

# **IFIEC's response to ERGEG Consultation on Regulation 1228/2003:**

## **Compliance Monitoring Second Report, 10 September 2008**

### **General remarks**

1. IFIEC welcomes the monitoring report by ERGEG. Such an inventory about the compliance of TSOs with the provisions of Regulation 1228/2003 provides a useful tool to evaluate the actual situation with regard to the issue of cross-border trade in the EU.
2. The report shows clearly that the Regulation and the Congestions Management Guidelines have still not been fully implemented more than four years after entering into force of the Regulation. It is evident that TSOs do not comply with most articles. With regard to almost every provision, at least one TSO is not compliant. Such a result is quite remarkable and not acceptable.
3. Also, it is not clear which method the national regulatory authorities (NRAs) have used in deciding whether a TSO is compliant with a certain legal provision. Did the NRAs simply ask the TSOs whether they comply, or did they execute an auditing within the companies? In order to value the validity of the results of report, it is crucial to have more information on the auditing methods used. For assurance that monitoring has been effective, it is important that the information provided by TSOs has been verified by the relevant NRAs. The report gives the impression that this has not always been the case. Indeed, it states that the "reporting by the TSOs to the NRAs is in many cases missing" (p. 53). It is remarkable that the regulators have to admit that TSOs don't report to them and that regulators seemingly are unable to do something about it.
4. From these observations it follows that obviously there is a need more and appropriate powers to be given to the NRAs so that they are able to enforce the Regulation and the Guidelines. Also, in some countries NRAs already have many legal instruments to ensure compliance. In the next report it would be very interesting to see which of these instruments have been successfully used in order to speed up compliance, where they have not and why.
5. On the issue of how to achieve compliance more rapidly, there can be only one conclusion: The provisions of the Regulation and the Guidelines have to be enforced by the NRAs. The publication of a new report that explicitly states which TSOs do not comply with which provisions, could be a first step. This compliance report does not contain that information. In the new report, a tight deadline has to be given to the TSOs, after which they have to comply with all provisions. When TSOs are still non-compliant after this deadline, NRAs should open formal cases against the non-compliant TSOs. If NRAs have insufficient legal powers, these should be enhanced within national and European legislation.

## Maximization of cross border capacity

6. IFIEC finds it remarkable that ERGEG states that the Regulators cannot ensure compliance with the provision to maximize cross border capacity available to market participants (article 6.3 Regulation). Maximization of the available cross border capacity is the core of Regulation 1228/2003. ERGEG's statement would suggest that NRAs cannot enforce this provision and as a consequence, this provision is meaningless. Also ERGEG does not specify why enforcement is not possible, what the respective NRAs have tried in the past 4 years to enforce this legal provision, and why they have failed. Also it is not clear from the report what must be improved to achieve maximization of cross border capacities. IFIEC believes that the lack of clarification in the report on these important issues needs urgent attention.
7. In some cases achieving compliance with the provisions of the Regulation and the Guidelines seems straightforward. For example, on p.30 it is stated that 68% of the TSOs, more than two-thirds, do not comply with the requirement of netting electricity flows. In practice, compliance with the process of netting should be a relatively easy provision, compared with such as developing a common grid model as the basis for the common calculation of the available capacity.
8. On p.54, ERGEG assigns itself the task of advising the Commission on how to maximize the capacity. IFIEC supports ERGEG in drafting such advice and is willing to participate in this process.

## Use of congestion income

9. Since the removal of congestions is the ultimate means to achieve an integrated European Electricity Market, the elimination of existing bottlenecks via extension of the grid is to be given priority. Accordingly, any revenues resulting from the allocation of cross-border capacity have to be used for investments which increase interconnector capacity. Only then it is possible to overcome market segmentation in the long run. Today, these revenues are mainly used to lower the internal (national) grid fees.
10. In this context it is essential that the "3<sup>rd</sup> package" contains an amendment of article 6 of regulation 1228/2003 to allow such revenues to be earmarked for maintenance and extension of physical capacity. This will make more cross border capacity available to the market.
11. Also it is important that NRAs strictly enforce the regulation regarding the use of congestion income. For example, in the Netherlands, part of these funds was used to finance the purchase of the APX spot market. On the whole more certainty and transparency are needed regarding the use of congestion revenues.

## Transparency

12. Transparency of wholesale data is important to create a level playing field. Only with balanced, symmetric information between market parties can trust be expected to develop in both the market and the price setting mechanisms. Moreover, transparency is also needed to monitor possible abuse of market power by dominant players.
13. With regard to transparency, great improvements have been made by the various transparency reports within the Nordic, CWE and CEE regions which are harmonized to a high degree. Now it is important that these requirements are implemented by the national regulators. And it is equally important that all other regions catch up by publishing and implementing similar transparency reports. To ensure European-wide transparency, it is important that publication requirements are harmonized, data are published in a uniform format and in a common language, and publication is internet-based.

14. In doing so, it is important that transparency requirements are well-balanced. Only key and important data need to be included, but these must be identified and defined and the reporting process audited. For example, consumption data of large industrial users is less important than for the supply side, since the market power issue (which is the ultimate reason for transparency) is located purely at the supply side. Moreover, when made public, the electricity consumption of large consumer units (e.g. electrolyses) allows for the calculation of the final production of this unit and thus creates distortions in the market for this final product.

### **Responsibilities of NRAs**

15. As stated above, a strengthening of regulators' powers seems necessary. Moreover, their powers should be harmonized to the higher level throughout the different member states, so as to create a level playing field also with regard to the regulatory environment.

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