



**3<sup>rd</sup> Legislative Package Input**  
**Paper 2: Legal and regulatory  
framework for a European system  
of energy regulation**

An ERGEG public document

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## 1 Objectives

The model set out here seeks to fulfil the core functions and criteria of a European regulatory function listed in Annex A. European regulators are unanimous in seeing regulatory independence as the central “institutional” issue, so as to create the stable and predictable climate necessary for the huge EU-level investment that the European Commission have identified as necessary. The same requirements for regulatory independence at national level should in principle be applied at the EU level: once established, a European regulatory function should be able to fulfil its legal duties by taking independent, binding decisions without recourse to the Commission or Member States.

We also recognise, however, that a European regulatory function can only be established within the institutional limits and practices of the existing EU legal framework. It must have a clear legal character for it to be empowered legally to take binding decisions. We have therefore sought to propose a model that takes into account the present EU institutional balance (between the Commission, Parliament and Council), and to reflect existing policies (such as the draft inter-institutional agreement on the operating framework for EU regulatory agencies) and ECJ case law (eg. the “Meroni” principle). Further information on the legal background we have considered is provided at Annex B. As such, **the European System of Energy Regulation (ESER)** is presented in the spirit of finding a workable solution. We urge the European Commission to be as ambitious as possible in interpreting it and converting it into draft legislation.

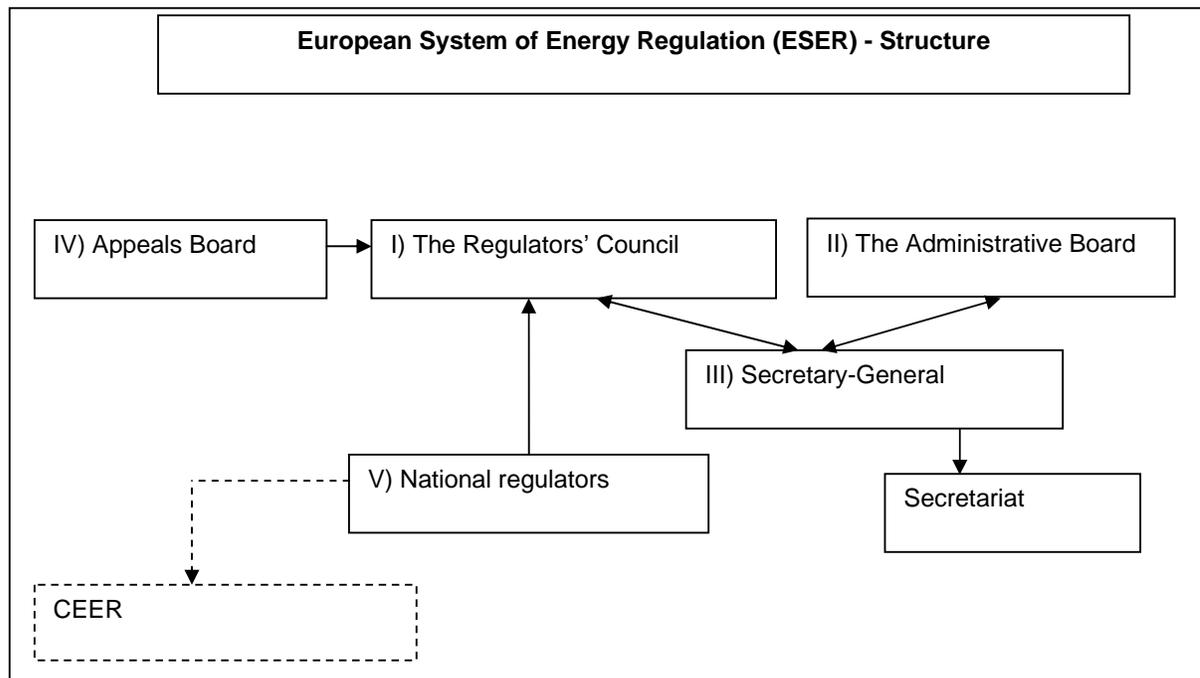
The ESER sets out the basic details of a model for the formation and operation of a European regulatory function, including its vital interactions with the national regulators and the EU Institutions. Our comments should be read in conjunction with other elements of this package on the overall framework for network regulation, *ETSOpus/GIEplus*, and the powers and independence of national regulators (respectively papers 3, 4 and 5). Together these papers represent the institutional requirements of a comprehensive European regulatory framework.

The ESER should be seen as our preliminary thinking. It is clear that some elements require further consideration, including with legal experts. Further work is necessary on the how the decision-making processes of the ESER will work in practice; the scope of the issues it will cover; and where EU-level regulatory decisions will have direct binding effect and where approval by eg. comitology might be necessary (which we believe should be kept to a minimum, in line with the requirement for regulatory independence). Further discussions with the European Commission on these and other elements of the ESER would be helpful as thinking develops.

## 2 The Model

The organisation chart (figure 1) sets out the basic structural arrangements, and each element is then considered in turn along with the processes that will need to be in place. Both the structure and processes will need new EU legislation (probably a Regulation) to give legal effect, which could require quite lengthy periods of negotiation in the EU co-decision procedures. It would be envisaged that regulators would work in the interim period to establish (informally, but as effectively as possible) the detail of the arrangements.

(figure 1)



### 2.1 The Regulators' Council

The primary regulatory decision-making body in the ESER is the Regulators' Council. Its EU-level duty will be to oversee the public interest objective of promoting a competitive single European gas and electricity market. It will be responsible for carrying out functions that would be established in a Regulation (and described in more detail in Annex A):

- The approval of EU security standards, on the basis of a proposal from the new EU TSO bodies (ETSO<sub>plus</sub>/GIE<sub>plus</sub>) following an invitation from the Regulators' Council (or the Commission)
- The approval of EU operating standards, on the basis of a proposal from ETSO<sub>plus</sub>/GIE<sub>plus</sub> following an invitation from the Regulators' Council (or the Commission)

- The approval of cost allocation methodologies for non-domestic/cross-border investments, on the basis of a proposal from ETSO*plus*/GIE*plus* following an invitation from the Regulators' Council (or the Commission)
- In conformity with agreed EU standards, the approval of EU-level investment plans, on the basis of a proposal from ETSO*plus*/GIE*plus*
- The approval of binding guidelines/implementing measures in areas defined by legislation (in Directives or agreed Comitology decisions).
- Providing advice to the European Commission on regulatory issues

Clearly, the processes by which these regulatory decisions are reached are vital. Our initial thinking is set out later in this paper (see section 3), although this is recognised as the area in which further work is necessary. At a high level, however, the framework for regulatory decision-making is as follows:

- The high level objectives for a secure and efficient EU grid will be set out in legislation
- The Regulators' Council will produce non-binding guidelines on e.g. required operating and security standards to meet these objectives
- On this basis ETSO*plus*/GIE*plus* will produce draft standards to be applied to the EU grid
- The Regulators' Council will assess these drafts against both the high level objectives in legislation and the non-binding guidelines, and will decide whether or not to approve the standards. The setting of non-binding guidelines by the Regulators' Council and the approval decisions will be subject to appropriate consultation.
- Once approved the standards will be binding. In some cases, as discussed later, this may require formal approval by the Commission and/or a comitology committee, although these instances should be kept to a minimum in line with the principle of regulatory independence.

In taking its decisions the Regulators' Council will act by Qualified Majority Voting, in accordance with the rules of procedure of the Council of Ministers and in line with the practice of the existing ERGEG arrangements.

The Regulators' Council will comprise the head of each national regulatory authority of the EU Member States, whose powers and independence will be harmonised in separate EU legislation (Paper 5 (C07-SER-13-06-5-PD): "Powers and Independence of National Regulators" deals with these arrangements). Internal rules will be based on the present ERGEG Decision, including additional measures to safeguard the security of tenure of members of the Regulators' Council. Members (or their alternates) will have a term which will be determined by their tenure as the head of a NRA. They will be removable from membership of the Regulators' Council when their term as head of a NRA expires, or on grounds only of incapacity or serious misconduct (vital to maximise the political and commercial independence of EU-level regulatory decisions, which in turn is fundamental to establishing a stable and predictable EU climate for investment). The Regulators' Council will elect a Chair, on a QMV basis, from amongst its members, who will serve for a minimum of 2 years (as with ERGEG) and/or in line with his/her tenure as head of a NRA. An alternate will represent

the Chair's NRA on the Regulators' Council, in line with existing ERGEG practice. The chair of the Regulators' Council should attend the comitology committee as an observer. The Regulators' Council will replace ERGEG, which will be extinguished. CEER will, however, continue (see below).

That the Regulators' Council will be established within the EU legal framework and have a legal personality (as defined in a Regulation of the Council and the Parliament) will carry three implications, which impose unavoidable restrictions:

- Firstly, where measures are required that are not foreseen by the existing *acquis* the need for EU-level regulatory decisions must be agreed and, where further implementing measures or binding guidelines are required, the Regulation establishing the ESER must give to the Regulators' Council the legal powers to take greater decisions in areas delegated by the Council and the EP to the Commission.
- Secondly, the Regulation establishing the new structure will need to distinguish between those implementing measures or decisions which amount to the development of the *acquis*, and those which solely involve the execution of the *acquis*. In line with the Meroni principle in ECJ case law (see Annex B), the Commission may only delegate powers to an independent body (ie. here the Regulators' Council) which are limited to the preparation and performance of executive acts, and such bodies may not be afforded discretionary powers. As a result therefore, whilst decisions in the second category may be delegated entirely to the Regulators' Council, decisions in the first category will need to be formally approved by the Commission and/or a comitology committee to become binding at EU level. The role of the Commission/comitology should be kept to a minimum in line with the principle of regulatory independence, and is considered further below.
- Thirdly, there must be some involvement of the Member States and the European Commission in line with the established EU institutional arrangements. These are considered under II below.

## 2.2 Administrative Board

As an EU body established in law the Regulators' Council and its accompanying resources will be funded from the Community budget. Following existing practice amongst EU agencies, for example the Chemicals Agency established by the REACH Directive, and in line with the draft "Inter-Institutional Agreement on the operating framework for European regulatory agencies" it will also therefore be necessary to establish an Administrative Board to oversee the governance and the accounts of the new arrangements. This management function to oversee the running of the organisation will be separate from the regulatory decisions, which will be the sole responsibility of the Regulatory Council, thus essentially preserving the independence of the regulators (which will also be safeguarded in the continuation of CEER). The Administrative Board will set the organisation's budget including the salary levels of staff within the Secretariat.

The Administrative Board will comprise equal numbers of representatives of the Member States and of the European Commission. Decisions will be reached on the basis of one vote per member, rather than QMV. The Commission will Chair the Administrative Board. In the case of a split vote, the Chair will have a casting vote. The Chair of the Regulators' Council should be appointed as an observer on the Administrative Board for all of its business.

## 2.3 Secretary-General /Secretariat

The Secretary-General will be assisted by an adequately resourced Secretariat. The role of the Secretary-General will be to prepare proposals on the areas listed in point 4 above for decisions by the Regulators' Council. He/she will undertake regulatory tasks under the direction and within the remit of the Regulators' Council. This will include monitoring of compliance of standards, preparing papers on regulatory policy, co-ordination between national regulators and undertaking the general business of the Regulators' Council. He/she will also provide support to the Administrative Board in respect of its management responsibilities.

The selection of the Secretary General will be made from a choice of three suitable candidates proposed by the Commission on the advice of the Regulators' Council. The Secretary-General will be formally appointed by the Administrative Board, following the recommendation of a selection panel which will include the chair of the Regulators' Council (with a vote amongst 3). The chair of the Regulators' Council must agree to the appointment. The term of office will be for a period of five years with a maximum of one period of renewal. He/she will not be dismissed without the agreement of both the Administrative Board and the Regulators' Council.

The staff of the secretariat will be appointed by the Secretary-General, who will consult both the Administrative Board and the Regulators' Council. The staff may comprise of full time employees, secondees and consultants. The location of the secretariat will be determined by the Regulation establishing the ESER. The existing arrangements viz-a-viz the independent CEER Secretariat and the ERGEG secretariat, which is based within the Commission and largely staffed by NRA secondees, might be developed as a means of making practical progress in the interim period whilst new legislation is negotiated. (NB. Further consideration is needed into the functions and relationships of the Secretary-General and the Secretariat, including the extent to which CEER should prepare work that goes to the Secretariat; who should be appointed to the Secretariat (experts seconded from regulators, other experts etc.); and the ability of the national regulators to bring forward proposals to the Regulators' Council independent of the secretariat).

## 2.4 Appeals Board

Decisions of the Regulators' Council are, in principle, challengeable to the ECJ. This is a heavy and lengthy procedure, particularly unsuited to very technical issues. Therefore the Regulators' Council will need an appeals body and process to consider cases before recourse to ECJ action. The appeals body will need to be technically competent and recognised as independent in reaching appealed decisions. This body will, given the complex nature of regulatory decisions, be particularly difficult to develop lest the Council has all real control. A standing Appeals Board may resolve this dilemma, appointed by the Regulators' Council and comprising three people each with a high level of expertise and experience in taking regulatory decisions (ex-regulators or a lawyer), reflecting the precedent established by the Community Trademark Office (CTMO) in Alicante.

The Appeals Board will operate on the basis that all regulatory decisions by the Regulators' Council are announced by a public notice. From the point a decision is received by the

Appeals Board, a period of time (say two months) will be allowed for third parties to submit a request for an appeal. A public notice will be made which will provide an explanation for the decision of the Appeal Board. If the appeal is upheld a new proposal will be made by ETSO*plus*/GIE*plus* and further regulatory approval from the Regulators' Council sought. The cost of any appeal which is not upheld will fall to the appellant in order to deter vexatious appeals. The Court of First Instance may confirm, invalidate or alter the Appeal Board's decision.

Appeals against the decisions of national regulators in the application of the decisions of the Regulators' Council will be taken, as now, through national appeal arrangements and national courts.

Infraction proceedings against the Regulators' Council or national regulators for failure to properly apply the legislation will be taken, as now, by the European Commission subject to ECJ scrutiny.

## 2.5 National Regulators

National regulators will need enhanced independence and harmonised powers, as set out in the separate paper 5 "Powers and Independence of National Regulators" (C07-SER-13-06-5-PD). Along with their national responsibilities, they will in addition have a new EU duty assigning to them responsibility for overseeing at national level, within their jurisdictions, the public interest objective of promoting a competitive single European gas and electricity market. This duty is commensurate with the EU-level duty on the Regulators' Council, and represents the mechanism by which regulatory approval of the Regulators' Council becomes binding on the national regulators ie. once approved by the Regulators' Council, the investment needed to meet the EU security standards and high level objective will be automatically approved by the national regulators. National regulators will oversee the European activities of the relevant TSO in the same way as for a solely national investment. National regulators will also need to be obliged to co-operate in cross-border market investigations and enforcement actions, possibly building on the model of the European Competition Network, since as markets become more integrated the effect of market distortions in one Member State will increasingly be realised in another.

National regulators (independent of both commercial and political influence) will ensure a stable and predictable climate for investment. They will have a standard term of office and will be removable from office based only on incapacity or serious misconduct.

Similarly, at EU level independent national regulators will, through the Regulators' Council, ensure a stable and predictable climate for EU investment. The revision in powers described above should permit the EU dimension to feature permanently in the national decisions taken by the regulators (again, requiring legislation). The role of CEER in this aspect will be crucial. Whilst the existing ERGEG arrangements will be replaced by the new Regulators' Council, CEER should continue as the independent association of the national regulators of the EU and EEA Member States alongside the ESER. It will provide an ongoing forum for eg. the exchange of best practice involving a wider group of regulators. CEER would not have a formal role within the ESER.

## **2.6 ETSOplus/GIEplus**

Although not formally part of the ESER TSOs will play a vital role in the proposed framework at national level and at EU level through the enhanced EU networks bodies, ETSOplus and GIEplus. As constituent members of ETSOplus/GIEplus, the TSOs will be responsible for delivering the secure and efficient EU grids through their actions and decisions in the development and operation of their networks. Accordingly, ETSOplus and GIEplus will have a central role in preparing the draft technical operating and security standards, the cost allocation methodologies and (of high importance, though as yet insufficiently explored) the EU level investment plans which, once approved, will form the substantive basis of the ESER. The EU-level obligations on ETSOplus/GIEplus, their legal personality and issues to do with their composition are discussed in the separate paper 4 “ETSOplus/GIEplus” (C07-SER-13-06-4-PD). However, it is important to recognise their role here in order to discuss the processes by which the ESER will work.

### 3 Processes

#### 3.1 Decision-making

In order to illustrate how the ESER model would work in practice, it is necessary to describe the processes by which the different decisions (as foreseen in paragraph 4) will be taken ie.

- EU level operating and security standards
- Cost allocation methodologies for non-domestic/cross-border investments
- EU-level investment plans
- Implementing measures and guidelines

There are two different processes when either: formal approval is required for a measure to become a binding part of the *acquis*; or those measures which solely involve the executive implementation of the *acquis*. In the former the Regulators' Council will be responsible, in law, for providing advice to the Commission to ensure appropriate technical input in the same way that ERGEG does today. In line with the precedent of the Committee of European Securities Regulators in the *Lamfalussey* procedures in financial services, the Commission should commit in a declaration to accompany the Regulation establishing the ESER to take utmost account of the advice of the Regulators' Council in such matters. Further discussion, including with the Commission, will be needed to establish which decisions fall into which of these two categories – and in line with the principle of regulatory independence it will be important to keep the use of comitology proceedings to a minimum level. Further consideration may also be necessary as to whether and how to differentiate between “general” and “specific” ie. targeted decisions.

Whilst this is work in progress, the two processes for regulatory and comitology approval might be:

- a. Development of the *acquis*: approval required by the Commission/Comitology:

##### Scenario 1

- i. Where the advice of the EU networks bodies is required, the Regulators' Council will produce non-binding guidelines and will make a request to ETSO*plus*/GIE*plus* to draw up detailed proposals in line with these guidelines.
- ii. ETSO*plus*/GIE*plus* will prepare draft proposals, in full consultation with market players.
- iii. The Regulators' Council, acting by QMV, will examine and discuss the draft proposals and ensure the public interest concerns are fully met, in line with the initial guidelines.
- iv. If the proposals are approved by the Regulators' Council, they will pass to the Commission/Comitology who will take utmost account of its views. The chair of the Regulators' Council should attend the comitology committee as an observer.

##### Scenario 2

- v. If the proposals are not approved by the Regulators' Council, they will be returned to ETSO*plus*/GIE*plus* for further consideration.

- vi. If the proposals of ETSO*plus*/GIE*plus* are not approved at the third attempt, the Regulators' Council may itself propose a binding solution to the Commission/Comitology.

#### Scenario 3

- vii. If the Commission/Comitology approve the proposals they will be binding on all TSOs and relevant market players and will be enforced by the national regulators within their jurisdictions.
- viii. If the Commission/Comitology do not approve the proposals, they will be returned to ETSO*plus*/GIE*plus* as in point (v).

#### Scenario 4

- ix. If the Regulators' Council is not able to reach a decision by QMV, the proposals will pass to the Commission. The Commission may either: approve the proposals, which are then applied as in point (vii); or not approve them, in which case they return to ETSO*plus*/GIE*plus* as in point (v).

#### b. Independent execution of the *acquis*

This is much more straightforward and replicates scenarios 1 and 2 above, with the exception that if the Regulators' Council approves a decision by QMV as in point (iv), that decision will be final: the proposals will become binding on all TSOs and relevant market players and will be enforced by the national regulators within their jurisdictions.

#### Regional aspects:

Given the state and pace of the development of single EU energy markets, the ESER may need to give weight to regional decision-making in certain areas, notably investment planning. This needs to fit into the above framework, whether or not the decision of the Regulators' Council is judged to be binding or in need of formal approval. To take the example of investment planning, a process might be envisaged whereby:

- National TSOs will submit their national investment plans to ETSO*plus*/GIE*plus*. ETSO*plus*/GIE*plus* will then facilitate discussions between regional groupings of TSOs, possibly based on the ERGEG Regional Initiatives. Where necessary, such regional plans will return to the national TSOs to ensure their agreement.
- Once agreed at regional level, ETSO*plus*/GIE*plus* will consider the plans as a whole from an EU perspective. Again, where necessary such EU plans will return to the national TSOs to ensure their agreement. Once agreed at EU-level, ETSO*plus*/GIE*plus* will pass such European level investment plans to the Regulators' Council for approval.
- The Regulators' Council may approve or reject the plans if they are deemed to meet the public interest objectives, or it may approve the plans with amendments ie. it may approve a lower level of investment, in line with the economic test provided by the standards and if sufficient to meet the commensurate security test. The Regulators' Council will act by QMV, although will be expected to follow the advice of the relevant regional grouping of national regulators.

### 3.2 Transparency/confidentiality

The Regulators' Council and the ESER Secretariat will need to be able to gather all the relevant information in order to provide reports on its activities. Appropriate safeguards will need to be imposed on the handling of this information to preserve legitimate commercial confidentiality. The existing EREG confidentiality requirement might simply be carried over to all the bodies in the ESER in this regard.

### 3.3 Compliance

The Regulators' Council will be empowered to take action against ETSO*plus*/GIE*plus* for failure to deliver appropriate operating and security standards, cost allocation methodologies or investment plans. In any case where the Regulators' Council reached a decision of non-compliance, it will inform ETSO*plus*/GIE*plus* of the decision. ETSO*plus*/GIE*plus* will be given a reasonable period to take any necessary action to achieve compliance. The period of time granted to ETSO*plus*/GIE*plus* will depend upon the issue at hand and will be determined by the judgement of the Regulators' Council in the circumstances of the case. If, after this period of time ETSO*plus*/GIE*plus* fail to comply, then the Regulators' Council may allow ETSO*plus*/GIE*plus* a further opportunity to achieve compliance. After this second period, the Regulators' Council will be empowered to impose a solution: either directly, in the case of regulatory decisions; or via a proposal to the Commission/Comitology where it involves the development of the *acquis*.

An "EU Grid Code" will oblige market players to provide necessary information to ETSO*plus*/GIE*plus* in a timely way to assist them in undertaking the work necessary to achieve compliance.

Once approved, national regulators will ensure compliance with the EU operating and security standards in line with their new EU legal duty. The failure to reach approved investment plans will not in itself represent a breach of the TSOs' obligations; just as approval of an investment plan will not in itself represent compliance. It will be for national regulators to ensure *actual* compliance by the TSOs in their jurisdiction, enforced via national procedures as is currently the case for national standards. The European Commission will also be able to take action in the ECJ against TSOs who fail to meet the terms of the Regulation.

## 4 Practical Issues

There are further issues that will need to be considered in relation to the establishment of the European System of Energy Regulators, amongst which are the following:

### Legal base:

A Regulation of the Council and the Parliament based on Art. 95 (TEU) re. the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

### Funding:

The ESER, notably the Secretary-General and the Secretariat, will be funded from the Community budget. Annual budgets will be prepared by the Secretary-General following consultation with the Regulators' Council and submitted to the Administrative Board for agreement. An agreed proposal would be sent to the EP and Council of Ministers.

### Accountability:

The ESER will publish:

- Annual reports on its activities and the issues it sees as important in the achievement of a competitive single European gas and electricity market. The annual report will be submitted to the Commission, the Council, and the European Parliament
- Financial accounts
- Reports requested of it by the Commission or other EU institutions
- Reports that it decides should be prepared and published

The Chair of the Regulators' Council will, at least once a year and upon request, appear before the appropriate committees of the European Parliament or the Energy Council to give evidence on the activities and views of the ESER.

### Market oversight:

The Regulators' Council can publish reports on the operation of the European and regional markets. It is not clear that it will need further powers to do this beyond those which are mentioned above, and those to be given to national regulators. These powers include the ability to gather information, to share information, and to publish reports. Any consequent enforcement action in this area would fall to national regulators. The extent of involvement with financial services regulators in relation to financial instruments in the energy field (commodity derivatives) also needs further discussion.

## Annex A: Functions and Criteria of the Regulators' Council

The Regulators' Council is the central regulatory decision-making body of the ESER. It will provide the EU-level regulatory function previously envisaged by the so-called ERGEG*plus* option: it defines the essential cross-border powers necessary to oversee a secure and efficient EU grid; but does so by building on the existing ERGEG arrangements and encapsulating in a new EU legal body the expertise and experience of the national regulators. Accordingly, consideration of the appropriate legal arrangements for the Regulators' Council and the surrounding ESER framework needs to be based on: the required core functions, restricted to those tasks that can only be performed at a European level in line with the principle of subsidiarity; and the essential criteria for effective, independent regulatory decisions. In accordance with the ERGEG Response to the European Commission's Communication "An Energy Policy for Europe" (C06-BM-09-05) (which is available on the ERGEG website [www.ergreg.org](http://www.ergreg.org)), these are:

### Core Functions

- The approval of EU security standards, put forward by the EU network bodies following an invitation from the Regulators' Council (or the Commission) as the means of meeting the high level objective on their constituent members to develop a secure and efficient EU grid.
- The approval of EU operating standards, put forward by the EU network bodies following an invitation from the Regulators' Council (or the Commission) as the means of meeting the high level objective on their constituent members to maintain and operate a secure and efficient EU grid.
- The approval of the European-level investment plans put forward by the EU networks bodies as the means of meeting the agreed operating and security standards and, therefore, the TSOs' high level public interest obligation. Once approved at EU level this investment will be approved automatically by the NRA(s) in respect of the relevant TSO(s).
- The approval of cost allocation methodologies for non-domestic/cross-border investments, put forward by the EU networks bodies following an invitation from the Regulators' Council (or the Commission), to ensure that the appropriate users pay for (and bear the risks of) a given investment. (The legislative mechanism for such a methodology already exists in electricity, but not for gas.)
- Enforcement powers, including the ability to impose solutions on the EU network bodies e.g. for the failure to deliver appropriate security standards, to ensure the above process happens efficiently.
- In addition, the Regulators' Council, at its own initiative or at the request of the Commission, shall advise and assist the Commission in consolidating the EU internal energy market, in particular with respect to the preparation of draft implementing measures in the field of electricity and gas, and on any matters related to the internal market for gas and electricity. It is essential that these measures or guidelines become binding in a number of areas defined in legislation.

### **Essential Criteria**

- Maximum political and commercial independence in order to facilitate a stable EU climate for investment
- The ability, recognised in legislation, to take binding decisions
- Adequate Community resources and funding
- Appropriate involvement of the EU's national regulatory authorities, who will be the main means of implementing decisions
- Proper accountability to the EU Institutions

## Annex B: Legal Background

In its Communication “An Energy Policy for Europe” the Commission put forward 3 options for developing a European regulatory function: gradually evolving the current approach; a European network of independent regulators (which it called ERGEG*plus*); or a new single body at European level. The ERGEG response to this Communication made clear that: the first of these is not sufficient since, EU-level regulatory decision-making powers are needed which cannot be achieved by the existing ERGEG arrangements or improved co-operation between NRAs alone; and the latter of these is not appropriate at this stage of the development of single EU energy markets. Rather, we put forward an alternative model of an enhanced body called “ERGEG*plus*”.

In developing a model which gives practical meaning to this we have taken into account a wide background. This includes:

- ECJ case law on the Commission’s ability to delegate tasks to administrative agencies eg. the Meroni principle (Case 9/56 Meroni vs. High Authority [1957-8- ECR 133]). In the ECJ’s reasoning the Commission could in fact delegate tasks to administrative agencies, but such a delegation was subject to strict constraints:
  - Delegation might only relate to powers which the Commission itself possesses;
  - Such delegation must be limited to the preparation and performance of executive acts alone;
  - As a consequence of this, independent bodies may not be afforded any discretionary powers;
  - The Commission must consequently retain oversight of the delegated activities and will be responsible for the manner in which it is performed;
  - Such a delegation must not disturb the institutional balance within the Community.
- The precedent set by other EU agencies, and in particular the draft “Inter-Institutional Agreement on the operating framework for European regulatory agencies” (COM(2005)59 final, 25 February 2005). The Commission Communication “An Energy Policy for Europe” refers explicitly in a footnote to this draft agreement of the Commission, EP and Council. It proposes a common structure for “European regulatory agencies”, which are defined as autonomous legal entities set up by the legislature in order to help regulate a particular sector at EU level and to help implement a Community policy. The proposed structure includes:
  - an administrative board as the decision-making body, with an equal number of members designated by the Council and the Commission;
  - an Executive Board with fewer members to facilitate effective decision-making in defined areas;
  - a Director and staff to manage the work programme;
  - A Board of Appeals.
- Other EU decision-making bodies with precise, binding powers and comprised of specific, independent national representatives eg. the ECB and Eurojust, although these were agreed by Treaty change and by unanimity voting in Council respectively, which would preclude the rapid implementation required for the ESER.

- and, of course, the ongoing current debate in other areas such as telecoms. Commissioner Reding has herself proposed the ECB as a possible model for a “federal system” of national telecoms regulators.

In developing the ESER we have, acting within these legal constraints, sought to create a structure which is fit for purpose for the energy sector and the oversight of EU gas and electricity grids. Whilst we have borrowed from all these examples, therefore, the ESER is not limited to any one of them – rather, it describes a system best suited to delivering the core functions and in line with the essential criteria defined in Annex A. This reflects the tradition of EU bodies, which are often unique and designed to fulfil a specific function defined at the time of its creation.