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COMMISSION OPINION

of 15.9.2015

**on the draft 2016 Work Programme for the Agency for the Cooperation of Energy
Regulators**

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1. GENERAL

Regulation (EC) No 713/2009 of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators¹ (hereafter "ACER") foresees in Article 13 that the Administrative Board of ACER shall adopt, before 30 September each year, after consulting the Commission and after having received approval by the Board of Regulators in accordance with Article 15(3) of that Regulation, the work programme of ACER for the coming year and shall transmit it to the European Parliament, the Council and the Commission. The work programme shall be adopted without prejudice to the annual budgetary procedure and shall be made public.

On 30 June 2015, the Director of ACER submitted the draft work programme for 2016 to the Board of Regulators, to the European Parliament and the European Commission in accordance with Article 17(6) of Regulation (EC) No 713/2009.

This version of the draft work programme (as submitted on 30 June 2015) is subject to the following opinion of the European Commission.

2. OPINION

2.1. Overall comments

The draft work programme of ACER for 2016 is rightly focused on the tasks related to the completion of the internal energy market in line with the European Council conclusions of 4 February 2011 and 22 May 2013, which is also one of the main priorities identified in the Commission's communication on the Energy Union². Therefore, the main focus is on the implementation of the Third Energy Package³ through the provision of reasoned opinions and recommendations on the remaining network codes and, notably, through monitoring of the implementation of the adopted network codes. Due focus is also given to tasks such as the implementation of Regulation (EU) No 1227/2011 on Wholesale Energy Market Integrity and Transparency (hereafter "REMIT")⁴ and Regulation on guidelines for trans-European energy

¹ OJ L 211, 14.8.2009, p. 1.

² European Commission Communication: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM(2015)80 final, 25.2.2015.

³ 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, Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, Regulation (EC) No. 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, Regulation (EC) No. 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to natural gas transmission networks and repealing Regulation (EC) No 1775/2005 and 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 (ACER Regulation).

⁴ Regulation (EU) No 1227/2011 of 25 October 2011 on Wholesale Energy Market Integrity and Transparency.

infrastructure (hereafter "TEN-E")⁵. ACER plays a very important role in implementation of the above related tasks.

The Commission positively notes that ACER continues applying the multiannual dimension to the work programme identifying the areas on which over the next years it will focus its activity. These rightly include: the completion of the Internal Energy Market, the infrastructure challenge, the monitoring of wholesale energy markets and the long-term regulatory challenges.

2.2. Legislative measures and tasks related to the Third Energy Package

ACER's priorities in the sixth year of its activity will be focused on continuing to work on the completion of the internal energy market. This includes the promotion of regional market integration through early implementation of the network codes and guidelines⁶. ACER also envisages to issue opinions and recommendations on the remaining network codes developed by the European Networks for Transmission System Operators (hereafter "ENTSOs") and to provide advice and support to the European Commission during the comitology procedures. Following the adoption of the majority of the network codes and guidelines ACER has rightly shifted the focus to implementation and monitoring of these new Commission Regulations. The Commission considers ACER's support in the implementation of the network codes and guidelines as key priority. The effectiveness of the adopted network codes and guidelines depends to a large extent on the thorough monitoring and active moderation of the implementation process. This is not only because the network codes and guidelines contain technically complex rules, but notably because many of the new Regulations provide for further implementation procedures in which the actual rules are further developed and refined. This applies notably to the electricity guidelines, which require TSOs, power exchanges and regulators to develop numerous terms, conditions and methodologies for important details of the implementation of the respective guidelines. Also the implementation of the adopted gas regulations has proved to be a complex process which requires thorough monitoring and moderation of potential implementation issues.

On electricity, the implementation work can be expected to be particularly resource intensive, given the many terms, conditions and methodologies that need to be developed in a new procedural framework, with the involvement of ACER. Along with focusing on implementation and its monitoring, ACER will develop possible framework guidelines on rules regarding harmonised electricity transmission tariff structures, depending on the outcome of the scoping exercise during 2015 and decisions taken as part of the Commission's energy market design initiative. ACER will also advice and support on network codes and guidelines during their adoption via the comitology process, as appropriate, on the recommended network codes⁷.

The Commission takes note of ACER's remarks that its implementation work might be at risk due to missing personnel. The Commission encourages ACER to consider the implementation

⁵ Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009.

⁶ ACER coordinates the regional framework for early implementation of the Network Codes through two dedicated regional initiatives: the electricity regional initiatives (ERI) and the gas regional initiatives (GRI).

⁷ These include: emergency requirements & procedures and balancing rules including network-related reserve power.

work of network codes and guidelines as priority in the coming years and to shift resources internally if need be to make sure that ACER can fulfil its task⁸.

Also in gas – as in electricity –, the focus is shifted from developing network codes and guidelines to implementing them and monitoring the implementation. This shift in focus is also clearly stated in the Commission's consultation document on the priority list for 2016⁹ and in the draft ACER work programme describing one of the four main areas, i.e. the completion of the internal energy market¹⁰. In light of this, the Commission invites ACER not to limit its role in the gas sector to monitor the implementation of the network codes and guidelines as currently foreseen in the draft ACER work programme¹¹, but to assume a more proactive role in ensuring effective and well-coordinated implementation across Europe¹². In particular the recitals of the network codes and guidelines state that: *"National regulatory authorities and transmission system operators should have regard to best practices and endeavours to harmonised processes for the implementation of network codes. Acting in accordance with Article 7 of Regulation (EC) No 713/2009, ACER and the national regulatory authorities should ensure that [the rules of the network codes] are implemented across the Union in the most effective way"*¹³. In the frame of the implementation – as experience shows – many issues are arising, which require a structured implementation process involving all relevant parties including stakeholders, in order to ensure a harmonised process for the implementation of the network codes and guidelines which can run smoothly and without delay. The Commission invites ACER to reflect this in the gas section of the ACER work programme 2016.

Further, the Commission invites ACER to focus its activities in the gas sector on three main areas in 2016, namely (i) on ensuring a coherent and coordinated implementation of network codes and guidelines across the EU, (ii) on regional implementation in the Gas Regional Initiative (GRI) focusing on the areas where ACER can have the most added value, i.e. mainly in the GRI SSE and (iii) monitoring of implementation and reporting activities. In order to ensure a coherent and coordinated implementation of network codes and guidelines across the EU ACER should consider setting up a structure for co-ordinating a harmonised implementation as well as issuing guidance papers on harmonised implementation and

⁸ The Commission notes in this respect that there might be some scope for internal re-allocation, considering that ACER for example allocates 8,5 FTEs to the drafting of the annual market monitoring report, while allocating only 4,4 FTEs for the implementation work for electricity respectively.

⁹ To be adopted in accordance with Regulations (EC) No. 714/2009 and 715/2009, and in particular Articles 6(1) thereof.

¹⁰ Draft ACER Work Programme 2016 as submitted on 30 June, Point 2.2.5 Completion of the IEM – objectives and expected achievements: "The focus will shift to implementation and monitoring".

¹¹ ACER foresees monitoring reports on the implementation of the Network Code on Capacity Allocation Mechanisms and its capacity bundling provisions, on the implementation of the Network Code on Balancing, on congestion at interconnection points, on the implementation of the Congestion Management Procedures Guidelines as well as on the status of early implementation of the network code on harmonised transmission tariff structures and the amendment of the network code on capacity allocation mechanisms regarding incremental capacity.

¹² Articles 8(8), 8(9) and 9(1) of 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 network makes clear that ACER – besides the ENTSOs and the European Commission – has a crucial role to play in terms of ensuring implementation of the network codes and guidelines.

¹³ Recitals (11) of Commission Regulation (EU) No 984/2013 of 14 October 2014 establishing a Network Code on Capacity Allocation Mechanism and Commission Regulation (EU) No 312/2014 of 26 March 2014 establishing a Network Code on Gas Balancing of Transmission Networks; see also Recital (7) of Commission Decision of 24 August 2012 on amending Annex I to Regulation (EC) No 715/2009 of the European Parliament and of the Council on conditions for access to the natural gas transmission networks.

guidance of best practice. Furthermore to use the existing resources more efficiently, the binding reporting obligations could be carried out focusing on the main remaining issues while providing a pragmatic reporting (e.g. as regards the implementation monitoring of the Congestion Management Procedures guidelines or the monitoring report on capacity bundling).

Additional, specific comments for the gas section of the draft ACER work programme 2016:

- For all network code monitoring reports the objectives could include providing practical recommendations, as foreseen for the implementation monitoring report for the network code on capacity allocation mechanisms.
- In case the task "Preparation for the review (Transparency) or scoping new Framework Guidelines at the request of the EC..."¹⁴ refers to the amendment proposals consulted upon by ACER in 2015, the majority of the related work will be finalised in 2015. Therefore, the Commission proposes to reduce the foreseen 0.6 FTE staff for 2016.
- We would welcome clarification of the task and its legal basis: "Review of the ENTSOG monitoring on the Implementation of the Network Code on Interoperability and Data Exchange Rules".
- The Commission would also welcome clarification with regard to the foreseen task "3rd ACER report on monitoring of Congestion at interconnection points and possible review of the Implementation Monitoring Review on the CMP Guidelines with a view to the combined application of CMPs" (whether it refers to the obligatory yearly ACER reporting on the implementation of the CMP Guidelines combined with the yearly ACER reporting on congestion at interconnection points and with regard to the stated risks).
- The Commission further proposes to delete the task identified under GRI Annual Status Review Report topics: "Presentations on progress for the Madrid Forum" as this is not included for any other deliverables neither with regard to the Madrid nor to the Florence Fora and certainly does not justify separate allocation of staff resources.
- Finally, ACER is invited to correct the information with regard to the entry into force of the Network Code on Interoperability and Data Exchange under point 2.2.5.

With regard to the Regional Initiatives, the draft ACER work programme on the one hand, includes description and specific tasks under the Gas Regional Initiative while it does not devote a dedicated section to the Electricity Regional Initiative; and on the other hand includes an organisational chart¹⁵ depicting a "Regional Cooperation Electricity Team" under the Electricity Department while a respective team for regional cooperation gas is not included under the Gas Department. The Commission invites ACER to either provide an explanation for this discrepancy or include the relevant necessary sections, as appropriate.

¹⁴ "Preparation for the review (Transparency) or scoping new Framework Guidelines at the request of the EC. Potential amendment to the Network Code on Capacity Allocation Mechanisms, if there is scope for improvements based on ACER's analysis of conditional capacity uses".

¹⁵ Under point 3.9.1 Organisation (pages 85-86) of the ACER draft work programme 2016.

2.3. Legislative measures and tasks related to REMIT

The Commission agrees that, following the start of the operational phase of REMIT in October 2015, also 2016 will be an important year for the REMIT activities. The Agency is expected to be fully operational with its data collection on the basis of the phased approach of REMIT Implementing Acts by 7 July 2016, when all data sets will have to be reported to the Agency.

As to ACER's concerns in relation to the staffing levels mentioned in the draft work programme, the Commission recalls its support for ACER and the fact that in the budgetary process for the 2016 EU budget – despite significant financial constraints –, the Commission proposed 10 additional establishment plan posts for ACER, including for the activities under REMIT (and for the work under the TEN-E Regulation). The Commission considers that these new posts, together with the existing 15 dedicated REMIT staff, are sufficient in order to carry out the REMIT tasks in a sustainable manner and in good quality. The Commission has also accepted the request of the ACER Director concerning additional operational expenses related to the IT licenses necessary for a practical implementation of REMIT.

2.4. Legislative measures and tasks related to TEN-E

The Commission notes that ACER correctly identified its main tasks in relation to Regulation (EU) 347/2013 and proactively engages in a benchmarking exercise regarding actions taken by national regulatory authorities as regards Article 13 of the TEN-E Regulation.

The Commission considers that ACER should step up cooperation with the ENTSOs on elements related to cost-benefit analysis. This includes improvements to the ten-year network development plan regarding the methodology, transparency and stakeholder participation while also ensuring its suitability for the selection of projects of common interest, taking fully into account the award criteria laid out in the TEN-E Regulation. ACER should underline the importance of a project specific cost-benefit-analysis, showing country-specific monetized benefits.

In view of the obligations for ENTSO-E and ENTSG to deliver a network model including electricity and gas transmission infrastructure as well as storage and LNG facilities until 31 December 2016, ACER should actively engage with the ENTSOs in line with the above mentioned necessary capabilities of such a model¹⁶.

As regards the opinion on ENTSOs' updated methodologies for cost-benefit analysis the Commission invites ACER to provide proposals on incorporating the unit investment costs and using the data from the ACER report on unit investment costs, which will be published in the second half of 2015.

The Commission further invites ACER to provide support to its mid-term review due in 2017 of the Regulation (EU) No 347/2013 by providing a report on the lessons learnt and possible amendments from the ACER (and NRA) perspective.

In line with ACER's competences under the TEN-E Regulation and previous activities, the Agency should elaborate a report on the alignment of national, regional, European network development plans and the list of projects of common interest (PCIs) regarding their status quo, coherence and implementation of investments to arrive at detailed and reliable data as regards the investment challenge in transmission infrastructure.

¹⁶ This could be undertaken in the frame of the relevant work streams run by the ENTSOs regarding Article 11(8) of Regulation (EU) No 347/2013.

Regarding the monitoring of projects of common interest, the European Commission notes the importance of the Innovation and Networks Executive Agency ("INEA") regarding the implementation of the Connecting Europe Facility. INEA will carry out financial monitoring duties as regards the co-financing of PCIs and, therefore, a close cooperation between ACER and INEA is advisable to ensure that the annual consolidated report on progress of projects of common interest also covers the full picture regarding the financing of those PCIs.

2.5. Longer term regulatory challenges

The Commission agrees with ACER that one of its main roles is to be effective in developing a European dimension in the cooperation among NRAs and to make this cooperation even more robust. As stated in the Commission's communication on the Energy Union¹⁷, EU-wide regulation of the single market should be strengthened, through a significant reinforcement of the powers and independence of ACER to carry out regulatory functions at the European level in order to enable it to effectively oversee the development of the internal energy market and the related market rules as well as to deal with all cross-border issues necessary to create a seamless internal market.

As a follow-up to the Energy Union communication and in the framework of the electricity market design initiative¹⁸, the Commission addresses governance issues, including potential additional competences assigned to ACER. However, possible concrete measures, powers and responsibilities for ACER are unlikely to affect the 2016 ACER work programme, given the envisaged timing of legislative proposals. The Agency is invited to revise its work programme to focus on existing tasks.

2.6. Human and financial resources of the Agency as well as organization, administration and functioning of the Agency

In order to allow ACER to carry out its mandate effectively, the Commission supported in its draft budget 2016 the Agency's request for an increase of human resources by 10 Temporary Agents for the implementation of REMIT and the selection and monitoring of energy infrastructure projects, identified as projects of common interest (PCIs). The Commission also supported ACER's additional budget request for operational expenditure linked to IT hosting services for REMIT and further development, maintenance, services and support as well as license purchases necessary to maintain a fully functional REMIT IT system.

Accordingly, ACER is invited to align the Work Programme to the levels of human and financial resources proposed by the Commission in the Draft Budget 2016 adopted on 27 May 2015 (64 establishment plan posts and EU contribution of EUR 15 547 582 including assigned revenues) subject to the adoption of the Draft Budget 2016 by the Budgetary Authority¹⁹. The Commission encourages ACER to plan its activities realistically against the background of available resources and within the statutory obligations assigned to it under its mandate.

In this sense, the Commission calls on ACER to modify the wording of its draft work programme under point 2.3.5 and point 3.2.2.8 as follows:

¹⁷ COM(2015)80 final.

¹⁸ COM(2015)340 final.

¹⁹ ACER is invited to include a disclaimer related to the fact that ACER's final budget is subject to the adoption of the budget by the Budgetary Authority.

"The Agency has already highlighted on several occasions the inadequacy of such resources and submitted requests for additional staff with the Agency's draft budgets for 2014, in 2015 and, more recently for 2016 – on which this Work Programme is based. All budgets were adopted by the Agency's Administrative Board with a supportive opinion of the Board of Regulators. No additional staff was authorised in 2014 and 2015, whereas the Commission has proposed 10 additional establishment plan posts in 2016."

"[...] over the period 2014-2017 the Agency has been indicated to receive 8 additional posts, as well as the corresponding appropriations. However, the Agency was only authorised to recruit 5 additional staff due to the 5 % staff reduction which all EU bodies are required to achieve by 2018 as agreed in the Interinstitutional agreement of 2 December 2013."

As regards more detailed comments on the text of the Work Programme, the Commission recommends ACER to:

- Ensure correctness of all information and figures related to 2015 (e.g. the number of contract agent posts in annex I does not reconcile with the contract agent posts authorised for 2015 and the column "establishment plan in voted EU budget 2015" of table 2 in annex III does not reconcile with the establishment plan authorised for 2015 at the level of grades).
- Continue to achieve efficiency gains in order to ensure an optimal use of resources.
- Set a more ambitious performance indicator for the recruitment of staff, as a 90% recruitment target is not deemed as sufficiently ambitious by the Commission.
- Concerning the performance indicators related to the budget implementation, the Commission is of the view that the targets of 95% execution rate for commitments and 75% execution rate for payments are not ambitious and suggests those are elevated to a full implementation level.
- Establish a link between the ICT infrastructure objectives (section 3.9.6 of the draft ACER work programme) and the IT hosting services for REMIT as well as other operational expenditure linked to the REMIT IT system for which the European Commission supported additional operational expenditure in 2016.

The Commission welcomes the improvements implemented and further planned in the areas of communication (external and internal) and transparency. The related activities should be maintained and enhanced as necessary to ensure that the Agency's website is the main source of relevant information for the stakeholders (e.g. by providing user-friendly access to a well-structured and updated library of relevant documents or a forward looking public consultation planning tool to allow stakeholders to better plan their input and related workload throughout the year).

The Commission welcomes ACER's efforts to promote gender equality and to review its performance in this regard. It invites ACER to pursue further actions, in particular removing barriers to gender discrimination in recruitment, training and career development across all staff grades.

Done at Brussels, 15.9.2015

For the Commission
Miguel ARIAS CAÑETE
Member of the Commission

