



Review of the process for drafting framework guidelines

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Background

European Energy Regulators decided to work, during the interim period before the Agency for the Cooperation of Energy Regulators (ACER) becomes operational on 3 March 2011, on the development of draft Framework Guidelines. The aim was to accelerate progress once ACER is able to take on its formal responsibility. The European Commission and the European Network for Transmission System Operators (ENTSOs) for electricity and for gas have agreed to work 'as if' the 3rd Energy Package¹ were in place.

As the work has been done on a voluntary basis, it is particularly important that the process followed is very robust and provides a sound basis on which ACER can rely.

European Energy Regulators' basic process has been to:

- Identify priority Framework Guidelines (FGs) following consultation with stakeholders, subsequently informally endorsed by the European Commission;
- Undertake an Initial Impact Assessment (IIA) on our own initiative (not stipulated in the legislation);
- Establish a task force responsible for drafting the relevant FG composed of representatives from different national regulatory authorities (NRAs);
- Engage stakeholders in a number of ways:
 - establish an ad hoc expert group in each framework guideline area;
 - establish an Ad Hoc Advisory Group (AHAG) in the case of electricity Capacity Allocation and Congestion Management (CACM);
 - hold bilateral meetings with key stakeholders and the European Commission;
 - host public workshops for all interested parties;
 - engage informally and regularly with the ENTSOs; and
 - undertake formal public consultations on the proposals (minimum 8 week consultation periods).

In order to assess the effectiveness of the process European Energy Regulators have applied, and to make recommendations to ACER before it takes on responsibility for the development of framework guidelines, this review has been undertaken to gather the

¹ The 3rd Energy Package is a set of legislations comprising two Directives for electricity and for gas and three Regulations for electricity, for gas and one creating the new Agency for the Cooperation of Energy Regulators; http://ec.europa.eu/energy/gas_electricity/legislation/legislation_en.htm

experiences of the interim period and make recommendations. In order to understand at a detailed level how the process has worked and how it might be improved questionnaires were sent to stakeholders to get external views, and to regulators involved in the process to get internal views. Interviews were conducted with the European Commission and the ENTSOs, as well as with some regulators. The intention has been to identify general lessons for application in the future. Therefore, cases have been identified where improvements could be made or where a new approach could be beneficial in relation to the overall process.

Overall, the feedback we have received is that the process European Energy Regulators have followed is basically a good one, but that some improvements could be made to its operation which would enhance the trust of stakeholders in the outcome. However, there are serious tensions between the desire to enhance the process and the resource implications of doing so and a careful balance will be needed to set ACER's ambitions at a level which is actually achievable.

This public document contains a summary of the overall feedback received from regulators, the Commission and stakeholders and the resulting recommendations made to ACER.

Conclusions and recommendations

Timeline

- i. 12 months should be planned as the 'normal' period for the development of each framework guideline (FG) rather than assume that all work can be done within the 6 months formally allowed in the regulation;² this means that ACER should start working on each FG around 6 months ahead of the start of the official 6 month period. Adjustments to the overall 12 month period should be made only if the specific framework guideline is particularly complex or straightforward. ACER should strive to arrive at the preparation stage of the consultation document by the time the Commission's letter is received requesting ACER to prepare a framework guideline, i.e. by the time the 6 month period starts. This will allow 2 months for consultation, 1 month for redrafting the final FG, 2 months for the ACER approval process and discussions with the Commission, ENTSOs and stakeholders. This leaves 1 month for contingency.

Scoping/Initial Impact Assessment

- ii. The 'scoping' phase is extremely important and should be used to determine the scope of the topic to be addressed, the identification of the outcome that is the goal (i.e. what the effect should be on the operation of the market), the depth of harmonisation that is required (or, at least, areas which do not need to be harmonised, such as low calorific value gas, perhaps), and the scope of the FG compared to the network code to be developed by the ENTSOs. ACER should involve the Commission and the relevant ENTSO in the scoping phase and aim at a common understanding on these areas between them so that the overall aim of the FG/ network code process is clear.

Currently co-ordination rests with the Planning Group (senior level representatives from the Commission, ERGEG/ACER and the ENTSOs), but there is a question of whether more formality is required for endorsing the outcome of the scoping phase, given its importance for the direction of subsequent work during the whole period of the development of the FG and related network codes. It should be considered whether the High Level Group (Commission Director, Chairman of the ACER Board of Regulators, ACER Director and the Presidents of ENTSO-E, ENTSG) should receive reports on the scoping work to provide oversight of the process.

² Article 6(2) of Regulation No 714/2009 and of Regulation No 715/2009.

- iii. There is a broad consensus among regulators that more resources would need to be applied to undertaking Initial Impact Assessments (IIAs) if they are to be done to a higher standard. However, the reality is that the resources (including expert resources) of NRAs are under growing pressure and, realistically, no more resources from NRA or ACER funds are likely to become available for this purpose. The conclusion must therefore be that regulators should undertake the best IIA that they can with the resources that are reasonably available. In each case, consideration should be given to whether external consultants are needed to undertake part of the process if this is needed to achieve a high quality outcome. Where regulatory resources are not available for this purpose, then the option should be given to the Commission to provide the necessary funds since the requirement to undertake an impact assessment is formally one which rests on the Commission.
- iv. Overall, stakeholders have identified the problem of preparing good IIAs that we have identified ourselves. However, there are different opinions on what constitutes a 'good' IIA, and this is unlikely to be easily resolved. ACER should issue a short information document explaining the overall objectives and purpose of the IIAs it undertakes so that the limits on what ACER aspires to achieve through the IIAs (which must be realistic given resource constraints) are clearly set out.

Consultation

- v. In the case of the gas Framework Guideline on Capacity Allocation Mechanism (CAM) the Commission proposed that European Energy Regulators make changes to the FG after it had been submitted. If such circumstances should arise in the future then an additional round of consultation with stakeholders, on the revised text, should be undertaken by ACER. This could be a formal written consultation or a workshop depending on the circumstances. However, a revision of a Framework Guideline and an additional round of consultation would require a significant extension to the initial 6 month drafting period.
- vi. Overall the main request from stakeholders is for early involvement in the FG development process. The effect of the very short statutory timeline has been that in every case so far, the process for the preparation of FGs has resulted in public consultation taking place only at the stage when policy proposals are already quite fully developed. Typically the IIA has been undertaken, the policy approach selected and the FG drafted before consultation happens. By this time, the formal letter from the Commission has been received and the 6 month deadline is in operation. This suggests that the scope for a change of course as a result of the consultation is, in reality, very limited. However, further consultation at an early stage would take more time and clearly there is a trade-off between consultation and speed of progress. It may be that the pragmatic approach of issuing a written consultation at the stage

when policy choices have to be made (which should normally be before the 6 month period begins) is that such consultation should be undertaken only when there are options which could have very different outcomes commercially for market participants (e.g. where the value of contracts could be affected or significant costs will be incurred). When such a consultation is undertaken it could include a request for quantitative analysis from the stakeholders as an additional input to the IIA to assist our own analysis and also to help prepare the ENTSO's own IA. In other cases where early consultation with stakeholders is needed, but short of a formal consultation, a workshop could be held.

- vii. Overall, the level of resources committed to this work by stakeholders is considerable (as it is for regulators). This gives rise to the question of how smaller participants can engage in the process. It may be that simplified information could be included in a basic 'fact sheet' to accompany each FG consultation. Such a fact sheet should be short, and should explain the objectives of the FG, the overall approach being proposed, its relevance to the achievement of the single market, and the timetable for consultation. This could assist smaller players in targeting topics of interest to them, and could also be a handy tool for the other players involved.
- viii. Informal contacts with the ENTSOs, based upon roughly monthly telephone calls or meetings, work well and should be continued, although stakeholders have indicated that they would appreciate even more frequent contacts in gas. These contacts should be managed by the relevant ACER Working Group and should be focussed on those involved in the particular FG. It is not their purpose to reach agreement; rather they should provide a forum for discussing issues in order to ensure communication is good.
- ix. FG policy development is a responsibility given to ACER in the 3rd Package. Clearly, there is a balance to be struck between consultation and receiving expert views and proposing a policy approach. The process for the development of FGs should include the production of a project plan for each FG which should include clear points for ACER policy decisions. The project plan should indicate when expert input is required and when consultation is to be undertaken. The project plans should be made public so that those stakeholders involved are clear on their role (both in terms of timing and purpose) in the overall process.

Expert Groups/Ad hoc groups

- x. The initial approach of applying confidentiality commitments to expert group members was thought by some to be too restrictive given that the costs of membership was covered by their employers. The practical reality was that these

conditions were either not applied (published minutes sometimes named who said what) or Chatham House rules were applied. Either solution would be acceptable.

- xii. The expected role of expert group participants should be more carefully explained to them at the start of the process.

Effectiveness of the process

- xiii. The request by some stakeholders that there should be a full picture of the architecture of the FGs and network codes depends upon there being a well defined and comprehensive target model which the FGs and codes are designed to implement. European Energy Regulators are working on a target model in gas which may allow a high-level view on the FG architecture to be reached later this year. One exists in electricity in relation to congestion management and capacity allocation, but it does not currently extend to other important areas such as tariffs and investment. Regulators should consider whether such a model should be developed as an aid to the development of FGs and network codes, as well as to the consideration of future code modification proposals.