

MINUTES
14th ACER Administrative Board meeting
Wednesday, 26 September 2013, 9.00 – 16.00

Present:

Mr Piotr Woźniak, Chair

Mr Razvan Nicolescu, Vice Chair

Mr Olivier Onidi, Member, and with proxy from Mr Philip Lowe

Mr Luis Martin Oar, Member

Mr Rene Tammist, Member

Mr Gonzalez Finat, Alternate

Lord John Mogg, Chair of the Board of Regulators, Observer

Mr Alberto Pototschnig, Director of ACER, Observer

Ms Marie-Christine Jalabert, Adviser

Main conclusions of the meeting

- 1.) The Board adopted the Agency Work Programme for 2014.
- 2.) The Board requested to be involved in the evaluation of the Agency, pursuant to Article 34 of the Regulation (EC) No 713/2009.
- 3.) The Board adopted the Decision AB No 19/2013 of the Administrative Board of the Agency for the Cooperation of Energy Regulators of 26 September 2013 amending Decision AB No 08/2010 laying down the Procedures and practical measures for applying Regulation (EC) No 1049/2001 on access to documents of the Agency (ANNEX1).
- 4.) The Board approved the dates for its meetings in 2014 in Ljubljana. The dates are: 20 March 2014, 12 June 2014, 18 September 2014, and 18 December 2014.

The Chairman welcomed the new AB member appointed by the Commission, Mr Olivier Onidi, replacing Mr Stefan Tostmann.

1. Approval of the Agenda

The following agenda of the 14th ACER Administrative Board meeting was approved:

Agenda Topics	Accompanying documents	Rapporteur
<p>Opening</p> <p>1. Approval of the agenda</p> <p>2. Minutes of the 13th Administrative Board meeting</p>	<p>Doc 1 for approval</p> <p>Doc 2 for approval</p> <p>Doc 3 for information</p>	<p>AB Chair</p> <p>AB Chair</p>
<p>Reporting on developments</p> <p>3. Report on the written procedure(s)</p> <p>4. Report on ACER developments (including REMIT, monitoring pursuant to Art. 11 Regulation (EC) No 713/2009, and on the activities of the Board of Regulators)</p> <p>5. Budgetary developments 2013 and 2014</p>	<p>Oral update</p> <p>Oral update</p> <p>Doc 4 for consideration</p> <p>Doc 5 for information</p>	<p>ACER Director</p> <p>ACER Director BoR Chair</p> <p>ACER Director Commission</p>
<p>General ACER work</p> <p>6. Review of the 2013 Work programme</p> <p>7. Work programme 2014</p>	<p>Oral update</p> <p>Doc 6 for adoption</p> <p>Doc 7 and 8 for information</p>	<p>ACER Director</p> <p>ACER Director BoR Chair Commission</p>
<p>8. Multi-annual Work programme</p>	<p>Oral update</p>	<p>ACER Director</p>
<p>9. Evaluation of ACER pursuant to Art. 34 Regulation (EC) No 713/2009</p>	<p>Doc 9 for information</p>	<p>Commission</p>

Agenda Topics	Accompanying documents	Rapporteur
10. New ACER Premises – Update on the process	Oral update	ACER Director
Administrative work		
11. Decision AB No xx/2013 of the Administrative Board of the Agency for the Cooperation of Energy Regulators of xx September 2013 amending Decision AB No 08/2010 laying down the Procedures and practical measures for applying Regulation (EC) No 1049/2001 on access to documents of the Agency	Doc 10 for adoption	ACER Director
12. AB Meetings in 2014	Doc 11 for approval	AB Chair
13. 2013 AB Decisions, by delegation of the Administrative Board to the Chairman via Decision AB 05bis/2010 of 21 September 2010	Docs 12, 13,14 and 15 for information (decisions since the last AB meeting only)	ACER Director
AOB		

2. Minutes of the 13th Administrative Board meeting

The Minutes of the 13th Administrative Board meeting were approved.

3. Report on the written procedures

The Director reported on the two written procedures that had taken place since March 2013. Both of them were successful. The AB Decision 8-2013 adopting the Multi-annual Staff Policy Plan 2014 – 2016 was adopted on 28 March. The AB Decision 14-2013 amending some provisions of the Rules of Procedure of the Administrative Board was adopted on 18 July 2013.

4. Report on ACER developments (including REMIT, monitoring pursuant to Art. 11 Regulation (EC) No 713/2009, and on the activities of the Board of Regulators)

The Director made a presentation on the Agency's progress including on staff. At the moment there are 69 staff members in office. A total of 72 staff is expected by the end of 2013. In 2014 the Agency envisages 14 staff for TEN-E and 35 for REMIT, totalling to 121 staff altogether, pending approval by the budgetary authorities. 11 NRAs are currently seconding their staff to the Agency (16 all together). He also informed about the open vacancies. Currently staff of 23 nationalities works at the Agency.

Regarding the Agency premises, as a result of a year-long selection procedure, the new contract was signed on 26 July 2013 for the same location: Trg republike 3, Ljubljana. The duration of the contract is for 5 years (from 1.2.2014 until 31.1.2019) with the possibility of extension for up to 5 years. The Director presented the premises layout. All fit-out work will be finalised by 20/12/13, and the final handover is envisaged by 31/1/14. On the Agency activities, he presented a state of play for Framework Guidelines (FGs) and Network Codes (NC), as well as other regulatory activities and REMIT.

The Director reported that the Agency Guidance on NC amendments has been finalised and was published the day before. The Guidance envisages a regular review of the NC every 5 years (instead of 3 years envisaged in a previous draft) and an ad-hoc urgent procedure. The Agency Guidance on Consultation practices was recently published. The Market Monitoring Report this year will be again co-branded with CEER and will focus on the barriers to the internal energy market. It will be presented to the ITRE Committee on 27 November and to the public on 28 November.

The Director presented the implications of the Agency budget developments over 2013 and 2014, especially with respect to the implementation of REMIT. An additional € 3 million are required in 2013 to finalise the IT system. If the availability of these funds were delayed, the Agency would not be in a position to collect data and the development of REMIT data collection and screening would be suspended. In practical terms the Agency would need to ask the EC to delay the implementing acts.

If the Agency received the total 2013 budget, the deployment of REMIT Data collection and screening platform will be finalised by the end of 2014.

If the Agency is then further allocated the resources for 2014 (covering the need for 35 additional staff) according to the 2014 budget (as adopted by the AB) it will be able to undertake wholesale market monitoring at Union level.

Conversely, if the 2014 funding were to correspond to the level indicated in the Commission's draft budget, the Agency would not be able to have the human resources for market monitoring and therefore the NRAs will have to monitor markets at national level themselves on the basis of the data collected by the Agency. Under this scenario, the Agency will simply coordinate the cross border investigations.

However, he also presented the situation in the NRAs, where the results of a recent survey show that most NRAs plan to employ no more than 3 staff to monitor and investigate national transactions according to REMIT.

The Director presented progress on the implementation of the Regulation (EU) No 347/2013 on guidelines for trans-European energy infrastructure, which entered into force on 15 May 2013. The Agency received the draft lists of regional projects of common interest (PCI) on 14 June and gave its opinion on them on 18 July. The first EU PCI list is expected to be adopted by the Commission on 9 October 2013. On 25 September the Agency issued its Recommendation on cross-border cost allocation of electricity and gas PCIs.

Lord Mogg reported on the CEER plans to move to new premises at the end of October. The meeting rooms will be available for use by the Agency subject to a charge. He suggested that logistics arrangements (microphones etc.) on the 14th floor meeting room of the new Agency premises improve.

He said that collaboration between the Agency staff and the NRAs has been improving. A lot of progress has been made on the network codes. The Commission has already launched a number of network codes through comitology, which is good news. However, the committees are composed of the Member States' representatives, which, on some specific issues, may take a different position from the regulatory community. The gas Network Code on Capacity Allocation Mechanisms has already gone through comitology and should soon enter into force, while one gas code and two electricity codes are still in the comitology procedure.

Regarding future amendments to the network codes, the Director confirmed that impact assessments will be prepared by the Agency staff. To fulfil the Agency's obligation to monitor the tasks of the ENTSOs in line with Article 6 (2) of ACER Regulation, the Director sent a letter to the EC listing all Agency's opinions and recommendations on the documents received by the ENTSOs during the year.

The main focus of this year's Market Monitoring Report, prepared jointly with CEER, is going to be barriers to energy market integration. The Director said that the Agency will reassess on a yearly basis the need to prepare the market monitoring report jointly with CEER. In any case, the Agency will have a final word on the text.

A discussion took place on the need for extensive communication and press coverage of the Market Monitoring Report. The Director indicated that two press conferences (one in Ljubljana and one in Brussels are planned). A citizens' summary will also be prepared. As regards coordination with the EC on the report, it is done via the EC staff being involved in the Agency working groups.

Lord Mogg as the representative of the BoR said that the Agency is developing a Strategy paper on energy markets covering the period after 2014; the objective is to cover the period between now and 2025. The Agency's strategy should be seen as a major contribution and link to the strategy the EC is preparing for 2020 and 2030. He said that the Market Monitoring Report should pull the strategy. A consultation with the EC was also planned for 8 October.

The AB member representing the EC reiterated that the Agency should have the last word on the Market Monitoring Report and stressed the importance of Agency's independence. He said that this report is critical for other upcoming reports, including an orientation for the next Commission. In parallel, there will also be the first evaluation of the Agency.

One AB member agreed that the convergence of different institutions and the approach are very important. This is a very important occasion for the Agency showing it is doing something for the citizen and for the European integration.

Several suggestions on how to upgrade the presentation of the Market Monitoring Report were also offered. Contacts with the Council could also be enhanced.

On REMIT, Lord Mogg commented that in some NRAs there is still no decision on the authority responsible for REMIT. The results of the survey reveal that due to the scarce resources foreseen for REMIT in a majority of the NRAs, the monitoring of the wholesale markets could not effectively be done at the NRA level.

Lord Mogg as a representative of the NRAs argued that according to REMIT the Agency has an obligation to monitor wholesale markets, including cross-border; individual NRAs can monitor their markets if they wish, but they are not required to. While monitoring for the NRAs is voluntary, the enforcement is obligatory.

The AB Chairman stated that the Agency needs the financial resources to complete the deployment of the REMIT-related IT infrastructure. The EC representative replied that the software itself is not sufficient, the key being the implementation of the 3rd energy package and the enforcement of legislation.

Some discussion on the practice of market monitoring at FERC (US) took place. An MoU with FERC (US) is planned to be concluded by the Agency. The Director reassured that the MoU does not provide for data on transactions to be provided to FERC on an automatic basis. The EC underlined that the Agency has no legal personality outside the EU. Any new Agency obligations outside the EU need first to be consulted with the EC. Furthermore, the EC is currently negotiating a free trade agreement with the US.

The Director confirmed that at the next AB meeting he will report on the MoU of the Agency with FERC.

The AB Chairman requested that the Director prepares a report on the days of teleworking by different categories of staff at the Agency. The Director informed that the upcoming new Staff Regulations require that the EU agencies adopt the implementing rules by analogy; therefore the AB will have to readopt these by 1 January 2014.

Lord Mogg, as the BoR representative, warned about the dangers of the Common approach for the Agencies, particularly as regards the provisions on the new Management Board, which could undermine the independence of the Agency. The AB Vice-Chair reported on the EC meeting with the Chairs of the Management Boards of the Agencies in Brussels, where he had raised this issue. At that meeting he had received guarantees that the Common approach will be applied on a case-by-case basis. He underlined that the ACER Regulation is quite recent and the modern approach to the governance is already applied.

The EC representative replied that the Common approach is a text of the 3 EU institutions, it is not legally but politically binding. As regards the proposed governance there should be no omnibus revision of the agencies' regulations. However, when the revisions will take place, the provisions of the Common approach will have to be implemented. The AB Chairman agreed with the analysis of Lord Mogg that the triple size of the AB would be most problematic for the Agency.

One AB member analysed the context of the Common approach, saying that the change would take at least one year. At that time there would be a new EP and a new EC.

5. Budgetary developments 2013 and 2014

The Director explained his note to the AB and BoR on Implications of the budgetary prospects for the Agency and the results of the NRAs questionnaire for the implementation of REMIT, indicating that the 2013 budget, as adopted, does not provide the Agency with the financial resources required for the deployment of the REMIT-related IT system planned for this year and there is limited scope for the Agency to identify surplus funds in other areas of activity to transfer them to REMIT. The emerging delay in the deployment of REMIT – related IT system is jeopardising the ability of the Agency to complete the REMIT implementation stage and be ready to start the operational stage by mid-2014.

Moreover, for 2014, most of the budget increase relates to the Agency to recruit expert staff to reinforce its market monitoring capability to support the launch of the operational stage of REMIT. However, these resources have not been identified by EC draft budget in June. In this situation, the Agency has serious concerns on whether the goal of increased integrity and transparency of wholesale energy markets to foster open and fair competition in wholesale energy markets can be achieved.

Moreover, for the implementation of TEN-E Regulation only 5 additional staff were granted. Here redeployment within the Agency is however easier, which is not the case in REMIT where specific expertise is required. Briefly, the Agency is short of €3 million and 35 staff. An example of the recently imposed \$ 450 million fine by FERC in the US was given to compare the scale of required resources versus the potential damage from market abuse.

The AB member representing the EC confirmed that as regards the 2013 budget, the additional resources for REMIT are on the agenda of the October trilogue, regretting the cancellation of the July trilogue and the fact that the Council was not ready to take the decision in September. He gave an overview of the complex budgetary situation. On a broader context there are the constraints of the 5 % reductions in staff applicable to all EU institutions and bodies and then there is a levy of 1 % for redeployment amongst the agencies. The partner DG has made sure that ACER remains the new tasks agency, therefore eligible for receiving additional resources from the pool. In the context of ACER, the possibility of receiving resources from the fees should be looked at. He also called for closer cooperation in preparations for the 2015 budget.

The AB and the BoR Chairmen found the idea of charging the fees interesting.

The Director expressed gratitude for the support of the partner DG in this process.

Action: The Board took note of the note on implications of the budgetary prospects for the Agency and the results of the NRAs questionnaire for the implementation of REMIT.

6. Review of the 2013 Work programme

The Director explained that the Internal Audit Service of the EC suggested reviewing the 2013 Work Programme immediately as the Agency is taking on the risk of non-implementation of its 2013 Work Programme should the additional resources not become available soon. The Director said that he is still willing to wait for the results of the trilogue taking place on 16 October. In case the additional resources were not to become available he would immediately launch the revision of the Agency 2013 Work Programme.

Action: The Board took note of Director's oral update.

7. Work programme 2014

The Director presented the 2014 Work programme, which was approved by the BoR on 25 September after having received the opinion of the EC on 10 September 2013. The Work Programme is very ambitious, based on the resources envisaged in the draft budget approved by the AB in March. It is divided in 4 streams: 1.) The completion of the IEM; 2.) The infrastructure package; 3.) REMIT and 4.) Post-2014 vision.

In its opinion the EC suggested closer cooperation with the Energy Community Regulatory Board and to start building expertise on exemptions, cross-border cost allocation and TSO certification. The Agency has addressed some of EC suggested activities in its Work Programme 2014, but not all due to resource constraints. The Director however disagreed with the suggestion to align the Work Programme with the draft EC budget already at this stage, i.e. before the final adoption of the EU Budget.

The EC representative clarified that this is not the right reading of their suggestion and the Work Programme should be adapted only after the final adoption of the EU budget. He said the EC is in the position to agree with this Work Programme; there was good cooperation with the Agency. There could however be further improvements on the basis of the EC suggestions and possibly there will be a need for revision.

Action: The Board adopted the Agency Work Programme for 2014.

8. New ACER Premises – Update on the process

The Director reported on the outcome of the tender on the Agency premises. The location of the Agency remains on Trg republike 3, Ljubljana. The contract with CEEREF Naložbe d.o.o. was signed on 26.07.2013. The duration of the contract is 5 years (from 1.2.2014 until 31.1.2019) with the possibility of extension for up to 5 years. The Agency will have 2,871 m² of total space, all fit-out work should be finalised by 20.12.2013, and the final handover of premises is scheduled for 31.1.2014.

Lord Mogg, as the BoR representative, said that the regulators are satisfied with the outcome of the tender.

9. Multi-annual Work programme

The Director updated the Board about his discussions with the Internal Audit Service about the need to produce a Multi-annual Work Programme. He explained how difficult it is for the Agency to look ahead given the complex circumstances it faces (the network codes are decided on an annual basis, the timeline of the implementation of REMIT and TEN-E Regulations is unclear given the uncertainty on resources).

However, the Director also indicated that he agreed with the Internal Audit Service on a format of the Multi-annual Work Programme, whereby the Agency would describe the circumstances in which it finds itself and the big directions it is planning to take.

The Director said the Agency would start working on it in 2014 and publish it early 2015.

One AB member agreed with the Director's plans on the Multi-annual Work Programme to include broad lines and the general context, but suggested to prepare the Multi-annual Work programme already for 2015. He pointed out the usefulness of projecting the Agency a few years ahead.

Action: The Board agreed with the approach of the Director and suggested that the Multi-Annual Work programme is prepared for 2015 onwards.

10. Evaluation of ACER pursuant to Art. 34 Regulation (EC) No 713/2009

The representative of the EC informed the Board that this year the EC launched a "light" evaluation of the Agency, which is the first evaluation of the Agency since its establishment. It will look at the performance (results and working arrangements) of the Agency in its first three years of operation. The Public consultation had taken place from 17 June to 18 September, whereby they received 17 replies. The skeleton of the report will be presented to the BoR in November. The BoR will issue a recommendation to the EC. The adoption of the report is foreseen in December. The BoR will have an opportunity to discuss it.

Lord Mogg, as the representative of the BoR, commented while this will be a light evaluation, there is going to be a stronger evaluation next year. The NRAs are ready to provide recommendations to the EC.

The AB Chairman inquired about the nature and possible implications of the report. The EC representative replied that the EC will be looking at the efficiency and the challenges. The report will be a good hint at what will be proposed in 2014, when there will be an evaluation of the Director.

Action: The Board requested to be involved in the evaluation of the Agency.

11. Decision AB No xx/2013 of the Administrative Board of the Agency for the Cooperation of Energy Regulators of xx September 2013 amending Decision AB No 08/2010 laying down the Procedures and practical measures for applying Regulation (EC) No 1049/2001 on access to documents of the Agency (Annex 1)

The Director presented the reasons for amending the decision AB No 08/2010 by saying that the initial decision included the option of invoking the Board of Appeal in the context of granting access to the documents of the Agency. He explained a recent human resources case, where this option was suggested. As the Board of Appeal is hesitant on deciding on a human resource issue, the purpose of the amendment is to remove the reference where a human resource case could be handled by the Board of Appeal.

Some discussion took place on the scope and modalities of Regulation (EC) No 1049/2001.

Action: The Board adopted the decision (ANNEX1).

12. AB Meetings in 2014

The Board approved proposed dates for the meetings of the AB in 2014. The dates are:

Number of the meeting	Date (s)	Timing	Place
16 th meeting	20 March, Thursday	9.00-16.00	Ljubljana
17 th meeting	12 June, Thursday	9.00-16.00	Ljubljana
18 th meeting	18 September, Thursday	9.00-16.00	Ljubljana
19 th meeting	18 December, Thursday	9.00-16.00	Ljubljana

13. 2013 AB Decisions, by delegation of the Administrative Board to the Chairman via Decision AB 05bis/2010 of 21 September 2010

The Chair reported that, by delegation from the AB, and since the last AB meeting in June 2013, he made 4 appointments of new members and alternates of the BoR.

Action: The Board was informed of the 4 recent AB decisions, delegated to the AB Chair, to appoint new members and alternates of the BoR.

ANNEX 1

DECISION AB No 19/2013 OF THE ADMINISTRATIVE BOARD OF THE AGENCY FOR THE COOPERATION OF ENERGY REGULATORS

of 26 September 2013

AMENDING DECISION AB NO 08/2010 OF 28 NOVEMBER 2010 ON PROCEDURES AND PRACTICAL MEASURES FOR APPLYING REGULATION (EC) NO 1049/2001 ON ACCESS TO DOCUMENTS OF THE AGENCY

THE ADMINISTRATIVE BOARD OF 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 (hereinafter referred to as the “Agency”), and, in particular, to Article 30(2) thereof,

HAVING REGARD to Decision AB No 03/2010 of 6 May 2010 containing the Rules of Procedure of the Administrative Board, and, in particular, Article 8 thereof,

Whereas:

- (1) Article 9(3) of Decision AB No 08/2010 on procedures and practical measures for applying Regulation (EC) No 1049/2001 on access to documents of the Agency (hereinafter referred to as “Decision AB No 08/2010”) stipulates that an applicant may bring an appeal against a confirmatory decision to the Agency’s Board of Appeal, and, in case the latter rejects the request for access, to the General Court or the European Ombudsman.
- (2) The powers of the Board of Appeal are laid down in Article 19(1) of Regulation (EC) No 713/2009, which only allows appeals against a decision referred to in Articles 7, 8 or 9 of the same Regulation addressed to a person or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person. Confirmatory decisions concerning a request for access to documents do not fall within this scope, as they are based on Article 30(2) of Regulation (EC) No 713/2009 *jo.* Article 9(1) of Decision AB No 08/2010.
- (3) Any act or decision of the Agency which is of direct and individual concern to any natural or legal person may also be challenged directly before the Court of Justice pursuant to Article 263

of the Treaty on the Functioning of the European Union. This right cannot be made conditional upon a prior appeal to the Agency's Board of Appeal.

- (4) Article 8(3) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents refers to the General Court and the Ombudsman as possible appeal measures against a confirmatory decision.
- (5) Article 9(3) of Decision AB No 08/2010 should be amended and rephrased accordingly,

HAS DECIDED:

Sole Article

Article 9(3) of Decision AB No 08/2010 shall be replaced by the following:

“The decision shall also inform the applicant of his/her right to bring an action before the General Court in accordance with article 263 TFUE or, if appropriate, to lodge a complaint with the European Ombudsman”.

This decision shall enter into force on the day following that of its adoption.

Done at Ljubljana, on 26 September 2013.

For the Administrative Board:

Piotr Woźniak

Chairman of the Administrative Board of the Agency for the Cooperation of Energy Regulators