

# **Misconduct at EU balancing zones**

## Policy paper with recommendations

10 February 2021

This policy paper was prepared by ACER and ENTSOG for the European Commission, transmission system operators, market area managers or any other balancing operators and national regulatory authorities to provide with good practices 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. This paper incorporates feedback received as part of the public consultation held between the 21<sup>st</sup> of September 2020 and the 3<sup>rd</sup> of November 2020.

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## 1. Introduction

### 1.1. Purpose of the joint paper

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 the 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 ('NUs') 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 NUs. The transmission system operators ('TSOs') 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, NUs 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<sup>1</sup>.

In 2016, 2018 and 2019, TSOs and market area managers ('MAMs') reported cases in which certain NUs 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 NUs. For instance, in the Netherlands, such incurred costs of non-payment of the defaulting NUs were estimated to be approximately 16 million euros.

At the same time, ACER-CEER paper, The Bridge Beyond 2025<sup>2</sup>, also noticed the problem of potentially inappropriate behaviour of the NUs and indicated the need to develop solutions to deal with this risk.

For that reason, ACER and ENTSOG together with the affected TSOs, MAMs and related national regulatory authorities ('NRAs') started a discussion during a workshop, hosted by ENTSOG on the 10<sup>th</sup> of May 2019, on the lessons learned from the reported cases and how such risk could be best mitigated in the future. According to the views expressed in the workshop, affected TSOs and MAMs shared the view that solutions should be investigated both at national and EU levels. At a 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

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<sup>1</sup> For more details see: [ACER Report on enabling short-term gas markets after interim balancing measures](#) and [ENTSOG BAL NC Implementation & Effect Monitoring Report 2019](#)

<sup>2</sup> For more details see:

[https://www.acer.europa.eu/Official\\_documents/Acts\\_of\\_the\\_Agency/SD\\_The%20Bridge%20beyond%202025/The%20Bridge%20Beyond%202025\\_Conclusion%20Paper.pdf](https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/SD_The%20Bridge%20beyond%202025/The%20Bridge%20Beyond%202025_Conclusion%20Paper.pdf)

balancing operator should be given the possibility to take preventive measures based on this cross-border information sharing.

After internal discussions, a coordinated effort of ACER and ENTSOG started in January 2020 to elaborate joint policy paper with recommendations on improvements concerning the European regulatory framework outlining recommendations for the implementation of this 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 of Article 31 of the BAL NC status of the current regulatory framework. 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 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 paper, 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 (eg. Austria, UK). ACER and ENTSOG acknowledge that the same rules of the BAL NC that apply to TSOs, do apply to the entities in charge of balancing, according to Article 4(4) of the BAL NC.

'Network user' ('NU') means NUs 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 the BAL NC) regardless whether they have contracted capacity or not.

'Balancing Misconduct' means: i) default in payment of charges related to balancing (according to Article 31(3) of the BAL NC) or ii) an increased risk that the NU will get into a situation of default in payment. Such increased risk can be considered as established in the case when the NU is exposed in terms of credit limit (meaning its creditworthiness safeguards are non-sufficient to cover the potential or actual liabilities related to imbalances based on BOs' internal assessments) and the risk for non-payment is identified in an objective and non-discriminatory manner, according to the BOs' policies, such as '*know your customer policy*'<sup>3</sup>. Such objective and non-discriminatory policy measures include: transparency about the

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<sup>3</sup> Commercial policy (for example: '*Know your customer policy*') is a set of rules and instruments that can be understood, for example, as a BO policy verifying the identity of the candidate NU and assessing its professional reliability, along with the potential risks of fraudulent intentions or performing illegal acts in connection with the services in accordance with national and European legal framework. It could include but is not limited to the trading history and track record, financial health check and reputational information publicly available and can be updated from time to time.

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 NUs.

### **1.3. Overview of the recommendations and scope**

The present policy paper 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 proactive 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.

Proactive and reactive measures should be applied in an interactive way to achieve the best possible impact, based on country specific choices and needs evaluated in the light of the proportionality principle.

ACER and ENTSOG understand that proactive measures improve the correct functioning of the market and the policy paper refers to the following key proactive measures:

- 1) The follow-up of the creditworthiness of the NU to ensure that sufficient financial safeguards are available;
- 2) ‘*Know your customer*’ and ‘*due diligence*’ policies to screen obviously fraudulent market participants and remove them from the sales ledgers;
- 3) Exchange of information at a cross border level amongst BOs, ACER, NRAs and ENTSOG to share intelligence early on about misconduct cases.

The policy paper equally highlights that reactive measures with immediate outcome could be effective in reducing the damage created by non-payment and the paper foresees reactive instruments that aim to recover the damage caused or stop its proliferation:

- 1) Notifying and/or drawing the guarantees of the NU;
- 2) Imposing partial restriction to the participation of the NU in the market (nominations restrictions, capacity reservation restrictions);
- 3) The suspension of the NU’s contract partially or fully with the possibility of the termination of the contract by BOs or TSOs, or the possibility of the withdrawal of licence (feasible in some EU MSs).

Exchange of information at a cross border level amongst BOs and NRAs should be facilitated. Annex 2 points to the findings of the public consultation and the need to do further work concerning the design of an appropriate communication tool.

In connection to these measures, the policy paper suggests a few amendment proposals to the BAL NC.

Finally, the policy paper includes a reminder of the provisions of the BAL NC on neutrality concerning rules for the recovery of losses through the neutrality principle at a last resort, when

the measures to prevent balancing misconduct were not effective and only insofar the losses could not be recovered.

Market manipulation pursuant to REMIT is out of scope of this paper.

## **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, the BAL NC implementation monitoring reports as well as the results of the 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). In a few cases, financial security safeguards are requested upon registration in circumstances where there is insufficient credit rating or where a specific risk of breaching the contract is identified (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.
- 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 NU’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. Calculation is based mainly on capacity bookings (past and/or future). Calculation methodology takes often (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 the case when the NU signs a contract for the first time or in the case that the NU has neither a history nor capacity booked (active at the virtual trading point as a ‘paper trader’). Review and subsequent adjustments of the amounts of guarantees are done regularly, but the frequency varies largely, from daily to twice per year.
- For good functioning of the balancing market, the BO regularly monitors 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 of credit limits is performed at frequent intervals, with the exception of one case, where the monitoring takes place once per year.

ENTSOG and ACER, in an effort to improve efficiency and shed light on good practices, would be of the opinion that proactive measures are of utmost importance for mitigating balancing misconduct. Both, financial safeguards and ex-ante monitoring checks, are effective means of implementation of Article 31 of the 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 the BAL NC as follows: *"The BO shall establish effective procedures to regularly monitor NU's balancing positions [...]"*.

The financial security safeguards are governed by national rules, which may vary. Despite differences, it is recommended that 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 the 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, calculation methodology could take into consideration the necessity for adjustment of the creditworthiness safeguards based on the information on balancing misconduct received by another BO from the same or another MS;
- *'Know your customer'* and *'due diligence'* policies are strongly recommended and should be promoted. They complete the ex-ante checks for a continuous monitoring of the credibility and creditworthiness of the NUs, including indicatively information revealing changes in companies and persons involved. Lessons learned should be shared regularly on a continuous basis amongst NRAs and BOs in the spirit of building appropriate *'know your customer'* policies;
- Sharing intelligence among the BOs concerning efficient practices in risk assessment and assertive and timely management of misconduct cases is also helpful.

### **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. Legal and operational improvements can be made that guarantee efficiency, certainty and at the same time security by mitigating legal risks. 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 an objective criteria. The purpose of the recommendations in this paper 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 providing guidance on what information would be considered as relevant for sharing. We recommend the amendments to Article 31 of the BAL NC to regulate the principle of sharing information by BOs with ENTSOG and NRAs, including the establishment of a template.

#### **3.2. Cross border communication channels**

Communication of the cases of balancing misconduct could be structured in two steps, which still need to be fully defined<sup>4</sup>. However, indicatively, the first step should be as close to real time as possible and include two channels: i) a channel amongst affected BOs and all the rest of BOs (and possibly ACER) via ENTSOG, and ii) a channel amongst affected BOs and the NRA of their jurisdiction. As a second step in time, a channel is required for sharing the information amongst all the other NRAs via ACER. Such a case should be shared amongst the BOs as soon as possible, so that the 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 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 BOs 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 ACER via ENTSOG or via the NRA of the same jurisdiction as the BO. ACER should then share the information with all the other NRAs. For the purposes of the current note, operational details are not elaborated but still need discussion.

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<sup>4</sup> Liabilities related to the sharing of information should be carefully assessed.

### 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<sup>5</sup> 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<sup>6</sup> 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. [...]*
- 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 CSI 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 or 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 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 the BOs across the border, depending on the limitations foreseen by the national law.

As far as exchange of information amongst the BOs and the NRAs is concerned, we are of the opinion that a clear legal ground should be established, which 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.

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

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<sup>5</sup> Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency.

<sup>6</sup> 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.

### 3.3.1. Recommended legal amendments

- Insertion of paragraphs 4, 5, 6 and 7 to Article 31 of 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 informed, ENTSOG shall share this information with transmission system operators or balancing operators of all Member States (and the Agency)<sup>7</sup> without any further delay.*
  6. *When notified, the Agency (or the national regulatory authority) shall share this information with the regulatory authority of all Member States without any further delay.*
  7. *After consulting stakeholders, ENTSOG shall develop a draft template, which shall be approved 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 the national regulatory authorities and to the balancing operators before [date to be defined by the legislator].*

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

- Insertion of Article 16(4) of the Gas Directive:

*Paragraph 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 provide indicative guidance to the BOs for adapting their contractual arrangements with NUs in a way that the exchange of information is facilitated at a 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 currently 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 and 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 not– limited to the examples:

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<sup>7</sup> As per paragraph 1 of Chapter 3.2, the part in brackets is still to be discussed and agreed.

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 by 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 the BO/NRAs, upon duly justified request or upon the BOs own initiative, is necessary in order for them to maintain a 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.

#### **4. Reactive measures against balancing misconduct**

According to the internal ENTSOG survey:

- All BOs contracts provide for reactive measures in case the NU is 'exposed' (meaning that the financial creditworthiness safeguards of the NU is 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. 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.
- In case a NU enters 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 can extend 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 a national level (in case that the financial safeguards are not enough to cover actual or estimations for potential liabilities) are necessary. Regardless of the set of measures, the defaulting NUs should be informed by any reasonable means according to the national framework of the BO.

The following is recommended:

- In a spirit of proportionality, reactive measures should include reasonable actions for collection of the defaulted amount. They 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 the NU the opportunity to mitigate its 'exposure'<sup>8</sup>. 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 as last resort measures.

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

*"In case of a default attributable to a NU, 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 the BOs of an adjacent/another MS can take action based on the information received from an 'affected' BO. Such measures could be to refuse access of the NU at the gas wholesale market, if not yet registered, or adjustments in the security safeguards and/or limitation of rights, if this NU is already active in the market. For any action taken by another BO based on the information shared by the affected BO, the responsibility should remain with the BO that takes the measure, in order to encourage the affected BO to share the information. This point is not addressed in the proposal for amendment and should be further discussed. In order to add clarity on the BAL NC and include the cross-border aspects, we propose to amend Article 31(1) as follows:

*"The balancing operator 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."*

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<sup>8</sup> Reactive measures are fixed according to the proportionality principle ensuring the right balance with the proactive measures.

No amendment is recommended for paragraph 3 of the same article.

## **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 NUs 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 Article 31(1) and (2) were duly implemented. The letter and spirit of this article provides that the TSOs should first take effective actions in a proactive and reactive way. The TSOs shall report their efforts to the NRAs shortly after the events take place.

The NRAs shall set or approve the methodology for the calculation of the neutrality charges for balancing. BOs shall publish the aggregate 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 the TSOs and NRAs, that neutrality provisions have been implemented in the EU MSs, with only a few exceptions<sup>9</sup>.

ACER and ENTSOG find that the implementation of provisions on neutrality mechanisms is of key importance and encourage its further and full implementation.

Rules on neutrality mechanisms of the BAL NC should apply also for cases of BAL misconduct. Article 31(3) will keep covering balancing misconduct cases. This goes without prejudice to the provisions of Article 31, namely the TSOs' obligations for an efficient application of the credit risk management arrangements and the NRAs' powers in line with the Articles 30(2) and 29 of the BAL NC.

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<sup>9</sup> 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).

## **6. ANNEX I – Outline of the amended Article 31 of the BAL NC**

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

1. The balancing operator shall establish effective procedures to regularly monitor network user's balancing positions and be entitled to take necessary measures, including 'know your customer policies', 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.
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 informed, ENTSOG shall share this information with transmission system operators or balancing operators of all Member States [and ACER]<sup>10</sup> without any further delay.
6. When notified, ACER [or the national regulatory authority] shall share this information with the regulatory authority of all Member States without any further delay.
7. After consulting stakeholders, ENTSOG shall develop a draft template, which shall be approved 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 the national regulatory authorities and to the balancing operators before [date to be defined by the legislator].

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<sup>10</sup> As per paragraph 1 of Chapter 3.2, the part in brackets is still to be discussed and agreed.

## **7. ANNEX II – Feedback from the stakeholders on ‘additional’ measures**

An EU-wide list of registered NUs specifying their status as active or deactivated was conceived during the discussions amongst ACER and ENTSOG. Its efficiency, necessity, purpose and development details being questioned, it was submitted to the public consultation. The question addressed to the stakeholders investigated whether an EU-wide registry shall be established on NUs active in the EU to detect and prevent misconduct in the balancing markets.

The feedback received from the public consultation demonstrates interest from certain stakeholders in establishing such registry as an additional tool as long as it can provide alerting functions. Its design necessitates further discussions.