

OPINION No 02/2023
OF THE EUROPEAN UNION AGENCY
FOR THE COOPERATION OF ENERGY REGULATORS

of 31 March 2023

on ENTSO-E's statutory documents

THE EUROPEAN UNION AGENCY FOR THE COOPERATION OF ENERGY REGULATORS,

Having regard to Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators¹, and, in particular, Articles 3(1) and 4(1) thereof,

Having regard to Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity² and, in particular, Article 29(2) thereof,

Having regard to the favourable opinion of the Board of Regulators of 29 March 2023, delivered pursuant to Article 22(5)(a) of Regulation (EU) 2019/942,

Whereas:

1. INTRODUCTION

- (1) This opinion concerns the Articles of Association and Rules of Procedure (collectively 'statutory documents') of the European Network for Transmission System Operators for Electricity ('ENTSO-E'). Pursuant to Article 29(1) of Regulation (EU) 2019/943, the transmission system operators have to submit any draft amendments to ENTSO-E's statutes, list of members or rules of procedure to ACER for an opinion.

¹ OJ L 158, 14.6.2019, p. 22.

² OJ L 158, 14.6.2019, p. 54.

- (2) On 16 December 2022, ACER received the draft amendments to ENTSO-E's Articles of Association ('AoA') and Rules of Procedure, consisting of Internal Regulations ('IR') and the Network Code Development Process. No amendments to the current list of members were proposed. Upon request of ACER, ENTSO-E submitted additional documents, including complete versions of its statutory documents, thus completing its notification by 1 February 2023. ACER must provide an opinion on the draft amendments to the European Commission, as stated in Article 29(2) of Regulation (EU) 2019/943.
- (3) ACER has taken this opportunity not only to revise the draft amendments in isolation, but to assess them in their context with all ENTSO-E's statutory documents and to carry out a comprehensive assessment of those statutory documents as a whole. More than a decade has passed since ACER's last opinion on this matter in 2011.³ During this period, the EU energy *acquis* has considerably grown and developed reflecting progressing market integration within the EU but also beyond, with Norway and the Energy Community Contracting Parties taking up new obligations under the Third Energy Package and more recently, with the entry into force of the Clean Energy Package. The latter, adopted in 2019, broadened the scope of ENTSO-E's mission, formulating new climate-related objectives, and entrusted ENTSO-E with new responsibilities, notably in the development and implementation of network codes, resource adequacy, regional coordination centres, cooperation with the EU DSO entity and digitalisation of transmission networks. A thorough review of ENTSO-E's statutory documents is thus warranted at this point in time, allowing to take stock of the past decade's experiences and developments and ENTSO-E's expanded mandate, and to assess whether its statutes are still fit for purpose in the now considerably changed policy and legal context. Since ACER's assessment goes beyond the submitted draft amendments and concerns ENTSO-E's statutory documents as a whole, this opinion is also based on Article 3(1) of Regulation (EU) 2019/942, permitting ACER to provide an opinion to the Commission on its own initiative on any of the issues relating to the purpose for which it has been established, including its tasks as regards the TSO cooperation.

2. PROCEDURE

- (4) On 16 December 2022, ENTSO-E submitted to ACER the draft amendments to its statutory documents. ENTSO-E's submission consisted of a submission letter and the following annexes:

Annex I	draft amendments to AoA
Annex II	draft amendments to IR
Annex III	draft Network Code Development Process
Annex IV	ENTSO-E's Explanatory Note

³ ACER Opinion 01-2011 available at <https://www.acer.europa.eu/documents/official-documents/opinions>.

- (5) On 11 January 2023, ENTSO-E notified ACER that their submission is not only made in its own name but is also made on behalf of all the electricity transmission system operators which are members of ENTSO-E.
- (6) In light of the high amount of proposed amendments, and given that ACER understood that ENTSO-E already carried out an amendment of its statutory documents in 2014 which had not been the subject of any notification, ACER required additional documents, including the complete versions of its statutory documents,⁴ in order to fully comprehend and assess the proposed amendments. ENTSO-E submitted the last required document to ACER on 1 February 2023, thus completing its submission.
- (7) Between 3 and 17 February 2023, ACER consulted, via its website, the organisations representing all stakeholders, in particular the system users, including customers. ACER received no responses from stakeholder organisations to this consultation. Where relevant and appropriate, ACER considered the responses submitted to its 2021 consultation on the same subject matter.⁵
- (8) On 8 March 2023, a proposed draft of the present opinion was submitted to ACER's Electricity Working Group for consultation in accordance with Article 24(2) of Regulation (EU) 2019/942.
- (9) On 15 March 2023, ACER's Electricity Working Group provided its advice, endorsing the proposed draft. No comments were provided by the regulatory authorities during the consultation phase.
- (10) On 29 March 2023, ACER's Board of Regulators issued a favourable opinion pursuant to Article 22(5)(a) of Regulation (EU) 2019/942.

3. ACER'S ASSESSMENT

- (11) The submission includes two documents setting out the draft amendments to AoA and IR (Annex I and Annex II respectively). The Explanatory Note (Annex IV) divides the proposed amendments into different categories, depending on their objective and/or focus, namely those related to:
 - a) technical alignment with the new Belgian Code of Companies and Associations;
 - b) increasing flexibility and resilience of AoA and IR;
 - c) purpose and activities of ENTSO-E;
 - d) rights and obligations of ENTSO-E's members;

⁴ AoA and IR, versions of 30.09.2014, currently in force, available at: <https://www.entsoe.eu/about/inside-entsoe/governance/#association-documents>.

⁵ ACER's consultation of March 2021: https://extranet.acer.europa.eu/Official_documents/Public_consultations/Pages/Consultation-on-amended-statutory-documents-of-ENTSO-E.aspx

- e) decision-making process;
 - f) election processes; and
 - g) budget and resource matters.
- (12) ACER's assessment is divided into two sections. Section 3.1 sets out ACER's remarks on ENTSO-E's AoA and IR, including the proposed draft amendments. Section 3.2 focuses on the revised Network Code Development Process.

3.1. Remarks on ENTSO-E's AoA and IR

3.1.1. ENTSO-E's purpose and activities

- (13) Article 28(1) of Regulation (EU) 2019/943 sets out three key objectives for ENTSO-E, as the TSOs are required, through ENTSO-E, to *'cooperate at Union level'* in order *'to promote the completion and functioning of the internal market for electricity and cross-zonal trade and to ensure the optimal management, coordinated operation and sound technical evolution of the European electricity transmission network'*.
- (14) Article 4 AoA⁶ sets out the purpose and activities of ENTSO-E, with its second paragraph clearly referring to and using the wording of Article 28(1) of Regulation (EU) 2019/943. However, in its current formulation, it combines two objectives⁷ into one in a seemingly hierarchical order. ACER recommends to make it clear that the two objectives are separate objectives, both pursued on equal footing by ENTSO-E.
- (15) The third objective of ENTSO-E as foreseen in Article 28 of Regulation (EU) 2019/943 is the duty of EU TSOs to cooperate with one another at Union level, using hereby ENTSO-E as the relevant platform for such cooperation, in order to achieve the aforementioned objectives.
- (16) Whilst the objective of cooperation is present in Article 4 AoA, its broad wording and the proposed activities reflect a dual nature of ENTSO-E. Article 4 does not clearly divide nor prioritises between, on the one hand, ENTSO-E's legally mandated tasks and objectives and, on the other hand, the other objectives and activities pursued by the association. ENTSO-E is not only expected to support the TSOs in carrying out their legal mandate, or to meet its own obligations under Regulation (EU) 2019/943

⁶ ACER's assessment refers to the provisions of AoA and IR in their versions of 30.09.2014, but including, where applicable, the updated wording as per Annex I and Annex II of the submission.

⁷ I.e., the promotion of the completion and functioning of the internal market for electricity and cross-zonal trade, and ensuring the optimal management, coordinated operation and sound technical evolution of the European electricity transmission network.

and the network codes and guidelines, but also to be simultaneously active as an association voicing the interests of its TSO members.⁸

- (17) Whereas it is understandable that the TSOs may wish to organise themselves to voice their common interests and to engage with the EU and the relevant stakeholders, ACER recommends to remove this advocacy activity, as it may be incompatible with the legal objectives and tasks which ENTSO-E is expected to pursue and carry out. As the fundamental decisions which ENTSO-E has to make will often occur on very specific aspects in a particular file, it may be very difficult in practice to separate these two tensions and have the legal objectives prevail.
- (18) As a very minimum, as all the activities undertaken by ENTSO-E compete for the same human and financial resources, ACER recommends that Article 4 AoA provides a clear distinction between ENTSO-E's legally mandated objectives and tasks and other objectives and activities pursued by the association. For the avoidance of doubt, Article 4 AoA should also explicitly state that ENTSO-E's legally mandated objectives and tasks take priority over its other objectives and activities, which are and should remain of secondary nature.
- (19) If the prioritisation of EU tasks and objectives cannot be guaranteed by the current governance model, ACER recommends that ENTSO-E explores ways, including structural changes, to prevent potential tensions occurring within the association. This may involve strengthening the role of ENTSO-E's Secretariat as a protector of the association's legally mandated objectives and tasks.
- (20) Finally, ACER notes that Article 4 AoA does not make a clear distinction between EU TSOs and its other members, and their area of activity. Article 4 AoA refers to 'European TSOs' and the 'pan-European interconnected power system', which includes more than just the EU TSOs and the EU internal market for electricity. The large scope of Article 4 AoA is also reflected in ENTSO-E's membership admission criteria, which allow also non-EU TSOs to become members. Once the TSOs become member of ENTSO-E, they enjoy equal rights in the organisation, apart from a provision ensuring a minimum percentage of EU TSOs' voting rights in the Assembly or when ENTSO-E only acts as a platform for 'all TSO' activities.⁹

⁸ Article 4(1) AoA refers to ENTSO-E as '*the common voice of European TSOs*' whose task it is to '*safeguard the TSOs' positions and [to] engage actively in the European rule setting process*'. Article 4(2) AoA states that ENTSO-E '*may undertake any activity (including service-oriented activities), which, directly or indirectly, enables it to achieve the above-mentioned purpose*', and provides a non-exhaustive list of activities, including but not limited to, ENTSO-E's legal tasks.

⁹ See also section 3.1.4.

- (21) Despite their near-equal status within ENTSO-E, the TSO members present in fact a highly heterogeneous group when it comes to their relationship with the EU energy *acquis*, and the ensuing right and duty to cooperate through ENTSO-E.
- (22) The first category of members comprise thirty EU TSOs,¹⁰ which operate under the Clean Energy Package and are subject to an explicit obligation to cooperate at Union level through ENTSO-E, as set out in Article 28(1) of Regulation (EU) 2019/943.
- (23) The second category includes the TSOs from EEA EFTA States, namely Statnett (Norway) and Landsnet (Iceland), which are subject to the provisions of the Third Energy Package, and the related network codes and guidelines, and a corresponding duty to cooperate through ENTSO-E as per Article 4 of Regulation (EC) 714/2009.¹¹
- (24) The third category consists of five TSOs from the Energy Community (EnC) Contracting Parties (CPs).¹² The CPs are currently transposing the Clean Energy Package, as adapted and adopted by the EnC Ministerial Council in December 2022.¹³ Once this process is finalised, all CPs' TSOs, including the five current members of ENTSO-E, will be operating under the Clean Energy Package, as transposed into their respective national laws. At present, all CPs' TSOs have to cooperate with ENTSO-E to enable regional market integration.¹⁴ After the Clean Energy Package is transposed, all CPs' TSOs will be explicitly required to cooperate through ENTSO-E, however, they won't be required to become ENTSO-E's members. The CPs' TSOs which are not members yet, will be obliged to enter into agreements with ENTSO-E to cover the additional costs resulting from the extension of ENTSO-E's tasks to these TSOs.¹⁵
- (25) SONI, the TSO for Northern Ireland, represents a category on its own. Following United Kingdom's withdrawal from the EU, SONI remains subject to certain provisions of the Third Energy Package insofar as they apply to the generation, transmission, distribution, and supply of electricity, trading in wholesale electricity or cross-border exchanges in electricity.¹⁶

¹⁰ <https://www.entsoe.eu/about/inside-entsoe/members/>

¹¹ Article 4 of Regulation (EC) 714/2009 was incorporated in the EEA Agreement by EEA Joint Committee (EEA JCD) No 93/2017 of 5 May 2017 amending Annex IV (Energy) to the EEA Agreement.

¹² OST (Albania), NOS BiH (Bosnia and Herzegovina), Crnogorski elektroprenosni sistem (Montenegro), EMS (Serbia) and MEPSO (Republic of North Macedonia).

¹³ Ministerial Council decision D/2022/03/MC-EnC incorporating the Clean Energy Package in the Energy Community *acquis*.

¹⁴ Article 3 of the Procedural Act 2022/01/MC-EnC on regional market integration, adopted together with the Ministerial Council decision D/2022/03/MC-EnC.

¹⁵ Ministerial Council decision D/2022/03/MC-EnC, Article 5(25).

¹⁶ Protocol on Ireland/Northern Ireland, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L 29, 31.1.2020.

- (26) Finally, Swissgrid, the Swiss TSO, is also a member of ENTSO-E, while Switzerland does not apply EU energy *acquis*.
- (27) The above situation is barely reflected in ENTSO-E's (uniform) membership status. ACER would recommend to make a clearer distinction between those activities whereby ENTSO-E and its EU TSO members are carrying out obligations imposed upon them by EU law, and the other activities, which should also manifest itself in voting rights and/or possibly other participation rights¹⁷ of different categories of the TSOs.
- (28) In making this distinction, ENTSO-E should however pay particular attention to the TSOs which are under legal duty to cooperate through ENTSO-E. It is essential that the ENTSO-E membership admission criteria allow any such TSO, once certified and designated, to become a member with sufficient participation and voting rights to enable their effective cooperation, as required by law.
- (29) ACER notes that Article 15(6) AoA, third subparagraph, already sets a twofold limit in the voting rights of members from non-EU countries at the Assembly (i.e. 28% of the first part of the voting power, 35% of the second part of the voting power). However, while the Assembly is responsible for an overall strategic direction (e.g., adoption of the general strategy, the annual work programme), a number of important legally mandated deliverables are developed and/or adopted at the level of the Committees¹⁸ or the Board¹⁹, where, however, no comparable thresholds currently apply.
- (30) In order to prevent any undue influence for EU TSOs in carrying out their legal obligations under EU law, ACER recommends that, at minimum, thresholds similar to those applicable at the Assembly are also introduced at the other decision-making levels of ENTSO-E (Board, Committees) when they relate to deliverables required by EU law.

3.1.2. Admission of new members

3.1.2.1. *Designation as a TSO*

- (31) There seems to be an inconsistency between Article 7(1)(b)AoA and Article 12(2)(a) AoA. Whereas the designation as a TSO in Article 7 AoA must take place '*according to any Regulation or Directive in force concerning common rules for the IEM*', the designation as a TSO in Article 12 AoA can be refused either '*in compliance with Regulation (EU) 2019/943 and/or Directive 2019/944 [...] and/or any treaty or*

¹⁷ E.g. nominations of candidates for key offices in ENTSO-E's bodies (Assembly, Board, Committees).

¹⁸ Article 18(5) AoA.

¹⁹ Article 16(6) AoA.

agreement between the EU and the non EU state governing their relationship with the IEM [...]'.

- (32) Notwithstanding the comments regarding the nature of involvement of non-EU TSOs in ENTSO-E²⁰, ACER proposes for consistency reasons to align the wording of the two corresponding provisions, allowing for a wider legal basis for a TSO designation in Article 7(1)(b) AoA.

3.1.2.2. Obligation to apply the EU energy acquis

- (33) Article 12(3) AoA lays down that a member shall be excluded, or that its participation and/or voting rights *shall* be suspended, if a state in which such member operates is either under no legal obligation to apply, or is materially delayed in its implementation of the Third Energy Package's directives and regulations and/or the related treaty or agreement.

- (34) ACER supports this criterion as a situation which should lead to automatic suspension or exclusion, but notes that there is no corresponding criterion among the membership *admission criteria* in Article 7(1) AoA, requiring a candidate to demonstrate that the state in which it operates in fact applies EU energy *acquis*. For clarity and internal consistency of AoA, ACER recommends to mirror this criterion of Article 12(3) AoA also in Article 7(1) AoA.

3.1.3. Suspension of participation and/or voting rights and exclusion of members pursuant to Article 12(2) and Article 12(3) AoA

3.1.3.1. Non-compliance with membership admission criteria

- (35) Article 12(2) AoA provides that the member shall be excluded, or its participation and/or voting rights shall be suspended in two cases, namely, in case it is refused the designation as a TSO or if its certification is withdrawn or annulled.

- (36) This measure addresses a situation when one of the membership admission criteria is not fulfilled anymore, namely the criterion of Article 7(1)(b) AoA. Article 7 AoA lists a number of other admission criteria. In such other cases, however, Article 12(1) AoA provides that the Assembly *may* suspend or exclude the member under certain conditions, among others, when the Assembly considers that the member commits a material infringement of the AoA.

- (37) Given that any TSO needs to meet all requirements of Article 7(1) AoA in order to become a member of ENTSO-E, it seems logical that any non-compliance with such criteria would be considered a material infringement of the AoA and lead directly to a suspension or exclusion. Absent any legitimate reasons for keeping the above distinction, it would appear appropriate to extend the scope of Article 12(2) AoA to

²⁰ Section 3.1.1, paras (20) - (30).

the non-compliance with any of the membership admission criteria as laid down in Article 7(1) AoA.

- (38) Similarly, it is not clear to ACER why a mandatory suspension or exclusion should not also apply to observer members which were designated as TSOs under their national law and were subsequently refused the designation.

3.1.3.2. Procedural aspects - clarification of the mandatory exclusion / suspension of participation and/or voting rights

- (39) For procedural aspects, Article 12 AoA refers to Article 4 IR. ACER agrees with the proposal that the procedural rules to implement the provisions on the mandatory exclusion or suspension of voting rights should be clarified. However, the proposed implementation rules do not correspond to the clear requirements of Article 12 AoA. Article 4 IR provides that a member (or members) representing at least 20% of the total population²¹ or a group of three members from at least three different countries, who is (or are) of the view that suspension/exclusion conditions of Article 12 are met, can submit a suspension or exclusion request, triggering a process which ultimately leads to the Assembly's decision on the matter. The process outlined in Article 4 IR is proposed to be transferred to Article 12 AoA as new paragraphs (4) and (5), with no content changes.
- (40) Given the absence of any other procedural references in Article 12 AoA, Article 4 IR/new Article 12(4) and (5) seems to suggest that the process in these paragraphs is the only possible process for initiating the exclusion/suspension procedure in all three cases described in Article 12 AoA. Such an interpretation would be concerning as the threshold laid down in Article 4(1) IR would effectively create a precondition for suspension or exclusion, which seems arbitrary. It would also undermine the *mandatory* suspension/exclusion under Article 12(2) and Article 12(3) AoA (i.e. cases where *'the Assembly shall decide'*), because it would allow a TSO who ceased to be designated/certified TSO or whose country ceased to apply the relevant EU energy *acquis*, to continue to be ENTSO-E's member, unless and until another member or members consider(s) it appropriate to request its suspension/exclusion.
- (41) ACER does not object to Article 4 IR/new Article 12(4) and (5) AoA as a complementary process to other possible ways of initiating a procedure for suspension/exclusion. However, ACER strongly recommends that Article 12 AoA should also clearly lay down the default approach for the mandatory exclusion/suspension (e.g. that the Board shall initiate a procedure for suspension/exclusion when it becomes aware that the conditions of Art 12(2) or (3)

²¹ Total population as mentioned in Table 1 of Article 15(6) AoA.

AoA are fulfilled) and the related procedure for all the three foreseen cases of exclusion/suspension.²²

- (42) In order to ensure proper regulatory oversight and/or to have an up-to-date list of active ENTSO-E members, Article 12 AoA should also specify that, if the Assembly decides to suspend or exclude a member, ENTSO-E must inform the competent regulatory authority, the European Commission and ACER of such suspension or exclusion without delay.

3.1.4. Decision-making process for terms and conditions or methodologies

- (43) While not specifically mentioned among ENTSO-E's activities under Article 4 AoA, ACER understands that ENTSO-E also provides important logistical and other support for EU TSOs' joined development and adoption of proposals for terms and conditions or methodologies (TCMs) under the relevant network codes and guidelines. Key principles of the TCM process are laid down in the relevant network codes and guidelines,²³ however ACER notes that the role of ENTSO-E in the development of the TCMs is nowhere mentioned in the AoA or IR and is not aware of any document explaining how EU TSOs further implement these provisions.
- (44) ACER questions whether the TCM process should not also be part of ENTSO-E's statutory documents. While formally a task of EU TSOs (and not of ENTSO-E as such), TCM proposals still constitute important deliverables resulting from TSOs' cooperation which, pursuant to Article 28 of Regulation (EU) 2019/943, should be carried out *'through ENTSO-E'* and in order to promote objectives which are common for ENTSO-E and the EU TSOs (see also section 3.1.1).

3.1.5. Election processes and gender balance

- (45) The proposed amendments include a requirement that the selection of the candidates for the Board members, other than the Chairperson, shall, among other criteria, take into account *'an appropriate level of diversity amongst the persons nominated in terms of skills, including gender balance exemplarity, while also taking into account the ability for the persons nominated to represent the specificities of as many Members as possible'*.²⁴

²² Strictly speaking, the Assembly is required to request an opinion of ACER and the Commission prior to an exclusion decision, as such exclusion would effectively constitute an amendment of its list of members (cf. Article 29(1) of Regulation (EU) 2019/943). In order to avoid that any member meeting the criteria for exclusion could still benefit of all membership rights during the period that ACER and the Commission would have to take such opinion, ACER recommends that the Assembly would in the meanwhile also suspend the member concerned.

²³ E.g. Article 9 of Regulation (EU) 2015/1222, Article 4 of Regulation (EU) 2017/2195.

²⁴ Article 21 IR or a new Article 32(2) AoA following the technical alignment.

- (46) ACER much welcomes the inclusion of the gender balance criterion for the election of the Board members. The inclusion reflects the regulatory objectives set out under both European and national legislation, and is an attempt to address the current absence of female representatives in ENTSO-E's governing bodies.
- (47) ACER recalls hereby the European Commission's EU Gender Equality Strategy 2020-2025 and the new EU Directive on gender balance on corporate boards of listed companies.²⁵ The Directive, adopted in 2022, sets targets of 40% of the underrepresented sex among non-executive directors, or 33% among all board members, for listed companies by 2026.
- (48) At national level, ACER notes that Article 9(2) of Belgian Electricity Market Law of 29 April 1999 similarly foresees the mandatory participation of at least one third of each gender at the Board of Directors of grid operators. Also, Article 2 of Belgian federal law of 28 July 2011 requires that at least one third of the Board of Directors of large public companies and large registered private companies should be female.
- (49) ENTSO-E, however, is established under Belgian law as an international non-profit making association.²⁶ As such, no legal provision on gender balance would impact ENTSO-E under Belgian law, other than through explicit provisions in its statutory documents.
- (50) However, the proposed provision in ENTSO-E's statutory documents makes the gender balance criterion very weak, suggesting it is merely a desirable quality to be balanced against other skills and abilities forming together a broader 'diversity criterion', which itself has to be then again balanced against the other selection criteria (geographical representation and work contribution). ACER has concerns that the proposed amendment to the statutory documents would not be sufficient to ensure a level of gender balance which would be in line with the current European and national targets.
- (51) Given that binding quotas drive more rapid progress than soft measures to reach gender-balanced participation²⁷, ACER recommends ENTSO-E to examine ways for imposing stronger requirements in its statutory documents in order to reach a sufficient equilibrium, not only among the Board members, but also among the Committee Chairs. In particular, ACER encourages the inclusion in the AoA of a mandatory gender quota for the Board and also for the positions of the Committee Chairs.

²⁵ Directive (EU) 2022/2381 of 23 November 2022 on improving the gender balance among directors of listed companies and related measures, OJ L 315/44.

²⁶ I.e. Internationale Vereniging zonder Winstoogmerk (IVZW) or Association Internationale Sans But Lucratif (AISBL). Article 2 AoA.

²⁷ 2023 Report on gender equality in the EU, SWD(2023) 55 final, 7.3.2023.

3.1.6. Budget and resource matters

- (52) A new paragraph (2) in Article 22 AoA is proposed as part of the amendments, stating that ENTSO-E's budget '*can be composed of contributions, external financing, revenues and any other resources*'.
- (53) ACER considers it critical that the TSOs resource ENTSO-E appropriately so that it can carry out the tasks envisaged under Union law. Such resources include appropriate financing as well as sufficient human resources not only in terms of permanent staff and secondments but also in terms of TSO staff members contributing with their expertise in ENTSO-E's Committees and subgroups.
- (54) However, with respect to the financing of ENTSO-E, the financial resources which it proposes in addition to the contribution of its members²⁸ are not clearly defined with one income category even being phrased open-ended ('*any other resources*').
- (55) ACER supports the fact that ENTSO-E's budget can be reinforced with other means, in particular when such financing would stem from ENTSO-E activities which foster the cooperation of TSOs at Union level (e.g., revenues for administrative services for the management of TSOs' cooperation as a platform and facilitator). However, the current proposed wording of Article 22(2) AoA could in principle also allow a source of income and revenue that could potentially endanger the performance of ENTSO-E's functions under EU law, for example, through undue influence on its decision-making via external funding. For transparency, ACER recommends that Article 22 AoA defines and clearly delineates ENTSO-E's budget components.
- (56) In addition, the terminology related to the membership contributions is confusing. Article 12(1)(c) AoA refers to '*membership contributions or fees due as Associated Member or Observer Member*' while Article 22(5) AoA²⁹ refers to '*membership subscription fees*', '*associated membership fees*' and '*observer membership fees*'. Similar inconsistencies are found in the Explanatory Note. ACER recommends to use consistent terminology throughout the statutory documents.

3.1.7. Confidentiality

- (57) Article 45 IR³⁰ imposes specific confidentiality, non-disclosure and data-handling obligations on the members, associated members and observer members of ENTSO-

²⁸ According to the Explanatory Note, contributions come from Members, Associated Members and Observer Members (section 7, p. 4).

²⁹ New Article 40(6) AoA, following the technical alignment.

³⁰ The proposed amendments include a transfer of Article 45 IR to the AoA (new Article 49 AoA), as part of the technical alignment, with no content changes.

E. As this article does not contain any confidentiality requirements regarding ENTSO-E's Secretariat³¹, ACER recommends to add this aspect.

3.2. Assessment of the Network Code Development Process

(58) The submission includes a document setting out ENTSO-E's revised Network Code Development Process (Annex III). ENTSO-E's submission letter explains that the revisions in the document aim to:

- a) formalise cooperation with the EU DSO Entity;
- b) streamline preparatory work and decision-making;
- c) refine and formalise the procedure with the Commission and ACER regarding amendment proposals;
- d) update references to ongoing and incoming network code development and amendment; and
- e) align with the draft amendments to AoA and IR.

(59) ACER has the following comments and recommendations on the submitted document:

3.2.1. Drafting committee

(60) Article 59(10) of Regulation (EU) 2019/943 requires ENTSO-E to convene a drafting committee to support it in the network code development process. The drafting committee must include representatives of ACER, ENTSO-E, where appropriate the EU DSO entity and NEMOs, and a limited number of the main affected stakeholders.

3.2.1.1. Role in ENTSO-E's process

(61) While the document makes reference to the establishment of the drafting committee, it does not provide any further details beyond what is already set out in Regulation (EU) 2019/943. While the drafting process itself is quite detailed and involves a number of ENTSO-E's bodies,³² the drafting committee has no specific role beyond providing support. What is meant by 'support' is not further specified in the document, however the name 'drafting committee' suggests that the EU legislator has foreseen its involvement specifically in the drafting process.

(62) It would be appropriate to give greater attention to a new, formal body which ENTSO-E is required to create under the Regulation. ACER would therefore recommend to specify when exactly the committee is convened and which documents it is given access to, and also to describe in detail its involvement at different stages of ENTSO-E's internal process up to the submission to ACER. In particular, ENTSO-E should

³¹ I.e., the Secretariat as defined in Article 1(27) AoA.

³² Annex III, pp. 8-10.

clarify the role of the committee vis-à-vis the ENTSO-E Drafting Team and the TSO-DSO Development Team, whose roles and duties should also be more thoroughly explained. Finally, for consistency and to avoid confusion with the drafting committee, ACER suggests to rename ‘ENTSO-E Drafting Team’ to ‘ENTSO-E Development Team’, as its role corresponds to the TSO-DSO Development Team.

3.2.1.2. *Participation of affected stakeholders*

- (63) ENTSO-E states at the beginning of the document that *‘[t]he process is designed to achieve consensus within ENTSO-E and with the affected stakeholders and, in this way, to be fair, transparent and balanced’*.³³
- (64) As later specified in the document, stakeholders partake in the process at various points, notably through public consultation and the drafting committee.
- (65) Stakeholder participation in the drafting committee is explicitly required by Article 59(10) of Regulation (EU) 2019/943, which states that it includes *‘a limited number of the main affected stakeholders’*. While ENTSO-E’s document reiterates this legal requirement,³⁴ it does not provide any further details as to how many stakeholders could participate in the committee and on what basis they would be selected. For clarity and transparency, it would be appropriate that the document outlines a clear process for selecting the affected stakeholders based on objective selection criteria.

3.2.2. Interpretations of network codes’ rules

- (66) According to the document, any party materially affected by the network code may request interpretations of its rules from ENTSO-E and that these will be prepared in writing by the relevant Working Group or Steering Group no later than 60 days after receipt of the request.³⁵ The document explains that these interpretations are non-binding, and without prejudice to the interpretation of law by the European Courts.
- (67) ACER recommends to clarify that such requests relate to the actual application of the rules in practice, and not their interpretations as such, as well as that they also may cover queries related to the guidelines (and not only to the network codes). In case the guidance sought from ENTSO-E may be relevant for a wider EU audience, ACER recommends to refer the request to the ENTSO-E ESC Issue Logger³⁶, which lists all the official recorded stakeholder inquiries raised during the European Stakeholder Committees (ESC) meetings.

³³ Annex III, pp. 3, 4.

³⁴ Annex III, p. 10.

³⁵ Annex III, p. 15. A similar process is foreseen for requests addressed to the EU DSO Entity, p. 19.

³⁶ <https://esc.network-codes.eu/>

3.2.3. Supporting material accompanying network code (amendment) proposals

- (68) According to the document, draft proposals for network codes submitted to the leading Committee for approval should be accompanied by a description of the objectives pursued, explanations and justifications of the choices made as well as cost benefit analyses.³⁷ It is unclear whether these documents are published as part of the formal consultation and whether they are submitted to ACER together with the final proposal. For transparency and meaningful stakeholder input, it would be appropriate to disclose all the supporting material, in particular the related cost benefit analyses, in the consultation. This material should be also shared with ACER as part of the formal submission. ACER suggests that the document clarifies these points.
- (69) Amendment proposals submitted for approval to the leading Committee are supported by a different set of materials, namely the reasoning why the change is beneficial, by when it is needed, a prioritisation based on the importance of the changes and an assessment of impacts on TSOs and ENTSO-E with respect to resources, budget, relation to existing projects, new projects needs and other impacts.³⁸ ACER recommends that in addition to these elements, proposals for amendments are also supported by appropriate assessment of market impacts and/or cost benefit analysis, as is the case with proposals for network codes. These assessments should also be made publicly available and submitted to ACER together with the proposal for amendments.

3.2.4. ENTSO-E as a consulted party

- (70) Section 6.2 of the document describes ENTSO-E's internal process for preparing input to consultations on amendments organised by ACER pursuant to Article 60(3) and the Commission pursuant to Article 61(6) of Regulation (EU) 2019/943.
- (71) While disclosing the details of this process has some merits as it provides insight to ENTSO-E's working methods, it is not clear why it only concerns two specific cases, as they are not the only cases envisaged in Regulation (EU) 2019/943 where ENTSO-E must be consulted by ACER or the Commission. For instance, in relation to network codes, this is the case when ACER prepares a framework guideline or revises a network code proposal submitted by ENTSO-E, or when the Commission develops a network code on its own initiative.³⁹
- (72) It would be beneficial to clarify in the document whether the two described processes differ from the other cases where ENTSO-E is a consulted party and if so, why this is the case. ACER also notes that step 1 of ENTSO-E's process ('Initiation')⁴⁰ makes no reference to ACER's obligation to consult ENTSO-E. It would be beneficial to clarify

³⁷ Annex III, pp. 13-14.

³⁸ Annex III, pp. 20-21.

³⁹ Paragraphs (5), (11) and (14) of Article 59 of Regulation (EU) 2019/943.

⁴⁰ Annex III, pp. 12, 16.

that ENTSO-E's engagement with ACER at this stage is required by the Regulation, and also explain how ACER's consultation relates to the process described in step 1.

3.2.5. Formal consultation of stakeholders

- (73) ENTSO-E's process provides a short reference to the formal consultation, noting that *'ENTSO-E will launch a formal stakeholder consultation process, following the "ENTSO-E Consultation Process" (document available on the ENTSO-E website) allowing any interested party to provide comments.'* The only document under this title on ENTSO's website appears to be from 2011 and therefore might require necessary updates. The document has not been submitted to ACER for review,

HAS ADOPTED THIS OPINION:

1. ACER considers the draft amendments to the statutory documents of ENTSO-E to be in general compliant with the requirements of Regulation (EU) 2019/943 and Directive (EU) 2019/944, save for the aspects outlined in this opinion.
2. Going beyond the assessment of the draft amendments, this opinion highlights possible ways to improve the statutory documents even further or indicates situations to which ENTSO-E should pay particular attention.

This Opinion is addressed to the European Commission.

Done at Ljubljana, on 31 March 2023.

- SIGNED -

*For the Agency
The Director*
C. ZINGLERSEN