

E.ON's response to ERGEG's consultation **on the future set-up and role of ACER**

Ref: C08-GA-45-08

Following ERGEG's publication of "An initial consultation paper by the European Energy Regulators" on the implementation of the third energy package and also the latest text proposals with respect to the role, responsibilities and set-up of ACER E.ON would like to take the opportunity to lay out its positions on some of the currently debated aspects of ACER's role but would also like to provide answers to ERGEG's consultation.

Executive Summary

The original text proposals and the latest changes by the European Parliament, Commission and Council to the future role/duties of ACER contain a complete reform of the current energy governance system in the European Union. E.ON in many ways supports the proposal – but there are shortfalls and important issues to be obeyed when undertaking such drastic change. These shortfalls and issues are mainly seen in the following areas:

- ACER's responsibility should focus **only** on EU and in particular **cross-border** network regulatory **issues** (e.g. harmonization of market rules and TSO co-operation). ACER should encourage regional market integration, should be responsible for coordinating and supervising the cooperation of national regulatory authorities on regional level and should lay down principles of better regulation across EU energy markets. For example, ACER should be the only responsible body for approving Third Party Access (TPA) exemptions for new infrastructure in all cases where these facilities cover more than one member state (such as cross border networks). We support a strong role of ACER, this would mean that ACER would also be the responsible body for issues such as cross-border congestion management and EU wide or regional transparency requirements/codes.
- While on the one hand ACER's powers should be restricted to supra-national issues, it should on the other hand be given **sufficient powers**. This means ACER should be the final decision making regulatory authority for EU and cross-border issues. There must be no parallel competencies at the national or European level which are likely to make regulatory processes unnecessarily complex and time consuming and will delay further market integration. The decisions of ACER should be binding on the national regulatory authorities involved. Where necessary, according to the EC Treaty, the decisions adopted by ACER could be confirmed by a Commission decision. However, the regional initiatives as already successfully established and acknowledged institutions in the European market integration process should be the relevant forum for ACER to exert its competencies. In this context it is questionable whether the "one-country-one-vote" approach by the Council will allow ACER to function and will not lead to a permanent logjam. Therefore we suggest that ACER should decide on issues by QMV based on the "Nizza voting rights" that is relevant to the European energy market.
- As to the **initial ACER code development** the following should be observed:
 - ACER should delegate the code drafting to ENTSO (Gas/Electricity) together with a network user panel in order to make use of the leading expert know-how.
 - ACER should then initiate a formalized consultation of the draft code. The consultation should address and respect TSOs and network users to the same extent.

- Any code needs final approval by ACER.
- With regard to **changes to existing codes** the subsequent point should be ensured:
 - In analogy to the UK governance structure, ACER itself should not be in the position to propose *changes* to existing codes. **Only network users and/or TSOs should be able to suggest changes** in order to ensure that any further development is needed *by the market*. Here, network users and TSOs should have equal rights to propose and to decide jointly on changes required. Only if they cannot reach agreement ACER shall have the power to take a binding decision in favour of either position.
- **In the entire process** the following requirements are crucial:
 - ACER should commit itself to **carrying out regulatory impact assessments** before making any decisions. In this context the suitability, necessity and proportionality of a modification of the existing code need to be proven: changes must be proven to facilitate defined objectives, such as efficiency in network operation.
 - Transmission network users and TSOs must have equal rights and official representation to draft network codes and market codes. They should also be the only parties who can propose changes to such codes that affect all market participants.

Detail Response to ERGEG’s Consultation paper
– Implementing the third energy package -

References:

- Questions: Implementation the third energy package – An initial consultation paper by the European Energy Regulators - OVERVIEW, p. 5-6
- Document: Appendix 1, Annex 2: Proposed modifications to the ERGEG Public Consultation Practices, p 10-13

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.*

E.ON welcomes the proposals for the interim period and mainly supports the suggested modifications to the ERGEG public consultation. But there some issues that should be modified as following:

“5.) *On when they consult,*

iii) ~~organise, upon request, informal discussions at an early stage with those most directly affected, recognising the limited resources that are available for this;~~”

Reason: As the overall goal of consultation is to receive a response and to make it public to all entities concerned. We have doubts whether informal ‘discussion’ allows a fair and transparent pre-consultation process.

Further modification:

“iv) consult at a sufficiently early stage on strategic issues of cross-border or cross-regional relevance and to take responses into account, before elaborating concepts, action plans,”

guidelines etc.”

Reason: In several regional markets it can be observed that regulators’ action plans are not met. Even if goals shall be set ambitiously they have to be realistic, respect the complexity of issues and human resources available.

6.) On how they consult, the following should be inserted:

“i) will, whenever appropriate establish consultative working groups of experts: in particular when consideration is given to future legislation and on technical content issues, a standing group of experts that may be consulted at any time may be created; this group of experts consists of an equal number of representatives of TSOs and network users. This consultation supplements the written consultation of stakeholders.”

Reason: E.ON welcomes the establishment of consultative working groups for an efficient process. Regarding the Agency and ENTSO, a network user panel representing the interests of suppliers, traders, consumers, network user, gas exchanges and producers must be established in order to have a proper representation of network users. A small number of representatives of this network panel along with an equal number of TSO representatives could form a small and efficient consultative working group of experts.

Further modification:

“vii) use appropriate processes in order better to target consultations at those who are most affected (~~this will include the use of bilateral discussions, as well as Maribor, Athens, Florence, Madrid and London Regulatory Fora.~~”

Reason: We propose to use ENTSO and a new established network user panel representing the market demand (see above 6).

9. In respect of the Regional Initiatives,

E.ON recognises that separate public consultations may be organised by regulators at the regional level under the umbrella of the Regional Initiatives. Where the outcome of any such consultation is seen by the Regional Co-ordination Committee of regulators of the Regional Energy Market (REM) in question to have a broader application at EU level, the RCC may propose to ERGEG that a full public consultation is launched at the European level. Therefore the following should be included:

“Before technical concepts are elaborated and finalized for regulatory approval it must be ensured that market participants and TSOs concerned in each region are able to present their views..”

Reason: E.ON observed in several regional markets (electricity / gas) the common tendency that concepts are introduced to the stakeholders as final and agreed among the TSOs, leaving not much space for other proposals. Even if E.ON highly acknowledges TSOs’ work and the presentation of feasible concepts we see a major benefit for market evolution to be involved at an earlier stage in order to support the concept development by expert input. Even for TSOs such an input shall be valuable as they can trust that their engagement goes in the right direction and is compatible with market needs. Finally a strategic action plan needs to be defined followed by technical implementation without any further discussion on strategic issues.

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?*

As noted in question A, instead of using the listed fora, the interests of suppliers, traders, consumers, network user, gas exchanges and producers should be represented by a network user panel. This institution can be consulted besides ENTSO for future legislation and on technical issues.

C *Could focused ‘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?*

Ad hoc panels of sector experts consisting of representatives of network users and ENTSO would represent an efficient way for consultation. It should be ensured that this consultation supplements a written consultation.

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

We support the suggested measures as annual report, work programme, evaluation report and a review report. In order to enforce further accountability of ACER the Commission should consult stakeholder to give feedback on the annual work of ACER .

E *What do you consider to be the key elements for the successful establishment of the Agency? What are the most important issues relating to the NRAs and their role within the Agency?*

The following aspects have to be observed in this respect:

A **clear distinction between competences of NRA and the Agency** is essential. The Agency should be restricted to supra-national issues. This means the Agency should be the *only* regulator for EU and cross-border issues. Parallel competencies at the national or European level would make regulatory processes unnecessarily complex and time consuming and will delay further market integration. ACER should also be responsible for coordinating and supervising the cooperation of national regulatory authorities in regional cooperation for market integration and should lay down the basic principles across EU energy markets.

- Besides clear competences **efficient processes** regarding decision making and the time period to approve network codes present a core element for the successful establishment.
- The tasks of the Agency should enhance monitoring the implementation of provisions by the directive, regulation and network codes. The Agency should have an overview about the implementation status in each country and clearly identify, the issues not yet implemented at each country. **Sufficient power**, e.g. to impose penalties is also crucial in order to establish a Single European market with harmonized market rules. ACER should not be a body where national regulators negotiate between themselves to find compromises.

References

- **Questions: Implementing the third energy package – An initial consultation paper by the European Energy Regulators: Overview, p. 11**
- **Appendix 2: Framework guidelines and European codes**

A. Are the proposed priorities for the codes and technical areas the right ones? If not, what should the priorities be?

Yes, we agree with the priorities (for electricity) as described in Appendix 2, para 22. However, investments in cross-border related transmission should be a main concern for ACER as well. ACER should develop codes for evaluation of the 10-year investment plans and how costs shall be allocated between TSOs. We also agree with the proposed priorities I to IV for gas as described in Appendix 2, para 24. However, the two additional areas "LNG" and "storage" should be let out for consideration of development of codes. The proposal of the 3rd package allows Member States to choose between regulated and negotiated access. Therefore, the Commission should take the individual particularities and choices of Member States into account.

B. Do you agree with our proposed approach grouping the technical areas into codes (see Appendix 2)? If so, what could the groupings be?

We are of the opinion that data exchange is one of the most important issues which decides finally about the success of the specific framework. The framework itself can be perfectly set but if data exchange does not work, it will fail. Therefore we recommend to focus on data exchange in each of the relevant priority groups and to make data exchange an integral and obligatory part of each framework guideline.

For gas, the area "grid connection and access rules" shall be reduced to "grid connection rules". In general, the "access rules" contain all rules about the usage of the grid. This mainly includes rules about the booking and allocation of capacities, operational questions such as nomination and balancing as well as tariff questions. These topics are to a large extent already covered separately under Priority I and Priority II so we suggest to delete the words "and access" under Priority IV in order to avoid conflicting priorities."

C. Which aspects of market design or network operation should be fully harmonised across the Union through the first set of codes?

E.ON welcomes and supports the vision to create a single, liberalized and harmonised European electricity and gas market. As E.ON is active in many European countries and therefore also in cross-border business we would like to offer our support to discuss and develop these codes.

E.ON recommends to concentrate on the European wide harmonization efforts for electricity mainly on the second priority group. In detail:

- Grid connection and access: Identical rules are urgently to safeguard a level playing field for generation companies across Europe. This relates particularly to identical rules within each synchronous zone where differences of grid connection requirements are hardly or even not to argue. We are also of the opinion to extend this rule setting to renewable energy units which, according to our knowledge, face quite different frameworks for grid connection and access across Europe. An optimal outcome would be to define a precise process with clear deadlines and responsibilities of TSOs/DSOs and generation companies and obligatory technical requirements for generation units including renewables to comply with indispensable security standards.
- Capacity allocation and CM rules: We also see the urgent need to fully harmonize the methodology how cross-border capacities within the regional markets are calculated. In case the same methodology is used by several TSOs there should be no difference with the outcome. According to our knowledge, there are still differences today.

As far as auction rules are concerned we would very much welcome an unique set of auction rules or at least identical definition and practices regarding the most critical issues such as firmness, force majeure, compensation in case of curtailment.

- **Transparency:** Related to transparency we favour identical obligations across Europe where all TSOs and generation companies face the same obligations. Hereby, we propose to define precisely and identically the relevant data publication obligation and the timeframe for publication. This would allow a level playing field for cross-border trading.

For gas the following must be stated: Having identified the importance of the aspects by grouping them in priorities, the choice of topics for a first set of gas codes can be driven by importance or likeliness to reach a solution within an acceptable time frame. Furthermore many of the topics are interlinked. Harmonised transparency is precondition for the capacity allocation and management rules or balancing rules. Therefore it might be adequate to start with transparency rules. The results of the project of the Gas Regional Initiative North-West might be already a good basis for EU wide set of codes.

The first set of codes should furthermore deal with an aggregated, frequently updated and aligned publishing of cross border data of all concerned TSOs via a centralized platform (The GTE+-Transparency Platform can be a model. To contribute to it should be mandatory for TSOs). The code should inter alia elaborate on an in depth definition of terms used in the transparency requirements of Gas Directive/Gas Regulation to secure data consistency across Europe, establish standards of frequency/intervals of updating etc.

D. Annex 1 of Appendix 2 we describe the content of each area mentioned in the Commission's initial proposals. Do you think the description is complete? If not, what aspects should be elaborated within the areas?

The purpose of the Agency shall be to assist the national regulatory authorities in exercising at Community level the regulatory tasks performed at national level (Art. 1 of the Draft ACER Directive). As the national authorities may decide on exemptions from specific parts of regulations for new infrastructure we assume that the Agency will - like the national regulatory authority - not be responsible for these exempted infrastructures.

References

- **Questions: Implementing the third energy package – An initial consultation paper by the European Energy Regulators: Overview, p. 13**
- **Appendix 3: Co-ordination of decisions at regional and European level**

A. Are the mechanisms and observations outlined above – notably in relation to the interaction between the Agency and the ENTSOs (and CEER and GTEplus/ENTSO-E) adequate? Are the changes that should be considered for their improvement?

No specific comments.

References

- **Questions: Implementing the third energy package – An initial consultation paper by the European Energy Regulators: Overview, p. 16**

A. Are the proposals in paragraph 69 to ensure the regional level involvement of stakeholders adequate? If not, how could they be further improved?

In general we find the proposals in paragraph 69 adequate but would add another one. Derived from the current experience in the regional electricity markets, we see the need to define cornerstones for a wider European solution such as identical gate closure times. In order to take such harmonization needs into account we recommend to add to paragraph 69 a bullet “Consult and define of cornerstones allowing a PanEuropean congestion management solution”.

Furthermore we propose to establish a network user panel for electricity and gas representing the interests of suppliers, traders, consumers, network user, gas/electricity exchanges and producers in order to have a proper representation of network users. In addition, a so-called ad hoc panel consisting of a small number of representatives of this network panel along with an equal number of ENTSO representatives may form a small and efficient consultative working group of experts assisting the Agency in regulatory policies.

B. 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?

E.ON believes that the overall value of the Regional Initiative will remain as the running initiatives such as regional market coupling should be continued. It will not be possible and effective to achieve a full harmonisation of all features of the market design in a short period of time. Even if the 3rd package is in force there is still a long way to go until finally a fully integrated Single European Energy market is achieved.