

## **Capacity Allocation Mechanisms (CAM) Network Code**

### **Supporting document for revised CAM NC**

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## A. Introduction

On 6 March 2012, ENTSOG delivered the final CAM network code (NC) to ACER. On 5 June 2012, ACER provided ENTSOG with its reasoned opinion on the NC<sup>1</sup>. For the majority of topics in the CAM NC, the ACER opinion concludes that the NC is in line with the relevant framework guideline (FG) and does not recommend changes. In particular, the elements of the NC dealing with auction design were not challenged by ACER.

The EC wrote to ENTSOG on 18 July 2012 inviting it to resubmit a revised CAM NC to ACER by 17 September 2012.

ENTSOG has carefully considered each of the issues set out in the ACER opinion. On 27 July 2012 ENTSOG published a 'stakeholder engagement document' setting out the proposed approach in respect of each of these issues<sup>2</sup>, together with proposals for a number of further technical changes intended to promote a workable network code. Stakeholders were invited to comment on the proposals and information sessions were held in order to promote understanding of the potential revisions to the CAM NC.

Despite the limited time available for this engagement process, network users provided valuable feedback on the proposed modifications to the CAM NC. To the extent possible, the revised NC reflects the outcome of these discussions, and ENTSOG thanks all those who contributed for their input to the modified network code.

In the interests of transparency, this document provides a comprehensive list and explanation of the changes that have been made to the CAM NC since the version that was submitted to ACER on 6 March 2012.

The document is organised as follows:

- Section B gives an overview of the changes to the CAM NC;
- Section C sets out ENTSOG's response to each of the issues raised in the ACER opinion on the CAM NC, including an explanation of related changes to the NC;
- Section D explains a number of further changes that have been made by ENTSOG in order to ensure a clear network code that is capable of being implemented and compatible with other network codes; and
- The Annex is a legal analysis of the possibility for harmonising transport contracts.

ENTSOG considers that on the majority of issues, the revised CAM NC remains a clear and robust document that provides a solid foundation for progress towards the internal energy market. Nevertheless one area of the NC, the sunset clause, continues to be of great concern to ENTSOG as well as to the majority of network users, as demonstrated in the responses to ENTSOG's stakeholder support process in February 2012. While this issue has not been addressed as part of the revision of the CAM NC, ENTSOG's position that the sunset clause should be removed from the NC has not changed.

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<sup>1</sup>ACER opinion no 04-2012: 'Reasoned Opinion on the network code on capacity allocation mechanisms for the European Gas Transmission network'.

<sup>2</sup> 'Capacity Allocation Mechanisms (CAM) Network Code - Stakeholder Engagement Document: Potential Modifications to the Network Code Following Receipt of ACER Opinion', CAP267-12.

## B. Summary of the changes to the CAM NC

The modifications to the CAM NC presented into this document fall into two categories: changes made in response to the ACER opinion, and changes considered essential to ensure a workable CAM NC. The table below summarises the changes made.

Issue	Source	Changes made since 6 March 2012
Definitions	ACER opinion	Definitions revised in line with ACER opinion
New capacity	ACER opinion	Standard products and bundling now apply to new capacity in line with ACER opinion. No change with regard to the application of quotas to new capacity
Standardisation of contracts	ACER opinion	None; further information requested by ACER is provided in this document (Annex)
TSO co-operation	ACER opinion	New article inserted in section 3 of CAM NC specifying requirements for co-operation in line with ACER opinion
Capacity breakdown	ACER opinion	No change; not considered appropriate given the aims of delivering a workable network code and promoting a well-functioning market
Offer of unbundled capacity	ACER opinion	Period for which unbundled capacity can be offered has been limited to 5 years before gas flow (ACER opinion specified one month before)
Existing capacity contracts: role of NRAs in sunset clause application	ACER opinion	None; further information requested by ACER is provided in this document (section C.7)
Interruption lead time: role of NRAs	ACER opinion	NRA approval now needed for any shortening of default minimum interruption lead time in line with ACER opinion
Tariffs	ACER opinion	<p>Passage on under-recovery modified in line with ACER opinion</p> <p>Default rule for split of auction premium changed to 50:50 in line with ACER opinion</p> <p>[Note: article 7.3, the revenue equivalence principle, has been retained]</p>
Incentives	ACER opinion	Reference to incentives removed in line with ACER opinion
Interim period	ACER opinion	Reference to interim period removed in line with ACER opinion

Issue	Source	Changes made since 6 March 2012
Day-ahead auction timings	ENTSOG	Bidding window and allocation process both shortened to 30 minutes to allow earlier allocation, as requested by network users
Within-day auction timings	ENTSOG	Hourly auctions open 4h before gas flow; bidding window and allocation process both shortened to 30 minutes for compatibility with re-nomination lead time specified in Balancing NC  First within-day auction opens after closure of day ahead interruptible allocation to avoid clash between processes
Interruption lead time: default minimum	ENTSOG	Interruption lead time shortened to re-nomination lead time less 45 minutes (1h 15min), to reduce the probability of interruption
Competing capacities	ENTSOG	NC now contains an exemption from full independence of auctions when competing capacities are sold, together with an explanation of the concept of competing capacity. Agreement of relevant TSOs and approval of NRAs is a prerequisite for such an arrangement.

## C. Response to the ACER opinion

### C.1 Definitions

*ACER's opinion is that:*

- *The definition of “virtual interconnection points” should be amended in line with the CAM Framework Guidelines, which take into account that there can be more than one transmission system operator within an entry-exit system*
- *The definitions of “additional capacity” and “capacity contract” should be amended so that they are consistent with those in Regulation 715/2009 and Directive 2009/73/EC*

The CAM NC has been modified in line with the ACER opinion on these points. The modifications were supported by a large majority of respondents to the stakeholder engagement document.

#### ***Virtual interconnection points***

Article 5.1 (9) of the CAM NC has been modified to make clear that where possible, virtual interconnection points must be established between adjacent entry-exit systems rather than adjacent transmission systems, as requested by ACER. The conditions set out in 5.1 (9) (a)-(d) remain unchanged, as it is important to ensure that virtualisation is required only where technically and commercially feasible, and where it will not create detrimental effects on the parties involved.

To ensure that the CAM NC remains clear and internally consistent, article 1.2 (y), which defines virtual interconnection points, has been modified so that it refers to section 5.1 (9) rather than offering another definition of VIPs.

#### ***Additional capacity***

The definition of additional capacity in article 1.2 (a) has been modified to align it with that in the CMP Guidelines, which were adopted into law on 24 August 2012. ENTSG considers that this change has no impact on the application of the CAM NC<sup>3</sup>.

#### ***Capacity contract***

The definition provided for “capacity contract” in article 1.2 (f) has been adjusted to be in line with Article 2 of the Regulation, which refers to a “transport contract”.

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<sup>3</sup> This change links to the request from ACER to remove references to incentive regimes (see section C.10), as the wording in the CAM NC submitted to ACER referred to additional capacity being released at the discretion of the TSO in accordance with incentive regimes.

## C.2 Application of the Network Code to New Technical Capacity<sup>4</sup>

*ACER's opinion is that the CAM NC should be modified to specify that the following elements of the CAM NC apply to new capacity as well as existing capacity:*

- *Standard capacity products*
- *Bundling of capacity*
- *Rules on capacity breakdown (quotas)*

The CAM NC has been modified in line with the ACER opinion on the first two of these points. On the third point, ENTSG considers that no change to the CAM NC is appropriate.

### ***Standard capacity products***

Article 2.3 of the CAM NC has been modified so that article 4.2 of the NC, which specifies the standard capacity products to be offered (yearly, quarterly, monthly, daily and within-day) also provides the basis for the sale of new capacity, in line with ACER's opinion. This change was supported by respondents to the stakeholder engagement document.

Consistent with the CAM FG, the NC will retain the provision that new capacity is exempt from the NC rules on allocation. This means that there will be no requirement in European law at this stage that new capacity must be allocated via independent auctions, and it will in principle be possible to allocate capacity in blocks of more than one year. Such arrangements will be determined on a national level until the introduction of any future network code dealing with this issue.

A capacity contract confers a daily right to flow a certain amount of gas. Network users purchasing capacity products of longer than a day in duration, whether this capacity is new or existing, may therefore split that capacity into blocks of a day or more if they wish to surrender it to the TSO or trade it on the secondary market.

Taking these factors into account, ENTSG considers that the application of standard products to new capacity offer is purely an administrative change that will not have either a beneficial or a detrimental impact on the operation of access arrangements.

For completeness, article 2.3 has been further modified so that article 4.3 of the NC, regarding units, also applies to new capacity. This means that new capacity must be offered either in kWh/h, or in kWh/d assuming a flat profile.

### ***Bundling***

Article 5.1 (1) of the CAM NC has been modified to remove the exemption from bundling for new capacity, in line with ACER's opinion. This means that new capacity must be offered as a bundled product wherever matching capacity is available, whether that matching capacity is new or existing. This change was supported by the majority of respondents to the stakeholder engagement

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<sup>4</sup> 'New capacity' in this case relates to physical investment in the network which results in an increase in the technical capacity that can be offered. It is distinct from the 'additional capacity' referred to in C.1, whose release is a commercial decision by TSOs.

document, though a number of network users commented that they remained opposed to the mandatory bundling of capacity in general.

ENTSO-G considers that this change may not be beneficial, as it may limit the options that can be considered as part of current and future work on the allocation of incremental capacity<sup>5</sup>. For example, if there is a mismatch between the technical capacity at two sides of an interconnection point (IP) and the TSO with less capacity is proposing to invest in its network in order to equalise the technical capacities, the requirement to offer the capacity as a bundled new/existing product may limit the offer period to 15 years.

To further improve the consistency between the CAM NC and the FG, article 2.3 now specifies that article 5.1 (2) (concerning booking platforms) does not apply to new capacity, while article 5.1 (3) has been reworded to remove a reference to allocation. These changes ensure a consistent approach whereby parts of the CAM NC that deal with allocation do not apply to new capacity, while other aspects of the CAM NC do apply.

### ***Capacity breakdown (quotas)***

ENTSO-G has not changed the CAM NC to reflect ACER's opinion that quotas applying to existing capacity should also apply to new capacity, for the reasons set out below. This position was supported by the majority of respondents to the stakeholder engagement document, including by a number of network users who favoured the application of significant quotas to existing capacity.

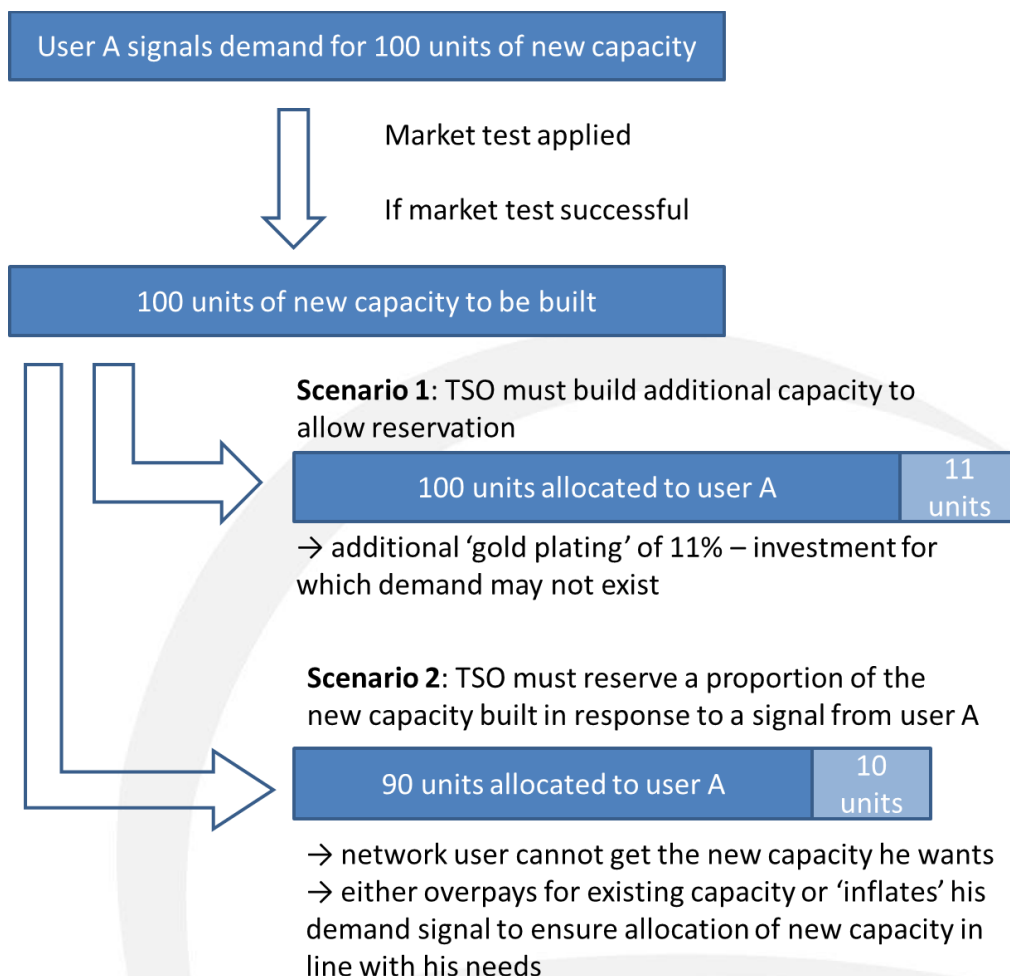
The impact of such a change would be that a TSO receiving a demand signal for new capacity would have to build not only the capacity demanded, but also extra capacity for which there is no evidence of demand.

For example, if users demand 100 units and the TSO must reserve 10%, this means that 111 units must be built. Therefore, reserving 10% means an over-investment of 11% in relation to demand. Alternatively, 100 units could be built and only 90 initially allocated; however, a rational response of network users to such a system could be to signal a higher demand (111) in order to ensure that they receive their desired allocation of 100. This is illustrated in the diagram below:

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<sup>5</sup> This work is being led by CEER. See [http://www.energy-regulators.eu/portal/page/portal/EER\\_HOME/EER\\_CONSULT/OPEN%20PUBLIC%20CONSULTATIONS/Investment%20Procedures%20for%20Gas%20Infrastructure](http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_CONSULT/OPEN%20PUBLIC%20CONSULTATIONS/Investment%20Procedures%20for%20Gas%20Infrastructure)





ENTSOG therefore concludes that no change to the CAM NC can be made in this area, for the following reasons:

- Any qualifying user can signal a demand for incremental capacity<sup>6</sup>, and TSOs will create this capacity providing the relevant criteria are met and their national regime provides for the building of the capacity. This means that users wishing to purchase capacity for particular quarters or months, for example, can indicate their willingness to do so. There should therefore be no need to wait until very close to gas flow to see if there is additional demand.
- The risk of capacity hoarding should be eliminated or at least minimised by new congestion management procedures (which apply to all capacity, new and existing).
- If the TSO were compelled to build more capacity than indicated by the incremental signal (111 units in the example above), this measure would result in 'gold plating' of the network and potentially a negative effect on investment, tilting the playing field against those making financial commitments to secure new capacity. As set out above, reserving 10% of newly built capacity for short-term use effectively means an 11% overinvestment for which there is no proof of demand. Market demand reflected in binding contracts is the only guarantee for efficient investments.

<sup>6</sup> This forms part of the general rights regarding access to the network. Additionally, under Article 16 (5) of Regulation 715/2009, TSOs are required to assess the market for new investment.

- If the TSO were required to reserve some of the capacity demanded by users (building 100 units and reserving 11 in the example above) and users do not react by increasing the new capacity demanded, this would create artificial scarcity and could drive up prices for both long and short term capacity.
- This measure would result in a risk that capacity is created for which there is no demand. If the cost of this capacity must be covered by those signalling a (lower) demand for incremental capacity, this would create cross subsidisation between those booking long term and short term capacity<sup>7</sup>.
- If users cover the cost of the additional build through tariffs, they will pay inflated prices.

### C.3 Standard Contracts

*ACER's opinion document asks ENTSG to provide ACER with an assessment of whether standardisation of transmission contracts can be implemented in future, and a timeline for carrying this out.*

No change has been made to the NC in response to this point, instead, information is provided as requested by ACER. Respondents to the stakeholder engagement document supported that no change is made to the CAM NC at this stage, though a number requested that network users should be involved in any future process to standardise transmission contracts.

A detailed assessment of the possible standardisation, together with potential next steps, is presented in the Annex to this document.

### C.4 TSO co-operation

*ACER's opinion is that the CAM NC should be modified to include specific minimum requirements for the exchange of information between adjacent transmission system operators, as referenced in section 1.5 of the CAM framework guidelines.*

The CAM NC has been modified in line with the ACER opinion on this point. A new article, 3.4, has been inserted into the CAM NC in order to address ACER's concerns in this area.

The table below shows how the provisions of article 3.4 fulfil the requirements of the CAM FG.

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<sup>7</sup> Article 13 (1) of Regulation 715/2009 specifies that tariffs shall, among other aims, avoid cross-subsidies between network users while providing incentives for investment. Consistent with this, the EC's invitation to ACER to develop a framework guideline on tariffs noted that the framework should 'aim to achieve cost-reflectivity, the avoidance of cross-subsidies, the promotion of efficient new investment, and greater transparency.'

FG requirement for information exchange	New CAM NC provision for information exchange between adjacent TSOs	Correspondence between FG and NC
Forecast entry and exit flows; steering decisions for the technical use of physical interconnection points including those combined in VIPs	3.4 (1) Re-nomination matching and confirmation information	Best source of information on forecast flows on a short term basis is nominations made by network users and the outcomes of processing those nominations
Availability of network components	3.4 (2) Information on maintenance of individual transmission networks	Maintenance schedule and incidence of any unplanned maintenance dictates availability of network
Potential congestions on the respective networks	3.4 (3) Clearing price and quantity allocated in each auction	Market demand for capacity at IPs is best predictor of congestion
The use of CMPs	3.4 (4) Information as required in annex 1 chapter 3 of the Regulation (CMP guidelines)	CMP guidelines require full disclosure of use of the procedures

In its stakeholder engagement document, ENTSG noted that each of these provisions duplicates other requirements on TSOs, which arise either from existing legislation or from other articles in the CAM NC, and queried whether this new article was necessary. This view was supported by a number of respondents to the stakeholder engagement document, who believed that the new article did not add value to the CAM NC.

Some market participants also requested that ENTSG consider whether this article was desirable in light of the developing network code on interoperability. ENTSG has discussed the compatibility of the two network codes with experts in the interoperability area and concludes that there is no conflict between the two areas.

ENTSG concludes that this article 3.4 could be removed with no detrimental effect on the NC.

## C.5 Capacity Breakdown

*ACER's opinion is that the requirements of the CAM NC with regard to the reservation of capacity for release on a timescale shorter than 15 years are insufficient and may not contribute adequately to the completion and well-functioning of the internal market in gas and cross-border trade. The CAM NC should therefore be modified to specify that:*

- A significant proportion of capacity should be reserved for release in the medium term (for example 4 or 5 years), in addition to the minimum 10% already reserved for release the year before gas flow; and*

- *There should be full flexibility to implement additional short or medium term quotas at any interconnection point*

*ACER also asks ENTSOG to consider whether additional auctions for quarterly products should be included in the auction calendar, to allow for learning by those network users who are unable to acquire capacity at their first attempt.*

ENTSOG considers that no change to the CAM NC is appropriate on this point, for the following reasons:

- ENTSOG has already taken into account ACER requests in this area by specifying that 10% of technical capacity (not available capacity as per FG wording) is reserved. For example, if technical capacity is 100 units of which 80 units were sold prior to the CAM NC coming into force, the reserved quantity would be 10, rather than 2 as implied by the FG.
- Inappropriate quotas have some significant disadvantages in principle: they create artificial scarcity and thus risk driving up prices for existing capacity and reducing the value that can be placed on demand signals for incremental capacity. For example, if a TSO has 100 units of technical capacity but can only offer 80 units, and if users demand 95 units in long term auctions, either the price at which the capacity is sold will be artificially inflated, or the TSO may wastefully invest in up to 15 additional units, or both.
- The EC recognised in a January 2012 note to ENTSOG regarding day ahead auctions<sup>8</sup> that limiting the amount of capacity on offer in a given auction may lead to “unnecessary and skewed price developments”. While this specific note discussed very short term products, ENTSOG considers that the same argument applies equally to the allocation of longer term products.
- The network code already provides flexibility to allow higher quotas on a case-by-case basis, where warranted by local circumstances: Article 4.1 (7) specifies that the 10% reserved for release in annual quarterly auctions is a minimum while Articles 9.1 and 9.2 specify that the amount can be increased following consultation and a decision at cross-border level.
- Additional quarterly auctions are unlikely to allow ‘learning’ by network users unless these are associated with reserved capacity (and consequent artificial scarcity). Such auctions could also create practical issues particularly if they are expected to run in parallel with annual auctions.
- ENTSOG notes the desire of some respondents to the stakeholder engagement document to be able to purchase medium term capacity in blocks shorter than 1 year. However, the timing and sequence of auctions was discussed fully with stakeholders during the CAM NC development and ENTSOG is not therefore proposing a change to the NC on this point.

Just over half of the respondents to the stakeholder engagement document considered that no further reservation of capacity was appropriate. The remaining network users considered that there should be some additional reservation of capacity.

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<sup>8</sup> The note discussed the EC’s request for ENTSOG to change the CAM NC for consistency with the day ahead use-it-or-lose-it provisions in the CMP guidelines.

## C.6 Sale of Unbundled Firm Capacity

*ACER's opinion is that any unbundled capacity resulting from a mismatch in technical capacity at two sides of an interconnection point should not be offered on the same timescales as bundled capacity. Offering such capacity up to 15 years ahead creates the risk that capacity becoming available on the 'lower' side of the IP on a shorter timescale cannot be bundled, as the matching capacity has already been sold. The CAM NC should be changed to specify that this capacity can only be offered in the rolling monthly auction or shorter duration auctions.*

Article 5.1 (5) of the CAM NC has been modified to limit the sale of unbundled capacity resulting from such a 'technical mismatch' to a maximum of 5 years before gas flow, on a rolling basis. The solution is intended to address the concern expressed in ACER's opinion, that progressive bundling of capacity should not be prevented where a technical mismatch could be solved via the availability of the matching capacity at that IP.

This modification means that there will be an opportunity for any technical mismatch to be corrected through investment on the side of the interconnection point with lower technical capacity, before the unbundled capacity is offered to the market. The five year period has been chosen on the basis that this represents a typical lead time for investment in new physical infrastructure. Actual lead times may vary between around 3 and 8 years. Since the value of bundled capacity is likely to exceed the value of unbundled capacity following implementation of the CAM NC, a TSO may choose to delay the offer of unbundled capacity if there is a realistic possibility of investment on the other side of the IP on a timescale shorter than five years before gas flow.

The possibility to offer unbundled products at least in the medium term is considered by ENTSG as necessary, in particular to comply with the obligation on TSOs to maximise their firm capacity offer<sup>9</sup>, and also to limit the risk of revenue shortfalls which must be made up by those purchasing bundled capacity.

ENTSG does not share ACER's view that it will often be possible to 'correct' mismatches of capacity in the short term. A mismatch in the levels of technical capacity at the two sides of an interconnection point may reflect a wide range of issues including physical constraints in the networks, incentives on the concerned TSOs, regulatory obligations and legal constraints. Correcting such mismatches will be possible only if all of the relevant factors are aligned and it is not clear to ENTSG that this alignment will increase as gas flow approaches.

This change to the NC was supported by the majority of respondents to the stakeholder engagement document, though some of these users had wider concerns about the mandatory offer of bundled capacity.

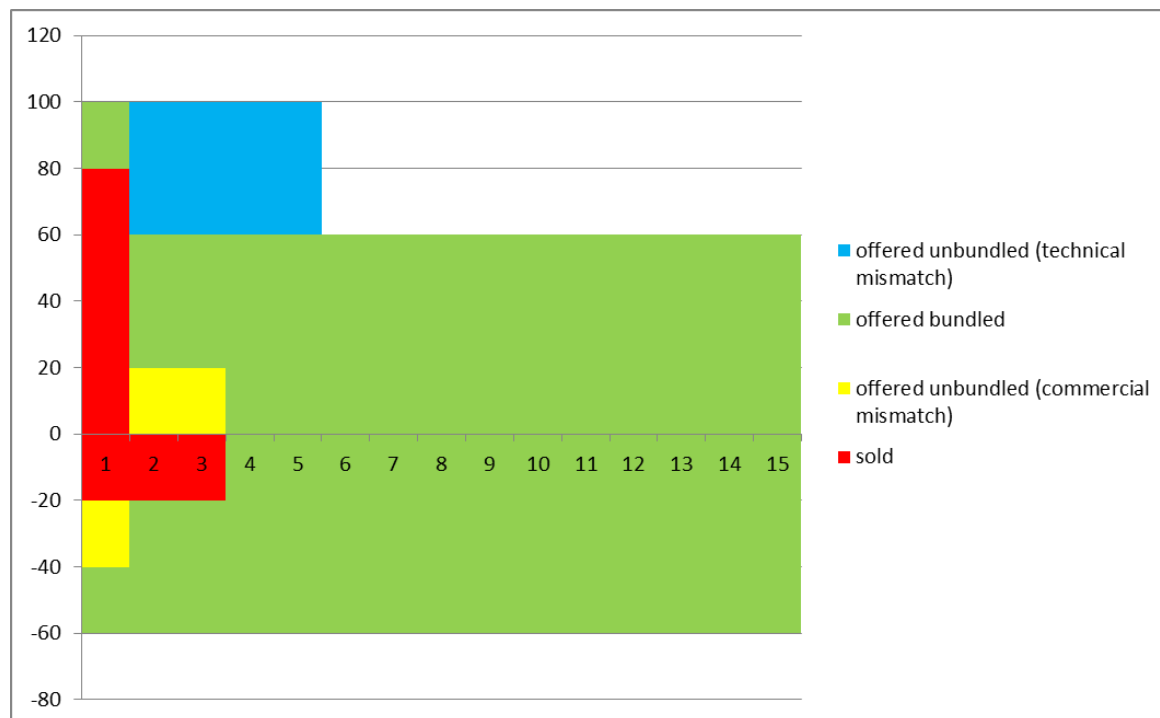
Article 5.1 (5) has been further redrafted, and combined with article 5.1 (6) from the previous version. The revised wording provides greater clarity regarding the different treatment of unbundled

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<sup>9</sup> Article 16 Regulation EC 715 /2009

capacity arising due to previously sold capacity on the other side of the IP, and unbundled capacity arising from a difference in technical capacity.

The diagram below shows an example of the offer of unbundled capacity arising in these two possible ways. TSO 1 (top part of the diagram) has a technical capacity of 100 while TSO 2 at the bottom of the diagram has a technical capacity of 60. Numbers on the horizontal axis represent years until gas flow.



## C.7 Amendment of Existing Capacity Contracts

*ACER's opinion is that the CAM NC should be modified to specify that NRAs "may" mediate between parties affected by the sunset clause, rather than (as currently) that they "shall" mediate.*

*Following discussions between ACER and ENTSGOG on this point, ACER asked ENTSGOG to provide further justification for the current wording of the CAM NC.*

ENTSGOG considers that the NC does not require amendment on this point, and as requested by ACER explains its reasoning below.

The existing wording ("shall upon request") achieves the aim of the Framework Guidelines. The rationale for article 5.2 (9) of the CAM NC is to refer to the role of the NRAs in dispute resolution consistently with that task set forth in article 41 of the Directive (EC) 73/2009 and related regulations, as the sunset clause will affect the transport contract and conditions of access to the network.

This approach was strongly supported by respondents to ENTSGOG's stakeholder engagement document. Network users believed that regulators would have an important role to play in the

resolution of disputes relating to the sunset clause and considered it appropriate for the CAM NC to make clear that NRAs would fulfil this role whenever requested by the relevant parties.

Therefore ENTSG believes that the provision requesting the intervention of the NRA upon request of a party involved is appropriate and clarifies the reference of that option foreseen in the FG.

ENTSG reaffirms its position regarding the sunset clause that was expressed previously when submitting the CAM NC. Indeed, ENTSG maintains its advice to delete article 5.2 of the CAM NC due to the legal and economic impacts triggered by the implementation of such a clause and strong doubts as to its effectiveness in fostering effective competition and efficient functioning of the market.

### C.8 Interruptible Capacity

*ACER's opinion is that the CAM NC should be modified to require that NRAs approve any downward deviation from the default minimum interruption lead time*

In line with ACER's opinion, the CAM NC has been changed to state that if two TSOs wish to shorten the default lead time, they will seek the approval of the relevant NRAs. This change was supported by respondents to the stakeholder engagement document.

The change to the CAM NC in respect of the length of the default lead time is discussed in section D.3 below.

### C.9 Tariffs

*ACER's opinion is that certain changes should be made to the CAM NC in relation to tariffs:*

- *The revenue equivalence principle in Article 7.3 of the CAM NC goes beyond the requirements of the CAM framework guideline and should be deleted*
- *The specification that any auction premiums from bundled products are (as a default rule) attributed proportionally to the reserve prices of the capacity products forming the bundle should be changed. The NC should specify an equal split of auction premium revenues as a default rule*
- *The provision that NRAs shall recognise revenue shortfalls by adjusting tariffs accordingly, where allowed revenues are set, should be deleted.*

The CAM NC has been modified to address ACER's concerns on the second and third of these points. On the first point, ENTSG considers that no change is appropriate.

#### **Revenue equivalence principle, article 7.3**

ENTSG considers that no change to the CAM NC is appropriate on this point.

Please note that this represents a change from the proposal set out in ENTSG's stakeholder engagement document dated 31 July 2012. While ENTSG was prepared to consider changes to the



previous version of article 7.3 as part of a possible compromise solution, ACER has indicated that no compromise is possible on any of the other issues set out in its opinion. ENTSOG is not therefore able to recommend the removal of the important principle that a profiled booking of shorter term capacity products should, on average, yield revenue equivalent to that from a flat booking of yearly products.

ENTSOG appreciates that there are ongoing discussions concerning future tariff structures as part of ACER's work to develop a tariff framework guideline and that it is not possible or desirable to introduce permanent new tariff arrangements via the CAM NC. However, it considers that until any permanent arrangements are put in place it is essential to have interim provisions which protect network users from undue cross subsidy, and TSOs from shortfalls in cashflow and revenue. Were these undesirable consequences to arise as a result of implementation of the CAM NC provisions, it would severely hamper efforts to implement the NC and achieve improvements in third party access to transmission networks.

In response to the stakeholder engagement document, many users noted that the network code on tariffs was the most appropriate place for tariff provisions. ENTSOG understands this view and will continue to lead and engage in discussions aimed at reaching a new tariff framework guideline and network code. However, given the strong links between capacity allocation and tariffs, it is necessary for the CAM NC to contain some basic provisions to protect both TSOs and users from detrimental effects that could otherwise arise as a result of CAM implementation.

#### ***Split of auction premiums***

The CAM NC has been modified in line with ACER's view that auction premiums on bundled products should by default be split in equal proportions between the involved TSOs. This change was not opposed by respondents to the stakeholder engagement document.

ENTSOG is still of the opinion that there are few convincing arguments for a default split of an auction premium in equal proportions, and retains its view that a proportional split is more appropriate due to the differential input that may be needed in order to offer capacity at two sides of an IP. However, it recognises that arguments can be made against both options; ACER claims that a proportional split would incentivise national regimes to raise reserve prices in order to reap a higher proportion of an auction premium.

ENTSOG considers that the most important consideration is the avoidance of distortions in the reserve price setting process. At the same time, given the lack of a comprehensive discussion of the issue of the auction premium split so far, and the need to clearly identify and test arguments for different approaches, a debate is required in the light of the upcoming framework guideline/network code process. Therefore, ENTSOG urges ACER to promote a full discussion of this issue among market participants as part of its on-going work on tariff structures.

#### ***Under recovery***



The final sentence of Article 7.6, on correction of under-recovery, has been deleted in line with ACER's opinion. This change was supported by respondents to the stakeholder engagement document.

### C.10 Incentive Regimes

*ACER's opinion is that the reference to appropriate incentive regimes being decided at a cross-border level following stakeholder consultation in Article 9.2 (d) of the CAM NC goes beyond the framework guidelines and should be deleted.*

Article 9.2 (d) has been deleted from the CAM NC in order to address ACER's opinion. This change was supported by respondents to the stakeholder engagement document.

However, ENTSG continues to believe that it is essential to address the issue of incentives at an EU level given the danger that incompatible incentive regimes in neighbouring systems will damage the offer of bundled capacity to the market. ENTSG also notes that ACER's request to remove this article from the CAM NC conflicts with the principles included in the draft Balancing NC, in the draft CMP guidelines, and in discussions on incremental capacity allocation, that incentive-based approaches should play a fundamental role in developing the internal market. It is essential that NRAs assure an appropriate package of incentives relating to CAM as foreseen in the third energy package, particularly Article (8) of Directive 2009/73/EC.

### C.11 Interim Period

*ACER's opinion is that the reference to an interim period in Article 10.3 of the CAM NC is not appropriate since such matters should be decided during the Comitology process, and should be deleted.*

Article 10.3 has been deleted from the CAM NC in line with ACER's opinion. In their written comments, market participants expressed some concern about this change, believing that the NC should specify the conditions under which interim periods can be granted. Many also felt that harmonised allocation arrangements were an important principle regardless of whether auctions were applied, and that this element of the CAM FG should continue to be reflected in the NC.

This provision of the NC aimed to refer to the right to seek an exemption that could be needed on a national level in any circumstance. However, the EC has indicated to ENTSG that this reference is superfluous and should not appear in the CAM NC. Specific derogations from European law must be requested and approved during the Comitology process before becoming part of the legislation itself. As the CAM NC once approved by ACER will have the status of a Comitology proposal it is not appropriate for the document to contain references to interim periods in any circumstance.

Following resubmission of the CAM NC to ACER, ENTSG will continue to discuss this issue with the EC with the aim of finding out whether a legal avenue can be found to address stakeholders' concerns.

## **D. Changes proposed by ENTSOG**

During 2012, ENTSOG has monitored the parallel development of a number of pieces of legislation as well as steps towards the early implementation of the CAM NC via pilot projects.

The finalisation of new congestion management procedures, which include day ahead use-it-or-lose-it provisions, has led ENTSOG to re-consider the timings of day ahead auctions. Alongside this, the development of the Balancing network code, which is due to be submitted to ACER in November 2012, has prompted detailed discussions within ENTSOG on the issue of (re)nomination timings and their compatibility with the timings of auctions and interruptions. These discussions have highlighted a limited number of areas within the CAM NC in which technical changes are necessary in order to ensure that the code is fully workable and compatible with other legislation. The proposed changes relate to three sections of the CAM NC: day ahead capacity allocation, within-day capacity allocation, and interruption lead time. These are explained below in sections D.1, D.2 and D.3.

A further proposed change has been identified following discussions on the ‘competitive allocation’ mechanisms that are used to allocate capacity at certain IPs, and the need to ensure that the CAM NC does not prevent such competitive processes from taking place. This change is explained below in section D.4.

### **D.1 Day ahead capacity allocation**

Article 4.7 of the CAM NC and related articles have been updated to specify a shorter timescale (30 minutes) for both the bidding window and the time allowed for TSOs to allocate capacity in the day ahead auction. The aim of these changes is to enable network users to bid for capacity and be notified of their allocations as early as possible during the day before gas flow. Allocation of capacity will take place by 17.30h (all local time references are to central European time), allowing users an opportunity to participate in the day ahead commodity markets before their closure and thus to gain the maximum benefit from the capacity purchased. These changes were welcomed by the great majority of respondents to the stakeholder engagement document as a positive move.

A large proportion of respondents asked whether it was possible for ENTSOG to go further and enable capacity allocation by 17.00h. As initial nominations must take place by 14.00h, earlier allocation of day ahead capacity could only be achieved through a shortening of the lead time for matching and confirmation of these nominations. As part of the development of the Balancing network code, ENTSOG considered fully whether this process could be shortened from the current 2 hour standard and concluded that this was not possible.

The full reasoning for this decision is set out in the Analysis of Decisions document accompanying the Balancing NC<sup>10</sup>, but in summary, a lead time shorter than two hours is not feasible given the large number of processes, both electronic and physical, which must occur between the last re-nomination and the start of gas flow. In particular, managing flow changes involves physical changes within the grid and therefore a “lead time” between a requested flow change and its actual occurrence is likely to be necessary given the physics associated with gas transmission. Two hours

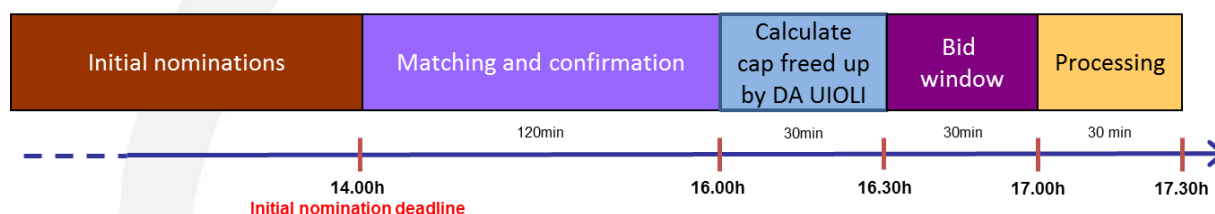
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<sup>10</sup> ‘Analysis of ENTSOG Decisions for the refined draft Network Code on Gas Balancing of Transmission Networks’, BAL391-12.

represents a compromise; it will not be possible to accommodate all requested flow changes within this “lead time”.

Original CAM NC	Revised CAM NC	Reasoning
<ul style="list-style-type: none"> <li>- Opens 16.30h local time</li> <li>- 90 minute bid window</li> <li>- 60 minute processing time</li> </ul>	<ul style="list-style-type: none"> <li>- Opens 16.30h local time</li> <li>- 30 minute bid window</li> <li>- 30 minute processing time</li> </ul>	Request from users for allocation as early as possible to allow participation in day ahead commodity markets

Revised timings (all times are local time CET):



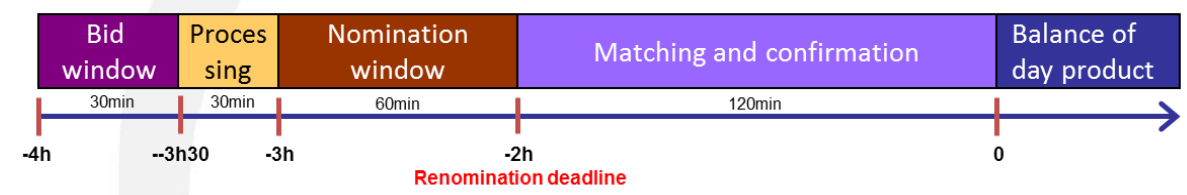
## D.2 Within-day capacity allocation

A number of changes have been made to article 4.8 and related articles of the CAM NC to alter the timings of within-day capacity allocation. The principal aim of these changes is to ensure that users can bid for, be allocated and have an opportunity to nominate against capacity offered in within-day auctions, before the deadline for re-nominations specified in the Balancing network code.

These changes were supported by a large majority of respondents to the stakeholder engagement document.

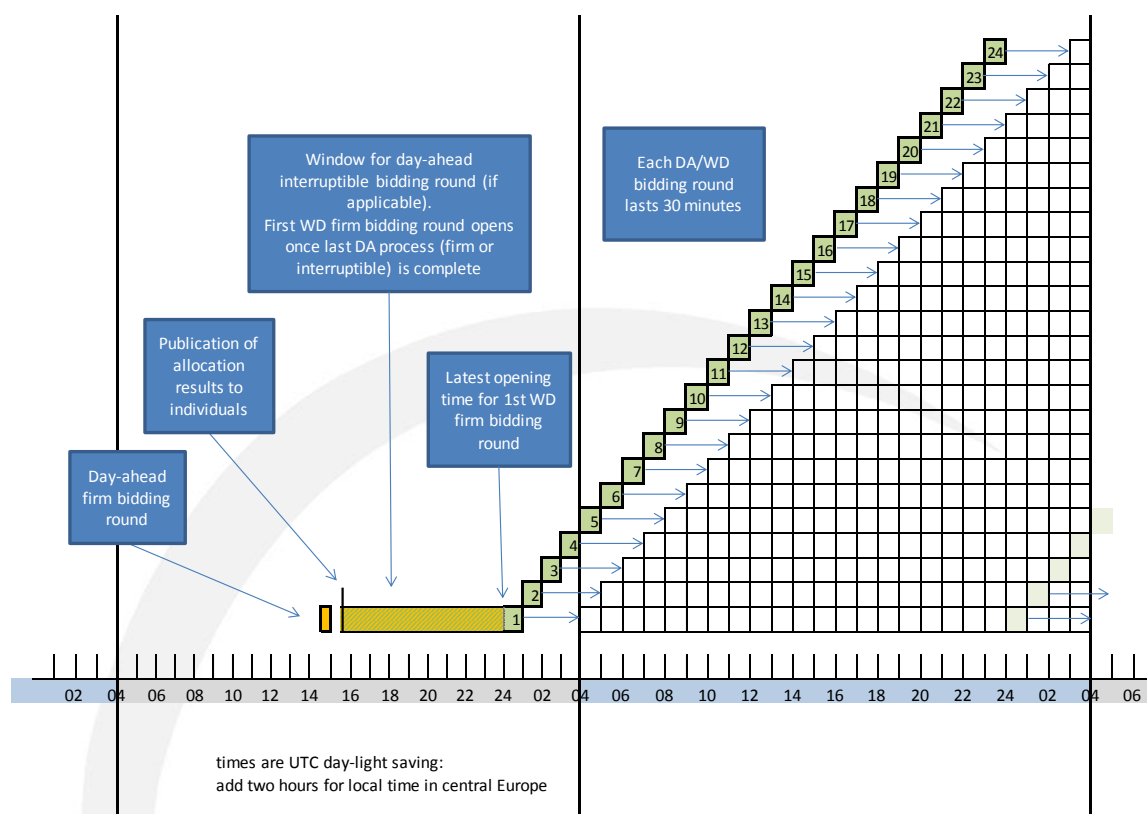
Original CAM NC	Revised CAM NC	Reasoning
<ul style="list-style-type: none"> <li>- 1<sup>st</sup> bidding round opens after publication of DA auction results</li> <li>- Each bidding round closes 2h before gas flow</li> <li>- 60 min bid window,</li> <li>- 15 min processing time</li> </ul>	<ul style="list-style-type: none"> <li>- 1<sup>st</sup> bidding round opens after end of interruptible DA allocation process</li> <li>- Each bidding round closes 3h30 before gas flow</li> <li>- 30 min bid window</li> <li>- 30 min processing time</li> </ul>	<ul style="list-style-type: none"> <li>- Avoid overlapping auctions and associated reduction in capacity offer</li> <li>- Consistent with TSO need for 30 min processing time and 2h confirmation/ matching time</li> <li>- Consistent with stakeholder views on time needed for WD bidding and nomination</li> </ul>

Revised timings:



The diagram below updates the information shown on page 17 of the 'Explanatory Note for the CAM NC' document published by ENTSG on 30 January 2012<sup>11</sup>.

<sup>11</sup> CAP227-12



### D.3 Interruption lead time

The CAM NC has been changed so that it refers not to an absolute number for the default lead time, but to a time period after the deadline for re-nominations. This means that if the re-nomination deadline is shortened in future for any regime (to the benefit of users), the interruption lead time will automatically adjust in line with this.

A period of 45 minutes is allowed after the re-nomination deadline, allowing time for the processing of nominations and determination of whether interruptions may be necessary. As the Balancing NC provides for a two hour re-nomination lead time, this implies a default interruption lead time of 1 hour 15 minutes. Users receiving an interruption notice will therefore have a short window to re-nominate against their capacity holdings before the next hour bar, if they wish to do so. They may also, or alternatively, choose to participate in the firm within-day auction starting on the next hour bar, in order to bid for capacity starting 4 hours later.

This additional 45 minute period allows time for TSOs to make interruption decisions on the basis of processed quantities. Allowing less time than this between the re-nomination lead time and the interruption lead time would mean that TSOs would have to make interruption decisions based on their assessment of the re-nominations that are expected to be received. This is likely to lead to a more conservative approach and therefore a higher risk of interruption.

A number of respondents to the stakeholder engagement document expressed concern about the balancing implications of the 45 minute proposal, indicating that an interruption 1 hour 15 minutes before gas flow would leave them with insufficient time to adjust their physical flows. This could put them in an imbalance position for one or two hours and expose them to additional costs in the form

of balancing products or imbalance charges. Users suggested a number of possible solutions to this situation:

- **Allow a longer interruption lead time.** This is possible but ENTSG does not consider it desirable as it would lead to higher probabilities of interruption, for the reasons set out above.
- **Shorten the re-nomination lead time.** This is not possible, for the reasons set out in section D.1 above.
- **Exempt users from imbalance charges in the case of interruption.** This is not considered feasible as imbalance charges will be set so as to recover the costs imposed by any imbalance. An exemption from such charges would therefore represent a cross-subsidy from firm to interruptible capacity holders.
- **Require TSOs to provide early information on possible interruptions on a best endeavours basis.** TSOs will do this wherever possible but it is not feasible to insert such a requirement in the CAM NC. In order to avoid possible anti-competitive effects such information would need to be provided to all registered network users simultaneously. There are a number of disadvantages associated with providing such information, most notably the risk that it could lead to speculation on any firm capacity offered as part of an overselling and buyback scheme and thus to a weakened incentive on TSOs to offer such capacity. Additionally there is the risk that network users will take action in response to a ‘false alarm’ for interruptions, a situation that has been seen following the introduction of maintenance notifications. In practice, the best source of information on likely future interruptions is likely to be data on past interruptions, which is provided by TSOs in fulfilling transparency requirements. It is unlikely that most TSOs will be able to provide significantly more information than this on a regular basis.
- **Introduce a short standard lead time for trade notifications into the Balancing NC.** ENTSG recognises the potential benefits of such a provision and in line with user requests has introduced a provision within the Balancing NC<sup>12</sup> specifying that the maximum lead time for trade notifications will be 30 minutes in systems with within-day balancing obligations. This allows an opportunity for users to correct an imbalance position through an administrative change in the ownership of gas already in the transmission system, until 30 minutes (or less) before gas flow.

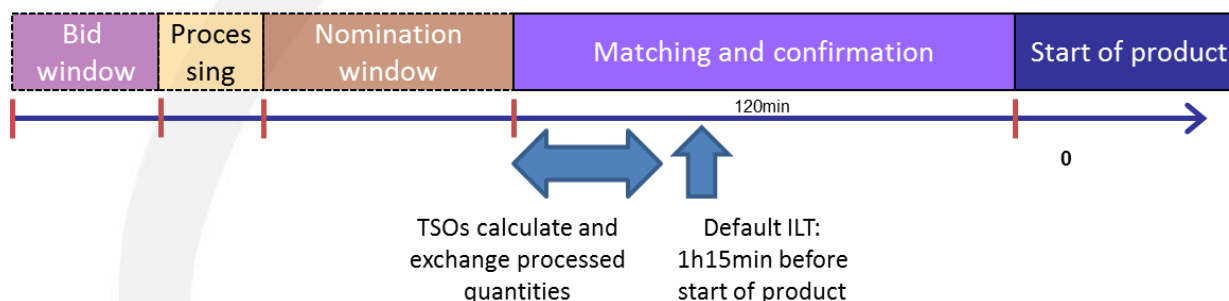
ENTSG considers that the combination of a 1 hour 15 minute lead time, and a short lead time for trade notifications, provides the best possible solution for network users. The risk of interruption is reduced relative to a longer interruption lead time, while the potential balancing impact of a shorter lead time is mitigated through the change to the Balancing NC regarding trade notifications.

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<sup>12</sup> The Balancing NC was published on 14 September 2012 and a stakeholder support process was launched. The change in the NC regarding trade notifications is fully explained in the accompanying Analysis of Decisions document. The inclusion of this provision is subject to stakeholder support and ENTSG internal governance.

Original CAM NC	Revised CAM NC	Reasoning
<ul style="list-style-type: none"> <li>- 2h default interruption lead time</li> <li>- Adjacent TSOs may jointly decide on different ILT</li> </ul>	<ul style="list-style-type: none"> <li>- 1h15 interruption lead time</li> <li>- Adjacent TSOs may implement different ILTs subject to NRA approval</li> </ul>	<ul style="list-style-type: none"> <li>- Minimum 45 min needed for processing and messaging after closure of re-nominations, in order to ensure interruption is on the basis of actual renominations</li> <li>- NRA approval requested by ACER</li> </ul>

Revised timings:



To note:

- Adjacent TSOs can agree different lead time, if NRAs approve
- In an emergency situation (network problems) the default lead time does not apply

#### D.4 Competing capacity

Article 4.1 (2) has been modified to allow for an exemption from the general principle of independent auctions in the specific case where competing capacities are allocated. Competing capacities exist where there is a relationship between the availability of capacity in two or more concurrent auctions. This means that the available capacity in one of these auctions cannot be allocated without fully or partly reducing the available capacity in the other auctions. In such a case, it would not be possible for the two (or more) auctions to be independent of each other.

At present, such processes take place at a limited number of IPs across Europe, but early experiences of implementation suggest that this number may increase in future, particularly once the CAM NC requirements on bundling come into force.

ENTSOG understands that the allocation of competing capacities is considered by NRAs and users with experience of such processes to work well under appropriate circumstances. ENSOG would not wish for the CAM NC to prohibit Member States from implementing such competitive arrangements for the efficient usage of existing capacities. At the same time, the auction of competing capacities is just one of a number of solutions that could be used to distribute available



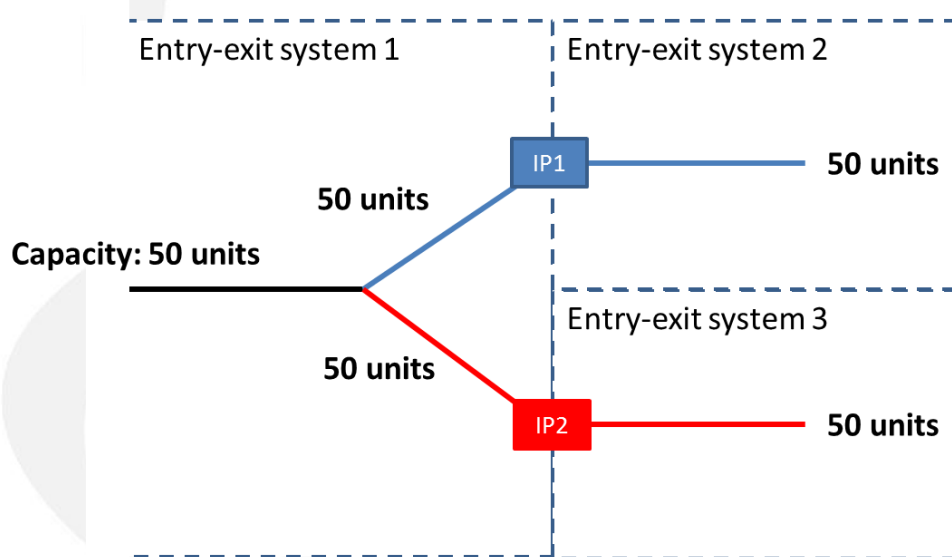
capacity across a number of competing routes, and it is important that such arrangements should be implemented only where considered appropriate by involved parties.

Competing capacity arrangements will not be applied between IPs where, according to article 5.1 (9) of the CAM NC, a VIP must be created. In principle, however, it is possible that competing capacity arrangements could be applied between a VIP and a physical IP or between two VIPs.

The majority of respondents to the stakeholder engagement document did not oppose this change, though a small number stated that they would prefer for independent auctions to apply in all cases. Many respondents asked for further information on such arrangements and reassurances that they would be applied appropriately. In response to these requests, ENTSOG has further modified article 4.1 (2) of the CAM NC to specify that competing capacity arrangements will be put in place only where they are agreed between all directly involved TSOs and approved by relevant NRAs. A new article 4.1 (3) has been inserted to provide a definition of competing capacity. In addition, ENTSOG has set out below some indicative information on how allocation rules may work in such situations.

### ***Competing capacities – example***

The diagram below shows a simple example of a situation involving competing capacities. In this example, there are three entry-exit systems so it is not possible to create a virtual interconnection point.



A total of 50 units of cross-border capacity can be offered, either at IP 1 (bundled product A) or at IP 2 (bundled product B), or a mixture of the two.

In the above system, product 1 (bundled entry-exit capacity at IP1) competes with product 2 (bundled entry-exit capacity at IP2). Up to 50 units of product 1 and 50 units of product 2 are offered, but in total no more than 50 units may be allocated, because of the bottleneck on the pipeline (marked in black) in entry-exit system 1.

These competing capacities could, for example, be allocated as follows:



- Two auctions are held for products 1 and 2. This example assumes that an ascending clock auction is taking place.
- At the end of the first bidding round, at the reserve price, the bids for products 1 and 2 are added together and compared against the 50 units that can be allocated.
- If the total demand is less than or equal to 50 units, the auction closes and the capacity is allocated according to the bids placed. If demand is greater than 50 units, a price step is applied and a new bidding round opens at price P1.
- This process is repeated until the total demand for products 1 and 2 falls below 50 units. At this point, small price steps are applied as set out in section 4.10 of the CAM NC.
- The auction closes and the capacity is allocated at the point where total demand again falls below 50.

## **Annex: Legal analysis regarding standardisation of transport contracts**



## Capacity Allocation Mechanisms (CAM) Network Code

### Annex to the Supporting document for revised CAM NC

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**EXECUTIVE SUMMARY:**

- A. In its Reasoned Opinion n° 04-2012 dated 5 June 2012; ACER asked ENTSG to provide an assessment of whether a full standardisation can be implemented in the future, taking into account the current differences in the national legal frameworks and the development of Framework Guidelines and Network Codes in other areas, and a timeline for carrying out this task”.
- B. Embedding a “fully standardised capacity contract” as an annex to the CAM network code, as ACER requests it, is *disproportionate*, thus against the general principle of proportionality under Article 5, §1 of the TFEU, that is applicable to any act/action of the EU, thus also to network codes.
- C. This conclusion is based on the assessment of a sample of nine transmission contracts, as submitted to us by ENTSG members. We observe from the sample that transmission contracts all contain, to some diverging extent, four main types of provisions, the harmonisation of which entailing diverging consequences from a market and/or a legal perspective:
- (i) All sample contracts contain **rules related to core-tasks of TSOs**, especially detailed rules on capacity allocation and congestion management, not covered by the CAM network codes. Standardisation of these is difficult as affecting such rules in fact consists in affecting technical and/or economical processes. The example of the CWE market coupling in the electricity sector shows that a standardisation/harmonisation of these rules –if relevant at all at the first place, takes time and requires extensive market consultation. Moreover, some of the sample contracts contain rules not related to capacity allocation properly speaking (balancing e.g.) that need to be dealt with in other network codes (i.e. not via the CAM network code).
  - (ii) **Other more “legal” provisions** found in the sample contracts are less difficult to harmonise, subject to what is explained regarding “sensitive clauses” below. Most of these rules indeed generally fall under non-mandatory law (*droit supplétif*). As the sample contracts reveal numerous discrepancies, it is however advisable to perform a detailed survey beforehand.
  - (iii) **Sensitive clauses**, as they impact the financial situation of TSOs and/or network users, are difficult to standardise (liability rules e.g.). Before altering these rules, it is necessary to consult the market to assess the relevance of such harmonisation and the impact on network users.

**(iv) Clauses related to taxes or insurances** cannot be standardised by way of network code due to the lack of legal basis.

**(v) Legal systems** and divergent approaches through EU have to be taken into consideration

- D.** Taking the above into consideration, the standardisation of transmission contracts by way of a standardised template attached to the CAM network code (or other) to the extent possible, must be *progressive*.
- E.** In a first phase (“phase 1”), ENTSG could design and draft a harmonised template covering (a) the contractual provisions falling under the scope of the CAM network code; and (b) other “legal” provisions, the sensitive clauses excepted. In a nutshell, the standardisation work would cover these provisions **highlighted in green** in the visual summary ([annex 1](#)). Please refer to section 4 for the detailed actions that would need to be carried out for this purpose.
- F.** In parallel to phase 1, a market inquiry should be carried out to assess the relevance, from a market integration perspective, to standardise: (a) rules on core-tasks of TSOs; and (b) sensitive clauses, i.e. those provisions **indicated in reds** in the visual summary ([annex 2](#)).
- G.** If the market inquiry is positive, standardisation of these clauses could start in a phase 2. For more details regarding phase 2, please refer to section 4.

## 1. Object of the present note

1. In the Framework Guidelines FG-2011-G-001 on Capacity Allocation Mechanisms for the European Gas Transmission Network dated 3 August 2011 (or “*CAM framework guidelines*”), ACER requests ENTSOG to “define”, that is to insert, in the draft Network Code on Capacity Allocation Mechanism (or “*CAM network code*”) a standardised content of transmission capacity contracts and general terms and conditions for capacity allocation and capacity services.<sup>13</sup>

In its Reasoned Opinion n° 04-2012 dated 5 June 2012 (or “*reasoned opinion*”), ACER notes the following:

*“Although the Network Code defines standardised capacity services and a standardised capacity allocation mechanism, it does not set out a fully standardised capacity contract. For instance, it is silent on the credit status of network users and on liability rules. However, Section 1.4 of the Framework Guidelines requires the Network Code to define a standardised content of transmission capacity contracts and general terms and conditions for capacity allocation and capacity services. ENTSOG argues that the differences in the national legal frameworks make it difficult to define a standardised content for transmission contracts”.*

In the reasoned opinion, ACER thus requests the following assessment from ENTSOG (or “*the assessment*”):

*“ENTSOG is asked to provide the Agency with an **assessment of whether a full standardisation can be implemented** in the future, taking into account the current differences in the national legal frameworks and the development of Framework Guidelines and Network Codes in other areas, and a timeline for carrying out this task”.*<sup>14</sup>

In the limited time granted before the submission of the revised Network Code, ENTSOG therefore has undertaken to produce a global assessment on the feasibility of a standardisation of transmission contract in order to justify its initial position.

2. The purpose of the present note is to assess the degree of ease of a “full standardisation” of the transmission contracts/capacity allocation rules (or “*transmission contracts*”). For this purpose, we used a sample of nine transmission contracts, submitted by ENTSOG members (or “*the sample*”).<sup>15</sup> On the basis of this sample:

- We first describe the main types of clauses we find in the sample and, for each type of clause, we assess the potential issues that a “full standardisation” would entail (**section 2**).

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<sup>13</sup> Section 1.4, CAM framework guidelines.

<sup>14</sup> Section 3, reasoned opinion.

<sup>15</sup> The transmission contracts are those of the following TSOs: Gas Connect Austria GmbH, Fluxys SA, SNAM Rete Gas SpA, Open Grid Europe, GRTgaz Deutschland GmbH, GRTgaz, National Grid, Bord Gais Eireann, Baumgarten Oberkappel Gasleitungsgesellschaft mbH and Gas Transport Services BV.

- We then assess the extent of ACER's request in the light of the general principle of proportionality (**section 3**);
- In a final section, we provide for a proposal of solution to address ACER's request, including a high level roadmap, as a way forward (**section 6**).

Moreover, you will find in **annex 1** a scheme visually summarising the main types of clauses we find in the sample.

In **annex 2**, you a table, for which the following colour codes are used:

- The degree of "ease" of standardisation is identified by a high, medium and/or low mark (**high, medium or low**);
- When we believe a standardisation is not relevant for a given provision, we indicate it with a "not relevant" mark –in which case the degree of ease is high (**not relevant**);
- A lack of legal basis is indicated by a "lack of legal basis" indication (**lack of legal basis**);
- Concrete proposals of solutions and/or way forward by clause are identified by an arrow (→).

## **2. Identification of potential issues to full standardisation by main type of provisions**

### ***2.1. Preliminary observation***

3. We observe from the sample that transmission contracts all contain, to some diverging extent, four main types of provisions, namely:

- Provisions related to "core-tasks" of TSOs;
- Provisions having a more "legal" nature; including,
- "Sensitive" clauses; and
- Provisions on tax and insurances.

### ***2.2. Provisions related to core-tasks of TSOs***

4. By provisions related to core-tasks of TSOs, we mean provisions on tasks that typically fall within the scope of TSOs' responsibility (operation, maintenance, system development, capacity allocation, etc.), as defined under Article 2, §1, 4 of Directive 2009/713/EC:

*"Transmission system operator means a natural or legal person who carries out the function of transmission and is responsible for operating, ensuring the maintenance of, and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transport of gas".*

5. We note that some contracts (but not all contracts)<sup>16</sup> contain provisions related to core-tasks of TSOs *not related to capacity allocation properly speaking*. For instance, the transmission contract of Fluxys SA, which is by far the densest of all sample contracts, contains provisions on operating conditions and quality requirements, maintenance procedures, including long term planning, and so on. Other contracts, such as that of GRTgaz, incorporate balancing rules by way of appendixes.

We also observe from the sample that clauses on capacity allocation cover numerous topics *falling out of the scope of the CAM network code*. On the one hand, the CAM network code deals with three main topics, i.e. (a) the mechanism to be used for capacity allocation, that is a standardised auction; (b) the products that will be offered within this auction (standardised as well); and (c) the underlying rules to the auctions, that is the economic/mathematical rules that will be used for allocating the said capacity, including for determining its value. On the other hand, numerous contracts from the sample contain numerous additional rules related to capacity allocation, not covered by the CAM network code, such as e.g. detailed rules on capacity allocation, detailed registration processes, congestion management principles, products and services not falling under the scope of the CAM network code (when allocated on an implicit basis e.g.) and so on.

6. **Standardisation of provisions related to core-tasks of TSOs is difficult (“low” mark), except for what is harmonised by the CAM network code and/or by Regulation 2009/715/EC.** Indeed, these provisions not only reflect legal rules embedded in contracts and/or in sector specific regulations (national network codes); *they also reflect technical and/or economic processes, which development depends on historical factors specific to each Member State*. A “full harmonisation” at the EU level of such rules thus requires, beforehand, a feasibility assessment from an economic, a technical and/or a mathematical (auction rules) viewpoints. Should it be concluded that “full harmonisation” is feasible, a full-fledge project would be then required, notably to set up common operational procedures, common functional requirements, an economic assessment of the solution retained, and so on.

7. **With this respect, experience of harmonisation of capacity allocation rules in the electricity sector may be of relevance**, e.g. in the context of the Central West European market coupling (or “CWE market coupling”).

In the CWE market coupling, the day-ahead bids submitted on the power exchanges (“PXs”) in the CWE region, that is the region composed of Belgium, France, Germany, Luxembourg and the Netherlands, compete against each other (“international shared order books”). As cross-border capacity is the main constraint for executing the selected bids/transactions following clearance, the CWE TSOs must make available the cross-border capacity to the CWE PXs as well as allocate it to the selected transactions *in a coordinated manner*. The CWE market coupling solution thus embeds common capacity allocation rules, notably in line with Regulation 2009/714/EC and, in the future, in

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<sup>16</sup> For instance, the scope of the transmission contract of National Grid, named “uniform network code – transportation principal document – section B – system use and capacity” is strictly limited to capacity allocation.



line with the relevant network codes.<sup>17</sup> The parallel with the CWE market coupling is therefore relevant for the purpose of the present assessment.<sup>18</sup>

As the implementation of the CWE market coupling, also known in the industry as the “*CWE market coupling project*”, took over three years,<sup>19</sup> it demonstrates that a *harmonisation of core-tasks of TSOs, including detailed capacity allocation rules and congestion management rules, takes time*.

The parallel with the CWE market coupling also demonstrates the *need to extensively consult with the market when harmonising rules on core-tasks of TSOs*. The CWE market coupling project was indeed based on regular consultations of the market, under the close scrutiny of the European Commission, of national regulation authorities and other relevant stakeholders.<sup>20</sup>

**8. Moreover, it is questionable whether a standardised contract embedded in the CAM network code can provide for “full harmonisation” on these topics at all, some of these topics (balancing e.g.) are to be dealt with by *separate network codes*, as it appears from Article 8, §6 of Regulation 2009/715/EC.<sup>21</sup>**

### **2.3. Other more “legal” provisions**

**9.** By other more “legal” provisions, we mean clauses that are typical of international commercial contracts, such as introductory clauses (preamble, parties, definitions, contractual interpretation, principles of collaboration), main rights and obligations, IPR, confidentiality, applicable law, and so on.

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<sup>17</sup> See R. FELTKAMP, C. MUSIALSKI, “Electricity markets and the functioning of spot power exchanges – A Belgian perspective”, TBM-RCB, 2010/2, pp. 20 to 26.

<sup>18</sup> Other examples from the electricity sector in the CWE region or in other regions, such as the setting up of the common capacity allocation company CASC.EU SA (or “CASC”) are relevant and could be further investigated.

<sup>19</sup> The CWE market coupling project was launched following a MOU signed by the relevant stakeholders on 6 June 2007, whereas the launch of the CWE market coupling officially occurred on 9 November 2010. See the dedicated web page of APXEndex e.g. at <http://www.apxendex.com/index.php?id=186> (accessed in September 2012).

<sup>20</sup> See e.g. the reporting document prepared to the attention of stakeholders, available at [http://www.tennet.org/images/Implementation%20study%20v%201%200\\_tcm41-17213.pdf](http://www.tennet.org/images/Implementation%20study%20v%201%200_tcm41-17213.pdf) (accessed in September 2012).

<sup>21</sup> See article 8, §6 of Regulation 2009/715/EC, which lists the following rules for network codes in the gas sector: (a) network security and reliability; (b) network connection rules; (c) third-party access; (d) data exchange and settlement rules; (e) interoperability rules; (f) operational procedures in emergency; (g) capacity-allocation and congestion-management rules; (h) rules for trading related to technical and operational provision of network access and system balancing; (i) transparency rules; (j) rules regarding harmonised transmission tariff structures; and (l) energy efficiency regarding gas networks.

**10. As a general rule –and without prejudice to what is explained in the following section regarding sensitive clauses, these clauses are less difficult to harmonise (“low” and/or “medium” mark).** Indeed, in our European legal systems, national rules applicable to contracts/private obligations are generally (but not always) “non-mandatory rules” (*droit supplétif*) meaning that contractual parties may derogate to them by way of agreement. Under the general principle of law of *pacta sunt servanda* (*convention-loi*), parties may thus well decide to build up their own rules, within some limits set up by sector specific laws (sector specific definition of force majeure e.g.) and of other mandatory limitations (such as the national case-law on liability exonerations e.g.).

**11.** This being said, you will see from **annex 2** that we find numerous discrepancies regarding these clauses. In order to enhance acceptance of harmonisation, it would thus be advisable to carry out a preliminary detailed survey in order to find a lowest common denominator, which could then be used as a basis for drafting full-fledge provisions.

#### **2.4. Sensitive clauses**

**12.** By “sensitive clauses”, we mean clauses having an impact on what is financially due in case of deviation from the contractual obligations, following the application of common liability rules or following deviations from these, be it either *upwards* (lump sum penalty e.g.) or *downwards* (exemption e.g.). From the sample contracts, we identify at least the following sensitive clauses:

- Any rule increasing or decreasing liability for contractual breach (or “*liability rules*”), such as the degree of care, liability limitations, damage exonerations, etc., as it has a direct impact on what is financially due;
- Force majeure, as it modulates the level of liability of a failing debtor *downwards* (in fact, down to zero): should the conditions of force majeure be met, one is generally not liable/not subject to indemnification towards the creditor for the non-performance of the corresponding obligation; and
- Clauses suspending a party’s obligation, as such clauses having as a result the exemption from financial compensation of the party entitled to suspend its obligations.

One could potentially also include in this category the rights and obligations of the parties as their breach is the prerequisite for triggering and/or altering financial compensation.

**13. Standardisation of the sensitive clauses is difficult (“low” mark).** Indeed, when applied, these clauses affect the financial situation of either party, be it a TSO or a network user. As the standardisation work expected by ACER is meant to be “full”, standardisation of sensitive clauses is expected to affect the financial situation of *all network users in the EU*, be they large players, SMEs, etc.

**14.** Therefore, before altering these rules, it is necessary to extensively consult the market (or “*market inquiry*”) to see: (i) whether harmonisation on these clauses is useful/desirable at all for all network users at the first place; (ii) what is the financial impact of such harmonisation on network

users; (iii) what should be the extent of such harmonisation (from mere lowest common denominator principles to full-fledged liability rules e.g.); and (iv) what should be the content of such rules, taking into account the diverging specificities of network users (extent the ability to bear a given financial risk, revenues, type of business, and so on).

### **2.5. Taxes and insurances**

15. As Regulation 2009/715/EC currently stands, network codes have no legal basis for ruling tax matters. It indeed appears from the preamble of Regulation 2009/715/EC, that is the seat/legal basis of network codes in the field of gas, that the Regulation is adopted on the bases of:

- Ex-Article 95 of the European Community Treaty, thus on the current Article 114 of the TFEU on harmonisation of law; and on
- Ex-Article 251 of the European Community Treaty, that is Article 284 TFEU (ordinary legislative procedure).<sup>22</sup>

Regulation 2009/715/EC is not based on the TFEU (ex-European Community Treaty) provisions for taxes,<sup>23</sup> so the rules adopted on its basis cannot rule tax matters.

16. The same holds true for insurance matters. In the EU legal system, insurance matters fall under the scope of the free movement of services and the freedom of establishment. As Regulation 2009/715/EC is not based on the TFEU provisions for free movement of services neither on the freedom of establishment,<sup>24</sup> network codes have no legal basis for ruling insurance matters.

### **2.6. Visual summary of the main types of clauses**

17. You will find in **annex 1** a scheme visually summarising the four main types of provisions identified from the sample. In this scheme, we follow the colours used for assessing the degree of ease of harmonisation as used in the assessment table (**annex 2**), that is a **high** or **low** degree of ease.

## **3. Legal systems and approach**

18. Legal systems are generally based on one of three basic systems: civil law, common law, and religious law – or combinations of these. Nevertheless, the legal system of each country is shaped by

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<sup>22</sup> Regulation 2009/715/EU cannot be based on Article 194 TFEU as it was adopted before the entry into force of the Lisbon Treaty.

<sup>23</sup> Legal bases triggering the action of the EU in tax matters are articles 110 to 113 TFEU.

<sup>24</sup> Legal bases triggering the action of the EU in these fields are articles 56 to 62 TFEU and articles 49 to 55 respectively.

its unique history and incorporates individual variations. Comparative law shows the differences and similarities between the law of different countries.

19. Indeed if some general principles of law or concepts seem to exist, first some concepts do not exist or have sometime an equivalent concept to compare to. In addition even where the same concept could exist, the meaning could differ as evidenced through case law/jurisprudence revealing variation in the construction and interpretation.

20. The standardisation of contract where different legal systems are in place is by nature limited to the elements that can be fully integrated and applied without risking a divergent approach while implementing or interpreting. The standardisation goes beyond the harmonisation requesting the feasibility to adhere to a concept and a common interpretation.

#### **4. European Gas industry –regulatory regimes and administrative law**

21. As a matter of fact, the transmission contracts cannot be fully assimilated to commercial contract for being constraint for certain aspects by a regulatory regime and the national administrative law that apply. Indeed, the standardisation may be limited to specific law governing either the transmission system operator eg if it is a public entity or with the applicable regulatory regime that apply in the member state concerned.

#### **5. Assessment of ACER's request in the light of the general principle of proportionality**

22. Taking into account the above assessment of the sample, ACER's request to embed in the CAM network code a "**fully standardised capacity contract**", clarifying elements such as "**credit status of network users and on liability rules**", is disproportionate.

It is thus against Article 5, §1 TFEU, which subjects any EU legislative action, thus also network codes, to the observance of the principle of proportionality, under which:

*"The content and form of Union action **shall not exceed what is necessary to achieve the objectives of the Treaty**".*

A step-by-step approach, taking into account the impact of standardisation on the market (and as further summarised in section 6 below) is to be followed.

Such approach is moreover the only one allowing the European Commission to be line with Protocol N° 2 of the TFEU on the application of the principles of subsidiarity and proportionality, which states the following (article 5):

*"Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including,*

*where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved”.*

**23.** Moreover, it appears from the sample that a limited degree of harmonisation currently exists, that is between relevant contracts within the same Member States, when several TSOs operate the said Member State. We find for instance a substantial degree of harmonisation between the contracts of Open Grid Europe and GRTgaz Deutschland GmbH (Germany) or between the contracts of Gas Connect Austria GmbH and Baumgarten Oberkappel Gasleitungsgesellschaft mbH (Austria).

**It is therefore useful to question whether a “regional” approach is more suitable in a first step, rather than a EU-wide approach, as allowed by Article 8, §6 of Regulation 2009/715/EC.**

For instance, in the field of gas, the “Regional Initiatives” developed in the context of the Madrid For a are divided into the following regions: (i) North-West, covering the Netherlands, Belgium, France, United Kingdom, Ireland, Germany, Denmark and Sweden; (ii) South, covering Spain, Portugal and France; (iii) South-South-East, covering Italy, Austria, Slovakia, Hungary, Slovenia, Greece, Poland, Czech Republic, Bulgaria and Romania.<sup>25</sup>

Should a regional approach turn out to be useful for harmonisation, it needs to be assessed how to define “regions” for standardisation of transmission contracts.

## **6. Proposal of way forward**

**24.** Taking the above into consideration, the standardisation of transmission contracts by way of a standardised template attached to the CAM network code (or other) where possible, must be progressive.

From the global assessment it would be at least necessary to divide the work that needs to be done to address ACER’s request into two main phases, that is a phase that can be achieved in a +/- short period of time (“**phase 1**”) and a phase that can be achieved, in a second step, over a long period of time, if relevant at all (“**phase 2**”).

**25. Phase 1.** The purpose of this phase is to providing a harmonised template for the (a) contractual provisions falling under the scope of the CAM network code; and for the (b) other more “legal” provisions, sensitive clauses excepted, as identified in the assessment table (annex 2). In a

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<sup>25</sup> F. GRÄPER, C. SCHOSER, ‘The Establishment of Common Network Rules’, in C. JONES (ed.), EU Energy Law, Volume I, The Internal Energy Market, The Third Liberalisation Package (Leuven: Claeys & Casteels, 2010), p. 532.

nutshell, such standardisation would cover **the provisions highlighted in green in the visual summary** ([annex 1](#)).

Achieving this would require the performance of the following actions:

- (i) **Survey** of the “legal” provisions of all the relevant contracts or of a sample of these.<sup>26</sup> The purpose of this survey would be to find a lowest common denominator, which could then be used as a basis for drafting full-fledge provisions.
- (ii) **Draft of full-fledge standardised legal provisions.** In order to enhance acceptance, this step could consist first in the preparation of **term sheets**, which each TSO would discuss with its national regulation authority, involving where relevant ENTSG, ACER and/or other stakeholders. In a second step, **full-fledged clauses** would be drafted, taking into account the remarks received for the term sheets.
- (iii) Regarding **sensitive clauses**, such as liability rules, force majeure, and obligation suspension, a **market inquiry** must be performed in parallel. Alternatively, only a high level harmonisation could be achieved on such kinds of clauses, but in any event, no decision having a financial impact on network users and/or TSOs should be taken without being backed by a market inquiry.

Depending on the result of the market inquiry, ACER/the European Commission might decide to move to phase 2 (“go”/“no go”).

- (iv) In parallel, each TSO must align the relevant clauses of the national network codes/relevant contracts with the CAM network code, as requested under the CAM network code. This **alignment with the CAM network code** must take into account the harmonisation work on legal provisions and/or must be incorporated into the standardised template as well.
- (v) In parallel, a **consultation of the market** on the opportunity to harmonise the provisions on core-tasks of TSOs (be they related to capacity allocation and/or to other core-tasks) could be carried out, if the European Commission/ACER deem it useful at all at this stage.

Depending on the result of such consultation, ACER/the European Commission might decide to move to phase 2 (“go”/“no go”).

**26. Phase 2.** In a nutshell, such standardisation would cover **the provisions highlighted in reds in the visual summary** ([annex 1](#)). Phase two has therefore two main aspects.

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<sup>26</sup> For instance, where a Member State counts several TSOs, the relevant contract(s) of only one TSO could be taken into account as it appears from our preliminary analysis that there is already a high degree of harmonisation for contracts of TSOs of the same Member State (see [n° 19](#) above).

**27.** If the market inquiry reveals that a harmonisation of **sensitive clauses** is useful for market integration, it would be necessary to draft standardised clauses to be incorporated in the standardised template (or other). The standardised clauses would be full-fledge or contain a lowest common denominator only, depending on the result of the inquiry. The following actions would need to be performed:

- (i) **Survey** of the sensitive clauses of all the relevant contracts. The purpose of this survey would be to find a lowest common denominator.
- (ii) If it appears useful for market integration purposes to have full-fledge standardised provisions, **draft of full-fledge standardised provisions**. In order to enhance acceptance, this step could consist first in the preparation of **term sheets**, which each TSO would discuss with its national regulation authority, involving where relevant ENTSOG, ACER and/or other stakeholders. In a second step, **full-fledged clauses** would be drafted, taking into account the remarks received for the term sheets.

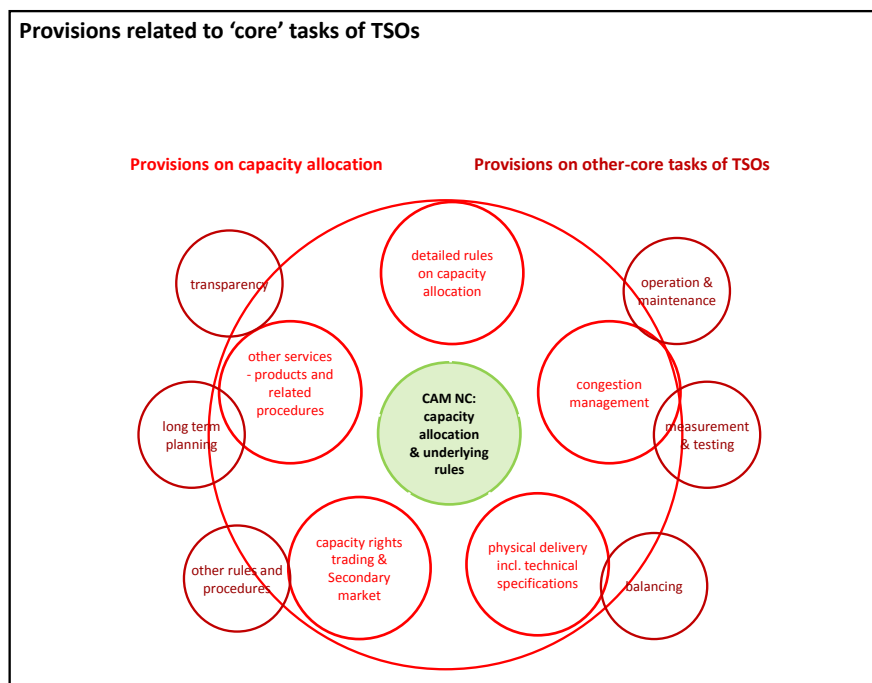
**28.** If the market inquiry reveals that a **harmonisation of rules on core-TSO tasks** is useful for market integration purposes:

- (i) A preliminary **feasibility assessment** from an economic, technical and/or mathematical viewpoint, taking into account regional specificities, must be performed.
- (ii) Should it be concluded that “full harmonisation” is feasible, a **long-term project** would be required, notably to set up common operational procedures, common functional requirements, an economic assessment of the solution retained, and so on, possibly on a regional basis.

**29.** Whereas phase 1 can be mainly dealt with on the basis of legal expertise (subject to operational input for alignment of clauses with the CAM network code), phase 2 would require the superposition of operational expertise (economic, technical, financial/mathematical).

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## ANNEX 1 – VISUAL SUMMARY OF THE MAIN TYPES OF PROVISIONS FOUND IN THE SAMPLE CONTRACTS



### Main provisions of a contract

#### Introductory clauses

- Preamble, parties, definitions, contractual interpretation, principles of collaboration, including compliance with all relevant laws and regulations, subcontracting conditions, and so on
- Condition precedent (if any)

#### Sensitive clauses

- Main rights and obligations
- Liability rules
- Force majeure
- suspension for given reasons (emergency situations, etc.)

#### Other important clauses

- IPR\*, confidentiality, information and communication
- Creditworthiness/warranties
- Audits

#### Taxes and insurances

#### Jurisdiction and applicable law

#### Final clauses

- Language\*, correspondence, boiler plates, including succession and assignment, etc.
- Amendments
- Entry into force and termination\*

**Notes:** in this scheme, we use the same colours than those identifying the degree of “ease” of harmonisation in the assessment table (annex 2), where reds indicate a low degree of ease and green indicates a high degree of ease. As mentioned above, not all surveyed contracts contain provisions on other non-core tasks of TSOs.



## ANNEX 2 – DETAILED ASSESSMENT TABLE

### Introduction

The table is subdivided into two main sections, namely:

- Provisions related to core-tasks of TSOs; and
- Provisions of more “legal” nature typical of contracts<sup>27</sup>.

### 1. Provisions related to core-tasks of TSOs

#### a. Provisions related to capacity allocation

	Provision	Degree of ease of harmonisation	Extensive comments
1.	Object	Medium	<p><b><u>Specific comment based on sample:</u></b></p> <p>The sample contracts have, as a general rule, a similar object, that is allocation of capacity. However, the rules provided for organising/implementing capacity allocation vary to a great extent: some contracts contain a limited number of provisions <i>not</i> related to capacity allocation <i>stricto sensu</i> (GRT Gaz Deutschland, National Grid e.g.), while others contain numerous provisions not related to capacity allocation at all (other-core tasks) (Fluxys e.g.).</p>

<sup>27</sup> International commercial contract used as reference

			<p>➔ <b>Proposal of solution:</b> isolate the provisions related to capacity allocation <i>stricto sensu</i> and/or in general from the provisions related to other core-tasks of TSOs.</p>
2.	Definitions	Low	<p><b>General comment:</b> The technical definitions affected by the CAM network code have to be aligned to those of the code. With respect to the <i>other</i> technical definitions, harmonisation is difficult as they reflect national processes and rules.</p> <p>➔ <b>Proposal of solution:</b> isolate the definitions related to capacity allocation <i>stricto sensu</i> and/or in general from the definitions related to other core-tasks of TSOs.</p>
3.	Registration as grid users	Medium	<p><b>General comment:</b> The relevant national contracts must be aligned with the CAM network code with this respect (article 1.6). It remains to be seen whether provisions on details regarding registration are easy or difficult to harmonise, depending on the level of standardisation currently existing (or not) in the EU.</p> <p>➔ <b>Proposal of solution:</b> survey the extent of standardisation existing currently in the EU in a first step.</p>
4.	Booking platforms	Medium	<p><b>General comment:</b> The relevant national contracts (access, terms of use) must be aligned with the CAM network code with this respect (article 8) as soon as joint booking platforms are made available to users (not directly relevant for the time being).</p> <p>➔ <b>Proposal of solution:</b> standardised template to be harmonised fully when joint platforms are implemented.</p>
5.	Auction organisation	High	<p><b>General comment:</b> The relevant national contracts must be aligned with the CAM network code with this respect (article 4 to article 6 included).</p>
6.	Capacity allocation rules	High	<p><b>General comment:</b> The relevant national contracts must be aligned with the CAM network code with this respect (article 4 to article 6 included).</p>
7.	Underlying auction rules	High	<p><b>General comment:</b> The relevant national contracts must be aligned with the CAM network code with this respect (article 4 to article 6 included).</p>

8.	Price/tariffs	Medium	<p><b><u>General comment:</u></b> Price, which is governed by tariffs, falls out of the scope of the CAM network code. Under article 2, 5) of the CAM network code, this topic is covered to the extent necessary to address interactions with this topic. Moreover, Article 7.2 contains a limited provision on payment modality. The corresponding network users' rights could thus be aligned in all relevant contracts.</p> <p><b><u>Specific comment based on sample:</u></b> Contracts usually refer to the price as published tariffs. We note that in some cases (GRTgaz, National Grid), the price is divided into various components, such as e.g. (GRTgaz) a basic price (tariffs) and price supplement, defined under other sets of rules (balancing rules) or incentives (UIOLI) or other. This might require further refinement (hence the "medium" mark).</p> <p>➔ <b>Proposal of solution: standardised template to remain relatively high level with respect to this clause, the details having to take into account national tariffs until further harmonisation at the EU level is available.</b></p>
9.	Detailed rules related to capacity allocation	Low	<p><b><u>Specific comments:</u></b> We find numerous provisions not covered by the CAM network code that relate to capacity allocation but that would require affecting existing processes based on national specificities and/or national technical regulations/network codes, such as:</p> <ul style="list-style-type: none"> <li>• Detailed procedures for registration;</li> <li>• Technical requirements and security requirements of the IT system;</li> <li>• Detailed nomination rules (processes, messages, etc.);</li> <li>• Some capacity rules not related to capacity allocation properly speaking, such as capacity checks;</li> <li>• Gas quality;</li> <li>• Rules related to capacity left-unused;</li> <li>• And so on.</li> </ul> <p>➔ <b>Proposal of solution: it is necessary to perform a market inquiry first.</b></p>
10.	Other rules related to capacity allocation	Low	<p><b><u>Specific comment based on sample:</u></b> We find numerous provisions not covered by the CAM network code that relate to capacity allocation but that would require altering existing processes based on national specificities and/or national technical regulations/network codes, such as:</p> <ul style="list-style-type: none"> <li>• Other services/products, such as quality conversion, capacity allocated on an implicit basis (pools, platforms), multi-shipper codes (?), capacity allocated in the context of an Open Season, and so on, as well as their related procedures;</li> </ul>

			<ul style="list-style-type: none"> <li>• Entry-point/exit-point identification;</li> <li>• Physical delivery/technical specification for gas delivery;</li> <li>• Congestion management;</li> <li>• Trading of capacity rights (OTC or on an exchange);</li> <li>• Secondary market;</li> <li>• Capacity assignment (National Grid contract);</li> <li>• And so on.</li> </ul> <p>➔ <b>Proposal of solution: it is necessary to perform a market inquiry first.</b></p>
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**b. Other provisions**

	Provision	Degree of ease of harmonisation	Extensive comments
11.	Operation and maintenance	Low	<p><b><u>General comment:</u></b> This falls out of the scope of the CAM network code. The CAM network code nonetheless contains limited obligations for TSOs to publish information related to maintenance (article 3.1 2 to 4). The corresponding network users' rights could thus be aligned in all relevant contracts, but, for the remainder, harmonisation is difficult as affecting existing processes/national technical regulations.</p> <p><b><u>Specific comment based on sample:</u></b> In some contracts, reference to maintenance is limited ("<i>the TSO endeavours to maintain the network and carry out test and extensions of the network under conditions that minimise the consequences of such operations on network users</i>"; "<i>the TSO shall announce suspensions due to maintenance within a given period of time</i>"). Harmonisation on this point should not be an issue, if the same approach is followed in the sample.</p> <p>➔ <b>Proposal of solution: it is necessary to perform a market inquiry first.</b></p>
12.	Long term planning	Low	<p><b><u>General comment:</u></b> This falls out of the scope of the CAM network code.</p> <p>➔ <b>Proposal of solution: it is necessary to perform a market inquiry first.</b></p>

13.	Measurement and testing	Low	<p><b>General comment:</b> This falls out of the scope of the CAM network code.</p> <p>➔ <b>Proposal of solution: it is necessary to perform a market inquiry first.</b></p>
14.	Balancing	Low	<p><b>General comment:</b> This falls out of the scope of the CAM network code. However, under article 2, 5) of the CAM network code, this topic is covered to the extent necessary to address interactions with capacity allocation.</p> <p>➔ <b>Proposal of solution: it is necessary to perform a market inquiry first.</b></p>
15.	Procedures	Low	<p><b>General comment:</b> This falls out of the scope of the CAM network code. However, under article 2, 5) of the CAM network code, this topic is covered to the extent necessary to address interactions with capacity allocation.</p> <p>➔ <b>Proposal of solution: it is necessary to perform a market inquiry first.</b></p>
16.	Transparency	Low	<p><b>General comment:</b> This falls out of the scope of the CAM network code. However, under article 2, 5) of the CAM network code, this topic is covered to the extent necessary to address interactions with capacity allocation.</p> <p>➔ <b>Proposal of solution: it is necessary to perform a market inquiry first.</b></p>

## 2. "Legal" provisions typical of international commercial contracts

	Provision	Degree of ease of harmonisation	Extensive comments
17.	Preamble	High	<p><b>General comment:</b> This is standard work/harmonisation on this point should not be an issue.</p>

18.	Parties	Medium	<p><b><u>Specific comment:</u></b></p> <p>In most contracts, the counter-party is a network user. In National Grid contract, the “counter-party” is a user, a “DNO user” or a “Shipper User”. In GTS contract, the counter-party is a shipper or an “end user with exit capacity”. In GRTgas, the Gas Connect Austria and in the Bord Gais Eireann contracts, the counter-party is a shipper. These differences might entail specific regime of rights and obligations (for instance, we note that under the GRTgas contract the shipper may reserve auxiliary services whereas “regular” users not; or the shipper takes over liability for gas delivery) as well as application of specific procedures (core-provisions) that are not applicable to regular users. The scope of application <i>ratione personae</i> will have to be refined, as well as potential impact on separate provisions that apply to this kind of party only.</p> <p>➔ <b>Proposal of solution: provide for a body of clauses applicable to all users as well as a separate body of clauses applicable to users having a specific quality (shippers, and so on).</b></p>
19.	Definitions	Medium	<p><b><u>General comment:</u></b></p> <p>Other definitions than those defined in the CAM network code need to be assessed on a case-by-case basis, however, if the harmonised template remains relatively high level, this should not be an issue. Moreover purely “legal” definitions such as “force majeure”, “hardship” and so on may relatively easily be aligned subject to the comment on sensitive clauses below.</p> <p><b><u>Specific comment on the basis of sample:</u></b></p> <p>For the technical definitions (related to core-provisions) not harmonised by the CAM network code, harmonisation of these will depend on the state of harmonisation of core-provisions.</p> <p>➔ <b>Proposal of solution: severing what can be easily harmonised from the rest and isolating the definitions in a separate annex rather than in the body of the template.</b></p>
20.	Contractual architecture	Medium	<p><b><u>Specific comment based on sample:</u></b></p> <p>We note that the contractual structure varies from one contract/Member State to the other: for instance, with Fluxys, both the provisions on core-TSO tasks as well as more legal provisions are embedded in the same document, which makes the contractual structure rather dense. In other cases, such as with SNAM Rete Gas, the main contract is rather short/simple, referring to the national network code, that is a separate piece of legislation, for the remainder. National Grid’s contract contains few “legal” provisions, but focuses on products, access to products and capacity allocation strictly. The standard contract of Gas Connect Austria varies depending on whether the service is purchased on a firm basis or on an interruptible basis (two standard contracts). Therefore, a uniform contractual structure/template is more difficult to implement, i.e. requiring more changes/adaptations, in some Member States (UK, Belgium) than in others.</p>

			<p>Moreover, in several contracts, we find that the main contract refers to additional contracts or documents, such as (i) specific purchases/booking of capacity (often provided for in an annex as a template); (ii) additional terms and conditions when purchasing capacity on a platform operated by several TSOs (GRTgaz Deutschland); (iii) separate contracts for other core-provisions such as balancing contracts e.g.; (iv) computerised exchange of documents (GRTgaz); (v) a technical code containing capacity allocation rules or other (Bord Gais Eireann); (v) general terms and conditions for transportation (Gas Connect Austria and Baumgarten). Therefore, the scope of harmonisation needs to be refined, taking into account these specificities.</p> <p>➔ <b>Proposal of solution: identification of the simplest contractual architecture for the standardised template (e.g. following the structure Baumgarten, German TSOs, SNAM Rete Gas), while reference to other contracts may be provided for in a list of annexes. Those TSOs having more dense/complex contracts will require extra-efforts of alignments.</b></p>
21.	Contractual interpretation	High	<p><b>General comment:</b> Contractual rules on overall interpretation of contracts, their annexes, headers and so on are usually standard so harmonisation of this should not be an issue. We note a diverging clause in the contract of Bord Gais Eireann, under which, in case of conflict between provisions of the contract and of its annexes (operational code), provisions of the operational code/the annexes prevail.</p>
22.	Principles of collaboration	High	<p><b>General comment:</b> By “principles of collaboration”, we mean any principle governing collaboration that we may find in relevant contracts such as good faith, compliance with all relevant laws, etc.</p> <p><b>Specific comment based on sample:</b> It could be useful to include such a clause in the standardised template, notably to allow references, in national contracts, to:</p> <ul style="list-style-type: none"> <li>• Specific laws (for instance, the contract with SNAM Rete Gas SPA makes reference to compliance with an ethic code or with the money-laundering law, which could usefully fall within such a generic clause; the GRTgaz contract refers to customs and administrative formalities);</li> <li>• Related contracts whose harmonisation may be delayed (designation of a BRP);</li> <li>• Requirement to obtain all permits and licences (present in some contracts but not in others);</li> <li>• Requirement to operate without prejudice to public service obligations (present in some contracts but not in others);</li> <li>• Principles for subcontracting (present in some contracts but not in others);</li> <li>• And so on.</li> </ul>
23.	Permit and licences	Medium	<p><b>Specific comment based on sample :</b></p>

			See principles of collaboration/harmonisation should not be an issue except where the relevant national law shall apply. Content of the clause to be adapted with relevant cross references.
24.	Public service obligations	Medium	<b>Specific comment based on sample :</b> See principles of collaboration/harmonisation should not be an issue except where the relevant national law shall apply. Content of the clause to be adapted with relevant cross references.
25.	Subcontracting	High	<b>Specific comment based on sample:</b> We find only one contract (Bord Gais Eireann) providing for a subcontracting clause (drafted to the benefit of the TSO only). It remains to be seen why other contracts do not foresee such clause but harmonisation on this point should not be an issue/could be usefully inserted in the general principles of collaboration clause e.g.
26.	Condition precedent	High	<b>Specific comment based on sample:</b> Some contracts subject the entry into force to the conclusion of separate purchase order (Bord Gais Eireann) or other conditions. Therefore, the standardised template should allow for the inclusion of condition precedent.
27.	Main rights and obligations	Low	<b>Specific comment based on sample:</b> In some contracts (see e.g. GRTgas Deutschland), we find that the main rights and obligations of the parties (purchasing capacity in exchange of having it reserved for a given price, delivering or shipping the reserved capacities, and so on) are not defined in a separate “legal” provision –in which case they appear in core-provisions or in a less obvious fashion throughout the contract). One useful way of providing harmonisation could be to developing such a general clause on rights and obligations, while the details would be left to the individual contracts. However, this would require a pre-identification of core-obligations.  ➔ <b>Proposal of solution: survey whether a common list of common rights and obligations would be an issue for some individual contracts.</b>
28.	Invoicing and payment	Medium	<b>Specific comment on the basis of sample:</b> Clauses on invoicing and payment vary substantially from contracts to the others. Subject to the applicable regulatory regime  <b>General comment:</b> An agreement on overall conditions for payment should not be difficult to reach (UNIDROIT principles e.g.). Likewise, late payment rate in commercial relationships is harmonised at the EU level, that is the new Directive 2011/7/EU, containing the principle of contractual freedom in businesses commercial transactions, according to which enterprises have to pay their invoices within 60 days, unless they expressly agree



			<p>otherwise and if it is not grossly unfair. However, invoicing is a matter of internal policy implying internal policy changes, changes of software, etc. hence the mark “medium”.</p> <p>➔ <b>Proposal of solution: survey whether the setting up of common principles/best practices regarding payment conditions would be an issue for some individual company internal policies.</b></p>
29.	Taxes	No legal basis	<p><b>General comment:</b> Network codes have no legal basis for ruling tax matters.</p>
30.	IPR	High	<p><b>General comment:</b> Taking into account the object of the transmission contract/capacity allocation rules, this should not be an issue; a generic clause should do. In term of enforceability this shall be subject to the relevant applicable law (territoriality jurisdiction)</p>
31.	Confidentiality	High	<p><b>General comment:</b> A basis for harmonisation can be found in Article 16 of Directive 2009/73/EC; it should not be an issue to expanding further on it, which is all the more true that confidentiality clauses are usually standards in (international) contracts.</p>
32.	Information and communication	High	<p><b>Specific comment based on sample:</b> The contracts of GTS and of Fluxys SA provide for separate clause(s) on information and communication, including e.g. (GTS) expression in SI units, use of a VPN and so on. Such separate clause could prove useful for reading clarity and should not be an issue for harmonisation.</p>
33.	Liability rules: type of obligations/degree of care	Low	<p><b>General comment:</b> Liability rules are sensitive clauses: they have an impact on what is financially due in case of deviation from the contractual obligations, either <i>upwards</i> or <i>downwards</i>. Standardisation of sensitive clauses is expected to affect the financial situation of <i>all network users</i> in the EU, be they large players or SMEs. In addition, it is closely linked to the legal system and national application.</p> <p><b>Specific comment based on sample:</b> From our general experience, agreements usually provide that provisions under a given agreement are “best efforts” (obligation to deliver normal efforts) unless explicitly provided otherwise (obligation to achieve a given/pre-defined result). In the field of capacity allocation, result obligations could for instance be the capacity allocation rules/the rules underlying the auctions, as they are defined under the CAM network code, thus binding on TSOs.</p>

			<p>Likewise, it would be necessary to check whether TSOs are subject to strict liability rules (liability without fault) in the context of capacity allocation. This can be checked on the basis of a quick survey.</p> <p>In some contracts, we find references to a certain degree of care, however these references relate to the general mission of the TSO rather than to capacity allocation properly speaking (<i>"the TSO must operate the system in accordance with the standard of a reasonable and prudent operator and shall make all reasonable efforts to facilitate the day-to-day operations..."</i>; <i>"the TSO maintains the network..."</i>). In other contracts, we do not find such cross-references to side-obligations and/or references to a degree of care in general. Taking above our general comment, a harmonisation on this point should not raise serious issue, subject to an identification of potential obligations of higher degree than others (<i>obligation de résultat</i> and <i>obligations de garantie</i> notably).</p> <p>➔ <b>Proposal of solution: it is necessary to perform a market inquiry first.</b></p>
34.	<b>Liability rules: liability limitations and damage exoneration</b>	<b>Low</b>	<p><u><b>General comment:</b></u> Liability rules are sensitive clauses: they have an impact on what is financially due in case of deviation from the contractual obligations, either <i>upwards</i> or <i>downwards</i>. Standardisation of sensitive clauses is expected to affect the financial situation of <i>all network users</i> in the EU, be they large players or SMEs.</p> <p>By liability limitations, we mean provisions reducing the degree of fault for triggering liability/indemnification obligation, for instance by excluding liability in case of regular fault/negligence. Excluding liability for regular fault/negligence is a common practice in the industry sector, as it appears from our report on TSO liability. However, we know from our general legal culture of comparative law, that conditions for liability limitations vary from one Member State to the other (see also our report on TSO liability). In France and Italy for instance, liability exemptions by way of agreement are valid provided there is no exoneration for gross negligence or wilful misconduct. By contrast, in Belgium and in Germany, it is perfectly valid to exonerate for gross negligence (but not for wilful misconduct). In other Member States, liability exemptions are valid provided they are not "unreasonable" (Denmark) or unacceptable to the criterion of reasonableness and fairness (<i>"naar de maatstaven van van redelijkheid en billijkheid"</i>) (the Netherlands). It seems that in some Member States, it is unsure whether such clauses are permissible (Czech Republic). We are aware of some sector-specific limitations in the electricity sector (Germany), but, to our knowledge, not in case of breach of capacity allocation rules.</p> <p>By indemnification limitations, we mean provisions reducing the indemnification obligation pertaining to a damage caused by the fault of a given party, for instance by excluding from the indemnification certain types of damages, such as e.g. indirect damages. From our general legal culture of comparative law in the electricity sector, we know that it is a common practice for TSOs to exclude indemnification for indirect damages in all agreements, thus including for capacity allocation. We can thus expect this practice to be commonly found in the gas sector as well, but this would need to be further investigated.</p>

			<p>In addition, as stated above it is closely linked to the legal system and national application.</p> <p><b><u>Specific comment based on sample:</u></b></p> <p>We find substantially diverging rules with this respect (varying financial caps depending on the type of fault, different rules whether the origin of the payment is contractual or in tort, excluded or included damages defined differently, and so on). Usually, detailed liability rules are provided for in the main body of the contract/in the applicable general terms and conditions, however, under the Bord Gais Eireann contract, they seem to be spread throughout the code of operations. A common base could be found for harmonisation purposes, but –taking into account our comment above, this would also require taking into account national limitations beforehand.</p> <p>Moreover, we find at least one original rule regarding capacity exemption, that is the right to decrease capacity for no reason within a given limit and under pre-defined conditions under article 6.A.12 of GTS contract. Such case is specific to Dutch law and may not be view as extendable throughout the EU (to be further investigated).</p> <p>Importantly, harmonisation of liability rules, especially of liability exonerations, could prove to be difficult due to the fact that the topic is sensitive.</p> <p>➔ <b>Proposal of solution: it is necessary to perform a market inquiry first.</b></p>
35.	Force majeure	Low	<p><b><u>General comment:</u></b></p> <p>Force majeure clauses are sensitive clauses: they have an impact on what is financially due in case of deviation from the contractual obligations, that is <i>downwards</i>. Standardisation of sensitive clauses is expected to affect the financial situation of <i>all network users</i> in the EU, be they large players or SMEs.</p> <p>The interpretation of the concept can vary from a legal system to another.</p> <p><b><u>Specific comment based on sample:</u></b></p> <p>The core definition of force majeure is relatively similar from one agreement to the other. The examples listed as force majeure events vary. The rules applicable in case of force majeure vary from one contract to the other. This being said, it should not be difficult to harmonise force majeure as it is a common principle of law in the EU and as good practices for drafting clauses may be referred to (UNIDROIT principles e.g.). It remains to be checked whether there are specific force majeure definitions binding TSOs for their scope of application, notably in the field of capacity allocation (firmness) that may cause issue, as we know it is the case in other sector (electricity), but this may be checked easily by way of survey.</p> <p>The force majeure clauses of National Grid substantially diverge from those in other contracts. Notably, National Grid foresees some arrangements to be applicable in case of force majeure, which content vary depending on the extent of force majeure, determined by pre-defined formulas. These clauses are substantially more elaborated than those in other agreements so, it remains to be seen which degree of</p>

			<p>details to implement in the harmonised rules on force majeure, hence the “medium” mark.</p> <p>➔ <b>Proposal of solution: it is necessary to perform a market inquiry first.</b></p>
36.	Assimilated circumstances to force majeure	Low	See “suspension”.
37.	Hardship/change of circumstances	High	<p><b><u>General comment:</u></b> From our general legal culture in comparative law, contractual provisions on hardship/changes of circumstances are valid; it is when the contract does not contain such explicit clauses that national law (usually case-law) restrains the judge’s power to revise the terms and conditions of the contract following hardship/circumstances changes. UNIDROIT principles could be used as a basis for preparing such a clause.</p> <p><b><u>Specific comment based on sample:</u></b> Some contracts contain a hardship clause whereas other not; where they do, wording varies. Harmonisation should not be an issue taking into account or general comment.</p>
38.	Emergency situations	Low	See “suspension”.
39.	Incident management	Low	See “suspension”.
40.	Suspension, interruptions or other restrictions	Low	<p><b><u>General comment:</u></b> Provisions suspending a given party’s obligation are sensitive clauses: such clauses have as a result the exemption from financial compensation of the party entitled to suspend its obligations. Standardisation of sensitive clauses is expected to affect the financial situation of <i>all network users</i> in the EU, be they large players or SMEs.</p> <p><b><u>Specific comment based on sample:</u></b> The sample reveals diverging clauses with respect to suspension, interruptions or other restrictions. In all cases, these are possible for network security reasons, but in some contracts, this is possible due to other reasons, such as: force majeure cause, quality requirements not met, suspension due to maintenance. Moreover, the Gas Connect Austria contract foresees a reduction of fee according to a given formula in case of “reduction” due to force majeure or maintenance. Some contracts furthermore refers to incident management procedures. Harmonisation on this point needs to be surveyed beforehand.</p> <p>➔ <b>Proposal of solution: it is necessary to perform a market inquiry first.</b></p>

41.	Warranties	Medium	<p><b><u>Specific comment based on sample:</u></b> We find diverging requirements regarding warranties/creditworthiness, including with respect to the circumstances where a warranty must be set up (in all cases vs. in “justified cases” enumerated imitatively), the type of warranty (deposit, bank guarantee such as first demand guarantees, and so on), the amount and so on. This point needs to be surveyed.</p> <p>➔ <b>Proposal of solution: performance of a detailed survey is needed before coming up with a standardised clause.</b></p>
42.	Insurance	No legal basis	<p><b><u>General comment:</u></b> Network codes have no legal basis for ruling insurance matters.</p> <p><b><u>Specific comment based on sample:</u></b> Somme contracts contain an obligation to undertake insurances whereas others not. Such obligations might find their seats elsewhere, e.g. in general law or sector-specific law. One way for harmonising this point is to provide an obligation to insure according to relevant laws or other obligations (e.g. in the clause on “general principles of collaboration” mentioned above).</p>
43.	Audits	High	<p><b><u>Specific comment based on sample:</u></b> The contract of GTS is the only one providing the possibility for either party to use the services of recognised accounts for verifying books, records, charts of the other party for verifying the accuracy of a statement, a charge or computation under certain conditions (article 10.3). Such clause could be provided in the Standardised Template as well (good practice).</p>
44.	Contract language	Not relevant	<p><b><u>General comment:</u></b> Through the third package the obligation is to provide the information in the national language and in English. Network codes, as Regulations, have to be translated into all official EU languages. Under national law, in particular where administrative law is concerned, it is usual to have the document in the official language(s). Therefore if a translation in one common language eg English could be required, the national language(s) shall be applicable</p>
45.	Correspondence	High	See “information and communication”.
46.	Miscellaneous	High	<p><b><u>General comment:</u></b> Entire agreement, severability, waiver, nature of contract/relationship, information and so on are boiler plates, whose harmonisation should not be an issue.</p>

47.	Assignment of rights/succession	High	<p><b><u>Specific comment based on sample:</u></b></p> <p>We find diverging provisions with this respect; for instance, the assignment clause under the Bord Gais Eireann is drafted to the benefit of the TSO only, whereas changes affecting the shipper/user are dealt under a “change of control” provision, providing for elaborated procedure to follow, including rights to the benefit of the TSO. As this is a rather standard clause in the industry (if not a boiler plate), harmonisation should not be an issue.</p>
48.	Amendments	High	<p><b><u>General comment:</u></b></p> <p>From our experience in the electricity sector, amendments should be possible at least in cases of (i) change of applicable law/regulation or decision of the national regulation authority (now ACER as well); and (ii) for “any” other reasons provided a given procedure is completed.</p> <p><b><u>Specific comment on the basis of sample:</u></b></p> <p>We find diverging procedures for amendment. Taking into account our general comment above, harmonisation should not raise serious issues, but this would need to be surveyed beforehand.</p>
49.	Entry into force	High	<p><b><u>Specific comment based on sample:</u></b></p> <p>In most cases this provision does not raise any issue from a harmonisation perspective, the contract entering into force on the date foreseen under it. We note that with SNAM Rete Gas SPA, the entry into force is subject to the conclusion of the separate contract for purchasing capacity. We find it weird to subject the whole entry into force of the agreement to nominations and this original clause might need to be aligned as well (compare with condition precedent above where the contract enters into force upon signature but its implementation is subject to other conditions).</p>
50.	Termination	Medium	<p><b><u>Specific comment based on sample:</u></b></p> <p>We find substantially diverging rules with this respect: in some cases provisions are drafted in broad terms whereas in others, the approach is casuistic, cases for termination varying depending on the type of party. Harmonisation on this point needs to be surveyed beforehand and legal feasibility checked.</p> <p>➔ <b>Proposal of solution: performance of a detailed survey is needed before coming up with a standardised clause.</b></p>
51.	Jurisdiction clause	Not relevant	<p><b><u>General comment:</u></b></p> <p>This issue becomes increasingly less relevant as relevant applicable rules become increasingly harmonised at the EU level, notably on the basis of the CAM network code for its scope of application. Should the Standardised Template be provided for all relevant national contracts (possibly going beyond the scope of the CAM network code), the Standardised Template will become the “law of the parties” (<i>pacta sunt servanda</i>), which,</p>

			<p>by definition will be harmonised at the EU level precisely due to the Standardised Template. For instance, in case of dispute <i>exclusively related to</i> capacity allocation and/or to additional issues falling under the scope of the Standardised Template, the court/the arbitrator will apply: (i) Regulation 2009/715/EC, including the forthcoming amended guidelines currently under preparation; (ii) the CAM network code; and (iii) the relevant bilateral conventions that, by definition, will provide for harmonised principles throughout the EU. So, irrespective of where a dispute will be filed, the solution to the dispute is expected to be the same everywhere.</p> <p>In addition where administrative law is applicable or due to the regulatory system in place, some restrictions could be imposed.</p> <p><b><u>Specific comment based on sample:</u></b></p> <p>Unsurprisingly, jurisdiction clauses generally foresee that the common national judge is competent, whereas the Austrian contracts foresee that the ICC or another body ("Energy Control GmbH") is competent. Taking into account our comment above, we believe this is not an issue/not relevant.</p> <p>This being said, one point where harmonisation could be relevant is the pre-litigation phases as we note that contracts refer to pre-expertise, amicable resolution, etc. to varying levels of details. Such procedures –that are recommendable from a legal certainty viewpoint, may be easily harmonised.</p>
52.	Applicable law	Not relevant	<p><b><u>General comment:</u></b></p> <p>Same comment as under the jurisdiction clause.</p> <p>In addition, the national law could be compulsory for administrative requirements depending on the legal system at stake</p> <hr/> <p><b><u>Specific comment:</u></b></p> <p>Unsurprisingly, all contracts refer to national law as applicable law but we do not see this as an issue taking into account the previous comments.</p>

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