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**COMMISSION OPINION**

**of 25.11.2020**

**on the statutory documents on the establishment of the EU DSO Entity**

(only the English version is authentic)

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### 1. GENERAL

Chapter VI of the Regulation (EU) 2019/943<sup>1</sup> of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (hereafter “the Regulation”) describes the specific criteria and guiding principles for the establishment of a European entity for distribution system operators (hereafter “the EU DSO Entity”).

Article 53(4) of the Regulation foresees that the European Commission is to deliver an opinion to the European distribution system operators on their draft statutes, the list of members and the draft rules of procedures on the establishment of the EU DSO Entity (hereafter “the draft statutory documents”).

The European Distribution System Operators, represented by their four European associations of distribution system operators (CEDEC, E.DSO, Eurelectric and GEODE), submitted on 24 June 2020 the draft statutory documents to the Commission and the Agency for the Cooperation of Energy Regulators (hereafter “ACER”).

ACER, taking into account the outcome of a public consultation it carried out from 13 to 27 of July 2020, adopted an opinion on the draft statutory documents on 25 August 2020 and submitted that opinion to the Commission on 25 August 2020 (hereafter “ACER’s Opinion”).

Taking into account ACER’s Opinion, the Commission hereby provides the following opinion on the statutory documents on the establishment of the EU DSO Entity.

### 2. OVERALL ASSESSMENT OF THE STATUTORY DOCUMENTS

#### 2.1. Content

The draft statutory documents of the EU DSO Entity are: the Statutes of the EU DSO Entity AISBL (Association Internationale Sans But Lucratif), the Rules of Procedure, including the financing rules, the Rules of Procedure on Consultations, the Code of Conduct and the list of initial potential registered members.

The Statutes are the main governance rules of the new EU DSO Entity. Apart from defining its general purpose and activities in Chapter I, it contains articles on the status of its Members, Associate Members and Observers in Chapter II, describes the composition, powers and tasks of its Bodies in Chapter III, and sets out the financial arrangements in Chapter IV.

With respect to the provisions related to the election of the President, the Statutes contain both a ‘majority option’ and a ‘minority option’ as two possible options under Article 54 of the Regulation. Whereas the majority option, supported by three of the four European associations of distribution system operators (E.DSO, Eurelectric and GEODE) is integrated

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<sup>1</sup> OJ L 158, 14.06.2019, p. 103

in the main body of the Statutes, the minority option is supported by CEDEC and added as an annex together with an explanatory note.

The Rules of Procedure define the practical and technical matters and procedures governing the operations of the EU DSO Entity, such as fees and financial provisions, the functioning of the Strategic Advisory Group and the Country Expert Groups or arrangements related to the handling of personal or confidential information. Article 1 of the Rules of Procedure stipulates that the Statutes prevail over the Rules of Procedure in case a difference in interpretation would occur. The Rules of Procedure on the consultation lay down the consultation process and describe how the EU DSO Entity would handle the responses received from its consultations.

The Rules of Procedures on Consultations describe the types of consultations foreseen, timing and duration, consultation process and principles for the treatment of the responses and confidentiality requests for the content of responses.

The Code of Conduct describes the core values of the EU DSO Entity and the ethical principles and standards that apply to its Members, Observers and Secretariat.

Finally, the submission contains a list of initial potential members, distinguishing the DSOs coming from EU and non-EU Member States, and stating the number of connected customers for most of the potential members.

## **2.2. Overall ACER's Opinion**

ACER considers the statutory documents of the EU DSO Entity to be overall compliant with the specific criteria and guiding principles of Chapter VI of the Regulation.

As described below, ACER highlights possible ways to improve the statutory documents even further or indicates situations to which the EU DSO Entity should pay particular attention with respect to the level of neutrality and the funding of the EU DSO Entity, the possibility of a deadlock in the voting procedure, or the need to ensure a balanced geographic and gender representation in the Board of Directors.

ACER considers that both, the majority option and the minority option submitted in relation to the election of the President, are in compliance with the Regulation. However, if the members do not find an agreement amongst themselves which of the two options to decide on, ACER suggests to follow the majority option as the option that most closely implements The Regulation under the various possible interpretations of its Article 54.

## **2.3. Overall Commission's Opinion**

The Commission agrees with ACER that the statutory documents submitted for the EU DSO Entity meet in general the specific criteria and guiding principles of Chapter VI of the Regulation. In particular, and even taking into account the various possible interpretations of Article 54 of the Regulation to elect and nominate the Board of Directors, the Commission agrees with ACER that, as compared to the 'minority' option, the 'majority option' represents the most complete implementation of all the provisions of that article. Regarding the minority option, the Commission considers that the nomination process described in the Annex of the Statutes for the President of the Board under the minority option is either incomplete or does not provide a sound procedure to ensure compliance with both, the 9-9-9 representation principle described in Article 54(2)(a) and the explicit role of the General Assembly described in Article 54(1)(e) of the Regulation.

The Commission concurs to a large extent with ACER on the possible ways suggested to improve the statutory documents. In addition, the Commission considers that the proposed modalities of participation have to be redefined into three categories: i) 'Members' shall be

limited to distributed system operators in EU Member States, with full rights; ii) ‘Associate Members’ shall be limited to third countries who apply the relevant EU energy law, but with no voting rights and no formal participation in the bodies of the entity; and iii) regarding the involvement of any other distribution system operator from a third country that does not apply any EU energy legislation (e.g. the US, China or Russia), and whose cooperation with them would must be established within the framework of bilateral agreements, following the positive opinion of the Commission.

The Commission requests the European distribution system operators to amend the relevant provisions of the legal documents of the EU DSO Entity as described below.

### **3. REMARKS ON PARTICULAR ASPECTS OF THE STATUTORY DOCUMENTS**

#### **3.1. President of the Board of Directors**

##### *3.1.1. Content*

The proposed Statutes contain both a ‘majority option’ and a ‘minority option’ for the procedure to appoint the President of the Board of Directors. Whereas the majority option, supported by three of the four European associations of distribution system operators (E.DSO, Eurelectric and GEODE) is set out in the main body of the text, the minority option, supported by CEDEC, is added as an annex together with an explanatory note.

The main difference between the two options fundamentally lies in the fact that under the majority option the General Assembly has an explicit role in the election of the President of the Board of Directors, whereas under the minority option the General Assembly does not have such a role and instead the President is nominated exclusively by the Board from amongst its members. A second difference lies in the distinction between the President of the Board and the President of the EU DSO Entity, as well as whether or not the former should be endorsed by the General Assembly in the same way as the latter, but both options coincide in the fact that the President of the Board presides over the Board of Directors and the General Assembly.

##### *3.1.2. ACER’s Opinion*

With respect to the election procedure for the President of the Board of Directors, ACER points out the following:

- (a) Under the majority option, the General Assembly votes for the President of the Board according to the voting rights of the Members, for a single candidate from the list of 27 Directors, whom the General Assembly then recommends to the Board members. However, Article 16.9.4(2)(c) of the Statutes explicitly states that this proposal by the General Assembly concerns a “non-binding recommendation”, from which the Board members can thus deviate. Once the members of the Board of Directors nominate the candidate for President, the General Assembly is then called upon to decide whether or not to endorse the proposed candidate as President of the EU DSO Entity. Article 16.9.4(2)(f) of the Statutes supports this option, as that provision provides for the procedural steps in case the Director nominated by the Board as President is not endorsed by the General Assembly as President of the EU DSO Entity. The endorsement decision follows the same rules as for any regular decision to be adopted by the General Assembly, laid down in Article 15.13 of the Statutes, and duly implements the dual threshold prescribed in Article 54(1)(c) of the Regulation. The General Assembly’s endorsement decision of the President of the EU DSO Entity thus respects the institutional balance and fair representation of all participating DSOs.

Therefore, ACER recalls in this respect that the General Assembly does not have any decisive role in the nomination procedure, but only provides a non-binding recommendation. In case of a discord in the nomination/endorsement of the President of the Board and the President of the EU DSO Entity, the President of the Board can still continue to exercise his competences and legal mandate for six months. ACER recalls that the fact that the General Assembly is explicitly involved via a non-mandatory recommendation in the nomination procedure and that the Statutes aim for a combined position does therefore not appear to be in contradiction with the requirements laid down in Articles 53 and 54 of the Regulation.

- (b) Depending on the possible interpretations of certain provisions of Article 54 of the Regulation, the required involvement of the General Assembly in the election of the President of the Board may even go well beyond what is foreseen in the Statutes. One possible interpretation would indeed consist of a combined reading of Article 54(1)(e) and Article 54(2)(a) of the Regulation. As Article 54(2)(a) of the Regulation makes clear that the board of directors is composed of the President of the Board and the 27 board members, the reference to the “board of directors” in Article 54(1)(e) of the Regulation would imply that the General Assembly also has to elect the President of the Board, following the nomination process by the board members in accordance with Article 54(1)(f) of Regulation 2019/943.

Neither the majority option nor the minority option would be fully in line with the above interpretation of the Regulation. However, according to ACER, the majority option approach would more closely give the General Assembly its role as envisaged in the Regulation according to this interpretation.

- (c) In contrast to the majority option, the Statutes in the version of the minority option does not foresee the role of the President of the EU DSO Entity. The procedure in the minority option for nominating the President of the Board is straightforward: the Board of Directors is elected by the General Assembly; the Board of Directors nominate the President of the Board and the three Vice-Presidents from among the members of the Board; and the mandate of the Directors is for a term not exceeding four years. If the combined interpretation of Article 54(1)(e) and Article 54(2) of the Regulation is to be followed, the minority option is silent about the election of the President of the Board by the General Assembly, following the nomination by the Board members. As the minority option does not prevent the General Assembly from using the regular decision procedure of Article 15.13 of the Statutes, the Statutes in the version of the minority option would still be compliant with the Regulation under this interpretation, be it that the General Assembly’s role in the procedure would be less clear and explicit as compared to the majority option.

As regard the President of the EU DSO Entity, ACER recalls that the Regulation is silent, or at most ambiguous, about the combined role of the President of the Board to the Presidency of the EU DSO Entity. However, it also implies that the Regulation does not prevent the President of the Board from also assuming the responsibilities of the President of the EU DSO Entity, as long as such combined position does not hinder the President of the Board in any way in the exercise of his functions as foreseen in the Regulation.

Therefore, ACER considers both proposals compliant with the Regulation and recommends that, if the members do not find an agreement amongst themselves which of the two options to decide on, preference should be given to the version that

most closely implements the Regulation taking into account the possible interpretation of its Article 54, and thus to the majority option.

### *3.1.3. Commission' opinion*

Regarding the proposed position of the President of the EU DSO Entity, it is clear that the Regulation refers only to the President and Vice-Presidents of the Board. However, this does not prohibit the option of appointing also a President of the EU DSO Entity, nor the case that the President of the Board and the President of the EU DSO Entity are the same person, as proposed in the Statutes. Therefore, the Commission agrees with ACER on the compliance with the Regulation of the position of the President of the EU DSO, as proposed in the Statutes.

Regarding the appointment procedures, the majority option describes in Article 16.9.4(2) of the Statutes a detailed set of procedures for the appointment of the President of the Board and the President of the EU DSO Entity with the involvement of both the Board of Directors and the General Assembly. Pointing out the possible interpretations of certain provisions in Article 54 of the Regulation, the explanatory note for the majority option advocates that the proposal is fully in line with the Regulation and notes that the approach avoids dual leadership and the risk for a resulting lack of effectiveness in leadership of the Entity.

The minority option is described in the annex of the Statutes. It questions the need for a President of the EU DSO Entity and does not propose a role for General Assembly in the election procedure of the President as in the case of the majority option. It therefore proposes that the Statutes should only lay down that the President is the President of the Board, nominated exclusively by the Board from amongst its members.

Based on what is submitted, the Commission considers that the nomination process described in the Annex of the Statutes for the President of the Board under the minority option is either incomplete or does not provide a sound procedure to ensure compliance with both, the 9-9-9 representation principle described in Article 54(2)(a) and the explicit role of the General Assembly in electing the Board of Directors defined in Article 54(1)(e) of the Regulation.

Therefore, taking into account the different possible interpretations of Article 54 of the Regulation for the election and appointment of the Board of Directors, the Commission agrees with ACER that the "majority option" represents the most complete implementation of all the provisions of said article. To the Commission's opinion, the combined reading of Articles 54(1)(e), 54(2)(a) and 54(1)(f) of the Regulation supports the "majority option" where the Board of Directors nominates the President from among its 27 members and the General Assembly elects the President of the Board. Furthermore, in the opinion of the Commission, the majority option would create the necessary links between the Board of Directors and the General Assembly, which would also support the internal decision-making process and facilitate the dialogue within the EU DSO Entity, as well as with third parties.

## **3.2. Balanced representation in the Board of Directors**

### *3.2.1. Content*

Articles 16.9.1(2)(l) and 16.9.3(2)(f) of the Statutes encourage the members of the EU DSO Entity, when nominating their candidate Director, "to reach an acceptable level of diversity and gender balance as well as geographical representation in the composition of the Board of Directors". Article 16.9.3(2)(g) of the Statutes provides further guarantees for a balanced representation of all participating DSOs, by requiring that "the elected Directors in the Board in all three Categories should as much as possible reflect the diversity of their respective group of DSOs. Balanced representation of all participating DSOs will consider the size,

country, industrial group of the DSO, also its service area (i.e. local, national, transnational, urban or rural) and its scope of service”.

In addition, and in compliance with Article 54(2)(f) of the Regulation, Articles 16.8(w) and 18 of the Statutes and Article 4 of the Rules of Procedure foresee the establishment of a Strategic Advisory Group, which is composed inter alia of one DSO representative of each Member State which is not represented in the Board of Directors. The Strategic Advisory Group provides opinions on relevant decisions and projects related to the EU DSO Entity, which the Board of Directors has to duly take into account in its decision-making process.

### *3.2.2. ACER's Opinion*

Given the complex governance structure of the EU DSO Entity, ACER understands that a complete geographic representation within a single mandate of the Board of Directors may not be feasible. In order to avoid possible long-term gaps in the representation of the Member States in the Board of Directors, ACER recommends to amend Article 9.3(2) of the Statutes on this point and to include a commitment that the members of the EU DSO Entity take appropriate action in the next nomination procedures to avoid that such lack of direct representation in the Board of Directors would persist over time.

Regarding the gender balance, ACER highly welcomes the inclusion of the gender balance objective in the Statutes, which was not explicitly foreseen in the Regulation. Unfortunately, the wording remains very weak, as it limits itself to a declaration of intent which on its own does not ensure ‘an acceptable level’ of balance. Therefore, ACER recommends to examine ways for imposing stronger requirements in the Statutes in order to reach an ‘acceptable’ balance at the Board of Directors. In particular, ACER encourages the inclusion in the statutes of a mandatory gender quota to be respected by the Nomination Committee when proposing a Board of Directors.

### *3.2.3. Commission's Opinion*

Taking into consideration the large number and diversity of the electricity distribution system operators in the EU, the Commission considers very important that the EU DSO Entity ensures a geographical balanced representation of all EU members. In line with ACER proposal, the Commission requests distribution system operators to include a rotation system into nomination procedures under Article 16 of the Statutes that guarantees the direct representation of all the Member States on the Board of Directors at least once every three mandates of the Board.

The Commission welcomes the inclusion of the gender balance intention in the Article 19 of the Statutes and calls on the electricity distribution system operators to include the development of a gender balance strategy, with annually revision of the targets in accordance with the Commission's Strategy of the EU on gender equality 2020-2025 adopted on 5 March 2020 and further gender balance policy initiatives and targets at EU level.

## **3.3. Deadlock in the voting procedure**

### *3.3.1. Content*

Based on the combined reading of Article 54(1)(c)(iii) and Article 54(1)(d)(iii) of the Regulation, there could be cases in which a decision of the General Assembly can simultaneously be adopted and rejected, which thus entails a risk for the efficient governance of the EU DSO Entity. To mitigate this risk, Article 15.13(b)(i) of the Statutes introduces a new criterion for the approval of the decision, by requiring that more than 50% of the votes attributed to the members present or represented in the voting session of the General Assembly need to be in favour of the proposed decision.

### 3.3.2. *ACER's Opinion*

The additional criterion in Article 15.13(b) of the Statutes attenuates the risk of a stalemate situation in the voting procedure for some cases. However, as the risk is not entirely annulled by the measure and, if this situation would however become a recurrent case in the future, ACER would in that case recommend the EU DSO Entity to revisit and amend the Statutes on this particular aspect.

### 3.3.3. *Commission's Opinion*

The Commission understand the legitimate concern of ACER and encourages the EU DSO Entity to timely report possible stalemate situations in the voting procedure and take a pragmatic and constructive proposal to amend should this event occur.

Regarding the criterion in Article 15.13(b)(i), the Commission agrees with ACER that it attenuates the risk of a stalemate situation in the voting procedure of the General Assembly, but for the time being the Commission considers that no further amendment in the Statutes is needed on this particular aspect.

On this particular aspect, to the Commission's opinion, the criterion in Article 15.13(b)(i) of the Statutes to request more than 50% of the votes attributed to the members represents the basic and generally accepted rule that a simple majority of the votes cast is needed to adopt a decision. Furthermore, in combination with the criterion in Article 54(1)(c)(iii) of the Regulation requesting majority of 55% of the members to adopt decisions, it reinforces the consensus of the decisions process of the EU DSO entity. Therefore, the Commission considers that the proposed combination of both criteria is compatible and respect the rules in Article 54(1)(c) of the Regulation while is fully in line with the principles of balanced representation and fair and proportionate treatment of its members, as state in Article 53(2) and Article 54(2) of the Regulation.

## **3.4. Conflict of interest**

### 3.4.1. *Content*

Article 15.19 and Article 16.25 of the Statutes address the possible risk for procedures at the Assembly and the conflict of interest obligations for the Board of Directors, respectively.

### 3.4.2. *ACER's Opinion*

Although the nomination committee is not entrusted with any decision-making power, ACER has concerns as regards its role in the election procedure of the Directors and President and recommends that a conflict of interest clause is also foreseen for the members of the nomination committee, established pursuant to Article 16.9.1 of the Statutes.

### 3.4.3. *Commission's Opinion*

The Commission understands ACER's opinion and fully supports any measure taken to avoid any possible conflict of interest. However, considering the tasks associated with the nomination committee, which are mainly of organisational nature and lack decision-taking responsibilities, the Commission does not see a risk of influence on the results of the election procedure. The Commission considers that the provisions on conflicts of interest in Article 15.19 and Article 16.25 of the Statutes adequately ensure the integrity and reliability of the election procedures of the EU DSO Entity. In the opinion of the Commission, no further changes are needed to Article 16.9.1.

### **3.5. Funding of the EU DSO Entity**

#### *3.5.1. Content*

Article 23(4) of the Statutes relates to the funding of the EU DSO Entity and clarifies that, in addition of membership fees, the EU DSO Entity can be funded by subsidies, loans and own revenues from e.g. the industry or other stakeholders.

#### *3.5.2. ACER's Opinion*

ACER underlines that the mission of the EU DSO Entity as working for the common Union interest is of primary importance and considers that the Entity shall not receive any funding from stakeholders other than from its own members via the payment of the membership fees.

#### *3.5.3. Commission's Opinion*

The Commission reminds that Article 52.2 of the Regulation envisages the EU DSO Entity as a neutral expert entity and Article 53.7 clearly states that the costs related to the activities of the Entity shall be borne by the registered members. As a neutral expert entity working for the common Union interest, the Commission considers that the EU DSO Entity should exclusively focus on the fulfilment of its statutory tasks whose funding should be ensured by the registered members' fees. Furthermore, and because stakeholder's funding is explicitly not foreseen in the Regulation, the Commission agrees with ACER that there should not be any additional funding by stakeholders, which could potentially result for instance the EU DSO Entity being involved in tasks outside the ones foreseen in the Regulation.

### **3.6. Members, Associate Member and other members from 3rd countries with no agreements with the EU.**

#### *3.6.1. Content*

Article 6 of the Statutes defines Member as an electricity distribution system operator from any EU Member state, or a non-EU country which participates in the European single market for electricity via a European Economic Area agreements (e.g. EFTA States or Energy Community countries), or is in a bilateral agreement with the EU with the obligation to implement relevant EU energy legislation, in particular Network Codes. In order to include cooperation with other third countries, Article 7 of the Statutes defines 'Associate Members' any electricity distribution system operator constituted under the laws of its country of origin outside the EU which does not meet the criteria set in Article 6 of the Statutes for admission as a Member.

#### *3.6.2. Commission's Opinion*

In line with Recital 60 of the Regulation, which defines the EU DSO Entity as an entity of distribution system operators in the Union, to the Commission's opinion, the cooperation and representativeness among distribution system operators in the Union are the core elements of this new entity at EU level. Therefore, the Commission considers that the proposed categories in Chapter II of the Statutes for registered members in the EU DSO have to be reformulated as following:

- (a) 'Members' shall be limited to distributed system operators in EU Member States, with full rights to participate in all the bodies of the entity;
- (b) 'Associate Members' are distribution system operators from 3rd countries who apply the relevant EU energy law but with no voting rights in the General Assembly and no formal participation in Board of Directors;

- (c) ‘Third Country Partners’ are distribution system operator from other 3rd countries with no agreements with the EU energy legislation. Cooperation with them would need to be set out under bilateral partnership agreements and after Commission’s positive view. These 3rd Country Partners may not attend the General Assembly and can only participate in Expert Groups according to the terms set out in the partnership agreement, but they cannot, however, participate in Expert Groups which develop proposals for EU rules, in particular network codes as referred in Article 55 of the Electricity Regulation.

### **3.7. List of initial potential members**

#### *3.7.1. Content*

The submission contains a list of initial potential members, distinguishing the DSOs coming from EU and non-EU Member States, and stating the number of connected customers for most of the potential members.

#### *3.7.2. ACER’s Opinion*

ACER notes that the list of initial potential members requires further revision. In particular, to avoid repetition of distribution system operators, complete some missing information about number of connected customers, etc. ACER recommends to revise and correct inconsistencies.

#### *3.7.3. Commission’s Opinion*

The Commission agrees with ACER and recommends to revise the list and its classification in line with the three categories for registered members recommended above, under 3.6.

## **4. CONCLUSION**

Based on the above assessment, the Commission concludes that the statutory documents of the EU DSO Entity are overall compliant with the specific criteria and guiding principles of Chapter VI of the Regulation.

The Commission requests the distribution system operators to amend the statutory documents taking duly into consideration the concerns and recommendations expressed by the Commission in the present opinion and notify the amended documents to the Commission prior to establish the EU DSO Entity.

The Commission does not consider the information contained herein to be confidential. The Commission will publish this opinion in the relevant Commission's website.

Done at Brussels, 25.11.2020

*For the Commission*  
*Kadri SIMSON*  
*Member of the Commission*

