Implementing the Third Package

A conclusions paper

Ref: C09-ADG-04-03

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1   Introduction

In anticipation of the adoption of the proposed third package of legislation on the electricity and gas markets, on 21 October 2008 European energy regulators published an initial consultation document[1] giving an outline of their initial thinking on how the challenges of implementation might be addressed and, in particular, how stakeholders might engage effectively with the proposed processes. The consultation was based on the first reading text of the European Parliament. Changes that occur in subsequent and remaining stages of the negotiations will need to be taken into account in implementing the conclusions outlined in this document. We will issue a further document once the negotiations are complete to confirm any resulting changes to these conclusions.

The consultation sought views from stakeholders on a number of questions on issues relating to: the Agency and its consultation procedures, and how CEER/ERGEG should act in the interim period (from the point the third package is adopted until the Agency and ENTSOs are fully operational); the relationship between the Agency and the ENTSOs in particular in respect of the development of network codes (and the relationship between CEER/ERGEG and ENTSO-E/ GTE*plus* in the interim period); and how regional and national specificities might be taken into account in the development of European regulatory policy.

We held a public hearing on the consultation document in Brussels on 11 December 2008. Although many of the contributions at the hearing have been included in the written responses, all of the contributions made have been taken into account.

2   Responses to the consultation

34 responses were received to the consultation document. One of the respondents requested that their response should remain confidential and in accordance with the CEER/ERGEG consultation rules this response has not been published and is not referred to in this document although it has been taken into account. The remaining 33 responses have been published on the European Energy Regulator website[2]. A table containing a non exhaustive summary of each non-confidential response, and providing a reasoned response explaining how the comments have been treated, is attached at annex 2 to this document.

3   Conclusions

This section summarises briefly the responses received to the consultation from stakeholders and explains the conclusion reached by European energy regulators in relation to each question posed in the consultation document.

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[1]   Implementing the third energy package – An initial consultation by European Energy Regulators
    (http://www.energy-regulators.eu/portal/page/portal/EER_HOME)

[2]   http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_CONSULT/CLOSED%20PUBLIC%20CONSULTATIONS/CROSS_SECTORAL/Implementing%20the%203rd%20Energy%20Package/RR

Some respondents made some general comments which do not fit obviously under any of the specific questions posed. Many stakeholders welcomed the consultation document and supported the approach of the regulators (and ENTSO-E, GTE*plus*) in taking steps to work on an "as if" basis. However, a few responses said that until the third package was adopted and implemented, the building blocks would not be in place (e.g. unbundling) and that it would be better to wait until final agreement is reached on the third package (Gasunie).

Eurelectric and Vattenfall Europe Transmission GMBH suggested that a roadmap be prepared, along project management lines, to aid progress during the interim period.

We think this is a positive suggestion although we recognise that such a voluntary roadmap which joins together the planned work of all involved organisations would need the endorsement of all involved parties including ENTSO-E, GTE*plus* and the Commission. We will return to this proposal once the third package proposals have been formally adopted, recognising that decisions on any roadmap in the longer term would be for the Agency, when established.

Chapter 2: The work of the Agency

Question 2A: 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.

Most respondents supported the proposals in the consultation paper, and many mentioned specifically the proposals on impact assessments and calls for evidence. Several respondents said that the process for the development of the framework guidelines and codes, and the related consultations, should be managed as an 'end-to-end' process. Of those that commented on this issue, some said that the process should be integrated, whilst others were concerned about the close involvement of regulatory bodies in the code drafting process. Some were concerned by the potential duplication of consultations. They said that the Agency should seek to minimise the costs it imposes on market participants and therefore only consult when it has to (Shell). Others have suggested that only the Agency consult (RWE). EnBw, whilst agreeing the suggested limit of 40 pages for normal consultations, proposed that the limit should be 5 pages for consultations relating to framework guidelines. Some pointed to the existing work of EASEEgas and UCTE as the basis for work on codes. Some respondents suggested that distribution system operators (DSOs) and gas storage operators be included in the consultation process.

We agree that an end-to-end process for the development of the codes (i.e. from the development of the Framework Guidelines to the agreement and subsequent modification of the codes) is required as a next step. The consultation document stated that it deliberately examined only the role of the Agency and ERGEG, and that other responsible parties would need to react in respect of their processes. ERGEG intends to liaise with the Commission, ENTSO-E and GTEplus to develop such a process for the interim period. The envisaged process must preserve the independence of the Agency and ERGEG, whilst enabling an efficient process including for stakeholders.

The outcome of the public consultation confirms that the Guidelines on ERGEG's Public Consultation Practices form a good basis for consultations to be undertaken by ERGEG during the interim period. We agree that all interested parties, including DSOs and gas

storage operators, should be involved in the consultation process. The Guidelines have been reviewed in the light of comments received and a copy of the revised version is attached at Annex 1. Should the need arise for CEER to undertake public consultations these arrangements will be applied to CEER as well.

In anticipation of the establishment of the Agency, we will pay particular attention to how we implement them. The use of tools such as impact assessments and calls for evidence (see definitions in Annex 1) will be progressively implemented. Calls for evidence are useful as a means to involve stakeholders at an early stage. Impact assessments should provide an opportunity to assess the practical consequences related to the implementation of regulatory decisions. As part of the process for the development of CEER/ERGEG's input to the Agency on framework guidelines, we will use these tools (impact assessments, call for evidence) as appropriate, and consider that the Agency should use them when the adoption of legally binding codes is recommended to the Commission.

At the end of the interim period, we intend to review these consultation practices and make proposals to the Agency for their endorsement.

Question 2B: 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?

Many respondents said that the Fora should continue for high level discussions. Whilst many thought that the Fora could not be used as stakeholder panels, some thought that they could. Some suggested that the effectiveness of the Fora could be enhanced by opening the participation to a wider group, but others thought the Fora were inflexible and unwieldy. Some respondents suggested that a separate stakeholder panel, of a market panel or network user panel should be created. BEUC said that the London forum should be more influenced by consumer issues. APG suggested that e-Fora (i.e. electronic chat rooms) be created on specific topics.

We note that there was no agreement among respondents on the future role of the Florence, Madrid, London and other Fora. There was no agreement on whether a separate stakeholder panel should be created. Those who suggested that a stakeholder panel, a market panel, or a network user panel be created made no suggestions to resolve the difficulty identified in the consultation document of how such panels might be formed in a representative and legitimate way. There would, therefore, seem to be no clear proposal to make to the Commission on how the Fora might be improved, although the suggestion of BEUC in respect of the London Forum has been noted. The suggestions that the membership of the Fora might be expanded would seem to conflict with other observations about the inflexibility and unwieldiness of the existing format of the Fora. We agree with the view expressed by many respondents that the Fora should continue as a focus for high level discussions. We have no objection to the idea of e-Fora, but we are not convinced that such Fora would add to the proposed formal consultation processes.

Question 2C: 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 Florence, Madrid and the new London Fora to avoid the proliferation of consultation structures, to ensure the effective delivery of stakeholder views and proper representation? Or should the ad hoc panels be organised independently of the Fora in close co-operation with energy consumer and network user representatives?

Almost all respondents supported the proposal for ad hoc expert panels. Most thought that the panels could be linked to the Fora, although one respondent, ERDF, though that they should be independent of the Fora. Many commented that the governance arrangements of such panels should be carefully developed. In particular, many respondents were concerned that the panels' work should be transparent and that there should be a clear process for deciding the membership of each panel. Many respondents thought that panel membership should be representative, although there was no agreement on the nature of the representation (e.g. by association, sector, or geography). GTE and EFET suggested that any panels created to support the process for the development of Framework Guidelines should also support the work of the ENTSOs in the development of the relevant codes.

We accept the view of most respondents that ad hoc expert panels should be used to assist the Agency. We also accept the view that the process for the appointment of panel members and the panel working arrangements (including transparency) are important. However, the basic model for these panels is that they should consist of individuals who are best qualified to provide expert advice. There is no intention that they should represent the interests of any organisation or region. We will publish a note on how we propose to manage the creation and operation of ad hoc expert panels and the note will be updated in the light of practical experience. We agree with the view that the membership of ad hoc expert panels should include (where appropriate) experts from network users, DSOs and industrial customers. We think there is merit in the proposal that any panels created in respect of the development of framework guidelines might also be used by the ENTSOs in the development of codes. We intend to include this idea in the work we propose to undertake in liaison with the Commission and the ENTSOs in developing an end-to-end process for code development (see above). We accept the support given by many respondents that the ad hoc expert panels should be linked to the Florence, Madrid or London Fora as appropriate. A decision on whether and how to make such a link will ultimately be a decision for the Commission. Nevertheless, we think that arrangements should be implemented for the work of the ad hoc panels to be reported to the Fora on a regular basis to ensure transparency in their operation. This would increase awareness at an early stage among the Fora participants (including stakeholders, EU Institutions and Governments) on the progress of work. We agree with most participants that, whatever the shape and future arrangements for of expert panels, they would be tools for the stakeholder involvement at an early stage of the policy preparation process (including for framework guidelines) and would not be a substitute for written consultations. We will, in future, call these bodies 'ad-hoc expert groups'.

Question 2D: Are the proposed measures to ensure the proper accountability of the Agency broadly adequate?

Many respondents though that the proposed measures on accountability were sufficient. Many supported the proposals for a 'question desk' and a Quality Charter. One participant thought that the work of the Agency should be more transparent, and that this should happen in real time. EuroPEX said that the Agency should also be committed to providing a

reasoned response in respect of each consultation it undertakes. Two respondents remarked that the Agency should be accountable for its budget. Some respondents said that the Commission should consult on the performance of the Agency and give feedback. BEUC suggested that there should be a duty placed on the Agency relating to electricity and gas users, especially those who are disadvantaged, so that decisions could be subject to legal scrutiny. Some respondents called for an appeals mechanism in respect of Agency decisions. Shell and OGP said that the Agency should not go beyond setting boundaries for code development, should not have a role in raising code proposals, and that there should be clarity of roles and of the accountability routes for the Agency and Member States' regulators.

We recognise the strong support for the proposals in respect of the accountability of the Agency. The strong support for 'question desk' is also recognised and CEER will build on existing practices to implement one in a practical way which will be open to all participants. The proposals for a Quality Charter will be further developed. The proposal to provide reasoned response to each consultation is accepted and is addressed in respect of the proposed consultation procedures. We support the principle that the work of the Agency should be transparent, but we cannot agree that transparency in respect of the Agency's activities should be in 'real time' as suggested by one respondent. We think real time transparency as proposed is neither efficient nor necessary for the Agency to be held to account. The Agency should be accountable for its budget, and it will be subject to the normal EU accounting rules in this respect. The third package contains proposals for an independent Board of Appeals for the appeal of Agency decisions. The procedures for the appeal will be for the independent appeals panel to decide (and eventually the European Court of First Instance and the ECJ). Appeal of the decisions of NRAs is subject to national laws. The third package proposes that the Agency has the function of advising the Commission on the draft codes prepared by the ENTSOs (on the basis of the Framework Guidelines prepared by it to assist the ENTSOs in their subsequent drafting). These documents are defined in the proposed Regulations as being cross border in scope. The Agency also has functions relating to co-operation between national regulators, and these functions may not be restricted to cross border issues as they could, for example, include sharing regulatory best practice.

Question 2E: What do you consider 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?

A number of respondents said that the role of the Agency should be well defined and distinguished from other Institutions, including national regulatory authorities (NRAs). Some raised concerns about the Agency have a potentially conflicted position, either by being 'rule maker, supervisory body and judge' or 'judge and party'. Some respondents said that the internal management of the Agency would be important, including such things as establishing rules of procedure and attracting high quality staff. Two respondents, Shell and OGP, thought that the Boards of the Agency should include industry experts. Some respondents said that the Agency and NRAs should have strong enforcement powers, and that NRAs should have a pan-European perspective rather than just a national one.

The third package envisages that the Agency will have a dual role: to provide a framework for the cooperation of regulators; and where necessary co-ordinating their actions. The functions of the Agency envisaged in the third package in relation to cross border rules include preparing draft framework guidelines, and advising the Commission on draft codes

drafted by the TSO bodies (the ENTSOs). The Commission may then decide to make proposals to the comitology procedure, through which binding rules could be made. We do not consider that the position of the Agency staff or of regulators is conflicted in the proposed process as some have suggested it might be. We recognise that the relationship between the Agency and the ENTSOs during the process of code development will need to be carefully defined, as we mention below, so that the independence of the Agency is protected. The Agency may also take direct individual decisions in relation to the cross border regime of interconnectors and exemptions (although the role of the Agency is still subject to the outcome of the negotiations). Decisions of the Agency will be subject to independent appeal.

We are giving separate consideration to the internal procedures of the Agency. We therefore agree that clarity is needed on the roles of the Agency and NRAs including in respect of the regional initiatives. We agree that the Agency should play its part within the European regulatory framework to facilitate a sound investment climate as part of its role in the development of a single European energy market. We do not agree that the Agency's Board of Regulators should include industry experts as a key principle of economic regulation is that regulatory authorities should be independent of commercial interests. In any case, the composition of the Board of Regulators and the Administrative Board is decided in the proposed legislation. We agree that good internal management and high calibre staff will be critical and this will be a challenge for the Director of the Agency when appointed. The third package included proposals to extend the objectives of NRAs to include wider European interests.

Chapter 3: Framework Guidelines, Codes and other Cross-Border Regulatory issues

Question 3A: Are the proposed priorities for the codes and technical areas the right ones? If not, what should the priorities be?

Although some respondents supported the proposed prioritisation of technical areas, other respondents made alternative proposals. There was no clear consensus on what the priorities should be, although overall those that suggested different priorities indicated that higher priority should be given to congestion management. Europex said that the priorities should be established on the basis of a set of objectives or criteria, clearer that those in the draft legislation. A number of respondents said that there should be binding guidelines relating to LNG and gas storage. The ENA said that there should be a reference to embedded (distributed) generation in view of its potential impact on grid operations.

Whilst there is not a consensus on priorities we note the support for the proposed priorities is quite broad. We will therefore continue to work during the interim period on the basis of the priorities proposed in the consultation document[3]. We agree that the codes should be

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3 For electricity;
Priority I: security and reliability rules; interoperability rules; and operational procedures in an emergency. Priority II: grid connection and access rules; capacity allocation and congestion management rules; and transparency rules. Priority III: balancing rules including reserve power rules; and data exchange and settlement rules; and Priority IV: rules regarding harmonised transportation tariff structures including locational signals and inter-TSO compensation rules; energy efficiency regarding electricity networks.
For gas: Priority I: capacity allocation and congestion management; transparency; and balancing rules. Priority II: rules regarding harmonised transmission tariff structures; interoperability rules. Priority III: security and

binding. We note the references in some responses to the work of EASEEgas and UCTE which will, no doubt, form one of the inputs to the development of the draft codes by the ENTSOs.

Based on the priority areas, we intend to issue a number of consultation documents over the coming few months aimed at developing the CEER/ERGEG input to the Agency on the following issues to be used for developing Framework Guidelines. These will include:

- in electricity: grid connection and access; capacity allocation and congestion management. These topics belong to proposed Priority II and III areas. A public consultation on balancing, intraday and automatically activated reserves has recently been carried out to prepare the revised ERGEG Guidelines of Good Practice on Electricity Balancing Market Integration. Furthermore, as with security and reliability rules, interoperability and operational procedures in an emergency are Priority I, CEER/ERGEG will initiate work towards draft Framework Guidelines incorporating these issues and will arrange ad hoc meetings with stakeholders on the scope and content. For this purpose, existing ERGEG work on relevant Guidelines for Good Practice on Operational Security (which were approved by ERGEG in December 2008) will be used.

- in gas: capacity allocation, congestion management, rules for transparency, balancing and harmonized tariff structures have been defined as top priorities to work on our input to Framework Guidelines. Currently meetings with GTEplus and other stakeholders on the scope and content are envisaged. A consultation on a discussion paper on capacity allocation and congestion management has been held. The process for all other areas (security and reliability rules, grid connection and access rules, data exchange and settlement rules, interoperability rules, operational procedures in an emergency, rules for trading related to technical and operational provision of network access services and system balancing and energy efficiency regarding gas networks) will be started at a later stage.

As part of the consultation and policy development process for the development of CEER/ERGEG's input to the Agency on framework guidelines, where appropriate, we will establish ad hoc groups of experts.

Question 3B: Do you agree with our proposed approach to grouping the technical areas into codes (see appendix2)? If so, what could the groupings be?

All of the respondents who commented on this issue endorsed the proposal to group the technical areas into fewer codes. Some respondents thought that it would be premature to decide now on the exact groupings. VIK and IFIEC suggested a different grouping structure. Scottish and Southern suggested that the technical areas be grouped according to the types of stakeholders most affected in order to simplify the consultation process.

We note that there seems to be wide support for the idea that the technical areas should be grouped into a fewer number of codes. We have some sympathy with the view of some

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reliability rules; grid connection and access rules; data exchange (although aspects of this area may have relevance to other, higher priority areas) and settlement rules; rules for trading related to technical and operational provision of network access services and system balancing; and Priority IV: operational procedures in an emergency, energy efficiency regarding gas networks.

respondents that it is premature to decide on the exact grouping at this stage, but we think that the drafting process and the related resource management will be simplified if an initial view on grouping can be reached. We intend to consider the grouping issue further as part of the process for developing Framework Guidelines.

Question 3C: Which aspects of market design or network operation should be fully harmonised across the Union through the first set of codes?

Some respondents proposed a range of areas which might be candidates for early harmonisation across the Union, although there was no consensus. Some respondents said that harmonisation should occur only to the extent necessary. Some said that further work was needed to determine the priority areas for further harmonisation.

We note that many respondents thought that further steps to harmonise areas were needed to facilitate the development of a single European energy market. We agree that further work is needed to determine which areas might be a priority and intend to use the views of respondents as an important input into our work on our input to the development of the priority Framework Guidelines, on which we will consult further as an integral part of the process for the development of CEER/ERGEG's input to the Agency on Framework Guidelines. The decision on the prioritisation of the Framework Guidelines themselves will be for the Commission on the advice of the Agency and other stakeholders.

Question 3D: In 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 in the areas?

Many respondents said that the description of the content of each area was broadly complete, or that it was a reasonable initial description. Some respondents made suggestions to improve the description.

These responses are a useful input to our work on the development of our input to the Framework Guidelines on which there will be further consultation at a later stage.

Chapter 4: The ENTSOs and European Energy Regulators

Question 4A: 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 there changes that should be considered for improvement?

Some respondents said that the Agency should separate its functions from those of the ENTSOs, and some of these thought that the separation should be complete because of the risk that the staff of the Agency will either become too captured by the process and therefore unable to provide independent advice to the Commission on the final draft codes, or will have too much influence over code drafting. Some other respondents said that the Agency and the ENTSOs should co-operate, notably in respect of the development of the codes, so that the process is an efficient one. Some of these considered that the process of code development, including the stages relating to the Framework Guidelines, should be fully integrated. ETSO-E said that the mechanisms used in the interim period should not differ materially from the enduring arrangements, and thought that the status of Framework Guidelines should be

clarified. One Member State representative said that the role of Member States in the comitology process should not be overlooked and that measures to consult Member States at an early stage were needed.

We accept the view that the Agency's role in relation to providing independent advice to the Commission relating to the wider public interest, notably in respect of the draft codes, should be carefully protected. We also think that within this constraint, the end-to-end process of developing the codes should be facilitated in an efficient way. We therefore intend to develop, for consultation, and in co-operation with the European Commission and ENTSOs, a public document defining the interaction between ERGEG/CEER and ENTSO-E/ GTE*plus* in the interim period, and to refine the document in the light of experience gained as a basis for the operation of the Agency. We agree that the interim and enduring arrangements should be aligned as far as possible, as we stated in our consultation document. Preparatory work on Framework Guidelines is included in the 2009 work programme of the European energy regulators. We also agree that Member States should be consulted as part of the process of code development and we intend to discuss with the Commission, ENTSO-E and GTE*plus* how this might be achieved most effectively.

We also agree that a common understanding must be established on the nature of the framework guidelines and the codes. In our view Framework Guidelines should establish economic, regulatory and technical principles to which network codes must adhere. However, it is also important to recognise that the network codes, which we think should be binding in nature, will be a major instrument for facilitating the development of a single European energy market. The Framework Guidelines should provide a clear view of the problems which must be tackled to enable further market integration, and on the nature of the solutions that should be incorporated by the ENTSOs in the draft network codes. The scope of each Framework Guideline and the degree of detail will, therefore, depend upon the issues addressed in each case.

Chapter 5: Regional considerations in moving to a single European market

Question 5A: Are the proposals in paragraph 69 to ensure regional level involvement of stakeholders adequate? If not, how can they be further improved?

Almost all of the respondents who commented on this issue said that they supported the proposals based on building on existing Regional Initiative (RI) structures for involving stakeholders, or thought that they were adequate. Eurogas and Europex thought that greater clarity was needed in how the arrangements would operate. Some respondents thought that both the Agency and the ENTSOs would need to establish regional committees, and GTE*plus* said that the regional structures of the Agency and ENTSOG would need to reflect the needs of each subject area. Stadtwerke Munchen GMBH and MVV Energie AG said that DSOs should be involved in the co-ordination process. Shell and OGP said that consultation processes should be directed through European industry organisations rather than regional structures. Eurelectric said that when the codes were in place the Regional Initiatives to be used as a pure implementation tool.

We note the broad support for the proposed approach to co-ordination between regional and European levels on European regulatory policy issues to ensure a coherent approach to achieving a single European energy market. This reinforces our view that we should build on the existing Regional Initiative arrangements rather than create any new, and potentially

duplicate, structures. We accept that further clarification may be required in future on how these arrangements will operate in practice, but we think that there is already substantial experience of operating the Regional Initiatives from which to draw. We accept that all interested stakeholders should be able to participate in the co-ordination process. We are considering separately how best to manage the internal operations of CEER/ERGEG, and ultimately, the Agency. We have already decided to establish a new Regional Initiative Working Group within ERGEG to give greater focus, inter alia, to co-ordination issues. We do not think that regional issues and practices can be adequately represented solely by European associations. Whilst some may have good regional structures to facilitate co-ordination, many do not. We also consider that there is a valuable role for the Regional Initiatives, which they have already demonstrated, as 'pilots' for the development of potentially pan-European solutions and that their scope to undertake this role should not be unduly constrained.

Question 5B: 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?

All respondents thought that the Regional Initiatives will continue to play an important role. Some said that their role should diminish over time as a single European market is established. Europex thought that the Regional Initiatives should concentrate on issues where a regional focus was helpful. ETSO-E said that the potential for merging some regions should be assessed, and were concerned that Regional Initiatives in their current form may inhibit creation of a single market.

We note the strong support for continuation of Regional Initiatives and that many respondents made very positive comments on the progress they have achieved. It is our intention to refocus on the Regional Initiatives in the light of the new regulatory framework contained in the third package and the European energy regulators have created a new working group on the Regional Initiatives to help achieve this. We agree with the view that the Regional Initiatives should be seen as a stepping stone towards a single European energy market. We believe that it will be important to establish a clear view of the role that the Regional Initiatives should play in this regard and how they should be managed so that they are an effective instrument for the creation of a single European energy market. The new ERGEG Regional Initiative Working Group will have an important role in developing the operational arrangements in this regard from the perspective in liaison with the Commission, Member States and other involved organisations.