

EUROPEAN POLICY ON CAPACITY ALLOCATION

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Abstract

As known, the EU Commission and the Agency for the Cooperation of Energy Regulators (also ACER) are envisaging the possibility to modify the balance of tasks and powers currently in place between ACER and the European Network of Transmission System Operators for Gas (also ENTSOG). Such an initiative, already foreseen by ACER through the “Energy Regulation: A Bridge to 2025 Conclusions Paper - Recommendation of the Agency on the regulatory response to the future challenges emerging from developments in the internal energy market” (also “Bridge 2025”), could be likely carried out (i) through new legislative acts (namely, amendments of the relevant Basic Regulations) and/or (ii) through implementing acts of the Third Energy Package, such as Regulations adopting Network Codes (also “NC”) drafted by ENTSOG according to proceedings provided by Regulation (EC) No 715/2009 (also “Gas Regulation”).

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JEL Classification: [K23]

1. Basic regulations governing ACER and ENTSOG

Since the adoption of the first liberalisation directives (namely, Directives 98/30/EC and 96/92/EC), the EU Commission promoted an initiative aimed at creating a “place” where stakeholders (i.e. Member States, regulatory authorities, Transmission System Operators, network users and traders) could discuss and develop new regulatory rules and procedures to establish a cross-border energy market. The Fora were conceived as a coordinating platform open to all relevant parties, but not entitled to take binding decisions. Indeed, neither the Florence Forum nor the Madrid Forum have legal basis in EU Law, as they operate on the basis of consensus; nevertheless, the EU Commission have adopted legal acts founded on the basic rules agreed in the context of the two Fora. With regard to the gas sector, the Madrid Forum developed the so-called Guidelines for Good Practice (also “GGP”) that have been formalized by the European Commission through Regulation (EC) No 1775/2005 on conditions for access to the natural gas transmission networks, which made the principles set out in the GGP directly applicable and enforceable in the Member States. As for the electricity sector, the basic rules agreed in the context of the Florence Forum have been turned into legally enforceable ones by the EU Commission through Regulation (EC) No 1228/2003

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on conditions for access to the network for cross-border exchanges in electricity. (F. GRÄPER and C. SCHOSER, 2017)

In this framework, also the European Regulators Group for Electricity and Gas (also “ERGEG”) was established by the EU Commission with Decision No 2003/796/EC, of 11 November 2003. As stated in Recital 5 of the Decision establishing ERGEG, the EU Commission acknowledges that, with respect to “common approaches to issues relevant for cross-border transactions”, the two Fora “have made important contributions” and therefore “will remain important as comprehensive discussion platforms involving all players from government, regulators and industry”. Nonetheless, the EU Commission expressed the need “to give regulatory cooperation and coordination a more formal status”, and ERGEG was consequently established in order to “facilitate consultation, coordination and cooperation between the regulatory bodies in Member States, and between these bodies and the Commission, with a view to consolidating the internal market and ensuring the consistent application in all Member States”. (EU Commission Decision 2003/796/EC of 11 November 2003, Recital 6)

After the sector-wide enquiry, based on Article 17 of Regulation (EC) No. 1/20037, the EU Commission argued, inter alia, that “[t]he EC has already adopted a series of measures to create an Internal Energy Market intended to deliver real choice for all EU consumers, be they citizens or business, new business opportunities and more cross-border trade”; nevertheless, the rules applicable at that time “have not yet achieved these objectives”. In this perspective, the EU Institution affirmed that *“the levels of powers and independence of energy regulators need to be harmonized on the basis of the highest, not the lowest, common denominator in the EU. Secondly, they must be given not only the task of promoting the effective development of their national market, but also that of promoting the development of the Internal Energy Market. In addition, the technical standards necessary for cross-border trade to function effectively need to be harmonised. Progress to date has fallen far short. The creation of [ERGEG] and the electricity and gas regulations, have not provided the governance required. Most of the relevant technical standards remain different in each Member State, making cross-border trade difficult and often impossible”*. (C. JONES, 2011)

2. ACER and ENTSOG

For the purpose of the present analysis, it is worth noting that, in order to achieve the Internal Energy Market, the Third Energy Package has not only created new tools but has also established new organisations to develop and use them. In order to enhance cooperation between NRAs, Regulation (EC) No 713/2009 created ACER, while, in order to improve cooperation between Transmission System Operators (also “TSOs”), Regulation (EC) No 715/2009 has created ENTSOG.

As clearly specified by Regulations (EC) No 713/2009 and No 715/2009, ACER is *“a Community structure with clear competences and with the power to adopt individual regulatory decisions in a number of specific cases”*. Indeed, ACER is a *“Community body with legal personality”* [see Article 2(1) of

Regulation (EC) No. 713/2015] established with the purpose to “*assist the regulatory authority [...] in exercising, at Community level, the regulatory tasks performed in the Member States and, where necessary, to coordinate their action*” [see Article 1(2) of Regulation (EC) No. 713/2015].

In order to develop the integrated gas and electricity market, the legislative package proposal also envisaged a stronger cooperation between TSOs. As clarified by the EU Commission’s proposal of the future Gas Regulation, although “[t]ransmission system operators in gas and electricity already cooperate voluntarily in existing structures such as the European Transmission System Operators (ETSO) and Gas Transmission Europe (GTE)”, the voluntary cooperation is no longer efficient. Therefore, in order to assure full recognition at EU level to TSOs’ cooperation structures, “the Commission will formally designate the European Networks of (gas and electricity) transmission system operators in charge of these tasks”. (F. GRÄPER and C. SCHOSER, 2017)

ENTSOG and ACER respective tasks and powers led to the following result: in line with the Meroni ruling, ACER is not being conferred with a strong decision-making power and its monitoring power over ENTSOG is “light” and in no way comparable to the one granted to NRAs over the TSOs.

In this respect, as provided by Article 9 of Regulation (EC) No 715/2009, while ACER shall monitor the execution of certain tasks by ENTSOG, as well as the implementation of Network Codes, the Agency, as the case may be, only has the possibility to ask for “explanations”, to “inform” the Commission and to provide its “opinion”.

Coming to ENTSOG’s tasks, as specified by Recital 16 of the Gas Regulation, they have been “well defined” by the same Regulation. According to Article 8, beside other obligations (such as the adoption of annual report 34 and working program 35), ENTSOG’s main tasks can be classified as follows: to develop Network Codes with respect to cross-borders and market integration issues, to adopt common network operation tools “to ensure coordination of network operation”; to adopt a non-binding Community-wide ten-year network development plan every two years, to be built on national investment plans, taking into account regional and EU planning aspects; in this respect, it shall also identify investment gaps with respect to cross-border capacity; to adopt recommendations regarding the “coordination of technical cooperation” between EU and third-country TSOs.

3. The Bridge 2025 and the Energy Union Package

The Bridge 2025 devotes an entire chapter to governance issues. In this respect, ACER affirms that the evolution of integrated energy market will require to attribute more responsibilities on ENTSOs. In the light of the evolution of the regulatory framework of the Internal Energy Market, the Agency “will be called upon to play greater role in a more Europeanised energy sector”, thus “it is important that (...) checks and balance are maintained and [its] independence (...) is preserved”.

ACER concludes that it should *“have effective oversight of the ENTSOs in respect of their EU-wide activities. These oversight arrangements should ensure that the European public interest is properly served and that the ENTSOs’ operations are undertaken efficiently and transparently. This may be of some significance where some ENTSOs’ members, although regulated nationally, are (inevitably) primarily driven by legitimate duties to their own shareholders. Further, since the ENTSOs, similar to national TSOs, do not face competitive pressures on their costs, we believe it is important that there is a degree of oversight at European level to encourage efficiency in the interests of Europe’s energy consumers”*. (A. POTOTSHNIG, 2014)

More particularly – as also clarified in a presentation made by ACER Board of Regulator Chair and CEER President – “in addition to its current non-binding opinions/recommendations for ENTSOG core EU tasks”, ACER is envisaging a stronger role, with the possibility to issue binding decisions with respect to, inter alia: “- Guidelines and Codes development and implementation - TYNDP process - Work programmes and related budget and expenditure - Statutes and Rules of procedure”

ACER seems to understand that a new legislation is necessary, at least with respect to possible new powers of regulatory oversight over ENTSOs. Indeed, ACER affirms that, *“[g]iven this increasingly central role of the ENTSOs in the European regulatory structure, the EC should consider whether new legislation is required to ensure that they are subject to appropriate checks and balances and that there is effective regulatory oversight in respect of the ENTSO’s evolving role in order to ensure the fulfilment of their European role towards the IEM completion and operation”*. (The Bridge 2025, 2014)

Therefore, it seems clear that, in line with ACER’s “Bridge 2025”, also the Commission is willing to increase ENTSOG’s tasks and to strengthen ACER’s powers. It is not clear whether in the Commission view such outcome should be achieved through the enactment of new legislation or through mere implementing acts; however the first approach seems more likely to occur.

Conclusions

As described above, Article 8 of Regulation (EC) No 715/2009, well establishes ENTSOG’s tasks and prerogatives; actually, it has been already underlined that ENTSOG shall develop the NCs, monitor their implementation, adopt common network operation tools and the Community-wide ten-year network development plan, ensure the technical cooperation between EU and third-countries TSOs.

The above-mentioned list is to be considered substantially exhaustive since, as already discussed, Recital 16 of Gas Regulation states that ENTSOG’s tasks must be, as in fact are, “well-defined”. In this perspective, one should remind that, differently from what was envisaged by Article 9 of Regulation (EC) No 713/2009 with respect to ACER’s tasks, when discussing ENTSOG’s tasks, the legislator clearly wanted to define a precise and circumscribed set of prerogatives. this is also

proved by the fact that the Gas Regulation does not contemplate the possibility to vest ENTSOG with “additional tasks” other than those established by Article 8. (P. SYRPIS, 2015)

Given such circumstances, it can be excluded the possibility for ACER to entrust ENTSOG with additional task; this inter alia because ACER does not have the needed (legislative) power to do so. As known, in order to modify the set of tasks and prerogatives established by the Basic Regulation - that are a result of an intense discussion occurred during the legislative phase - ACER would have to modify the Regulation itself. It is, on the contrary, well known that the only way to modify a regulation would be the adoption by the EU legislator of a new legislative act, through the ordinary legislative procedure set forth by Articles 289 and 294 TFEU.

Having already noted that ACER is not provided with a legislative power, it is also worth noting, for the sake of completeness, that, being a mere annex to an agency “recommendation”, the Bridge 2025 is obviously an act lacking any binding legal effects (Article 288 TFEU) and having no influence whatsoever on the scope and effects of the abovementioned provision of the Basic Regulation.

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