

**DECISION OF THE AGENCY FOR THE COOPERATION OF ENERGY
REGULATORS No 03/2017**

of 2 October 2017

**ON THE ELECTRICITY TRANSMISSION SYSTEM OPERATORS'
PROPOSAL FOR HARMONISED ALLOCATION RULES FOR LONG-TERM
TRANSMISSION RIGHTS**

THE AGENCY FOR THE COOPERATION OF ENERGY REGULATORS,

HAVING REGARD to the Treaty on the Functioning of the European Union,

HAVING REGARD to 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 Regulators¹, and, in particular, Article 8(1) thereof,

HAVING REGARD to Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a guideline on forward capacity allocation², and, in particular, Article 4(10) thereof,

HAVING REGARD to the outcome of the consultation with the concerned national regulatory authorities and transmission system operators,

HAVING REGARD to the favourable opinion of the Board of Regulators of 28 September 2017, delivered pursuant to Article 15(1) of Regulation (EC) No 713/2009,

WHEREAS:

1. INTRODUCTION

- (1) Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a guideline on forward capacity allocation ('FCA Regulation') laid down detailed rules on cross-zonal capacity allocation in the forward markets, i.e. the markets for the allocation of cross-zonal capacity for the long-term. These rules include specific requirements for the development of harmonised allocation rules.
- (2) Under Articles 4(1), (6)(d) and 51(1) of the FCA Regulation, transmission system operators ('TSOs') are required jointly to develop a proposal for harmonised allocation rules ('HAR') for long-term transmission rights and submit it to the competent regulatory authorities for

¹ OJ L 211, 14.8.2009, p. 1.

² OJ L 259, 27.9.2016, p. 42.

approval. Then, according to Article 4(9) of the FCA Regulation, the regulatory authorities receiving the proposal on the HAR for long-term transmission rights shall reach an agreement and take a decision on that proposal, in principle, within six months after the receipt of the proposal by the last regulatory authority. According to Article 4(10) of the FCA Regulation, if the regulatory authorities fail to reach an agreement within the six-month period, or upon their joint request, the Agency is called upon to adopt a decision concerning the TSOs' proposal.

- (3) The present Decision of the Agency follows from the regulatory authorities' request that the Agency adopts a decision on the proposal concerning the HAR for long-term transmission rights, which the TSOs submitted to the regulatory authorities for approval, because the regulatory authorities were not able to agree on certain elements of the proposal. Annex I to this Decision sets out the HAR for long-term transmission rights, pursuant to Article 51(1) of the FCA Regulation, as decided by the Agency.

2. PROCEDURE

2.1 Proceedings before regulatory authorities

- (4) On 16 January 2017, the European Network of Transmission System Operators for Electricity ('ENTSO-E') and the TSOs responsible under Article 51(1) of the FCA Regulation published an 'All TSOs' draft proposal for Harmonised Allocation Rules for long-term transmission rights' for public consultation. The consultation lasted from 16 January until 17 February 2017. Moreover, during the public consultation period, ENTSO-E organised a stakeholder workshop on Harmonised Allocation Rules on 3 February 2017, giving the opportunity to interested stakeholders and various organisations impacted by the HAR to raise questions and ask clarifications from the TSOs.
- (5) On 21 April 2017, all concerned TSOs submitted to their respective regulatory authority an 'All TSOs' proposal for HAR for long-term transmission rights in accordance with Article 51 of Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a Guideline on Forward Capacity Allocation' dated 10 April 2017³ ('HAR Proposal'), together with a supporting document⁴.

2.2 Proceedings before the Agency

- (6) In a letter dated 17 August 2017 and received by the Agency on the same date, the Chair of the Energy Regulators' Forum - i.e. the regulatory authorities' platform to consult and

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https://www.entsoe.eu/Documents/Network%20codes%20documents/NC%20FCA/170414_Atth4_HAR_MainBody_FINAL.PDF

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https://www.entsoe.eu/Documents/Network%20codes%20documents/NC%20FCA/170410_Atth_5_HAR_SupportingDocument_FINAL.PDF

cooperate for reaching a unanimous agreement on a TSOs' proposal -, on behalf of all regulatory authorities, informed the Agency that, on 16 August 2017, all regulatory authorities agreed to request the Agency to adopt a decision, pursuant to Article 4(10) of the FCA Regulation, on the HAR Proposal because they were not able to agree on the provisions of Article 21(1)(h) of the HAR Proposal concerning the required credit rating for banks issuing collaterals for market participants. According to the letter, at least one regulatory authority opposed the proposal that, in case of an industry-wide downgrading of the credit-rating of financial institutions, the allocation platform may decrease the required rating below BBB+ for a limited period of time. The opposing regulatory authority proposed alternatively either (i) to maintain the default required credit rating level BBB+ even in the case of an industry-wide downgrading, or (ii) to delete all provisions on credit rating and leave the decision completely to TSOs. However, these alternative proposals were opposed by at least three other regulatory authorities.

- (7) The letter of 17 August 2017 included also an annex entitled '*Additional areas that all regulators agree ACER may include and take into account when reaching a decision*'. According to this annex, all regulatory authorities agreed that, although they had no concerns on the majority of the elements of the HAR Proposal, certain elements of that Proposal could also be addressed, if this were not to hinder reaching a decision on time for legal or process related reasons. Those elements were described as follows:
- a) '*Article 48(1)(a): to avoid any ambiguity, the expression "subject to the approval of the relevant NRAs" should be placed as in Article 59(1)(a), and in both Articles the adjustment of the price to reflect Allocation Constraints should be limited to Allocation Constraints as defined in Article 23(3)(b) of the CACM Regulation;*'
 - b) '*Article 58: the Day Ahead Firmness Deadline should remain set 30 minutes before the Day Ahead Market Gate Closure Time unless otherwise specified in accordance with the process described in Article 69 of the Commission Regulation (EU) 2015/1222, to avoid any discrepancy between firmness deadlines applicable for long-term and day-ahead capacity rights during the transition period where HAR will be in force but the Day Ahead Firmness Deadline defined pursuant to Article 69 of the Commission Regulation (EU) 2015/1222 will not yet be applicable;*'
 - c) '*Article 68: this Article shall be amended to reflect that the amendment process of the HAR is now governed by Article 4(12) of Regulation 2016/1719;*'
 - d) '*Article 76(3): a sentence should be added, symmetrically to the second sentence of the paragraph, to clarify that subcontracting by the Allocation Platform does not relieve it of any obligation or liability.*'
- (8) The letter of 17 August 2017 does not indicate that the regulatory authorities requested the TSOs to amend the HAR Proposal. In fact, there was no such request.

- (9) By e-mail of 26 August 2017, the Agency consulted the concerned TSOs and regulatory authorities with regard to potential amendments of the HAR Proposal, inviting them to submit their comments by 8 September 2017. Those amendments concerned some of the amendments suggested by the regulatory authorities in the annex of their letter of 17 August 2017, an amendment regarding the definition of a reduction period, suggested by the stakeholders during the public consultation held by ENTSO-E from 16 January until 17 February 2017, and minor wording amendments to ensure consistency with the FCA Regulation. In addition, the Agency invited the concerned TSOs and regulatory authorities to submit their comments on the issue of the required credit rating for banks, and on the alternative options mentioned in the letter of 17 August 2017. A summary and evaluation of the responses received is attached as Annex II to this Decision.
- (10) On 11 September 2017, the Agency organised a workshop on the HAR for long-term electricity transmission rights, aiming at discussing the HAR Proposal and its potential amendments also with the other stakeholders. In the announcement of the workshop on 30 August 2017, the Agency invited the stakeholders to submit any comments they may have, via e-mail, ahead of the meeting. Stakeholders did not submit any comments before the workshop.

3. THE AGENCY'S COMPETENCE TO DECIDE ON THE HAR PROPOSAL

3.1 Joint request and no agreement by the concerned regulatory authorities

- (11) Pursuant to Article 4(10) of the FCA Regulation, where the regulatory authorities have not been able to reach an agreement on terms and conditions or methodologies within six months following the receipt of the proposal for such terms and conditions or methodologies by the last regulatory authority concerned, or upon the regulatory authorities' joint request, the Agency shall adopt a decision concerning the submitted proposal within six months and in line with Article 8(1) of Regulation (EC) No 713/2009.
- (12) According to the letter of the Chair of the Energy Regulators' Forum of 17 August 2017, all concerned regulatory authorities agreed to request the Agency to adopt a decision on the HAR Proposal, pursuant to Article 4(10) of the FCA Regulation, because the regulatory authorities were not able to agree on Article 21(1)(h) of the HAR Proposal.
- (13) It follows from this letter that the concerned regulatory authorities jointly requested the Agency to take a decision on the HAR Proposal and that they could not reach an agreement on that Proposal.
- (14) Therefore, under the provisions of Article 4(10) of the FCA Regulation, the Agency became responsible to adopt a decision concerning the submitted HAR Proposal by the referral on 17 August 2017.

4. SUMMARY OF THE HAR PROPOSAL

(15) The HAR Proposal includes the following elements:

- a) general provisions, including on the scope of application and on harmonised definitions, in Title 1;
- b) requirements and process for participation in auctions and transfer, including harmonised provisions on participation conditions, in Title 2;
- c) requirements for collaterals, including harmonised provisions on financial requirements, netting policies and financial collaterals for financial transmission rights ('FTRs') – obligations, in Title 3;
- d) provisions on auctions, including the description of the forward capacity allocation process, with the auction specification, the submission of bids, the publication of auction results and contestation period, in Title 4;
- e) harmonised provisions for the return of long-term transmission rights in Title 5;
- f) harmonised provisions for the transfer of long-term transmission rights, including their notification, in Title 6;
- g) principles regarding the use and remuneration of long-term transmission rights, including harmonised Use-It-Or-Sell-It (UIOSI) provisions in case of physical transmission rights, a description of the types of long-term transmission rights which are offered, including the remuneration principles, as well as principle description of the applicable nomination rules, in Title 7;
- h) provisions regarding fallback procedures in Title 8;
- i) provisions regarding curtailments, including provisions on firmness and compensation rules, in Title 9;
- j) provisions regarding invoicing and payment, including harmonised provisions on financial requirements and settlement, in Title 10; and
- k) miscellaneous provisions, referring also to the contractual framework between the single allocation platform and the market participants, including provisions on the applicable law, the applicable language, confidentiality, dispute resolution, liability and force majeure, in Title 11.

- (16) The HAR Proposal provides that the HAR shall enter into force in accordance with the applicable national regulatory regimes and on the date announced by the allocation platform. According to the HAR Proposal, the HAR shall apply to capacity allocation for long-term transmission rights with the delivery period to be specified by the allocation platform on its website upon the entry into force of these allocation rules, it being understood that the said delivery period shall be from 1 January in the subsequent year following the adoption of the HAR in accordance with Article 4 of the FCA Regulation (Article 5 of the HAR Proposal).
- (17) The HAR Proposal describes the expected impact of the proposed HAR on the objectives of the FCA Regulation (paragraphs (8) to (16) of the HAR Proposal).
- (18) In addition, the supporting document to the HAR Proposal explains the legal context, describes the previous steps taken as part of the early implementation of the FCA Regulation, assesses the comments received during the public consultation and provides further explanations on amendments of the Proposal made after the public consultation. The document has one annex with the detailed comments received by ENTSO-E on the main body of the HAR during the public consultation.

5. ASSESSMENT OF THE HAR PROPOSAL

5.1 Legal framework

- (19) Articles 51 and 52 of the FCA Regulation set out specific requirements for the common proposal for the HAR for long-term transmission rights.
- (20) According to Article 51(1), the common proposal for HAR shall be developed in accordance with the requirements of Article 52(2) and shall be subject to consultation in accordance with Article 6 of the FCA Regulation.
- (21) According to Article 52(1), the requirements for HAR for long-term transmission rights shall cover physical transmission rights, FTRs — options and FTRs — obligations, and TSOs shall consider and duly take into account specificities related to the different types of products.
- (22) According to Article 52(2), the common proposal for HAR shall follow the principles of non-discrimination and transparency and at least contain the general requirements set out in subparagraphs (a) to (l) of Article 52(2).
- (23) As a general requirement, Article 4(8) of the FCA Regulation demands that every proposal for terms and conditions or methodologies includes a proposed timescale for their implementation and a description of their expected impact on the objectives of the FCA Regulation.

- (24) Further, for coherence reasons and as confirmed by Article 4(8) of the FCA Regulation, the common proposal must be in line with the objectives of the FCA Regulation defined in its Article 3.

5.2 Assessment of the requirements in Article 52(1) of the FCA Regulation

- (25) The HAR Proposal contains harmonised provisions for the allocation of long-term transmission rights, which, according to the definition in Article 2(2) of the FCA Regulation (that definition being applicable also for the HAR, pursuant to Article 2(1) of the HAR Proposal), mean a physical transmission right or a FTR – option or a FTR – obligation. According to Article 2(j) of the HAR Proposal, any reference to financial transmission rights shall cover both FTR – options and FTR – obligations.
- (26) Article 47 of the HAR Proposal sets out different provisions for each of the specific types of products. Furthermore, in Article 48 of the HAR Proposal on the remuneration of long-term transmission rights' holders for non-nominated physical and financial transmission rights, the specificities of each product are taken into account for the calculation of the remuneration.
- (27) Therefore, the HAR Proposal covers physical transmission rights, FTRs — options and FTRs — obligations, and it considers and takes into account the specificities related to the different types of products, in compliance with Article 52(1) of the FCA Regulation.

5.3 Assessment of the requirements in Article 52(2) of the FCA Regulation

- (28) According to Article 7 of the HAR Proposal, any market participant may apply to be a party to a 'Participation Agreement', as long as he/she follows a clearly defined and harmonised process, and fulfils transparent conditions, which are the same for all market participants according to Article 6 of the HAR Proposal. This Agreement also allows access to the auction tools of the single allocation platform. Moreover, the rules set in the HAR apply to all parties and harmonise the process of participating in the long-term auctions, providing non-discriminatory access to the cross-zonal long-term capacity, as stated also in paragraphs 3 and 4 of the HAR Proposal.
- (29) Regarding transparency, the HAR Proposal clarifies which information is to be published by the single allocation platform in a centralised manner during the whole process of the capacity allocation, including provisions regarding the publication of the allocation rules, the registered participants, the bidding zone borders, the auction calendar, the auction specifications (Article 29), the auction results (Article 36), the notice board for transfer of long-term transmission rights (Article 44), the nomination rules (Article 46), any information on fallback procedures and the triggering events for curtailment (Article 57).

(30) The HAR Proposal, as also indicated above in recital (15), comprises rules for all the areas of general requirements listed in subparagraphs (a) to (l) of Article 52(2) of the FCA Regulation.

(31) Therefore, the HAR Proposal follows the principles of non-discrimination and transparency in accordance with Article 52(2) of the FCA Regulation and contains the general requirements mentioned in Article 52(2) of the FCA Regulation.

5.4. Public consultation

(32) The draft HAR Proposal was consulted Union-wide with stakeholders from 16 January to 17 February 2017.

(33) The supporting document to the HAR Proposal describes the comments received from stakeholders, assesses them and explains why comments have or have not been taken into account. The explanatory document was published together with the HAR Proposal on 14 April 2017.

(34) Therefore, the HAR Proposal has been subject to a public consultation in accordance with Article 6 of the FCA Regulation and complies with Article 51(1) of the FCA Regulation.

5.5 Proposed timescale for the implementation

(35) Article 5 of the HAR Proposal provides that the HAR shall apply for capacity allocation for long-term transmission rights with delivery period starting from 1 January in the subsequent year following the adoption of the HAR by all regulatory authorities or decided upon by the Agency.

(36) Therefore, the HAR Proposal complies with the requirement of the implementation timescale in Article 4(8) of the FCA Regulation.

5.6 Expected impact on the objectives of the FCA Regulation.

(37) Paragraphs (8) to (16) of the HAR Proposal describe the expected impact of the HAR on the objectives listed in Article 3 of the FCA Regulation.

(38) Therefore, the HAR Proposal complies with the requirement of the impact description in Article 4(8) of the FCA Regulation.

(39) As regards the substance of the described impact, the Agency agrees with the description in the HAR Proposal.

5.7 Assessment of the point of disagreement among regulatory authorities regarding the provisions of Article 21(1)(h) of the HAR Proposal

- (40) Article 21(1)(h) of the HAR Proposal provides that in the case of an industry-wide downgrading of the credit rating of financial institutions, the allocation platform may investigate what the new standards are and, if deemed necessary, decrease the required rating for a limited period of time, informing TSOs, who shall then inform the relevant regulatory authorities. Accordingly, the allocation platform may decrease the required rating below BBB+ for a limited period of time.
- (41) In that regard, at least one regulatory authority opposed the proposed requirement for credit rating and suggested, as alternatives, either (i) to maintain the default required credit rating level BBB+ even in the case of an industry-wide downgrading, or (ii) to delete all provisions on credit rating and leave the decision completely to TSOs.
- (42) According to the Agency, maintaining the default required credit rating level BBB+ even in the case of an industry-wide credit rate downgrading, could result, depending on the magnitude of the downgrading, in practically preventing market participants, in particular smaller ones, from accessing the long-term transmission rights allocation process, which could therefore be in conflict with the objective of non-discriminatory access to long-term cross-zonal capacity pursuant to Article 3(c) of the FCA Regulation.
- (43) Moreover, deleting all provisions on credit rating and leaving the decision to the TSOs could result in different credit rating requirements across Europe, which could also run counter the objective of non-discriminatory access to long-term cross-zonal capacity pursuant to Article 3(c) of the FCA Regulation.
- (44) The current wording of Article 21(1)(h) of the HAR Proposal, as described in recital (40) above, provides the required flexibility to the allocation platform to react in an extreme case, enabling undisrupted access of registered participants to the allocation platform, respecting the new rating conditions. In that respect, the HAR Proposal provides harmonised provisions on financial requirements, as required in Article 52(2)(h) of the FCA Regulation, and non-discriminatory access to long-term cross-zonal capacity, promoting the objectives of FCA Regulation. For these reasons, the Agency does not deem it necessary to amend Article 21(1)(h) of the HAR Proposal.

5.8 Assessment of other minor points of the HAR Proposal

- (45) In Article 2 of the HAR Proposal, the definition of a ‘Reduction Period’ includes the ‘balancing problems’ as an example of a specific network situation that might give rise to a reduction of cross-zonal capacities. The Agency considers that this type of network situation should be addressed with other instruments in the shorter timeframes. Therefore, the Agency deems it necessary to remove this specific example from the definition.

- (46) Article 28(4) of the HAR Proposal provides that *'additional timeframes and/or an additional form of products other than the standard products and timeframes described in paragraph 1, 2 and 3 of this Article may be offered'*. As these additional elements are specified in the regional design of long-term transmission rights, the Agency deems it useful to add at the end of the paragraph: *'as specified in the regional design of LTTRs in accordance with Article 31(4) of the FCA Regulation'*.
- (47) In Articles 48(1)(a) and 59(1)(a) of the HAR Proposal, it is provided that the price used for the remuneration of reallocated long-term transmission rights at the relevant daily allocation and the compensation for curtailed long-term transmission rights, respectively, may be adjusted to reflect allocation constraints on interconnections between bidding zones as defined in Article 23(3) of Commission Regulation (EU) 2015/1222, where these allocation constraints are included in the day-ahead cross-zonal capacity allocation process, *'subject to the approval of the relevant NRAs'*. As this adjustment is specified in the regional annexes of the HAR, the Agency deems it useful to replace the expression *'subject to the approval of the relevant NRAs'* by *'if specified in the respective regional or border specific annexes'* in both Articles 48(1)(a) and 59(1)(a). Regarding the reference to Article 23(3) of Regulation (EU) 2015/1222, the Agency notes that this provision defines allocation constraints in its subparagraphs (a) and (b). Therefore, the Agency considers a reference to Article 23(3), which is not confined to one of the subparagraphs of Article 23(3), as an appropriate reference to the legal text in the present context. This does not, however, prevent regulatory authorities from determining, in their decision on the respective regional or border specific annexes, how the allocation constraints referred to in Article 23(3) should be taken into account.
- (48) Article 59(2) of the HAR Proposal states that *'A cap may be applied to the compensations calculated according to paragraph 1 which occurred within one calendar year subject to the approval of the relevant NRAs'*. Similar to recital (46) above, the regulatory authorities' approval refers to the approval of the regional annexes of the HAR. Therefore, the Agency deems it useful to replace the first sentence of Article 59(2) by *'If specified in the relevant annexes to these Allocation Rules a cap shall be applied to the compensations on specific bidding zone borders.'*
- (49) In Article 68 of the HAR Proposal, the duration and the amendment process of allocation rules is described. However, according to Article 4(6)(d) of the FCA Regulation, the HAR Proposal belongs to the proposals of terms and conditions or methodologies subject to approval by all regulatory authorities. Furthermore, Article 4(12) of the FCA Regulation specifies provisions for the amendment process of such terms and conditions or methodologies, which are not taken into account in Article 68 of the HAR Proposal. Therefore, to comply with the amendment process requirements set by Article 4(12) of the FCA Regulation, the Agency deems it necessary to amend Article 68 of HAR Proposal.
- (50) In Article 76(3) of the HAR Proposal, an 'Allocation Platform' or 'Registered Participant' is allowed to enter into a subcontracting agreement in relation to the HAR. For the case of

the Registered Participant, there is a clause that the entry into a subcontracting agreement by a Registered Participant does not relieve the Registered Participant of any obligation or liability under its 'Participation Agreement' or the HAR. In order to ensure symmetry with the framework for Registered Participants, the Agency deems it necessary that the same clause is introduced in Article 76(3) of the HAR Proposal for the case when the Allocation Platform enters into a subcontracting agreement.

(51) In addition, the Agency introduced a few additional editorial amendments.

5.9 Conclusion

(52) The Agency considers the HAR Proposal in line with the requirements of the FCA Regulation and Regulation (EC) No 714/2009. However, in order to ensure better clarity and overall coherence with the regulatory framework, the amendments described in recitals (45) to (51) above are integrated to the Proposal.

(53) Therefore, the Agency approves the HAR Proposal subject to the necessary amendments of Articles 2, 28, 48, 59, 68 and 76 and to necessary editorial amendments. To provide clarity, Annex I to this Decision sets out the HAR Proposal as approved, including the above amendments.

HAS ADOPTED THIS DECISION:

Article 1

The harmonised allocation rules for long-term transmission rights pursuant to Article 51 of Regulation (EU) 2016/1719 is adopted as set out in Annex I of this Decision.

Article 2

This Decision is addressed to 50Hertz Transmission GmbH, Amprion GmbH, Austrian Power Grid AG, AS Augstsprieguma tīkls, BritNed Development Limited, ČEPS, a.s., Creos Luxembourg S.A., Croatian Transmission System Operator Ltd. (HOPS d.o.o.), EirGrid Interconnector DAC, EirGrid plc, Elering AS, ELES d.o.o., Elia System Operator SA, Energinet.dk, Electroenergien Systemen Operator EAD, Independent Power Transmission Operator S.A., Litgrid AB, MAVIR Magyar Villamosenergia-ipari Átviteli Rendszerirányító Zártkörűen Működő Részvénytársaság, Moyle Interconnector Limited, National Grid Electricity Transmission plc, National Grid Interconnectors Limited, Polskie Sieci Elektroenergetyczne S.A., Red Eléctrica de España S.A.U., Rede Eléctrica Nacional S.A., Réseau de Transport d'Electricité, Slovenská elektrizačná prenosová sústava a.s., System Operator for Northern Ireland Ltd, TenneT TSO BV, TenneT TSO GmbH, Terna – Rete Elettrica Nazionale SpA, Compania Nationala de Transport al Energiei Electrice "TRANSELECTRICA" S.A., TransnetBW GmbH.

Done at Ljubljana on 2 October 2017.

For the Agency:


Alberto Pototschnig
Director

Annexes:

Annex I – Harmonised Allocation Rules for long-term transmission rights in accordance with Article 51(1) of the Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a Guideline on Forward Capacity Allocation

Annex Ia - Harmonised Allocation Rules for long-term transmission rights in accordance with Article 51(1) of the Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a Guideline on Forward Capacity Allocation in track change mode compared to the HAR Proposal (for information only)

Annex II - Evaluation of responses to the consultation of regulatory authorities and TSOs on the HAR Proposal