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**ACER RECOMMENDATION n° 01/2012**

on Article 2(1)(n) of the Commission proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (COM(2011) 656 final)

THE AGENCY FOR THE COOPERATION OF ENERGY REGULATORS (the Agency)

HAVING REGARD to Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing a European Agency for the Cooperation of Energy Regulators (hereafter referred to as "Regulation (EC) No 713/2009" and "Agency"), and, in particular, Articles 5, 6(4), 7(3), 11, 15(1) and 17(3) thereof,

HAVING REGARD to the favourable opinion of the Agency's Board of Regulators of 16 February 2012,

WHEREAS:

- (1) According to Article 5 of Regulation (EC) No 713/2009, the Agency may provide, on its own initiative, a recommendation to the European Parliament, the Council and the Commission on any issue relating to the purpose for which the Agency has been established.
- (2) Pursuant to Article 6(4) of Regulation (EC) No 713/2009, the Agency shall submit a non-binding framework guideline to the Commission where requested to do so. On this basis, on 29 July 2011 the Agency submitted the Framework Guidelines on Capacity Allocation and Congestion Management for Electricity, FG-2011-E-002 (hereafter referred to as the "FG CACM for Electricity").
- (3) Pursuant to Article 7(3) of Regulation (EC) No 713/2009, the Agency has to provide a framework within which national regulatory authorities can cooperate, and to promote cooperation between the national regulatory authorities at regional and Community level. Consequently, the Agency is also responsible for supporting and coordinating the activities of the Regional Initiatives so that they can contribute to the implementation of the internal electricity and natural gas markets. For this purpose, the Agency has presented, *inter alia*, a cross-regional roadmap for long-term transmission rights in which national regulatory authorities, under the coordination of the Agency, and Transmission System Operators (TSOs), under the coordination of the European Network of Transmission System Operators for Electricity, committed themselves to

implement certain projects in relation to long-term transmission of electricity.

- (4) Pursuant to Article 11(1) and (2) of Regulation (EC) No 713/2009, the Agency has to monitor the internal market in electricity and natural gas, in particular the retail prices and access to networks, to make public the results of this monitoring in an annual report, and to identify in this report any barriers to the completion of the internal energy market. Article 11(3) of Regulation (EC) No 713/2009 allows the Agency, when publishing its annual monitoring report, to suggest to the European Parliament and to the Commission measures that could be taken to remove the aforementioned barriers. In addition, as stated in Recital 8 of Regulation (EC) No 713/2009, the Agency may always inform the European Parliament, the Commission and national authorities of its findings from the monitoring where it considers such information as appropriate.
- (5) Efficient electricity and natural gas markets require access to the transmission systems. In particular, efficient access to scarce cross-border transmission capacity is essential for admitting trade between Member States and, thus, for enhancing competition. In this respect, long-term supply contracts and corresponding long-term transmission rights are a significant market feature, for example both as an incentive for producers to enter a market and as a guarantee for customers to obtain reliable supply. However, despite its advantages, trade on a long-term basis involves the risk that the conditions between contracting and delivery may change so that the execution of a supply contract becomes unprofitable. Therefore, to encourage trade across borders (or between different price zones), there must be the possibility for market participants to hedge against that risk. Such hedging can be achieved through Physical Transmission Rights (PTRs) and Financial Transmission Rights (FTRs) issued by TSOs or service providers acting on their behalf. In general, PTRs give its holder the right to physically transport electricity or natural gas, subject to the use-it-or-sell-it (UIOSI) principle in case of non-nominating the right, whilst FTRs entitle its holder to claim the price difference between two price zones, i.e. the value of access to the interconnector at that time. Other important elements of the currently envisaged concept of PTRs and FTRs are that they are related to network capacity, that they can be curtailed by the TSOs concerned, that they are auctioned and that they can be traded on a secondary capacity market.
- (6) Pursuant to Article 17(4) in conjunction with point 2.12 of Annex I of Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, transmission capacity shall be freely tradable on a secondary basis and TSOs shall enable such secondary trading. Similarly, Articles 16(3) and 22 in conjunction with point 3.1 (e) of Annex I of Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 require TSOs to take reasonable steps to allow and facilitate capacity trade on the

secondary market. On this basis, Sections 4.1 and 4.2 of the FG CACM for Electricity specify that the Capacity Allocation and Congestion Management Network Code(s) shall foresee that TSOs provide a single platform for anonymous secondary trading in PTRs and FTRs at European level. While Section 4.1 of the FG CACM for Electricity stipulates that the options for enabling risk hedging for cross-border-trading are FTRs or PTRs with UIOSI (unless appropriate cross-border financial hedging is offered in liquid financial markets on both sides of an interconnector), currently only PTRs are offered by TSOs in the European Union. In the meantime, the cross-regional roadmap for long-term transmission rights has identified the implementation of FTRs or PTRs with UIOSI as a potential way forward in building-up the Internal Electricity Market by 2014. For the gas sector, similar specifications are possible.

- (7) Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (hereafter referred to as “MiFID”) in conjunction with Regulation (EC) No 1287/2006 implementing Directive 2004/39/EC makes the provision of services concerning financial instruments subject to specific regulatory requirements, such as the prior authorisation of these services, minimum capital requirements, and transaction reporting and record keeping obligations. On 20 October 2011, the Commission adopted proposals for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council, COM(2011) 656 final (the MiFID proposal) and for a Regulation of the European Parliament and of the Council on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories, COM(2011) 652 final.
- (8) If transmission rights, dependent on their specific features, were to be governed by the regulatory requirements applicable to financial instruments under the MiFID regime, this would have negative effects on the completion of the internal energy market: Relevant market players (especially TSOs, producers and suppliers, including energy traders), who otherwise do not fall within the scope of MiFID, would regard the requirements under MiFID as too burdensome and refrain from trading in transmission rights. This would reinforce existing trade barriers inherent in the system of electricity and natural gas transmission, hinder secondary trading in transmission rights and naturally stifle competition. It would also clearly contradict and undermine the objectives set out in the FG CACM for Electricity and the cross-regional roadmap for long-term transmission rights. Therefore, to prevent and remove these trade barriers and to allow the implementation of the cross-regional roadmap for long-term transmission rights consistent with the FG CACM for Electricity, transmission rights need to be exempted in general from the EU’s regulatory framework for financial instruments and in particular from MiFID.
- (9) Possibly in anticipation of these negative effects, the Commission proposed to exempt TSOs under certain conditions from MiFID. Pursuant to Article 2(1)(n)

of the MiFID proposal, the Directive shall not apply to TSOs as defined in Article 2(4) of Directive 2009/72/EC or Article 2(4) of Directive 2009/73/EC when carrying out their tasks under those Directives or Regulation (EC) 714/2009 or Regulation (EC) 715/2009 or network codes or guidelines adopted pursuant to those Regulations. This exemption is to be endorsed in principle. However, to avoid any legal uncertainty the exemption should explicitly refer to the TSOs' issuance of transmission rights and to the TSOs' provision of a platform for secondary trading. Further, to minimise the negative effects of the MiFID requirements on transmission rights' trading, an exemption from those requirements has also to take into account that TSOs may assign the issuance of transmission rights and the operation of a platform for secondary trading to a service provider, and that efficient and non-discriminatory trade in transmission rights requires also the participation of other market players. Consequently, these aspects should be included in the proposed exemption from the MiFID regime, both in the recitals and in the enacting terms of MiFID.

- (10) This exemption from MiFID does not lead to any supervisory gap. In fact, PTRs and FTRs relate to the transportation of electricity or natural gas and are therefore wholesale energy products pursuant to Article 2(4) of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (hereafter referred to as "REMIT"). As such they will have to be reported by market participants, including TSOs, to the Agency according to REMIT and be subject to the market abuse prohibition rules, to the monitoring by the Agency and national regulatory authorities and to the enforcement of potential breaches of market abuse prohibitions stipulated therein.
- (11) This recommendation does not cover other possible energy-related products which – in addition to PTRs and FTRs – could be used for risk-hedging purposes. This shall not mean that similar concerns as those expressed in this recommendation would not emerge if the MiFID requirements were to apply to the trading in these other products. Therefore, the developments of other energy related risk-hedging products, including their treatment under the MiFID and REMIT regimes, will be closely monitored by the Agency.

HEREBY RECOMMENDS:

1. To include, after Recital no 22 of the Commission proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (COM(2011) 656 final), the following recital as number 23 and renumber the subsequent recitals of the proposal accordingly:

*(23) For a well-functioning internal market in electricity and natural gas, and for the carrying out of the Transmission System Operators' (TSOs) tasks under Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009,*

*Regulation (EC) No 715/2009, or network codes and guidelines adopted pursuant to those Regulations, it is necessary that TSOs and their service providers are exempted when issuing transmission rights, in the form of either Physical Transmission Rights or Financial Transmission Rights, and when providing a platform for secondary trading. In order to enable efficient trade in transmission rights it is further necessary to exempt any person when buying or selling those transmission rights.*

2. To modify Article 2(1)(n) of the Commission proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (COM(2011) 656 final) as follows:

*Article 2*

*Exemptions*

*1. This Directive shall not apply to:*

*...*

*(n) transmission system operators (TSOs) as defined in Article 2(4) of Directive 2009/72/EC or Article 2(4) of Directive 2009/73/EC and persons acting as their service providers when carrying out the tasks of TSOs under those Directives or Regulation (EC) 714/2009 or Regulation (EC) 715/2009 or network codes or guidelines adopted pursuant those Regulations, such as the issuance of transmission rights and the provision of a platform for secondary trading, and any other persons when buying and/or selling such transmission rights; this exemption applies only with regard to the aforementioned activities.*

This Recommendation is addressed to the European Parliament and to the Council.

Done at Ljubljana on 22 February 2012.

For the Agency:

  
Alberto Pototschnig  
Director



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