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Agency Guidance

**on the Evaluation Procedure for
Network Code Amendment Proposals
under Article 7 of the Electricity and Gas
Regulations**

24 September 2013



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I. Introduction

The purpose of this Agency Guidance is to set out the procedure in which persons with a relevant interest may submit proposals to the Agency to amend a Network Code (hereinafter: NC) after the latter has entered into force following the Regulatory Process with Scrutiny (hereinafter: Comitology) procedure, as provided in Article 6 of Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (hereinafter: the Electricity Regulation) and Article 6 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 (hereinafter: the Gas Regulation).

This Agency Guidance describes two different procedures to evaluate NC amendment proposals received by stakeholders. The same procedures are also followed by the Agency when proposing amendments of its own initiative.

The first procedure concerns a general, periodic review of the NC. This Guidance envisages that every 5 years the Agency submits the NC to an overall review. The Agency evaluates the various stakeholders' proposals received until that time and verifies to which extent they can improve the NC. A public consultation is held prior to the Agency submitting its proposal to the European Commission.

The second review procedure is devoted to *ad-hoc* NC amendments, which are either urgent or require priority. Essentially the same procedure is followed as in the periodic review, including the public consultation, albeit with shorter deadlines. This procedure is meant to be flexible and could be launched at any time to allow the Agency to react to changing market circumstances or to other situations which require an expedited follow-up.

The procedure to propose NC amendments

The particular procedure related to NC amendment proposals is laid down in Article 7 of the Electricity and Gas Regulations¹, as follows:

7(1): "Draft amendments to any network code adopted under Article 6 may be proposed to the Agency by persons who are likely to have an interest in that network code. (...). The Agency may also propose amendments on its own initiative. (...).

7(2): The Agency shall consult all stakeholders in accordance with Article 10 of Regulation (EC) No 713/2009. Following that process, the Agency may make reasoned

¹ See also recital 15 Gas Regulation and recital 6 Electricity Regulation.

proposals for amendments to the Commission (...)

7(4): (...) Those proposed amendments are without prejudice to other amendments which the Commission may propose.”

The procedure laid down in this Guidance relates only to the NCs adopted under Article 6 of the Electricity and Gas Regulations, i.e. NCs that have been submitted to the assessment of the Agency (or the Commission if the latter fails to submit a NC) and subsequently adopted via Comitology². The procedure does not cover the NCs adopted by the ENTSOs pursuant to Article 8(2) of the Electricity and Gas Regulations³.

Definition of the person proposing a NC amendment

In order to ensure the transparency and openness of the process, Article 7(1) of the Electricity and Gas Regulations allows for a very broad range of “persons” to propose amendments to a NC. Apart from the Agency, any person who is “likely to have an interest” in the NC concerned can submit NC amendment proposals.

The term “persons” refers here to both natural and legal persons. They include, *inter alia*, consumers, network users and system users⁴, shippers, producers, consumer organisations, ENTSOs, TSOs, DSOs, power exchanges, regulators, LNG and gas storage operators.

At first sight, the term “persons” should concern principally individuals domiciled in the EU and legal entities carrying out their activities in the EU, as NCs set up market and system rules for the EU energy market. Nonetheless, as non-EU persons may also fall within the scope of the NCs, consumers, network users or network operators from neighbouring countries may also propose amendments if they can demonstrate an interest.

The interest of the proposer in the amendment of a NC needs to be duly justified. This interest may be of a technical/commercial/financial nature and should be directly related to the proposed amendment.

The Agency points out that Article 7 of the Electricity and Gas Regulations do not convey a right to request an amendment to a NC but only a right to propose draft amendments to the Agency”, which is therefore to be read as equivalent to the right to submit a proposal of a

² Amendments to the Guidelines adopted by the Commission are not covered by this Guidance. Although the Guidelines adopted by the Commission must also go through Comitology and have the same binding effect as the NCs, their amendments are covered by other provisions (i.e., Art. 18(5) of the Electricity Regulation and Art. 23(2) of the Gas Regulation) which do not assign any task to the Agency.

³ In that case, the NCs are developed on ENTSOs’ own initiative and submitted to the Agency only for an opinion. Also the amendments of these NCs are expected to follow the procedure as laid down in Article 8(2) of the Electricity and Gas Regulations, with the Agency providing an opinion on the amendments introduced by ENTSO.

⁴ Meaning a natural or legal person supplying to, or being supplied by, a transmission or distribution system.

draft amendment.

Submission of the amendment proposal and periodicity of the review

Following the adoption of a NC, a proposal for its amendment can in principle be submitted to the Agency at any time. The Agency evaluates whether or not the proposal needs to be treated according to the periodic review procedure, as described in chapter II, or to the *ad-hoc* procedure, as described in chapter III of this Guidance.

In order to ensure consistency and efficiency in the treatment of the proposals, the Agency shall not immediately launch an admissibility and in-depth assessment of proposals which are not considered urgent (and therefore which are dealt with as part of the periodic review procedure). Rather than having on-going reviews of and stakeholder consultations on the NC draft amendments, the Agency prefers to bundle all the non-urgent NC amendment proposals which it has received over a given period of time (since the last periodic review). This approach avoids burdening the stakeholders with too often re-occurring public consultations and may thus facilitate a better use of resources for the Agency and stakeholders alike.

The Agency intends to organise the periodic review of the NC approximately every 5 years. It shall inform stakeholders in advance on its website of the start of a periodic review. At the same time, it invites stakeholders to submit their amendment proposals on a NC by a given date, so that these, together with all non-urgent amendment proposals received since the last periodic review, can be taken into account in the NC review.

Proposals which are considered urgent or which require priority are followed up immediately by the Agency, so that a proposal can be submitted to the Commission within a period generally not exceeding 3 to 4 months (including a public consultation), as described in chapter III of this Guidance.

The role of the ENTSOs

As part of any of the two review processes, the Agency intends to involve the relevant ENTSO, by consulting it on the amendment proposals and their (re)drafting. The ENTSOs have indeed played a crucial role in the development of the NC, and are likely to have drafted the provisions which are subject to review. The Agency would therefore regard it as logical to take due account of ENTSO's role in the NC development process, its expert view on the technical feasibility of the proposed amendments, on their potential market consequences or on any impact on other NCs, and its experiences gained from previously held market consultations. Therefore, the ENTSO's contributions submitted to the Agency are duly taken into account by the Agency and made public, together with the consultation documents. However, the relevant ENTSO opinion and possible recommendations are not binding on the Agency.

Maintenance of this Guidance

It is expected that this Guidance will be updated from time to time to reflect the experience gained by the Agency when following the currently described procedure.

II. The periodic review

A. Admissibility and initial assessment

When initiating the periodic review procedure, the Agency gathers all proposals received since the last periodic review and until that moment (and not dealt with through the *ad-hoc* procedure), check their formal and legal admissibility and verify whether the proposer is an “interested party”. The Agency makes sure that the proposer has:

- proved that it has a technical/commercial/financial interest in the amendment of the NC for which an amendment is tabled, and
- submitted the proposed amendment, along with a substantiated argumentation justifying the NC amendment proposal.

If the proposal is not clear enough or not supported by sufficient evidence or if the file is considered incomplete, the Agency, depending on the circumstances, may either refer it back to the proposer and request further clarification or accept the proposal subject to conditions as to the making of any corrections or the fulfilling of any conditions.

If the Agency considers the proposal admissible, it evaluates it, including consulting the relevant ENTSO. The aim is to eliminate those requests where it is clear that they have little or no chance to be considered further in the process, so as to avoid that both the Agency and stakeholders devote resources on amendment proposals unnecessarily.

The evaluation criteria to be taken into account in this appraisal can be outlined as follows.

- The Agency assesses to which extent the NC amendment proposals are “consistent with the objectives of the network codes set out in Article 6(2)” of respectively the Electricity and Gas Regulation⁵. The three objectives referred to in this article are the “*non-discrimination, effective competition and the effective functioning of the market*”.

Although these three criteria are the Agency’s main evaluation criteria for the NC amendment proposals, the Agency may take into account other relevant criteria implementing these objectives in practice⁶. For instance, it could be relevant for some amendments to look at the latest implementation projects and target models when assessing a proposed amendment.

⁵ Cfr. Article 7(2) of the Electricity and Gas Regulations.

⁶ Article 7 of the Electricity and Gas Regulations do not require the Agency to evaluate the NC amendment proposals against the original Framework Guidelines (FG). This is also logical, as the FG may become outdated with time. However, depending on the case at hand, the FG, its underlying reasoning and objectives may still provide useful insights, as they underpin the drafting of the original NC.

During this assessment, the Agency may exercise its discretion to redraft the NC amendment proposal if needed. The Agency may also reject the proposal at this stage if it considers that the case shows insufficient merit.

- Amendment proposals that would modify essential elements of the Electricity or Gas Regulations cannot be considered by the NC amendment procedure and are rejected.
- The proposal may either amend existing provisions of the NC, or supplement it without modifying essential elements of the electricity or gas regulations.
- Simple corrections of wording or typos are considered by the Agency to improve the overall textual quality of the NC, but they are ranked secondary in importance.
- NC amendment proposals should relate to new arguments or facts that were not yet previously raised in the NC preparation process or in a previous NC amendment procedure. They are likely to relate to new market or technological situations which could not be or were not addressed during the process of the preparation of the NC or during previous request for amendments. Reasons why issues were not covered by the NC might be manifold. The development of the market in a certain direction might have not been foreseeable at the time of drafting the NC, which may be the case if revisions to policy decisions occurred in the meanwhile; or certain facts or conditions on which the NC was based no longer exist or have been erroneously interpreted at the time of its drafting; monitoring results may expose market obstacles requiring a regulatory solution; or robust market data may reveal important new insights on the provision(s) concerned.
- A more advanced insight on the matter may also create the need to a change in the NC, such as return of first experience. Finally, some flaws and drawbacks in the current wording of a NC or its implementation may lead to the need of improving it.

In order to allow an appraisal of the amendment proposal, the proposer should explain in his/her submission the likely impact of his/her proposal on the market (including financial and technical impacts). It would be difficult to carry out a proper assessment of whether a proposed amendment will improve the market functioning if and when only loose and unsubstantiated requests are received. This is the reason why the Agency strongly encourages proposers to elaborate the proposal and to demonstrate as clearly and in as much detail as possible the likely costs and benefits that the proposed amendment is expected to bring, to which extent it achieves the objectives of the NC more effectively than the current text and to identify its pros and cons for different stakeholders. Any supporting legal or technical advice or opinion may be attached as an annex to the proposal.

For transparency reasons, the Agency shall make public on its own website all amendment proposals received, their status in the process, any opinion of the relevant ENTSO and the final outcome. The Agency indicates how the proposals received have been taken into

account and provides reasons where a proposal of a stakeholder has not been followed.

B. Impact analysis

As proposed amendments to the NC may ultimately become binding, it is important to assess their impact on all stakeholders. The scope of the impact analysis is determined, to a significant extent, by the importance of the proposed amendments. Depending on whether a proposal relates to a modest modification of a NC provision or a major overhaul of a NC approach, the relevant problems, objectives, options, costs and benefits (supported by quantitative analysis as far as possible) of the final NC amendment proposal shall be assessed.

The impact analysis is undertaken by the Agency before the public consultation, as described below in point C, on the basis of the impact assessment undertaken for the NC concerned. It is published alongside the consultation document. Given the original role played by the ENTSOs in the development of the NCs, the Agency also involves the relevant ENTSO, who is able to provide its view on the impact analysis developed by the Agency.

The impact analysis of the Agency shall, in the first place, be based on the justification that the proposer has provided when he/she tabled the amendment. The analysis shall primarily focus on the following:

- Specific and operational objectives assessment: A thorough impact assessment in relation to specific and operational objectives and criteria, taking full account of the relevance of technical aspects and using quantification as far as possible.
- Consistency test: Particular attention should be paid to the overall consistency with any other NC so as to ensure that NC provisions do not contradict one another and end up creating confusion. In particular, the impact of the proposed amendments on other NCs shall be assessed, as NCs are to be considered as one consistent body of regulations. Given ENTSOs' crucial role in the initial NC development process, its views on possible consistency issues in this respect should also be explicitly sought by the Agency. Although this analysis could be further developed during the consultation process, the inter-NC consistency is an important element to bear in mind when assessing the impact of a proposed amendment.
- Proportionality test: Is the amendment suitable to address the problem? Do the expected benefits of the amendment outweigh the encroachment upon legal certainty? Are there legitimate expectations created by the NC in force which might be frustrated by the amendment?

C. Public consultation

Once the proper impact analysis has been finalised, the Agency shall organise a formal stakeholder consultation pursuant to Article 7(2) of the Electricity and Gas Regulations, thereby allowing any interested parties to provide comments.

The consultation document shall include the Agency's draft proposal for amendment, the relevant draft impact analysis, as well as the original proposals which led to the Agency's draft proposal and the relevant ENTSOs' opinion.

The document shall be open for consultation for a period lasting at least four weeks

D. Final assessment and reasoned proposal to the Commission

After receiving the stakeholder comments, the Agency shall prepare the final amendment proposal and an evaluation of responses. The ENTSO is also involved in this final assessment and consulted upon.

If the results of the public consultation and the final assessment show that it is more appropriate to keep the original text of the NC concerned unchanged, the Agency, after consultation with the relevant ENTSO, may decide not to go ahead with the NC amendment. It is clear that no NC amendment proposal is submitted to the Commission if it does not bring improvements towards the objectives of the Third Package or, more generally, of European energy policy. In such a case, the reasons for the rejection are not communicated on an individual basis to the original proposer, but instead made public by the Agency, together with the opinion of the relevant ENTSO.

However, if the Agency considers that the conditions for improving the NC concerned are met in the case at hand, it sends its reasoned proposal to the Commission along with the relevant draft impact analysis and the relevant ENTSO opinion. All these documents shall be published on the Agency's website.

The whole review procedure should be completed within a maximum period of six months from the starting of the periodic review.

III. Ad hoc NC amendment proposals

If the proposed NC amendment is deemed to have an urgent character or requires an expedited follow-up, the review procedure is faster compared to the periodic review procedure described in chapter II. Please note, however, that this *ad-hoc* procedure is foreseen for exceptional cases only.

If the proposer considers his proposed amendment urgent or of such importance that it requires a priority follow-up, he/she has to specify and duly justify this in his/her NC amendment proposal to the Agency. When examining the request, the Agency involves and consults the ENTSO having previously worked on the NC. If the request for an *ad-hoc* NC amendment proposal is considered well founded, the Agency shall not wait until the next periodic review, but immediately launch the in-depth assessment. The Agency may also decide on its own initiative whether the NC amendment proposal merits expedited treatment.

The Agency shall inform the proposer whether his proposal has been considered for the *ad-hoc* procedure and provide reasons underlying its decision. If the claim for urgency is rejected, the NC amendment proposal follows the regular procedure as described in chapter II.

Due to the urgency of the proposal and, depending on its scope, the period for consulting the stakeholders may exceptionally be less than four weeks. In conformity with the Agency's Guidance Note on Consultations, the Agency in such case explains why a shorter consultation period is appropriate.

Depending on the scope and the degree of complexity of the proposal at hand, the overall duration of an *ad-hoc* procedure should in principle not last more than three to four months from the moment of starting the procedure.



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