

**Implementing the third energy package -
Comments by the European Federation of Energy Traders (EFET)¹ on
“An initial consultation paper by the European Energy Regulators”**

1. Support for consultation and early implementation

EFET supports the desire of ERGEG to start early development of the guidelines, code and rule formulation processes foreseen in the 3rd IEM legislative package.

We welcome ERGEG raising three key issues:

1. Stakeholders' interaction with ACER;
2. The development of framework guidelines and network codes; and
3. The coordination of regional and national elements of the European regulatory framework during the period of transition to a single European market.

However, EFET feels that the solutions envisaged in the consultation document do not sufficiently focus on avoiding any discrimination between the different stakeholders *ab initio*. EFET already set out similar concerns in January 2008, when we wrote in our commentary on the European Commission proposals:

“The voice of network users must feature more clearly in the 3rd package. The European TSOs' primary duty is to grant access and deliver a service to their customers, such as generators/producers, traders, shippers, suppliers, distributors and larger consumers. These users of transmission systems and services are commercially exposed to variations in access and service terms; sometimes they discharge public service obligations of their own: legislation establishing institutional structures and new rights for TSOs as a group must recognize these realities. The users must be in a position to optimise the energy value chain, through well functioning market mechanisms, based on the provision of effective and efficient services by the grid operators. The ideas of network users, at the very least when it comes to market operation and trading arrangements, deserve institutional and regulatory parity with those promulgated by network operators.”

¹ Established in 1999, the European Federation of Energy Traders (EFET) is an industry association representing over 90 trading companies operating in more than 20 countries.

The EFET mission involves improving conditions for energy trading in Europe and fostering the development of an open, liquid and transparent European wholesale energy market.

More information about EFET views and activities is available on www.efet.org.

And

“The foundation of ENTSO (gas) and ENTSO (electricity) must therefore be balanced by a clear and institutionally robust role for network users at the wholesale level in the formulation of guidelines, rules or standards. Currently there are shortcomings and inconsistencies concerning cross-border access at nearly every national network interface across Europe. Institutionalising two pan-European bodies comprising all gas and electricity TSOs risks actually delaying the process of market integration, and may result in a market design that is crafted for the convenience of the TSOs rather than optimised in the interest of the overall European economy. We therefore suggest the new rights and responsibilities assigned to ENTSO must be focused on the core international roles of TSOs (i.e. to deal with the commercial and operational aspects of pan-European network access), not on supply issues, trading arrangements and market rules. We also insist that these rights and responsibilities must be matched by powers vested in the Agency for Cooperation of Energy Regulators (ACER) to approve or disapprove any ENTSO initiatives after due consultation.”

We believe that the proper establishment of stakeholders’ consultation processes acknowledging the needs of network users, just as much as the preferences of network operators, must be a cornerstone of the ambitious project to bring about a single, unified European grid code in each of the power and gas sectors. We confine ourselves in the following comments mainly to answering those questions raised in the ERGEG consultation document dealing with the work of the agency as a central institution in decision making about progress towards such codes (hereafter referred to as “European Network Code”). The questions focusing on areas for harmonisation, the grouping of matters to be dealt with in the envisaged codes, priority topics to be tackled etc. are quite correctly raised. However, in our view these will be discussed in a more efficient way once the roles and the rights of participation of all interested parties are better understood.

We also believe that it would be helpful for ERGEG to produce an early example of a framework guideline and a rough guide to the necessary content of the corresponding network code. This would help to establish a shared understanding about the scope and depth envisaged for these documents, and enable better decisions about priorities and participation in code development.

2. The work of the Agency – Questions

A. Please comment on the Consultation Arrangements proposed in this paper (see Appendix 1 Annex 2) as a basis for the interim period and for later decision by the Agency as its own process.

EFET advocates diversified consultation by ACER at the earliest stages of its formulation of framework guidelines. The objective of this earliest consultation should be to ascertain the essential content required to satisfy system user requirements. Decisions by ACER or ENTSO, which naturally primarily affect the users of regulated energy infrastructure, should indeed focus on the needs of

these users, at least in so far as those needs reasonably reflect the forces of competition and respect the principles of objectivity, transparency and non-discrimination. Therefore, ideally a full range of (actual and potential) users of regulated infrastructure should enjoy the chance to define the output they believe to be necessary from any European Network Code in the first place. One of ACER's primary roles should then be to ensure any new or amended guidelines satisfy the users' - reasonable - requirements.

Any meetings for the development of framework guidelines or codes must be fully documented and the proceedings and reviewed materials must be published.

Having said that, and bearing in mind that any duplication of consultation should be minimised (see para 16. of the Consultation document) EFET would like to see the following suggestions taken up in the design of network users' involvement in elaboration of framework guidelines and codes:

- If the users of regulated energy infrastructure acquire by statutory means an equal voice to that of the TSOs in the initial development of framework guidelines and codes affecting both, then approval by ACER of the outputs from this process can be expedited.
- If, as appears to be the case in the 3rd package as currently drafted, the users of regulated energy infrastructure will not enjoy an equal voice to that of the TSOs in such initial development, then it will be appropriate for ACER to undertake consultation on its own account with the users, to ensure their requirements have indeed been met, prior to the approval by ACER, or submission by ACER to a comitology process, of any new or amended guideline or code.

- B. Could the fora (i.e. Florence, Madrid, London) be further enhanced to allow stakeholders to make an effective contribution to the development of the single European energy market? How could this be done in a practical way?
- C. Could focus 'ad hoc panels' of interested expert stakeholders assist the Agency in the development of regulatory policies? Should they be linked (though without full representation) to the Florence, Madrid, and the new London Fora to avoid the proliferation of consultation structures, ensure the effective delivery of stakeholder views and proper representation? Or should the ad hoc panels be organized independently of the Fora in close cooperation with energy consumer and network user representatives?

As the framework guidelines most likely will have a fundamental effect on wholesale market participants and the functioning of wholesale markets in power and gas, EFET regards it as appropriate that a panel of experts from the energy sector takes the lead in advising ACER on priorities and content from the beginning. The members of this panel should be appointed on the basis of their expertise and experience, not on the basis of their affiliations. Nonetheless the appointment process should aim to achieve a good balance between the interests of different parts of the sector in Europe, by reference to geography, company type (production, trading, supply, consumption, services etc.), commodity exposure (principally power and gas) and professional or academic background of individuals chosen.

An open, transparent and non-discriminatory process should be created, designed to produce a maximum degree of independence and impartiality of the panel as a whole.

The panel should consist of experienced, respected individuals, who may be either independent of, or employed by energy companies, knowledgeable about the functioning of wholesale power and/or gas markets. It should not comprise industry association "representatives" as such, nor include representatives of the regulators and the TSOs.

The choice of experts might be primarily determined according to their fulfilment of certain criteria, such as:

- Practical (corporate or other commercial or other professional) experience in international wholesale energy markets in Europe
- Knowledge of energy regulatory law and/or economics
- Understanding of the processes of granting of access to power and gas networks for market participants
- Familiarity with concepts of governance (of both network management and trading activities)
- Current familiarity with a range of relevant product and geographical markets across Europe.

In the case of both framework guidelines and later detailed rules or codes determining **terms of system access and market design**, we suggest the expert panel also take a part in reviewing any final ACER recommendations to the European Commission and Member States.

- For the drafting of codes (initial and modifications to the initial version), as opposed to the formulation of framework guidelines, we suggest that in the case of those, which determine terms of system access and market design, the expert panel take a leading role not only in any final ACER recommendations to the European Commission and Member States, but also in the initial drafting process.

- In the case of codes having their primary impact on network operators themselves (e.g. setting up minimum requirements for interconnection agreements, OBAs, inter TSO metering, inter TSO data exchange etc.), EFET recognises it will be appropriate for the ENTSO to take the lead in drafting. The ENTSO would submit its internally agreed draft to ACER for approval. Stakeholder consultation would then take place at this later stage.

Provided the interests of affected parties have been fully taken into account in the decisions leading to final formulation of draft guidelines or a draft code, then their ultimate adoption or approval should be speedy and straightforward.

D. Are proposed measures to ensure the proper public accountability of the Agency broadly adequate?

EFET agrees that ACER's accountability is an important aspect when ACER is formed, hopefully no later than 2010. The issue links closely with the constitutions and operating rules adopted by the ENTSO. We look forward to commenting on relevant proposals when they are available.

A key requirement for ACER's success will in any event be its ability to understand and take account of the features required for efficiently functioning and competitive wholesale energy markets.

E. What do you consider to be the key elements for the successful establishment of the Agency?

The key requirement for a successful ACER will be its ability to operate in the interests of all participants in the European energy market (whether on the supply or consumption side). Although the interests of consumers need to be protected most obviously at the retail supply level, we see the primary function of ACER relating to operation of wholesale power and gas markets. If these markets ultimately function optimally on a cross-border basis throughout the 27 Member States, consumers will rapidly then see benefits, in terms of choice, cost reflectivity and quality of service.

What are the most important issues relating to the NRAs and their role within the Agency?

It is of the utmost importance that the roles of the NRAs and of ACER are clearly distinguished. Even if the Agency's board comprises directors or employees of individual NRAs, they must be obliged to discharge their managing or supervisory function in a completely independent, objective and non-partisan manner. This is essential in order to ensure the Agency takes a truly European perspective, rather than reduces crucial EU market issues to multilateral compromises between national interests.

3.-Regional considerations in moving to a single European market

- F. Are the proposals in paragraph 69 to ensure the regional level involvement of stakeholders adequate? If not, how could they be further improved?
- G. How do you envisage the Regional Initiatives operating after the entry into force of the 3rd package legislation? Will their role become less important, given the development of network codes at EU level?

The Regional Initiatives have allowed stakeholders to express their views, draw attention to their needs and identify the main problems in each of the regions. Although the outcomes of the regional Initiatives are varied at this stage, they have represented a major step forward on the way to reaching a real European internal energy market. Thus, we believe ERGEG and the NRAs involved should continue to analyse and monitor objectively the achievements of each regional initiative, to foster continuing work and encourage involved TSOs to make further progress.

In the future, implementation of new EU-wide rules and codes will be an important step that may be facilitated through the Regional Initiatives.