

## Europex response to the proposed revisions of the ACER Regulation: a need for clarity and consistency

Brussels, 19 October 2017 | The proposal for the recast ACER Regulation<sup>1</sup> and the revised Council text<sup>2</sup> positively recognise the important contribution energy exchanges make towards a more integrated electricity market. However, Europex underlines the need for more precision on new ACER powers to oversee Nominated Electricity Market Operators (NEMOs), who perform market coupling operations. The recast Regulation should also ensure consistency with the recast Electricity Regulation and the Network Codes and Guidelines already in place.

With this in mind, and as the text is further discussed in the European Parliament and the Council, Europex highlights three key points:

1. **Clear regulatory oversight of Nominated Electricity Market Operators (NEMOs):** The proposal sets out ACER oversight of the market coupling function (MCO) performed by nominated electricity market operators (NEMOs) (Art 2a; Art. 9).<sup>3</sup> While Europex supports the oversight of this function, the current text is too vague and risks introducing uncertainty around the scope of ACER competences - it is important that these competences are more clearly defined and clearly linked to market coupling.
2. **Representative voting rules in the Board of Regulators:** Europex does not agree with the Commission's proposal to introduce single majority voting in ACER's Board of Regulators (Art. 23), as it does not reflect in a proportionate way the reality of electricity markets in the Member States. To ensure voting is fair and non-discriminatory, the current system of two-thirds majority voting in ACER's Board of Regulators should be maintained.
3. **Revision and approval of the Network Codes and Guidelines:** Art. 5(2) of the recast ACER Regulation introduces the possibility for ACER to revise or change related terms and conditions or methodologies before approval. Any revision of the Network Codes and Guidelines by ACER should be conditional on a consultation of all affected stakeholders having been carried out. To avoid the

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<sup>1</sup> Proposal for a Regulation of the European Parliament and of the Council establishing a European Union Agency for the Cooperation of Energy Regulators (recast); COM(2016) 863 final

<sup>2</sup> Council Revision of 15 Sep 2017, Proposal for a Regulation of the European Parliament and of the Council establishing a European Union Agency for the Cooperation of Energy Regulators (recast)

<sup>3</sup> Art. 6(1) of the Proposal for a Regulation of the European Parliament and of the Council on the internal market for electricity (recast)

creation of parallel processes, it is also vital for these provisions to be fully aligned with the processes currently in place for the adoption of Network Codes and Guidelines.

Further details can be found in the tables below.

### **About**

Europex is a not-for-profit association of European energy exchanges with 27 members. It represents the interests of exchange-based wholesale electricity, gas and environmental markets, focuses on developments of the European regulatory framework for wholesale energy trading and provides a discussion platform at European level.

### **Contact**

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## 1. Regulatory oversight of nominated electricity market operators (NEMOs)

| Article  | Draft CEP proposal (COM)   | Proposed amendments | Reasoning   |
|--|--|---------------------|---|
| Art. 6(1), Electricity Regulation (Day-ahead and intraday markets) | Transmission system operators and nominated electricity market operators shall jointly organise the management of the integrated day-ahead and intraday markets based on market coupling as set out in Regulation (EU) 2015/1222. Transmission system operators and nominated electricity market operators shall cooperate at Union level or, where more appropriate, on a regional basis in order to maximise the efficiency and effectiveness of Union electricity day-ahead and intraday trading. The obligation to cooperate shall be without prejudice to the application of the provisions of Union competition law. In their functions relating to electricity trading, Transmission system operators and nominated market operators shall be subject to regulatory oversight by regulators and the Agency pursuant to Article 59 of [recast of Directive 2009/72/EC as proposed by COM (2016) 864/2] and Articles 3 to 16 of [recast of Regulation (EC) No | N/A                 | <p>Europex seeks further clarification of the new mandate of ACER to regulate Nominated Electricity Market Operators (NEMOs).</p> <p>We support the oversight by ACER of the market coupling operation (MCO) function performed by Nominated Electricity Market Operators (NEMOs). However, ACER competences linked to this should be defined in clear terms in the Electricity Regulation (Article 6.1) and ACER Regulation (Articles 2(a) and 9) to facilitate the application of these principles – see below.</p> |

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|   | 713/2009 as proposed by COM (2016) 863/2].   |  |   |
| Art. 2a, ACER Regulation  | The Agency shall:<br>(a) issue opinions and recommendations addressed to transmission system operators, regional operational centres and nominated electricity market operators  | N/A  | <p>Europex seeks further clarification on the proposed regulatory oversight of NEMOs by ACER. The current formulation is too open, and does not make it clear that opinions and recommendations issued will be related to the performance of the market coupling operation (MCO) function.</p> <p>Europex supports the oversight by ACER of the market coupling operation (MCO) function performed by NEMOs. However, these competences should be clearly defined and clearly linked to the MCO function.</p> |
| Art. 9, ACER Regulation (Tasks of the Agency as regards Nominated Electricity Market Operators) | <p><b>Tasks of the Agency as regards Nominated Electricity Market Operators</b></p> <p>In order to ensure that Nominated Electricity Market Operators carry out their functions under the [recast Electricity Regulation as proposed by COM(2016) 861/2] and Commission Regulation 1222/2015 of 24 July 2015, the Agency shall:</p> <p>(a) monitor the Nominated Electricity Market Operators' progress in</p> | <p><b>Tasks of the Agency as regards Nominated Electricity Market Operators</b></p> <p>In order to ensure that Nominated Electricity Market Operators carry out their functions under the [recast Electricity Regulation as proposed by COM(2016) 861/2] and Commission Regulation 1222/2015 of 24 July 2015, the Agency shall:</p> <p>(a) monitor the Nominated Electricity Market Operators' progress in</p> | <p>Europex seeks further clarification on the suggested regulatory oversight of NEMOs by ACER. The current formulation is too open, for example, on the type of information request.</p> <p>Europex supports the oversight by ACER of the market coupling operation (MCO) function performed by NEMOs. However, these competences should be clearly defined and clearly linked to the MCO function and NEMO obligations in Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity</p> |

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|                               | <p>establishing the functions under Regulation 1222/2015;</p> <p>(b) issue recommendations to the Commission in accordance with Article 7(5) of Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation Regulation 1222/2015;</p> <p>(c) request information from Nominated Electricity Market Operators where appropriate.</p>   | <p>establishing the functions under Regulation 1222/2015;</p> <p>(b) issue recommendations to the Commission in accordance with Article 7(5) of Regulation 1222/2015;</p> <p>(c) request information from Nominated Electricity Market Operators where appropriate;</p> <p><i>(d) Issue non-binding opinions on disputes between Nominated Electricity Market Operators, when appropriate and solicited by the nominated electricity market operators.</i></p>   | <p>allocation and congestion management (CACM).</p> <p>Furthermore, NEMOs deem it essential to provide ACER with the power to issue non-binding resolutions to resolve disputes arising between NEMOs, in the event that NEMOs should solicit such an opinion (new point (d) suggested).</p>  |
| Recital (11), ACER Regulation | <p>(11) The Agency should monitor regional cooperation between transmission system operators in the electricity and gas sectors as well as the execution of the tasks of the European Network of Transmission System Operators for Electricity (ENTSO for Electricity), and the European Network of Transmission System Operators for Gas (ENTSO for Gas). The Agency should also monitor the implementation of the tasks of other entities with regulated functions of Union-wide dimension, such as energy exchanges. The involvement of</p> | <p>(11) The Agency should monitor regional cooperation between transmission system operators in the electricity and gas sectors as well as the execution of the tasks of the European Network of Transmission System Operators for Electricity (ENTSO for Electricity), and the European Network of Transmission System Operators for Gas (ENTSO for Gas). The Agency should also monitor the implementation of the tasks of other entities with regulated functions of Union-wide dimension, such as energy exchanges <i>and nominated electricity market operators (NEMOs) pursuant to</i></p> | <p>The Interim NEMO Committee (INC) is discussing a possible role for ACER in resolving dispute resolutions between NEMOs. It is important to provide a more solid legal basis for this in the text of the Regulation.</p> <p>There may also be a role for ACER in the event of a dispute between a NEMO and their regulating NRA.</p> <p>It should be clarified that energy exchanges are not necessarily the same as Nominated Electricity Market Operators (NEMOs) pursuant to Regulation (EU)</p> |

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|                                      | <p>the Agency is essential in order to ensure that the cooperation between transmission system operators and the operation of other entities with Union-wide functions proceeds in an efficient and transparent way for the benefit of the internal markets in electricity and natural gas.</p>   | <p><b>Article 2(23) of the Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management.</b> The involvement of the Agency is essential in order to ensure that the cooperation between transmission system operators and the operation of other entities with Union-wide functions proceeds in an efficient and transparent way for the benefit of the internal markets in electricity and natural gas.</p>   | <p>2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management (CACM).</p>   |
| <p>Recital (18), ACER Regulation</p> | <p>(18) Since the Agency has an overview of the national regulatory authorities, it should have an advisory role towards the Commission, other Union institutions and national regulatory authorities as regards the issues relating to the purpose for which it was established. It should also be required to inform the Commission where it finds that the cooperation between transmission system operators does not produce the results which are needed or that a national regulatory authority whose decision is not in compliance with the Guidelines does not implement the opinion, recommendation or decision of the Agency appropriately.</p> | <p>(18) Since the Agency has an overview of the national regulatory authorities, it should have an advisory role towards the Commission, other Union institutions and national regulatory authorities as regards the issues relating to the purpose for which it was established. It should also be required to inform the Commission where it finds that the cooperation between transmission system operators <b>and Nominated Electricity Market Operators</b> does not produce the results which are needed or that a national regulatory authority whose decision is not in compliance with the Guidelines does not implement the opinion, recommendation or decision of the Agency appropriately.</p> | <p>Pursuant to Recital 11, if the Agency is empowered to monitor the implementation of NEMOs, it should also be empowered to monitor the outcome and quality of the cooperation between NEMOs.</p> |

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| <p>Recital (19),<br/>ACER<br/>Regulation</p> | <p>(19) The Agency should also be able to make recommendations to assist regulatory authorities and market players in sharing good practices.</p> | <p><i>[new] The Agency should also be able to make recommendations to assist nominated electricity market operators (NEMOs) in the resolution of disputes arising from the performance of their functions by providing a non-binding opinion on the dispute, if solicited by the concerned NEMOs.</i></p> | <p>NEMOs deem it essential to provide ACER with the power of issuing non-binding resolutions to resolve disputes arising between NEMOs, in the event that NEMOs should solicit such an opinion.</p> |
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## 2. Voting in the Board of Regulators

| Article   | Draft CEP proposal (COM)   | Proposed amendments  | Reasoning   |
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| <p>Art. 23(1), ACER Regulation (Functions of the Board of Regulators)</p> | <p>The Board of Regulators and sub-committees pursuant to Article 7 shall act by a simple majority of the members present, with one vote for each member, except for the opinion pursuant to paragraph 5(b) which shall be taken on the basis of a two-thirds majority of its members present.</p> | <p>The Board of Regulators and sub-committees pursuant to Article 7 shall act by a <b>two-thirds</b> simple majority of the members present. <b>Each member or alternate shall have one vote.</b> <del>with one vote for each member, except for the opinion pursuant to paragraph 5(b) which shall be taken on the basis of a two-thirds majority of its members present.</del></p> | <p>The empowerment of ACER and the strengthened regulatory oversight of the market coupling operation (MCO) function performed by nominated electricity market operators (NEMOs), increases the need for transparent and balanced internal governance of the Agency, in particular regarding voting rights within the Board of Regulators.</p> <p>The Board of Regulators currently takes its decisions by two-thirds majority of its members present, as stated in the 713/2009 Regulation and the Rules of Internal Order.</p> <p>Europex is extremely concerned by the Commission’s proposals regarding the introduction of single majority voting in ACER’s Board of Regulators, as it does not reflect in a proportionate way the Member States and their electricity markets.</p> <p>ACER’s voting mechanism should be based on a non-discriminatory and fair representation of each Member State. Therefore, Europex calls for the current</p> |



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|                               |  |   | system of two-thirds majority voting in ACER's Board of Regulators to be maintained.   |
| Recital (34), ACER Regulation | Through the cooperation of national regulators within the Agency it is evident that majority decisions are a key pre-requisite to achieve progress on matters concerning the internal energy market which have significant economic effects in various Member States. National regulators should therefore vote with simple majority within the Board of Regulators. | Through the cooperation of national regulators within the Agency it is evident that majority decisions are a key pre-requisite to achieve progress on matters concerning the internal energy market which have significant economic effects in various Member States. National regulators should therefore vote with <b>two-thirds majority</b> simple majority within the Board of Regulators. | For the above-mentioned reasons, Europex advocates for keeping the two-thirds majority voting in ACER's Board of Regulators. |

### 3. Consistency with the Network Codes and Guidelines

| Article                    | Draft CEP proposal (COM)   | Proposed amendments | Reasoning   |
|----------------------------|--|---------------------|---|
| Art. 5(2), ACER Regulation | <p>In cases where the network codes and guidelines developed pursuant to Chapter VII of [recast Electricity Regulation as proposed by COM(2016) 861/2] provide for the development of proposals for terms and conditions or methodologies for the implementation of those network codes and guidelines which require regulatory approval by all regulatory authorities or by all regulators of the concerned region, the terms and conditions or methodologies shall be submitted for revision and approval to the Agency. Before approving the terms and conditions or methodologies, the Agency shall revise and change them where necessary in order to ensure that they are in line with the purpose of the network code or guideline and contribute to market integration, non-discrimination and the efficient functioning of the market. The procedure for the coordination of regional tasks in accordance with Article 7 shall apply.</p> | N/A                 | <p>Europex seeks further clarification on the revision and approval of the network codes and guidelines by ACER.</p> <p>Adding a right to change late in the process does not “streamline” the process, it rather allows changes to network code texts that have not been widely reviewed and subject to the earlier consultations with stakeholders.</p> <p>Any revision of the network codes and guidelines by ACER should be conditional on a public consultation, or a process to fully consult all affected stakeholders, having been carried out on the proposed changes.</p> <p>It is also vital to avoid the creation of parallel processes when adopting terms and conditions or methodologies. This Article should therefore ensure consistency with the processes currently in place for the network codes and guidelines, and in particular the Electricity Balancing Guideline and the guideline on capacity</p> |

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|  |  |  | allocation and congestion management (CACM). |
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