

ACER Framework Guideline on CAM: art 2.4.2

“Amendment of existing capacity contracts”

Opinion of the ENTSOG Legal Group

Article 2.4.2 of ACER’s CAM Framework Guideline (FG) proposal states that network users should aim at reaching an agreement on the split of the new bundled capacity in order to have existing capacity contracted before the entry into force of the network codes bundled no later than five years thereafter. If no agreement on the split of bundled capacity can be reached, the TSOs are entitled to split the bundled capacity proportionally in accordance with the FG.

The ENTSOG Legal Team has analysed the matter with regards to feasibility, and Team is of the opinion that entrusting TSOs with the right (or the task) of unilaterally changing transmission contracts to which they are parties would, if this right is exercised, amount to a breach of contract, with exposure to damage claims and/or a renegotiation or a termination of the contracts with subsequent losses of revenues. The response of ENTSOG to ACER’s consultation dated 28th March 2011 reflects this position and concludes that it is not a task for a contracting party such as TSOs to unilaterally impose changes to existing transmission contracts.

The ENTSOG Legal Team is of the opinion that the European legislation directly applicable or transposed at the national level could impose an obligation on both contracting parties to amend their agreement in a certain way within a reasonable period of time to ensure the bundle of existing capacity contracted. The appropriate way to ensure that contracting parties fulfil such an obligation in time would be by monitoring the progress of the bundling of capacity and ultimately enforcement of such an obligation by the NRA (or any other competent authority) by means of administrative sanctions. Any intervention in the contracts by the NRA, to the extent that such intervention affects contractually stipulated or otherwise legally fixed terms, might be considered as a direct or indirect expropriation of contractual rights, which amounts to violation of the right to peaceful enjoyment of possession, guaranteed under article 1 of the First Protocol annexed to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

However, it is the view of the ENTOSG Legal Team that European legislation directly applicable or transposed at the national level may not impose an obligation on one of the contracting parties to ultimately unilaterally amend the contract without the other contracting party being able to exercise its contractual rights resulting from a unilateral amendment of the contract. This would be in violation of the internationally accepted principle of freedom of contract for not considering the will of the contracting parties involved. Under the national laws of the Member States, and pursuant to widely used contractual provisions under commercial terms, the other contracting party shall be entitled to, amongst others, have a recourse such as claim for compensation or termination of the contract should the equilibrium of the contract be affected and/or should the change be detrimental to its rights under the contract. We refer to the Principles of European Contract Law prepared by the Commission on European Contract Law and commonly recognised in the legal systems of the European Union. As a result, the Legal Team recommends not to include any sort of "sunset clause" in the Network Code on CAM, as this might be prejudicial (on a material level) to TSOs.