which has delegated its balancing tasks to another entity remains responsible for ensuring compliance with the obligations under that Guideline. Given that the current proposal does not aim to transfer in a definite manner the TSO balancing duties to the other entity, but that the parents Fluxys and Creos retain ultimate responsibility in addition to Balansys’s own, the Agency currently considers the proposal as compatible with the requirements of Article 7(4) of Directive 2009/73/EC.

Conversely, if the parent TSOs had no longer retained responsibility (which is not the case here), the joint undertaking would no longer have been a cooperation within the meaning of Article 7(4) of Directive 2009/73/EC between two TSOs that remain responsible for the acts

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<sup>2</sup> Article 4(4) of Commission Regulation (EU) No 312/2014 states that “[i]n a balancing zone where more than one transmission system operator is active, this Regulation shall apply to all the transmission system operators within that balancing zone. In case the responsibility of keeping their transmission networks in balance has been transferred to an entity, this Regulation shall apply to that entity to the extent defined under the applicable national rules”.

of this undertaking. In such case, the joint undertaking would have entirely taken over the TSO responsibilities, and would have needed to be certified for that purpose.

### Related documents

- 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 (<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009R0715>)
- 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 (<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32009L0073>)
- Commission Regulation (EU) No 312/2014 of 26 March 2014 establishing a Network Code on Gas Balancing of Transmission Networks (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R0312>)

## 1.2 The proposed approach

When assessing the Balansys' compliance programme proposal under Article 7(4) of Directive 2009/73/EC, the Agency has to evaluate whether the compliance programme ensures that any discriminatory and anticompetitive conduct is excluded.

The proposed compliance programme is attached to this Notice of Public Consultation. The proposed compliance programme contains, *inter alia*, measures to ensure impartial and independent conduct by the personnel, conflict of interest requirements and anti-fraud measures (cf. Sections 5 and 6). The compliance programme also specifies that Balansys is bound to protect the confidential nature of commercially sensitive information which it obtained as if it were a TSO.

The compliance programme is to be understood as applying in a setting whereby Balansys relies heavily on subcontracts with its parent TSOs to perform its duties. The proposed division of tasks between its subcontractors aims to ensure that the confidential information obtained by Balansys is only processed by Fluxys. Thus, Fluxys would be responsible for back-office, dispatching and invoicing services, whilst Creos would be contracted for administrative and legal management, general invoicing services, and accounting.

Although Balansys relies on subcontracting services, Section 5.2.3 of the compliance programme requires that the employment contracts of Balansys, as well as those of Balansys's subcontractors, contain provisions which must ensure the confidential treatment of the commercially sensitive information in line with Balansys' compliance programme.

Balansys also contracted a compliance officer, who is tasked with supervising that all relevant staff (i.e., both Balansys' and those of Balansys' subcontractors) act in accordance with the compliance programme. Where appropriate, Balansys' compliance officer can take further investigatory steps and, when necessary, propose corrective measures and sanctions to the relevant bodies (cf. Sections 7 and 8).

An earlier draft of Balansys' compliance programme was subject to a public consultation organised by the Belgian regulator CREG and resulted in its Final Advice A(1618) on the compliance programme of Balansys, which contained a detailed analysis and several recommendations to improve the draft compliance programme. Following CREG's advice, Balansys revised its compliance programme before submitting it to the Agency.

#### Related documents

- Compliance programme
- Public consultation (<https://www.creg.be/nl/openbare-raadplegingen/gewijzigd-ontwerpadvies-over-het-nalevingsprogramma-van-de-nv-balansys>; <https://www.creg.be/fr/consultations-publiques/projet-davis-modifie-sur-le-programme-dengagements-de-la-sa-balansys>) and the Final Advice A(1618) of CREG regarding the compliance programme of Balansys S.A. (<https://www.creg.be/nl/publicaties/advies-a1618>; <https://www.creg.be/fr/publications/avis-a1618>)

## 2. The Consultation

The Agency seeks to consult third parties on the proposal and the compliance programme.

Stakeholders are invited to submit their observations until

**1 July 2019, 23:59 hours (CET)** to [complianceprogramme@acer.europa.eu](mailto:complianceprogramme@acer.europa.eu)

The Agency values the information that will be gathered through this public consultation; however, the Agency stresses that the results of the consultation are not binding the Agency, and the Agency will base its decision on all information collected in the course of the proceeding and its own assessment.

## 3. Publication of responses

Following the public consultation period, the Agency will publish all answers received from third parties. Since the Agency needs to remove personal data from the published version, it requests stakeholders to submit answers without, or containing only a minimal amount of, personal data. The Agency advises respondents to claim confidentiality only for commercially sensitive information and to ensure that a non-confidential version is also submitted. Therefore, if you wish to submit confidential material, please indicate that the document is 'CONFIDENTIAL' in the subject line of the e-mail and provide simultaneously a NON-CONFIDENTIAL version to your answer. The Agency will not treat as confidential those e-mails which contain only a standard disclaimer inside the message of the e-mail (usually added automatically at the bottom).

## 4. Data protection and Privacy statement

The Agency will process personal data of the respondents in accordance with Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions,

bodies, offices and agencies and on the free movement of such data, taking into account that this processing is necessary for performing the Agency's consultation task.

For more details on how the contributions and the personal data of the respondents will be dealt with, please see the standard Privacy Statement, which is available on the website of the Agency. The terms and procedure described therein will be followed during the current proceedings ([https://www.acer.europa.eu/en/The\\_agency/Data-Protection/Documents/DPN\\_Interactions%20with%20Stakeholders.pdf](https://www.acer.europa.eu/en/The_agency/Data-Protection/Documents/DPN_Interactions%20with%20Stakeholders.pdf)).