

**Memorandum of Understanding
on cooperation, information exchange and consultation**

This Memorandum of Understanding (“MoU”) has been reached

BETWEEN

the EFTA Surveillance Authority (“the Authority”), with its seat in Brussels, Belgium

AND

the European Union Agency for the Cooperation of Energy Regulators (“ACER”), with its seat in Ljubljana, Slovenia

WHEREAS:

- (1) On 5 May 2017, the following legislation was incorporated into the EEA Agreement by EEA Joint Committee Decision No 93/2017:¹
 - a. Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators;²
 - b. 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;³
 - c. 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;⁴
 - d. Commission Regulation (EU) No 543/2013 of 14 June 2013 on submission and publication of data in electricity markets and amending Annex I to Regulation (EC) No 714/2009 of the European Parliament and of the Council;⁵
 - e. Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC;⁶

¹ EEA Joint Committee Decision No 93/2017 of 5 May 2017 amending Annex IV (Energy) to the EEA Agreement. The EEA Joint Committee Decision No 93/2017 is available at: <http://www.efta.int/sites/default/files/documents/legal-texts/eea/other-legal-documents/adopted-joint-committee-decisions/2017%20-%20English/093-2017.pdf>

² OJ L 211, 14.8.2009, page 1.

³ OJ L 211, 14.8.2009, page 15.

⁴ OJ L 211, 14.8.2009, page 36.

⁵ OJ L 163, 15.6.2013, page 1.

⁶ OJ L 211, 14.8.2009, page 55.

- f. 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 and repealing Directive 2003/55/EC;⁷
 - g. Commission Decision 2010/685/EU of 10 November 2010 amending Chapter 3 of Annex I to Regulation (EC) No 715/2009 of the European Parliament and of the Council on conditions for access to the natural gas transmission networks;⁸ and
 - h. Commission Decision 2012/490/EU of 24 August 2012 on amending Annex I to Regulation (EC) No 715/2009 of the European Parliament and of the Council on conditions for access to the natural gas transmission networks.⁹
- (2) In accordance with the EEA Joint Committee Decision No 93/2017, the EU and EEA EFTA Member States agreed, with due regard to the two-pillar structure of the EEA Agreement, that the Authority will adopt decisions, in cases involving one or more EEA EFTA States, addressed to the national regulatory authorities (“NRAs”) of the concerned EEA EFTA State(s), whereas ACER will be competent to perform actions of a non-binding nature, such as the adoption of opinions and recommendations, towards EEA EFTA States’ NRAs. Action on either side will be preceded by, as appropriate, consultation, coordination or information exchange between ACER and the Authority.
- (3) Moreover, according to the EEA Joint Committee Decision No 93/2017, it was agreed that in order to ensure integration of ACER’s expertise in the process and consistency in consideration of the two-pillars structure of the EEA Agreement, individual decisions of the Authority addressed to EEA EFTA States’ NRAs will be adopted on the basis of drafts prepared by ACER.

ACER AND THE AUTHORITY HAVE REACHED THE FOLLOWING
UNDERSTANDING:

Chapter I

Introductory provisions

Article 1

Definitions

For the purpose of this MoU:

- (a) “The Parties” means the signatories to this MoU or their successor authorities.
- (b) “ACER Regulation” means Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.
- (c) “Electricity Regulation” means Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the

⁷ OJ L 211, 14.8.2009, page 94.

⁸ OJ L 293, 11.11.2010, page 67.

⁹ OJ L 231, 28.8.2012, page 16.

network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003.

- (d) "Gas Directive" means 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 and repealing Directive 2003/55/EC.
- (e) "ACER Rules of procedure" means any rules of procedure adopted by the bodies of ACER, in order to provide practical arrangements for the functioning of ACER's internal bodies, committees, panels or other working structures.
- (f) "EEA EFTA States" means the Republic of Iceland, the Principality of Liechtenstein and the Kingdom of Norway.
- (g) "EEA Agreement" means the Agreement on the European Economic Area.
- (h) "EEA law" means the main text of the EEA Agreement, as well as secondary legislation incorporated into the EEA Agreement at any particular time, in particular Annex IV (Energy), as interpreted by the EFTA Court and the Court of Justice of the European Union.

Article 2

Purpose and legal character

1. The purpose of this MoU is to set out ACER's and the Authority's common understanding of the EEA Joint Committee Decision No 93/2017, incorporating the legal acts referred to into the EEA Agreement, taking into account Article 7 and Protocol 35 of the EEA Agreement.
2. This MoU is a statement of intent to cooperate in a manner consistent with, and permitted by, the laws and requirements that govern ACER and the Authority.
3. This MoU is not intended to and does not: (a) constitute in any way a binding or legal agreement, (b) impose any legal obligation or duty on ACER, the EU, the Authority or EEA EFTA States, (c) confer any rights, or (d) supersede applicable laws. This MoU is without prejudice to any ongoing process under the EU enlargement and/or neighbourhood policy.
4. This MoU does not prejudice or affect in any way the competences of any institutions or authorities in the States of the European Economic Area.

Chapter II

Binding decisions, cooperation, information exchange and consultation

Article 3

Key principles and contact persons

1. ACER and the Authority recognise the importance of close and continuous cooperation, information exchange and consultation for the fulfilment of their tasks, as stipulated by Union law and the EEA Agreement. ACER and the Authority commit their best efforts to follow the spirit of this MoU when carrying out these tasks and in developing their cooperation in relation thereto.

2. For the purpose of implementing this MoU:
 - a) ACER's contact point will be the Team Leader Legal Service.
 - b) The Authority's contact point will be the Officer in charge of the energy portfolio.
3. The Authority and ACER will notify each other of any changes to these contact points by an exchange of letters between the Director of ACER and the Authority's President.

Article 4

Binding decisions of the Authority

It is the Authority that has the power to adopt binding decisions under Articles 7, 8 and 9 of the ACER Regulation, Article 17(5) of the Electricity Regulation and Article 36(4) third subparagraph of the Gas Directive, with regard to NRAs in the EEA EFTA States. Such decisions shall, without undue delay, be adopted on the basis of drafts prepared by ACER at its own initiative or at the request of the Authority, in the cases specified and under the conditions laid down in these legislative acts, which have been incorporated into the EEA Agreement and in accordance with ACER's applicable Rules of procedure.

Article 5

Cooperation arrangements and information exchange with regard to the binding decisions of the Authority

1. ACER and the Authority agree to cooperate closely throughout the entire process in relation to the Authority's adoption of binding decisions under Articles 7, 8 and 9 of the ACER Regulation, Article 17(5) of the Electricity Regulation and Article 36(4) third subparagraph of the Gas Directive, as incorporated into the EEA Agreement, and addressed to NRAs in the EEA EFTA States. In this cooperation, ACER and the Authority will exchange any information that may have an impact on an ACER decision and / or on a draft decision to be prepared by ACER as swiftly as possible, taking into account the applicable deadlines for decision.
2. For the purpose of paragraph 1, ACER will prepare drafts in accordance with the applicable provisions of Union law and the EEA Agreement for the Authority.
3. Binding decisions by the Authority will, without undue delay, be adopted on the basis of the drafts prepared by ACER.
4. ACER will in due time inform the Authority of the drafts under preparation. Once these drafts are adopted by ACER, it will immediately submit the drafts to the Authority.
5. Should the Authority request the preparation of a draft from ACER, it will provide ACER with all relevant/necessary information.
6. The Authority will inform ACER of any decision based on a draft prepared by ACER before formal adoption of the relevant decision.
7. All drafts will be prepared by ACER and submitted to the Authority in English.

8. The Authority will incorporate any specificities of the EEA Agreement while adopting a decision based on a draft prepared by ACER.
9. If ACER needs information from an EEA EFTA NRA, system operator or entity in an EEA EFTA State to prepare drafts for the purpose of paragraph 2, it shall ask the Authority to request the said information from the concerned NRA, system operator or entity, and to share it with ACER upon receipt.

Article 6

Decision-making procedure and appeals

1. ACER and the Authority agree that the right to be heard of any named addressee of a decision must be ensured and respected. When ACER prepares a draft for the Authority, it shall inform the Authority. The latter shall set a time limit within which the NRAs of the EEA EFTA States shall be allowed to express their views on the matter, taking full account of the urgency, complexity and potential consequences of the matter.
2. NRAs of the EEA EFTA States may request the Authority to reconsider its decision. The Authority shall forward this request to ACER. In that case, ACER shall consider preparing a new draft for the Authority and reply without undue delay.
3. Where ACER amends, suspends or withdraws any decision parallel to a decision adopted by the Authority, ACER shall, without undue delay, prepare a draft to the same effect for the Authority.
4. Where the Board of Appeal amends, suspends or terminates any decision of ACER parallel to the decision adopted by the Authority, ACER shall without undue delay prepare a draft decision to the same effect for the Authority. When ACER is preparing a new draft in this regard, Articles 5 and 6 will apply accordingly.

Article 7

Opinions and recommendations

1. In accordance with the EEA Joint Committee Decision No 93/2017, ACER and the Authority shall cooperate closely when ACER is adopting opinions and recommendations in cases concerning an EEA EFTA NRA, system operator or entity.
2. ACER shall inform the Authority as soon as possible when it is asked to issue an opinion or undertakes on its own initiative to issue an opinion which concerns an EEA EFTA NRA, system operator or entity.
3. ACER shall inform the Authority as soon as possible when it is asked to issue recommendations or undertakes on its own initiative to issue recommendations, which concern an EEA EFTA NRA, system operator or entity.
4. If ACER wishes to request information from an NRA, system operator or entity in an EEA EFTA State in the context of an opinion or recommendation in the cases specified and under the conditions laid out in the legislative acts incorporated into

the EEA Agreement, ACER shall inform the Authority as soon as possible in the preparation of such a request.

5. When ACER is required to submit its opinions or recommendations to the European Commission in the cases specified and under the conditions laid out in the legislative acts incorporated into the EEA Agreement, it shall submit them simultaneously to the Authority when the said opinions or recommendations concern an EEA EFTA NRA, system operator or entity in an EEA EFTA State.

Article 8

Dispute resolution

Disagreement between ACER and the Authority, with regard to the administration of the provisions in this MoU, shall be settled by means of consultation and negotiation between ACER and the Authority.

Article 9

Participation

1. ACER and the Authority will take the necessary measures to give effect to their reciprocal right to participate in each other's decision-making and preparatory bodies, including internal committees, working groups, task forces and panels without the right to vote.
2. In participating in the work of ACER's decision-making bodies, such as the Board of Regulators and preparatory bodies of ACER, including internal committees, working groups, task forces and panels, the Authority will comply with ACER's Rules of Procedure.
3. ACER has a reciprocal right to participate in the work of the Authority when the College takes binding decisions addressed to NRAs in the EEA EFTA States. If the Authority establishes its own preparatory bodies, ACER will be granted a reciprocal right of participation in them.
4. ACER and the Authority will invite each other in due time to meetings of preparatory bodies and decision-making bodies and will inform each other regularly and proactively about the creation of new bodies that might be of interest to ACER and the Authority.

Article 10

Information exchange

1. ACER and the Authority will exchange information necessary for them to fulfil their tasks under this MoU to the fullest extent possible.
2. Upon request from the Authority, ACER will, subject to their confidentiality regime, forward information collected or received, in the cases specified and under the conditions laid in the legislative acts incorporated into the EEA Agreement, from NRAs, system operators or entities in the EEA EFTA States. ACER has a

reciprocal right to request the Authority to provide information collected or received, in the cases specified and under the conditions laid in the legislative acts incorporated into the EEA Agreement, from such NRAs, system operators or entities.

3. ACER and the Authority will establish secure channels for information exchange, taking into account the need to protect the confidentiality of such information and the need for an effective exchange of views between ACER and the Authority.
4. ACER and the Authority will ensure that their decisions are publicly available, adequately reflecting any confidentiality concerns and limitations as provided for by applicable Union law and the EEA Agreement.
5. The Authority processes any personal data in accordance with rules equivalent to the applicable EU data protection legislation.

Chapter III

Final provisions

Article 11

Cooperation in relation to proceedings before the EFTA Court

If a decision adopted by the Authority on the basis of a draft by ACER is challenged before the EFTA Court, the Authority will without delay inform ACER, which provided a draft for the challenged decision and request ACER to provide all necessary assistance in the defense of its decision.

Article 12

Confidentiality

1. ACER and the Authority will keep information shared under this MoU, requests made under this MoU, the contents of such requests and any other matters arising thereunder confidential to the extent permitted by Union law and the EEA Agreement.
2. The disclosure of non-public information received under this MoU to any non-signatory of the MoU will be subject to the prior consent of the Parties where the information originates, as applicable.
3. ACER and the Authority shall ensure that their staff members participating in each other's decision-making and preparatory bodies do not provide access to the work of these bodies to other persons, including staff members or other representatives of the EEA EFTA NRAs not participating themselves in these bodies and refrain from any action that may lead to direct or indirect disclosure of any related information or work. Staff members of ACER and the Authority participating in each other's decision-making and preparatory bodies can share information on the work of these bodies with other staff members of ACER and the Authority, provided that the latter is subject to and respects the same confidentiality requirements provided for in this MoU or requirements having an equivalent effect. ACER and the Authority's staff members shall continue to respect the

confidentiality requirements set out in this paragraph once they stop participating in the aforementioned bodies.

Article 13

Successor authorities

Where the relevant functions of ACER or the Authority are transferred or assigned to another authority or authorities, the terms of this MoU will apply to the successor authority or authorities performing those relevant functions. Such successor authority or authorities will be considered as a signatory or signatories to this MoU without the need for any further amendment to this MoU and notice will be provided to the Parties.

Article 14

Revision and Amendments

1. This MoU will be revised whenever the relevant provisions of the EEA Agreement are changed or whenever deemed appropriate by the Parties.
2. This MoU may only be amended with the written consent of the Parties.

Article 15

Execution

This MoU will enter into force on the date it is signed by the last Party.

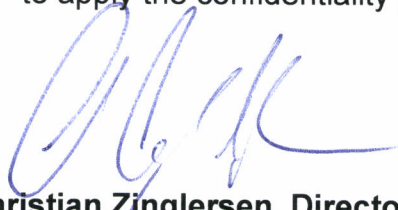
Article 16

Termination

This MoU will remain operative for an unlimited period of time.

If one of the Parties wish to terminate this MoU, it will provide thirty (30) calendar days' prior written notice to the other Party.

Following a Party's withdrawal from this MoU, the Parties to this MoU will continue to apply the confidentiality protections set out in this Memorandum.



Christian Zinglensen, Director
(For the European Union Agency
for the Cooperation of Energy Regulators)
On 10.09.2020, in Ljubljana



(For the EFTA Surveillance
Authority) *President*

On 17.09.20, in Brussels