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COMMISSION EVALUATION

of 22.1.2014

**of the activities of the Agency for the Cooperation of Energy Regulations (ACER) under
article 34 of Regulation (EC) 713/2009**

1. Introduction

Article 34 of Regulation (EC) 713/2009 of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators¹ (hereafter "ACER") requires the Commission to carry out a regular evaluation of ACER's activities. The evaluation shall cover the results achieved by the Agency and its working methods, in relation with its objective, mandate and tasks as defined in Regulation (EC) 713/2009 and in ACER's annual work programmes. On the basis of the Commission's evaluation, ACER's Board of Regulators shall issue recommendations to the Commission regarding changes to the Regulation, the Agency and its working methods. The Commission may forward those recommendations, together with its own opinion as well as any appropriate proposal, to the European Parliament and the Council.

This is the first evaluation of ACER's activities since its establishment. As the ACER Director took office on 16 September 2010, but ACER formally assumed its role and responsibilities as of 3 March 2011 only², the assessment is mainly focused on the period from March 2011 to November 2013. As ACER is a new agency, the current assessment can only give first indications of its performance. In view of Article 16(3) of Regulation (EC) 713/2009, the Commission foresees a full evaluation exercise to be undertaken during 2014.

The current evaluation is based on the Commission's own assessment of the Agency's activities and the results of a public consultation³.

2. ACER's objective, mandate and tasks

ACER's mission is to assist the National Regulatory Authorities (hereafter 'NRAs') in exercising, at EU level, their regulatory tasks and to coordinate their actions where necessary.

Regulation (EC) 713/2009 entrusts ACER with extensive tasks, including tasks as regards the cooperation of transmission system operators and supervision of the European networks of transmission system operators (hereafter "ENTSOs"), tasks as regards NRAs and tasks as regards cross-border infrastructure. ACER has the task to monitor the functioning of gas and electricity markets in general, and wholesale energy trading in particular. This last task had been added by Regulation (EU) No 1227/2011 on Wholesale Energy Market Integrity and Transparency (hereafter "REMIT")⁴. There are also additional tasks envisaged for ACER in the recently adopted Regulation (EU) 347/2013 on guidelines for trans-European energy infrastructure (hereafter "TEN-E Regulation")⁵.

¹ OJ L 211, 14.8.2009, p.1

² On the day of the entry into force of the Third Energy Package (Directives 2009/72/EC and 2009/73/EC and Regulations (EC) Nos. 713/2009, 714/2009 and 715/2009).

³ The public consultation took place from 17/06/2013 to 18/09/2013. The Commission received 16 responses. The full results of the public consultation, together with a summary, are published at: http://ec.europa.eu/energy/gas_electricity/consultations/20130918_acer_en.htm. Whereas the Commission has taken into account in its assessment a report that ACER commissioned from an external expert and made available to the Commission, the Commission has not commissioned its own expert report for the purpose of this exercise. It has, however, contracted an external expert to provide a report in the first half of next year on the performance of ACER and its Director and on ACER's duties and requirements in the coming years in accordance with Article 16(3) of the Regulation (EC) 713/2009.

⁴ OJ L 326, 8.12.2011, p.1.

⁵ OJ L 115, 25.4.2013, p.39.

Before 30 September of every year ACER adopts and publishes a work programme, in which it sets out the concrete projects it intends to focus on for the following year, taking into account the tasks entrusted to it as well as the instruments and resources available to it. As the work programme shall be adopted without prejudice to the annual budgetary procedure and in order to react swiftly to unforeseen tasks and circumstances, ACER may be asked to carry out a mid-term revision of the annual work program, as it did for 2012. Four work programmes had been adopted till now, covering ACER's activities for the years 2011-2014.

In order to report on the execution of its tasks, ACER adopts and publishes an annual activity report by 15 June of the following year. Two reports had been published till now, covering respectively the 2011 and 2012 activities.

3. Evaluation of ACER's activities

Focus on the right priorities

The Commission considers that during the first two and half years of its operation ACER has focussed on the right priorities. This view is broadly shared by stakeholders. ACER has thereby taken into consideration the comments made by the Commission on its draft work programmes as well as the Commission Decisions establishing the annual priority lists for the development of network codes and guidelines.⁶

As reflected in its consecutive annual work programmes for 2011, 2012 and 2013, ACER has given priority to:

(i) tasks contributing to the completion of the Internal Energy Market (hereafter "IEM") for which the European Council has set 2014 as a target date. ACER's activities in this area have included:

- The drafting of Framework Guidelines and the adoption of opinions on draft network codes prepared by the ENTSOs.
- The adoption of opinions on the draft statutes and rules of procedure of the ENTSOs and on the draft work programmes of the ENTSOs.
- Enhancing the regional cooperation of transmission system operators and of NRAs through active promotion of and involvement in the different Regional Initiatives for gas and electricity.
- Adoption of two monitoring reports on the EU gas and electricity markets, in cooperation with the Council of European Energy Regulators (hereafter "CEER")⁷.

(ii) tasks contributing to the development of transmission networks, as assigned by Regulation (EC) 713/2009 and the TEN-E Regulation for which ACER's activities have so far included:

- The adoption of opinions and recommendations on the draft ten year network development plans (hereafter "TYNDPs") established by the ENTSOs.
- Enabling the establishment of the first list of Projects of Common Interest (PCIs).⁸

⁶ 2013/442/EU: Commission Decision of 21 August 2013 on the establishment of the annual priority lists for the development of network codes and guidelines for 2014 Text with EEA relevance

⁷ The Council of European Energy Regulators (CEER) is a non-profit, voluntary association of energy regulators from Europe that was established in 2000.

(iii) tasks contributing to the implementation of REMIT, for which ACER's activities have included:

- The adoption of guidelines on the implementation of REMIT (3 editions).
- The adoption of a recommendation to the Commission on the records of wholesale energy market transactions.
- The adoption of a Decision determining the registration format to be used for the establishment of a European register of market participants.

All these activities, individually and together, have contributed positively to the development of well integrated and interconnected, transparent and reliable gas and electricity markets in the EU. Some of these activities are commented on in more detail hereafter.

Framework Guidelines and network codes

The development of framework guidelines and opinions on network codes has certainly been ACER's principal activity and accomplishment so far. During the period covered by this report, ACER has adopted seven Framework Guidelines⁹ and fourteen opinions/recommendations on draft network codes¹⁰. As regards gas, ACER's work has already contributed to the adoption of the network code on capacity allocation mechanisms, to be followed soon by the adoption of a network code on balancing. Other codes, both for gas and electricity, are currently under consideration by the Commission with the aim to have them adopted through comitology in 2014.

At the early stages of these activities ACER concentrated essentially on the drafting of the Framework Guidelines and of its opinions on draft network codes. Responding positively to requests of the Commission and the ENTSOs, ACER has gradually taken a more active role throughout the entire network code development process. It follows closely the development of the codes by the ENTSOs and assists the Commission in the discussions with Member States in comitology. Since the early pilot projects, the Framework Guidelines have also become more concrete, giving the ENTSOs more precise guidance on what ACER expects from the network codes. Continued efforts by ACER to draft Framework Guidelines which are as concrete and precise as possible, and to play an active role throughout the entire process, alongside ACER exercising its scrutiny role when adopting an opinion on the draft network codes, will in the Commission's view help to reassure some stakeholders who expressed concerns about the network code development process.

⁸ Commission Delegated Regulation (EU) No /... of 14.10.2013 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council on guidelines for trans-European energy infrastructure as regards the Union list of projects of common interest

⁹ Including four Framework guidelines for electricity (on: capacity allocation and congestion management rules (CACM), grid connection, system operation and balancing rules) and three Framework guidelines for gas (on: capacity allocation mechanisms (CAM), balancing rules, interoperability and date exchange). Framework Guidelines on harmonized gas transmission tariff structures are expected soon.

¹⁰ Including three in gas (opinion on CAM NC, opinion/recommendation on balancing rules and opinion on interoperability rules) and eleven in electricity: two on CACM NC (opinion/recommendation), four on grid operation rules (opinion/recommendation for draft NC on Requirements for Generators, and opinion/recommendation for draft NC on Demand connection), and five on system operation codes (opinion on draft NC for Operational security, recommendation/opinion for draft NC on Operational Planning and Scheduling, and recommendation/opinion for draft NC Load frequency control and reserves).

The Commission encourages ACER to remain vigilant as regards the consistency of various codes. It would also like to see ACER's Framework Guidelines being accompanied by an appropriate impact assessment.

As regards the implementation of the network codes and guidelines adopted by the Commission, ACER has successfully accompanied the early implementation of certain network codes, inter alia through the Regional Initiatives. This is in particular the case for certain aspects of the capacity allocation codes in gas and electricity. The important role of ACER in the Regional Initiatives has been recognized also by stakeholders.

As different network codes and Commission guidelines now start to enter into force, ACER is encouraged to monitor and analyse their implementation and to report to the Commission in accordance with Article 6(6) of Regulation (EC) 713/2009.

Regional co-operation of transmission system operators and NRAs

As indicated above, ACER has through its involvement in the various Regional Initiatives for gas and electricity contributed to the early implementation of certain codes. As is recognized also by stakeholders, ACER thereby has contributed to an enhanced focus of the Regional Initiatives. Under the coordination of ACER, the focus of the Regional Initiatives has shifted towards broader cross-regional projects. The impetus it has given to the development of concrete roadmaps and regular reporting, inter alia at the Florence and Madrid Fora is positive. The Commission encourages ACER to pursue this work further and if possible intensify it, for example as regards the roll-out of day-ahead market coupling and flow-based capacity calculation in electricity across the EU. ACER could also consider using its role in the Regional Initiatives to monitor progress as regards the implementation of new interconnection projects in accordance with Article 6(7) of Regulation (EC) 713/2009, whilst taking into account the roles given to it and to the regional groups to monitor the implementation of the PCIs in accordance with the TEN-E Regulation.

Monitoring and reporting

An important task of ACER is indeed to monitor and report on various topics, including in general on the IEM development. ACER's first Internal Market Annual Monitoring Report was published in 2012 and the second in November 2013. These reports have been a good source of information, and notably the benchmarking function has been in particular highly valued. Going forward, the reports could also usefully contain a summary of the results of ACER's monitoring activities under Article 6 of Regulation (EC) 713/2009, in particular as regards progress on the implementation of new interconnector projects, implementation of the TYNDPs and the implementation of Network Codes and Commission Guidelines.

Decisions, recommendations and opinions

So far, ACER has not been requested to take decisions or opinions on conditions for access and operational security of cross-border infrastructure as well as on exemptions. The Commission invites ACER to be more proactive, in particular where diverging approaches and interpretations between NRAs as regards cross-border issues prevent the smooth functioning of the internal energy market. For example, ACER could play a positive role in aligning further the capacity products for gas interconnectors. Some stakeholders regret in this regard that, in accordance with Article 8 of Regulation (EC) 713/2009, ACER can only decide on such matters upon a *joint* request of the competent NRAs or in case of prolonged disagreement. In their view, this can lead to dead-lock situations. However, the Commission points out that on the basis of Article 7 of Regulation (EC) 713/2009, ACER can at its own

initiative or at the request of the Commission or a single regulator provide opinions and recommendations. As the IEM implementation progresses, this will become a more prominent task for ACER. ACER will be called in the future to mediate and arbitrate between NRAs as regards the interpretation of specific provisions of Network codes. Moreover, the Commission or regulators might ask ACER to deliver decisions/opinions regarding rules concerning a growing number of new cross-border infrastructure projects. This will be stimulated by the further integration of the energy markets.

REMIT implementation

ACER has contributed actively to the implementation of REMIT through the organisation of information sessions and workshops, the adoption of several guidance documents and a recommendation to the Commission on the records of wholesale energy market transactions and a Decision determining the registration format to be used for the establishment of a European register of market participants. The Commission notes the pro-active approach of ACER going beyond the strict legal obligations, such as pilot projects for data reporting and increased cooperation with partner authorities (in particular the European Securities and Markets Authority - ESMA). ACER's engagement with market participants and partner authorities is appreciated. Its next challenge is to procure and put in operation the necessary IT equipment to execute the data collection and monitoring functions entrusted to it. This step is necessary for ACER to be able to establish and administer a European register of market participants and develop an IT system for market participants' registration, data collection and market surveillance. It is expected that data reporting obligations under REMIT will become operational by the end of 2014.

Tasks related to TEN-E

The TEN-E Regulation further expanded ACER's responsibilities in the energy network planning area. The TEN-E Regulation will be fully implemented in 2014 and new tasks will be assigned to the Agency, mostly related to the process of identification of PCIs, the development of the cost-benefit methodology, the best practice development on incentives as well as the handling of cross-border cost allocation requests as a last resort. ACER is also responsible for the monitoring of the implementation of PCIs through annual reports (first in 2015) and recommendations to overcome identified obstacles.

Important preparatory work done by ACER and NRAs should be highlighted in respect to the early implementation of the TEN-E Regulation. In particular, ACER's opinion on the first list of PCIs under the TEN-E Regulation and its work on the development of methodologies for cost-benefit analysis are worth mentioning.

Other tasks

ACER has started to develop a strategic vision of the energy market and the energy systems beyond the 2014 target date, with the first workshop on "Energy Regulation: A bridge to 2025" which has taken place on 6 November. The Commission welcomes this initiative and encourages ACER to provide input into energy related policy debates at EU and, where appropriate, national level. ACER is also part of the Electricity Co-ordination Group, chaired by the Commission and gathering heads of national energy administrations and national regulators, and ENTSO-E, to co-ordinate electricity policy developments at EU level, including in the area of electricity security of supply.

4. Organizational structure, independence and resources

Organisation

ACER comprises the following bodies: the Administrative Board, the Board of Regulators, the Director and the Board of Appeal¹¹. Their tasks and composition are provided in Chapter III of Regulation (EC) 713/2009.

The Administrative Board has to ensure that ACER carries out its mission and performs its tasks in accordance with Regulation (EC) 713/2009. It is responsible, among other tasks, for the adoption of the annual work programmes and the annual activity reports. Both instruments have been effective in setting priorities, monitoring implementation and reporting on results achieved. The Commission notes that so far the Administrative Board has not adopted any multi-annual programme.

The Board of Regulators and the Director are responsible for the regulatory decisions taken by ACER. In the Board of Regulators each NRA has one vote. With the aim of being supported in these tasks, the Director and the Board of Regulators decided to establish internal working groups, composed of experts from NRAs and ACER staff. Commission representatives frequently attend the meetings of the working groups. There are four ACER Working Groups: 1) Implementation and Procedures; 2) Monitoring, Integrity and Transparency; 3) Electricity and 4) Gas. ACER relies heavily on these working groups in its daily regulatory work, including for the drafting of the Framework Guidelines and opinions on Network Codes.

The Commission considers that these working groups are an efficient instrument to carry out the extensive workload of ACER and to ensure proper coordination. The work of the Working Groups has been extremely valuable. Active involvement of all or as many as possible NRAs in the working groups, alongside ACER staff, is necessary to ensure that regulatory decisions taken are as informed and coordinated as possible and reflect best practices and the interests of stakeholders across the EU. In this respect, although the Commission recognizes that NRAs across EU have different budgets and resources impacting on their daily involvement in ACER, the Commission invites ACER to continue acting as a strong coordinator enhancing inter-NRAs cooperation and encouraging the participation of all NRAs. Member States are encouraged to properly staff their NRA, taking into account NRAs' obligations to play an active role in ACER.

Independence

As far as the independence of ACER from industry and TSOs is concerned, the general standing of the Director among the stakeholders is high and his independence is not questioned. Also, the independence and impartiality of the ACER staff are rather highly regarded. The Commission is satisfied to acknowledge that since its establishment ACER has become a credible and respected institution playing a prominent role.

As regards the independence of NRAs from national governments (and its indirect impact on ACER which a limited number of stakeholders have raised as an issue), the Commission notes that it will not hesitate to act against Member States where the independence of NRAs in accordance with the Third Energy Package provisions is not fully respected. As far as ACER

¹¹ The Board of Appeal did not meet so far.

is concerned, the Commission has no doubt about its full independence towards Member States.

Finally, as regards the independence of ACER from the Commission, the Commission's role is clearly defined in Regulation (EC) 713/2009 and in the other legal acts of the Third Energy Package, in addition to the general tasks and powers of the Commission under the Treaty. Within this framework, the Commission has a strong role, among others, in the planning and development of the Network Codes and Commission Guidelines. ACER is a decentralized agency of the EU, which implies that the Commission proposes to the budgetary authorities ACER's budget as part of the EU budget and has a supervisory role as regards the execution of ACER's tasks, including on the budget execution.

Resources

Since 1 October 2012, ACER's staff has been organised into the Director's Office and four departments: the Electricity, the Gas, the Market Monitoring and the Administration Department. ACER is located in Ljubljana (Slovenia), where the majority of the meetings of ACER's bodies take place. There is also a liaison office in Brussels to which many stakeholders attached particular importance in our consultation. The Agency has in total 49 temporary posts, 7 contract posts and up to 16 seconded national experts. The staff is rather evenly distributed among different departments, each having on average approximately 15 people. Each department is headed by a Head of Department. In December 2013 all the establishment plan posts (i.e. 49 TAs) were filled.

The Commission notes that ACER has highlighted at several occasions that it does not have the necessary resources at its disposal to carry out entirely all the tasks entrusted to it. It congratulates ACER for having been able to undertake activities necessary to ensure a smooth implementation of REMIT and the TEN-E Regulation already ahead of those Regulations entering into force and the corresponding budgetary adjustments becoming available to ACER. Within the context of the EU budget in general, the Commission ensures that ACER disposes of the necessary means to execute its tasks. ACER reports on the use of its resources in its Annual Activity Report.

5. Communication and transparency

ACER is committed to transparency and openness. Pursuant to Article 10(1) of Regulation (EC) 713/2009, ACER, in carrying out its tasks, should consult extensively and at an early stage with market participants, transmission system operators, consumers, end-users and, where relevant, competition authorities. To clarify the process, ACER prepared a Guidance Note on Consultations that has been itself consulted with stakeholders. ACER has consistently promoted the involvement of stakeholders in its activities through public consultation and workshops. Most of the workshops are organized at the headquarters in Ljubljana and whenever possible are web-streamed with the aim of involving as many participants as possible.

Transparency of ACER is further improved by well prepared and extensively consulted annual Work Programmes. ACER also regularly monitors its own performance by issuing Annual Activity Reports, which are comprehensive and clearly show ACER's performance against the deliverables. Transparency could be further enhanced by reporting in the annual

activity report on key performance indicators which ACER is already using for internal management purposes.

Transparency of ACER's bodies (Administrative Board/Board of Regulators/Board of Appeal) is achieved through established rules of procedure and the publication of the minutes. Efforts of the Board of Regulators to enhance transparency further through quarterly debriefing on ACER's activities and 'meet the members of the Board sessions' have been appreciated by stakeholders.

The establishment of '*ad-hoc experts groups*' on specific issues is welcomed as an efficient instrument to engage intensively with more limited groups of experts with specific knowledge and/or interests. ENTSOG has successfully used a similar instrument for the development of the gas network codes. However, ACER needs to ensure that membership is determined on the basis of objective selection criteria. The publication on ACER's website of the mandate, composition and activities of the expert groups is welcomed as it helps to enhance transparency.

The Commission notes that the relation between ACER and CEER and their respective roles and activities continues to give rise to some confusion amongst stakeholders. Although, ACER and CEER are different in terms of their status and membership, with the last one being a voluntary association of regulators with a focus on consumer issues and international cooperation, the Commission considers that some improvements could be introduced to clarify better the relation between them. Identifying clearly the priorities and the deliverables in each organization Work Programme could help to separate identity and responsibilities and to achieve a complementarity between the work of ACER and CEER.

In terms of ACER's communication policy, stakeholders are carefully reading ACER's technical documents, which are considered generally of a good quality. In particular Framework Guidelines and ACER opinions on draft Network Codes are considered well drafted and informative.

ACER's newsletter is considered an effective and often used instrument to inform stakeholders about public consultation, reports published, as well as upcoming workshops and conferences. Stakeholders point out that early announcement of events is important to allow proper preparation and attendance. Moreover, the Commission welcomes additional actions foreseen by ACER, such as 'citizens summaries' of crucial documents and press releases to accompany the publication of ACER's documents, because they could help to make the process more transparent for a broader public.

Finally, although ACER launched a new website in 2012 with the intention to offer more user-friendly features, only very few of the stakeholders considered that the website has improved considerably. Stakeholders have almost unanimously expressed the wish for ACER to set up a single user-friendly website, which should include appropriate links to the websites of the ENTSOs and of the Commission e.g. on the network codes development process.

6. Conclusions and Recommendations

Since its establishment, ACER has become a credible and respected institution playing a prominent role in the EU regulatory arena. Overall, ACER has focused on the right priorities. Its annual work programmes and annual activity reports are useful tools to set priorities and

report transparently on results achieved. The Commission encourages ACER to plan its activities realistically against the background of available resources, to carry out a mid-term review where appropriate, to include key performance indicators in its Annual Activity Report and to establish a multi-annual programme. Going forward, the Commission encourages ACER to strengthen further its regulatory control over the ENTSOs, including on the implementation of the network codes and Ten Years Network Development Plans. ACER should also play an active role as an arbiter when NRAs disagree or adopt incompatible approaches on cross-border issues, which impede a smooth functioning of the internal energy market.

The governance corresponds to the set up foreseen in the ACER Regulation. The Commission welcomes the positive contribution made by NRAs whilst encouraging some NRAs to take a more active role in the valuable work undertaken by the Agency' Working Groups. Also, as they gain experience, ACER's staff could play a more prominent role in the Working Groups, including by chairing the Groups, as well as in stakeholders' events.

As regards ACER's communication and transparency, the Commission notes in general positive results of the public consultations and important efforts successfully undertaken to improve these aspects. In terms of potential improvements, there is a consensus that ACER's website needs to become more informative and user-friendly.

In 2014, the Commission will carry out a full evaluation of ACER under Article 16(3) of Regulation (EC) 713/2009 with the aim to publish recommendations early on in 2015 on ACER's duties and requirements in the following years. It will at that occasion evaluate whether any amendments to Regulation (EC) 713/2009 could be appropriate.