

NC IMG informal guidance for the preparatory phases of the network code and guidelines amendment process – dated 5 April 2019

1. Introduction and background

This NC IMG guidance for the preparatory phase of the amendment process is the outcome of the discussions having taken place and as concluded at the NC IMG meeting on 2 July 2018¹ (hereinafter referred to as “the NC IMG amendment guidance”). It reiterated the usefulness to have a consistent preparatory process for amendment proposals regarding existing network codes (NCs) and guidelines (GLs) in electricity and gas in accordance with applicable legislation², notwithstanding the different entry points and channels for proposing and addressing them. It takes due respect to the roles of each party as defined in the legislation and the differences between electricity and gas sectors.

2. Scope

The NC IMG amendment guidance sets out key principles for the preparatory stages of future amendment processes prior to the launch of the formal legislative procedure. It should serve as a basis for discussions at the NC IMG but also at other relevant bodies or fora as the Agency for Cooperation of Energy Regulators (the Agency), the European Electricity stakeholder committees (ESCs) and relevant gas fora as the functionality platform (FUNC). It also sets out the key stages of the preparatory process, along with some criteria to be used for the assessment of the proposals by ACER³ or those involved (i.e. ACER and ENTSOG in FUNC).⁴

3. Key principles

- The future preparatory process should take due respect of the roles and responsibilities of the parties as defined in the legislation in order to safeguard the legitimacy and accountability of the process,

¹ The NC IMG members agreed in July 2018 (see conclusions of the 5th NC IMG meeting [here](#)) that NCs/GLs amendment proposals have to be assessed to determine their nature and urgency and adaptation of NCs/GLs will take place to the extent necessary. The NC IMG members committed to continue working on a common NC amendment process guidance aiming at providing clarity on the roles of the various actors in accordance with the legal framework and the conclusions agreed by the NC IMG and take into account the need for consistency and transparency regarding the treatment of amendment proposals.

² At the moment of the endorsement of this guidance the applicable legislation refers to Regulation (EU) 714/2009 (Electricity Regulation) and Regulation (EU) 715/2009 (Gas regulation). However, the NC ING participants took into account the upcoming changes regarding the amendment process for electricity NCs/GLs that will enter into force with the draft Recast Electricity Regulation (see provisional edition at the time of the endorsement of this NC IMG amendment guidance in the European Parliament’s site [here](#)).

³ These draw from and, where appropriate, replicate the building blocks of the process developed in the ACER Guidance. See Agency Guidance on the Evaluation Procedure for Network Code Amendment Proposals under Article 7 of the Electricity and Gas Regulations, 24 September 2013.

⁴ The formal legislative process, which the European Commission (EC) initiates with its proposals for amendments and concludes with the final adoption of the amendments, is outside the scope of this process. The objective of the NC IMG amendment guidance is to ensure an efficient and robust preparatory stage in order to facilitate the formal legislative stage.

including the thorough assessment of the draft amendment proposals and stakeholder consultations. The NCs/GLs' amendment process should not necessarily replicate the formal NCs' development process and should avoid unnecessary delays.

- The transparency of the whole process and appropriate consultation of ENTSOs and all stakeholders is vital to allow the proper consideration, assessment and justification of amendment proposals. Subject to the stage and nature of the amendment, ACER will and the EC may hold an additional public consultation.
- To the appropriate extent and for consistency purposes, the preparatory stages of the amendment process should apply both to NCs and GLs, notwithstanding the different legal bases for their adoption.
- The preparatory stages of the amendment process should be simple and avoid unnecessary delays. The priority and urgency of amendment proposals will be assessed in a flexible way at any stage, either as a result of ad hoc assessment or after regular reviews; however, efforts will be made to group amendments as far as possible.
- To ensure consistency and transparent cooperation among NC IMG members, regular high-level implementation monitoring reports will be provided to the NC IMG or at working level groups, particularly to highlight progress, problems and bottlenecks that may lead to an amendment request.

4. NCs/GLs amendments process: definition of phases and roles

The amendment process should apply to the amendment of both NCs and GLs, notwithstanding the different legal basis for their adoption⁵. The NC IMG distinguishes between the following stages and roles of the various parties in the amendment process (see Annex 1):

a) Preparatory phase I:

The current legislation does not provide a legal basis for the process to be followed during the initial stages for preparation of an amendment before the preparatory phase II (see below). In particular and only in the case of electricity, the existing NCs and GLs provide for the establishment of ESCs⁶ where the implementation and potential amendment of such NCs/GLs should be discussed. On a voluntary basis, a channel has been established in the gas sector through the creation of FUNC, which is jointly operated by ACER and ENTSOG and which aims at resolving issues within the current network codes.

The NC IMG acknowledges the added value of these platforms and supports their active role as being a platform for discussing and considering potential amendments of NC/GLs before the following phases are launched as described below. Consultations should be held in this stage for the platforms to take an informed decision and all stakeholders are encouraged to use these platforms as initial place to exchange views on potential NC/GLs amendments. Such consultations do not replace though the formal consultation that the Agency and/or the EC may additionally run in the next phases of the amendment process nor do they substitute the preparatory phase II which will follow.

⁵ Articles 7 and 18(5) of the Electricity Regulation Electricity Regulation as amended by the Recast Electricity Regulation (Articles 60 and 61) and Articles 7 and 23(2) of the Gas Regulation respectively.

⁶ See for example article 11 of Commission Regulation (EU) 2015/1222 establishing a Guideline on capacity allocation and congestion management (CACM) according to which "The Agency, in close cooperation with ENTSO for Electricity, shall organise stakeholder involvement regarding single day-ahead and intraday coupling and other aspects of the implementation of this Regulation. This shall include regular meetings with stakeholders to identify problems and propose improvements notably related to the single day-ahead and intraday coupling. This shall not replace the stakeholder consultations in accordance with Article 12."

In this context, ACER may ask ENTSOs to support the ESCs/FUNC significantly in terms of providing technical and administrative assistance. Regarding the ways of working of these platforms, this NC IMG amendment guidance refers to the rules governing each platform respectively⁷.

b) Preparatory phase II:

The NC IMG acknowledges also the crucial role of the Agency in assessing NC/GLs amendments' proposals. This is reflected in the current and future legislation by the fact that NC/GL amendment proposals should be submitted by anyone who may have an interest in that NC/GL to the Agency who should assess them and make a public consultation before tabling a reasoned opinion for an amendment proposal to the EC. The Agency may also propose amendments to the EC on its own initiative. Contributions from all stakeholders, including ENTSOs, regional coordination centres (RCCs), TSOs, the EU-DSO entity for electricity, nominated electricity market operators (NEMOs) or other stakeholders and stakeholder committees and fora as above mentioned will be duly taken into account by the Agency and made public, together with the consultation documents.

In this phase, the Agency will make an assessment using the principles and criteria included in Annex 2 to this NC IMG amendment guidance. When assessing amendments during the preparatory phase I and the formal amendment process respectively other fora and the EC may also use such criteria. To ensure consistency and transparency regarding NC/GLs amendments proposals, the Agency may establish its own dedicated platform or use an existing one if suitable for this purpose. The Agency's formal or, where the EC proceeds on its own initiative, informal involvement in the amendment process has significant advantages, namely ensuring consistency and transparency and a thorough assessment of/consultation upon the proposals before submitted to the EC.

The possibility to propose amendments to the Agency is without prejudice to the right of the EC to launch the formal process on its own initiative. In this case, the EC may still ask the Agency and/or the ENTSOs to provide their technical support and use the platform used by the Agency or ENTSOs for the treatment of such proposals.

c) Formal amendment process:

Taking utmost account of the steps described above, the EC is the only responsible party to present the formal amendment proposal and launch the formal process aiming at adopting a NC/GL amendment. This phase follows the EC's internal rules and, where required, a positive vote from Member States in the Cross-Border Committee and after scrutiny by the European Parliament and the Council. This phase is out of the scope of this NC IMG amendment guidance.

5. Role of the NC IMG

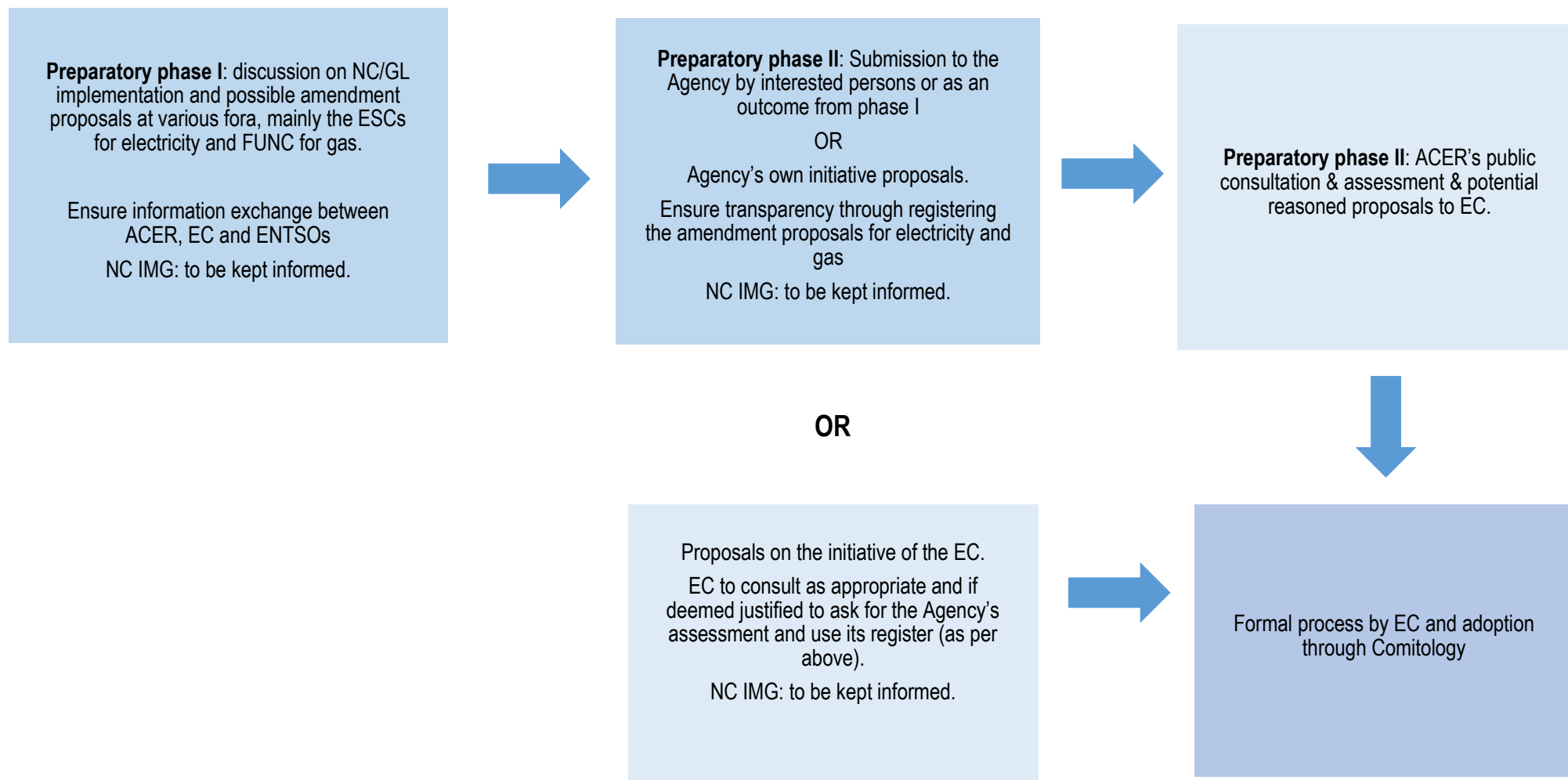
The NC IMG members agree that the group should have a planning role regarding future NC/GL amendment processes setting the priorities and timelines for future NC/GL amendments and assessing

⁷ For the rules governing the functioning of the FUNC platform see: <http://www.gasnfunc.eu/>.

the resources for that purpose. For this purposes, the NC IMG members commit to keep each other regularly informed on working level and/or at relevant platforms.

The NC IMG may, in accordance with its [Reference Paper](#) dated 2 October 2017, provide informal guidance regarding an amendment proposal or on questions regarding the process if requested so by the parties involved in the phases described herein. This may take place in particular in case of bottlenecks, deadlocks or where requested so by the NC IMG members.

Annex 1: NCs/GLs amendment process illustration



Annex 2: Key evaluation criteria for the Agency during preparatory phase II in electricity and in FUNC for gas

The Agency will review the proposals submitted on a more flexible basis rather than with a specified periodicity. This means the assessment will be performed either when a need arises following implementation monitoring or on the basis of the requests submitted, their priority and urgency. At the same time, it makes sense to group the amendments related to a NC/GL so as to ensure the maximum consistency and proper assessment of the impact of various amendments to the entire NC/GL.

- ➔ Pursuant to current and future legislation, persons who are likely to have an interest can only submit draft amendment proposals to the Agency. Given that this criterion is understood as very broad, the Agency will during this stage mainly focus on the merits of the proposal.
- ➔ In order to determine which proposals the Agency should further evaluate, the Agency will verify amongst other things whether such a proposal has already been submitted and evaluated in the past and if it relates to new arguments or facts not known at the stage of the preparation and adoption of NCs/GLs. In order to enable the Agency to review the robustness of the proposal, the Agency will require the stakeholders to provide appropriate justification.
- ➔ Subsequently, the Agency will assess whether the amendment proposals are “consistent with the objectives of the NCs/GLs set out in Article 6(2) of respectively the Electricity Regulation as amended by the Recast Electricity Regulation and Gas Regulation: non-discrimination, effective competition and effective functioning of the market. This evaluation may take into account other relevant criteria that have emerged during the implementation and serve these objectives in practice related to the target models.
- ➔ The Agency will assess the impact of an amendment proposal including the benefits that the proposed amendment may bring, to which extent it facilitates the achievement of the objectives of the NC/GL, the consistency with other NCs/GLs and its proportionality (i.e. whether the amendment is suitable to address the problem).
- ➔ Transparency requirements: for transparency reasons, the Agency shall make public, on an appropriate new or existing dedicated platform, the amendment proposals received, their status in the process, any opinion of the relevant ENTSO, the EU DSO entity for electricity and other relevant stakeholders, where applicable, and the final outcome.
- ➔ Public consultation: the Agency shall organise a formal stakeholder consultation pursuant to Article 7(2) of the Electricity Regulation as amended by the Recast Electricity Regulation and Gas Regulation, thereby allowing any interested parties to provide comments.
- ➔ The amendment proposals that would modify essential elements of the Electricity or Gas Regulations will not be admissible for assessment. The Agency will nevertheless publish any such proposals and accompanying material it has received in a dedicated platform as they may be taken into account by the EC for the report on the review of NCs/GLs pursuant to Article 56 of the recast Electricity Regulation.