

3rd energy package and creating an effective EU Agency (ACER) in the consumer's interest

What is in the 3rd energy liberalisation package for the EU energy consumer?

Its aim is to create a stable and coherent climate for investment in an efficient integrated grid and, to deliver **open and competitive single EU markets in gas and electricity in the consumer interest**. It puts in place a European mindset for regulators, Member States and TSOs. This new EU regulatory system for energy would be built upon 3 pillars.

- **effective separation** (unbundling) of Transmission System Operators (TSOs)
- an **Agency** for the Cooperation of Energy Regulators (ACER),
- and the creation of **European Networks of TSOs** (ENTSOs).

Consumer-specific provisions of the 3rd package proposals include

- A new **consumer forum** (akin to the Madrid and Florence energy regulatory fora)
- New measures for **increased consumer protection** (e.g. access to consumption data, customer complaints procedures, supplier switching) and new duties on regulators.
- It seeks to **harmonise the powers of national regulators and strengthen their independence** from political and commercial interests (which is essential for competitive markets to develop). The 3rd package mandates national regulators to ensure the **"efficient functioning of their national market and to promote effective competition"**. This policy objective is in the interest of the consumer. In the context of developing a competitive, single EU energy market, it means **acting in the interest of the EU energy consumer**, facilitated by the new EU energy Agency (ACER).

Does an energy Agency (ACER) mean a "single EU regulator" or something else?

The Commission believes that the European Regulators Group for Electricity and Gas (EREGEG¹), which does not have decision-making powers, should evolve. It proposes a

¹ The Commission, in November 2003, set up EREGEG, as its advisory body on energy issues. It is made up of the national energy regulatory authority of the 27 EU Member States. Visit www.ereg.org.

new Agency (ACER), established by Regulation to close the regulatory gap between national borders. The new Agency is not intended as a substitute for national regulators (whose powers and independence are reinforced) nor as a single EU regulator.

What is wrong with the European Commission's proposed model?

The major weakness lies with the role of the Agency and its inter-relationship with the ENTSOs.

- The proposed ACER has **limited authority to take decisions which are legally binding on third parties**, based on the Commission's interpretation of case law (Meroni).
- The model proposed by the Commission amounts to **self-regulation by TSOs at EU level**. This is contrary to the national regime where TSOs are not free agents but instead are regulated by independent regulators acting in the consumer's interest.
- The **governance arrangements** of the proposed ACER need to reflect the appropriate independence arrangements at national level.

Codes and Rules – which lie at the heart of the integrated EU grid – is the area of most concern.

- The **scope** of the 11 areas of "technical and market rules" **given to the European TSO bodies (ENTSOs) is too broad** and undefined, and in some cases (e.g. trading rules) go beyond what TSOs should do.
- **ACER (which should protect the public interest at EU level) has no effective powers, nor duty to consult**. It only "issues opinions" to the ENTSOs and the Commission.
- Many technical and market rules likely to remain **voluntary**, thus **unenforceable**, only becoming binding if there is comitology.
- **Limited customer/stakeholder involvement** – reliance on TSOs to protect the public interest when drafting the very codes and rules which apply to TSOs.
- **Lack of any mechanism to modify the technical codes**

Does it matter if rules remain voluntary so long as TSOs cooperate and develop them?

Voluntary rules do not work as experience shows. Binding rules (e.g. for security and reliability standards), drafted by TSOs and subject to appropriate regulatory oversight, are necessary so as to avoid further blackouts and for TSOs to take responsibility for non-compliance. They are also essential to provide the climate for investment which is central to achieving the Union's goals for competitiveness, sustainability and security. Also, for the networks to operate properly, many of the rules must bind those who use them.

Can the weaknesses of the Commission's proposal be overcome?

Yes. The 3rd package should provide the opportunity to give ACER (acting in the EU consumer's interest) the power to take **binding technical decisions** on defined cross-border issues within a framework agreed at political level. The regulators have proposed some amendments², consistent with Meroni, which would enable the ACER to take decisions on cross-border issues within a framework set through comitology process, and at the same time ensure appropriate stakeholder/consumer involvement. In essence, policy objectives would be agreed through comitology, early on in the process, which would establish clearly the technical decisions that ACER should make, and mandatory codes would result at the end of the process. (see Fig. 1)

Stage 1: **Strategic guidelines** (that would guide ENTSOs in their subsequent drafting) would set out the general objective, level of priority, roles and responsibilities for each code or rule and should therefore be agreed at a political level. **ACER (after consultation** with ENTSOs and stakeholders) would propose to the Commission "**strategic guidelines**" that **would be agreed through comitology**.

Stage 2: **ENTSOs would draft the codes/rules to meet the "strategic guidelines"**. ACER agrees after consultation (or disagrees) with the code rules (or asks ENTSOs to revise).

Stage 3. Following the **approval by ACER**, the codes and rules become **binding**.

In order to guarantee the independence and autonomy of the Agency, avoid unnecessary expenditure and enhance regulatory certainty, the regulators have proposed some improvements to the governance arrangements of ACER (including an independent appeals mechanism and accountability to the European Parliament).

Benefits of the regulators' alternative approach vis-à-vis the Commission's proposal

- **Binding codes**, which form the basis of the single European energy market, will **provide regulatory certainty** for investors and for competition to develop.
- "**Strategic guidelines**" (focused on key issues) are for agreement under comitology – unlike the Commission's proposal which envisages comitology only at the end of the process on highly technical codes. These strategic guidelines set the framework early on and avoid detailed comitology scrutiny of highly complex, technical codes. This will enable the Council to retain control of the framework within which ACER and the ENTSOs undertake their tasks.
- **More effective engagement of the comitology process** which will address strategic issues at the beginning of the process rather than hundreds of pages of technical rules.
- A final **definitive consultation by the Agency** – thus **protecting the consumer interest**.
- **Modifications to codes** – inevitable and frequent as markets develop and integration of markets deepens – will not need detailed comitology scrutiny. Only changes to the "strategic guidelines" would require this.
- At national level, codes **and rules will also need to be consistent with "strategic guidelines"** and EU level codes and rules. This essential step cannot be ensured with voluntary codes.

² See "CEER Key Comments on the European Commission's Third Package", 20 December 2007, (ref: C07-GA-36-08) on www.ceer.eu.

How does the regulators' alternative approach benefit consumers?

- A **better balance of powers between ACER and ENTSOs** (including giving ACER rather than the ENTSOs the primary obligation to consult) **would better serve the public interest of the EU energy consumer**. ACER acts in the interest of all market participants whereas TSOs are potentially an interested party.
- Once codes and rules are drafted by TSOs they should be passed to **ACER to consult** stakeholders and to ensure the public interest requirements are met. Public consultations are crucial for providing expert views on proposals. ACER would operate to the same four principles of **EREGEG's already established written public consultation practices**³ - openness, transparency, consistency and accountability. These written consultations are used in conjunction with public hearings and the Madrid and Florence fora, and could in the future include the **proposed new consumer fora (which energy regulators strongly support) or engagement with a non-binding stakeholder platform**.

Where can I get further information?

EREGEG was established by the European Commission (in November 2003) as the **European Commission's advisory body** on internal EU energy matters. EREGEG (www.ergeg.org) and CEER (www.ceer.eu) aim to create EU-wide electricity and gas markets, **acting in the interest of the EU energy consumer**.

This FactSheet (FS-08-01) was issued by the European Energy Regulators to reflect their advice on the Commission's (19 September 2007) third package proposals.

Should any member of the EU Institutions require the (free and timely) independent advice of the European Energy Regulators on any energy issue (big or small), contact the Secretary General:

Mrs. Fay Geitona
 E-mail: Fay.Geitona@ceer.eu or Brussels@ergeg.org
 Tel. + 32 2 788 73 30
 Fax.+ 32 2 788 73 50

³ See Guidelines on EREGEG public consultation practices (E07-EP-16-03) on the EREGEG website www.ergeg.org.

Fig. 1 - European Regulators' proposed process for the adoption of 'codes and rules'

