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**OPINION OF THE AGENCY FOR THE COOPERATION OF ENERGY
REGULATORS No 24/2013**

of 18 December 2013

**ON ENTSO-E'S NETWORK CODE ON FORWARD CAPACITY
ALLOCATION**

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, Articles 6(4) and 17(3) thereof;

HAVING REGARD to 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 1228/2003², and, in particular, Article 6(7) thereof;

HAVING REGARD to the favourable opinion of the Board of Regulators of 11 December 2013, issued pursuant to Article 15(1) of Regulation (EC) No 713/2009,

WHEREAS:

- (1) The Framework Guidelines on Capacity Allocation and Congestion Management for Electricity, FG-2011-E-002 (the "Framework Guidelines")³, were adopted by the Agency on 29 July 2011, pursuant to Article 17(3) of Regulation (EC) No 713/2009.
- (2) Following the adoption of these Framework Guidelines, the Commission invited ENTSO-E, by letter of 21 September 2012, to start the drafting of a network code, covering the long-term capacity calculation process, the establishment of a single allocation platform, the allocation of long-term transmission rights and the nomination rules for the physical transmission rights, and to submit it to the Agency, pursuant to Article 6(6) of Regulation (EC) No 714/2009, by 1 October 2013.
- (3) On 1 October 2013, ENTSO-E submitted to the Agency, pursuant to Article 6(6) of Regulation (EC) No 714/2009, the Network Code on Forward Capacity Allocation (the

¹OJ L 211, 14.8.2009, p. 1.

²OJ L 211, 14.8.2009, p. 15.

³[http://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Framework_Guidelines/FG%20on%20Capacity%20Allocation/FG-2011-E-002%20\(Final\).pdf](http://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Framework_Guidelines/FG%20on%20Capacity%20Allocation/FG-2011-E-002%20(Final).pdf)

“Network Code”), accompanied by a supporting document “Network Code on Forward Capacity Allocation (FCA), Explanatory Document” (the “supporting document”)⁴.

- (4) This supporting document had been taken into account when assessing the Network Code’s content in this opinion.
- (5) The Agency acknowledges the importance of the Network Code for the completion and well-functioning of the internal market in electricity and cross-border trade, including the delivery of benefits to customers and the facilitation of the European Union’s targets for the penetration of renewable energy sources.
- (6) In drafting the Network Code, ENTSO-E involved stakeholders with a direct interest in this Network Code. ENTSO-E established a stakeholder advisory group for this Network Code consisting of representatives of major European-wide stakeholder associations. The stakeholder group met on five occasions where stakeholders were able to present their views and voice their concerns. In addition, ENTSO-E organised two public workshops open to all interested stakeholders. The minutes, presentations and other working material from these events are well documented at ENTSO-E’s web page.
- (7) The Agency drafted this reasoned opinion in a transparent manner and by involving stakeholders. First, stakeholders were invited to provide written feedback on the Network Code. Second, a dedicated workshop was organised to allow stakeholders to express their concerns. All comments received from stakeholders were carefully assessed and duly taken into account where relevant in this opinion.
- (8) The Network Code is interrelated with network codes that are being developed in other areas pursuant to Article 6 of Regulation (EC) No 714/2009. It is essential that those network codes are consistent and coherent with the Network Code,

HAS ADOPTED THIS OPINION:

The Network Code submitted by ENTSO-E to the Agency on 1 October 2013 is in some aspects not in line with the Framework Guidelines and the objectives stated therein and lacks ambition regarding the implementation horizon.

The Agency recognises ENTSO-E’s effort to align the Network Code to the Framework Guidelines and Regulation (EC) No 714/2009 and acknowledges that the Network Code should help facilitate market integration, as well as non-discrimination, effective competition and the efficient functioning of the market.

The Agency acknowledges the significant efforts of ENTSO-E to define the requirements and responsibilities of Transmission System Operators and other entities performing the functions regarding coordinated long-term capacity calculation, allocation and nomination in general.

⁴ <https://www.entsoe.eu/major-projects/network-code-development/forward-capacity-allocation>

However, the following two aspects are of particular concern: the deadlines set to implement terms and conditions or methodologies and the firmness regime.

On the latter, the regime described in this Network Code does not only diverge from the principles and criteria indicated in the Framework Guidelines, but also represents a step back compared to the progress achieved by Transmission System Operators and National Regulatory Authorities in some regions through the early implementation of the Electricity Target Model. As a general default principle, the Framework Guidelines state that “capacities shall be firm”, even though some derogations may be granted in specific cases, before the nomination deadline. The Framework Guidelines have indeed set an ambitious, but balanced compromise between the market players’ and Transmission System Operators’ positions. This compromise reflects the strong belief among regulators that the firmer the allocated products are (in particular close to real time), the more confident are the product holders in trading cross-border electricity for the benefit of competition and end-consumers. In the early implementation, Transmission System Operators have submitted auction rules with firmer products to National Regulatory Authorities which have approved them on different borders (in Central West Europe for instance). The Agency welcomes these positive developments and regrets that the Network Code diverges from the principle set in the Framework Guidelines and as such may jeopardise the progress achieved so far.

With regard to the deadlines set to implement terms and conditions or methodologies, the Network Code does not seem fully to take into account both the work and the progress achieved towards the implementation of the Target Model as well as the 2014 deadline set by the European Council. For example, deadlines set for harmonised allocation rules for transmission rights or the implementation of the single allocation platform are not in line with the ambitious work and the target dates set in the Cross-Regional Roadmap on Long-Term Transmission Rights endorsed by the Florence Forum. Despite the delay, some specific developments such as the “wish-list” (the list of requirements the European Auction Rules must comply with, drafted by National Regulatory Authorities under the coordination of the Agency, in close cooperation with market participants and Transmission System Operators) and the Memorandum of Understanding recently signed between the operators of the two existing regional allocation platforms (“Capacity Allocation Services Company”, CASC and “Central Allocation Office”, CAO) should help achieve the goals set in this Cross-Regional Roadmap. In that respect, the Agency believes that the Network Code should build upon these positive developments to facilitate the progress further.

Below, the Agency details further the specific divergences of this Network Code, in the two identified areas, with the Framework Guidelines and the progress already achieved, together with the direction to correct them.

The concerns expressed by the Agency in this opinion do not require extensive efforts and changes in the structure of the Network Code, but require however improvements before the Agency can be satisfied that the Network Code is in line with the Framework Guidelines and recent developments and can be recommended for adoption. The Agency believes that the issues identified in what follows can be addressed within a period of a few months by amending the Network Code in the specified areas and, by increasing the clarity and ambition of the Network Code requirements in general (or, where relevant, amending supporting

documents). Therefore, such amendments shall not significantly delay the adoption of the Network Code, which represents a key instrument for promoting security of supply, the completion and well-functioning of the internal market in electricity and cross-border trade, including the delivery of benefits to customers and the facilitation of the European Union's targets for the penetration of renewable energy sources.

In addition to the work necessary for improving the clarity and for raising the ambition of the Network Code, the Agency recommends ENTSO-E to further align this Network Code to the Network Code on Capacity Allocation and Congestion Management, currently in the Comitology process, once it is finally adopted. Definitions and concepts common to the two Network Codes must be identical.

Specific concerns with regard to the Network Code are:

1. Timelines for establishing the single allocation platform and for harmonising the type of Transmission Rights, the allocation rules, and the nomination rules

While the Agency recognises the complexity of developing and implementing the single allocation platform, it is nonetheless concerned with the lack of ambition in the Network Code when setting binding deadlines to implement the main features of the Electricity Target Model in the long-term timeframe. Considering the timeline to develop, recommend and finally adopt this Network Code, the strict 2014 target as set by the European Council, currently seems unachievable. Nevertheless, the Network Code should strive for fulfilling the objective of implementing the Electricity Target Model at the earliest date. Therefore, the Agency proposes to bring the deadlines forward, and invites ENTSO-E to take into account all the work already done.

1.1. Single allocation platform

The Framework Guidelines (section 4.1) require Transmission System Operators to provide a single platform (single point of contact) for the allocation of long-term transmission rights, namely Physical Transmission Rights (PTRs) and Financial Transmission Rights (FTRs), at European level.

This provision is covered by Articles 52, 53 and 54 of the Network Code. However, according to the process described in these articles, the implementation of the Single Allocation Platform may last up to three years and three months after the entry into force of the Network Code. This implementation time compromises the achievement of the overall objective of establishing an Internal European Market for Electricity by 2014, as stated in the Framework Guidelines.

The Network Code should foresee a significantly shorter process. First, Article 53(1) should not set a nine-month deadline to define a common set of requirements for the Single Allocation Platform as this task does not need a binding framework in order to be carried out by Transmission System Operators. National Regulatory Authorities' approval for such criteria should not be required. Second, the timeline to decide on the establishment of the

Single Allocation Platform and to implement such a platform as described in Article 54(2) should be shortened to a reasonable period of time (e.g. fifteen months) after the entry into force of the Network Code. This would guarantee that the platform is implemented and operational within an ambitious, but achievable deadline after the entry into force of the Network Code. The Network Code should be amended accordingly.

Regarding the type of Transmission Rights, the harmonisation of allocation and nomination rules, the Agency suggests that a common approach is adopted and consistent types of deadlines are set.

The deadlines set in the paragraphs below aim to ensure that a harmonised European Union's electricity market exists within a reasonable period of time after the entry into force of the Network Code. Overall, a decision on the type of Transmission Rights has to be reached and harmonised allocation rules are to be applied within a reasonable period of time, consistent with the objective set for the single allocation (e.g. fifteen months after the entry into force of the Network Code).

1.2. Type of Transmission Rights

Article 35(3) of the Network Code foresees that Transmission System Operators shall develop a proposal for the Long Term Transmission Rights to be issued on the border(s) of each bidding zone no later than eight months after entry into force of the Network Code.

This deadline to develop a proposal for the type of Transmission Rights should be shortened, e.g. to six months after the entry into force of the Network Code. The Network Code should also set a six-month deadline for National Regulatory Authorities to approve this proposal, and a further three-month deadline to implement such Transmission Rights.

1.3. Harmonisation of allocation rules

The Framework Guidelines (section 4.1) specify that "*the Network Code shall [...] foresee a harmonised set of rules for borders where PTRs with UIOSI are applied and a harmonised set of rules for borders where FTRs are applied*".

Articles 56(1) and (2) of the Network Code state that no later than twelve months after its entry into force, all Transmission System Operators shall develop a proposal for harmonised Allocation Rules for Physical Transmission Rights and another one for Financial Transmission Rights.

As for the type of Transmission Rights, the deadline to develop a proposal for harmonised allocation rules should be shortened, e.g. to six months after the entry into force of the Network Code. The Network Code should also set a six-month deadline for National Regulatory Authorities to approve this proposal, and a further three-month deadline for the harmonised allocation rules to apply.

Furthermore, Article 56 foresees two sets of allocation rules, one for Physical Transmission Rights and one for Financial Transmission Rights. The Network Code should instead strive

for stronger harmonisation and require one single document with dedicated sections including specificities for Physical Transmission Rights and Financial Transmission Rights where needed.

Regarding Financial Transmission Rights Obligations, Article 38(2) foresees a proposal for common rules for the implementation of Financial Transmission Rights Obligations. Such a proposal seems to be conflicting with the overall objective of developing harmonised allocation rules applicable to all European countries as defined in Article 56. The Agency therefore suggests removing this paragraph from the Network Code.

1.4. Harmonisation of nomination rules

Within the same section, the Framework Guidelines state that *“the Network Code shall also foresee greater harmonisation of the nomination rules, deadlines and processes”*.

Article 40(3) of the Network Code states that all Transmission System Operators shall progressively harmonise the nomination rules for all bidding zone border(s) where Physical Transmission Rights are applied, but does not provide any timescale or a binding deadline to that end.

The Network Code should introduce a deadline for such a harmonisation. In order not to unnecessarily burden Transmission System Operators intending to implement Financial Transmission Rights, the deadline to harmonise the nomination rules could be longer compared to the deadline to harmonise the allocation rules.

Therefore, the Agency suggests amending the Network Code to allow for a certain period of time (e.g. twenty-seven months) after the entry into force of the Network Code for Transmission System Operators to submit the harmonised nomination rules to National Regulatory Authorities. The Network Code should also set a six-month deadline for National Regulatory Authorities to approve this proposal, and a further three-month deadline for the harmonised allocation rules to apply. This will enable harmonised nomination rules to apply within three years after the entry into force of the Network Code.

2. Principles for long-term transmission rights remuneration

The Framework Guidelines (section 4.2) require that Transmission System Operators return the total financial resale value of capacity to the market participants who owned the Transmission Right, in the case of financial transmission rights and of non-nominated physical transmission rights subject to the “Use It Or Sell It” requirement. In addition, the remuneration for long-term transmission is specifically defined: *“in the case of an explicit auction this is equal to the clearing price of the auction in which the capacity is resold; in the case of an implicit auction this is equal to the day-ahead price differential between the two zones.”* This requirement ensures that transmission rights provide efficient hedging solutions against congestion costs at the day-ahead timeframe, i.e. the value of the day-ahead cross-zonal capacity.

Article 39 of the Network Code foresees that Transmission System Operators shall develop a proposal for the calculation of the Transmission Rights remuneration in both cases (allocation of the cross-zonal capacity in the day ahead timeframe through market coupling or through another method), while respecting two principles which do not comply with the Framework Guidelines' requirements.

The first principle states that the remuneration for the Transmission Right shall be "based on" the market spread between the two concerned bidding zones. The second principle, the so-called "Revenue Adequacy principle" specifies that the Transmission Rights pay-outs will be linked to the collected day-ahead congestion income, in order to mitigate the risk of Transmission System Operators' financial deficits due to specific design aspects of day ahead capacity allocation such as, but not limited to, transmission losses.

The Agency considers these principles to be conflicting with the definition for the remuneration provided by the Framework Guidelines, and not to enable Transmission Rights to provide valuable hedging instruments against the day-ahead price differential. Regarding the financial risk faced by Transmission System Operators, it should be noted that not only the day-ahead congestion income, but also the congestion rent provided by the capacity allocation at the long term (at least annual and monthly) timeframe, must be used to guarantee the Transmission Rights pay-outs, as foreseen by Article 16(6) of Regulation (EC) No 714/2009. The concept of hourly revenue adequacy should thus be removed from the Network Code.

In order to ensure consistency between all timeframes, the Agency believes that the only case where the remuneration for long-term transmission rights might differ from the day-ahead price differential is where a loss functionality is activated for DC cables in the market coupling algorithm. In that respect, the provisions in the Network Code are too broad, as it refers to "*design aspects of Day Ahead Capacity Allocation such as, but not limited to, transmission losses*".

Furthermore, the Agency is concerned with the Network Code foreseeing that the principles for the remuneration of long-term Transmission Rights are dealt with at the level of each bidding zone border. As a result, the method may differ according to the bidding zone border and the same method may not apply throughout Europe. Instead, harmonisation of such long term Transmission Rights remuneration principles should be pursued to the maximum possible while complying with the Framework Guidelines' requirements. As a consequence, the Network Code should oblige Transmission System Operators to harmonise, to the extent possible, the principles for Transmission Rights remuneration at European level (even though some regional specificities might apply, for instance when considering losses in case of DC cables, but in a harmonised way).

The Agency welcomes the coordination between all Transmission System Operators described in Article 63 for developing a proposal for a methodology for sharing Congestion Income for Forward Capacity Allocation. However, the Agency considers that the Network Code should also ensure consistency between congestion rent sharing principles and compensation scheme. Thus the Network Code should specify that all Transmission System Operators should develop a proposal for a methodology for sharing congestion income for

forward capacity allocation, consistent with the compensation cost sharing, whether this applies to Transmission Rights remuneration or costs incurred to ensure financial firmness.

3. Firmness provisions

The Network Code contains provisions for a firmness regime which are not in line with the principles and criteria specified in the Framework Guidelines.

3.1. Long-term firmness deadline

The Framework Guidelines (section 6.4) specify that “*capacities shall be firm*”. Later in this section, the Framework Guidelines add that “*as a derogation to the general compensation rule, [...] caps may be introduced [...] in the case of curtailment announced before the nomination deadline*”. Article 58 of the Network Code introduces the concept of a long-term firmness deadline. This deadline allows splitting the period from the product allocation to the day-ahead deadline into two sub-periods with a different degree of firmness, as indicated above. Article 58(2) of the Network Code specifies that, in the case of Physical Transmission Rights, the long-term firmness deadline corresponds to the nomination deadline (as defined in the nomination rules), while in the case of Financial Transmission Rights to a moment to be placed between nineteen hours and two hours before day-ahead gate closure time. Therefore the long-term firmness deadline shall be considered as the nomination deadline for the purpose of implementing the compensation scheme in case of curtailment (see Section 3.2, below).

The Network Code enables each Transmission Operator System on the same bidding zone border to define a long-term firmness deadline, posing the risk of a lack of harmonisation which would result in issuing Transmission Rights across Europe with very different features. The Network Code should thus be amended to insist on harmonising the long-term firmness deadline for each type of Transmission Rights as well as between them so that, ultimately, only one long-term firmness deadline applies in Europe.

3.2. Compensation scheme in case of curtailments

The Framework Guidelines define full firmness as a general default principle. Specifically, the following requirements shall be respected: “*Capacities shall be firm. After the nomination deadline, physical firmness is the preferred approach, but financial firmness may be accepted in case of explicit auctions [...] except in the case of force majeure, capacity holders shall be compensated for any curtailment. Compensation shall generally be equal to the price difference between the concerned zones in the relevant time frame.*” Nevertheless, as a derogation to the general firmness principle, caps on the compensation may be introduced only in specific cases: curtailments announced before the nomination deadline, curtailments announced before a reasonable lead-time approved by the concerned National Regulatory Authorities while taking into account the liquidity of relevant markets and the possibility for grid users to adjust their cross-border positions, and curtailments of long duration.

Article 57 of the Network Code only partially complies with these stipulations. The Agency welcomes the wording of the Network Code stating that *“in cases of curtailment, Transmission System Operators on the Bidding Zone Border, where Long Term Transmission Rights have been curtailed, shall compensate the Long Term Transmission Rights holder whose Long Term Transmission Rights have been curtailed”* as well as *“when Long Term Transmission Rights are curtailed, all Transmission System Operators shall compensate the capped Market Spread”*.

However, Article 57(2) also indicates that a cap based on congestion income and / or a price cap shall be applied. This specification is clearly not in line with the Framework Guidelines which foresee full firmness as a general default principle. Caps limiting the compensation before the Long-Term firmness deadline may be allowed only in some specific cases, if they are approved by the relevant National Regulatory Authorities; they can however not be established by default in the Network Code.

A full financial firmness regime as proposed in the Framework Guidelines will establish Transmission Rights as products that enable hedging the long-term price risks in electricity markets and thus support competition for the benefit of consumers. The compensation in case of curtailment should be equal to the regular remuneration for Transmission Rights, namely, in the case of an explicit auction, the clearing price of the auction in which the capacity is resold, or, if market coupling is in place, the day-ahead hourly price differential corresponding to the curtailed period, with the exception of the specific treatment for DC cable losses. This presumes that market participants are confident enough with the price references and that Transmission System Operators have the appropriate tools and incentives to allocate firm transmission rights.

The Agency recognises that there might be a need, on some borders and in specific situations, to impose caps on compensation in order to mitigate the risk for Transmission System Operators and finally for network tariffs, but only before the nomination deadline, i.e. before the long-term firmness deadline (see Section 3.1, above). Indeed, after the long-term firmness deadline, transmission rights should be fully firm and uncapped. As the time between the long-term firmness deadline and the day-ahead firmness deadline (when all capacities become fully firm) is very short (e.g. few hours), any information on curtailment becoming available during this period would significantly affect the market processes within the day-ahead market and would not give market participants enough time to adapt to this new information.

This part of the Network Code should thus be revised to reflect the principles set in the Framework Guidelines: full firmness and regular remuneration for Transmission Rights shall be guaranteed after the long-term firmness deadline; caps limiting the compensation may be introduced before the long-term firmness deadline to help cope with specific risks and shall be subject to National Regulatory Authorities' approval.

3.3. Design for caps

As indicated above, the Agency agrees to the concept of caps limiting compensation before long-term firmness deadline, defined on a bidding zone border basis. Still, the cap design

proposed in the Network Code foresees two kinds of caps, i.e. caps based on congestion income and price caps.

Setting a price cap would not provide a hedge against price spikes, which are inherent characteristics of electricity markets (even efficient ones). Therefore, any price cap in the firmness regime would significantly impact the hedging efficiency for market participants and should not be allowed in the Network Code.

Any cap based on congestion income for the sub-period after the long-term firmness deadline should obviously be removed. Indeed, Transmission System Operators are the party best placed to manage the risk of transmission capacity availability, in particular after the long-term firmness deadline. Applying a cap on compensation for transmission rights curtailed after this deadline would significantly decrease their value, since these instruments would not offer full hedging against the uncertain price spread in day-ahead markets, at the same time as market participants are not in a position to adapt to the curtailment announcement and adjust their cross-border positions accordingly.

The cap based on congestion income for the sub-period before the long-term firmness deadline in the Network Code takes into account the revenues received from the allocation of the Long-Term Transmission Rights in the respective month, the respective bidding zone border and the applicable direction. The Agency considers that this scope is too constrictive. The caps based on congestion income should instead consider the total revenues received from capacity allocation (not only at the long-term time frame, but across all timeframes), on a yearly basis, at the respective bidding zone border. To cope with the specific risks incurred by DC cables, a cap based on the total revenues issued from capacity allocation on a monthly basis, at the respective bidding zone border, may be considered, subject to National Regulatory Approval. The specification “in the applicable direction” should be removed in both cases.

Finally, it should be clarified in the Network Code that such cap on congestion income before the long-term firmness deadline shall be considered as an exemption granted by National Regulatory Authorities when duly justified, as explained in paragraph 3.1.

3.4. Compensation rules

Article 60(3) indicates that each Transmission System Operator shall be entitled to develop a proposal for compensation rules for outages which last for a long period of time and for outages which affect a bidding zone border consisting of one single interconnector. The Agency considers this statement to be unclear with regard to the context of the compensation scheme and to induce the risk of a lack of coordination among Transmission System Operators.

The Framework Guidelines foresee a potential derogation from the full financial firmness regime before the long-term firmness deadline in specific cases, such as outages lasting for a long period of time. This specific case should be dealt with through a compensation scheme which can include caps based on congestion income before the long-term firmness deadline and is subject to National Regulatory Authorities’ approval, as described above. The

Framework Guidelines do not foresee any kind of derogation from the full financial firmness regime in cases of outages which affect a bidding zone border consisting of one single interconnector.

The Network Code should be amended accordingly. The compensation scheme should be handled in the harmonised allocation rules under the title of “Regional specificities”. In these rules, any derogation from the full financial firmness regime shall be duly justified and approved by National Regulatory Authorities at least at the regional level.

3.5. Compensation in case of force majeure and emergency situations

Article 62 of the Network Code applies the same firmness regime for force majeure and emergency situations, whereas the Framework Guidelines provide the exemption from general firmness principle only in the case of force majeure and not of an emergency situation. For this reason, the reference to emergency situations should be deleted from this Article.

4. Decision on cross-zonal risk hedging opportunities

The Framework Guidelines (section 4.1) request that the options for enabling risk hedging for cross-border trading shall be Financial Transmission Rights or Physical Transmission Rights with Use-It-Or-Sell-It provisions, unless appropriate cross-border financial hedging is offered in liquid financial markets on both sides of an interconnector.

Article 34 of the Network Code foresees by default the implementation of Long Term Transmission Rights, and describes a two stage process to determine cross-zonal risk hedging instruments, more specifically an assessment of the needs for cross-zonal hedging opportunities, possibly followed by a decision addressed at Transmission System Operators not to issue Long Term Transmission Rights. The assessment and the decision are both performed by National Regulatory Authorities. The assessment should include at least a consultation with market participants on their needs for cross-zonal risk hedging opportunities on the concerned bidding zone border(s), and an evaluation, performed in a coordinated manner, on whether forward financial electricity markets are well developed and have shown their efficiency, or if other cross-zonal hedging opportunities are needed. The decision taken by National Regulatory Authorities to grant an exemption from Transmission Rights’ issuance shall be based on this assessment.

The Agency welcomes the proposed approach to deciding on cross-zonal risk hedging opportunities. However, the Agency is concerned by the lack of detail regarding the evaluation of existing cross-zonal risk hedging opportunities, and by the timeline proposed in paragraphs 2 and 6 of Article 34.

First, the Agency recommends that Article 34(4) of the Network Code describes more in depth the criteria required to perform the evaluation “*on whether Forward financial electricity markets are well developed and have shown their efficiency or whether other cross zonal hedging opportunities are needed*”. In this regard, the Network Code lacks specificity. In

addition to this, the geographical scope of the coordinated assessment is not wide enough. As a minimum, the assessment should be performed in a coordinated manner at the regional level and eventually at EU level.

With regard to the decision to be made within two months after the entry into force of the Network Code, the Agency considers that the assessment supporting this decision could be older than three years. Indeed, a significant amount of work on risk hedging opportunities was carried out in 2011 and in 2012 by National Regulatory Authorities in some regions (in particular the Nordic) when preparing the ground for the long-term capacity allocation issue in the framework of the Regional Initiatives and of the Network Code. As long as it meets the requirements of the criteria to assess that transmission rights are not needed in this given geographic area, this extensive work sets an appropriate basis for such countries and regions when deciding on the hedging instruments after the entry into force of the Network Code. However, the Network Code may not enter into force before early 2015, meaning that the concerned National Regulatory Authorities would not be able to use the assessment made in 2011 and 2012, and should therefore perform a new assessment before the Network Code comes into force. To avoid this uncertainty, the Agency recommends that the Network Code allows National Regulatory Authorities to use an assessment produced up to four years ahead of the entry into force of the Network Code, as long as it complies with the list of criteria (which should be described in the Network Code), when deciding on the risk hedging opportunities at the entry into force of the Network Code.

With regard to the periodicity of performing a reassessment and revisiting the decision, the deadlines proposed in the Network Code should also be amended. The Network Code states that a reassessment of risk hedging opportunities shall be performed at least every three years, and that a decision according to such a reassessment could be issued up to three years after having performed the reassessment. These deadlines seem to be conflicting. In particular, if a decision is issued two years and a half after the reassessment, another reassessment would need to be performed six months after this decision, which does not provide enough time for Transmission System Operators to change the design of cross-border risk hedging instruments for the long-term timeframe, and for market participants to fully adapt to the new configuration. The Agency suggests having in the Network Code a five-year periodicity for the reassessment, instead of a three-year one, as the financial markets are not likely to change in depth so frequently. Besides, National Regulatory Authorities do not need a three-year period to issue a decision based on an assessment, and this part of the process could be shortened to six months. This way, whenever a decision is made by National Regulatory Authorities resulting in a change of market design at the long-term timeframe, this new market design will have more than four years to be developed and to gain efficiency and liquidity before being reassessed.

5. Other issues

5.1. Legal robustness

In order to avoid any misunderstanding or conflict of interpretations, the Agency would like to emphasise the importance of drafting the provisions to the highest level of precision, and to

ensure the consistency of each article of this Network Code with the Framework Guidelines, as well as the consistency of articles between them.

The Agency also recommends ENTSO-E to carefully assess which definitions and concepts applicable in the Network Code on Capacity Allocation and Congestion Management are relevant to the Network Code on Forward Capacity Allocation, and to remove any item which is not appropriate for this timeframe.

5.2. Regulatory Approvals

Article 8 implies that the list of terms and conditions or methodologies provided in paragraphs 2, 3 and 4 is exhaustive and thus precludes the National Regulatory Authorities' approval of any other terms and conditions or methodologies that might be relevant to them according to Directive 2009/72/EC. The Network Code should thus specify that the list is non-exhaustive and as such it is without prejudice to competences of National Regulatory Authorities with respect to other provisions of the Network Code. It seems reasonable to align the approach to such clarification with the approach for other Network Codes for which similar concerns have already been raised, for instance in the Agency's opinion on the draft Network Code on Operational Security⁵.


In addition, Article 8 distinguishes three geographical levels of approvals for the different terms and conditions or methodologies to be approved by National Regulatory Authorities: all National Regulatory Authorities, each National Regulatory Authority of the concerned capacity calculation region and each National Regulatory Authority of the concerned Member States. This third level of approval defined on a "case-by-case" basis appears to be in contradiction with the level of coordination required to develop such terms and conditions or methodologies. Thus, the Agency considers that, at least, the nomination rules (Article 8 (4) (b)) should be subject to approval by all National Regulatory Authorities and thus be included in Article 8(2). As mentioned in Article 8(5), nomination rules shall be harmonised at European level. Regarding the other terms and conditions or methodologies listed under Article 8(4), the Agency invites ENTSO-E to reconsider the appropriate level of approbation in coherence with the level of coordination or harmonisation required at Transmission System Operator level.

Article 8(1) reiterates that the principles and procedures for the regulatory approvals defined in the Network on Capacity Allocation and Congestion Management apply to this Network Code as well. The Agency would like to emphasise the importance of such coherence between the two Network Codes on the regulatory approval issue. National Regulatory Authorities will approve several terms and conditions or methodologies which impact different timeframes and several borders. It is of utmost importance that all National Regulatory Authorities adopt the same process for ensuring coherence between the different timeframes and the different borders.

⁵http://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Opinions/Opinions/ACER%20Opinion%2010-2013.pdf

Done at Ljubljana on 18 December 2013.

For the Agency:


Alberto Pototschnig
Director



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