

ERGEG Consultation on implementing the Third Energy Package

Statement of RWE

Introduction

RWE welcomes the opportunity to submit an opinion in the framework of the ERGEG consultation on the implementation of the Third Energy Package. We would like to point out however that we have chosen to comment only on selected questions as the co-ordinated implementation of the 3rd Energy Package in all Member States is of particular importance for the rapid and efficient completion of the Internal European Market in electricity and especially in gas. We think that the answers to the selected questions are crucial for a rapid implementation. This implies that a consultation now will certainly help in obtaining a common understanding of the necessary procedures and priorities in the next years.

2. The Work of the Agency

Question 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.

RWE fully shares the view of ERGEG in the sense that a clear and precise specification of the Consultation Arrangements generally contributes towards the solutions required by the upcoming European Electricity and Gas Market issues. Given the complexity of these issues with diverging interests amongst the involved stakeholders taking a well structured approach to find the most appropriate solution is absolutely necessary.

However, in the suggested approach stakeholders get involved repeatedly at different stages. In order to enhance process efficiency such reiterations of consultations should be avoided. Hence, the number of stages which the process goes through (see Figure 1 on p.2 of Appendix 2) should be reduced whenever possible. This could be handled by attributing the process responsibility to the party with the most vital interest in a certain subject matter.

Therefore, it is reasonable that as a general principle only the Agency consults the stakeholders thereby avoiding redundant consultations at different stages. In questions where the Agency has the lead, we do not consider it necessary that ENTSO carries out a separate consultation of all stakeholders. In this case ENTSO develops a draft for the network codes which is then consulted by the Agency.

An exception shall apply if the network code predominantly concerns grid-focussed commercial or technical issues. In this case one of the ENTSO shall get the opportunity to consult the stakeholders.

Either the Agency or one of the ENTSO would thus exclusively organise one consultation process thereby avoiding redundant consultations at different stages.

In regard to decision-making powers of the Agency (Appendix 1, Annex 1) it needs to be clarified how the right of appeal of the affected persons can best be protected.

Question 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?

We agree that the Madrid Forum and the Florence Forum have in the past proven to be suitable platforms for a stakeholder panel to consult the framework guidelines and the network codes. The concentrated form of annual or biannual forum meetings is still preferable to a standing committee. We welcome that, thereby, the fora gain additional importance. However, due to the increased significance of these fora it is now worth considering increasing the group of participants. Even though we think that the system of representation of stakeholders by associations has worked in the past, it may in the new framework be necessary to allow individual stakeholders to participate as observers. The impression should be avoided that important decisions are made in a "closed shop" setting.

If stakeholder panels and/or ad hoc panels were established it would be crucial to ensure a high level of transparency. The necessary level of transparency could be facilitated by publishing minutes after meetings of consulting stakeholder panels and/or ad hoc panels. In order to avoid these panels being influenced by single and unbalanced interests and in order to guarantee the accountability it shall be ensured that all stakeholders are represented accordingly and a system of rotation of experts is established.

In addition it is crucial that the network codes for trade related issues are drafted in a way that considers both market requirements and technical constraints. The network codes will be only successful in facilitating cross-border trade of gas and electricity if they also meet the needs of the market participants and respect all relevant technical and economical limitations. Therefore, the consultation for the framework guidelines could be clearly divided into two stages. In a first step, the objectives of the network code should be identified. In this context it is necessary also to investigate the needs of all stakeholders because they know what kind of framework is needed for cross-border trading of gas and electricity. After objectives have been set, regulators, TSO and market participants should discuss in a second step which approach is most suitable to implement the objectives. We are convinced that in-depth consultations of all stakeholders are necessary to develop technically appropriate, fair and equitable solutions.

Question 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?

A good stakeholder involvement and support at all stages is essential to safeguard an efficient and collaborative process. The creation of "ad hoc panels" to assist the Agency could be an adequate instrument to reach that goal. However the panel will only be accepted by all participants if the process of nominating members is non-discriminatory and transparent. It is essential that all relevant stakeholder interests are represented properly in these panels. Surely not only consumers and network users, but also transmission grid operators have to be involved. If stakeholder panels and/or ad hoc panels were established it would be crucial to ensure a high level of transparency. The necessary level of transparency could be facilitated by publishing minutes after meetings of consulting stakeholder panels and/or ad hoc panels. In order to avoid these panels being influenced by single and not balanced interests and in order to guarantee the

accountability it shall be ensured that all stakeholders are represented accordingly and a system of rotation of experts is established.

Additionally, it is vital for an efficient functioning of the panels to have real experts on board. They have to be capable, willing and committed to discuss the technical details and to promote good results and progress. Therefore, the panels should be created ("ad hoc") for each project (for instance for each code). Because of these reasons, the panels should be organised independently and not be directly linked to the existing fora.

We prefer that ad hoc panels should be initiated by the Agency who asks the stakeholders to nominate experts. The Agency should aim for experts with different backgrounds covering all aspects of the issues to be discussed. The result has to be published and stakeholders must have the right to comment on it. The overall results could be presented at the fora.

As an additional benefit, ENTSO might use these panels initiated by the Agency within the process of drafting the codes as an advisory panel. This could safeguard consistency and continuity.

3. Framework Guidelines, Codes and Other Cross-Border Regulatory Issues

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

The proposed priorities for gas are welcome as capacity, transparency and balancing are certainly the main priorities. To our knowledge, that is broadly agreed by all stakeholders.

Since it will be impossible to work on all aspects of the mentioned areas at the same time, it has to be resolved what needs to be done sooner and later. Therefore, as a first step, it is necessary to define ambitious, but still manageable packages and realistic steps. As a second step, these packages have to be prioritised further. This should be part of the definition of the framework guidelines.

However the proposed priorities for gas should be changed with regards to their ranking as follows:

Priority I: capacity allocation and congestion management rules; transparency rules; balancing rules;

Priority II: security and 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;

Priority III: rules regarding harmonised transmission tariff structures; interoperability rules;

Priority IV: operational procedures in an emergency, energy efficiency regarding gas networks.

We think that the grouped issues are highly interrelated. In any case, these issues surely will lead to very complex, extensive and probably controversial discussions, even within each group of stakeholders. Additionally, the national systems differ significantly not only regarding the legal

framework and the characteristics of the respective markets, but also the physical abilities and requirements of the grids.

Regarding electricity, RWE fully agrees with the suggested priority list attributing the highest importance to security of supply followed by market related issues.

However, the right set of codes also depends on the level of details covered by these codes and the level of enforceability. In any way these codes need to respect the balance of power as established by the EU Treaty and to respect the limited power of discretion. The enforcement of legally binding codes by the Agency needs to respect the Agency's limited powers and needs to be in line with the Meroni-Doctrine.

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

In the electricity sector we are convinced that an Internal European Market is already in place. Electrical energy can be transferred freely across borders as far as technical constraints permit such transactions. Both capacity allocation and congestion management can be further refined, which does not imply however that there is any benefit in harmonising these rules for all 27 Member States. In this sense, existing Regional Initiatives (such as the Central Western European electricity market project) should be completed before envisaging full Europe-wide harmonisation.

Concerning the gas sector, we think that the harmonisation of inconsistencies in capacity allocation and capacity terms should have priority. Inconsistencies lead to serious trading barriers for companies wishing to buy gas in one Member State and sell it in another. The main obstacle for seamlessly interacting gas transmission networks are a lack of available capacity for the cross-border pipelines and the connecting transmission system.

Currently, capacity is allocated in an inefficient and intransparent way: There is no efficient (secondary) market in transmission capacity rights. As a result, the available physical capacity is only partially used, even when there is demand for additional capacity. Congestion management at the international bottlenecks is inadequate. The way congestion is managed and the allocation procedures differ from country to country, and are subject to change from one year to another. The congestion procedures often lack transparency on how the capacity is allocated. In addition, market participants do not get timely access to capacity bookings information in a harmonised format.

It is important that – without delay – capacity rules are harmonised to the extent technically possible. There will only be a level playing field for all market participants if it is as simple to ship gas across European borders as it is within a country.

The codes should generally be legally binding and directly enforceable, which provides additional reliability for all parties involved including the grid operators. It is in principle not desirable that the codes have to be transposed into national law by the Member States. It is essential that grid codes provide for identical capacity rules in all Member States in order to facilitate cross border interactions between the transmission systems. We agree with ERGEG that high-level, general obligations are no solution for the technical issues which arise in the context of capacity allocation.

Still there may be cases where the continuous development and rapid adaptation to changing circumstances are impeded by having legally binding codes. The question which codes are legally binding and which rules are adopted through Member State legislation should thus be decided on a case by case basis. It can also be helpful to split issues into more fundamental and permanent rules that are legally binding on a European scale while more detailed description are left to the imposition of the Member States. This may indeed be the only way to arrive at workable solutions in an acceptable timeframe that are also widely accepted by most of the parties concerned.

4. The ENTSO and European Energy Regulators

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

Both the individual network operators as well as the ENTSO have to be involved in the whole implementation process from the very beginning to the end. As the experts with most profound understanding of the issues they should not merely be consulted, but accompany the whole process even if it is initiated by the Agency. In particular the ENTSO must be consulted not only for the first draft on each set of codes, but also regarding any further development of the drafts.

This close co-operation of the Agency with the ENTSO would also render any possible duplication of consultation procedures irrelevant. As mentioned in our reply to question 2.A., if the Agency and the ENTSO have a close working relationship at all stages of drafting the codes, a single consultation procedure would be sufficient. This consultation should in most cases be initiated by the Agency. However it is more appropriate if the consultation for predominantly grid-focussed commercial or technical issues is left to one of the ENTSO. Such an approach would also enable the ENTSO to concentrate on providing clear and precise draft for the codes (although not necessarily in the form of the legal texts required).

Another issue in this regard is that the legal rights of all parties must be guaranteed. The EU Treaty establishes a balance of power based on democratic principles. Thus, all decisions taken by the Agency especially if these are binding must respect the balance of power, the democratic principles and must ensure the legal rights, especially the right of appeal. As said before the right set of codes, the level of involvement and the enforceability depends on the level of details covered by these codes. In any way these codes need to respect the balance of power as established by the EU Treaty and to respect the limited power of discretion. Enforcement of codes can only happen in areas where the Agency can enforce legally binding codes and to an extent in line with the Meroni-Doctrine.

5. Regional Considerations in Moving to a Single European Market

Question 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?

RWE fully agrees with the appraisal that Regional Initiatives are essential steps towards a single European energy market. A number of Regional Initiatives have in fact contributed widely to the progress made so far in integrating formerly separated national markets. A good example for

these achievements is offered by the experience within the Central Western European electricity market that would not have been possible by merely waiting for pan-European legislation or regulation that by nature is focusing for "one fit all" solutions.

Growing interactions between neighbouring markets will require even greater cooperation between regulators, TSO and stakeholders. This is particularly true when it comes to issues like co-ordinated network planning or co-ordinated congestion management. This is why the 3rd Energy Package itself acknowledges the concept of regional markets by asking national regulators to take regional aspects into account.

There is, however, a clear danger of double work. If the same codes are discussed at national, at European and also at regional level, the resources of regulators, TSO and stakeholders will be overloaded with work with a potential negative impact on quality. In case that codes discussed and agreed upon at regional level are to be made legally binding, this cannot happen at regional level (EU provisions are valid throughout the entire Union and not constrained to certain regions). Nor does it make sense to raise the issue to the European level as the decision of dealing with the issue at the regional market was based on some kind of particular regional pattern. In fact, this task would have to be executed at the national level of those Member States that are building up the respective regional market.

However, assigning the responsibility for transferring one common code into several national legal frameworks might prove practically infeasible (the same code would have to pass several different national legislative bodies e.g. within a certain market region). This open issue of how to practically implement commonly agreed codes into valid legislation still needs to be resolved.