

## Explanatory Notes

*for a proposed Procedural Act of the Permanent High Level Group laying down the rules governing the adoption of Guidelines and Network Codes in the Energy Community*

### 1. Adoption of Network Codes and Guidelines in the Energy Community

In October 2011, the Ministerial Council of the Energy Community incorporated Directives 2009/72/EC and 2009/73/EC as well as Regulations (EC) No 714/2009 and No 715/2009, essential components of what is known as the “Third Package”. Together, they establish an upgraded governance scheme for the electricity and gas sector in Europe, including very important new features in areas such as unbundling, regulatory competences or retail markets. The “Third Package” also introduces new European bodies – ENTSO-E, ENTSO-G and ACER – which together with the European Commission are tasked with developing and updating the technical legislation required for a common and synchronous operation of interconnected energy systems in Europe.

In this respect, the Network Codes defined by Articles 6 and 8 of the “Third Package” Electricity and Gas Regulations will provide the detailed rules necessary for effective system operation, market integration and system development. They will be developed and made legally binding, following a drafting procedure involving the ENTSOs, ACER and the Commission, through comitology procedures. Furthermore, the European Commission also has the possibility on a number of additional issues, and as stipulated in numerous provisions throughout the Electricity and Gas Directives and Regulations, to draft and adopt own Guidelines following again comitology procedures.

Network Codes and Guidelines are at the very heart of the “Third Package” and are crucial for cross-border energy flows to become a reality and for a truly integrated internal energy market to emerge. Their importance is not limited to the European Union: The tasks of the Energy Community, as listed in Article 2 of the Treaty, include the creation of a stable regulatory and market framework in gas networks, power generation and transmission and distribution networks, the creation of a single regulatory space for trade in Network Energy as well as the development of Network Energy market competition on a broader geographic scale. The incorporation of harmonized Network Codes and Guidelines in the Energy Community is thus not only needed to complete the “Third Package” as implemented by the Ministerial Council in October 2011. It would contribute significantly to reaching key objectives of the Energy goals and reaping the benefits of integrated markets.

A second and not less important reason calling for the incorporation of Network Codes and Guidelines is related to the homogeneity between the European Union on the one side and

the Contracting Parties on the other side. Without the same Network Codes and Guidelines being applied in both pillars of the Energy Community, the balance will be distorted to an extent the goal of establishing a single internal market for Network Energy will be at risk. Lack of applicability of Network Codes and Guidelines in the Contracting Parties will create two separate legal and technical regimes jeopardizing the interoperability of interconnected networks in wider Europe. If Network Codes and Guidelines are not fully incorporated in the Energy Community's – and subsequently in the Contracting Parties' – legal orders, a gap in the pan-European energy governance regime will open up. For this reason, the present proposal aims to ensure that Network Codes and Guidelines are adopted by the Energy Community's competent institution, the Permanent High Level Group, and subsequently the Contracting Parties, as close as possible to the original adoption in the European Union, and as true as possible to their original content.

In the framework of the relevant institutions' rules governing membership and participation in the Network Code drafting process, the Secretariat considers it important for Contracting Parties' transmission system operators to involve themselves and actively take part in the procedures established within the European Union for the adoption of Framework Guidelines and of Network Codes, including through public consultations. By doing so, the transmission system operators can and should be an important source of information and advice to the PHLG member of their respective Contracting Party.

## **2. Legal basis and procedure**

Articles 27 and 28 of Decision D/2011/02/MC-EnC task the Permanent High Level Group to adopt a Procedural Act. In this case, Articles 86, 87 and 82 provide the basis for the decision-making.

## PROCEDURAL ACT

### **No 2012/1/PHLG-EnC of the Permanent High Level Group of the Energy Community of 23 March 2012 laying down the rules governing the adoption of Guidelines and Network Codes in the Energy Community**

The Permanent High Level Group of the Energy Community,

Having regard to the Treaty establishing the Energy Community ("the Treaty"), and in particular Articles 87 and 82 thereof,

Having regard to Articles 27 and 28 of Decision D/2011/02/MC-EnC on the implementation of Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009 and amending Articles 11 and 59 of the Energy Community Treaty ("Decision D/2011/02/MC-EnC"), providing for the adoption of Guidelines and Network Codes by the Permanent High Level Group upon proposal from the European Commission based on Article 79 of the Treaty,

Following up on the task assigned to the Permanent High Level Group in Articles 27(3) and 28(3) of Decision D/2011/02/MC-EnC to prepare a Procedural Act laying down the procedure for the incorporation of Guidelines and Network Codes adopted within the European Union,

Recognizing the importance of a synchronous evolution of the Energy Community *acquis communautaire* for the creation of an interconnected internal market throughout the Energy Community,

Acknowledging the necessity to transpose Guidelines and Network Codes into domestic legal orders as timely and truly to the original as possible, and to implement and enforce them vigorously,

Having regard to the Secretariat's proposal,

Taking into account the discussions at the meetings of 14 December 2011 and 23 March 2012,

**HAS ADOPTED THIS PROCEDURAL ACT:**

#### *Article 1*

#### ***Subject-Matter***

These rules lay down the procedures for the adoption of Guidelines and Network Codes by Decision of the Permanent High Level Group of the Energy Community upon proposal of the European Commission, as required by Articles 27 and 28 of Decision D/2011/02/MC-EnC.

#### *Article 2*

## **Definitions**

For the purpose of this Procedural Act

- The term “Guidelines” means Guidelines adopted and/or amended by the European Commission under Directive 2009/72/EC, Directive 2009/73/EC, Regulation 714/2009, and Regulation 715/2009;
- The term “Network Code” means the codes adopted and/or amended under Regulation 714/2009 or Regulation 715/2009.

## *Article 3*

### **Procedure**

- (1) The Presidency and the Vice-Presidencies shall include the European Commission’s proposal on the adoption of Guidelines or Network Codes in the agenda of the next possible meeting of the Permanent High Level Group. The text of the proposal shall be circulated by the Secretariat to all members at least 30 days before the relevant meeting.
- (2) If the next possible meeting of the Permanent High Level Group is to take place later than two months following the receipt of the above-mentioned proposal of the European Commission by the Secretariat, or later than three months, where it concerns the adoption of Network Codes, the Presidency, after consultation and in agreement with the Vice-Presidencies, may opt for decision-making by correspondence in line with the Rules of Procedure of the Permanent High Level Group.
- (3) Where the European Commission’s proposal concerns the adoption of Network Codes, the Secretariat shall forward it to the President of the Regulatory Board and request the opinion of this institution within an appropriate timeframe not exceeding 30 days. The President of the Regulatory Board shall transmit its opinion officially to the Secretariat, who shall notify it to the members of the Permanent High Level Group without delay. Where the Regulatory Board fails to submit an opinion within the specified timeframe, the Permanent High Level Group shall proceed without such opinion.
- (4) The Permanent High Level Group shall take its Decisions under this Procedural Act in accordance with Articles 78 to 81 of the Treaty.
- (5) Decisions of the Permanent High Level Group shall:
  - a. Specify the period within which the Contracting Parties shall transpose Guidelines and Network Codes, as adopted by the Permanent High Level Group’s Decision, into their domestic legislation and require that the Guidelines and Network Codes be transposed without changes to their text or their structure of the Decision, other than translation.
  - b. Require the Contracting Parties to ensure that the Guidelines and Network Codes, as adopted by the Permanent High Level Group’s Decision, are binding on market participants, and task the national regulatory authorities with monitoring and enforcing compliance.

- c. Require the Contracting Parties to notify the Secretariat of the measures transposing the Permanent High Level Group's Decision, and of any subsequent changes made to those measures, within two weeks of the adoption of such measures.
- (6) The Secretariat shall make Decisions available to all Parties within seven days of their adoption.

#### *Article 4*

##### **Addressees and entry into force**

This Procedural Act is addressed to the Parties and institutions of the Treaty. It shall enter into force upon adoption.

#### *Article 5*

##### **Availability of these rules**

The Secretariat shall make this Procedural Act available to all Parties within seven days of its adoption.

Done in Vienna on 21 June 2012

For the Permanent High Level Group:

(Presidency)