EU Balancing Suspected Misconduct

ACER & ENTSOG Consultation Document

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This document is a working document. It was prepared by ACER and ENTSOG for the European Commission, ENTSOG, TSOs, Market Area Managers or any other Balancing Operators, ACER and NRAs in an attempt to provide with recommendations on better implementation of the current regulatory framework and facilitate discussions on policy options for future legislation governing the functioning of the gas wholesale markets, including balancing markets. Its content is subject to changes after taking into consideration the feedback from the stakeholders.

EU Balancing Suspected Misconduct
Joint Recommendations

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1. Introduction

1.1. Purpose of the joint note

The functioning of balancing markets has changed significantly under the Commission Regulation (EU) No 312/2014 of 26 March 2014 establishing a Network Code on Gas Balancing of Transmission Networks ("BAL NC"). The BAL NC applies to balancing zones within the borders of the EU. The BAL NC sets gas balancing rules, including network-related rules on nomination procedures, imbalance charges, settlement processes associated with daily imbalance charges and provisions on operational balancing.

The BAL NC laid down the foundation of market-based balancing, where network users are responsible for balancing their inputs and off-takes. Therefore, the balancing rules are also instrumental to promote short-term wholesale gas markets, with trading platforms established to trade gas between network users. The transmission system operators carry out any residual balancing of the transmission networks that might be necessary to keep the network within its operational limits. According to Article 19(1) of the BAL NC, network users pay or receive (as appropriate) daily imbalance charges in relation to their daily imbalance quantity for each gas day.

According to recital (11) of the BAL NC: "*National regulatory authorities and transmission system operators should have regard to best practices and endeavours to harmonise processes for the implementation of this Regulation.*" The BAL NC has been progressively implemented since October 2015, with some exceptions. Implementation delays occurred in a few balancing zones[1].

In years 2016, 2018 and 2019 TSOs and Market Area Managers ("MAMs") reported cases where certain network users created substantial imbalances, for which they were charged but which they left unpaid despite their legal obligations described above. According to ENTSOG's information and press releases, such cases refer mainly to Germany, the Netherlands and Spain. The result has been incurred costs and damages to the balancing markets and the gas system in general, since aggregated costs were ultimately borne by all network users. For instance, in the Netherlands such incurred costs of non-payment of the defaulting network users were estimated to be approximately 16 million euros.

For that reason, ACER and ENTSOG together with the affected TSOs, Market Area Managers and related NRAs started a discussion during a workshop hosted by ENTSOG on the 10th of May 2019 on the lessons learned from the reported cases and how such risk could best be mitigated in the future. According to the views expressed in the workshop, affected TSOs and MAMs shared the view that solutions should be searched both at national and EU level. At national level, the frameworks should be adapted so that prevention monitoring checks and reactive measures are reinforced. At EU level, cross border sharing of information should be improved and TSOs/MAMs or any other entity acting as balancing operator should be given the possibility to take preventive measures based on this cross-border information sharing.

[1] For more details see the latest published *ACER Report on enabling short-term gas markets after interim balancing measures* and *ENTSOG BAL NC Implementation & Effect Monitoring Report 2019*

After internal discussions, a coordinated effort of ACER and ENTSOG started on January 2020 to elaborate joint recommendations on improvements of the European regulatory framework and/or recommendations on implementation of the current framework. The aim of the work was twofold: improving national practices through the sharing of good practices amongst TSOs, MAMs and NRAs and increasing cross-border collaboration and sharing of information. An internal ENTSOG survey on TSO/MAM commercial policies, which collected data on twelve Member States ("MSs"), covering the most liquid gas wholesale markets and including the MSs where cases were reported, allowed to better understand the implementation status of Article 31 of the BAL NC. The survey showed that the implementation measures were amended after the information of the reported cases was shared. The results were shared with ACER and the NRAs and helped identify the margin for improvements of the implementation of the current framework and the missing links especially in terms of cross border collaboration. ACER and the NRAs focused on collecting current practices for information sharing and the potential constraints that may apply. The regulatory community carefully reviewed the transparency improvements that could be made.

1.2. Terminology

For the purposes of the current note, certain key terms are defined as follows:

"Balancing Operator (BO)", means any entity responsible for balancing or monitoring checks related to balancing and creditworthiness, depending on the national circumstances, such as TSOs, MAMs or any third entity (e.g. Austria, UK). This term could also be introduced in the BAL NC.

"Network user" (NU), means network users which have concluded a "legally binding agreement, being a transport contract or another contract, which enables them to submit trade notifications (in accordance with Article 5 of BAL NC) regardless whether they have contracted capacity or not.

"Balancing Misconduct", means: 1. default in payment of charges related to balancing (according to Article 31(3) of BAL NC) and 2. an increased risk that the network user will get into a situation of default in payment. Such increased risk can be considered as established in the case that the network user is exposed in terms of credit limit (meaning its creditworthiness safeguards are non-sufficient to cover potential or actual liabilities related to imbalances based on BOs internal assessments) **and** risk for non-payment is identified in an objective and non-discriminatory manner according to BOs policies, such as "know your customer policy". Such objective and non-discriminatory policy measures include: transparency about the situations occurred and corrective measures taken as a response, which are proportionate to the risk exposure created.

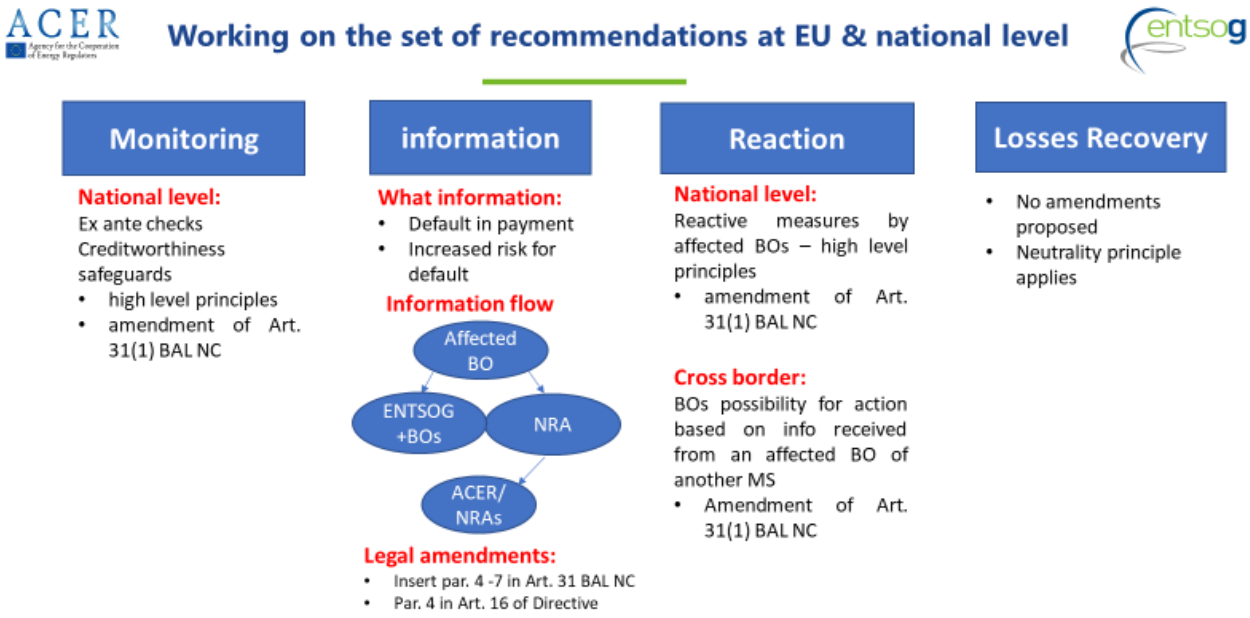
"Contractual arrangement" or simply "contract", means legally binding arrangement(s) for access to the gas wholesale market, which generate balancing obligations for network users.

1.3. Overview of the recommendations and scope

The present note includes recommendations, related to good practices for ex-ante monitoring checks on balancing and creditworthiness, cross border exchange of information, good practices currently implemented for reactive measures and possibility for reactive measures in case of balancing misconduct identified in another MS (especially in an adjacent market). Such recommendations are considered as efficient for addressing balancing misconduct by BOs and NRAs, involving ACER and ENTSOG where applicable, and do not exclude more sophisticated solutions if justified by the market needs. Finally, it includes a reminder of the provisions of the BAL NC setting rules for recovery of losses through the neutrality principle and incentives/penalties for preventing network users from creating imbalances. The latter is wider in scope but still partly related to balancing misconduct and

is included for the sake of completeness. Market manipulation pursuant to REMIT is out of scope of this note.

In summary, the following is proposed:



Such recommendations include legal amendments mainly of Article 31(1) of BAL NC, with insertion of new paragraphs in the same Article.

• ***Questions for public consultation - General:***
- *Do you share the concerns described in this chapter?*
- *What kind of measures do you consider to be of the highest value? Please explain.*
- *Do you agree with the proposed definition of balancing misconduct? Would you have additional comments for its improvement?*
- *Do you see any risks of implementing the proposed measures? If so, please describe them.*
- *Do you have any other remarks?*

2. Ex ante monitoring checks on balancing positions and creditworthiness

Article 31 of the BAL NC provides that TSOs can "*impose relevant contractual requirements, including **financial security safeguards**, on network users to mitigate their default in payment regarding any payment due for daily imbalance charges, within-day charges, balancing actions charges and other charges related to balancing activities*", provided that these measures are *transparent and* on *equal treatment basis, proportionate to the purpose and defined in the methodology referred to in Article 30(2*) of the BAL NC.

According to ACER and ENTSOG, BAL NC implementation monitoring reports as well as the results of ENTSOG's internal survey, the following conclusions were reached in terms of implementation of Article 31 by BOs and NRAs:

- ✓ All BOs that participated in the survey (from 12 MSs) apply a financial security system, as well as monitoring ex-ante checks of credit limits and balancing.
- ✓ All BOs that participated in the survey have in place a financial security system for NUs to enter/register and be able to subscribe capacities in the gas transportation system. In the majority of cases, such financial security requirement applies to all NUs as a condition for their signing of the contract with the BO, subscription of capacities or registration and is used to cover the risk of unpaid invoices (note that in some cases separate financial securities are required for access to the transportation system and to the balancing systems, in particular when those services are offered by a separate entity). Only in few cases, financial security safeguards are requested upon registration only in case of insufficient credit rating or in presence of a specific identified risk of breaching the contract (e.g. DE).
- ✓ In most cases, financial securities take the form of a bank guarantee or a cash collateral / security deposit. Alternatives can be used, such as a minimum credit rating, which can alleviate the NUs from the obligation to provide a financial security. Other securities can consist in a pledge over gas in storage, notarial deed or insurance certificate, depending on the national circumstances. This is not an exhaustive list and the variety of solutions allows BOs to best adapt to the specificities of each market.
- ✓ The calculation of the amount of the bank guarantees or other financial securities varies from country to country in the light of the risk exposure related to each and every network user's volume of activity on the considered market. This approach is generally followed and fulfils the requirement of proportionality. As a result, the individual amount typically reflects the risk exposure related to each and every NU's volume of activity on the considered market. The calculation is based mainly on capacity bookings (past and/or future). The calculation methodology often takes (but not always) into consideration balancing bill/invoices of previous month up to estimations of future imbalances (actual, actual potential or provisional liabilities). In rare cases a fixed amount is exceptionally asked mainly in case when the NU signs a contract for the first time or in the case that the network user has neither a history nor capacity booked (active at the virtual trading point as "paper trader"). Review and subsequent adjustments of the amounts of guarantees is done regularly, but the frequency varies largely: from daily to twice per year.
- ✓ For a good functioning of the balancing market the responsible party for monitoring the balancing markets, the BO monitors regularly the balancing position of the NUs in comparison to their credit limits. Such ex-ante checks have been reinforced after the reported cases of misconduct in the balancing market. Some BOs reported regular monitoring without specifying the frequency of checks that may be going from intraday, daily and up to monthly. Monitoring frequency of credit limits is relatively frequent, with the exception of one case when it takes place once per year.

Both the ENTSOG BAL NC monitoring report and the internal survey demonstrated a satisfying legal application of BAL NC provisions. However, ENTSOG and ACER in an effort to improve efficiency and shed light on good practices would be of the opinion that both financial safeguards and ex-ante monitoring checks are effective means of implementation of Article 31 of BAL NC. Therefore, ACER and ENTSOG recommend that BOs conduct regular ex-ante monitoring checks in terms of NU's creditworthiness and balancing position, subject to technical/operational specificities. Timely identification of NU's uncovered risk exposure allows for a quick reaction and sharing of information about increased defaulting risks. This principle could be embedded in Article 31(1) of BAL NC as

follows: "*The BO shall establish effective procedures to regularly monitor network user's balancing positions […]".*

The financial security safeguards are governed by national rules, which may vary. Despite differences, it is recommended they are strong enough to likely prevent "Balancing Misconduct" and ensure the good functioning of the market. For that reason, the following recommendations are proposed:

- Creditworthiness requirements can take at least one or more of the following forms: guarantees, advanced payment, cash deposit or high credit rating.
- The amount of the financial security safeguard should be proportionate to the liabilities/ potential exposure that are guaranteed. The calculation/fixation methodology of the security safeguards could take into consideration costs/fees related to balancing services and actions, for e.g. estimations on potential or actual imbalance costs against the financial safeguards charges.
- Creditworthiness adjustments should be done regularly to cover potential changes in the portfolio of the NU.
- Subject to legal provisions on confidentiality, the calculation methodology could take into consideration the necessity for adjustment of the creditworthiness safeguards based on information on balancing misconduct received by another BO from the same or another MS.

• *Questions for public consultation:*
- Do you think that measures such as monitoring checks and credit risk management arrangements provide a satisfying level of implementation of Article 31 of the BAL NC and reasoning?
- What kind of other measures would you consider relevant? Please explain.

3. Channels for cross-border exchange of information

Dealing with the reported cases has shown that cross border communication amongst BOs and NRAs needs to be facilitated in order to prevent similar misconduct in other markets. The cases have shown that information cannot always be shared due to legal boundaries, and it takes time to make an assessment of what can be shared with which organisation (see also section 3.3). Legal and operational improvements can be made to improve this situation by clarifying when, what and with whom information needs to be shared. The first question that needs to be addressed is what kind of information related to balancing misconduct can be shared and the second question is what the appropriate communication flow is.

3.1. Balancing misconduct information

We recommend that the information to be shared should be based on objective criteria. The purpose of the recommendations in this note is to protect the functioning of the balancing markets with proportionate measures. Therefore, attention is needed when it comes to the scope of the information that can be shared at a cross border level. The definition of "Balancing Misconduct" aims at giving guidance on what information would be considered as relevant for sharing. We recommend

that ENTSOG develops a draft template that is reviewed by the Agency to be used as guidance for BO and NRAs.

3.2 Cross border communication channels

Communication of the cases of balancing misconduct should be structured in two steps, the first step being as close to real time as possible and including two channels: a) a channel amongst affected BOs and all the rest of BOs via ENTSOG and b) a channel amongst affected BOs and the NRA of their jurisdiction and as a second step in time, a channel for sharing of the information amongst the NRA of the same jurisdiction and all the other NRAs via ACER.

Such a case should be shared amongst BOs the soonest possible, so that BOs are alerted and able to increase the monitoring checks and -where applicable- even take reactive measures. For communication on balancing misconduct, ENTSOG is considering creating a dedicated email address for receiving information on cases of balancing misconduct by BOs within the border of the EU. Taking into consideration the current legal barriers on sharing of information and until the legislation changes according to the recommendations under chapter 3.3.1, it remains with the BO to analyse whether and which information can be shared or not, based on the national legislation. BOs are recommended to dedicate adequate resources for such an information mechanism.

For communication amongst BOs and NRAs at cross border level, an appropriate mechanism shall be established. The information should be shared as soon as possible with the NRA of the same MS, which should then share it with all the other NRAs within ACER. For the purposes of the current note, operational details are not necessary.

3.3 Necessity for mitigation of confidentiality barriers

Sharing of information between BOs and NRAs of the same MS or across MSs is governed by the Third Energy Package, as transposed into national law, REMIT Regulation[2] and the contractual arrangements (including confidentiality obligations that may extend to several years after termination of the contracts). At EU level, Article 16 of the Gas Directive[3] protects the commercially sensitive information. It provides the following:

"*1. […] each transmission system owner, shall preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its activities, and shall prevent information about its own activities which may be commercially advantageous from being disclosed in a discriminatory manner. In particular, it shall not disclose any commercially sensitive information to the remaining parts of the undertaking, unless this is necessary for carrying out a business transaction. In order to ensure the full respect of the rules on information unbundling, Member States shall ensure that the transmission system owner including, in the case of a combined operator, the distribution system operator, and the remaining part of the undertaking do not use joint services, such as joint legal services, apart from purely administrative or IT functions.*

[2] Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency.

[3] Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas.

2. Transmission, storage and/or LNG system operators shall not, in the context of sales or purchases of natural gas by related undertakings, misuse commercially sensitive information obtained from third parties in the context of providing or negotiating access to the system.
3. Information necessary for effective competition and the efficient functioning of the market shall be made public. That obligation shall be ***without prejudice*** *to protecting commercially sensitive information*"

Such provision provides for the protection of information when it is qualified as commercially sensitive ("CSI"), without such definition being provided by the same framework. The qualification of commercially sensitive information or whether the BOs can share it with other BOs, is subject to varied interpretations according to national rules, which either transposed the Directive to the letter or which introduced certain details (e.g. in France operators can exchange CSI under very specific circumstances related to carrying out their missions, including obligations for security of supply). Such exceptions -explicitly- provided in the legal framework are rather limited. As a result of such a variety of interpretations, in some cases, sharing of information related to balancing misconduct is restricted. Even the identity of the NU may be considered as a CSI, moreover in the case that this NU is suspected of misconduct, and as such be subject to restrictions of sharing. Overall, there may be some difficulty in sharing information amongst BOs across the border, depending on the limitations foreseen by national law.

As far as exchange of information amongst BOs and NRAs is concerned, we are of the opinion that a clear legal ground should be established that would provide the obligation of the BO to share information on a NU related to Balancing Misconduct with the NRA of the same jurisdiction upon their own initiative, and when such information is requested.

Preventing balancing misconduct requires a certain freedom and legal clarity for exchange of relevant and necessary information between BOs and NRAs of the same MS and at cross border level in a timely and efficient manner. For the sake of legal certainty, legal amendments as well as contractual amendments amongst BOs and NUs (where applicable) are recommended as follows.

3.3.1. Recommended legal amendments

Insertion of paragraphs 4, 5, 6, 7 to art 31of the BAL NC:

4. A balancing operator that reasonably suspects a breach of the legal or contractual requirements as referred to in paragraph 1 shall notify the national regulatory authority and ENTSOG without any further delay.
5. When notified, the national regulatory authority shall share this information with the Agency and with the regulatory authority of all Member States without any further delay.
6. When informed, ENTSOG shall share this information with transmission system operator or Balancing Operators of all Member States without any further delay.
7. In a consultative process, ENTSOG shall develop a draft template which shall be reviewed by the Agency giving guidance on the content of the notification to be reported in accordance with paragraph 1. The template shall be made available to national regulatory authorities and Balancing Operators before [date].

This proposal requires a legal ground in the Gas Directive. Such ground could be found in the Article 16(3). To strengthen the legal basis, we propose the following:

- Insertion of Article16(4) of the Gas Directive:

4. Par. 1 shall not apply to information that shall be shared with other operators or national regulatory authorities under other legal provisions, including the (REMIT) Regulation, ACER Regulation, Regulation 715/2009 and the Network Codes.

3.3.2. Recommendation for contractual arrangements adjustments

The following proposal is elaborated in order to give indicative guidance to BOs for adapting their contractual arrangements with NUs in a way that the exchange of information is facilitated at national and cross border level in case of balancing misconduct, subject to the principle of proportionality. The proposal is an evolution of the "confidentiality clause" as elaborated in the template on Main terms and conditions of transport contracts affecting bundled capacities, published by ENTSOG in January 2018 (new text in italics). We acknowledge, though, that until the adaptation of the EU legislation (as proposed under the previous chapter) this proposal can only be useful and applied in those MS where the national legislation allows for a wider information sharing.

CONFIDENTIALITY CLAUSE and exchange of information between BOs and NRAs

• The BO shall safeguard the confidentiality of commercially sensitive information obtained in the course of carrying out its activities in compliance with the applicable laws and regulations.

• Parties shall treat and keep all information such as but not limited to information of business, legal, technical, financial nature obtained by one Party from the other in any form, such as but not limited to in writing, orally, virtually or electronically, as confidential. Parties shall not disclose any such confidential information to any third party without the prior written consent of the other Party, except where needed for the proper performance of the contracts of the BOs [to specify the list of third parties – non -limitative examples: employees, agents, contractors, etc.] and where shared with Balancing Operators, storage systems operators and LNG terminals operators.

The above confidentiality obligations shall not apply in the following (non- exhaustive list of) circumstances:

- the information is requested by law or a public authority (including but not limited to a regulatory authority, a tribunal); or
- the information is already in the public domain; or
- the information is already available to the receiving Party from another source without breaching of the present clause; or
- *the communication of this information to BO/NRAs -upon duly justified request or upon BOs own initiative- is necessary in order for them to maintain the good functioning of their respective market area in compliance with applicable law, including but not limited to cases that the NU has breached contractual and/or legal obligations related mainly to default in payment regarding any payment due for daily imbalance charges, within day charges, balancing actions charges and other charges related to balancing activities.*

• *Questions for public consultation:*
- *What kind of information should be included in the template developed by ACER/ENTSOG in order to allow timely and effective sharing of information to prevent cases of balancing misconduct? What other major points would you like to share about chapter 3?*

4. Reactive measures against balancing misconduct

According to the internal ENTSOG survey:

- All BOs contracts provide for reactive measures in case a NU is "exposed" (meaning that the financial creditworthiness safeguards of the NU are not enough to cover the liabilities). Terminology used for this situation varies, as well as the conditions of definition of such state. Most of them use thresholds, which can be a percentage, or a fixed number, of the balancing position in relation to credit limit of the NU or the opposite. Some systems might leave it open to the assessment of the BO to appreciate whether a risk exposure reached a certain level or not and decide whether the system is able to cope with multiple and varying suspicious circumstances, yet with the safeguard that such assessment must be duly grounded on objective circumstances. Very often we see granularity of such measures and thresholds, the higher the threshold is, the stricter the measure gets.
- In case a NU enters in a situation in which it is "exposed", this triggers an array of measures from the BOs for regularisation of the NU's situation (credit limit in comparison to balancing position). Measures that can be triggered are the top up of securities/(bank) guarantees, partial restriction to the participation of the NU in the market (nominations restrictions, capacity reservation restrictions) or else as a last resort suspension of the contract, partial or total, the last one being the most frequent measure.
- Before suspension or other measures, some time might be given to the NU for regularisation of its state of credit limits. Such period extends from 24 hours (applied by one BO for e.g. in case of high excess of the threshold) up to three months (applied by one BO for e.g. in case of not severe excess). Conditions of suspension vary according to the thresholds. The notification period is also variable, going from no notification at all (applied by 2 BOs in severe cases) up to some days in advance. Suspension can be of immediate effect or take some time (usually 1 or 2 days) to enter into force. Termination of the contract is also possible for some BOs as well as withdrawal of licence (4/12 of the EU MSs).

ENTSOG and ACER are of the opinion that reactive measures from a BO implemented at national level - in case that the financial safeguards are not enough to cover actual or estimations for potential liabilities – are necessary. The following is recommended:

- In a spirit of proportionality, reactive measures could be granular, subject to national specificities, meaning that several thresholds can be set corresponding to an increasing severity of the "exposure" of the NU. Action can be immediate or, BOs can give to the NU the

opportunity to mitigate their "exposure"[4]. Depending on the proactive measures provided in the contract, reactive measures should include a request for adjustment of security safeguards and following that a partial or total suspension of the contract, meaning suspension of certain NU's rights, including nominations, based on the abovementioned nationally set "exposure thresholds". Suspension of the contract with immediate effect could be considered and, where applicable, termination of the contract or withdrawal of licence could be applied.

At EU level, the BAL NC remains silent on the reactive measures that BOs can take in cases that are defined for the purpose of the current note as balancing misconduct. It only sets the following principle, in Article 31 par. 3 for the case of default:

"*3. In case of a default attributable to a network user, the transmission system operator shall not be liable to bear any loss incurred provided the measures and requirements referred to paragraphs 1 and 2 were duly implemented and such loss shall be recovered in accordance with the methodology referred to in Article 30(2).*"

Moreover, to address the gap on the possibility for immediate action at a cross-border level, amendments are proposed based on which BOs of an adjacent/another MS can take action based on the information received from an "affected" BO. Such measures could be to refuse of access of the network user at the gas wholesale market, if not yet registered or adjustments in the security safeguards and/or limitation of rights if this network user is already active in the market. In order to add clarity on the BAL NC and include the cross-border aspects, we propose to amend Article 31(1) could be amended, as follows:

1. The BO *shall establish effective procedures to regularly monitor network user's balancing positions* and be entitled to take necessary measures, including limitation of network user's rights and impose relevant contractual requirements on network users, *related to nominations or* financial security safeguards, to mitigate their default in payment regarding any payment due for the charges referred to in Article 29 and 30, *including on the basis of information shared under paragraph 4. BOs should not be held liable for any action taken by another BO based on the information shared under paragraph 4.*
No amendment is recommended for par. 3 of the same article.

• *Questions for public consultation:*
- *How would you improve the proposed amendments of Article 31 of the BAL NC that provide improved legal grounds to prevent and address cases of balancing misconduct, (taking into consideration the proportionality principle in terms of the interaction amongst the ex-ante and reactive measures)?*
- *What kind of other measures would you consider relevant? Please explain.*

[4] Reactive measures are fixed according to the proportionality principle ensuring the right balance with the proactive measures.

- *Do you have any other remarks?*

5. Recovery of losses: neutrality principle for BOs

According to the provisions of the BAL NC, the BOs shall not gain or lose by the payment and receipt of daily imbalance charges, within day charges, balancing actions charges and other charges related to their balancing activities. Any costs or revenues arising from balancing activities shall be passed by BOs to network users and especially in case of a default attributable to a NU, the TSO (and where applicable other BO) shall not be held liable, provided the measures and requirements referred to in paragraphs 1 and 2 of Article 31 were duly implemented.

The NRAs shall set or approve the methodology for the calculation of the neutrality charges for balancing and BOs shall publish the aggregated neutrality charges for balancing at least once per month.

The latest monitoring carried out by both ACER and ENTSOG on the implementation status of the BAL NC highlight, based on the self-reporting of TSOs and NRAs, that neutrality provisions have been implemented in the EU MSs, with only a few exceptions[5].

ACER and ENTSOG find that implementation of provisions on neutrality mechanisms are of key importance and encourage their further and full implementation.

Rules on neutrality mechanisms of the BAL NC should apply also for cases of BAL misconduct. For reasons of clarity we remind that the term “default” of Article 31(3) shall be interpreted as covering BAL misconduct cases, as described in the present.

• *Questions for public consultation:*
- *Do you consider that the current provisions set by the BAL NC are sufficient to ensure the neutrality of the cash flow of balancing operators? If not, what should be improved?*

[5] See more details in Chapter 2.9 of ENTSOG BAL NC Implementation Monitoring Report and the European Union Agency Report on the implementation of the Balancing Network Code of 8 April 2020 (enabling short-term gas markets after interim balancing measures)

ANNEX

If all amendments are accepted, Article 31 of BAL NC should read as follows:

1. The BO ***shall establish effective procedures to regularly monitor network user's balancing positions*** and be entitled to take necessary measures, including limitation of network user's rights and impose relevant contractual requirements on network users, ***related to nominations or*** financial security safeguards, to mitigate their default in payment regarding any payment due for the charges referred to in Article 29 and 30, ***including on the basis of information shared under paragraph 4. BOs should not be held liable for any action taken by another BO based on the information shared under paragraph 4.***

2. The contractual requirements shall be on a transparent and equal treatment basis, proportionate to the purpose and defined in the methodology referred to in Article 30(2).

3. In case of a default attributable to a network user, the transmission system operator shall not be liable to bear any loss incurred provided the measures and requirements referred to paragraphs 1 and 2 were duly implemented and such loss shall be recovered in accordance with the methodology referred to in Article 30(2).

4. ***A balancing operator that reasonably suspects a breach of the legal or contractual requirements as referred to in paragraph 1 shall notify the national regulatory authority and ENTSOG without any further delay.***

5. When notified, the national regulatory authority shall share this information with the Agency and with the regulatory authority of all Member States without any further delay.

6. When informed, ENTSOG shall share this information with transmission system operator or Balancing Operators of all Member States without any further delay.

7. In a consultative process, ENTSOG shall develop a draft template, which shall be reviewed by the Agency, giving guidance on the content of the notification to be reported in accordance with paragraph 1. The template shall be made available to national regulatory authorities and Balancing Operators before [date].

Additional measures

ACER and ENTSOG wish to get stakeholders feedback on two additional measures that could be considered for development as long as the market finds them useful, necessary and efficient.

EU-wide registry of network users: *to create a registry collecting information on network users active in the EU balancing markets, including information regarding which MS network users are registered and whether a network user is active or not (meaning recently deactivated). It is not about the creation of a new registration process but rather collecting the information on already registered network users and display them at EU level.*
• *Are you in favour of establishing an EU wide registry of active network users as a tool to detect and prevent balancing misconduct in the EU gas market? Please provide a reasoning for your answer.*
• *Which information is needed to establish that the network user is active in a balancing market?*
• *Who should have access to the registry? TSO, NRA, network users, market operators, others? Please provide a reasoning for your answer.*
• *How frequent should the updates of the list be, given the nature of the balancing trading and potential misconduct? Please explain.*
• *Do you have any other remarks?*

Blacklist: *to create an EU wide list of network users that have committed balancing misconduct (that might include the information whether the misconduct was rectified by the network user)*
• *Are you in favour of establishing an EU wide (balancing) blacklist of network users who have been involved in misconduct? Please provide a reasoning for your answer.*