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COMMISSION STAFF WORKING PAPER

**on the Possibility of Neighbouring Countries and their Transmission System Operators
to Participate in ACER and in the ENTSOs**

1. GENERAL

- (1) After the establishment of the Agency for the Cooperation of Energy Regulators' Administrative Board and Board of Regulators in the first half of 2010, Norway, Switzerland and the Energy Community respectively raised the question whether they may participate in ACER.
- (2) The situation is similar with respect to the European Networks for Transmission System Operators ("**ENTSO-E**" for electricity and "**ENTSO-G**" for gas, together "**ENTOSs**"). Here, too, third country Transmission System Operators ("**third country TSOs**") have stated their interest to participate in order to contribute actively to the drafting of network codes. The current approach is, however, different for ENTSO-E and ENTSO-G. ENTSO-E's statutes are open to third country participation, while ENTSO-G's statutes still exclude it. To date therefore, no third country TSO has been admitted to ENTSO-G¹. ENTSO-E on the other hand has opened its working groups to TSO's of most members of the Energy Community.² Switzerland, too, has membership status with voting rights as it used to collaborate closely with EU TSO's in one of the predecessor organization of ENTSO-E.³
- (3) In the above context, the **purpose of this Staff Working Paper** is to set out preliminary views of the Commission on its interpretation of Article 31 Regulation (EC) No 713/2009 and the possibility of third countries to participate in the Agency for the Cooperation of Energy Regulators ("ACER"). This **preliminary** position is **without prejudice** to the prerogative of the Council to authorise the opening of any necessary negotiations, adopt negotiating directives or authorise the signing of international agreements.⁴ This Note moreover sets out preliminary views of the Commission as to the involvement of third country TSOs as members of the ENTOSs⁵. This note does **not express any final or in any way legally binding view** and the situation of each request for participation will in any event have to be examined in more detail on the basis of its specific facts and circumstances.

2. ACER

- (4) The conditions for any participation by Third Countries in ACER are set out in Article 31 of Regulation (EC) No 713/2009 establishing ACER (the "**ACER Regulation**"). These foresee that

¹ Article 1 (38) ENTSO-G Articles of Association of ENTSO-G defines transmission System Operators as undertakings designated as a transmission system operator for natural gas "*by a Member State*" in accordance with the provisions of Article 10 of the Gas Directive. See also Article 7 of the ENTSG AoA.

² All except Albania, Kosovo and Moldova, namely Croatia, Serbia, Bosnia and Herzegovina, Montenegro, Mazedonia.

³ Union for the Coordination of Transmission of Electricity, UCTE.

⁴ Such as foreseen by Article 31 of Regulation (EC) No 713/2009 in accordance with the general provisions of Article 218 (2) of the TFEU and the opinion of the European Parliament according to Article 218 (6) b of the TFEU.

⁵ According to Article 5 (3) of Regulation (EC) 714/2009 and Article 5 (3) of Regulation (EC) 715/2009.

(1) "The Agency shall be open to the participation of third countries which have concluded agreements with the Community whereby they have adopted and are applying Community law in the field of energy and, if relevant, in the fields of environment and competition.

(2) Under the relevant provisions of those agreements, arrangements shall be made specifying, in particular, the nature, scope and procedural aspects of the involvement of those countries in the work of the Agency, including provisions relating to financial contributions and to staff."

(5) On this basis, conditions for participating in ACER are (1) that the third country concluded an international agreement (2) adopting and, as a consequence, (3) applying Community law in the field of energy and, (4) if relevant, in the fields of environment and competition. These international agreements must also (5) specify, in particular, the nature, scope and procedural aspects of the involvement of those countries in the work of the Agency, including provisions relating to financial contributions and to staff. Third countries participating in ACER are in particular also expected to contribute to the budget of ACER in a proportionate way.

(a) Contracting Parties to the European Economic Area ("EEA countries")

(6) EEA Countries, by signing the EEA Agreement, have already signed an international agreement which obliges them to implement and apply the Community *acquis* in the area of energy.

(7) By means of a decision of the EEA Joint Committee amending Annex IV of the EEA Agreement, the EEA Contracting Parties committed to apply the provisions of the "Second Package" of the liberalisation of the internal energy market⁶, but not yet the "Third Package". The EEA Contracting Parties also apply EU competition and environmental rules. The EFTA Surveillance Authority and the EFTA Court supervise the implementation of the EEA Agreement, and thus also any commitments to apply the *acquis*. EEA Countries are therefore arguably **best placed** to be closely involved in the work of ACER, once Annex IV to the EEA Agreement incorporates the Third Package. However, condition 5 of Article 31 of the ACER Regulation would still have to be fulfilled. The nature, scope and procedural aspects of any involvement EEA Countries in the work ACER, including provisions on financial contributions and to staff, have to be set out in a legally binding way, for instance by a negotiated annex to the EEA agreement or in a separate international agreement.

(b) The Treaty establishing the Energy Community ("EnC Treaty")

(8) The EnC Treaty may, once it is updated to implement the "Third Package" rules in a binding way, provide for a sufficient legal basis within conditions 1 to 4 of Article 31 of the ACER Regulation.

(9) In September 2010, the Ministerial Council of the Energy Community ("EnC") recommended the Contracting Parties to start implementing the Third Package rules

⁶ See the decision of the EEA Joint Committee No 146/2005 of 2 December 2005 adopting the 2nd energy package.

(on a voluntary basis). However, a binding decision by the Ministerial Council still needs to be adopted which will have to set out the necessary adaptations taking into account the institutional framework and specific situation of the different EnC Contracting Parties. The timing of participation of the individual EnC Contracting Parties in ACER may differ, because the scope of national measures needed to implement the Third Package and to apply it in practice will differ from one EnC country to another. Again, as for the EEA, condition 5 of Article 31 of the ACER Regulation has to be fulfilled.

(c) Third countries other than the EEA and EnC Contracting Parties

- (10) Other third countries such as, for instance, Switzerland, may also participate in ACER provided that they conclude bilaterally an international agreement with the European Union whereby they pledge to adopt and in practice apply Community law in the field of energy and, if relevant, in the fields of environment and competition, and fulfil condition 5 of Article 31 of the ACER Regulation⁷.

3. PRELIMINARY INTERPRETATION OF ARTICLE 31 ACER REGULATION

- (11) For all third countries participating in ACER, Article 31 requires that they not only commit to implement the EU energy *acquis*, but they must also *keep applying* it in practice. It is therefore considered at this stage that any international agreement on the basis of which third countries could be admitted to ACER, should contain a clause enabling ACER and/or the Commission to suspend the third country's participation if it is found that that it fails to apply the Community *acquis* in practice. A truly independent National Regulatory Authority ("NRA") is an essential prerequisite.
- (12) Furthermore, such international agreements should specify that the country concerned must apply also tertiary EU legislation, such as the network codes of ENTSOs and ACER as from time to time adopted in the comitology process. Third countries willing to participate in ACER should dynamically incorporate such network codes into their national legislation. It is unlikely to be acceptable, for instance, that Third Countries wishing to participate in ACER "pick and chose" which network codes they wish to implement into their national legislation and which not.
- (13) As to the scope of the participation of third countries in ACER, *any* participation presupposes that the country at stake fulfils the general conditions of Article 31 of the ACER Regulation the ACER Regulation.
- (14) The **Administrative Board** of ACER is composed of nine members⁸ and decides in particular on matters related to staff policy, work programming and more generally also ACER's budget. Where third countries financially contribute to ACER in a

⁷ Reading Article 31 (1) in conjunction with recital 25.7 of the Regulation, it is clear that third countries other than EEA and EnC should in principle also be able to participate in ACER under the general conditions. This could be doubted because the text of Article 31 (1) read on a stand alone basis suggests that only those third countries may participate in ACER which "have adopted" EU law in the field of energy. This wording targets the EnC and EEA countries but, as recital 25.3 suggests, is not aimed at excluding the participation of other third countries.

⁸ Article 12 Regulation (EC) No 713/2009

substantial way, they could be argued to have a legitimate interest to observe how ACER's budget is used for the staff planning and work programming. In this circumstance, it appears justified to allow third countries to send an observer to the Administrative Board.

- (15) A participation of third countries as full member of the Board on the other hand appears excluded as it would run counter to the spirit of Article 12 of the ACER Regulation. According to this provision, two Board members are appointed by the Commission, two by the European Parliament and five members by the Council. Member States cannot appoint representatives on the Administrative Board. Allowing third countries to appoint members in this Board would therefore give the latter a privileged status as compared to EU Member States.
- (16) The **Board of Regulators** of ACER is composed of senior representatives of NRAs and one alternate per EU Member State, as well as one non voting representative of the Commission. It is conceivable that observers from third countries could be admitted, provided these third countries fulfil the requirements of Article 31 of the ACER Regulation. A full membership of third countries in the Board of Regulators would not seem to be appropriate. Article 14 of the ACER Regulation limits the number of members to *one per EU Member State* and foresees that the Board votes on a one country - one vote basis (Article 14 (3) ACER Regulation). Besides the fact that Article 14 reserves membership status to EU Member States, granting voting rights to third country participants could also jeopardise the effectiveness of the Board's deliberations in view of the one country one vote principle.
- (17) International agreements within the meaning of Article 31 could also foresee that third countries may send an observer to (some of) the working groups of ACER.

4. EUROPEAN NETWORKS OF TRANSMISSION SYSTEM OPERATORS

- (18) Contrary to the participation of third countries in ACER, their participation in the **ENTSOs** is not further specified in either Regulation (EC) No 714/2009, nor in Regulation (EC) No. 715/2009. This does, however, not exclude such participation. Rather, it is a matter of governance for the General Assemblies of both ENTSOs. The Commission, based on an opinion from ACER, then has to express an opinion on the statutes, list of members and draft rules of procedure of the ENTSOs after March 2011.⁹
- (19) In providing this opinion, the Commission will be guided by the consideration that the ENTSOs will exercise a fundamental legal function in the architecture of the internal market: the elaboration of network codes which are the legal framework for finalising the internal market for electricity and gas. Due to this central function, it appears unconceivable that TSOs who do not themselves fulfil the requirements of the Third Package in particular as regards unbundling participate in the drafting of network codes. Only TSOs which fully comply with the Third Package could be entitled to participate in this crucial part of ENTSOs' work. This also implies that as long as a third country does not adopt and apply the Third Package, its TSOs should not

⁹ Article 6 (1) of Regulation 713/2009 and Article 5 (3) Regulations 714 and 715/2009

participate in the work of the ENTSOs as they are not subject to the same unbundling and certification requirements which apply to TSOs established in EU Member States.

- (20) At the same time, a pragmatic solution may be considered for TSOs from third countries which are founding members of ENTSO-E and which used to participate in the work of its predecessor organisations. Excluding these TSOs from ENTSO-E immediately upon the entry into force of the Third Package on 3 March 2011 would be seem inappropriate, as the electricity networks of these TSOs are physically integrated with the neighbouring EU networks and need to follow the same technical codes. It may therefore be in the common interest to allow for a certain **transition period** until third countries can realistically be expected to adopt and apply the Third Package.
- (21) ENTSO-E foresees a pragmatic solution in this respect which involves the use of a **sunset clause**. ENTSO-E's General Assembly on 7 December 2010 resolved to introduce a sunset clause in the ENTSO-E draft Articles of Association. Its effect is to ensure that if a country, in which an ENTSO-E member operates, is either under no legal obligation to apply, or is materially delayed in its implementation of the Third Package and/or any international agreement between the EU and the third country relating to the Third Package, the Assembly shall, following an opinion of the European Commission, decide to suspend the participation and/or voting rights of that Member's representative or exclude that Member.
- (22) Moreover, the **voting** mechanisms in ENTSO-E ensures that third country TSOs can never prevent the adoption of a network code if the majority of votes cast by EU TSOs would suffice to adopt it in the General Assembly.
- (23) These two measures in principle appear appropriate to provide a pragmatic solution for third country participation in the ENTSOs and they could apply *mutatis mutandis* for ENTSO-G, albeit with the particularity that no third country TSOs have yet been admitted to this organisation and that therefore the admission of third country TSOs could be subject to the condition that these TSOs stem from countries which have already adopted and are applying the Third Package.

5. CONCLUSIONS

- (24) The Commission is prepared to consider a way in which third countries' national regulatory authorities could participate in ACER. A precondition is in any event that the third country fulfils the requirements of Article 31 of the ACER Regulation. Furthermore, an EU Agreement with the third country concerned is needed to specify the conditions (e.g. the financial contribution to the ACER budget) and the scope of its participation in ACER.
- (25) As far as the ENTSOs are concerned, a common approach to the participation of third country TSOs could be considered to foster the integration of neighbouring markets into the internal market of the EU. In this context, ENTSO-G could allow the admission of third country TSOs to its association, if the third country applies the Third Package and the TSO concerned is certified by an independent national regulator as unbundled.

- (26) On the other hand, the continuing participation of third country TSOs in ENTSO-E, which already joined the association as founding members before 3 March 2011, should be limited in time if these TSOs are not certified as unbundled within a reasonable time period. During a transition period, founding members of ENTSO-E from third countries could be allowed to participate. However, this transitory situation should be subject to an explicit sunset clause such as the one adopted by ENTSO-E