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**NOTE**

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From:	General Secretariat of the Council
To:	Delegations
No. Cion doc.:	15149/1/16 ENER 419 IA 134 CODEC 1815 REV 1 + ADD 1 REV 1
Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a European Union Agency for the Cooperation of Energy Regulators (recast)

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In view of the Energy Working Party on 15 May 2018, delegations will find in annex a further revised text of the above draft Regulation, amended in light of the discussions in the Energy Working Party and the written comments received, while recalling the exchange of views by Ministers on the "Way forward on ACER Regulation" held at the Informal Meeting of Energy Ministers in Sofia on 18-19 April 2018.

Changes compared to the previous version (doc.12953/5/17 REV 5) are indicated in **bold underlined text**; deletions are marked with ~~[striketrough text]~~. Changes compared to the Commission proposal are indicated in **bold text**; deletions are marked with [].

2016/0378 (COD)

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**establishing a European Union Agency for the Cooperation of Energy Regulators (recast)**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union , and in particular Article 194(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee,

Having regard to the opinion of the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure ,

Whereas:

- (1) Regulation (EC) No 713/2009 of the European Parliament and of the Council<sup>1</sup> has been substantially amended. Since further amendments are to be made, that Regulation should be recast in the interest of clarity.
- (2) The creation of the Agency has manifestly improved coordination between regulators on cross-border issues. Since its creation, the Agency has received new important tasks concerning the monitoring of wholesale markets under Regulation (EU) No 1227/2011 of the European Parliament and of the Council<sup>2</sup> and in the field of cross-border energy infrastructure under Regulation (EU) No 347/2013 of the European Parliament and Council<sup>3</sup>.
- (3) It is projected that the need for coordination of national regulatory actions will increase further in the coming years. Europe's energy system is in the middle of its most profound change in decades. More market integration and the change towards more variable electricity production requires increased efforts to coordinate national energy policies with neighbours and to use the opportunities of cross-border electricity trade.
- (4) Experience with the implementation of internal market rules has shown that uncoordinated national action can lead to severe problems for the market, notably in closely interconnected areas where decisions of Member States often have a tangible impact on their neighbours. To achieve the positive effects of the internal electricity market for consumer welfare, security of supply and decarbonisation Member States, and in particular independent national regulators, are required to cooperate on those regulatory measures which have a cross-border effect.

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<sup>1</sup> Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ L 211, 14.8.2009, p. 1)

<sup>2</sup> Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (OJ L 326, 8.12.2011, p. 1).

<sup>3</sup> Regulation (EU) No 347/2013 of the European Parliament and Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 (OJ L 115, 25.4.2013, p. 39).

- (5) Fragmented national state interventions in energy markets constitute an increasing risk to the proper functioning of cross-border electricity markets. The Agency should therefore be given a role in the development of a coordinated European resource adequacy assessment, in close cooperation with the European Network of Transmission System Operators for Electricity ("ENTSO for Electricity"), in order to avoid the problems of fragmented national assessments which follow different uncoordinated methods and do not sufficiently take into account the situation in neighbouring countries. The Agency should also supervise the technical parameters developed by the ENTSO for Electricity for an efficient participation of cross-border capacities and other technical features of capacity mechanisms.
- (6) Security of electricity supply requires a coordinated approach to prepare against unexpected supply crises. The Agency should therefore coordinate national actions related to risk preparedness, in line with [Risk Preparedness Regulation as proposed by COM(2016) 862].
- (7) Due to the close interconnection of the Union electricity grid and the increasing need to cooperate with neighbouring countries to maintain grid stability and integrate large volumes of renewable energies, [] **Regional Security Coordinators** will play an important role for the coordination of transmission system operators. The Agency should guarantee regulatory oversight over the [] **Regional Security Coordinators** where necessary.
- (8) As large parts of new electricity generation will be connected at local level, distribution system operators will play an important role when it comes to operating the European electricity system in a flexible and efficient manner.

- (9) Member States should cooperate closely, eliminating obstacles to cross-border exchanges of electricity and natural gas with a view to achieving the objectives of the Union energy policy. A European Union Agency for the Cooperation of Energy Regulators (the Agency) was established by Regulation (EC) No 713/2009 in order to fill the regulatory gap at Union level and to contribute towards the effective functioning of the internal markets in electricity and natural gas. The Agency enables national regulatory authorities to enhance their cooperation at Union level and participate, on a mutual basis, in the exercise of Union -related functions.
- (10) The Agency should ensure that regulatory functions performed by the national regulatory authorities in accordance with [the recast Electricity Directive as proposed by COM(2016) 864/2] and Directive 2009/73/EC of the European Parliament and of the Council are properly coordinated and, where necessary, completed at Union level. To that end, it is necessary to guarantee the independence of the Agency from electricity and gas producers, transmission and distribution system operators, whether public or private, and consumers and to ensure the conformity of its actions with Union law, its technical and regulatory capacities and its transparency, amenability to democratic control and efficiency.
- (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 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 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.

- (12) The Agency should monitor, in cooperation with the Commission, the Member States and relevant national authorities, the internal markets in electricity and natural gas and inform the European Parliament, the Commission and national authorities of its findings where appropriate. Those monitoring tasks of the Agency should not duplicate or hamper monitoring by the Commission or national authorities, in particular national competition authorities.
- (13) The Agency provides an integrated framework which enables national regulatory authorities to participate and cooperate. That framework facilitates the uniform application of the legislation on the internal markets in electricity and natural gas throughout the Union . As regards situations concerning more than one Member State, the Agency has been granted the power to adopt individual decisions. That power should under clearly specified conditions cover technical and regulatory issues which require regional coordination , notably concerning the implementation of network codes and guidelines, cooperation within [] **Regional Security Coordinators**, the regulatory decisions necessary to effectively monitor wholesale market integrity and transparency, decisions concerning electricity and natural gas infrastructure that connects or that might connect at least two Member States and, as a last resort, exemptions from the internal market rules for new electricity interconnectors and new gas infrastructure located in more than one Member State.
- (14) The Agency has an important role in developing framework guidelines which are non-binding by nature ("framework guidelines"). Network codes should be in line with those framework guidelines . It is also considered appropriate for the Agency, and consistent with its purpose, to have a role in reviewing draft network codes to ensure that they are in line with the framework guidelines and provide for the necessary degree of harmonisation , before it submits them to the Commission for adoption.

- (15) With the adoption of a set of network codes and guidelines which provide for a stepwise implementation and a further refinement of common regional and Union-wide rules, the role of the Agency in monitoring the implementation of the network codes and guidelines has increased. Effective monitoring of network codes and guidelines is a key function of the Agency and crucial for the implementation of internal market rules.
- (16) From experience with the implementation of network codes and guidelines it has emerged that it is useful to streamline the procedure for the regulatory approval of regional or Union-wide terms and conditions or methodologies to be developed under the guidelines and network codes by submitting them directly to the Agency in order for national regulators, represented in the Board of Regulators, to be able to decide upon them.
- (17) Since the stepwise harmonisation of the Union energy markets involves finding regional solutions regularly as an interim step **and many methods are developed by a limited number of regulatory authorities for a specific region**, it is appropriate to reflect the regional dimension of the internal market and to provide for appropriate governance mechanisms. []
- (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.

- (19) The Agency should also be able to make recommendations to assist regulatory authorities and market players in sharing good practices.
- (20) The Agency should consult interested parties, where appropriate, and provide them with a reasonable opportunity to comment on proposed measures, such as network codes and rules.
- (21) The Agency should contribute to the implementation of the guidelines on trans-European energy networks as laid down in Regulation (EU) No 347/2013 of the European Parliament and of the Council<sup>4</sup>, in particular when providing its opinion on the non-binding Union -wide ten-year network development plans ( Union -wide network development plans) in accordance with Article 4 (3) of this Regulation.
- (22) The Agency should contribute to the efforts of enhancing energy security.
- (22a) **The Agency may, in urgent cases and in specific clearly defined circumstances, adopt individual decisions ~~clearly defined in Union legislative acts~~, ~~be commissioned with additional technical tasks~~ on issues strictly related to the purpose for which it has been established.**
- (23) In order to ensure that the Agency's framework is efficient and coherent with other decentralised agencies, the rules governing the Agency should be aligned to the Common Approach agreed between the European Parliament, the Council of the EU and the European Commission on decentralised agencies<sup>5</sup>. However, insofar as necessary, the structure of the Agency should be adapted to meet the specific needs of energy regulation. In particular, the specific role of the national regulatory authorities needs to be taken fully into account and their independence guaranteed.

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<sup>4</sup> Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 (OJ L 115, 25.4.2013, p. 39).

<sup>5</sup> Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies of 19.7.2012.

- (24) Additional changes to the present Regulation may be envisaged in the future in order to bring the Regulation fully in line with the Common Approach on decentralised agencies. Based on the current needs of energy regulation, deviations from the Common Approach are necessary. This proposal therefore does not prejudice any further amendments to the Founding Regulation of the Agency which the Commission may wish to propose following further evaluation, as provided for in this act or on its own initiative.
- (25) The Administrative Board should have the necessary powers to establish the budget, check its implementation, draw up internal rules, adopt financial regulations and appoint a Director. A rotation system should be used for the renewal of the members of the Administrative Board who are appointed by the Council so as to ensure a balanced participation of Member States over time. The Administrative Board should act independently and objectively in the public interest and should not seek or follow political instructions.
- (26) The Agency should have the necessary powers to perform its regulatory functions in an efficient, transparent, reasoned and, above all, independent manner. The independence of the Agency from electricity and gas producers and transmission and distribution system operators is not only a key principle of good governance but also a fundamental condition to ensure market confidence. Without prejudice to its members' acting on behalf of their respective national authorities, the Board of Regulators should therefore act independently from any market interest, should avoid conflicts of interests and should not seek or follow instructions or accept recommendations from a government of a Member State, from Union institutions or another public or private entity or person. The decisions of the Board of Regulators should, at the same time, comply with Union law concerning energy, such as the internal energy market, the environment and competition. The Board of Regulators should report its opinions, recommendations and decisions to the Union institutions.

- (27) Where the Agency has decision-making powers, interested parties should, for reasons of procedural economy, be granted a right of appeal to a Board of Appeal, which should be part of the Agency, but independent from its administrative and regulatory structure. In order to guarantee its functioning and full independence, the Board of Appeal should have a separate budget line in the budget of the Agency. In the interest of continuity, the appointment or renewal of the members of the Board of Appeal should allow for partial replacement of the members of the Board of Appeal. The decisions of the Board of Appeal can be subject to appeal before the Court of Justice of the European Union .
- (28) The Agency should exercise its decision-making powers in line with the principles of fair, transparent and reasonable decision-making. All procedural rules of the Agency should be laid down in its rules of procedures.
- (29) The Agency should be mainly financed from the general budget of the Union, by fees and [] by voluntary contributions. In particular, **fees should cover the costs of the Agency for services to market participants or entities acting on their behalf enabling them to report data pursuant to Article 8 of Regulation (EU) 1227/2011 in an efficient, effective and safe manner.** ~~should contribute to the costs of the Agency's tasks according to Article 32 of this Regulation. This should ensure that the resources available to the Agency for these tasks are proportionate to the volume of wholesale energy market transactions.~~ The resources currently pooled by regulatory authorities for their cooperation at Union level should continue to be available to the Agency. The Union budgetary procedure should remain applicable as far as any subsidies chargeable to the general budget of the Union are concerned. Moreover, the auditing of accounts should be undertaken by an independent external auditor in accordance with Article 107 of Commission Delegated Regulation (EU) No 1271/2013<sup>6</sup>.

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<sup>6</sup> Commission Delegated Regulation (EU) No 1271/2013 of 30 September 2013 on the framework financial regulation for the bodies referred to in Article 208 of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council (OJ L 328, 7.12.2013, p. 42).

- (30) The Agency's budget should be assessed by the budgetary authority on an ongoing basis, with reference to the Agency's workload and performance. The budgetary authority should ensure that the best standards of efficiency are met.
- (31) The Agency should have highly professional staff. In particular, it should benefit from the competence and experience of staff seconded by the national regulatory authorities, the Commission and the Member States. The Staff Regulations of Officials of the European Communities ("the Staff Regulations") and the Conditions of employment of other servants of the European Communities ("the Conditions of Employment"), laid down in Regulation (EEC, Euratom, ECSC) No 259/68<sup>7</sup> and the rules adopted jointly by the Union institutions for the purpose of applying those regulations should apply to the staff of the Agency. The Administrative Board, in agreement with the Commission, should adopt appropriate implementing rules.
- (32) The regulatory work of the Director and the Board of Regulators pursuant to this Regulation, may be supported by working groups.
- (33) The Agency should apply the general rules regarding public access to documents held by Union bodies. The Administrative Board should establish the practical measures to protect commercially sensitive data and personal data.

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<sup>7</sup> Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (OJ L 56, 4.3.1968, p. 1).

- (34) 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 **continue to** vote with **two-thirds** majority within the Board of Regulators. **The Agency should be accountable to the European Parliament, the Council and the Commission.**
- (35) Countries which are not members of the Union should be able to participate in the work of the Agency in accordance with appropriate agreements to be concluded by the Union .
- (37) Since the objectives of this Regulation, namely the participation and cooperation of national regulatory authorities at Union level, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union . In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.
- (37a) **The seat of the Agency is situated in Ljubljana as provided by Decision 2009/913/EU taken by common agreement between the Representatives of the Governments of Member States on 7 December 2009.**
- (38) The Agency's host Member State should provide the best possible conditions to ensure the smooth and efficient functioning of the Agency, including multilingual, European-oriented schooling and appropriate transport connections **as required by Regulations (EU) No 713/2009 and 863/2016. The Seat Agreement between the Government of the Republic of Slovenia and the Agency for the Cooperation of Energy Regulators which fulfils these requirements together with its implementing arrangements, was concluded on 26 November 2010 and entered into force on 10 January 2011.**

HAVE ADOPTED THIS REGULATION:

## **CHAPTER I**

### *OBJECTIVES AND TASKS*

#### *Article 1*

#### **Establishment and objectives**

1. This Regulation establishes a European Union Agency for the Cooperation of Energy Regulators ("the Agency").
2. The purpose of the Agency shall be to assist the regulatory authorities referred to in Article 57 of [the recast Electricity Directive as proposed by COM(2016) 864/2] and Article 39 of Directive 2009/73/EC of the European Parliament and of the Council in exercising, at Union level, the regulatory tasks performed in the Member States and, where necessary, to coordinate their action.

## Article 2

### Type of acts of the Agency

The Agency shall:

- (a) issue opinions and recommendations addressed to transmission system operators, **ENTSO-E, ENTSO-G, the EU-DSO Entity, [] Regional Security Coordinators** and nominated electricity market operators;
- (b) issue opinions and recommendations addressed to regulatory authorities;
- (c) issue opinions and recommendations addressed to the European Parliament, the Council, or the Commission;
- (d) take individual decisions in the specific cases referred to in Articles [] **5(2), (2a) and (2b) on terms and conditions or methodologies regarding network codes and guidelines, Article 5(3) on bidding zones review, Article 6(8) on arbitration between regulators, Article 8(2)(a) on the configuration of system operation regions, Article 10(1) on proposals for methodologies, calculations and technical specifications related to the European resource adequacy assessment and cross-border participation in capacity mechanisms, 10(2) on methodologies related to the [Risk Preparedness Regulation as proposed by COM(2106 862), Article 11 on exemption decisions, Article 12 on tasks related to infrastructure pursuant to Regulation (EU) No 347/2013 and Article 13 on tasks related to market supervision pursuant to Regulations (EU) No 1227/2011 and Regulation (EU) No 1348/2014;**

- (e) submit to the Commission non-binding framework guidelines ("framework guidelines") in accordance with Article 55 of [recast Electricity Regulation as proposed by COM(2016) 861/2] ] and Article 6 of Regulation (EC) No 715/2009 of the European Parliament and of the Council<sup>8</sup>.

### *Article 3*

#### **General tasks**


The Agency may, upon a request of the European Parliament, the Council or the Commission, or on its own initiative, provide an opinion or a recommendation to the European Parliament, the Council and the Commission on any of the issues relating to the purpose for which it has been established.

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<sup>8</sup> Regulation (EC) No 715/2009 of the European Parliament and the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OJ L 211, 14.8.2009, p. 36).

#### Article 4

### **Tasks of the Agency as regards the cooperation of transmission system operators and electricity distribution system operators**

1. The Agency shall provide an opinion to the Commission on the draft statutes, list of members and draft rules of procedure of the ENTSO for Electricity in accordance with Article 26(2) of [OP: recast Electricity Regulation as proposed by COM(2016) 861/2] and on those of the ENTSO for Gas in accordance with Article 5(2) of Regulation (EC) No 715/2009 **and on those of the EUDSO entity in accordance with Article 50(2) of [OP: recast Electricity Regulation as proposed by COM(2016) 861/2].**
2. The Agency shall monitor the execution of the tasks of the ENTSO for Electricity in accordance with Article 29 of [OP: recast Electricity Regulation as proposed by COM(2016) 861/2] and of the ENTSO for Gas in accordance with Article 9 of Regulation (EC) No 715/2009 **and of the EUDSO entity in accordance with Article 51 of [OP: recast Electricity Regulation as proposed by COM(2016) 861/2].**
3. The Agency  provides an opinion:
  - (a) to the ENTSO for Gas in accordance with Article 8(2) of Regulation (EC) No 715/2009 on the network codes; and

- (b) to the ENTSO for Electricity in accordance with the first subparagraph of Article 29(2) of [recast Electricity Regulation as proposed by COM(2016) 861/2], and to the ENTSO for Gas in accordance with the first subparagraph of Article 9(2) of Regulation (EC) No 715/2009 on the draft annual work programme, on the draft Union -wide network development plan and other relevant documents referred to in Article 27(1) of [recast Electricity Regulation as proposed by COM(2016) 861/2] and Article 8(3) of Regulation (EC) No 715/2009, taking into account the objectives of non-discrimination, effective competition and the efficient and secure functioning of the internal markets in electricity and natural gas.
- (c) **to the EU DSO entity on the draft annual work program and other relevant documents referred to in Article 51(2) of [*recast Electricity Regulation as proposed by COM(2016) 861/2*], taking into account the objectives of non-discrimination, effective competition and the efficient and secure functioning of the internal energy market.**

4. The Agency shall, based on matters of fact, provide a duly reasoned opinion as well as recommendations to the ENTSO for Electricity, the ENTSO for Gas, the European Parliament, the Council and the Commission, where it considers that the draft annual work programme or the draft Union -wide network development plan submitted to it in accordance with the second subparagraph of Article 29(2) ) of [recast Electricity Regulation as proposed by COM(2016) 861/2] and the second subparagraph of Article 9(2) of Regulation (EC) No 715/2009 do not contribute to non-discrimination, effective competition and the efficient functioning of the market or a sufficient level of cross-border interconnection open to third-party access, or do not comply with the relevant provisions of [OP: recast Electricity Regulation as proposed by COM(2016) 861/2 and recast Electricity Directive as proposed by COM(2016) 864/2] or Directive 2009/73/EC and Regulation (EC) No 715/2009.

## *Article 5*

### **Tasks of the Agency as regards the development and implementation of network codes and guidelines**

1. The Agency shall participate in the development of network codes in accordance with Article 55 of [recast Electricity Regulation as proposed by COM(2016) 861/2] and Article 6 of Regulation (EC) No 715/2009 **and of Guidelines in accordance with Article 57(7) of [OP: recast Electricity Regulation as proposed by COM(2016) 861/2]**. It shall in particular:
  - (a) submit non-binding framework guidelines to the Commission where it is requested to do so under Article 55(3) of [recast Electricity Regulation as proposed by COM(2016) 861/2] or Article 6(2) of Regulation (EC) No 715/2009. The Agency shall review the non-binding framework guidelines and re-submit it to the Commission where requested to do so under Article ) 55(6) of [recast Electricity Regulation as proposed by COM(2016) 861/2] or Article 6(4) of Regulation (EC) No 715/2009;
  - (b) provide a reasoned opinion to the ENTSO for Gas on the network code in accordance with Article 6(7) of Regulation (EC) No 715/2009;

- (c) **revise the network code according to article 55(10) of [OP: recast Electricity Regulation as proposed by COM(2016) 861/2]. In the proposal submitted to the Commission, the Agency shall take into account the views provided by all involved parties during the drafting of the proposal led by the ENTSO for Electricity or the EU DSO entity and shall formally consult the relevant stakeholders on the version to be submitted to the Commission. To this extend the Agency may use the committee established under the network codes where appropriate. Subsequently, the Agency shall submit the revised network code to the Commission, and report the outcome of the consultations, in accordance with Article 55(10) of [recast Electricity Regulation as proposed by COM(2016) 861/2]. The Agency shall submit the network code to the Commission [] pursuant to Article 6(9) of Regulation (EC) No 715/2009. Where the ENTSO for Electricity or Gas or the EU DSO entity have failed to develop a network code the Agency shall prepare and submit a draft network code to the Commission where it is requested to do so under Article 55(11) of [recast Electricity Regulation as proposed by COM(2016) 861/2] or Article 6(10) of Regulation (EC) No 715/2009;**

- (d) provide a duly reasoned opinion to the Commission, in accordance with Article 29(1) of [recast Electricity Regulation as proposed by COM(2016) 861/2] or Article 9(1) of Regulation (EC) No 715/2009, where the ENTSO for Electricity or the ENTSO for Gas has failed to implement a network code elaborated under Article 27(1)(a) of [recast Electricity Regulation as proposed by COM(2016) 861/2] or Article 8(2) of Regulation (EC) No 715/2009 or a network code which has been established in accordance with Article 55(2) to (11) of [recast Electricity Regulation as proposed by COM(2016) 861/2] and Article 6(1) to 10 of Regulation (EC) No 715/2009 but which has not been adopted by the Commission under Article 55(12) of [recast Electricity Regulation as proposed by COM(2016) 861/2] and under Article 6(11) of Regulation (EC) No 715/2009.
- (e) monitor and analyse the implementation of the network codes and the guidelines adopted by the Commission in accordance with Article 55(12) of [recast Electricity Regulation as proposed by COM(2016) 861/2] and Article 6(11) of Regulation (EC) No 715/2009, and their effect on the harmonisation of applicable rules aimed at facilitating market integration as well as on non-discrimination, effective competition and the efficient functioning of the market, and report to the Commission.

2. 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 **common** terms and conditions or methodologies for the implementation of those network codes and guidelines which require regulatory approval by all regulatory authorities **[], regulatory authorities shall use the framework of the Agency, including the working groups, to coordinate their decision on common terms and conditions or methodologies** ~~the terms and conditions or methodologies shall be submitted for revision to the Agency and shall be approved by the Board of Regulators pursuant to Article 23(5)(de).~~ **Regulators may refer the proposal to the Agency for approval.**

- 2(a) 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 competent regulatory authorities of the concerned region, the competent regulatory authorities of the concerned region shall reach an agreement by unanimity. The proposed terms and conditions or methodologies shall be notified to the Agency within one week of the submission of the proposal to the competent regulators. Regulators may refer the proposal to the Agency for approval pursuant to Article 6(8)(b) and shall do so pursuant to Article 6(8)(a) in case a unanimous decision cannot be reached.**
- 2(b) The Board of Regulators, acting on its own initiative or on a proposal of one or more of its members or of the Director, may require the regulators of the region concerned to refer the proposal to the Agency for approval. Such request shall be limited to cases where a regionally agreed proposal would have a tangible impact on the internal energy market or on security of supply beyond the region.**

- 2(c) Before approving the terms and conditions or methodologies pursuant paragraph 2, 2a and 2b, the regulatory authorities or where competent the Agency shall revise and change them where necessary in consultation with the ENTSO for Electricity or the EU DSO entity, in order to ensure that they are in line with the purpose of the network code or guidelines and contribute to market integration, non-discrimination, effective competition and the proper functioning of the market.

The Agency shall take a decision on the approval within the period specified in the relevant network codes and guidelines. That period shall begin on the day following that on which the proposal was notified.

3. In the context of the bidding zone review, in case that the relevant national regulatory authorities do not come to an unanimous decision on the transmission system operator's proposal, the Agency shall [] decide the methodology and assumptions that will be used in the bidding zone review process pursuant to Article 13(3) of [recast Electricity Regulation as proposed by COM(2016) 861/2] as well as issue an opinion pursuant to Article 14(2a) of that Regulation.
4. The Agency shall monitor the regional cooperation of transmission system operators referred to in Article 31 of [recast Electricity Regulation as proposed by COM(2016) 861/2] and Article 12 of Regulation (EC) No 715/2009, and take into account the outcome of that cooperation when formulating its opinions, recommendations and decisions.

## Article 6

### Tasks of the Agency as regards the national regulatory authorities

1. The Agency shall adopt individual decisions on technical issues where those decisions are provided for in [OP: recast Electricity Directive as proposed by COM(2016) 864/2], Directive 2009/73/EC, [OP: recast Electricity Regulation as proposed by COM(2016) 861/2] or Regulation (EC) No 715/2009.
2. The Agency may, in accordance with its work programme, at the request of the Commission or at its own initiative, make recommendations to assist regulatory authorities and market players in sharing good practices.
3. The Agency shall provide a framework within which national regulatory authorities can cooperate. It shall promote cooperation between the national regulatory authorities and between regulatory authorities at regional and Union level ¶ and shall take into account the outcome of such cooperation when formulating its opinions, recommendations and decisions. Where the Agency considers that binding rules on such cooperation are required, it shall make the appropriate recommendations to the Commission.
4. The Agency shall provide a factual opinion at the request of a regulatory authority or of the Commission, on whether a decision taken by a regulatory authority complies with the guidelines referred to in [recast Electricity Directive as proposed by COM(2016) 864/2], Directive 2009/73/EC, [recast Electricity Regulation as proposed by COM(2016) 861/2] or Regulation (EC) No 715/2009 or with other relevant provisions of those Directives or Regulations.
- 4a. **The Agency shall provide an opinion to the relevant regulatory authority pursuant to Article 14(2a) of [recast Electricity Regulation as proposed by COM(2016) 861/2].**

5. Where a national regulatory authority does not comply with the opinion of the Agency referred to in paragraph 4 within four months from the day of receipt, the Agency shall inform the Commission and the Member State concerned accordingly.
6. When a national regulatory authority encounters, in a specific case, difficulties with the application of the guidelines referred to in [recast Electricity Directive as proposed by COM(2016) 864/2], Directive 2009/73/EC, [recast Electricity Regulation as proposed by COM(2016) 861/2] or Regulation (EC) No 715/2009, it may request the Agency for an opinion. The Agency shall deliver its opinion, after consulting the Commission, within three months of receiving such request.
7. []
8. [As regards] **The Agency shall be competent to adopt individual decisions on regulatory issues [] having effect on cross-border trade or cross-border system security where [] have been conferred to at least two [] national regulatory authorities are tasked with adopting such individual decisions** ~~as a joint competence, by a legislative act of the Union adopted in an ordinary legislative procedure according to Article 289 TFEU, or by and Network Codes and Guidelines that have been adopted before the entry into force of this Regulation, the Agency shall decide [],~~
- (a) where the competent national regulatory authorities have not been able to reach an agreement within a period of six months after referral of the case to the last of those regulatory authorities; or
- (b) upon a joint request from the competent national regulatory authorities.

The competent national regulatory authorities may jointly request that the period referred to in point (a) be extended by a period of up to six months.

~~[When preparing its decision, the Agency shall consult the national regulatory authorities and the transmission system operators concerned and shall be informed of the proposals and observations of all the transmission system operators concerned.]~~

**8a. In cases of urgency, where postponing the conferral of decision making competences on the Agency until the adoption of a legislative act would lead to severe negative effects for the proper functioning of the internal market or would constitute a risk for security of supply, and where national regulatory authorities are tasked with adopting individual decisions on regulatory issues having effects on cross-border trade or cross-border system security by means of a Network Code or Guideline adopted pursuant to Articles 55 to 57 of [recast Electricity Regulation as proposed by COM(2016) 861/2] or pursuant to Art. 8 (6) of Regulation (EC) No 715/2009/EC, the Agency shall be competent to adopt such individual decisions,**

**(a) where the competent national regulatory authorities have not been able to reach an agreement within a period of six months after referral of the case to the last of those regulatory authorities; or**

**(b) upon a joint request from the competent national regulatory authorities.**

**The competent national regulatory authorities may jointly request that the period referred to in point (a) be extended by a period of up to six months.**

**8b. When preparing its decision pursuant to paragraph 8 or 8a, the Agency shall consult the national regulatory authorities and the transmission system operators concerned and shall be informed of the proposals and observations of all the transmission system operators concerned.**

9. Where a case has been referred to the Agency under paragraph 8 **or 8a**, the Agency:
- (a) shall issue a decision within a period of six months from the day of referral; and
  - (b) may, if necessary, provide an interim decision to ensure that security of supply or operational security of the infrastructure in question is protected.
10. Where the regulatory issues referred to in paragraph 8 **or 8a** include exemptions within the meaning of Article 59 of [recast Electricity Regulation as proposed by COM(2016) 861/2] or Article 36 of Directive 2009/73/EC, the deadlines provided for in this Regulation shall not be cumulative with the deadlines provided for in those provisions.

#### *Article 7*

### **II**

#### *Article 8*

### **Tasks of the Agency as regards II Regional Security Coordinators**

1. The Agency, in close cooperation with the national regulatory authorities and the ENTSO for Electricity, shall monitor and analyse the performance of **II Regional Security Coordinators**, taking into account the reports provided for in [Article 43(4) recast Electricity Regulation as proposed by COM(2016) 861/2].
2. To carry out the tasks referred to in paragraph 1 in an efficient and expeditious manner, the Agency shall in particular:

- (a) decide on the configuration of system operation regions pursuant to Article 33[] (2) of [recast Electricity Regulation as proposed by COM(2016) 861/2];
- (b) request information from [] **Regional Security Coordinators** where appropriate pursuant to Article 43 of [recast Electricity Regulation as proposed by COM(2016) 861/2];
- (c) issue opinions and recommendations to the European Commission, the Council and the European Parliament;
- (d) issue opinions and recommendations to [] **Regional Security Coordinators**.

#### *Article 9*

#### **Tasks of the Agency as regards Nominated Electricity Market Operators**

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<sup>9</sup>, the Agency shall:

- (a) monitor the Nominated Electricity Market Operators' progress in establishing the functions under Regulation 1222/2015;
- (b) issue recommendations to the Commission in accordance with Article 7(5) of Regulation 1222/2015
- (c) request information from Nominated Electricity Market Operators where appropriate.

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<sup>9</sup> Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management, OJ L 197, 25.7.2015, p. 24–72

## *Article 10*

### **Tasks of the Agency as regards generation adequacy and risk preparedness**

1. The Agency shall approve and amend where necessary
  - (a) the proposals for methodologies and calculations related to the European resource adequacy assessment pursuant to Article 19(2), (3) and (5) of [recast Electricity Regulation as proposed by COM(2016) 861/2].
  - (b) the proposals for technical specifications for cross-border participation in capacity mechanisms pursuant to Article 21(10) of [recast Electricity Regulation as proposed by COM(2016) 861/2].
- 1a. **The Agency, at the request of the Commission, shall issue an opinion on the ENTSO for Electricity's evaluation of national adequacy assessment pursuant to Article 18(3a) of [recast Electricity Regulation as proposed by COM(2016) 861/2]**
2. The Agency shall approve and amend where necessary the methodologies
  - (a) for identifying electricity crisis scenarios at a regional level as described in Article 5 of [Risk Preparedness Regulation as proposed by COM(2016) 862];
  - (b) for short-term adequacy assessments as described in Article 8 of [Risk Preparedness Regulation as proposed by COM(2016) 862].

## *Article 11*

### **Tasks of the Agency as regards exemption and certification decisions**

The Agency may decide on exemptions, as provided for in Article 59(5) of [recast Electricity Regulation as proposed by COM(2016) 861/2]. The Agency may also decide on exemptions as provided for in Article 36(4) of Directive 2009/73/EC where the infrastructure concerned is located in the territory of more than one Member State.

## *Article 12*

### **Tasks of the Agency as regards infrastructure**

With respect to trans-European energy infrastructure, the Agency, in close cooperation with the regulatory authorities and the ENTSOs, shall:

- (a) monitor progress as regards the implementation of projects to create new interconnector capacity;
- (b) monitor the implementation of the Union -wide network-development plans. If it identifies inconsistencies between those plans and their implementation, it shall investigate the reasons for those inconsistencies and make recommendations to the transmission system operators, national regulatory authorities or other competent bodies concerned with a view to implementing the investments in accordance with the Union -wide network-development plans.
- (c) carry out the obligations laid out in Article 5, 11, [] and 13 of Regulation (EU) No 347/2013.
- (d) **take decisions pursuant to Article 12(6) of Regulation (EU) No 347/2013.**

### *Article 13*

#### **Tasks of the Agency as regards wholesale market integrity and transparency**

In order to effectively monitor wholesale market integrity and transparency, the Agency, in close cooperation with the regulatory authorities and other national authorities, shall

- (a) monitor wholesale markets, collect data and establish a European register of market participants in accordance with Article 7 to 9 of Regulation (EU) 1227/2011<sup>10</sup>;
  - (b) issue recommendations to the Commission in accordance with Article 7 of Regulation (EU) 1227/2011;
  - (c) coordinate investigations pursuant to Article 16(4) of Regulation (EU) 1227/2011;
- (ca) establish mechanisms to share information it receives and give access to these mechanisms in accordance with Article 10 of Regulation (EU) 1227/2011.**

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<sup>10</sup> Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency OJ L 326, 8.12.2011, p. 1–16.

## *Article 14*

### **Commissioning of new tasks to the Agency**

The Agency may, in circumstances clearly defined by the Commission in guidelines adopted pursuant to Article 57 of [recast Electricity Regulation as proposed by COM(2016) 861/2] or Article 23 of Regulation (EC) No 715/2009 and on issues related to the purpose for which it has been established, be commissioned with additional tasks **|| which do not involve decision making powers.**

## *Article 15*

### **Consultations and transparency**

1. In carrying out its tasks, in particular in the process of developing framework guidelines in accordance with Article 55 of [recast Electricity Regulation as proposed by COM(2016) 861/2] or Article 6 of Regulation (EC) No 715/2009, and in the process of proposing amendments of network codes under Article 56 of [recast Electricity Regulation as proposed by COM(2016) 861/2] or Article 7 of Regulation (EC) No 715/2009 the Agency shall consult extensively and at an early stage with market participants, transmission system operators, consumers, end-users and, where relevant, competition authorities, without prejudice to their respective competence, in an open and transparent manner, in particular when its tasks concern transmission system operators.

2. The Agency shall ensure that the public and any interested parties are, where appropriate, given objective, reliable and easily accessible information, in particular with regard to the results of its work.

All documents and minutes of consultation meetings conducted during the development of framework guidelines in accordance with Article 55 of [recast Electricity Regulation as proposed by COM(2016) 861/2] or Article 6 of Regulation (EC) No 715/2009, or during the amendment of network codes referred to in paragraph 1 shall be made public.

3. Before adopting framework guidelines , or proposing amendments to network codes as referred to in paragraph 1 , the Agency shall indicate how the observations received during the consultation have been taken into account and shall provide reasons where those observations have not been followed.
4. The Agency shall make public, on its own website, at least the agenda, the background documents and, where appropriate, the minutes of the meetings of the Administrative Board, of the Board of Regulators and of the Board of Appeal.

#### **Article 15a**

1. **Before taking the decisions provided for in this Regulation, the Agency shall inform any named addressee of its intention to adopt a decision, setting a time limit within which the addressee may express its views on the matter, taking full account of the urgency, complexity and potential consequences of the matter.**
2. **The decisions of the Agency shall state the reasons on which they are based for the purpose of allowing an appeal on the merits.**

3. **The addressees of decisions of the Agency shall be informed of the legal remedies available under this Regulation.**
4. **The Agency shall adopt and publish adequate and proportionate rules of procedure for all Agency tasks set out under Chapter 1. These rules shall at least set out the standards specified in paragraphs 1 to 3 to ensure a transparent and reasonable decision-making process guaranteeing fundamental procedural rights based on the rule of law.**

### *Article 16*

#### **Monitoring and reporting on the electricity and natural gas sectors**

1. The Agency, in close cooperation with the Commission, the Member States and the relevant national authorities including the national regulatory authorities and without prejudice to the competences of competition authorities, shall monitor the wholesale and retail markets in electricity and natural gas, in particular the retail prices of electricity and natural gas, compliance with the consumer rights laid down in [recast Electricity Directive as proposed by COM(2016) 864/2] and Directive 2009/73/EC, access to the networks including access of electricity produced from renewable energy sources, potential barriers to cross-border trade, state interventions preventing prices from reflecting actual scarcity **such as price restrictions as laid out in Article 9 of [recast Electricity Regulation as proposed by COM (2016) 861/2]**, the performance of the Member States in the area of electricity security of supply based on the results of the European resource adequacy assessment as referred to in Article 19 of [recast Electricity Regulation], in particular taking into account the ex-post evaluation referred to in Article 16 of [Risk Preparedness Regulation as proposed by COM(2016) 862] .

2. The Agency shall publish annually a report on the results of the monitoring referred to r in paragraph 1. In that report, it shall identify any barriers to the completion of the internal markets in electricity and natural gas.
3. When publishing its annual report, the Agency may submit to the European Parliament and to the Commission an opinion on the possible measures to remove the barriers referred to in paragraph 2.
- 3a. **The Agency may issue a best practice report on tariffs pursuant to Article 16 (9) of [recast Electricity Regulation as proposed by COM(2016) 861/2];**
- 3b. **The Agency may request national regulatory authorities, the ENTSO for Electricity, the ENTSO for Gas, the Regional Security Coordinators, the EU DSO entity and the Nominated Electricity Market Operators to provide any relevant information necessary for the purpose of carrying out of monitoring pursuant to this Article.**

## CHAPTER II

### ORGANISATION OF THE AGENCY

#### *Article 17*

##### **Legal status**

1. The Agency shall be a Union body with legal personality.
2. In each Member State, the Agency shall enjoy the most extensive legal capacity accorded to legal persons under national law. It shall, in particular, be able to acquire or dispose of movable and immovable property and be a party to legal proceedings.
3. The Agency shall be represented by its Director.
4. The seat of the Agency shall be Ljubljana, Slovenia.

## II

#### *Article 18*

##### **Administrative and Management Structure**

The Agency shall be composed of :

- (a) an Administrative Board, which shall exercise the tasks set out in Article 20;
- (b) a Board of Regulators, which shall exercise the tasks set out in Article 23 ;

- (c) a Director, who shall exercise the tasks set out in Article 25 ; and
- (d) a Board of Appeal, which shall exercise the tasks set out in Article 29 .

### *Article 19*

#### **Composition of the Administrative Board**

1. The Administrative Board shall be composed of nine members. Each member shall have an alternate. Two members and their alternates shall be appointed by the Commission, two members and their alternates shall be appointed by the European Parliament and five members and their alternates shall be appointed by the Council. No Member of the European Parliament shall be a member of the Administrative Board.
2. The term of office of the members of the Administrative Board and their alternates shall be four years, renewable once. For the first mandate, the term of office of half of the members of the Administrative Board and their alternates shall be six years.
3. The Administrative Board shall elect by a two-thirds majority its Chairman and its Vice-Chairman from among its members. The Vice-Chairman shall automatically replace the Chairman if the latter is not in a position to perform his duties. The term of office of the Chairman and of the Vice-Chairman shall be two years, renewable once. The term of office of the Chairman and that of the Vice-Chairman shall expire when they cease to be members of the Administrative Board.

4. The meetings of the Administrative Board shall be convened by its Chairman. The Chairman of the Board of Regulators or the nominee of the Board of Regulators, and the Director shall participate, without the right to vote, in the deliberations unless the Administrative Board decides otherwise as regards the Director. The Administrative Board shall meet at least twice a year in ordinary session. It shall also meet at the initiative of its Chairman, at the request of the Commission or at the request of at least a third of its members. The Administrative Board may invite any person who may have a relevant opinion to attend its meetings in the capacity of an observer. The members of the Administrative Board may, subject to its rules of procedure, be assisted by advisers or experts. The Administrative Board's secretarial services shall be provided by the Agency.
5. Decisions of the Administrative Board shall be adopted on the basis of a **simple** majority of the members present, unless provided otherwise in this Regulation. Each member of the Administrative Board or alternate shall have one vote.
6. The rules of procedure shall set out in greater detail:
  - (a) the arrangements governing voting, in particular the conditions on the basis of which one member may act on behalf of another and also, where appropriate, the rules governing quorums; and
  - (b) the arrangements governing the rotation applicable to the renewal of the members of the Administrative Board who are appointed by the Council so as to ensure a balanced participation of Member States over time.
7. A member of the Administrative Board shall not be a member of the Board of Regulators.

8. **Without prejudice to the role of the members appointed by the European Commission,** the members of the Administrative Board shall undertake to act independently and objectively in the public interest **without seeking or following any political instruction.** For that purpose, each member shall make a written declaration of commitments and a written declaration of interests indicating either the absence of any interest which may be considered prejudicial to his independence or any direct or indirect interest which might be considered prejudicial to his independence. Those declarations shall be made public annually.

## *Article 20*

### **Functions of the Administrative Board**

1. The Administrative Board shall:
- (a) after having consulted the Board of Regulators and obtained its favourable opinion in accordance with Article 23(5)(b), appoint the Director in accordance with Article 24(2) and where relevant extend his term of office or remove him from office;
  - (b) formally appoint the members of the Board of Regulators in accordance with Article 22(1);
  - (c) formally appoint the members of the Board of Appeal in accordance with Article 26(2);
  - (d) ensure that the Agency carries out its mission and performs the tasks assigned to it in accordance with this Regulation;

- (e) adopt, each year **by 31 January** the draft programming document referred to in Article 21 **and submit it to the Commission, the European Parliament and the Council. It shall, [] following the opinion of the Commission and in relation to the multiannual programming after consulting the European Parliament,** and after having received approval by the Board of Regulators in accordance with Article 23(5)(c), **adopt the programming document** of the Agency **by a two thirds majority its members** and shall transmit it to the European Parliament, the Council and the Commission **by 31 October**. The **programming document []** shall be made public;
- (f) **adopt by a two thirds majority, the annual budget of the Agency and exercise its other budgetary functions** in accordance with Articles 31 to 35;
- (g) decide, after having obtained the agreement of the Commission, whether to accept any legacies, donations or grants from other Union sources or any voluntary contribution from the Member States or from the regulatory authorities. The opinion of the Administrative Board delivered pursuant to Article 35(5) shall address the sources of funding set out in this paragraph;
- (h) in consultation with the Board of Regulators, exercise disciplinary authority over the Director. **In addition, in accordance with paragraph 2, it shall exercise, with respect to the staff of the Agency, the powers conferred by the Staff Regulations on the Appointing Authority and by the Conditions of Employment of Other Servants on the Authority Empowered to conclude a Contract of Employment;**
- (i) draw up the Agency's implementing rules for giving effect to the Staff Regulations **and the Conditions of Employment of Other Servants in accordance with Article 110 of the Staff Regulations** pursuant to Article 39(2);
- (j) adopt practical measures regarding the right of access to the documents of the Agency, in accordance with Article 41;

- (k) adopt and publish the annual report on the activities of the Agency, on the basis of the draft annual report referred to in Article 25(h), and shall transmit that report to the European Parliament, the Council, the Commission , and the Court of Auditors by 1 July of each year. The annual report on the activities of the Agency shall contain an independent section, approved by the Board of Regulators, concerning the regulatory activities of the Agency during that year;
- (l) adopt and publish its own rules of procedure;
- (m) adopt the financial rules applicable to the Agency in accordance with Article 36;
- (n) adopt an anti-fraud strategy, proportionate to the risk of fraud, taking into account the costs and benefits of the measures to be implemented;
- (o) adopt rules for the prevention and management of conflicts of interest in respect of its members as well as members of the Board of Appeal;
- (p) adopt and regularly update the communication and dissemination plans referred to in Article 41;
- (q) appoint an Accounting Officer, subject to the Staff Regulations and the Conditions of Employment of other servants, who shall be totally independent in the performance of his duties;
- (r) ensure appropriate follow-up to findings and recommendations stemming from the internal or external audit reports and evaluations, as well as from investigations of the European Anti-Fraud Office ("OLAF");
- (s) authorise the conclusion of working arrangements in accordance with Article 43;

- (t) **after having considered the Director’s opinion in accordance with Article 25(b) and after having consulted the Board of Regulators and obtained its favourable opinion in accordance with Article 23(5)(da), adopt and publish adequate and proportionate rules of procedure for all Agency tasks under Chapter I which are not covered by the rules of procedure under Article 20(1)(l), Article 23(2), Article 26(3) or Article 30(3). The rules of procedure shall notably ensure a transparent and reasonable decision-making process guaranteeing fundamental procedural rights based on the rule of law, in particular the right to be heard, the right to access file and the duty to give reasons.**

2. The Administrative Board shall adopt, in accordance with Article 110 of the Staff Regulations, a decision based on Article 2(1) of the Staff Regulations and on Article 6 of the Conditions of Employment of Other Servants, delegating relevant appointing authority powers to the Director and defining the conditions under which that delegation of powers can be suspended. The Director shall be authorised to sub-delegate those powers.
3. Where exceptional circumstances so require, the Administrative Board may by way of a decision temporarily suspend the delegation of the appointing authority powers to the Director and those sub-delegated by the latter and in favour of itself or delegate them to one of its members or to a staff member other than the Director.

## *Article 21*

### **Annual and multi-annual programming**

1. Each year, the Administrative Board shall adopt a **draft** programming document containing multi-annual and annual programming ("**single programming document**") in line with **Article 32 of Commission Delegated Regulation (EU) No 1271/2013**, based on a draft put forward by the Director. **The Administrative Board shall adopt the programming document**, taking into account the opinion of the Commission, **after having received the approval of the Board of Regulators for the annual work programme**, and in relation to multiannual programming after consulting the European Parliament. It shall forward it to the European Parliament, the Council and the Commission no later than 31 **[[ October** each year.

The programming document shall become definitive after final adoption of the general budget and if necessary shall be adjusted accordingly.

2. The annual work programme shall comprise detailed objectives and expected results including performance indicators. It shall also contain a description of the actions to be financed and an indication of the financial and human resources allocated to each action, **including reference to the Agency working groups tasked with contributing to the drafting the respective documents**, in accordance with the principles of activity-based budgeting and management. The annual work programme shall be coherent with the multi-annual work programme referred to in paragraph 4. It shall clearly indicate tasks that have been added, changed or deleted in comparison with the previous financial year. **[[**

3. The Administrative Board shall amend the adopted annual work programme when a new task is given to the Agency.

Any substantial amendment to the annual work programme shall be adopted by the same procedure set out for the initial annual work programme. The Administrative Board may delegate the power to make non-substantial amendments to the annual work programme to the Director.

4. The multi-annual work programme shall set out overall strategic programming including objectives, expected results and performance indicators. It shall also set out resource programming including multi-annual budget and staff.

The resource programming shall be updated annually. The strategic programming shall be updated where appropriate, and in particular to address the outcome of the evaluation referred to in Article 45.

## *Article 22*

### **Composition of the Board of Regulators**

1. The Board of Regulators shall be composed of :
- (a) senior representatives of the regulatory authorities, in accordance with Article 57(1) of [Recast Electricity Directive] and Article 39(1) of Directive 2009/73/EC, and one alternate per Member State from the current senior staff of those authorities , both nominated by the national regulatory authority ;

(b) one non-voting representative of the Commission.

Only one representative per Member State from the national regulatory authority may be admitted to the Board of Regulators.

Each national regulatory authority shall be responsible for nominating the alternate member from current staff of the national regulatory authority.

2. The Board of Regulators shall elect a Chairman and a Vice-Chairman from among its members. The Vice-Chairman shall replace the Chairman if the latter is not in a position to perform his duties. The term of office of the Chairman and of the Vice-Chairman shall be two-and-a-half years and shall be renewable. In any event, however, the term of office of the Chairman and that of the Vice-Chairman shall expire when they cease to be members of the Board of Regulators.

### *Article 23*

#### **Functions of the Board of Regulators**

1. The Board of Regulators [] shall act by a [] **two thirds** majority of the members present, with one vote for each member **including in all cases referred to in paragraph 5 []**.
2. The Board of Regulators shall adopt and publish its rules of procedure, which shall set out in greater detail the arrangements governing voting, in particular the conditions on the basis of which one member may act on behalf of another and also, where appropriate, the rules governing quorums. The rules of procedure may provide for specific working methods for the consideration of issues arising in the context of regional cooperation initiatives.

3. When carrying out the tasks conferred upon it by this Regulation and without prejudice to its members acting on behalf of their respective regulatory authority, the Board of Regulators shall act independently and shall not seek or follow instructions from any government of a Member State, from the Commission, or from another public or private entity.
4. The secretarial services of the Board of Regulators shall be provided by the Agency
5. The Board of Regulators shall:
  - (a) provide opinions<sup>11</sup> **and amendments to text proposals** to the Director on **all documents containing []** opinions, recommendations and decisions referred to in Articles 3 to 11, 12(c), 13(a)-(c), [] 14, **16(3a)**, 30 and 43 which are considered for adoption. ~~The Board of Regulators may issue binding amendments to the opinions, recommendations and decisions referred to in Article [8(2), 10 and 43]. [In this case the presence of a simple majority of its members is required] [and the amendment must be supported by at least [three] members].~~ In addition, the Board of Regulators, within its field of competence, shall provide **[] opinions and guidance** to the Director **and the Agency's working groups** in the execution of [] tasks, with the exception of tasks pursuant to Regulation 1227/2011<sup>12</sup>.
  - (b) deliver an opinion to the Administrative Board on the candidate to be appointed as Director in accordance with Article 20(1)(a) and Article 24(2).

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<sup>11</sup> In order to reassure the national regulatory authorities and provide sufficient time for preparing their opinions, it is proposed that the revised Article 25 includes a task of the Director to consult the BoR on his drafts several weeks in advance.

<sup>12</sup> Regulation (EU) 1227/2011 of the European Parliament and of the Council of 25 October on wholesale energy market integrity and transparency, OJ L 326, 8.12.2011, p. 1.

(c) in accordance with Article 20(1)(e) and Article 25(f) and in line with the provisional draft estimate established in accordance with Article 33(1) to 33(3)(1), approve **the draft of multi-annual and annual programming of the Agency proposed by the Director and** the work programme of the Agency for the coming year and present it by **[ ] 30 September** of each year for adoption by the Administrative Board.

(d) approve the independent section on regulatory activities of the annual report, in accordance with Article 20(1)(k) and Article 25(h).

(da) **provide an opinion to the Administrative Board on the rules of procedure under Article 20(1)(t).**

(db) **provide an opinion to the Administrative Board on the communication and dissemination plans referred to in Article 41 and on the rules of procedure for relations with third countries or international organisations referred to in Article 43.**

~~(dc) approve the proposal for common terms and conditions or methodologies for the implementation of network codes and guidelines, developed pursuant to Chapter VII of [recast Electricity Regulation as proposed by COM(2016) 861/2] which require approval by all regulatory authorities under Article 5(2), (2a) and (2b).~~

6. The European Parliament may invite, while fully respecting his independence, the chairman of the Board of Regulators or his deputy to make a statement before its competent committee and answer questions put by the members of that committee.

## *Article 24*

### **Director**

1. The Agency shall be managed by its Director, who shall act in accordance with the guidance referred to in Article 23(5)(a) and, where provided for in this Regulation, the opinions of the Board of Regulators. Without prejudice to the respective roles of the Administrative Board and the Board of Regulators in relation to the tasks of the Director, the Director shall neither seek nor follow any instruction from any government, from the Union institutions, or from any other public or private entity or person. The Director shall be accountable to the Administrative Board. The Director may attend the meetings of the Board of Regulators as an observer.
2. The Director shall be appointed by the Administrative Board following a favourable opinion of the Board of Regulators, on the basis of merit as well as skills and experience relevant to the energy sector, from a list of at least three candidates proposed by the Commission, following an open and transparent selection procedure. Before appointment, the candidate selected by the Administrative Board may be invited to make a statement before the competent committee of the European Parliament and to answer questions put by its members. For the purpose of concluding the contract with the Director, the Agency shall be represented by the Chairman of the Administrative Board.
3. The Director's term of office shall be five years. In the course of the nine months preceding the end of that period, the Commission shall undertake an assessment. In the assessment, the Commission shall examine in particular:
  - (a) the performance of the Director;
  - (b) the Agency's duties and requirements in the following years.

4. The Administrative Board, acting on a proposal from the Commission, after having consulted and given the utmost consideration to the assessment and the opinion of the Board of Regulators on that assessment and only in those cases where it can be justified by the duties and requirements of the Agency, may extend once the term of office of the Director by no more than five years. A Director whose term of office has been extended may not participate in another selection procedure for the same post at the end of the extended period.
5. The Administrative Board shall inform the European Parliament of its intention to extend the Director's term of office. Within one month before the extension of his term of office, the Director may be invited to make a statement before the competent committee of the Parliament and to answer questions put by the members of that committee.
6. If his term of office is not extended, the Director shall remain in office until the appointment of his successor.
7. The Director may be removed from office only upon a decision of the Administrative Board, after having obtained a favourable opinion of the Board of Regulators. The Administrative Board shall reach that decision on the basis of a two-thirds majority of its members.
8. The European Parliament and the Council may call upon the Director to submit a report on the performance of his duties. The European Parliament may also invite the Director to make a statement before its competent committee and answer questions put by the members of that committee.

## Article 25

### Tasks of the Director

The Director shall:

- (a) be the legal representative of the Agency and shall be in charge of its day-to-day management;
- (b) prepare the work of the Administrative Board. He shall participate, without having the right to vote, in the work of the Administrative Board. The Director shall be responsible for implementing the decisions adopted by the Administrative Board;
- (c) draft, **consult upon** , adopt and publish opinions, recommendations and decisions. Opinions, recommendations and decisions referred to in Articles 3 to 11, 12(c), 13(a)-(c), [] 14, **16(3a), 30 and 43** shall only be adopted [] **with a favourable opinion of the Board of Regulators. Before submitting draft recommendations, opinions or decisions to a vote by the Board of Regulators, the Director shall send the recommendations, opinions or draft decisions to the relevant working group and justify in a written reasoning when submitting a proposal to the Board of Regulators in case requests for changes made by the relevant working group are rejected. The Director:**
  - i. shall take the comments and amendments ~~text proposals~~ of the Board of Regulators into account and, ~~in case requests for changes are rejected, provide a duly justified written reasoning;~~

ii. may withdraw the submitted draft opinions, recommendations and decisions subject to a duly justified written reasoning in case of disagreement with the amendments submitted by the Board of Regulators in case of binding amendments issued by the Board of Regulators pursuant to Article 23(5)(a). ~~*Before withdrawal of the proposal the Director may re-submit the proposal to the Board of Regulators for a second vote.*~~;

- (d) be responsible for implementing the annual work programme of the Agency under the guidance of the Board of Regulators and under the administrative control of the Administrative Board;
- (e) take the necessary measures, in particular as regards adopting internal administrative instructions and publishing notices, to ensure the functioning of the Agency in accordance with this Regulation;
- (f) each year prepare a draft work programme **document** of the Agency **containing multi-annual programming and the annual work programme** for the following year **in accordance with Article 21. The Director** [] shall , after the adoption of the draft by the Administrative Board submit it to the Board of Regulators, **to the Council**, to the European Parliament and to the Commission by 31 [] **October** every year. The Director shall be responsible for implementing the programming document and reporting to the Administrative Board of its implementation;
- (g) draw up a provisional draft estimate of the Agency pursuant to Article 33(1) and shall implement the budget of the Agency in accordance with Article 34 and 35.;
- (h) prepare each year and submit to the Administrative Board a draft annual report including an independent section on the regulatory activities of the Agency and a section on financial and administrative matters;

- (i) prepare an action plan following-up conclusions of internal or external audit reports and evaluations, as well as investigations by the European Anti-fraud Office (OLAF) and report on progress twice a year to the Commission and regularly to the Administrative Board;
- (j) be responsible for deciding whether it is necessary for the purpose of carrying out the Agency's tasks in an efficient and effective manner to locate one or more staff in one or more Member States [ ]. The decision to establish a local office requires the prior consent of the Commission, the Administrative Board and the Member State or Member States concerned **including the Member State where the seat of the Agency is located**. The decision, **based on an appropriate cost-benefit analysis**, shall specify the scope of the activities to be carried out at that local office in a manner that avoids unnecessary costs and duplication of administrative functions of the Agency.

## *Article 26*

### **Creation and composition of the Board of Appeal**

1. The Agency shall establish a Board of Appeal.
2. The Board of Appeal shall be composed of six members and six alternates selected from among current or former senior staff of the national regulatory authorities, competition authorities or other national or Union institutions with relevant experience in the energy sector. The Board of Appeal shall designate its Chairman.

The members of the Board of Appeal shall be formally appointed by the Administrative Board, on a proposal from the Commission, following a public call for expression of interest, and after consulting the Board of Regulators.

3. The Board of Appeal shall adopt and publish its rules of procedure. Those rules shall set out in detail the arrangements governing the organisation and functioning of the Board of Appeal and the rules applicable to appeals before the Board, pursuant to Article 29. [] The Board of Appeal shall adopt and publish its rules of procedure within [] **six months after its first meeting []**

The budget of the Agency shall comprise a separate budget line for the financing of the functioning of the registry for the Board of Appeal.

4. The decisions of the Board of Appeal shall be adopted on the basis of a qualified majority of at least four of its six members. The Board of Appeal shall be convened when necessary.

## *Article 27*

### **Members of the Board of Appeal**

1. The term of office of the members of the Board of Appeal shall be five years. That term shall be renewable **once**.
2. The members of the Board of Appeal shall be independent in making their decisions. They shall not be bound by any instructions. They shall not perform any other duties in the Agency, in its Administrative Board or in its Board of Regulators **or in any of its Working Groups**. A member of the Board of Appeal shall not be removed during his term of office, unless he has been found guilty of serious misconduct, and the Administrative Board, after consulting the Board of Regulators, takes a decision to that effect.

## *Article 28*

### **Exclusion and objection in the Board of Appeal**

1. Members of the Board of Appeal shall not take part in any appeal proceedings if they have any personal interest therein, or if they have previously been involved as representatives of one of the parties to the proceedings, or if they participated in the decision under appeal.
2. A member of the Board of Appeal shall inform the Board in the event that , for one of the reasons referred to in paragraph 1 or for any other reason, he considers that a fellow member should not take part in any appeal proceedings. Any party to the appeal proceedings may object to the participation of a member of the Board of Appeal on any of the grounds referred to in paragraph 1 , or in case of suspected bias. Such an objection shall be inadmissible if it is based on the nationality of a member or if, while being aware of a reason for objecting, the objecting party to the appeal proceedings has taken a procedural step in the appeal proceedings other than objecting to the composition of the Board of Appeal.

3. The Board of Appeal shall decide on the action to be taken in the cases specified in paragraphs 1 and 2 without the participation of the member concerned. For the purpose of taking that decision, the member concerned shall be replaced on the Board of Appeal by his alternate. If the alternate finds himself in a similar situation to that of the member, the Chairman shall designate a replacement from among the available alternates.
4. The members of the Board of Appeal shall undertake to act independently and in the public interest. For that purpose, they shall make a written declaration of commitments and a written declaration of interests indicating either the absence of any interest which may be considered prejudicial to their independence or any direct or indirect interest which might be considered prejudicial to their independence. Those declarations shall be made public annually.

#### *Article 29*

#### **Decisions subject to appeal**

1. Any natural or legal person, including national regulatory authorities, may appeal against a decision referred to in Articles 4 to 14 of this Regulation and in Article 12(6) of Regulation (EU) No 347/2013 of the European Parliament and of the Council as well as in Article 9(11) of Commission Regulation (EU) 2015/1222 which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person.
2. The appeal, including the statement of the grounds for appeal, shall be filed in writing at the Agency within two months from the notification of the decision to the person concerned, or, in the absence thereof, within two months from the day on which the Agency published its decision. The Board of Appeal shall decide upon the appeal within four months of the lodging of the appeal.

3. An appeal lodged pursuant to paragraph 1 shall not have suspensory effect. The Board of Appeal may, however, if it considers that circumstances so require, suspend the application of the contested decision.
4. If the appeal is admissible, the Board of Appeal shall examine whether it is well-founded. It shall invite the parties as often as necessary to the appeal proceedings to file observations on notifications issued by itself or on communications from the other parties to the appeal proceedings, within specified time limits. Parties to the appeal proceedings shall be entitled to make an oral presentation.
5. The Board of Appeal may exercise any power which lies within the competence of the Agency, or it may remit the case to the competent body of the Agency. The latter shall be bound by the decision of the Board of Appeal.
6. The decisions taken by the Board of Appeal shall be published by the Agency.

#### *Article 30*

#### **Working groups**

1. **[[ The Administrative Board shall establish working groups for the tasks referred to in Articles 5, 6, 8(2a), 10 and 43. For all other tasks the Administrative Board [[ shall establish working groups following a favourable opinion by the Board of Regulators. The removal of a working group shall be subject to a favourable opinion of the Board of Regulators.**

2. The working groups shall be composed of experts from the staff of the Agency, from national regulatory authorities and, **as necessary**, from the Commission [ ]. The Agency shall not be responsible for the costs of the participation of experts from the staff of national regulatory authorities in the Agency working groups. **Working groups which are set up to carry out the activities according to this Regulation shall take into consideration the views from experts from other relevant national authorities where these authorities are competent.**
3. The Administrative Board, **following a favourable opinion by the Board of Regulators**, shall adopt and publish internal rules of procedure for the functioning of the working groups. **The Director, following a favourable opinion by the Board of Regulators, shall appoint working group chairs.**
- 3a. **The Agency Working Groups shall carry out the activities assigned to them in the programming document adopted pursuant to Article 20(1)(e) and any activities assigned to them by the Board of Regulators and the Director.**

## **CHAPTER III**

### **ESTABLISHMENT AND STRUCTURE OF THE BUDGET**

#### *Article 31*

##### **Structure of the budget**

1. Without prejudice to other resources the revenues of the Agency shall be made up of :
  - (a) a contribution from the Union ;
  - (b) fees paid to the Agency pursuant to Article 32 ;
  - (c) any voluntary contributions from the Member States or from the regulatory authorities, under Article 20(1)(g);
  - (d) legacies, donations or grants under Article 20(1)(g).
2. The expenditure of the Agency shall include staff, administrative, infrastructure, and operational expenses.
3. The revenue and expenditure of the Agency shall be in balance.
4. All revenue and expenditure of the Agency shall be the subject of forecasts for each financial year, coinciding with the calendar year, and shall be entered in its budget.

## Article 32

### Fees

1. Fees shall be due to the Agency **for the following**:
  - (a) requesting an exemption decision pursuant to Article 11 and for decisions on cross border cost allocation provided by the Agency pursuant to Article 12 of Regulation (EU) No 347/2013 <sup>13</sup>
  - (b) **annual registration of market participants or entities acting on their behalf and ~~reporting of information~~ pursuant to Article 8 of Regulation (EU) 1227/2011 and ~~Commission Implementing Regulation (EU) No 1348/2014~~ including ongoing costs of collecting, handling, processing and analysing of information pursuant to this registration.**
2. The fees referred to in paragraph 1, **and the way in which they are to be paid**, shall be set by the Commission **after a public consultation and after consulting the Administrative Board and the Board of Regulators. The ~~amount of the~~ fees shall be proportionate to the costs of the respective services provided in a cost-effective way. They shall be non-**  
**~~discriminatory and~~ fixed at such a level as to ensure that they are not non-discriminatory and that undue financial or administrative burden on market participants or entities acting on their behalf is avoided, ~~the revenue in respect thereof is proportionate to the cost of the respective services delivered in a cost-effective way, and that there is no significant accumulation of surplus.~~**

The Commission shall regularly re-examine the level of fees on the basis of an evaluation and, if necessary, adapt the level of fees and the way in which they are to be paid.

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<sup>13</sup> OJ L 115, 25.4.2013, p. 39.

## *Article 33*

### **Establishment of the budget**

1. Each year, the Director shall draw up a provisional draft estimate covering the operational expenditure and the programme of work anticipated for the following financial year, and shall forward that provisional draft estimate to the Administrative Board, together with a list of provisional posts.
2. Each year, the Administrative Board shall, on the basis of the provisional draft estimate prepared by the Director, adopt a provisional draft estimate of revenue and expenditure of the Agency for the following financial year.
3. The provisional draft estimate, including a draft establishment plan, shall be transmitted by the Administrative Board to the Commission by 31 January each year. Prior to adoption of the estimate, the draft prepared by the Director shall be transmitted to the Board of Regulators, which may deliver a reasoned opinion on the draft.
4. The estimate referred to in paragraph 2 shall be transmitted by the Commission to the European Parliament and to the Council, together with the draft general budget of the Union.
5. On the basis of the draft estimate, the Commission shall enter into the draft general budget of the Union the estimates it considers necessary in respect of the establishment plan and the amount of the grant to be charged to the general budget of the Union in accordance with Article 313 and following of the Treaty.
6. The Council in its budgetary authority role shall adopt the establishment plan for the Agency.
7. The budget of the Agency shall be adopted by the Administrative Board. It shall become final after the final adoption of the general budget of the Union. Where necessary, it shall be adjusted accordingly.

8. Any modification to the budget, including the establishment plan, shall follow the same procedure.
9. The Administrative Board shall, without delay, notify the budgetary authority of its intention to implement any project which may have significant financial implications for the funding of the budget of the Agency, in particular any project relating to property . The Administrative Board shall also inform the Commission of its intention. If either branch of the budgetary authority intends to issue an opinion, it shall, within two weeks of receipt of the information on the project, notify the Agency of its intention thereof. In the absence of a reply, the Agency may proceed with the planned project.

#### *Article 34*

#### **Implementation and control of the budget**

1. The Director shall act as authorising officer and shall implement the Agency's budget.
2. By 1 March following the completion of each financial year, the Agency accounting officer shall forward to the Commission's accounting officer and the Court of Auditors the provisional accounts, accompanied by the report on budgetary and financial management over the financial year. The Agency's accounting officer shall also send the report on budgetary and financial management to the European Parliament and the Council by 31 March of the following year. The Commission's accounting officer shall then consolidate the provisional accounts of the institutions and decentralised bodies in accordance with Article 147 of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council<sup>14</sup> ("the Financial Regulation").

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<sup>14</sup> Regulation (EU, Euratom ) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L 298, 26.10.2012, p. 1).

**Presentation of accounts and discharge**

1. The Agency's accounting officer shall send the provisional accounts for the financial year (year N) to the Commission's Accounting Officer and to the Court of Auditors by 1 March of the following financial year (year N+1)
2. The Agency shall send a report on the budgetary and financial management for year N to the European Parliament, the Council, the Commission and the Court of Auditors by 31 March of year N+1.

By 31 March of year N+1 , the Commission's accounting officer shall forward the provisional accounts of the Agency, to the Court of Auditors. The report on budgetary and financial management over the financial year shall also be forwarded to the European Parliament and the Council.

4. After receiving the observations of the Court of Auditors on the provisional accounts of the Agency for year N in accordance with the provisions of Article 148 of the Financial Regulation, the accounting officer , acting on his own responsibility, shall draw up the final accounts of the Agency for that year. The Director shall transmit them, for opinion, to the Administrative Board.
5. The Administrative Board shall deliver an opinion on the final accounts of the Agency for year N .
6. The Agency's accounting officer shall transmit the final accounts for year N , accompanied by the opinion of the Administrative Board, by 1 July of year N+1 , to the European Parliament, the Council, the Commission and the Court of Auditors.

7. The final accounts shall be published in the *Official Journal of the European Union* by 15 November of year N+1 .
8. The Director shall send to the Court of Auditors a reply to the latter's observations by 30 September of year N+1 . He shall also send a copy of that reply to the Administrative Board and the Commission.
9. The Director shall submit to the European Parliament, at the latter's request , any information necessary for the smooth application of the discharge procedure for year N in accordance with Article 109(3) of Commission Delegated Regulation (EU) No 1271/2013 .
10. The European Parliament, following a recommendation by the Council, acting by qualified majority, shall, before 15 May of the year N + 2, grant a discharge to the Director for the implementation of the budget for the financial year N.

#### *Article 36*

#### **Financial rules**

The financial rules applicable to the Agency shall be adopted by the Administrative Board after consulting the Commission. Those rules may deviate from Commission Delegated Regulation (EU) No 1271/2013 if the specific operational needs for the functioning of the Agency so require and only with the prior agreement of the Commission.

## *Article 37*

### **Combating fraud**

1. In order to facilitate combating fraud, corruption and other unlawful activities under Regulation (EC) No 883/2013, within six months from the day the Agency becomes operational, it shall accede to the Interinstitutional Agreement of 25 May 1999 concerning internal investigations by OLAF and adopt appropriate provisions applicable to all employees of the Agency using the template set out in the Annex to that Agreement.
2. The European Court of Auditors shall have the power to carry out an on-the-spot audit, as well as auditing on the basis of documents, over all grant beneficiaries, contractors and subcontractors who have received Union funds from the Agency.
3. OLAF may carry out investigations, including on-the-spot checks and inspections with a view to establishing whether there has been fraud, corruption or any other illegal activity affecting the financial interests of the Union in connection with a grant or a contract funded by the Agency, in accordance with the provisions and procedures laid down in Regulation (EC) No 1073/1999 and Regulation (Euratom, EC) No 2185/96.
4. Without prejudice to paragraphs 1, 2 and 3, cooperation agreements with third countries and international organisations, contracts, grant agreements and grant decisions of the Agency shall contain provisions expressly empowering the European Court of Auditors and OLAF to conduct the audits and investigations referred to in this Article, according to their respective competences.

## CHAPTER V

### GENERAL AND FINAL PROVISIONS

#### *Article 38*

##### **Privileges and immunities and Headquarters' Agreement**

1. The Protocol on Privileges and Immunities of the European Communities shall apply to the Agency.
2. The necessary arrangements concerning the accommodation to be provided for the Agency in the host Member State and the facilities to be made available by that Member State together with the specific rules applicable in the host Member State to the Director, members of the Administrative Board, Agency staff and members of their families shall be laid down in a Headquarters' Agreement between the Agency and the Member State where the seat is located. That agreement shall be concluded after obtaining the approval of the Administrative Board.

## *Article 39*

### **Staff**

1. The Staff Regulations of Officials of the European Union ("the Staff Regulations") and , the Conditions of Employment of Other Servants of the European Union ("the Conditions of Employment") and the rules adopted jointly by the Union institutions for the purpose of applying the Staff Regulations and the Conditions of Employment shall apply to all the staff of the Agency, including its Director.
2. The Administrative Board, in agreement with the Commission, shall adopt appropriate implementing rules, in accordance with Article 110 of the Staff Regulations.
3. In respect of its staff, the Agency shall exercise the powers conferred on the appointing authority by the Staff Regulations and on the authority entitled to conclude contracts by the Conditions of Employment.
4. The Administrative Board may adopt provisions to allow national experts from Member States to be employed on secondment at the Agency.

## *Article 40*

### **Liability of the Agency**

1. The Agency's contractual liability shall be governed by the law applicable to the contract in questions.

Any arbitration clause contained in a contract concluded by the Agency shall be subject to the jurisdiction of the Court of Justice of the European Union.

2. In the case of non-contractual liability, the Agency shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its staff in the performance of their duties.
3. The Court of Justice of the European Union shall have jurisdiction in disputes over compensation for damages referred to in paragraph 2. .
4. The personal financial liability and disciplinary liability of Agency staff towards the Agency shall be governed by the relevant provisions applying to the staff of the Agency.

#### *Article 41*

#### **Transparency and communication**

1. Regulation (EC) No 1049/2001 of the European Parliament and of the Council <sup>15</sup> shall apply to documents held by the Agency.
2. The Administrative Board shall adopt practical measures for applying Regulation (EC) No 1049/2001 .
3. Decisions taken by the Agency pursuant to Article 8 of Regulation (EC) No 1049/2001 may be the subject of a complaint to the Ombudsman or of proceedings before the Court of Justice, in accordance with the conditions laid down in Articles 228 and 263 of the Treaty respectively.

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<sup>15</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

4. The processing of personal data by the Agency shall be subject to the Regulation (EC) No 45/2001<sup>16</sup>. The Administrative Board shall establish measures for the application of Regulation (EC) No.45/2001 by the Agency, including those concerning the appointment of the Data Protection Officer of the Agency. Those measures shall be established after consultation of the European Data Protection Supervisor.
5. The Agency may engage in communication activities on its own initiative within its field of competence. The allocation of resources to communication activities shall not be detrimental to the effective exercise of the tasks referred to in Article 3 to 14. Communication activities shall be carried out in accordance with relevant communication and dissemination plans adopted by the Administrative Board.

#### *Article 42*

#### **Protection of classified and sensitive non-classified information**

1. The Agency shall adopt its own security rules equivalent to the Commission's security rules for protecting European Union Classified Information ("EUCI") and sensitive non-classified information, inter alia, provisions for the exchange, processing and storage of such information, as set out in the Commission Decisions (EU, Euratom) 2015/443<sup>17</sup> and 2015/444<sup>18</sup>.

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<sup>16</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

<sup>17</sup> Commission Decision (EU, Euratom) 2015/443 of 13 March 2015 on Security in the Commission (OJ L 72, 17.3.2015, p. 41)

<sup>18</sup> Commission Decision (EU, Euratom) 2015/444 of 13 March 2015 on the security rules for protecting EU classified information (OJ L 72, 17.3.2015, p. 53).

2. The Agency may also decide to apply *mutatis mutandis* the Commission's decisions referred to in paragraph 1. The security rules of the Agency shall cover, *inter alia*, provisions for the exchange, processing and storage of EUCI and sensitive non-classified information.

### *Article 43*

#### **Cooperation agreements**

1. The Agency shall be open to the participation of third countries which have concluded agreements with the Union and which have adopted and are applying **the relevant rules of Union law in the field of energy, including notably the rules on independent national regulators, third party access to infrastructure and unbundling, energy trading and system operation and consumer participation and protection, as well as the relevant rules [] in the fields of environment and competition.**
  - 1a. **Subject to conclusion of an agreement to this effect between the Union and third countries referred to in paragraph 1, the Agency may exercise its tasks pursuant to Article 3 to 14 also with effect in regard to third countries if these countries have ~~concluded agreements with the Union and which have~~ adopted and are applying the relevant rules pursuant to paragraph 1 and mandated the Agency to coordinate the activities of their domestic regulator with regulators from Member States. Only in such cases the references to issues of cross-border character concern borders with third countries, and not borders as between two Member States.**
2. Under the relevant provisions of those agreements, arrangements shall be made specifying, in particular, the nature, scope and procedural aspects of the involvement of those countries in the work of the Agency, including provisions relating to financial contributions and to staff.

3. The Administrative Board shall adopt, **after having received an positive opinion by the Board of Regulators, [] rules of procedures** for relations with third countries **referred to in paragraph 1 []**. The Commission shall ensure that the Agency operates within its mandate and the existing institutional framework by concluding an appropriate working arrangement with the Agency's Director.

#### *Article 44*

#### **Language arrangements**

1. The provisions of Council Regulation No 1 <sup>19</sup> shall apply to the Agency.
2. The Administrative Board shall decide on the internal language arrangements for the Agency.
3. The translation services required for the functioning of the Agency shall be provided by the Translation Centre for the Bodies of the European Union.

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<sup>19</sup> Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385).

## *Article 45*

### **Evaluation**

1. No later than five years after the entry into force of the present Regulation, and every five years thereafter, the Commission, with the assistance of an independent external expert, shall carry out an evaluation to assess the Agency's performance in relation to its objectives, mandate and tasks. The evaluation shall in particular address the possible need to modify the mandate of the Agency, and the financial implications of any such modification .
2. Where the Commission considers that the continuation of the Agency is no longer justified with regard to its assigned objectives, mandate and tasks, it may propose that this Regulation be amended accordingly or repealed.
3. The Commission shall submit the evaluation findings referred to in paragraph 1 together with its conclusions to the European Parliament, the Council and to the Agency's Board of Regulators. The findings of the evaluation should be made public.
4. The Commission shall present to the European Parliament and the Council an evaluation at least every five years **taking into account the possibility to review the competences which have been conferred on the Agency.**

## *Article 46*

### **Repeal**

Regulation (EC) No 713/2009 is repealed.

References to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex II.

## Article 47

### **Entry into force**

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

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