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**OPINION OF THE AGENCY FOR THE COOPERATION OF ENERGY
REGULATORS No. 10/2012**

of 19 December 2012

**ON ENTSO-E'S NETWORK CODE ON CAPACITY ALLOCATION AND
CONGESTION MANAGEMENT**

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 (hereinafter the "Agency"), 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 4 December 2012, 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 16 September 2011, to start the drafting of a network code, covering optimal and coordinated use of transmission network capacity, day-ahead capacity allocation and intraday capacity allocation and to submit it to the Agency pursuant to Article 6(6) of Regulation (EC) No 714/2009 by the end of September 2012.
- 3) On 27 September 2012, ENTSO-E submitted to the Agency the Network Code on Capacity Allocation and Congestion Management (the "Network Code"), accompanied by a supporting document "Network Code on Capacity Allocation &

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)

Congestion Management (CACM), Explanatory Document” (the “supporting document”)⁴.

- 4) For the assessment of the Network Code’s content in this opinion, the supporting document was also taken into account.
- 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. Implementation of some aspects of the market models set out in the Network Code is already well advanced in some parts of the European Union, but complete implementation is still needed to achieve the commitment to deliver the single market in electricity by 2014. This Network Code is therefore important to provide a robust and legally enforceable basis on which to extend the implementation throughout the European Union within this timescale.
- 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 advisory group met five times, with dedicated time given to stakeholders to present their views and concerns. In addition, ENTSO-E organised two public workshops open to all interested stakeholders. The minutes, presentations and other working material used at these events are well documented on ENTSO-E’s web page. Furthermore, ENTSO-E arranged bilateral meetings with a number of relevant stakeholders. The importance of stakeholder feedback for the development of the Network Code is to be emphasised. The supporting document includes a description of comments received and changes made based on consultation responses. The Agency commends the stakeholder engagement by ENTSO-E in the preparation of this Network Code.
- 7) 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. In particular, the Network Code and the other network codes to be developed by ENTSO-E in the areas of forward capacity allocation, electricity balancing, operational security and operational planning and scheduling, pursuant to the Framework Guidelines on Capacity Allocation and Congestion Management for Electricity, the Framework Guidelines on Electricity Balancing and the Framework Guidelines on Electricity System Operation should provide a consistent and coherent set of rules for capacity calculation, allocation and congestion management across different timeframes and across different markets.

⁴<https://www.entsoe.eu/resources/network-codes/capacity-allocation-and-congestion-management/>

- 8) The Network Code is also strongly interrelated with governance aspects. These focus on the relationship between Transmission System Operators (TSOs) and Power Exchanges, as Power Exchanges play an important role in the implicit allocation of day-ahead and intra-day capacities. The tasks and responsibilities of these entities need to be clearly defined for the proper operation of allocation procedures. To that end, the European Commission worked together with stakeholders on separate governance guidelines, which are closely linked to the Network Code. The Agency understands that the Commission intends to modify the Network Code to incorporate the governance elements entirely before it proposes the Network Code for comitology. The Agency supports this approach, which implies that the Network Code as submitted by ENTSO-E will require further changes before it can be proposed for adoption,

HAS ADOPTED THIS OPINION:

The Network Code submitted by ENTSO-E to the Agency on 27 September 2012 is broadly in line with the Framework Guidelines and the objectives stated therein.

The Agency commends 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 shall help facilitate market integration as well as non-discrimination, effective competition and the efficient functioning of the market.

The Agency notes the significant efforts of ENTSO-E to define the requirements and responsibilities of TSOs and other entities performing functions within coordinated capacity calculation, allocation and congestion management in general. The Agency also appreciates that the Network Code defines valuable standards and processes, which will support the implementation of the target model for electricity, including processes for further elaboration of methods and terms and conditions, subject to regulatory approval.

However, in a few specific areas, the Network Code does not fully comply with the Framework Guidelines or adopts approaches based heavily on the *status quo* and therefore not fully contributing to the achievement of the objectives stated in the Framework Guidelines. The Agency considers that progress towards the delivery of the single market in electricity by 2014 would have been better served by clearly identifying requirements that should be harmonised on a pan-European basis and including them in the Network Code itself. However, considering the importance of the timely adoption of the Network Code for 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, the Agency focuses its concerns in this opinion on the specific points listed below. The Agency is mindful that the potential for future amendments to the Network Code, once adopted, may provide an avenue to address the opportunities missed at this stage in the light of better information gained from practical experience with early implementation.

The Agency would welcome changes to the Network Code by ENTSO-E to address the points listed below. The Agency also notes that other changes to the Network Code are envisaged by the Commission to incorporate governance aspects and offers to support this process.

Specific concerns with regard to the Network Code are:

1. Entry into force and application

The Framework Guidelines require that the Network Code defines the deadlines for the implementation of the target model, with 2014 as the final target for the completion of the Internal Energy Market, as set by the European Council in February 2011. Thus, deadlines for establishing the methodologies or terms and conditions, which are essential for the implementation of the Target Model, should be established consistently with the final target.

Article 97(2) of the Network Code indicates that specific chapters of the Network Code shall apply only after the approval of some methodologies or terms and conditions, subject to the processes defined in specified articles within those chapters. This has two important implications. Firstly, the application of these chapters is conditional on development and approval procedures defined in these same chapters, which essentially gives no obligation to apply the provisions contained in these chapters. Secondly, whole chapters of the Network Code, and not just the provisions related to the approval of relevant methodologies or terms and conditions, will apply at different times in different regions. Since the whole Network Code should apply at the time of its entry into force, the deletion of Article 97(2) is suggested.

2. Description and coordination of Capacity Calculation

The Framework Guidelines (Section 2.1.1) require that Flow Based and Coordinated NTC Capacity Calculation methods be described in the Network Code.

The Network Code describes general steps of the calculation process without sufficiently detailed description of neither of these Capacity Calculation methods. The Network Code should provide at least a basic description of both methods in particular with regard to specific steps on how the final Cross Zonal capacities or Flow Based parameters are derived from the Common Grid Model and other Capacity Calculation inputs (e.g. how to determine critical network elements or security margins). Without such basic description provided in the Network Code, the process for subsequent approval of the proposed Capacity Calculation methodology against the legal requirements is made more difficult and the risk of inconsistent approaches is increased.

Coordinated use of the transmission network through coordinated capacity calculation and allocation is one of the core requirements of the Framework Guidelines. Coordinated capacity calculation is also required in Annex I to Regulation (EC) No. 714/2009.

The Network Code puts significant focus on the coordination of Capacity Calculation, spanning from the creation of the Common Grid Model to the calculation and validation of Cross Zonal Capacities. However, in a few instances the Network Code reduces these

coordination and harmonisation requirements to obliging all TSOs only to “...use best endeavours to progressively harmonise...” different elements within the whole process. This approach is foreseen throughout the whole process of Capacity Calculation, from the creation of Individual Grid Models, the creation and harmonisation of Capacity Calculation inputs and the harmonisation of Capacity Calculation Methodology across Capacity Calculation Regions.

The Agency considers that the requirement to use best endeavours is not sufficiently strong to achieve the objectives as required by the Framework Guidelines (Section 2.1) and Article 4 of the Network Code. The Agency recognises the need for some specific local arrangements, provided that these are thoroughly justified and that the impact of non-harmonised approaches on the functioning of the regional or European market is regularly assessed in the Biennial report on Capacity Calculation. However, fully coordinated Capacity Calculation cannot be achieved without sufficient harmonisation. Thus, the Network Code should define a robust requirement to achieve harmonisation of Individual Grid Models and Capacity Calculation inputs. Furthermore, the Network Code should also require that Capacity Calculation methods of the same type (i.e. Flow Based or Coordinated NTC) are progressively harmonised across different Capacity Calculation Regions to the extent required to ensure efficient use of the network.

3. Redispatching and countertrading arrangements

Redispatching and Countertrading are important elements of efficient congestion management. The Agency acknowledges that the Network Code includes a general basis for the application of Redispatching and Countertrading, as well as for their future improvements. Nevertheless, the Framework Guidelines require that “*TSOs implement coordinated redispatching/countertrade at least at regional level, with a fair allocation of congestion costs between countries/zones*”. While TSO coordination is essential to achieve full efficiency in applying these measures, the Network Code does not specifically oblige TSOs to share remedial actions and to coordinate fully their activation within Capacity Calculation Regions.

The Framework Guidelines also require that “*TSO shall ensure that the pricing of generation capacity reservation does not distort the market and to coordinate capacity reservation conditions*”. The Network Code allows the pricing of redispatching actions to be based on market prices or costs, which may be implemented in a way which does not meet these requirements from the Framework Guidelines to avoid distortions on the market and to coordinate capacity reservation conditions. In particular, non-harmonised pricing of redispatching will have an important influence on the market as well as on the efficiency of coordinated redispatching and associated cost sharing. The Agency therefore considers that a more stringent path towards regional redispatching/countertrading methodologies, with limited distortions to the market, and coordinated capacity reservation conditions should be included in the Network Code. The Network Code should therefore define an obligation on TSOs within each Capacity Calculation Region to propose a regional coordinated redispatching/countertrading methodology, which must fulfil the above requirements of the Framework Guidelines.

4. Regulatory approval procedures

Article 8 of the Network Code addresses the approval competences of NRAs as defined in Articles 37 of Directive 2009/72/EC. These include the competences of NRAs to approve the terms and conditions (or at least the methodologies) for access to cross-border infrastructures, including the procedures for the Allocation of capacity and congestion management (hereinafter referred to as “methodologies or terms and conditions”). Paragraphs 3, 4 and 5 of Article 8 of the Network Code determine the required geographical scope of coordination amongst NRAs following an exhaustive list of methodologies or terms and conditions to be approved.

The Agency welcomes the approach to address all regulatory approval procedures in a single article. However, Article 8 of the Network Code does not provide sufficient clarity on the following issues:

- Article 8 limits the approval competences of NRAs to methodologies used to define or calculate the terms and conditions. Furthermore paragraphs 6, 8 and 9 of Article 8 only refer to procedures for the allocation of capacity and congestion management, whereas the reference should be made to the methodologies or terms and conditions;
- The provision, in a generic clause, of an exhaustive list may be too rigid: some specific items to be approved by NRAs, acting under slightly different jurisdictions in Europe, are missing in the list (e.g. the approval of the publication time of day-ahead market coupling results) or could be missed in the future, following, for instance, a later amendment to the Network Code, and thus lead to a lack of clarity upon the exact scope of competences of the NRAs. Article 8 should thus specify that the list is non-exhaustive and is without prejudice to other provisions of the Network Code explicitly referring to Article 8 as well as to relevant competences of NRAs pursuant to Article 37 of Directive 2009/72/EC;
- Article 8 lacks clarity on the level of coordination required from TSOs and NRAs. It should be clarified that the involved TSOs, according to the determined geographical scope of coordination, shall develop common proposals for methodologies or terms and conditions and submit them for approval to their respective NRAs and that the NRAs concerned shall closely consult and cooperate with each other and aim to reach an agreement within the period referred to in Article 8 of Regulation (EC) No 713/2009, with the exception of methodologies or terms and conditions pursuant to the Network Code which are based on a proposal from one TSO or which do not require the involvement of more than one NRA;
- Article 37(9) and (10) of Directive 2009/72/EC entrusts NRAs with the competence to request amendments to methodologies or terms and conditions. Article 8(8) of the Network Code limits this competence to the proposals submitted by TSOs to NRAs, omitting the general competence to request amendment to already approved terms and conditions or methodologies;
- In a few Articles within the Network Code (e.g. Article 19), the competences of NRAs to request amendments are mixed with the competences of TSOs to launch a reassessment. The Network Code should not mix these two competences, as competences of NRAs are given in the Directive 2009/72/EC and should be covered in Article 8 of the Network Code;

- Besides the methodologies or terms and conditions defined in Article 8(3) to (5), the Network Code also provides for the approval of conditions for explicit access to Intraday capacity pursuant to Article 92, approval of the introduction of sophisticated products and removal of Explicit Allocation pursuant to Article 93, and approval of Intraday Cross Zonal Gate Opening Time pursuant to Article 67. The lists in Article 8 should be augmented with these approval procedures;
- The geographical scope of approval for some methodologies or terms and conditions in Article 8, paragraphs 3, 4 and 5 is not entirely clear. Articles 42, 81 and 82 define the back-up procedures for Market Coupling and Methodology for sharing Congestion Income and provide that the proposals should come from all Market Coupling Operators and from all TSOs. However, in Article 8, the approval of these two methodologies seems to be on a national level. Furthermore, the Network Code is inconsistent in naming the Methodology for sharing Congestion Income.

5. Assessment of bidding zones

The Framework Guidelines require that “...*the assessment of bidding zones shall be prepared in a region-wide coordinated way, also taking into account possible impact on other zones in the respective region*”. Article 37(1)(a), (b) of the Network Code foresees that the process for review of bidding zones can be launched by all NRAs. Such involvement of all NRAs seems inefficient and unnecessarily cumbersome. Instead, the Network Code should provide more flexibility, such that relevant NRAs within a meaningful geographical area (considering the influence on other networks) can coordinate and agree together to launch the review of the bidding zones. The relevant set of NRAs for such a review could be determined by a recommendation of the Agency.

With respect to specific national reviews of the bidding zone configuration defined in Article 37(1)(c), the Network Code should also allow the NRA to launch a review directly.

6. Intra-day regional auctions

The Framework Guidelines require that “*the Network Code shall envisage that, where there is sufficient liquidity, regional auctions may complement the implicit continuous allocation mechanism*” for the intraday timeframe. Article 71 of the Network Code defines the conditions for approval of complementary regional auctions, however, given the definition of the Capacity Management Module (Article 2), the requirements on the Intraday Cross Zonal Gate Closure Time (Article 67(3)) and the conditions for complementary regional auctions (Article 71), the implementation of complementary regional auctions may be practically unfeasible.

Article 2 of the Network Code provides a definition of the Capacity Management Module, which does not enable the allocation of Cross Zonal Capacities by means of an implicit regional auction. Additionally, Article 67 defines the maximum time for the Intraday Cross Zonal Gate Closure Time, but no flexibility in this respect is provided in Article 71 to enable intraday implicit auctions. While the Agency welcomes the harmonisation requirements with respect to the pan-European intraday solution, the Network Code should, when defining the modalities of complementary regional auctions (Article 71), provide some flexibility of

Intraday Cross Zonal Gate Closure Time that respects at least the time needed to perform the intraday implicit auction.

The Agency considers that these points of the Network Code should be revised in order to guarantee that the Framework Guidelines provisions on intraday regional auctions are respected.

7. Definition of a common timetable

The Framework Guidelines require that the Network Code shall define a common timetable (including publication of available capacity, gate closure where applicable, publication of results and, when applicable, ex post analysis) for day-ahead and intraday timeframes respectively. The Network Code defines several deadlines with respect to the operation of Day Ahead market coupling. Some deadlines applicable to Market Coupling Operators are defined exactly (e.g. Day Ahead Gate Closure Time, Article 54(2)) or at least the maximum deadline is provided (e.g. publication of market information, Article 58(2)). On the other hand, some deadlines applicable to TSOs (e.g. Day Ahead Firmness Deadline, Article 76) are defined in a flexible way, via the proposal from TSOs followed by public consultation and regulatory approval.

The Network Code should define those deadlines in a clear, consistent and proportionate manner having in mind the harmonisation requirements defined in the Framework Guidelines and respecting the need for flexibility and the need for market participants to have sufficient time for their trading processes.

8. Compensation in case of Force Majeure and Emergency Situation

Article 80(3)(d) of the Network Code defines that, for capacity allocated explicitly, Market Participants shall be entitled to a compensation equal to the value of the Capacity set during the Explicit Allocation process. This contradicts the Framework Guidelines, which require full financial firmness in case of explicit allocation of capacities unless specific derogation conditions apply. In particular, the Framework Guidelines require that, except in the case of Force Majeure, capacity holders shall be compensated for any curtailment and that this compensation is generally to be based on the price difference between the concerned zones in the relevant timeframe.

Article 80(2) of the Network Code also foresees that the TSO which invokes Force Majeure or Emergency Situations shall publish the notification describing the nature of the Force Majeure and its probable duration. This is welcome but the Framework Guidelines also require that such notification should be sent directly to the contracting party.

9. Cost recovery

Article 85 of the Network Code provides for a general principle for cost recovery and cost acknowledgement (“reasonable and proportionate”, “in a timely manner via network tariffs”). Further Articles provide more details on different cost types.

The Agency considers that this Article goes beyond the scope envisaged in the Framework Guidelines for treatment of costs. Considering the subsidiarity principle, the deletion of this Article from the Network Code is suggested.

10. Objectives of the Network Code

The Framework Guidelines stipulate in Section 2 on “Optimal and Coordinated Use of Transmission Network Capacity” that “*Capacity calculation and the definition of zones for CACM are important elements for ensuring optimal use of transmission network capacity in a coordinated way*”. The optimal use of the available transmission infrastructure is seen as a general objective of capacity calculation and zones definition. The more general objective indicated in the Framework Guidelines ensures that the day-ahead calculation and allocation, the intraday calculation and allocation and redispatching/countertrade actions contribute together to an optimal use of the transmission network.

Therefore, the Network Code should include an additional objective to achieve optimal use of the transmission network in Article 4.

11. Consultation and Transparency

The Framework Guidelines does not detail particular requirements for how consultation should be conducted or for transparency of methodologies and terms and conditions (not least as all of the processes in the Network Code were generally not envisaged in the Framework Guideline). The Agency considers that where new processes are introduced by the Network Code they should meet the objectives of the Framework Guideline, which in turn implies a requirement to follow well established good practice in these areas.


In this light, the Agency is concerned that the Network Code (Article 5) does not define appropriate requirements for the consultation process and stakeholder involvement. The Network Code provides for consultation of the methodologies or terms and conditions at least with the envisaged Stakeholder Committee. However, such consultation process does not meet the existing best practices on public consultation. The Network Code should presume that any consultation is open to the wider public with all information freely available on a web site. In exceptional cases and when thoroughly justified, the Network Code may allow for a consultation via the Stakeholder Committee instead of the wider public.

Article 5(2) also defines the methodologies or terms and conditions, which shall not be subject to any public consultation. Among these, at least the Redispatching and Countertrading arrangements should be excluded from this list and included in Article 5(1). Redispatching and Countertrading arrangements can have a significant impact on the market, in particular within the intraday and balancing timeframe and thus should be subject to consultation.

Article 6(2) of the Network Code foresees that those methodologies which are not being consulted on shall not be made publicly available. The Agency considers that this provision has not been duly justified, including in the supporting document, and thus should be removed.

Done at Ljubljana on 19 December 2012.

For the Agency:


Alberto Pototschnig
Director



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