

OPINION No 05/2020
OF THE EUROPEAN UNION AGENCY
FOR THE COOPERATION OF ENERGY REGULATORS

of 25 August 2020

on the statutory documents on the establishment of the EU DSO entity

THE EUROPEAN UNION AGENCY FOR THE COOPERATION OF ENERGY REGULATORS,

Having regard to Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators¹, and, in particular, Article 4(1) thereof,

Having regard to Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity, and, in particular, Article 53(3) thereof,

Having regard to the outcome of the consultation with the Agency's Electricity Working Group,

Having regard to the favourable opinion of the Board of Regulators of 25 August 2020, delivered pursuant to Article 22(5) of Regulation (EU) 2019/942,

Whereas:

1. INTRODUCTION

- (1) Article 52 of Regulation (EU) 2019/943 requires the distribution system operators ('DSOs') to cooperate at Union level through the EU DSO entity, in order to promote the completion and functioning of the internal market for electricity, and to promote optimal management and a coordinated operation of distribution and transmission systems. As an expert entity working for the common Union interest, it is assigned with a variety of tasks related to distribution as listed in more detail in Article 55 of Regulation (EU) 2019/943. The EU DSO Entity is expected to cooperate closely with transmission system operators and ENTSO-E, amongst others when network codes touching upon distribution matters are being prepared, amended or implemented. The cooperation and expertise provided by the new EU DSO entity should increase

¹ OJ L158, 14.6.2019, p. 22.

efficiencies in the electricity distribution systems in the Union as well as foster innovation, necessary to cope with challenges of decarbonisation and digitalisation.

- (2) In order to establish the new EU DSO entity, the DSOs are required to submit its statutory documents to ACER and the Commission at the latest by 5 July 2020, in accordance with Article 53(2) of Regulation (EU) 2019/943.
- (3) Article 53(3) of Regulation (EU) 2019/943 lays down that, within a period of two months after receipt of the statutory documents, ACER provides an opinion, after having consulted the organisations representing all stakeholders, in particular distribution system users.
- (4) On 24 June 2020, ACER received, on behalf of the four European DSO associations (CEDEC, E.DSO, Eurelectric and GEODE), the statutory documents on the establishment of the new EU DSO Entity.
- (5) Between 13 and 27 July 2020, ACER held, via its website, its consultation of the organisations representing all stakeholders, in particular distribution system users. Following the consultation, ACER received 17 submissions, which were taken into account in the adoption of this opinion.

2. SUMMARY OF THE STATUTORY DOCUMENTS

- (6) The statutory documents of the EU DSO Entity contained 5 documents, i.e., the statutes of the EU DSO Entity AISBL (association internationale sans but lucratif), the Rules of Procedure, including the rules of procedure on consultations, its code of conduct and a list of initial potential members.
- (7) The Statutes are the articles of association of the new EU DSO Entity. Apart from defining its general purpose and activities (Chapter I), it contains articles on the status of its Members, Associate Members and Observers (Chapter II), describes the composition, powers and tasks of its Bodies (Chapter III), and sets out the financial arrangements (Chapter IV).
- (8) With respect to the provisions related to the election of the President, the Statutes contain both a 'majority' and a 'minority option'. Whereas the majority option is integrated in the main body of the Statutes, the minority option is added as an annex, together with an explanatory note.
- (9) The difference between both options essentially concerns the fact whether or not the Statutes can lay down that the President can be both President of the Board and President of the EU DSO Entity. The majority option favours such approach, and describes in the statutes the two procedures for the appointment of the President of the Board and the EU DSO Entity. Pointing out the lack of clarity in Article 54 of Regulation (EU) 2019/943, the explanatory note advocates that the proposal is in line with the Regulation, noting that the approach avoids dual leadership and the risk for a resulting lack of effectiveness in leadership of the Entity, and argues that the President should have full support from the Board of Directors and the General Assembly.

- (10) The minority option questions the distinction between the President of the Board and the EU DSO Entity and strongly disagrees with the role given to the General Assembly in the election procedure of the President. Pointing out the lack of clarity in Article 54 of Regulation (EU) 2019/943, it therefore proposes that the Statutes should only lay down that the President is the President of the Board, nominated by the Board from amongst its members.
- (11) The Rules of Procedure define the practical and technical matters and procedures governing the operations of the EU DSO Entity, such as 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 lays down the consultation process and describes how the EU DSO Entity would handle the responses received from its consultations.
- (12) 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.
- (13) Finally, the submission contains a list of initial potential members, distinguishing the DSOs coming from EU and non-EU Member States, and stating, for most of the potential members, the number of connected customers.

3. ASSESSMENT OF THE STATUTORY DOCUMENTS

3.1. Overall assessment

- (14) Chapter VI of Regulation (EU) 2019/943, and in particular Articles 53 and 54, prescribe the various essential elements which need to be taken into account in the new EU DSO Entity's statutory documents, and which should ensure its proper functioning.
- (15) Article 53 of Regulation (EU) 2019/943 requires the 'distribution system operators' to submit the statutory documents to ACER and the Commission. Due to the sheer amount of DSOs (more than 2,500 DSOs are active in the European Union), the submission was done via four DSO Associations (CEDEC, E.DSO, Eurelectric and GEODE), which jointly effectively represent the DSOs at EU level. The consultation held by ACER also did not register any critical comment in terms of representativeness of the submission.
- (16) Taking into account the large number and diversity of electricity DSOs in the European Union, the principal rules and procedures of the new EU DSO Entity should ensure a balanced representation of its members and reflect their diverse geographical

and economic structures.² Its members should be treated fairly and proportionately.³ The new EU DSO Entity's proposed working methods should ensure efficiency, proportionality and transparency.⁴ Overall, the statutory documents should enable the new EU DSO Entity to comply with its tasks as laid down in Article 55 of Regulation (EU) 2019/943.

- (17) As an overall comment, ACER considers that the various statutory documents of the EU DSO Entity meet the standards and various criteria set out in Chapter VI of Regulation (EU) 2019/943. The requirements of the relevant articles of Regulation (EU) 2019/943 have correctly been integrated in the Statutes, and where necessary developed in further detail.
- (18) Thus, the Statutes appropriately set out that, when a Board member is nominated as President of the Board, another Director would be appointed from the list of alternates, in order to comply with the criterion that the Board of Directors is composed of the President of the Board and 27 members' representatives.⁵
- (19) Similarly, ACER supports the manner how the fees are calculated.⁶ The proposed approach whereby the fixed fee is set as a small value and is combined with a variable fee related to the number of connected customers is reasonable and proportionate. The cost allocation is a very important aspect and should not create constraints in smaller markets or energy systems which are on the periphery of the Internal Energy Market.
- (20) Where necessary, the Statutes also reiterate the guiding principles that need to be respected. Thus, in case of the Nomination Committee, a body which is not explicitly foreseen in Regulation (EU) 2019/943, Article 16.9.1.1 appropriately requires that it "must ensure fair representation of Members diversity in terms of geography, size and economic structure among its Members".

3.2. Remarks on particular aspects of the statutory documents

3.2.1. President of the Board of Directors – President of the EU DSO Entity

- (21) Whilst the submission itself contains one set of Statutes⁷, the fact that the proposed Statutes contain both a majority and a minority option related to the position of the President, as described above in recitals 8 to 10, is not a sustainable construct. According to recital 60 of Regulation (EU) 2019/943, the EU DSO Entity's working method "should ensure efficiency". In order to avoid endangering the process for the

² Cf. Article 54(2) of Regulation (EU) 2019/943.

³ Idem.

⁴ Cf. recital 60 of Regulation (EU) 2019/943.

⁵ Cf. Article 16.9.4(2)(e) of the Statutes and Article 54(2)(a) of Regulation (EU) 2019/943.

⁶ The input received via the consultation with respect to the proposed fee structure was ambivalent. Whereas one stakeholder advocated for a fixed and equal amount per connected customer regardless the number of customers, another stakeholder lauded the membership fee as a good balance between all DSOs' interests.

⁷ It thus formally complies with the requirements set in Article 53(2) of Regulation (EU) 2019/943.

establishment of the EU DSO Entity, this opinion will examine both the majority and minority option as to their compliance with the various criteria laid down in Regulation (EU) 2019/943, and assess whether, on this basis, any of the two options is to be preferred.

- (22) In general, ACER considers that both approaches are compliant with Regulation (EU) 2019/943 for the following reasons.
- (23) Firstly, the majority option (as reflected in the main body of the proposed Statutes) duly implements the various articles of Regulation (EU) 2019/943 which contain explicit requirements as to the nomination of the members of the Board, its President and the three Vice-Presidents. Thus, the Board of Directors is elected by the General Assembly⁸; the Board of Directors nominate the President of the Board and the three Vice-Presidents from among the members of the Board⁹; and the mandate of the Directors is for a term not exceeding four years¹⁰.
- (24) As proposed in the Statutes, the General Assembly is involved in the election procedure of both the President of the Board and the President of the EU DSO Entity. The minority option challenges this involvement, and questions its compliance with Regulation (EU) 2019/943.
- (25) With respect to the election procedure for the President of the Board of Directors, the General Assembly indeed votes, according to the voting power of the Members, for a single candidate from the list of 27 Directors, whom the General Assembly then recommends to the Board members.
- (26) However, Article 22.9.4(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. Article 22.9.4(2)(f) of the Statutes supports this aspect, as this provision describes the procedural steps when the Director nominated by the Board as President is not endorsed by the General Assembly as President of the EU DSO Entity. Due to the recommendation’s non-obligatory character, the two election procedures (Board and EU DSO Entity) may indeed have different dynamics and lead to possible different outcomes.
- (27) Once the members of the Board of Directors nominate the President, the General Assembly is then called upon to decide whether or not to endorse the latter 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 Assembly¹¹. This decision procedure is laid down in Article 15.13 of the Statutes, and duly implements the dual threshold

⁸ Articles 16.4 and 16.9.4(1) of the Statutes and Article 54(1)(e) of Regulation (EU) 2019/943.

⁹ Article 16.21 of the Statutes and Article 54(1)(f) of Regulation (EU) 2019/943.

¹⁰ Articles 16.4 and 16.22 of the Statutes and Article 54(1)(e) of Regulation (EU) 2019/943.

¹¹ Cf Article 16.9.4(2)(d) of the Statutes.

prescribed in Article 54(1)(c) of Regulation (EU) 2019/943.¹² 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.

- (28) Article 17 of the Statutes links the position of the President of the Board to the Presidency of the EU DSO Entity. Regulation (EU) 2019/943 is silent, or at most ambiguous, about such a combined role.
- (29) However, it also implies that the Regulation does not prevent the President of the Board to also assume 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 his rights as foreseen in Regulation (EU) 2019/943. With respect to the nomination procedure of the President of the Board, 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.¹³ The fact that the General Assembly is involved via a non-mandatory recommendation in the nomination procedure and that the Statutes aim for a combined position do therefore not seem to be in contradiction with the requirements laid down in Articles 53 and 54 of Regulation (EU) 2019/943.
- (30) Depending on how one interprets Article 54 of Regulation (EU) 2019/943, 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.
- (31) One possible interpretation would indeed consist of a combined reading of Article 54(1)(e) and Article 54(2)(a) of Regulation (EU) 2019/943. As Article 54(2)(a) of Regulation (EU) 2019/943 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 Regulation (EU) 2019/943 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 2019/943.¹⁴

¹² I.e., for a decision to be validly adopted, 65% of the votes attributed to the members need to be cast, and the decision needs to be adopted by a majority of 55% of the members. ACER notes that the Statutes add a further threshold, i.e. "50% of votes attributed to the members" (see Statutes, art. 15.13(b)(i)). As discussed in recitals 54 to 60 of this opinion, ACER considers that this additional threshold is important to avoid as much as possible the risk of stalemate in the voting procedure of the EU DSO Entity.

¹³ Cf. Article 16.9.4(2)(f) and (g) of the Statutes.

¹⁴ An alternative interpretation of the two paragraphs would consist in considering the two paragraphs as separate from one another. Following this approach, Article 54(1)(e) and (f) lays down the appointment process (election of board members, and nomination of the President and Vice-Presidents), whilst Article 54(2)(a) of Regulation (EU) 2019/943 provides rules on the composition of the board of directors.

- (32) If this interpretation is correct, neither the majority option nor the minority option would fully implement the Regulation. The Statutes would respect the nomination procedure of Article 54(1)(f) of Regulation 2019/943, given the non-binding character of the General Assembly’s recommendation. However, the subsequent procedure only sets out that the General Assembly “endorses” (albeit following its decision-making procedure) the President of the EU DSO Entity (and not the President of the Board of Directors). Still, as Article 17 of the Statutes states that the “President of the Board is the President of the EU DSO Entity”, the approach in the majority option arguably would most closely grant the General Assembly its role as foreseen by the Regulation under this interpretation.
- (33) 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 for nominating the President of the Board also does not retain any role for the General Assembly. The only articles related to the nomination procedure duly implement the various articles of Regulation (EU) 2019/943 which contain explicit requirements as to the nomination of the members of the Board, its President and the three Vice-Presidents. Thus, the Board of Directors is elected by the General Assembly¹⁵; the Board of Directors nominate the President of the Board and the three Vice-Presidents from among the members of the Board¹⁶; and the mandate of the Directors is for a term not exceeding four years¹⁷.
- (34) If the combined interpretation of Article 54(1)(e) and Article 54(2) of Regulation (EU) 2019/943 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.
- (35) As is clear from the above analysis, ACER considers both proposals compliant with Regulation (EU) 2019/943. However, ACER does note that the Statutes as reflected in the majority option have the support of three out of four European DSO Associations¹⁸ (representing significantly more than 50% of connected customers¹⁹),

¹⁵ Articles 16.4 and 16.9.4(1) of the Statutes and Article 54(1)(e) of Regulation (EU) 2019/943.

¹⁶ Article 16.21 of the Statutes and Article 54(1)(f) of Regulation (EU) 2019/943.

¹⁷ Articles 16.4 and 16.22 of the Statutes and Article 54(1)(e) of Regulation (EU) 2019/943.

¹⁸ Similarly, 8 out of the 9 stakeholders that pronounced themselves on this issue during the consultation expressed a preference for the majority option.

¹⁹ One stakeholder pointed out that, on the basis of the list of initial potential members, the DSOs with less than 100,000 customers would represent 3.1% of customers in Europe, whilst having a 33.3% representation in the Board of Directors.

and, depending on the interpretation, may more closely implement Article 54 of Regulation (EU) 2019/943.

- (36) For reasons of legal certainty, the Statutes that will be finally adopted by the EU DSO Entity should only have one option regarding the election procedure of its President. Given the need to have an efficient and stable set of Statutes (in particular at the outset of the Entity's establishment), ACER 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 Regulation (EU) 2019/943 under the various possible interpretations of its Article 54, and thus to the majority option. As the majority option adds more links between the Board of Directors and the General Assembly, the approach may in addition help the internal decision making process and facilitate dialogue and leadership both within the EU DSO Entity and with external parties.

3.2.2. Balanced representation

- (37) It is very important that the organisational set-up of the new EU DSO Entity ensures a balanced representation of all participating DSOs.²⁰ Taking into account the large number and diversity of electricity DSOs, the rules and procedures should reflect the diversity of the DSO landscape, both economically and geographically.
- (38) Yet, a sizeable number of reactions which ACER received in the consultation related to the EU DSO Entity's ability to sufficiently represent their interest, or to be adequately heard by the organisation. The concern for a balanced representation touched upon geographical representation, representation of the different economic structures of the members, as well as the interests of the stakeholders at large.
- (39) With respect to the geographical representation, ACER acknowledges that, whilst the Board of Directors is composed of 27 Directors and the President of the Board, it is not guaranteed that every Member State would be represented in the Board of Directors.
- (40) However, Article 16.9.3(2)(f) of the Statutes takes this criterion into account, as it encourages the members of the EU DSO Entity, when nominating their candidate Director, to "strive to reach an acceptable level of (...) geographical representation in the composition of the Board of Directors".
- (41) Also Art. 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

²⁰ Cf. Article 53(2) of Regulation (EU) 2019/943.

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”.

- (42) In addition, and in compliance with Article 54(2)(f) of Regulation (EU) 2019/943, the statutory documents of the EU DSO Entity 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.²¹ 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.²²
- (43) ACER understands that a complete geographic representation within a single mandate of the Board of Directors may not be feasible, in particular given its already complex governance structure. Yet, 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.
- (44) A similar issue is present with respect to the economical representation of its members. During the consultation, the concern was raised that medium-sized DSOs, which typically have between 1 and 2 million customers and would thus fall in the “more than 1 million grid user” category, risk not to be represented in the Board of Directors, as the largest DSOs could outweigh the voting power of the smaller DSOs in this category. Also here, ACER would recommend the EU DSO Entity to monitor the implementation of the objectives and principles laid down in Articles 16.9.3(2)(f)-(g) of the Statutes, and where necessary to take remedial action in the next nomination procedures to guarantee the balanced representation of *all* members.
- (45) On a broader level, 6 stakeholders recalled the important regulatory tasks that the EU DSO Entity will need to carry out, in a neutral manner, and in a way that would aim for the most efficient operation and planning of the electricity system. They emphasised the resulting need for the EU DSO Entity to actively and structurally engage with all relevant stakeholders, including retailers, aggregators, and other service providers in the electricity supply chain.
- (46) The stakeholders had divergent proposals as to the manner in which the EU DSO Entity should act. Whilst one stakeholder organisation argued that they should be represented within the EU DSO Entity on the basis of their distribution activities (i.e., the operation of closed distribution systems), the other stakeholders instead argued that the EU DSO Entity should closely involve stakeholders throughout its processes.

²¹ Cf. Articles 16.8(w) and 18 of the Statutes, and Article 4 of the Rules of Procedure.

²² Cf. Article 18(4) of the Statutes.

Such involvement could either be via admission of stakeholders in expert groups²³, a much wider use of the status of observer, or by broadening the scope of a given type of consultation²⁴. Furthermore, the stakeholders encouraged the EU DSO Entity to closely cooperate with other entities such as ENTSO-E or the EU gas DSO associations, to establish a data exchange platform between TSOs and DSOs, and in general to aim for a high level of transparency.

- (47) The high amount of responses in the consultation (roughly half of all reactions received) indicate the degree of importance that the stakeholder organisations attribute to the EU DSO Entity for reaching out and involving all stakeholders as much as possible in its processes. As the EU DSO Entity will play a key role in the development of the new technical rules on grid management, it is indeed key that its work takes into account the input, vision and technical experience of all operators in the energy value chain. ACER recommends to heed the strong message arising from ACER's consultation and encourages the EU DSO Entity to actively involve the stakeholders as much as possible in its processes.

3.2.3. Diversity and gender balance

- (48) Apart from the geographical and economical representation, the Statutes also contain a provision on the diversity and gender balance of the Board of Directors. Thus, point (f) of Article 16.9.3(2) of the Statutes urges the members of the EU DSO Entity *inter alia* to “strive to reach an acceptable level of diversity and gender balance” of the Board of Directors.
- (49) ACER highly welcomes the inclusion of this diversity and gender balance objective in the Entity's Statutes, which was not explicitly foreseen in Regulation (EU) 2019/943 but which entirely connects with the regulatory objectives set out under both national and European legislation. Unfortunately, the wording of point (f) remains very weak, as it limits itself to a declaration of intent, which on its own does not ensure an acceptable level of balance.
- (50) ACER recalls hereby the European Commission's new EU Gender Equality Strategy 2020-2025 adopted on 5 March 2020 and the Commission President's wish to unblock the 2012 proposal for a Directive on improving the gender balance on corporate boards, which sets the aim of a minimum of 40% of non-executive members of the under-represented sex on company boards.
- (51) At national level, ACER notes that the Belgian Electricity Market Law of 29 April 1999 similarly foresees the mandatory participation of at least one third of each gender

²³ Article 54(1)(j) of Regulation (EU) 2019/943 allows one third of the Expert Groups to come from outside the membership of EU DSOs, such as external experts.

²⁴ With respect to Article 2(3) of the Rules of Procedure on consultations, one stakeholder suggested to consult also on best practices for optimising the use of the existing distribution network and increasing the networks energy efficiency.

at the Board of Directors of grid operators. Also the Belgian federal law of 28 July 2011 requires that at least one third of the Board of Directors of large public companies and large registered private companies should be female.

- (52) Pursuant to Article 3 of the Statutes, the EU DSO Entity will be established under Belgian law. However, no legal provision on gender-balance would impact International Associations IASBL under Belgian law, other than through explicit provisions in their statutes.
- (53) Given that binding quotas drive more rapid progress than soft measures to reach gender-balanced participation²⁵, ACER recommends the EU DSO Entity to examine ways for imposing stronger requirements in the Statutes in order to reach a sufficient equilibrium 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.

3.2.4. Deadlock in the voting procedure

- (54) Articles 15.13 and 15.14 of the Statutes lay down the criteria as to when a decision of the General Assembly is either adopted or rejected. The thresholds contained in these articles contain however a risk that a proposal is at the same time adopted and rejected, thus effectively leading to a deadlock in the voting procedure.
- (55) The risk contained in the Statutes actually does not come from the DSOs, but stems directly from the wording of Article 54(1)(c) and (d) of Regulation (EU) 2019/943, which the Statutes have duly followed.
- (56) Indeed, according to Article 54(1)(c)(i) and (ii) of Regulation (EU) 2019/943, the members of the EU DSO Entity are given a number of votes proportional to the number of their connected customers. 65% of the votes cast (in favour or against a proposal) would be necessary to get the quorum to take a decision.
- (57) According to Article 54(1)(c)(iii) of Regulation (EU) 2019/943, a decision is adopted when 55% of the members vote in favour (according to the principle of one member, one vote). The number of consumers served by each member (a proxy of the population) therefore does not play a decisive final role in the adoption of the decision.²⁶

25 Cf. 2019 Report on equality between women and men in the EU, EU Commission, Justice and Consumers, 2019.

²⁶ A number of participants in the consultation pointed out that the overall majority of customers is served by medium-size or large DSOs. Invoking the need for fair and proportionate treatment of the members, they argued that this reality should consequently be reflected in the voting rights and decision-making procedure of the General Assembly. ACER notes however that the balance between the various DSO categories within the EU DSO Entity, either in terms of composition of the Board or in terms of the voting thresholds for the General Assembly, is defined in Article 54 of Regulation (EU) 2019/943 and needs to be respected.

- (58) Based on the combined reading of Article 54(1)(c)(iii) and Article 54(1)(d)(iii) of Regulation (EU) 2019/943, a decision of the General Assembly can therefore simultaneously be adopted and rejected, which thus entails a risk for the efficient governance of the EU DSO Entity.²⁷
- (59) The proposed Statutes of the EU DSO Entity appear to have taken into account this risk, be it partially. 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 need to be in favour of the proposed decision.
- (60) The additional criterion attenuates the risk of a stalemate situation in the voting procedure. However, as the risk is not entirely annulled by the measure, ACER encourages the EU DSO Entity to take a pragmatic and constructive approach in case the event would nonetheless occur, in order to allow for an efficient decision-making process. If this situation would however become a recurrent problem in the future, ACER would in that case recommend the EU DSO Entity to revisit and amend the Statutes on this particular aspect.

3.2.5. Conflict of interest

- (61) In order to ensure the integrity and reliability of the procedures of the EU DSO Entity, conflict of interest provisions are appropriately included in the Statutes. Whereas Article 15.19 of the Statutes address the possible risk for procedures at the Assembly, Article 16.25 of the Statutes contains the conflict of interest obligations for the Board of Directors.
- (62) Although the nomination committee is not entrusted with any decision-making power, its role in the election procedure can under certain circumstances be influential. Yet, apart from the relevant obligation regarding the diversity of this committee, few obligations rest upon the members of the nomination committee themselves.
- (63) In order to ensure that the election procedure of the Director and President occurs in full impartiality, ACER recommends that a similar conflict of interest clause is also foreseen for the members of the nomination committee, established pursuant to Article 9.1 of the Statutes.

3.2.6. Tasks of the EU DSO Entity

- (64) During the consultation, 4 stakeholders proposed that the EU DSO Entity should set for itself additional tasks alongside those listed in Article 54 of Regulation (EU) 2019/943. Proposals were thus made for the Entity to be fully involved in the drafting of the TYNDP, a process currently led by ENTSO-E and ENTSOG, and also to set up

²⁷ An example of a deadlock situation would be an instance as follows: 10% of the members abstain, and the remaining 90% reach 65% of the votes cast. 60% of the members vote in favour, whilst 30% of the members vote against. In such case, the decision would be both approved and rejected.

a TYNDP for electricity distribution to complement the existing TYNDP for electricity transmission. Furthermore, it was argued that the EU DSO Entity should play a role in the Trans-European Networks for Energy (TEN-E) Regulation, whereby the TYNDP for electricity distribution could provide a basis for the identification and selection of smart distribution grid projects. Other stakeholders recommended the EU DSO Entity to be more engaged in the coordinated planification of gas and electricity networks and coupling of gas and electricity networks/technologies (smart grids), to reflect the EU decarbonisation objectives in the Statutes or code of conduct, or to promote best practices on RD and innovation and to set up a dedicated Expert Group thereto.

- (65) The proposed additional tasks and objectives do not appear to contradict the tasks already assigned to the EU DSO Entity by Regulation (EU) 2019/943. Yet, given that the EU DSO Entity still needs to be established, it does not seem opportune at this stage to already explicitly foresee new statutory tasks or Expert Groups. Instead, ACER recommends the EU DSO Entity to work on the basis of Article 4 of its Statutes, be it that the tasks defined herein should be interpreted broadly to take into consideration the European Green Deal policy objectives.

3.2.7. Funding of the EU DSO Entity

- (66) Article 23(4) of the Statutes relates to the funding of the EU DSO Entity, and clarifies that the EU DSO Entity “can be funded by, amongst other things, subsidies, membership fees, contributions, loans and own revenue. The EU DSO Entity can obtain funding by any legal means”.
- (67) It is not entirely clear what is meant by the “contributions” referred to in Article 23(4) of the Statutes. If interpreted broadly, the term could be understood as also allowing contributions from e.g. the industry or other particular stakeholders.
- (68) If so, ACER would have serious concerns with such broad interpretation. It recalls that Article 53(7) of Regulation (EU) 2019/943 requires that “*The costs related to the activities of the EU DSO entity shall be borne by the distribution system operators that are registered members and shall be taken into account in the calculation of tariffs. Regulatory authorities shall only approve costs that are reasonable and proportionate*”.
- (69) In addition, ACER notes that Article 13(1) of the Statutes states that “*The funds required to carry out the tasks of the EU DSO Entity will be raised by contributions from the Members and Associate Members.*”
- (70) ACER wishes to underline that the mission of the EU DSO Entity as working for the common Union interest is of primary importance. The European legislator indeed envisaged the EU DSO Entity as a neutral expert entity which would “neither represent particular interests nor seek to influence the decision-making process to promote specific interests”.

- (71) Article 13(1) and Article 23(4) of the draft Statutes should be read together, and in line with Article 53(7) of Regulation (EU) 2019/943. In order to create and maintain trust amongst all stakeholders that the core principles mentioned in the previous recital will be complied with, ACER considers that the Entity shall not receive any funding from stakeholders, other than from its own members. The funding of the EU DSO Entity should not induce, or be perceived to induce, the EU DSO Entity to act as a lobbying organisation.
- (72) In addition, ACER recommends to communicate from the outset publicly, regularly and in a transparent manner about the funding of the EU DSO Entity and its use of the various sources referred to in Article 23(4) of the draft Statutes, and to insert a provision in this respect in the Statutes.

3.2.8. List of initial potential members

- (73) ACER notes that the list of initial potential members requires further revision.
- (74) Thus, the list of initial potential members indicates that Slovenia would be having 5 DSOs.
- (75) However, this is not correct, as Slovenia has only one DSO, i.e. SODO d.o.o. This DSO has signed contracts with five individual electricity distribution companies (EDCs) in Slovenia: Elektro Celje, d.d., Elektro Gorenjska, d.d., Elektro Ljubljana, d.d., Elektro Maribor, d.d., and Elektro Primorska, d.d. The signed contracts concluded between SODO d.o.o. and the aforementioned EDCs cover the use of the electricity infrastructure and the provision of services for the electricity DSO for all connected customers to the distribution system in Slovenia. The number of all connected customers from all EDCs can thus be used as connected customers on the DSO grid.
- (76) In addition, it appears that some DSOs are mentioned twice in the list.²⁸ For some DSOs, the information related to their number of connected customers is also missing.
- (77) ACER recommends to correct the identified inconsistencies and lacunas in line with the above comments,

HAS ADOPTED THIS 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 Regulation (EU) 2019/943.

On particular aspects, this opinion has highlighted possible ways to improve the statutory documents even further or indicated situations to which the EU DSO Entity should pay

²⁸ See for example the DSOs in Latvia.

particular attention (eg, with respect to the level of transparency in the funding of the EU DSO Entity, the deadlock in the voting procedure, or the need to ensure a balanced geographic representation of the Board of Directors).

For the reasons laid down in this opinion, ACER considers both the majority option and the minority option related to the election of the President to be in compliance with Regulation (EU) 2019/943. However, ACER does note that the Statutes as reflected in the majority option have the support of three out of four European DSO Associations, and, depending on the interpretation, may more closely implement Article 54 of Regulation (EU) 2019/943.

Given the need to have an efficient and stable set of Statutes, ACER 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 Regulation (EU) 2019/943 under the various possible interpretations of its Article 54, and thus to the majority option. Due to the various links between the General Assembly and the Board of Directors, the approach may in addition help the internal decision making process and facilitate dialogue and leadership both within the EU DSO Entity and with external parties.

This opinion is addressed to the European Commission.

Done at Ljubljana, on 25 August 2020.

- SIGNED -

*For the Agency
The Director*

C. ZINGLERSEN