

# Agency for the Cooperation of Energy Regulators

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## The Rules of Procedure of the Board of Regulators of the Agency

Ref: A10-BoR-01-03

04 May 2010

As amended on 10 July 2012<sup>1</sup>,

19 February 2014<sup>2</sup>,

25 March 2015<sup>3</sup>,

13 July 2016<sup>4</sup>

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<sup>1</sup> Ref: A12-BoR-20-03

<sup>2</sup> Ref: A14-BoR-35-35

<sup>3</sup> Ref: A15-BoR-46-03

<sup>4</sup> Ref: A16-BoR-58-3.1a

## **Board of Regulators of the Agency for the Cooperation for Energy Regulators**

### **- Rules of Procedure -**

The Board of Regulators of the Agency for the Cooperation of Energy Regulators (ACER),

#### **Having regard to:**

- (1) Regulation (EC) 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents
- (2) Regulation (EC) No 713/2009 of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators
- (3) Directive 2009/73/EC concerning common rules for the internal market in gas and repealing Directive 2003/55/EC
- (4) Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC
- (5) Regulation (EC) No 715/2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005
- (6) Regulation (EC) No 714/2009 on conditions for access to the networks for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003
- (7) Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency
- (8) Regulation (EU) No 347/2013 on Guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006

**Considering** that the purpose of the Agency shall be to ensure that regulatory functions performed by the regulatory authorities referred to in Article 35 of Directive 2009/72/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity (hereafter “Electricity Directive”) and Article 39 of Directive 2009/73/EC of the European Parliament and of the Council of concerning common rules for the internal market in natural gas (hereafter “Gas Directive”) are properly coordinated and, where necessary, completed at the Union level.

**Considering** that the independence of sectoral regulatory authorities is not only a key principle of good governance but also a fundamental condition to ensure market confidence.

**Considering** that, reflecting the situation on a national level, the Board of Regulators shall according to article 14 (5) of the Regulation (EC) No 713/2009 of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators (hereafter “ACER Regulation”) act independently of market interests and shall not seek or take instructions from any government or other public or private entity or from the Commission.

**Considering** that the decisions of the Board of Regulators should, at the same time, comply with Union law concerning energy and in particular the internal energy market, the environment and competition.

**Considering** that the Board of Regulators may have to report its opinions, recommendations and decisions to the Union institutions, where appropriate.

**Considering** that the European Parliament may invite, while fully respecting his/her independence, the chairman of the Board of Regulators or his deputy to make a statement before its competent committee and answer questions put by the members of that committee.

**Considering** the importance of guaranteeing the independence of the Agency, its technical and regulatory capacities and its transparency and efficiency, national regulatory authorities within the Agency must act independently in fulfilling their role.

**Considering** that the structure of the Agency should be adapted to meet the specific needs of energy regulation and that the specific role of the national regulatory authorities needs to be taken fully into account within the Board of Regulators (hereafter “BoR”) established through the ACER Regulation.

**Considering** the Better Regulation Strategy endorsed by the European Commission, together with its three action lines including promoting the design and application of better regulation tools at the EU level (notably simplification, reduction of administrative burdens and impact assessment); working more closely with Member States to ensure that better regulation principles are applied consistently throughout the EU by all regulators; and reinforcing the constructive dialogue between stakeholders and all sectoral regulators at EU and national level.

**Whereas** the Agency should have legal guarantees that participants in the BoR will not disclose commercially sensitive information which they obtained in their capacity as members, alternates, observers or participants to the BoR.

**Whereas**, in light of the initiatives taken by the European Parliament, the Council of the EU and the European Commission, the Administrative Board of the Agency has laid down in Decision AB No. 02/2015<sup>5</sup> a comprehensive and coherent policy for the prevention and management of conflicts of interest which, in the interest of internal consistency, should be reflected in the Rules of Procedure of the Board of Regulators.

**Adopts the following Rules of Procedure:**

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<sup>5</sup> Decision AB n° 02/2015 of the Administrative Board of the Agency for the Cooperation of Energy Regulators of 31 January 2015 , laying down a policy for the prevention and management of conflicts of interest.

**Part 1**

**Scope and objective**

**Article 1 - Scope and objective**

- 1.1 Pursuant to Article 14.4 of the ACER Regulation the BoR must set out in greater detail its working arrangements in its Rules of Procedure together with the arrangements governing voting, especially the rules applicable to one member acting on behalf of another and also, where appropriate, the rules governing quorum.

The Rules of Procedure may also provide for specific working methods to consider issues arising in the context of regional cooperation initiatives. The BoR shall encourage cooperation between the regulatory authorities at regional and Union level.

- 1.2 These Rules of Procedure will govern primarily how regulators cooperate and work together but also how they work with the other organs of the Agency. In that respect, the Rules of Procedure shall reflect the specificities and tasks of the BoR within the Agency. Those tasks are set out in Article 15 of the ACER Regulation.

## **Part 2**

### **Structure and Organisation of the Board of Regulators**

#### **Section One**

#### **Internal organisation of the Board of Regulators**

##### **Article 2 - Membership of the Board of Regulators**

- 2.1 Pursuant to Article 14.1 of the ACER Regulation, the Board of Regulators (“BoR”) will comprise senior representatives (“Members”<sup>6</sup>) of their National Regulatory Authorities, in accordance with Article 35.1 of Directive 2009/72 EC and Article 39.1 of Directive 2009/73 EC, (hereafter “NRAs”), and one non-voting representative of the Commission. Only one representative for the NRA from each Member State may be admitted to the Board of Regulators.
- 2.2 Each NRA shall be responsible for nominating its member and an alternate from its current senior staff.
- 2.3 A NRA may be represented at the meetings of the BoR by its member, its alternate or a duly mandated proxy. The proxy should provide a power of attorney (see Annex 1) which should be sent in advance of the meeting to the Secretariat of the BoR. The proxy shall be a senior staff of the NRA or another Member of the Board of Regulators. A Member shall not have more than one proxy vote in addition to his/her own vote.

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<sup>6</sup> Under the provisions of the Rules of Procedure, “Members” are the senior representatives of each National Regulatory Authority of an EU Member State (in accordance with Article 35.1 of Directive 2009/72 EC and Article 39.1 of Directive 2009/73 EC) with a right to vote.

- 2.4 The Commission may participate in the meetings of the BoR but without the right to vote.
- 2.5 Each NRA will appoint a senior staff representative who will act as a Liaison Officer. His/her task will facilitate the relevant information exchange between his/her organisation, the Agency and that of other Members.
- 2.6 The modalities of the participation to the BoR of a representative of a third country which has concluded agreements with the Union (whereby it has adopted and is applying Union law in the field of energy and, if relevant, in the fields of environment and competition), are subject to the relevant provisions of these agreements in accordance with Article 31 of the ACER Regulation. For certain agenda items, the BoR may decide to restrict participation to Members only.
- 2.7 Members shall keep regulatory authorities at regional level<sup>7</sup> and regulatory authorities for small systems<sup>8</sup> of their Member State informed about the BoR discussions and decisions, where necessary. Each Member shall make all appropriate arrangements to ensure that he/she may speak for the national competent energy regulators as a whole in the event that regulatory authorities at regional level and/or regulatory authorities for small systems have an interest in the matter discussed.

### **Article 3 - Election and competences of the Chair and Vice-Chair of the Board of Regulators**

- 3.1 Pursuant to Article 14.2 of the ACER Regulation, the BoR shall elect a Chair and a Vice-Chair from among its Members. The election should take place by secret ballot.

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<sup>7</sup> A regulatory authority at regional level within a Member State as foreseen in article 35.2 of the Electricity Directive (Directive 2009/72/EC) and in article 39.2 of the Gas Directive ((Directive 2009/73/EC).

<sup>8</sup> A regulatory authority for a small system as foreseen in articles 35.3 of the Electricity Directive (Directive 2009/72/EC) and in article 39.3 of the Gas Directive ((Directive 2009/73/EC) means a regulatory authority for a small system on a geographically separate region whose consumption, in 2008, accounted for less than 3% of the Member State of which it is part, where such a body has been designated by a Member State, by way of derogation from paragraph 1 of Articles 35 and 39.

- 3.2 The term of office of the Chair and the Vice-Chair shall be two-and-a-half years and renewable. The term of office of the Chair and that of the Vice-Chair shall expire when they cease to be Members of the BoR. Members of the BoR whose remaining term of office on the national level will not cover the Chair/Vice-Chair mandate should inform the BoR when applying for the position of Chair/Vice-Chair.
- 3.3 The first election of the Chair and of the Vice-Chair shall take place during the first meeting of the BoR after approval of its Rules of Procedure.
- 3.4 The BoR may elect a Chair and a Vice-Chair only if at least two-third of the Members are present or represented. If the two-third of the Members are not present or represented at the first meeting, a second meeting shall be convened, at least 15 days after the first meeting, which may validly deliberate irrespective of the number of Members present or represented.
- 3.5 If the office of Chair or Vice-Chair falls vacant before the end of the term of office, the Vice-Chair or Chair as appropriate shall arrange within three months for the election of a successor pursuant to Article 3.4. The Member then elected shall serve as Chair or Vice-Chair for a full term of office or until the end of his membership of the Board of Regulators whichever is earlier.
- 3.6 In case both the Chair and the Vice-Chair are absent or impeded, the Member of the BoR who has been serving as a national regulator for the longest time should chair the BoR for as long as the Chair and the Vice-Chair are absent or impeded and arrange within three months for the election of a new Chair and a Vice-Chair pursuant to Article 3.4
- 3.7 The Chair will convene and chair the meetings of the BoR.



- 3.8 According to Article 12 (3) of the ACER Regulation the Chair may attend the meetings of the Administrative Board (hereafter “AB”) without the right to vote. In case of absence, the Chair may appoint a nominee (normally the Vice-Chair) to attend such meetings.
- 3.9 The Chair is responsible for representing the views and the policies of the BoR externally and may make a statement before the competent committees of the European Parliament and/or answer questions put by members of such committees if so invited. When presenting the policies of the Agency’s BoR externally, the Chair and/or the Vice Chair will reflect the Agency’s formal positions.
- 3.10 The Vice-Chair shall automatically take the place of the Chair if she or he is prevented from attending her/his duties and as such convene the BoR meetings.

#### **Article 4 - Meetings of the Board of Regulators**

- 4.1 Meetings of the BoR will be convened as often as needed but in principle once per month, at the invitation of the Chair or the Vice-Chair in the case foreseen in Article 3.10.
- 4.2 The secretarial services of the BoR shall be provided by the Agency staff when appointed (“Secretariat”). The BoR may decide that for certain items on the agenda, the Secretariat and/or representatives from third countries shall not be present.
- 4.3 The Chair may, on a case-by-case basis, invite external experts to attend a meeting as observers or speakers or following a proposal of a Member of the BoR. The invitation shall be issued with the assent of the Members of the BoR.
- 4.4 Members of the BoR may be accompanied in the BoR by some of their NRA staff who act as observers.

- 4.5 Subject to proposal by the relevant national Member and agreement by the BoR, Members of the BoR may also be accompanied by staff from regulatory authorities at regional level and/or regulatory authorities for small systems for topics of particular interest, without the right to vote.

#### **Article 5 - Agenda, minutes, documentation of the Board of Regulators**

- 5.1 The Chair shall propose the agenda for the meeting and ensure that it contains all items to be discussed and or approved and take into account proposals submitted by the Members. Each agenda item should indicate whether it is accompanied by a document, including whether that document is for information, for an orientation discussion, for informal endorsement, for an opinion, or for approval<sup>9</sup>. The Chair shall clearly indicate what items of the Agenda are submitted for information, for an orientation discussion, for informal endorsement, for an opinion and for approval. The draft agenda for approval at the meeting shall be circulated to the BoR at least two weeks before the meeting.
- 5.2 The Chair may decide that items may be removed from the agenda if the relevant documents have not been circulated one week before the meeting. Documents for an opinion or approval should, under normal circumstances, be accompanied by a report from the relevant Agency Working Group (AWG) Chair. The AWG report will be submitted to the BoR at the latest five days before the meeting. Exceptionally, it may be necessary to submit documents closer to the meeting date. Such late submission will be subject to justification and prior approval of the Chair.
- 5.3 The Secretariat shall prepare and maintain the minutes of the meetings, assist the BoR in their functions and execute other secretarial functions assigned to it by the BoR.

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<sup>9</sup> A BoR opinion or approval will be required where set out in the Regulation No 713/2009 or another legal act providing that the relevant provisions of Regulation No 713/2009 are applicable. Where there is no formal requirement for an opinion or approval of the BoR under the Regulation No 713/2009, a document may be submitted for informal endorsement where the BoR agreement is deemed necessary even not of a formal nature. Article 6 on the voting rules of the BoR shall apply *mutatis mutandis*.

- 5.4 Having received the approval of the Chair, the Secretariat shall submit a first draft of the minutes to Members within one week after the meeting. The final draft minutes shall be forwarded to Members for approval at the next meeting.

### **Article 6 - Voting rules within the Board of Regulators**

- 6.1 Each member of the BoR or his/her alternate or proxy has one vote. The Chair may decide that the vote for him or her or his/her NRA shall be exercised by the alternate or by the proxy.
- 6.2 Where the Agency considers adopting a specific individual decision or an opinion on a decision taken by a regulatory authority in accordance with Article 7, 8 and 9 of Regulation 713/2009, for which the BoR shall provide a reasoned opinion (under Article 15 (1) of Regulation 713/2009), the BoR Member concerned by the Agency's decision and/or opinion considered for adoption shall retain its right to vote.
- 6.3 Members may have an orientation discussion ahead of taking a decision on the draft proposals from the Director on the Agency's acts considered for adoption and may suggest amendments to the Director on his/her draft proposals. Such amendments may be given either orally at the orientation discussion or in writing within one week after the BoR meeting.
- 6.4 Members should strive to reach consensus in taking decisions. In case consensus is not achieved, the decision shall be put to a vote. The BoR shall act by a two-thirds majority of Members present or represented. Where the required majority is not reached, the Chair will use his/her best offices to seek to facilitate agreement.

- 6.5 The necessary quorum for a valid BoR decision generally is met if the majority of its Members are present or represented. If the majority of the Members are not present or represented at the first meeting, a second meeting shall be convened, at least 15 days after the first meeting, which may validly deliberate irrespective of the number of members present or represented.
- 6.6 The BoR decisions shall be recorded in the public minutes of its meeting. Where a decision is taken by vote, the public minutes recording the decision concerned shall indicate whether it is taken by consensus or majority vote and, where requested, with a dissenting opinion by a BoR Member. In the interest of transparency, any dissenting opinion will be attached to the BoR decision to be forwarded to the Director. A dissenting opinion shall be submitted in a standard summary format of no more than 300 words. This summary shall not be published but retained by the Director in the ACER records. If access to a dissenting opinion is requested, the relevant provisions of Regulation 1049/2001 will be applicable.
- 6.7 The Chair may decide that a matter is urgent and may use the electronic procedure if the Members agree to the use of the electronic procedure in order to seek agreement to a proposal according to the following procedure:
- 6.8 On a decision of the Chair the first round of the electronic procedure will be launched indicating the deadline for replying (of at least 3 working days) and the consequences of failure to respond within that deadline for: (a) the agreement to use the electronic procedure, and, (b) any comments on the proposal.

Should one-third of the BoR Members formally notify their disagreement with the use of the electronic procedure, the second round shall not be launched. The Director shall consolidate all the comments received and submit a proposal to the next BoR meeting.

If agreement is reached on the use of the electronic procedure, the Director shall explain to which extent the comments received have, as far as possible, been taken into account and submit a new consolidated version.

The BoR Chair will circulate the consolidated version for final agreement (within a deadline of at least 3 working days) without the possibility to submit comments.

The BoR Chair may, where necessary, provide an indication of possible concerns during the process.

During the second round of the electronic procedure, if the matter has previously been discussed in a meeting of the BoR, the proposal submitted for agreement is accepted if it obtains a two-thirds majority of Members who have responded in the electronic procedure. The necessary quorum for a valid BoR decision is met if the majority of its Members have responded in the electronic procedure. If the matter has not previously been discussed in a meeting of the BoR, the proposal submitted for agreement is accepted if it obtains a two-third majority of all Members.

## **Article 7 - Guidance to the Director**

- 7.1 Article 15(1) of Regulation 713/2009 (hereafter "Guidance") provides that the BoR shall give guidance to the Director.
- 7.2 The BoR may provide Guidance principally on important or strategic issues within the competence of the BoR, avoiding duplicating any issues within the scope of the Agency acts (as defined in Article 4 of the Regulation 713/2009) formally requiring a favourable opinion of the BoR.
- 7.3 A request for Guidance sponsored by a minimum of four Members of the BoR shall be submitted in writing, at least one week before the BoR meeting.
- 7.4 The request shall be sent to the Chair and Vice-Chair of the BoR and to the Director.
- 7.5 The request for Guidance shall include the rationale, the proposed scope and the objective of the Guidance sought under the Regulation 713/2009. It shall also include the rapporteur for the preparation of the Guidance.

- 7.6 The request for Guidance shall contain the proposed timeframe within which it is anticipated that the draft proposal will be prepared and submitted to the BoR for discussion.
- 7.7 The BoR shall, by a simple majority of its Members, approve or refuse the request to initiate the guidance; if approved, the BoR may provide additional comments regarding the proposed content of the Guidance.
- 7.8 The proposed Guidance will be submitted to the BoR for approval. The rules of Article 6 will apply *mutatis mutandis*. The proposed guidance shall be adopted if it obtains a two-thirds majority of Members present or represented.
- 7.9 Pursuant to Article 16 (1) of the Regulation 713/2009, after its adoption, the Guidance will be submitted by the BoR Chair to the Director with an invitation to explain how and in what timeframe he will act in accordance with that Guidance.

### **Part Three**

#### **Opinion on the Director candidate(s) Annual Work Programme and Budget of the Agency**

#### **Article 8 - Opinion of the BoR on the Director candidate(s)**

- 8.1 The BoR shall make a proposal on the profile of the Director of the Agency and submit it to the Administrative Board and to the Commission. The profile should be agreed by consensus; if consensus cannot be reached the general voting rules/quorums of the BoR as set out in Articles 6.4 and 6.5 shall apply.
- 8.2 The BoR shall deliver its opinion to the Administrative Board on the candidate(s) to be appointed as Director from a list of at least three candidates proposed by the Commission. According to Article 15(2) of the ACER Regulation, the BoR shall reach that decision on the basis of a three-quarters majority of its Members.

## **Article 9 - Adoption of the Work Programme**

- 9.1 The Agency shall adopt an annual work programme and publish it after its adoption by the Administrative Board.
- 9.2 According to Article 17 (6) of the ACER Regulation the Director shall submit the draft work programme for the following year to the BoR by 30 June of each year at the latest. The BoR may provide early input to the Director ahead of his/her submission of the draft Work Programme to the BoR on the regulatory activities and tasks of the Agency.
- 9.3 The BoR shall approve the work programme of the Agency for the coming year. The general voting rules/quorums of the BoR as set out in Articles 6.4 and 6.5 shall also apply for the approval of the work programme. The Chair shall present the approved work programme before 1 September for adoption by the Administrative Board.

<p style="text-align: center;"><b>Part Four</b></p>
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<p style="text-align: center;"><b>Amendments of the Rules of procedure</b></p>
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## **Article 10 - Amendments of the Rules of procedure**

- 10.1 Amendments to these Rules of Procedure can be proposed by the Chair or a Member of the BoR. In the latter case, the proposed amendment must be forwarded to the Chair who is responsible to submit it to all the Members of the BoR. An amendment of the Rules of Procedure must be approved following the rules set out in Article 6.4 of these Rules of Procedure.
- 10.2 Amendments to the Rules of Procedure may be approved only if at least two-thirds of the Members are present or represented.

## **Confidentiality arrangements – Article 11**

- 11.1 Members, alternates and observers of the Board of Regulators, together with any other participant to the Board meetings, shall be required, not to disclose information covered by professional secrecy. The members, alternates, observers and any other participant to the BoR meeting shall continue to be bound by this obligation also when they no longer take part in the BoR.
- 11.2 The BoR Members are permitted to exchange commercially sensitive information either within the NRA which they represent or with other NRAs, to the extent that all persons receiving such information are bound by these Rules of Procedure or by rules having equivalent effect on confidentiality of information. The information exchange and the appreciation of the level of protection of the confidential information by the NRA concerned shall fall under the responsibility of the member, the alternate, where relevant, the duly mandated proxy, the observer as well as any other participant of Board meetings.

## **Conflict of Interest – Article 12**

- 12.1 The rules for the prevention and management of conflicts of interest as laid down in chapter 4.2 of the Annex to Decision AB No. 02/2015 of the Administrative Board of the Agency for the Cooperation of Regulators of 31 January 2015 laying down a policy for the prevention and management of conflicts of interest (hereinafter “Decision AB No. 02/2015”) shall be applicable to the members and alternates of the BoR. In order to verify the compliance of the independence obligations of the Board members and alternates, a Declaration of Interests and a curriculum vitae shall be submitted on an annual basis and, where appropriate, be updated and published on the Agency’s website. The BoR members and alternates shall also explicitly declare at each Board meeting any potential conflict of interests with respect to any point on the agenda of the meeting.
- 12.2 Any deliberations of the BoR under chapter 4.2 of the Annex to Decision AB No. 02/2015 shall be subject to the regular voting rules as laid down in Article 6. If a



member is subject to a Breach of Trust procedure pursuant to chapter 4.2.5 of the Annex to Decision AB No. 02/2015, he/she shall not participate in the deliberations of the BoR on the breach of trust, but be replaced by his/her alternate or an authorised proxy (and vice versa).

- 12.3 The Board of Regulators' review panel as referred to in chapters 4.2.3.2 and 4.3.3.2 of the Annex to Decision AB No. 02/2015 shall consist of the Chair, the Vice-Chair and a Member of the Board of Regulators appointed by the Board, with the Director of the Agency as observer and a legal expert of the Agency as secretary. For the Chair, the panel shall consist of the Vice-Chair and two appointed Board Members, with the Director of the Agency as observer and a legal expert of the Agency as secretary. For the Vice-Chair, the panel shall consist of the Chair and two appointed Board Members, with the Director of the Agency as observer and a legal expert of the Agency as secretary.
- 12.4 Any deliberations of the Board of Regulators' review panel under chapters 4.2.3.2 and 4.3.3.2 of the Annex to Decision AB No. 02/2015 shall take place by simple majority of its Members.

## Annex 1

### Power of Attorney

The Member: [name]

Hereby appoints as his/her attorney-in-fact: [name]

To represent him/her at the meeting of the Board of Regulators of the Agency for the Cooperation of Energy Regulators, to be held:  
on [date]  
at [address]

#### With the following Powers

The attorney-in-fact may, on behalf of the member:

1. Attend the meeting of the Board of Regulators
2. Participate to the discussion on the Agenda items with the following power:

- Participate to the vote (Vote for or against) on all the items of the Agenda
- Vote against on the following item(s): \_\_\_\_\_
- Vote for on the following item(s): \_\_\_\_\_

Further comments: \_\_\_\_\_

Signed in \_\_\_\_\_ on \_\_\_\_\_

Signature and name of the Signatory:

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