

Key Comments on the European Commission's Third Package

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1. This paper presents the European Energy Regulators' views on the main elements of the Commission's proposals on the third package of internal energy market legislation. It concentrates primarily on the regulation of the networks, where energy regulators have particular expertise and responsibility. Regulators are, of course, also concerned about the wider context within which the energy markets operate including environmental and external issues, but these aspects have not been covered in this paper.
2. Regulators have already welcomed much of what the European Commission has proposed. However, more detailed analysis indicates that in some important areas significant improvements are essential. The co-decision process offers the possibility of making such improvements to deliver the effective and independent regulatory framework we need for sustainable, competitive and secure electricity and gas markets in the Union.
3. What follows are our general comments. Some of these would need legislation to take effect. For others, we indicate where best practice can be used by national regulators to improve their own national regulatory process. More specifically, the paper examines the areas listed below, providing an explanation of our position. In an accompanying paper CEER has also proposed some preliminary amendments to the European Institutions to address these problems. CEER will also provide further amendments, where appropriate, at a later stage.
4. The general areas covered are the following:

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Section 1: powers and independence of national regulators

Independence and Resources

5. The independence of national regulators is of profound importance for market confidence. A stable, predictable and coherent regulatory framework is essential for the huge level of investments that are required in the next decade at both national and EU levels. To ensure regulatory certainty, the staff and those responsible for the management of each national regulatory authority need to act independently, in particular of market interests and political influence.
6. European Regulators strongly support the reinforcement of national regulators' independence. Key amongst the proposals that will help to ensure the credible independence are the following:
 - the process for appointing a national regulator should be open and transparent, involving a broadly-based procedure rather than direct ministerial selection and appointment;
 - the term of office for the national regulator should be of sufficient length to ensure the delivery of effective management (best practices suggest a term of at least five years, renewable once, or a longer term, non-renewable, with a maximum not exceeding ten years);
 - regulators should enjoy security of tenure, legal personality and budgetary autonomy;
 - best practice within Europe (although differing according to the specific competences of each regulator) is the right directly to levy regulated operators for the budgetary needs of the regulatory body. NRAs must have sufficient human and financial resources to carry out their duties, which will in turn improve the quality of regulation;
 - national regulators must also exercise their powers impartially and transparently, subject to an explicit code of ethics.
7. We recognise that such regulatory independence requires certain counterbalancing arrangements, including in relation to regulators' financial administration. There should be an accountability mechanism prescribed (for example to the national Parliament and to a Court of Auditors). Similarly, regulatory independence needs an appropriate, independent appeals mechanism. This mechanism must reinforce both the right of

parties to appeal and the independence from political influence of regulatory decisions by the national regulator (appeals should be to the Courts and not, for example, to the Ministry/Government as is currently the case in several countries).

Powers

8. We also support a significant enhancement of the powers of national energy regulatory authorities. National regulatory authorities' powers to issue binding decisions, to apply effective sanctions and to impose measures (such as energy release programmes in cooperation with National Competition Authorities where appropriate), are essential.
9. EU legislation should set out clearly the policy objectives and a precise scope of each NRA's future duties and powers, which should cover the power to fix or approve network access tariffs and their methodologies, or alternatively to approve and monitor the methodologies used to set the tariffs. NRAs must each have the power to receive relevant information from natural gas and electricity undertakings; and to impose effective sanctions together with appropriate rights of investigation and sufficient powers for dispute settlement.
10. We welcome the Commission's proposals on the cooperation and information exchange between national energy regulatory authorities. However, improvements are needed to ensure that other relevant regulatory authorities – not only energy, but competition, financial and other relevant bodies - are also legally empowered under national legislation to enter into agreements with other EU and national regulatory authorities (e.g. on sharing data). It would also be helpful to make explicit that a national regulatory authority can enter into international cooperation agreements with energy and other regulators to assist in improving regulatory cooperation (for example, co-operation agreements for information exchange between competition authorities as defined in Council Regulation 1/2003.)
11. The proposals to establish a closer cooperation between energy regulators and competition authorities at both national and EU level are of particular importance. We support appropriate mechanisms and actions (e.g. gas or electricity release programmes such as "VPP"). Such arrangements should include closer cooperation with national financial services authorities and CESR with greater precision in defining the respective

responsibilities between sector regulators and competition authorities and without prejudice to their competences.

12. We are now examining in greater detail the extensive list of policy objectives and duties assigned by the initial proposals to national regulatory authorities. We have, however, already identified a few omissions (e.g. quality of supply of networks) and signalled amendments that are needed.

In an accompanying paper CEER has also proposed some preliminary amendments to the European Institutions to address these problems. CEER will also provide further amendments, where appropriate, at a later stage.

Section 2: the Agency for the cooperation of the Energy Regulators (ACER)

13. Improved regulatory arrangements at national level, although of significant importance, will not, in themselves be sufficient to accelerate the process leading towards a single European energy market. Just as the increased independence, powers and enhanced efficiency of national regulators are vital to maximise the benefits to each Member State in respect of its own energy policies, effective regulatory arrangements are also essential at EU level to achieve a competitive, sustainable and secure integrated European market.
14. The European Council agreed in its conclusions to the establishment of an independent mechanism for national regulators to cooperate and take decisions on important cross-border issues. In response, the European Commission has developed its proposals. The European Parliament has also endorsed the idea of an EU entity, as a way of promoting a more European approach to regulation on cross-border issues.
15. In our initial reflections, a large majority of regulators favoured a model where the regulatory independence and strong powers at national level would be replicated at EU level. However, we recognised that, when making its initial proposal, the Commission would need to take full account of the regulatory concerns about the governance arrangements, and of the Union's legal and constitutional arrangements. We have, however, become increasingly convinced that the Commission's rather narrow interpretation of the inter-institutional balance has negatively affected their approach not only in relation to the Agency but also to the responsibilities of the proposed European network bodies (ENTSOs). Moreover, the Commission's initial proposal has little policy consistency with regard to the powers and independence of national energy regulators the Commission itself proposed. We therefore feel that, changes are needed to the ACER proposals, lest the outcome is sub-optimal which would profoundly reduce the operational effectiveness of the regulatory processes at the EU level and minimise the achievement of strategic objectives defined by Heads of State or Government.
16. We shall continue to develop our thinking on how to adjust to the structure and processes of the Commission's proposal without violating essential European law considerations. However, we recognise that, as national regulators, we do not have the political authority to analyse definitively such constitutional issues although we can contribute to such an analysis. We therefore urge both the Council and the European

Parliament each to secure the formal opinion of its Legal Service. This will allow, at an early stage, a proper consideration of whether the Commission's analysis is shared or whether a more robust Agency and its associated processes could be improved.

17. We next move to consider some practical suggestions, based on our own experience, on how to improve the effectiveness and accountability of the ACER, making it less expensive, more independent, efficient, and more streamlined. At this stage it is, of course, not possible to decide whether the outcome of the co-decision procedure will resolve our concerns. There follows, therefore, some general comments on both the Commission's proposals and another approach which we believe remains within the institutional concerns outlined by the Commission. We identify a number of issues relating, first, to the processes and secondly to the independence of the Agency and the responsibilities of the ENTSOs. We can provide further information and comments to assist the Parliament and the Council if they wish. In early 2008, we intend to organise a workshop to provide our understanding of these complex processes. Separately, we shall also examine whether, and, if so, how the Council of European Energy Regulators' (CEER) own informal organisational arrangements may need to be developed in order to contribute fully to the creation of a stronger EU wide regulatory framework thereby achieving the triple objectives of sustainable development, security of supply and competitiveness.

Section 3: powers of the ACER, tasks vis-à-vis European Networks of Transmission System Operators (ENTSOs)

Introduction

18. This section of the paper describes the role of the technical and market codes and other relevant documents (operating processes, investment plans, generation adequacy outlooks, research plans and work plans) which are at the heart of delivering an integrated EU energy market. (For the purposes of the present paper, we describe them collectively as 'codes and rules').
19. We first analyse how the Commission proposes to introduce these codes and rules at EU level and identify some of the problems that result from their proposal. Since we believe that a more effective regulatory framework could have been developed, we make significant suggestions which could resolve many of the concerns we have. As negotiations progress, we shall, of course, continue to be constructively engaged and ready to come forward with further suggestions to achieve a more effective regulatory body with more efficient processes.

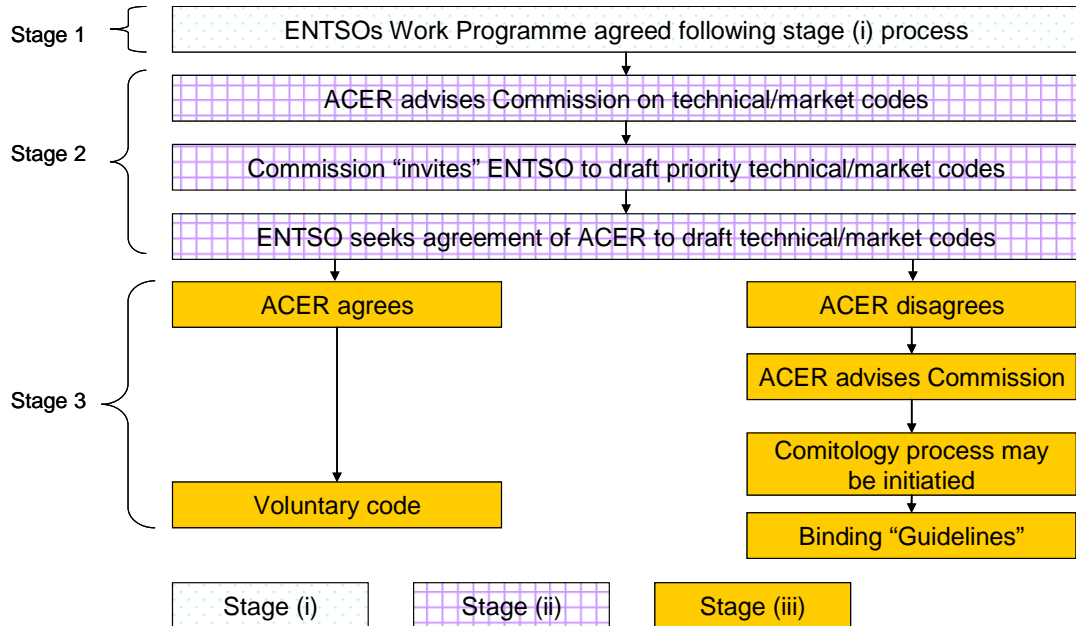
The Commission's proposed regulatory approach examined for the 'codes' and 'rules'

20. Under the Commission's proposed approach, eleven generic areas – at present very broadly defined - are identified. These will form the basis of the single European market (article 2c of the proposed Electricity and Gas Regulations). The proposed "technical and market codes" (which contain the rules that relate to each generic area) will include important, and sometimes complex, technical rules on which the basic features of the EU's networks are established. For many of these trade-offs between costs and performance may be needed. Indeed, for some, there may not be a 'right' answer but different (sometimes conflicting) approaches. There could, for example, be significant debate on issues such as the level of networks' inbuilt resilience (what should be the appropriate assumption with regard to how frequently the lights risk going out or the gas supply risks failure because of faults or bad weather). Similarly there will be important decisions to be made with regard to the market, including gate closure times.
21. There are, in addition to the "technical and market codes" themselves, other important documents to be prepared. These include operating processes, investment plans, generation adequacy outlooks, research plans and work plans. These too will play a

major role in determining the extent to which existing national rules will need to be harmonized and determined by European bodies rather than at national level. How quickly they will be developed and agreed will, of course, have a major influence over the pace of change towards a single European market.

22. In the next section we examine the Commission's proposed approach to see how far the process it recommends is effective in developing the codes and rules (Diagram 1 presents the key elements, in respect of the technical and market codes only). In the following section we outline the changes to the Commission's proposals which we argue will safeguard that public interests are more effectively protected (see diagram 2). It is conceivable, however, that another quite different model could be developed, but we have decided to base our proposals on the overall structure in the Commission's texts. These changes would permit a much more efficient development, delivery and maintenance of the codes and rules, and its fundamentals have already attracted initial support of many stakeholders. The key issue, however, remains whether the institutions consider that the revised proposals can be agreed within the present institutional arrangements.

Diagram 1
Commission's Proposed Regulatory Process (technical and market codes)



Stage (i)

23. Based on the eleven areas identified for both gas and electricity networks, the process begins with the two proposed European Networks of Transmission System Operators (ENTSOs) for gas and electricity. Each is required to prepare an annual work programme which contains a list of the technical and market codes and description of those codes to be drawn up in that and subsequent years. The description of the technical and market codes in the Commission's proposal is very broad and so the definition in the ENTSOs' work programme is important. That work programme is to be submitted to the Agency which may offer an opinion to the ENTSOs, within three months. (The Agency, would we expect, consult stakeholders on the draft work programme although this is not required in the Regulation.) If the draft work programme does not fulfill the criteria in the Regulation (to ensure non-discrimination, effective competition, and the efficient functioning of the market) the Agency is required to advise the Commission. (Again, the Commission needs to make clear what outcome should be expected in such circumstances).

Stage (ii)

24. Having agreed the ENTSOs' work programmes in Stage (i) (which identify the list of priority technical and market codes, their contents and the timetable for their production), the Commission must consult the Agency before inviting the ENTSOs to prepare the technical and market codes. The ENTSOs must then prepare the relevant technical and market codes within a reasonable period of time. Work on codes will be subject to monitoring by the Agency. The ENTSOs are required to consult stakeholders on the draft technical and market codes. When a draft technical or market code is ready, the ENTSOs pass it to the Agency which may offer an opinion to the ENTSO within three months.

Stage (iii)

25. If the Agency considers that a draft technical or market code is consistent with the criteria in the Regulation, then the draft code may be adopted by the ENTSOs. In this case, there is the possibility that the technical or market code could remain voluntary (and thus not enforceable in law, nor part of the regulatory framework). If however, there was concern that a particular code needed subsequent legal enforcement, there remains the option, even when a code has the Agency's agreement, for it to be recommended to the Commission as requiring subsequent comitology treatment (see next paragraph).

26. If a draft technical or market code is not consistent with the criteria in the Regulation then the Agency is required to advise the Commission. The Commission, on its own initiative or on the recommendation of the Agency, may adopt guidelines through the comitology process in respect of that code and in such cases it would take the form of legally binding guidelines.

27. With regard to the ten year investment plan:

- the European Network of Transmission System Operators (ENTSOs) for gas and electricity are requested to prepare a draft plan for submission to the Agency;
- the Agency may offer an opinion to the ENTSOs within three months on that plan (it is not obligatory);
- however, the Agency **must** provide a duly justified opinion to the Commission where it considers that the draft plan does not safeguard non-discrimination, effective competition and the efficient functioning of the market.

28. Given the Commission's right of initiative, binding guidelines can be agreed through the comitology process in respect of any of the codes even if some would otherwise remain voluntary. However, with regard to the 10 year investment plan, by virtue of the absence of a legal basis providing for the adoption of Guidelines through comitology in the Commission's proposals, binding guidelines through comitology cannot be issued.

Assessment of the Commission's proposals

29. We have identified where we consider that there is a lack of clarity and possibly significant weaknesses in the Commission's proposals:

- the scope of each technical or market code is undefined in the Commission's proposal which presents, rather, a simple list. There is also no place in the process for either the European institutions, or the Agency to make important decisions on key questions. (In contrast, at national level, codes and rules are determined principally by regulators and governments.) Technical and market codes will profoundly and durably affect market and network rules and thus directly reduce the level of subsidiarity that remains for national regulators and Member States. Issues such as these are either not addressed or not fully clarified in the Commission's proposals. Moreover, throughout the process, the obligation to consult on each technical or market code rests solely with ENTSOs. (The Agency, with its public interest responsibilities, is not obliged to consult but may well do so voluntarily rather than rely solely on TSO consultation).
- **the technical and market codes (where agreed by the Agency) could remain voluntary.** Unless the Commission decide that any voluntary code should be introduced into the comitology procedure, that code cannot be enforced, nor can it be relied upon by national regulators in making their own key regulatory decisions. Thus, for voluntary codes, it would not be possible to bind individual TSOs (and where necessary market participants). This could have serious consequences, in respect of the market and the behaviour of those physically connected to the networks. If a national TSO, or a market participant or network user, did not comply with a voluntary technical or market code (or a market participant or network user), **there would be no legal means by which to enforce it** by an infringement procedure with sanctions/penalties (any sanction can only be imposed by virtue of an infringement of legally binding measures),

nor would the obligations arising from the technical or market code be enforced by either the national regulator or at the EU level by the European Commission. Similarly, if a national regulator, when approving its national rules does not comply with the requirements of the EU agreed voluntary technical or market code, there is no means for the Agency to require that regulator to reflect the provisions of a voluntarily agreed code in its national arrangements.

- the draft Regulation presently provides the Agency **only with a mechanism to deliver an opinion to the Commission** in case of non compliance of a national regulatory authority with the guidelines adopted through comitology (in Article 7.4). It does not deal with technical or market codes voluntarily agreed.
- where the Agency does not agree the draft technical or market code proposed by the ENTSOs, the Commission may choose to follow either the ENTSOs' approach or that agreed by the Agency (or it may introduce its own proposals) in order to initiate the comitology process which, when completed, would result in legally enforceable guidelines.
- such issues are of real importance. They raise the question of **whether TSOs can be held fully responsible**, for example, for the security of the networks. If the Commission were to propose different guidelines from those suggested by the ENTSOs (for example in relation to operating standards on the real time operation of the networks), it is assumed, in principle, that such guidelines would not have the agreement of ENTSO and/or might not be in accordance with the advice of the Agency. **The result might expose a situation which lacked clarity and created uncertainties for all stakeholders.** Indeed, such legal uncertainty could affect TSOs' acceptance of liability.
- **the Commission's proposal gives the Agency no decision making powers** (only an advisory role) over the technical and market codes (stages (i), (ii)), nor with regard to the 10-year investment plan, whilst no process is envisaged following a disagreement by the Agency on that draft. This again leads to a lack of clarity and weakens confidence in the regulatory approach towards the market and European networks. In our view, it would be impossible for the Agency effectively or comprehensively to undertake a regulatory function proposed by the Commission at EU level.

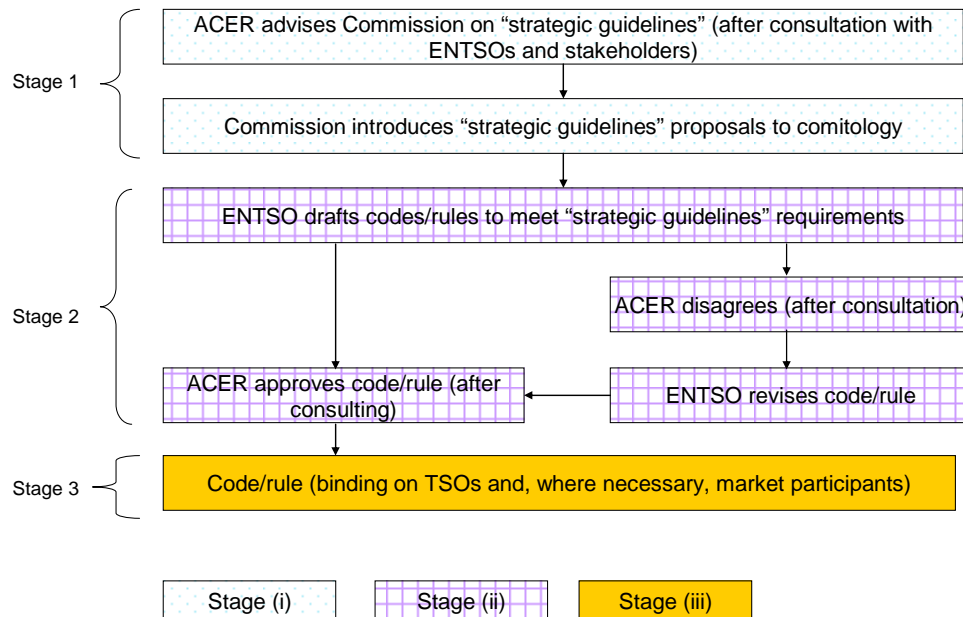
- **in practical terms, the Commission's approach could present major challenges. Codes and rules are often complex, technical and lengthy.** As an example, the UCTE handbook (the existing agreement between TSOs relating to electricity network operations) has seven parts and three appendices and it runs through 198 pages. Requiring the introduction into comitology of a fully drafted code or rule at the end of a lengthy process will be immensely challenging to the participants of that comitology process. Were additional major revisions sought during the process, a further round of ENTSOs' and Agency's consideration (including the formal consultation of stakeholders) might be needed.
- codes and rules will almost inevitably require amendment (sometimes slight, sometimes fundamental, sometimes urgent and critical for the operation of the market). How this can be achieved is not explored. However, for non voluntary codes, if further comitology procedures were needed to incorporate modifications, challenging logistical and timing issues would follow.

An alternative approach based mainly on the Commission's proposals

30. Regulators have developed a few significant amendments to the Commission's proposal that should, we believe, improve these regulatory processes (see diagram 2 below). What is needed, we feel, is a clear sense of direction and resolution of the key political issues at the earliest stage of the process. We therefore suggest "strategic guidelines" be prepared by the Agency with extensive consultation of stakeholders for consideration in the comitology process. For each code or rule the strategic guidelines would address questions such as the extent and pace of harmonisation; the degree of subsidiarity or harmonisation inherent in the codes and rules; and the degree of resilience (or reliability) expected of the EU's networks (and the resulting cost); and the prioritisation of the different codes or rules for the ENTSOs' work. Such questions require political judgement. They are thus clearly for Governments and the Parliament. They would also allow legal enforceability, thereby eliminating the ambiguity inherent in the Commission's proposal. In this way, on the basis of the overall objectives for each code and rule, the ENTSOs, monitored by the Agency and in full consultation with stakeholders will develop the detailed rules needed. The codes' subsequent application and enforcement at company level could therefore be left with the Agency since the key political decisions had been taken by means of the agreed strategic guidelines.

31. The Agency would also at the end of the process confirm that the codes and rules meet the objectives established in stage (i) in the comitology process. The resulting codes and rules would be binding and enforced by the Agency, avoiding the legal complications resulting by the Commission's proposals, notably in respect of voluntary codes.
32. In outline the proposed process is as follows:

Diagram 2: European Regulators' Proposed Regulatory Process for the adoption of 'codes and rules'



Stage (i)

33. The Agency consults stakeholders and the ENTSOs on the scope, content and relative priorities of each of the proposed codes and rules, based on the proposed eleven areas included in the Regulations. In the light of the responses, the Agency provides advice to the Commission on these and related issues in the strategic guidelines document. The Commission proceeds with the comitology process to provide a coherent overall framework and resolution of key strategic issues within each code and rule. The Commission would then introduce guidelines into the comitology process. As part of that process decisions of a political nature where there is discretion (it is not possible to delegate to the Agency under current constitutional legal constraints) would be

addressed and incorporated into the resulting legal guidelines. Each guideline will specify the code and rule that would be developed, together with its scope and objectives, and will place obligations on each ENTSO and on TSOs to have in place, and to maintain, detailed codes and rules (including the 10 year investment plan) which achieve the objectives and requirements in the guidelines, together with the timetable expected for implementation. The Agency would have a duty to oversee the developmental work of the ENTOSOs (national regulators will be responsible for ensuring that each TSO complies with its obligations under the guidelines; the detailed codes; the 10 year investment plan and the detailed national investment plans). The Agency would advise the Commission if the ENTSO is not fulfilling its obligations. The Commission will decide, in the light of that advice, what enforcement action to take.

Stage (ii)

34. The ENTOSOs (or the appropriate body) will draft the codes and rules to deliver the objectives set out in the guidelines. The ENTOSOs will consult stakeholders during the development of the codes and rules to ensure that they take full account of the needs of market participants and consumers. The Agency will monitor the process of codes and rules development and keep in close contact with the ENTOSOs, to ensure the overall direction and timetable will be satisfactorily met. In the case of codes and rules relating to the competitive energy market (as distinct from the EU's networks), the Agency itself will draft the codes and rules in full consultation with market participants.
35. Once the draft codes and rules have been prepared they would be passed to the Agency for formal consultation with stakeholders and to ensure that the public interest requirements are fully met. This will include confirmation that the codes and rules meet the criteria in the Regulations, and that they are consistent with the requirements of the relevant Guidelines. The Agency's consultation will form its policy recommendations to the Commission. Formal consultation will be crucial in providing expert input and views on draft proposals. The Agency will operate on the four principles that national regulators have agreed for CEER and ERGEG (Guidelines on ERGEG's Public Consultation Practices, ref. E07-EP-16-03) - openness, transparency, consistency and accountability. It will consult the full range of interested parties, including producers, network operators, suppliers and consumers as appropriate. It will also use appropriate processes in order better to target consultations at those who are most affected. Such formal consultations

by ERGEG (including written consultations, public hearings) in conjunction with the Forence or Madrid fora have worked well.

36. If the Agency concludes that any code or rule (including the 10 year investment plan) does not meet the public interest test, it will communicate that opinion to the ENTSOs on whom a legal obligation would be placed to redraft these to meet these concerns. (The Agency would consult again on the revisions to the draft code and rules).

Stage (iii)

37. Once the Agency has approved the draft codes and rules they will enter into effect. Such codes and rules having been specified in the legally binding guidelines following discussions of the strategic guidelines, they will become binding. Only for market codes drafted by the Agency, will the Agency approve the codes following formal consultation (including with the Commission).
38. Given that the codes and rules are binding, they are subject to enforcement by national regulators and, where necessary, the Commission. In some Member States, national legislation or regulatory measures may be needed to adapt these to national regulatory regimes.

Commentary of the European Regulators' proposed approach

39. The proposed approach outlined above addresses the shortcomings in the Commission's proposal:
- **definitive formal consultation is undertaken by the Agency** in respect of its (preliminary) stage (i) advice to the Commission (strategic guidelines) for consideration under comitology on the overall framework and during stage (iii) on the detailed codes and rules. This will ensure that the Agency is able to fulfil its responsibilities in relation to the protection of the public interest. The documents for comitology scrutiny will, under this approach, be less complex, probably less lengthy and certainly less technical, in sharp contrast to the comitology scrutiny at the final stage of the process envisaged by the Commission;
 - comitology at the beginning of the regulatory process **will enable Member States and the Parliament** to address the key issues of each code and rule at the regulatory process that follows;

- since comitology will result in legal guidelines which give defined mandates to the ENTSOs and the Agency, **the more detailed codes and rules that give force to these will be binding and enforceable by the Agency**. This will ensure regulatory certainty for investors and confidence for market participants. Necessary technical obligations on market participants and network users can be applied and enforced. National regulators can take account of the binding codes and rules in making regulatory decisions;
- **the Agency will be able to have direct decision making powers over the detailed codes and rules** given that the strategic guidelines would be established under comitology. Since the Agency is not entrusted with any discretionary powers. The role of the Agency will therefore closely parallel that proposed for national regulatory authorities. This will reinforce close collaboration at EU and national levels. The strategic guidelines for the Agency and the ENTSOs will be established through the comitology procedure so that Member States and the European Parliament will have a full and proper opportunity to determine the pace and scope of the transition to a competitive single European energy market;
- **the Agency will be fully accountable to the European Parliament** whilst appeals on individual cases will be dealt within the independent Appeals Board challengeable to the ECJ for the performance of the codes and rules and their effect on the development of the single European electricity and gas markets.

In an accompanying paper CEER has also proposed some preliminary amendments to the European Institutions to address these problems. CEER will also provide further amendments, where appropriate, at a later stage.

Section 4: governance of the ACER

40. Our general view of governance arrangements and our overall approach start from the principle that, wherever possible, the approach to energy regulation at national level should be replicated at European level. Whilst the European legal order has its own specificities and case law (including the form and duties of existing EU regulatory agencies), we consider that there are a number of changes to the proposed organisation and the governance of the Agency that should improve its effectiveness and avoid any unnecessary expenditure for the EU budget.
41. The Commission has proposed that a Board of Regulators perform the regulatory functions of the Agency. It is essential that the Board should have the necessary powers to perform these functions in an independent and efficient manner. Here, there remains real concern. There should be a clearly defined formal role for the Director who manages the Agency and, most importantly, is proposed to adopt the opinions, recommendations and (subject to the Board of Regulator's assent) the decisions of the Agency. In our view, the Board of Regulators should be responsible by providing its assent for the selection of the Director (and possible renewal and dismissal) and should also, rather than the Director, exercise proper regulatory control and powers. It is likely that there will need to be further consideration of the voting arrangements of the Board of Regulators.
42. Given that the Board of Regulators must exercise its powers impartially and transparently, and play a full role within the Agency, it must be in a position to provide overall guidance to the Director in performing his/her duties. The proposed role and powers of the Commission within the Agency are also of real concern to us. These arrangements risk undermining the independence and effectiveness of the Agency (for example, the Commission proposes that it be consulted by the Administrative Board before the adoption of the Agency's Work Programme, essentially covering regulatory issues).
43. In order to guarantee independence and autonomy of the Agency, the Administrative Board should be responsible for management and accounting issues.

44. Other concerns remain:

- the independence of the Director may be subject to question (not least since the Commission plays the decisive role in the procedures leading to the nomination of the Director and to the extension of his or her term of office);
- the Agency should be accountable. Independence of government is a very strong factor of the Commission's proposals for national regulators: we take the view that the Agency's accountability should be to the European Parliament. The Chairman of the Board of Regulators could also appear before the relevant committee of the EP and before the Energy Council. Decisions of the Agency can of course be challenged before the Court of First Instance of the Court of Justice;
- similarly, the Agency's appeals mechanism should be transparent and compatible with the principle of independence. Thus, whilst we welcome the Commission's assurance that the Board of Regulators will be consulted on the candidates for the appointment of the members of the Board of Appeals we would prefer a binding commitment to this effect;
- the presence of the Chair of the Board of Regulators as a formal observer (as in the comitology process) in meetings of the Administrative Board would be operationally useful and reinforce the value of regulatory independence.

In an accompanying paper CEER has also proposed some preliminary amendments to the European Institutions to address these problems. CEER will also provide further amendments, where appropriate, at a later stage.

Section 5: functioning of the electricity and gas markets

45. The Commission's Sector Inquiry showed that improvement to the functioning of Europe's electricity and gas markets (including good market design providing effective and transparent price formation) is of central importance to ensure the development of the single market.

Transparency

46. Transparency in energy markets is central to the efficient operation of the market, its effective regulation, and to the development of competition. ERGEG has shown that the current situation on information and data disclosure is very different across the electricity and gas markets at the national and regional level. For effective single European energy markets to develop, the information needed by the market must be provided to all in a timely and non-discriminatory way

47. In this context, we welcome in the Commission's proposals the obligations placed on TSOs, SSOs, and LNG Operators to disclose certain information.

Access to storage facilities and LNG facilities

48. Gas storage and LNG are important facilities for the operation of the gas market because they provide important services required by market participants. In principle, access to these facilities should be offered to market participants on a non-discriminatory basis. However, Regulators agree that access by third parties to these facilities must be balanced by certainty so that developers may be able to raise the finance to develop new facilities.

49. We share the Commission's assessment that access to gas storage facilities and LNG facilities is insufficient. We welcome, in principle, binding requirements to improve access to these infrastructures and will examine these proposals in greater detail in the coming months.

50. We also support the proposal to give ACER the power to decide on exemptions for interconnectors and the proposal to give ACER the power to decide on exemptions if the infrastructure is located on the territory of more than one Member State.

51. However, such decisions should not be subject to the Commission's review with the exception of the competition aspects. We are currently developing our position on exemptions to new gas investment infrastructure (article 22).

Retail markets

52. We welcome these proposals, both for gas and electricity, and will explore these in greater detail in the coming months and make appropriate recommendations.

Section 6: unbundling and regional cooperation of TSOs

Unbundling

53. Unbundling has already received substantial attention from energy regulators, based on what we have observed and experienced at national level and taking into consideration other relevant evidence, including the results of the Sector Inquiry. Unbundling alone, though crucial, is not however a cure-all. Other factors are important in explaining the unsatisfactory evolution of many Member States' energy markets, including land use permits (beyond the scope of energy regulators) or barriers created as the unintended consequence of EU legislation. These issues need addressing urgently.
54. Any company wishing to compete in the electricity or gas markets must have access to the existing monopoly networks. Achieving effective competition requires that individually and collectively TSOs act independently of commercial interests in the market (such as electricity generation, gas shipping, production and supply) and in a strictly non-discriminatory manner. In short, unbundling must be effective. In advising the European Commission on the unbundling requirements of the 3rd energy liberalisation package, we have already recommended that in principle, the model required in new EU legislation is ownership unbundling.
55. We have also stressed that there is no justification for less unbundling in gas as opposed to electricity, as the potential for discrimination does not differ. We have not, however, recommended at this stage that European measures be brought forward to apply ownership unbundling or an ISO at distribution level.

Regional cooperation of TSOs

56. The cooperation of TSOs at regional level is useful as a tool to achieve EU single energy market and is to be encouraged. However, alone, it will not be sufficient. Indeed, the model behind our Regional Initiatives policy is that market rules as well as network rules, need to be harmonised.
57. Most importantly, TSOs need to be effectively unbundled within any particular region and effectively regulated. These are pre-requisites of any regional arrangements. How regions are defined; how regional cooperation is smoothly integrated in the wider European context and framework (including defining the range of responsibilities of the

relevant Institutions and European Organisations) are crucial issues. The proposed Agency will thus operate also with respect to the regional dimension (as well as the European Organisation for TSOs). It is therefore helpful that in the Commission's proposals the Agency will monitor the regional cooperation of Transmission System Operators. The experience we have already gained within the framework of the policy of Regional Initiatives will be useful in moving forward.