

DIRECTOR DECISION 2012-06

**on
Rules for the Functioning
of the
Working Groups
of the
Agency for the Cooperation of Energy Regulators
and
repealing Director Decision 2011-002 and Director Decision 2011-009**

HAVING REGARD to Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing the Agency for the Cooperation of Energy Regulators (hereafter referred to as “the Agency”), and, in particular, Article 17(5) thereof;

HAVING REGARD to Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 and Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005;

HAVING REGARD to Article 339 of the Treaty on the Functioning of the European Union (hereafter referred to as “TFEU”);

HAVING REGARD to the Staff Regulations of the European Communities and of the Conditions of employment of other servants of the European Communities (CEOS), laid down by Council Regulation (EEC, EURATOM, ECSC) No 259/68 as amended, and, in particular, Articles 17 and 18 of the Staff Regulations and Article 11 of CEOS;

HAVING REGARD to Director Decision 2011-002 on Rules for the Functioning of the Working Groups of the Agency for the Cooperation of Energy Regulators (hereafter referred to as “Director Decision 2011-002”);

HAVING REGARD to Director Decision 2011-009 amending Director Decision 2011-002 regarding Rules for the Functioning of the Working Groups of the Agency for the Cooperation of Energy Regulators;

WHEREAS the Agency and its staff are obliged to respect all relevant provisions laid down in the TFEU, the Staff Regulations and the CEOS;

WHEREAS the participants in the Working Groups and Task Forces (members, observers and external experts) are not necessarily Agency staff members, and thus not bound by the provisions of the TFEU, the Staff Regulations or the CEOS;

WHEREAS additional measures are therefore required to legally align the provisions governing the functioning of the Working Groups and Task Forces with those governing the functioning of the Agency, especially in the areas of confidentiality and intellectual property rights;

WHEREAS the Agency should have legal guarantees that participants in the Agency Working Groups and Task Forces will not disclose commercially sensitive information which they obtained in their capacity as participants;

WHEREAS provisions need to be included in the Rules for the Functioning of the Working Groups of the Agency for the Cooperation of Energy Regulators (hereafter Working Group Rules) on intellectual property rights;

WHEREAS the transfer of the economic rights to works developed in Agency Working Groups or Task Forces is necessary to ensure that the Agency is able to use the texts elaborated in its Working Groups or Task Forces without bearing the risk of any possible subsequent restrictions, either in terms of rights of modification, reproduction or translation;

WHEREAS the Working Group Rules need to be further adjusted to take into account the experience obtained during the initial period of operation of the Agency;

WHEREAS the Director of the Agency is entitled to adopt internal administrative instructions and to publish notices to ensure the functioning of the Agency in accordance with Regulation No 713/2009;

THE DIRECTOR HAS DECIDED:

1. To adopt the Rules for the Functioning of the Working Groups of the Agency for the Cooperation of Energy Regulators, as annexed.
2. To repeal Director Decision 2011-002 and Director Decision 2011-009 amending Director Decision 2011-002 regarding Rules for the Functioning of the Working Groups of the Agency for the Cooperation of Energy Regulators.

This decision shall take effect on the day following that of its adoption.

Done at Ljubljana on 6 February 2012.


Alberto Pototschnig
Director

Rules for the Functioning of the Working Groups of the Agency for the Cooperation of Energy Regulators

1. Scope and general principles

1.1. The Agency for the Cooperation of Energy Regulators ("Agency") may establish Agency Working Groups ("AWGs") to provide support to the Agency when carrying out its regulatory duties under the relevant EU Regulations and Directives. This document lays down the Rules for the Functioning of the AWGs ("Rules").

1.2. The general objective of the AWGs is:

- a) to provide input to the Director for the preparation of opinions, recommendations and decisions to be submitted, before adoption, to the consideration of the Board of Regulators ("BoR"), pursuant to Article 15(1) and 17(3) of Regulation (EC) No 713/2009, and of other relevant documents;
- b) to support the Director and the Agency staff on other tasks, such as reviewing and analysing stakeholders' submissions during a consultation process, opinion building and interaction with external parties;
- c) to provide information to the BoR on the issues relevant to the Director's proposals to facilitate the BoR in adopting its formal opinion or in providing guidance to the Director pursuant to Article 15(1) of Regulation (EC) No 713/2009.

1.3. The organisation and functioning of the AWGs have to:

- a) support the efficient functioning of the Agency, allowing for a smooth decision making process between its main bodies;
- b) safeguard the regulatory independence of the BoR.

2. Establishment and objectives

2.1. The Director establishes and dissolves the AWGs.

2.2. The Director appoints one or more Chairpersons for each AWG, giving utmost consideration to the recommendations from the BoR. The appointment is typically for a period of two years. However, the Director may extend the term of

appointment or appoint a new Chairperson before the end of the period if he/she considers this to be in the best interest of the Agency. When the Director intends to appoint a new AWG Chairperson, he/she informs the BoR in advance in order to receive the BoR's recommendation.

- 2.3. The Director, having consulted the Chairperson(s), may appoint one or more Vice-Chairpersons of an AWG. The Vice-Chairperson(s) assist(s) the Chairperson(s) and replace(s) him/her/them when he/she/they is/are not able to convene and chair the AWG meetings or to perform any other function provided for in these Rules or which is required for the efficient running of the AWG.
- 2.4. In case the Chairperson is unable to continue to perform his/her role in the AWG, a new Chairperson is appointed, following the same procedure. For this purpose, the Director informs the BoR of the need to appoint a new Chairperson in order to receive the BoR's recommendation.
- 2.5. The Director defines the objectives, deliverables, milestones and deadlines for the activities of the AWGs, after consulting the Chairperson(s) and taking the Agency's Work Programme into account. More specifically, the Director may ask the AWG to proceed with developing an initial draft of an opinion, recommendation or decision which the Agency is required or has decided to adopt, taking into account any relevant evidence available. The objectives, deliverables, milestones and deadlines are reviewed at least annually, but more frequently if required. More specifically, the objectives, deliverables and milestones/deadlines of an AWG may be amended when a new activity is assigned to it. This might happen, for example, in connection with a request received from the European Commission to develop new Framework Guidelines or to adopt individual decisions.
- 2.6. The Chairperson(s) is/are responsible for the effective functioning of the AWG and for the achievement of the assigned objectives. The Director may provide guidance to the Chairperson(s) on aspects related to the functioning of the AWG. If more than one Chairperson is appointed, they are expected to cooperate in co-chairing the AWG according to the guidance provided by the Director; they should jointly or severally perform the functions of the Chairperson envisaged in these Rules.
- 2.7. The AWG Chairperson(s) may establish Task Forces if this is considered appropriate. The AWG Chairperson(s) should define the composition of the Task Forces, taking the interests of AWG members into account. The Chairperson(s) appoint(s) one or more convenors for each Task Force. The AWG Chairperson(s) inform(s) without delay the Director of any newly established Task Force and of the appointed convenor(s).

3. Composition and AWG membership

- 3.1. The AWGs should allow the Agency staff and representatives of National Regulatory Authorities ("NRAs") to work together from an early stage on Agency deliverables. Therefore, each AWG is composed of senior representatives of the

NRAs represented in the BoR and of Agency's staff. Each NRA may appoint one senior representative to each AWG. If the Chairperson allows, more than one representative from each NRA can be allowed to participate in the AWG.

- 3.2. The European Commission can appoint one or more representative(s) as participant in each AWG and Task Force.
- 3.3. A NRA or European Commission representative may either be admitted as a Member or as an Observer to the AWG or any of its Task Forces.

Observers may be nominated to the extent that they support the work of the Member. Whenever necessary, they may participate in AWG or Task Force meetings.

- 3.4. Continuity of the membership of the AWGs and their Task Forces is crucial. Members of an AWG or any of its Task Forces should commit themselves to attend meetings and actively contribute to the work. If a member cannot be present at a given meeting, he/she may provide comments on draft documents before the meeting and/or delegate another person from the same institution (NRA, Agency or European Commission, as the case may be) to attend the meeting.

In order to ensure transparency and operational consistency between the AWG and its Task Forces, the convenor of a Task Force shall regularly inform the AWG of the work undertaken in the Task Force.

- 3.5. In order to be accepted as a member or observer to either an AWG or a Task Force, a Compliance Commitment shall be submitted to the Agency. This Commitment shall confirm the agreement and commitment by the member or observer to comply with the current version of the Rules, of which they shall be duly informed by the AWG Chairperson in accordance with paragraph 3.6. The Compliance Commitment may be expressed either on an individual basis, by using the model provided in Annex 1, or by the NRA legal representative committing all the members and observers representing the NRA concerned, by using the model provided in Annex 2a.

Signed Compliance Commitments shall be submitted to the Agency, where they will be kept in a dedicated registry. The signed Compliance Commitments shall be directly submitted by the member or observer to the Agency upon his admission to the AWG or Task Force. The documents can either be submitted in hard copy or in electronic form. In the latter case, signature of the Compliance Commitment may be done via electronic signature in accordance with Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures.

The rights and duties of the member or observer in the AWG or Task Force will only become effective from the moment of receipt of the Compliance Commitment and, where relevant, the IP waiver of Annex 2b, by the Agency.



A NRA or European Commission representative who is not nominated as member or observer and who is exceptionally invited to participate in a meeting of the AWG or any of its Task Forces shall be required to sign the Statement of Confidentiality and Conflict of Interest, by using the model provided in Annex 3, unless the Compliance Commitment made by the NRA legal representative as referred to in the first subparagraph would already cover this participant.

- 3.6. If the Rules are modified, the members and observers as well as any other persons and institutions who have signed a Compliance Commitment shall be duly notified of such change in conformity with this paragraph.

Members and observers shall be automatically alerted via e-mail that the latest version of the Rules has been uploaded by the Director to the ACERnet area of the ACER website. In addition, the Director shall inform the AWG Chairpersons of such upload.

The AWG Chairperson shall inform all members and observers of the AWG or its Task Forces of the modified Rules by summarising the main modifications and by making reference to the ACERnet area where they can be found. The same shall apply for any subsequent modification to the Rules. The AWG Chairperson may delegate the provision of information on the Rules and their modification to the Task Force convenor(s) in respect to the Task Force members and observers.

The members and observers have a period of four weeks to object to the proposed changes following receipt of the ACERnet e-mail alert. In case of objection, the respective member, observer or institution's Compliance Commitment shall be invalid. As the member, observer or institution is in such case no longer complying with paragraph 3.5, his/her participation rights are temporarily suspended or withdrawn.

The members and observers may withdraw from the Working Groups or Task Forces upon advance notice to the AWG Chairperson.

- 3.7. The members and observers of the AWG and Task Forces shall take all lawful steps to prevent the unauthorised disclosure of information which they receive from their participation in the AWG or Task Forces (in particular, but not limited to, information about undertakings, their business relations or their cost components), unless that information has already been made public or is accessible to the public. Members and observers of the AWG or Task Forces shall continue to be bound by this obligation also when they no longer take part in the AWG or Task Forces. A request may be submitted to the AWG Chairperson and Director of the Agency if any doubt arises as to whether or not particular information may be disclosed.

Except for commercial business secrets, members and observers are allowed to exchange commercially sensitive information either within the NRA which they represent or with other NRA, to the extent that all persons receiving such information are bound by these Rules or by rules having equivalent effect on

confidentiality of information. The information exchange and the appreciation of the level of protection of the confidential information by the NRA concerned shall fall under the member's or observer's responsibility.

- 3.8. At each meeting of the AWG or Task Force, members and observers shall declare any interest which could be prejudicial to their independence with respect to any point on the agenda. The Chairperson or convenor shall decide to which extent such interest may affect the participation of the member or observer concerned on that relevant point and take the necessary measure to ensure that the proceeding of the AWG or Task Forces, and their neutrality, are not adversely affected by the declared interests.
- 3.9. All rights, including copyright and other intellectual property rights, in any writings or other work created by a member or an observer in the performance of his/her duties shall be the property of the Agency. The member or observer shall be deemed to have assigned to the Agency all such rights automatically and without further formality at the time of creation of the concerned right.

The first subparagraph shall not apply to pre-existing documents circulated in an AWG or a Task Force for information purposes only by an NRA or the Commission.

- 3.10. With the agreement of the Director, the AWG Chairperson or the Task Force convenor may represent the AWG or the Task Force at external meetings with relevant stakeholders. Other AWG or Task Force members may participate in such meetings. In the interest of transparency, an oral or a written report of the meeting shall be presented to the AWG and to the Director.

4. Procedures

- 4.1. The AWG should produce an action plan for each objective or deliverable, as defined by the Director pursuant to paragraph 2.5 above, allocate tasks among the AWG's members, decide on the dates/frequency and nature of meetings, on the working method used and on the potential use of consultants.
- 4.2. The AWG Chairperson and the Task Force convenors keep the action plan up to date and inform the Director, as well as members and observers of any changes and on the progress being made.
- 4.3. The Chairperson convenes the AWG meetings. The convenor convenes the meeting of the Task Force. The meetings are convened at the Seat of the Agency or, in exceptional circumstances, in another location. Any travel costs for attending the AWG meetings and the Task Force meetings are covered by the attendees themselves. If possible, meetings should be made accessible by voice or videoconference as well.

- 4.4. The draft agenda of AWG meetings is defined by the Chairperson. Agenda items may be added or modified, if necessary, at a later date. However, one quarter of participants to an AWG meeting may veto the treatment at the meeting of items not included in the original draft agenda. Each agenda item should indicate whether it is accompanied by a properly referenced document.
- 4.5. The draft agenda of the meetings should be made accessible via ACERnet by the AWG Chairperson to all members, at least 15 working days in advance of the meeting. The accompanying documents should be made accessible to members at least 5 working days before the meeting.
- 4.6. Meetings should not be cancelled or re-scheduled, except in exceptional circumstances and, if possible, with at least 5-day notice. The Chairperson should inform AWG members immediately, by email, of any cancellation of meetings. If the meeting is to be rescheduled, the Chairperson should propose alternative dates.
- 4.7. The draft minutes of an AWG meeting should be submitted by the Chairperson to AWG members well in advance of the next AWG meeting. Members may provide comments prior to or at the next AWG meeting. The minutes must be submitted for approval at the next AWG meeting.
- 4.8. The minutes should at least include the following information: the date and venue of the meeting; the list of participants; approval of the agenda; approval of the draft minutes from the previous meeting; a brief update on the AWG's work/discussions; and a clear set of agreed action points and decisions (with deadlines).
- 4.9. The rules governing the meetings of the Task Forces are agreed between the Chairperson and the convenors. The rules should in any event allow that in urgent cases, the relevant Task Force and AWG may have to respond simultaneously on a given proposal.
- 4.10. The Chairperson monitors progress in the activities of the AWG. Members who have committed to perform specific tasks or Task Force convenors should inform the Chairperson of any delay or foreseen problems, so that the Chairperson can take any appropriate remedial action.

5. Reporting

- 5.1. The AWG Chairperson reports regularly and at least once per quarter, to the Director on the progress achieved by the AWG. The AWG Chairperson informs the Director immediately of any problem in the functioning of the AWG or when delays in the fulfilment of the objectives occur or are foreseen.
- 5.2. Upon completion of each activity, including, where asked to do so, the drafting of an opinion, recommendation or decision, the Chairperson of the AWG will prepare and submit to the Director a summary report. Where relevant, the report is

accompanied by the draft opinion, recommendation or decision. The AWG Chairperson should also send the report to the Chairman of the BoR.

- 5.3. The summary report referred to in paragraph 5.2 above should present, at least:
- a) The background of the document and the approach taken;
 - b) The issues analysed and the considerations which have emerged from the analysis;
 - c) The areas where consensus was reached within the AWG;
 - d) The areas where it was not possible to reach a consensus within the AWG, with a brief description of the different positions and an assessment of their relative merits and drawbacks.
- 5.4. The summary report referred to in paragraph 5.2 above should be, as much as possible, a factual account of the work undertaken by the AWG. However, the AWG Chairperson may include in the report his/her own opinions or the opinions of other AWG members as long as these are clearly identified as such.

6. Involvement of stakeholders

- 6.1. The AWG may organise informal consultations of stakeholders or stakeholder dialogues in formats to be agreed with the Director.
- 6.2. The AWG Chairperson or the convenor of a Task Force may invite external experts to participate in AWG or Task Force meetings, respectively. The Director as well as members and observers of AWGs and/or Task Forces have to be informed in advance about the participation of external experts. The invitees may present their opinions and, with the Director's consent, may have access to documents that are related to their contribution. External experts shall ensure the confidentiality of the information which they receive in connection to their participation in AWG and Task Force meetings. To this end, and prior to receiving any confidential documents, external experts shall sign a Statement of Confidentiality and Conflict of Interest, by using the model provided in Annex 3.

7. Final provisions

- 7.1. For the first meeting of an AWG, the invitation should be sent to the attention of the BoR members.
- 7.2. In the case of the first implementation of the present Rules, the signed Compliance Commitment referred to in paragraph 3.5 above are directly submitted by the member or observer to the Agency within two months of the entry into force of the

Decision adopting the present Rules. The documents can either be submitted in hard copy or in electronic form. In the latter case, signature of the Compliance Commitment may be done via electronic signature in accordance with Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures.



COMPLIANCE COMMITMENT

Title:

First Name:

Surname:

In conformity with Director Decision 2011-0xx, I hereby confirm that I commit to comply with the current version or any later version of the Rules for the Functioning of the Working Groups of the Agency for the Cooperation of Energy Regulators (“Rules”).

I hereby also give my consent to transfer all rights as referred to in paragraph 3.9 of the Rules to the Agency for the Cooperation of Energy Regulators under the conditions described in the said paragraph.

The above commitment and consent is subject to the Agency’s acceptance of my application to be admitted as a member or observer in an Agency Working Group or Task Force.

This Compliance Commitment is governed by the principles of EU law.

Done at: _____ on _____

SIGNATURE: _____

JOINT COMPLIANCE COMMITMENT

Title:

First Name:

Surname:

In conformity with Director Decision 2011-0xx, I hereby commit on behalf of [name national regulatory authority] that the members and/or observers which [name national regulatory authority] nominates for the Working Groups or Task Forces shall comply with the current version or any later version of the Rules for the Functioning of the Working Groups of the Agency for the Cooperation of Energy Regulators (“Rules”).

[name national regulatory authority] warrants that it is the holder of all the rights as referred to in paragraph 3.9 of the Rules, and hereby gives its consent to transfer the intellectual property rights to the Agency for the Cooperation of Energy Regulators under the conditions described in the said paragraph.

[If the NRA is not the holder of the IP rights, the NRA should also submit the individual IP waivers pursuant to the model of Annex 2b]

With respect to the individual nominations, the above commitment [and consent] is subject to the Agency’s acceptance of the candidate to be admitted as a member or observer in an Agency Working Group or Task Force.

This Compliance Commitment is governed by the principles of EU law.

Done at: _____ on _____

SIGNATURE: _____

IP WAIVER

Title:

First Name:

Surname:

In conformity with Director Decision 2011-0xx, I hereby give my consent to transfer all rights as referred to in paragraph 3.9 of the Rules to the Agency for the Cooperation of Energy Regulators under the conditions described in the said paragraph.

The above consent is subject to the Agency's acceptance of my application to be admitted as a member or observer in an Agency Working Group or Task Force.

This IP Waiver is governed by the principles of EU law.

Done at: _____ on _____

SIGNATURE: _____

STATEMENT OF CONFIDENTIALITY AND CONFLICT OF INTEREST

Title:

First Name:

Surname:

In conformity with Director Decision 2011-0xx, I hereby commit that I will take all lawful steps to prevent the unauthorised disclosure of information received as a participant in the Agency Working Group or any of its Task Forces (hereafter AWG), even when I no longer take part in the AWG, unless the information concerned has already been made public or is accessible to the public.

Hereby, I declare any possible item which may constitute a conflict of interest and which could be prejudicial to my independence with respect to any point on the agenda.

Done at: _____ on _____

SIGNATURE: _____