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Introduction to the AGENCY'S POSITION ON THE REGULATORY OVERSIGHT OF (NEW) ENTITIES PERFORMING MONOPOLY OR NEAR-MONOPOLY FUNCTIONS AT EU-WIDE OR REGIONAL LEVEL

The implementation of the Third Energy Package envisages the establishment of new entities performing (new) monopoly or near monopoly functions. Some of these entities/functions have a clear EU-wide coverage (e.g. MCO function operator), while others have a regional scope (e.g. RSCs in electricity; and capacity allocation platforms in gas) with a potential to grow into EU-wide entities. In fact, the Regional approach is an important component of the Energy Union Strategy¹.

The Third Energy Package includes provisions relating to:

- the role and powers of NRAs at national level;
- the cooperation among NRAs, at regional and EU-wide level, including within the Agency;
- the role of the Agency in supporting NRAs in exercising their functions at EU level and in coordinating their actions where necessary, including the Agency's dispute-resolution role and its powers to take individual decisions as a last resort (where NRAs fail to agree).

In this context, under the Third Package, the Agency is called to:

- monitor the regional cooperation of transmission system operators (Article 6(9) of Regulation (EU) No 713/2009);
- provide a framework within which NRAs can cooperate. Where the Agency considers that binding rules on such cooperation are required, it shall make the appropriate recommendations to the Commission (Article 7(3) of Regulation (EU) No 713/2009);

However, the Third Energy Package defines neither a regional regulatory framework, beyond the generic reference to the need for NRAs to cooperate at regional level, nor a specific and robust regulatory framework for entities performing monopoly or near-monopoly functions at EU-wide level.

This emerging regulatory gap was already identified by the Agency in its "Bridge to 2025" Conclusions Paper and in the Agency/CEER response to the European Commission's Energy Market Design consultation, where the development of a robust regulatory framework for the entities performing monopoly or near-monopoly functions at EU-wide or regional level was advocated for both the electricity and gas sectors².

In the same documents, the Agency also presented a number of specific proposals on ways to enhance the robustness of the EU regulatory framework. Some of these proposals may also assist in defining an effective regulatory framework for new entities performing monopoly or near-monopoly functions at EU-wide or regional level, which best reflects the complementarity of action of NRAs and the Agency.

¹ The European Commission's Communication for a "Resilient Energy Union with a Forward-Looking Climate Change Policy" (Brussels, 25.2.2015, COM(2015) 80 final) highlights the objective of "Enhanced regional cooperation within a common EU framework" (page 10). It states that "[t]echnical implementation of the different elements of our Energy Union strategy will be very complex. Some elements, such as new market arrangements for short term markets in gas and electricity or integrating the operations of transmission system operators. should be developed and implemented at regional level as a step towards full EU-wide market integration".

² "We, therefore, see a case for these entities to be regulated, to ensure both cost effectiveness, quality of service and timely delivery of the trading infrastructure to all countries participating in the IEM", Agency/CEER response to the European Commission's Energy Market Design consultation.

Based mostly on these proposals, and on the experience gained so far in the framework of voluntary early implementation and cooperation among NRAs, the Position Paper outlines an approach for an effective regulatory oversight of entities performing monopoly or near-monopoly functions at EU-wide or regional level, taking the principle of proportionality and subsidiarity into account

If the Agency were to be given the additional responsibilities foreseen in the Position Paper for an effective oversight of entities performing monopoly or near-monopoly functions at EU-wide or regional level, its governance, notably with respect to the roles of the Board of Regulators and the Director, would need to be commensurate to the new tasks that the Agency will be called to perform.

Ljubljana, 6 July 2016.

**AGENCY'S POSITION PAPER ON THE
REGULATORY OVERSIGHT OF (NEW) ENTITIES PERFORMING MONOPOLY OR NEAR-MONOPOLY
FUNCTIONS AT EU-WIDE OR REGIONAL LEVEL**

6 July 2016

Introduction

- 1) The Third Energy Package and the Energy Union Strategy pursue the completion of the Internal Energy Market through the complementarity of the EU-wide and regional approaches³.
- 2) The regional approach in the Energy Union Strategy may serve two purposes:
 - in some areas, it is seen as a stepping stone towards a EU-wide approach, i.e. there is a legally-binding roadmap for integrating the regional initiatives across the EU (e.g. electricity market coupling);
 - in other areas (e.g. the definition of capacity calculation regions – CCR – in the electricity sector and capacity booking platforms in the gas sector), it may be a (permanent, or at least a longer-term) feature of the implementation of the relevant Target Model for the Internal Energy Market (as a EU-wide fully-harmonised implementation is currently deemed unnecessary), even though the geographical scope of some regions may expand over time. That said, even in this case, regional implementation should be coordinated such that the option of future convergence is maintained and the risk of distortions being created through divergence avoided.
- 3) Although different activities (e.g. capacity calculation, system operation, balancing and investments in electricity; and capacity allocation, daily balancing and investments in gas) may imply the definition of regions with different geographical scopes, it is desirable to make them as similar and consistent as possible for activities that are closely interrelated. This would help in defining a consistent approach and path towards the completion of the Internal Energy Market and in streamlining and simplifying the regional implementation and oversight.
- 4) At present, there are no explicit provisions in primary legislation or in the Network Codes and Guidelines for the regulatory oversight of entities performing monopoly or near-monopoly functions at EU-wide or regional level, except for the NEMO function in the CACM GL⁴. Therefore, the regulation of these entities and of the functions that they perform (for some

³ In fact, the European Commission's Communication for a "Resilient Energy Union with a Forward-Looking Climate Change Policy" (Brussels, 25.2.2015, COM(2015) 80 final) calls for "Enhanced regional cooperation within a common EU framework" (page 10) and foresees regional development and implementation as a stepping stone towards full EU-wide market integration: "Technical implementation of the different elements of our Energy Union strategy will be very complex. Some elements, such as new market arrangements for short term markets in gas and electricity or integrating the operations of transmission system operators should be developed and implemented at regional level as a step towards full EU-wide market integration".

⁴ However, the robustness of the provisions on the regulatory oversight of NEMOs in the CACM GL is still to be tested.

entities – e.g. RSCs - their functions are still to be defined) is currently only possible through an agreed action or ex-post controls by the NRAs from all the involved jurisdictions using their national powers vis-à-vis the national members of such entities (and not vis-à-vis the entities themselves). However, as the number of the involved jurisdictions grows, the risk that such an approach becomes less robust increases. The limitation of such an approach is most evident in the case of the regulatory oversight of EU-wide entities, where the current regulatory framework requires the agreement and concerted action, on an ongoing basis, by all 28 EU NRAs. The present proposal aims at defining a more robust framework, based on the complementarity of regulatory action at national and EU levels.

EU-wide oversight of entities performing monopoly or near-monopoly functions

- 5) In the case of entities performing monopoly or near-monopoly functions at EU-wide level, their regulatory oversight should be performed by the Agency. The exact form of such an oversight will have to be defined on the basis of an assessment of the risks to the integration and well-functioning of the Internal Energy Market posed by the governance of these entities, the functions they perform and the way in which such functions are performed.
- 6) The regulatory oversight of entities performing monopoly or near-monopoly functions at EU-wide level should in any case incorporate powers for the Agency to obtain any relevant information from such entities⁵, with the possibility of issuing enforceable binding decisions, where appropriate and proportionate.
- 7) The same approach and powers should be envisaged when the regional approach is only a stepping stone towards a EU-wide approach⁶, as there is no point in deploying a regional regulatory oversight which would be short-lived (due to the process of integration).

Regional oversight of entities performing monopoly or near-monopoly functions

- 8) When the regional approach is a more permanent feature of the Target Model/Network Codes/Guidelines implementation (and not a short-term stepping stone towards full EU market integration), the issue arises as to the most appropriate governance/regulatory oversight structure⁷. In this case, in order to ensure appropriate regulatory oversight at regional level, the respective roles, duties and responsibilities of the (new) regional entities and of their national members needs to be more clearly defined.
- 9) Regions are likely to differ in size and evolve over time. However, such regional implementation needs to be coordinated so that the option of future convergence is maintained and the risk of distortions being created through any possible divergences be

⁵ The Agency would then be in a position to share this information with NRAs when this is necessary for the latter to fulfil their mandate.

⁶ This is for example the case of the different market coupling regional cooperation arrangements. Other instances might be identified. See also footnote 3 above.

⁷ Under the current framework, the Agency must cooperate with national regulatory authorities and transmission system operators to ensure the compatibility of regulatory frameworks between the regions with the aim of creating a competitive internal market in electricity. However, as a result of regional cooperation and further integration, new entities might also emerge and clarity over their responsibilities is needed.

avoided. The Agency is ideally placed to perform this assessment, including through its Network Code implementation monitoring activity.

- 10) Regional implementation should be promoted by the NRAs in the region cooperating among themselves (including through existing regional cooperation structures). The same NRAs also should be responsible for the regulatory oversight of those entities that perform monopoly or near-monopoly activities at regional level⁸. The exact form of such an oversight will have to be defined on the basis of an assessment of the risks to the integration and well-functioning of the Internal Energy Market that might be posed by the governance of these entities, the functions they perform and the way in which such functions are performed. The Agency, consistently with its mandate, can support NRAs' action at regional level and coordinate it where necessary.
- 11) Having regard to the established principles⁹, the Agency should also be responsible for promoting and monitoring the consistency of regional implementation, and of the activities of entities that perform monopoly or near-monopoly activities at regional level, across the different regions,. Therefore¹⁰:
 - entities performing monopoly or near-monopoly functions at regional level should inform the relevant NRAs and the Agency of any relevant development related to their governance and activities;
 - NRAs, cooperating at regional level, shall inform the Agency of any relevant action that they take or intend to take vis-à-vis such entities, directly or through the entities' national members.
- 12) If, despite its coordination of regional cooperation, the Agency identifies instances of incorrect or inconsistent implementation, it should alert the concerned NRAs.
- 13) If, despite the Agency's alert, the situation persists, the Agency should issue an opinion or a recommendation, urging the concerned NRAs to take remedial actions. If those NRAs do not comply with the opinion or recommendation of the Agency, the issue may be referred to the Commission.

Implementation of the proposed approach

- 14) The approach outlined above is consistent with and based on key elements of the Third Package, which clearly set out:
 - the requirement for the NRAs to cooperate with each other and with the Agency for the purpose of integrating their national markets at regional levels;
 - the Agency's support and coordination role, including through the Board of Regulators.

⁸ Unless the regional approach is only a stepping stone towards a EU-wide approach,

⁹ Under the Third Package, the Agency is responsible for coordinating NRAs' action at EU level, for monitoring and analysing the implementation of the network codes and the Guidelines and for monitoring regional cooperation among TSOs.

¹⁰ The proposal in the "Bridge to 2025" Conclusions Paper and in the Agency/CEER response to the European Commission's Energy Market Design consultation that the Agency be given powers to require information necessary for its monitoring activities from any relevant stakeholder in the energy sector is consistent with and support this approach.

- 15) However, the implementation of the proposed approach also requires legislative changes regarding the Agency's role and responsibilities in the future Internal Energy Market, some of which were already proposed by the Agency in its "Bridge to 2025" Conclusions Paper and in its response to the European Commission's Energy Market Design consultation. Annex I summarises these proposals and illustrates their relevance for the effective regulatory oversight of entities performing monopoly or near-monopoly functions at EU-wide or regional level.
- 16) Moreover, the approach outlined above would greatly benefit from legislation further clarifying the roles and responsibilities of the Agency and NRAs for the effective regulatory oversight of entities performing monopoly or near-monopoly functions at EU or regional level and, more specifically:
- in respect of the regulatory oversight of entities performing monopoly or near-monopoly functions at EU level, or at regional level when this is a step towards full EU-wide integration:
 - o an obligation for the Agency to monitor the governance, the activities and the performance of such entities;
 - o an obligation for such entities to provide all relevant information to the Agency¹¹;
 - o the power for the Agency to issue enforceable binding decisions vis-à-vis such entities, when this is required to ensure the proper functioning of the Internal Energy Market;
 - with respect to the regulatory oversight of entities performing monopoly or near-monopoly functions at regional level (when there is no current plan for their integration at EU level):
 - o an obligation for NRAs to cooperate at regional level for the regulatory oversight of such entities, including by using NRAs' national competences vis-à-vis the national members of these entities. Such regulatory oversight should cover at least the governance, the activities and the performance of such entities;
 - o an obligation for the Agency to promote, support and, where necessary, coordinate NRA cooperation in the regulatory oversight of such entities;
 - o an obligation for such entities to provide all relevant information to the concerned NRAs and to the Agency;
 - o a requirement for NRAs cooperating at regional level in the regulatory oversight of such entities to inform the Agency of any relevant development and of any action that they take or intend to take in this respect;
 - o the power for the Agency to issue opinions and recommendations when NRAs, cooperating regionally for the regulatory oversight of such entities, fail to ensure proper and consistent implementation of the Network Codes, Guidelines or of the common/consistent principles.

¹¹ See footnote 5 above.

Annex I: Summary of the proposals for a more robust regulatory framework for the Internal Energy Market, presented in the “Bridge to 2025” Conclusions Paper and the comments on the European Commission’s Energy Market Initiative consultation, which are relevant for the effective regulatory oversight of entities performing monopoly or near-monopoly functions at EU or regional level

1. Effective oversight of the ENTSOs

Section 5.3 of the “Bridge to 2025” Conclusions Paper:

“The Agency, under the current framework, monitors the execution of the certain tasks of the ENTSOs and reports to the Commission. In this regard, the Agency can issue only non-binding opinions and recommendations addressed to the ENTSOs. Stronger oversight powers for the Agency (for example, the possibility to issue binding decisions, where appropriate and proportionate, with regard to the ENTSOs’ core tasks) should ensure that the ENTSOs’ responsibilities relating to the development and implementation of Guidelines, Network Codes and the TYNDP are subject to appropriate regulatory scrutiny at EU level along with adequate transparency requirements.”

This proposal could serve as a model for the regulatory oversight by the Agency of other entities performing monopoly or near-monopoly functions at EU level.

2. Approval by the Agency of binding subsidiary instruments in the case of EU-wide proposals prepared under Network Codes and Guidelines

Section 5.5 of the “Bridge to 2025” Conclusions Paper:

“In respect of the approval of binding subsidiary instruments in the case of EU-wide proposals prepared under [...] Guidelines, it is recommended that the EC considers proposing new legislation so that the Agency be empowered to take decisions directly rather than only in those cases where all NRAs fail to agree”.

This proposal is relevant, as the same approach is proposed for the regulatory oversight of entities performing monopoly or near-monopoly activities at EU level, where the assignment of regulatory oversight responsibilities and powers to the Agency would lead to a more robust approach than the one based on all NRAs having to agree on a common regulatory oversight strategy and on its ongoing implementation.

3. Effective regulatory oversight of bodies performing monopoly or near-monopoly functions at EU or regional level

Section 5.6 of the “Bridge to 2025” Conclusions Paper:

“[...] there is currently no clear and explicit framework for the regulatory oversight of mandatory EU TSO bodies, such as the future EU Allocation Platform foreseen in the Forward Capacity Allocation Network Code. These bodies are an emanation of their participating TSOs, who remain ultimately responsible and liable for the actions and services performed by these entities. However, given their EU-wide role it is recommended that they be subject to the regulatory oversight of the Agency on the basis of a specific Governance Guideline from the EC defining a clear and explicit framework for their activities in the context of the IEM.

A similar approach could apply to regional voluntary TSO cooperation bodies such as Capacity Allocating Service Company (CASC), Central Allocation Office (CAO) or Coordination of Electricity System Operators (Coreso) to the extent that they perform functions that need to be regulated.

Bodies with essential EU functions, which are not natural monopolies, are subject to the normal competition rules, even in cases where they hold a dominant position. However, competition law may

be less effective where there is only one player in the relevant market. Consequently, it is recommended that a framework of rules regarding their activities and behaviour is put in place and that there is ex-ante regulatory oversight by the Agency in cases where competition law is not effective and where there is no foreseeable prospect of competition developing.

This concerns, for example, European gas capacity platforms which are a major step towards the implementation of the gas Capacity Allocation Mechanism (CAM) Network Code. Whilst none holds a legal monopoly, currently PRISMA is the major gateway for shippers to obtain access to the gas transmission grid and to purchase capacity, although there could be others developed. PRISMA thus has the potential to become, de facto, a monopolistic platform. A similar situation might exist in respect of other entities to whom TSO activities can be transferred, such as those foreseen in the gas Balancing Network Code.”

The proposed approach presented in the Position Paper aims at implementing the above recommendations.

4. Powers for the Agency to obtain the information it requires for the effective monitoring of the Internal Energy Market

Section 5.9 of the “Bridge to 2025” Conclusions Paper:

“It is recommended that the EC considers proposing new legislation such that the Agency be given adequate powers to fulfil effectively the important monitoring responsibilities assigned to it, including, in particular, in respect of information gathering. In this respect it would also be essential to involve and coordinate these functions with those of the concerned NRAs in a way that safeguards complementarity of action at national and EU levels, and ensures full and effective enforcement.”

The ability of the Agency to monitor regional developments and the activities of entities performing monopoly or near-monopoly functions at EU-wide or at regional level (when this is a step towards EU-wide integration) critically rests on its ability to obtain the necessary information from all relevant stakeholders (including the entities themselves). This would allow the Agency to:

- get access to the contracts and agreements between these entities and their national members, as well as to the governance structure (statutes) of these entities;
- require that these entities report to the Agency about their operation (performance indicators, system evolution, costs, fees, ...) in a synthetic and standardised way on a regular basis;
- require these entities to report to the Agency on any exceptional event, its causes and consequences.

5. Ensuring compliance with the Agency’s binding decisions

Section 5.10 of the “Bridge to 2025” Conclusions Paper:

“Should the Agency be granted decision making powers through new legislation, as we recommended, then appropriate measures should be put in place to ensure compliance with those decisions as far as it is legally possible to do so.”

The enforceability of the Agency’s regulatory decisions related to entities performing monopoly or near-monopoly functions at EU or regional level (in this latter case mostly in connection with the provision of information) is key for an effective regulatory oversight of these entities.



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