



ETSO Response to ERGEG/CEER Consultation paper Implementing the Third Energy Package

30 December 2008

1 Introduction

ETSO welcomes the opportunity to give its view on the ERGEG/CEER Consultation paper Implementing the Third Energy Package published in October 2008. ETSO believes that the general principles described in the main part of the consultation paper constitute a good basis for discussion, but the appendices sometimes do not appear to be consistent with some of these general principles. ETSO would therefore welcome further clarification of the CEER/ERGEG view on those issues.

2 Key messages on the implementation of the 3rd package

ETSO welcomed the discussion on the implementation of the 3rd package held in Florence on 24-25 November at the XVth European Electricity Regulatory Forum. As presented then, the following principles are of key importance for European transmission system operators. Consequently ETSO would like them to be reflected in any voluntary regulatory arrangements during the interim period and then continued through to mandatory arrangements after the interim period.

2.1 Anticipation

The third package, although it has not yet entered into force, has already furthered the policy debate on grid issues. European TSOs are eager to tackle pending pan-European grid issues as soon as possible in a more efficient way. That is the reason for having created ENTSO-E ahead of any obligation to do so. ENTSO-E will enable European TSOs to work on an “as if” basis during the interim period, in order to rapidly and thoroughly reach beyond the discussion on the governance framework, to the substance of the third package.

2.2 Cooperation

European TSOs wish to cooperate with all stakeholders during the interim period, in anticipation of what will happen once the 3rd package effectively comes into force. For ETSO this, of course, includes consolidating the mutual-trust relationship with regulators,

but also to pursue a constructive, fruitful relationship with all stakeholders. Apart from the usual statements about the need for cooperation, this requires a consultation process that will enable stakeholders to fully participate in the process of drafting network codes. The aim, scope and organization of consultation need to be fine-tuned in order to optimise stakeholders' resources. Duplicating the consultation process should therefore be avoided by clearly separated and non-overlapping (cf. § 2.4) stages in the stakeholder-consultation processes performed by the Agency and ENTSO-E for their respective purposes. In addition, during the interim period, special attention must be given to the voluntary cooperation between European Commission, Member States, National Regulatory Authorities (NRAs), and TSOs, such that there is alignment among all these parties.

2.3 Roles & responsibilities

ENTSO considers that the success of the 3rd package regulatory framework lies in a clear definition of roles and responsibilities.

It is both necessary and desirable to work as soon as possible on the “as if” basis in order to efficiently tackle pan-European grid issues. Such an “as if” regulatory arrangement should be consistent with the legal framework that will result from implementation of the third package. European TSOs would like to stress the need to avoid creating a voluntary arrangement that would differ too much from the legal regulatory situation that will be established once the 3rd package is formally approved at EU level.

In this context ENTSO would like to emphasize the need for clarity as regards the role of the Agency. The Agency cannot be at the same time and for the same issues rule maker, supervisory body and judge. This principle, which is firmly established in the legal system of a majority of Member States and the European Union, should of course apply to the regulatory framework of the 3rd package, but also to the way CEER/ERGEG anticipates it. Any voluntary arrangement during the interim period must include a mechanism of possible appeal open to the interested parties, i.e. TSOs and stakeholders. This cannot be achieved if the powers delegated to the Agency are not well defined.

The relationship between the Agency and NRAs must also be well-defined. For the sake of clarity and efficiency in the making of regulations, European TSOs advocate that the decisions of the Agency should be made clearly enforceable, including towards NRAs. ENTSO considers this to be of utmost importance to ensure the coherence of regulation and to provide certainty to all stakeholders including the investment community.

2.4 Innovation & flexibility

The electricity industry as a whole faces huge challenges, many of which still need to be properly defined. Grid issues are increasingly being integrated into a broader perspective, e.g. the global environmental challenges that the European Union endeavours to address. In order to complete the ambitious programme to which the EU has committed itself, innovation on grid issues must be encouraged and not be frozen out by an inadequate, oversized regulatory framework.

Accordingly, ETSO believes that depriving TSOs of the possibility to perform their natural task as market facilitators would hinder innovation, and undermine Europe's aim to foster innovation as part of the Lisbon strategy for competitiveness. This means that the regulatory arrangement must provide room for flexibility and should not prevent TSO innovation which can provide the marketplace with adequate tools.

In short,

- a. ETSO considers that regulators should be given adequate means to perform their duty (together with proper means of accountability) to check that the solutions proposed by TSOs, after due consultation with all stakeholders, are in the public interest;
- b. At the same time, European TSOs must be allowed to play their role as market facilitators, with the responsibility to meet stakeholders' demands using their particular technical and economic knowledge and experience of power systems and markets. This innovative role should not be made more difficult by future arrangements. For example, market coupling was first resisted by some NRAs when proposed by TSOs and PXs of France, Belgium and the Netherlands, but is now asked for by market participants in all regions, and even "requested" (sometimes with unrealistic timetables) by some European regulators.

3 ETSO response to specific questions raised in the Consultation Paper

As a general comment, ETSO would like to outline that, while the main document provided for consultation by ERGEG can be considered to be largely acceptable by the European TSOs, this is not the case for the appendices. Indeed, the latter often contradict the statements of the main document, in a manner that is not constructive in promoting a cooperative framework.

3.1 The work of the Agency

- 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.*

ETSO/ENTSO-E aims at ensuring a professional, transparent and thorough consultation process with stakeholders on those fundamental issues that belong to their core business. The purpose will be to ensure that system physics and economics can be handled by market participants with usable, well designed market tools. A good understanding of market participants' demands is essential in order for ENTSO-E to be able to create innovative tools to enable electricity trading while ensuring network reliability

When drafting codes TSOs will engage stakeholders in consultation at different stages, before submitting a draft proposal to the Agency.

The purpose of Agency consultation, and CEER consultation during the interim period, on final codes proposed by ENTSO-E, is by nature different from that of ENTSO-E. Its purpose is to act in the public interest taking into consideration stakeholders' opinion.

Thus, ETSO believes that ENTSO-E and ACER consultations are complementary to each other and not competitors.

However, the implementation of the 3rd package, including the preparatory work during the interim period, will imply a huge number of consultations by European Regulators and European TSOs, i.e. on draft network codes, framework guidelines, work programs and other key documents. Bearing in mind that consultation is a demanding process, ETSO believes that an increased number of consultations, in particular on the same documents, such as different versions of draft codes or draft framework guidelines, may be inefficient. ETSO therefore suggests organizing consultation on network codes and framework guidelines in such a way that stakeholders perceive it as one consultation process with different stages. An illustration of the process is included in Annex 1 of this response. Moreover, ETSO welcomes that CEER appreciates avoiding duplication and will launch consultation supplementary to ENTSO-E only when necessary from a public interest point of view (para. 18).

- 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?*

This is an issue for stakeholders to comment on.

- 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 view 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?*

This is an issue for stakeholders to comment on.

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

This is an issue for stakeholders to comment on.

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

We could not find any clear statements in the CEER/ERGEG paper on the issue of enforceability of ACER decisions towards NRAs, whereas this point is of key importance and must be thoroughly addressed. Accordingly, ETSO would welcome clarifications from ERGEG/CEER on the way they intend to address this issue during the interim period.

3.2 Framework guidelines, Network Codes and other Cross-border regulatory issues

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

ETSO would like to stress that any temporary regulatory arrangement agreed upon for the interim period, should follow as closely as possible the legal framework which will enter into force upon formal adoption of EU legislation. This requires respecting both the wording and the spirit of the 3rd package, in which the European Commission is the sole body entrusted with the responsibility for establishing priorities for the development of network codes and for inviting ENTSO-E to prepare the network codes accordingly (i.e. following the basic EU policy principle that the EC has the right of initiative).

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

ETSO notes that CEER/ERGEG devotes much attention to the number of network code areas and the opportunity for consolidation. What is more important is to establish the scope of the priority network codes with market players to ensure good and timely progress. It is too early to define any groupings at this stage. The aim should be to develop the codes progressively in order to deliver a relevant and coherent framework. It is critical that the scope is well defined for each network code development process so that the interactions between separate code developments can be well managed. The codes' framework is illustrated in annex 2 of this response.

Moreover, ETSO considers that it is for the European Commission to decide on this question, after completion of its own consultation process. Accordingly, European TSOs believe that the grouping issue should be discussed in priority with the European Commission.

To ensure efficiency we may need developments to span and include subsets of the 11 areas identified in the proposals. This is why the Commission's priority setting process is critical to define the appropriate scope for each initiative.

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

ETSO believes that the first codes to be developed should, if possible, address those issues that have not been covered so far. Again, European TSOs consider that these issues should be first discussed with the European Commission because of its role in prioritizing areas for network code development.

Although ETSO hopes that the first integrated European network code will result in substantial progress it is unlikely to represent the final solution. A procedure for change processes will therefore be required. Both framework guidelines and the European

network code may need to be reviewed in such processes. Where such changes might be substantial the processes should reflect the similar responsibilities and accountabilities to those used to establish the initial code. This will require refinement of the currently proposed amended Electricity Cross Border Regulation and ETSO will engage with the European Commission and European Parliament to promote that the change proposals reflect a similar basis to those that are envisaged for the establishment of the initial network codes.

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

As mentioned above, it is an issue for ENTSO-E, European Commission and Regulators to identify the scope of each area in consultation with stakeholders.

3.3 The ENTSOs and European Energy Regulators

A. Are the mechanisms and observations outlined, 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 their improvement?

As recalled in the ETSO position above, European TSOs would like to stress the need not to create a regulatory arrangement that would differ from the legal regulatory situation that will be established once the 3rd package is formally approved at EU level. This situation should be avoided as it would be legally cumbersome and would result in a regulatory uncertainty that would mostly affect stakeholders. Accordingly, some clarification should be provided in addition to current CEER/ERGEG propositions. This is especially the case regarding the status of framework guidelines. ETSO considers that those should be non-binding, general and should not enter in to details or pre-empt TSOs' responsibilities and knowledge in power systems. Framework guidelines should respect the European Commission's role in prioritizing issues of importance. Depending on the spirit in which they are elaborated, framework guidelines can be either a useful tool to speed up the process of establishing codes, or on the contrary an obstacle to innovation and efficiency.

3.4 Regional considerations in moving to a single European market

A. 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?

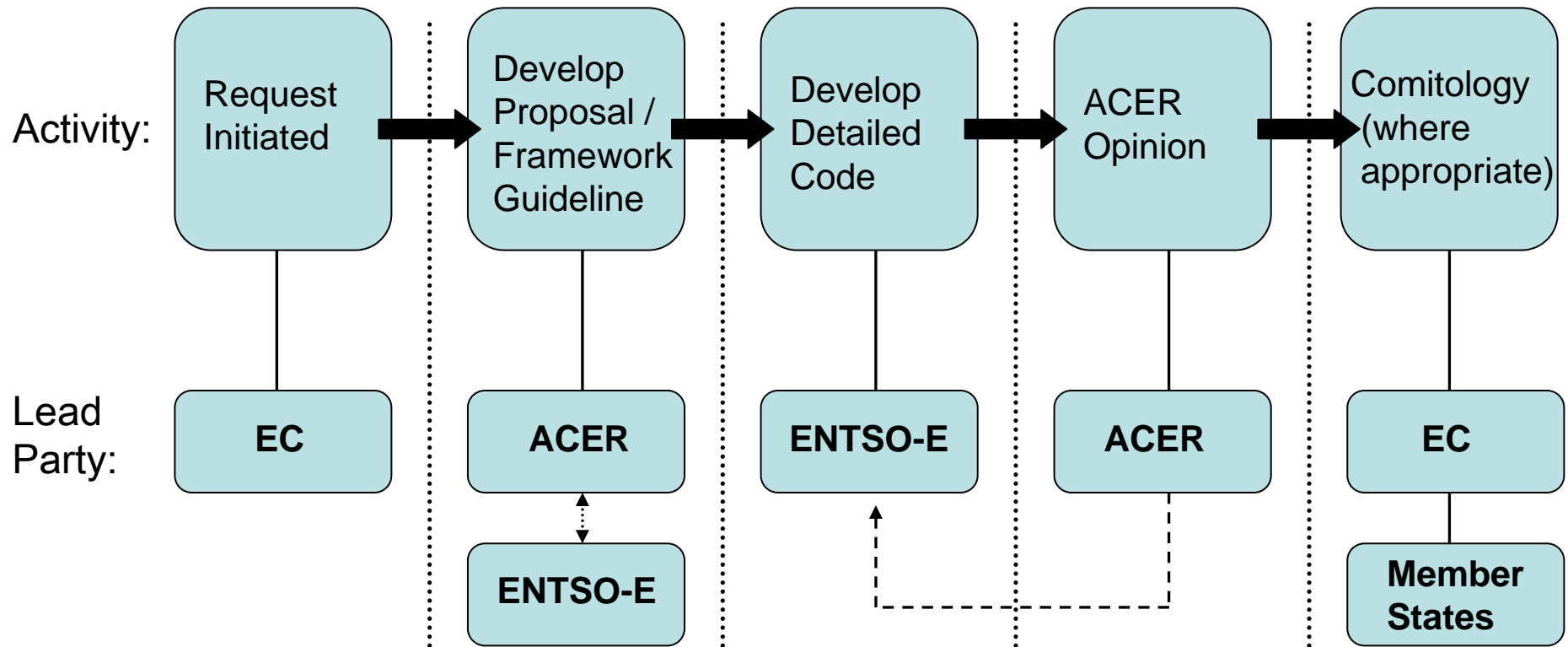
ETSO considers that it may be useful to engage into a forward-looking assessment on the future of current regional initiatives. Especially, the potential merging of some of them might be fruitfully debated. Regional initiatives, although useful to make progress in the short term, may ultimately undermine the wider objective of creating a single European

energy market if they remain focused on their own priorities and result in creating governance structures whose functional scope and regional extension are difficult to alter once established. Consequently, it may be useful to discuss whether the perpetuation of regional initiatives in their current form (with one leading NRA) risks freezing the current - and by definition transitional - state of regional cooperation in an unacceptable way and building up instead of removing barriers, which should be the aim in creating a single European electric market.

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

This is an issue for stakeholders to comment on.

Annex 1: Consultation Process (With Stakeholders)



- ENTSO-E & ACER stakeholder consultation activities are complementary
- Separate, non-overlapping stages in the consultation process



Annex 2: Codes Framework

