
Appendix 1

The Agency for the Cooperation of the Energy Regulators

1 Introduction

1. The proposed Regulation (“the Regulation”) of the European Parliament and of the Council establishes an Agency for the Cooperation of Energy Regulators (‘the Agency’) as a Community body with legal personality. The purpose of the Agency is to complement at Community level the increased regulatory tasks performed at national level by the regulatory authorities and, where necessary, to coordinate these tasks by providing a framework for national regulators to cooperate. In the latest texts, the Agency has general advisory powers, decision-making powers and monitoring powers, together with monitoring and enforcement powers. These are explained in Annex 1 of this appendix.
2. Regulators continue to believe that the Agency should be given greater powers of enforcement and have suggested these elements be included during the final negotiating stages of the third package. Regulators must engage fully with consumers, network users and the EU TSO bodies in the most efficient way during the interim period, as must the Agency thereafter. The Agency must be accountable to stakeholders and to EU institutions in the last analysis.
3. This present paper considers the way the European energy regulators can contribute to the establishment of the Agency, with a view to ensure that it is able to operate effectively as soon as it is legally able to fulfil its tasks. Enhancements are needed to the current consultation arrangements used by European energy regulators when undertaking preparatory work during the interim period.

2 Consultation during the interim period

Consultation Guidelines for use during the Interim Period

4. ERGEG will cease to exist at some point during the interim period, effected by a decision of the Commission, probably when the Agency is in a position to act formally. ERGEG is therefore likely to continue throughout the interim period, and it will undertake consultation with stakeholders on preparatory work of the European energy regulators. Stakeholders’ views would be welcome on the proposed enhanced ERGEG Consultation Guidelines at Annex 2. Should the need arise for CEER to undertake public consultations in is proposed that these arrangements will be applied to CEER as well. The practical experience gained during the interim period will allow the Agency, when formally established, to decide whether to adopt them as their own.

3 Consultation procedures of the Agency

5. The draft Regulation establishing the Agency states that “in carrying out its tasks the Agency shall consult extensively and at an early stage with market participants, TSOs, consumers, end-users and, where relevant, competition authorities, without prejudice to their respective competence, in an open and transparent manner”. In particular when its tasks concern TSOs, “the Agency shall, where appropriate, give interested parties a reasonable opportunity to comment on the proposed measure and shall make public the results of the consultation procedure”. Furthermore, “the Agency shall carry out its activities with a high level of transparency”.
6. Consultation is indeed at the heart of good policy development and Regulators are committed to apply the highest standards in this area. During the interim period European energy regulators will adopt similarly high standards for consultation in respect of our own preparatory work in establishing of the Agency.

The ERGEG Guidelines on ERGEG’s Public Consultation Practices

7. The European Energy Regulators already have a set of “Guidelines on ERGEG’s Public Consultation Practices¹” (“Guidelines”). These reflect best practices in accordance with the “Better Regulation” agenda and have been successfully tried and tested in twenty eight public consultations over the last five years on electricity, gas and consumers issues. These could serve as the basis for the consultation procedures of the Agency and will be used in the interim period also in respect of ERGEG and, where appropriate, by CEER.
8. The ERGEG Guidelines identify some key principles of consultation about:
 - Whom the European Energy Regulators consult;
 - When they consult;
 - How they consult;
 - How they respond to consultation;
 - How they treat confidential information;
 - How these consultations relate or complement the Athens, Florence, Madrid, Maribor and London Fora and regions.
9. There is a general obligation in the draft regulation that implies that the Agency will need to exercise discretion on when a consultation should be launched. Regulators consider that the Agency should always consult when providing an opinion to the European Commission (and/or to the Council, and to the European Parliament) on an issue of importance for the single European energy market, especially when the opinion in question could be the basis of the comitology procedure.

¹ http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_ERGEG_PAPERS/Founding%20Documents%20and%20Rules/Founding%20Documents/E07-EP-16-03_PC-Guidelines_v2.pdf

10. We consider that the current ERGEG Guidelines do not require a fundamental revision at this stage, but would benefit from certain specific improvements (set out below) in respect of the interim period.

Proposed changes to the ERGEG Guidelines for consultation practices in relation to the Agency

| ERGEG Principle of Consultation | Proposal for change |
|--|--|
| <u>On whom the European energy regulators consult</u> | In 4.1) consult the full range of interested parties including market participants, TSOs (including the EU TSO bodies), consumers, end-users and, where relevant, competition authorities, without prejudice to their respective competence. <i>Justification:</i> this is the wording in the third package |
| <u>On when the European energy regulators consult</u> | In 5.v) <i>insert at the end:</i> proper allowance needs to be made for the complexity of the issue under consideration and the time of the year consultations are conducted (the consultation period may be extended during normal holiday periods). <i>Justification:</i> this is in line with current Best Practices |
| <u>On how the European energy regulators consult</u> | In 6.i) <i>add one sentence:</i> A call for evidence should be held following publication of a request for advice received from the European Commission. <i>Justification:</i> this is a Best Practice which is used by other advisory bodies to the European Commission Insert new 6.vii) (New) publish documents which are easy to read. Templates should be used. The length of a consultation document should not exceed 40 pages. <i>Justification:</i> this is a basic principle of good consultation |
| <u>On how the European energy regulators respond to consultation</u> | Insert new 7.6) (New) respond to the consultation within reasonable time limits |
| <u>On how the European energy regulators treat confidential information</u> | No changes foreseen |

| EREG Principle of Consultation | Proposal for change |
|--|---|
| In respect of the Athens, Florence and Madrid Fora | In respect of the Athens, Maribor , Florence, Madrid and London Fora <i>Justification:</i> the new London forum (Citizen's Energy Forum) will be useful to consult when there is a consumer dimension |
| In respect of the regional issues | <i>No change foreseen – current guidelines still valid i.e “separate public consultations may be organized at the regional level under the umbrella of the Regional Initiatives. Where the outcome of any such consultation is seen by the RCC of the REM in question to have a broader application at EU level, the RCC may propose to EREG that a full public consultation is launched at the European level.</i> |

New tools to be used as part of the consultation procedure

11. In addition to the well established consultation methods used already by EREG the following additional tools could be used by Regulators during the interim period, and potentially adopted by the Agency when established building on the experience gained: impact assessments; call for evidence; expert panels; and a quality charter.
12. The Agency is not legally obliged to carry out impact assessments. However, in accordance with the principles of “Better Regulation”, conducting an assessment of impacts is an integral part of policy development and is not only about publishing reasons for a decision but about a structured approach to policy development and decision-making. We have yet to establish methods or practices for carrying out impact assessments but will do so during the coming months.
13. Some other European regulatory bodies, such as CESR in the financial services sector, make use of a different approach to gathering stakeholder views. In some circumstances a ‘call for evidence’ is made. In place of a detailed consultation document (such as this one) which contains detailed analysis on a particular topic area, and then seeks views on a well defined set of questions, a call for evidence seeks stakeholder comments in a much more open way on the basis of the basic facts and little supporting analysis. The advantage of such an approach would be that stakeholders can form their own views without any influence (even if well intended) for the regulatory authority and, critically, views can be sought at a much earlier stage as the time needed for the preparatory work for the consultation is much reduced. This approach might be useful in certain circumstances, particularly perhaps, at the very early stages in the development of a regulatory policy.

14. The idea of a 'stakeholder panel' has been suggested by the stakeholders themselves, eventually to assist the Agency. The term "stakeholder panel" could mean a range of different things. One model would be bringing together a broad spectrum of representative stakeholders from across the EU to act as a sounding board in policy development and evaluation. This is an important role which supplements but does not replace written consultation.
15. Regulators have given this proposal careful consideration in respect of the interim period and have concluded that there are difficult issues associated with the creation of such a panel. Our concerns relate principally to questions of how to ensure the panel is adequately representative of all network users and consumers across Europe. There is a concern that the creation of a further stakeholder panel could place significant additional burdens on stakeholders and the additional benefit of such a new panel must therefore be clearly established.
16. It has been argued that such a model for a stakeholder panel already exists. The Madrid and Florence Fora effectively fulfil the function of a stakeholder panel. At regional level, stakeholder meetings, which are taking place at regular intervals within the context of the ERGEG Regional Initiatives, also could be seen as stakeholder panels.
17. Another model is to establish several "ad hoc panels". Each could be a small group (perhaps ten people) of sector experts to review technical details of specific policy design, to provide advice on identified issues in short timescales. This type of model may be useful, for example, in developing and evaluating proposals for modifications to the network codes (after they are established) which will also involve technical content issues. Several panels could be sitting at any one time, each established to provide input into specific policy areas, and kept in place for the duration of the policy development period. As members would be appointed to these groups for their expertise rather than as representatives of stakeholder interests more generally, it is important to ensure that wider stakeholder input is obtained as part of the consultation process which (see above) we propose to amend. There could be benefit in organising such panels under the umbrella of the Florence, Madrid and London Fora: the expert panels could report on their activities to the wider stakeholder community.
18. In order to improve the accountability to the stakeholders, we will explore whether the Agency could lay down in a 'Quality Charter' the way to improve accessibility, timeliness and quality of decisions. Such a 'Quality Charter' will define objectives in terms of what market participants can expect, by setting out concrete and measurable standards in three key areas which will guide the service policy of the Agency:
19. Quality of decisions: The Agency's response on the objection or decision must consider and reply to the applicant's relevant arguments.
 - Accessibility: Availability of the agency personnel to answer to respond to information queries and deal with complaints.
 - Timeliness: Respect for the timeframe between the receipt of a request and the provision of a response.

20. To improve the Quality Charter a market participant “Satisfaction Survey” should allow the Agency to identify areas of improvement and to set appropriate priorities to enhance its actions.

Specific situations, to be included in the Agency rules of consultation

21. There are situations when the Agency, once established, may exercise discretion whether to consult, and situations when it is obliged to consult. The latest texts set out the following:
- Before it provides an opinion to the Commission on the draft statutes, the list of members and draft rules of procedures of the ENTSOs, (including the rules of procedures for the consultation of other stakeholders) – the Agency has two months to provide its opinion to the Commission, after consulting the organisations representing all stakeholders;
 - On a draft non-binding framework guideline, during a period of no less than two months, in an open and transparent manner. The Agency must consult ENTSO and other relevant stakeholders;
 - Before it provides a justified opinion to the Commission on a network code the Agency has three months during which it may carry out an (optional) formal consultation with relevant stakeholders;
 - Where the Agency is invited by the Commission (as provided for in the draft regulation) to prepare a draft network code (in a case where the ENTSO has failed to develop a network code), the Agency may launch a further consultation.
22. However, under certain circumstances the Agency may have to derogate from its normal consultation procedures (minimum consultation period of eight weeks). For example, the Agency only has two months to provide an opinion to the Commission.

4 Accountability and Reporting

23. The draft regulation provides that an annual report on the activities of the Agency is submitted to the European Parliament, to the Council, to the Commission, to the European Economic and Social Committee and to the Court of Auditors. The Work Programme of the Agency is also forwarded to the European Parliament, the Council and the Commission.
24. An evaluation report is to be presented by the Commission to the European Parliament and the Council at the latest three years after the first Director of the Agency has taken up their duties.
25. These procedures are in line with current practices at national level and European level. Already, the annual report of the European Energy Regulators is forwarded to the Commission (as provided for by the Commission Decision establishing the ERGEG) and to the Council and European Parliament. The Court of Auditors has not been included to date in the list of recipient, but this is because the current CEER and ERGEG are not funded through the EU budget.

26. The European Energy Regulators also provide annually a “Review Report” on the functioning of the market to the European Commission (based on the national reports that each ERGEG member individually is responsible for preparing). Regulators have participated in several public hearings organized by the ITRE Committee.
27. We consider that given that the Board of Regulators of the Agency will be the body in charge of taking regulatory decisions (its Director is bound by the opinions of the Board of Regulators) it is necessary that the Chairperson of the Board reports to the European institutions, including to the European Parliament, to ensure full accountability.
28. We shall send our “Review Report” to the European Commission, the European Parliament and Council Presidency. The 2008 European Energy Regulators Annual Report will also be forwarded to the European Commission, the European Parliament and Council Presidency at the beginning of 2009.
29. To comply with a better regulation a desk for questions coming from stakeholders could be launched. The results of the feedback could indicate:
 - The need for clarification (e.g. with regard to the technical content);
 - Insufficient information (e.g. a technical issue that is not covered by the document, decision, recommendation);
 - Inconsistencies (e.g. as consequence of conflicting statements in different documents).

5 Implications for the Agency

30. We shall continue our present approach in the interim period in respect of reporting and accountability, and the general approach to regulatory transparency. European energy Regulators will recommend to the Board of Regulators of the Agency that it meets its legal obligations in basically the same way – though with some improvements identified above.
31. The Agency is unique in the sense that – unlike any other Agency – it has a Board of Regulators (BoR) which will have a central role in developing the regulatory policies of the Agency and its decisions. The composition of the Board of Regulators is similar to the composition of ERGEG today. The BoR should be in a position to act independently, given that the third package will significantly enhance and level up the powers and independence of regulators at national level. It is also important to note that the third package places some additional requirements on NRAs to cooperate with each other and with the Agency.
32. The draft Regulation envisages that organisational steps in setting up the Agency and its bodies should be taken during the interim period. Until the Agency is able to fulfil its tasks after the 18 months interim period, ERGEG will continue to act as an advisory body on internal energy markets issues. After the expiration of the interim period (or before) the Commission Decision establishing the ERGEG should be repealed and the advisory tasks of the ERGEG should be legally assumed by the Agency.

33. Contributing to the establishment of the Agency is one of the priorities of the Work Programme of the European Energy Regulators for 2009. This will involve:

- Development of proposals in terms of organisational arrangements for the Agency;
- Drafting of the Rules of Procedure of the BoR (and – if requested – advice on the Rules of Procedure of the other governing bodies of the Agency). The Rules of Procedure of the BoR will address working methods, rules governing the decision making process of the BoR and the interactions between decisions at regional and at EU levels.
- Guidelines for the cooperation between NRAs, and between NRAs and the Agency.
- A published document, which will describe the way interactions between the Agency and ENTSOs will be prepared.

Annex 1

Tasks and powers of the Agency

1. The exact scope of the tasks and powers of the Agency has yet to be fully defined in the negotiations on the 3rd package text. However, it is clear that the Agency will have some important functions.

Advisory tasks

2. In relation to the development of network codes, the Agency's advisory role will be to prepare framework guidelines which set out the objectives of the network codes. The draft network codes, once developed by the ENTSOs, will be submitted to the Agency. The Agency may provide advice to the Commission, and the Commission may decide to make proposals through the comitology procedure so that the codes become binding.

Decision-making powers

3. It is only in very specific cases that the Agency has direct decision making powers, although the exact scope of these powers has yet to be concluded in the negotiations. Essentially, the Agency has the power to adopt individual decisions in relation to exemptions where the infrastructure is located in more than one MS; and the regulatory regime for cross-border trade for transmission systems involving more than one Member States if no joint agreement is reached by the NRAs responsible or upon their request.

Monitoring tasks and powers

4. The Agency has a number of monitoring tasks to fulfil, in particular in relation to the codes (monitoring of the implementation of the network codes, of the 10-year investment plan and of the annual work programme).

Enforcement Powers

5. There is a very important issue, which relate to the enforcement of the network codes. The European Energy Regulators have taken the view that such network codes should be binding and therefore enforceable. Whilst the Council's text provides that NRAs shall ensure compliance with the Regulations (and therefore the network codes adopted under the Regulations) it is unclear whether they will be in a position to impose significant and dissuasive penalties (a certain level of harmonisation would be needed in that respect).
6. The exact split of roles and responsibilities between the Agency and individual NRAs will need to be clarified if decisions and network codes are to be enforced.

Annex 2

Proposed modifications to the ERGEG Public Consultation Practices

(Ref: E07-EP-16-03, Guidelines on ERGEG's Public Consultation Practices)

General Remarks

1. The European Regulators Group for Electricity and Gas (ERGEG) have reviewed and revised their public consultation guidelines (of August 2004) recognising in particular:
 - the importance of consultation in providing expert input and views on draft proposals;
 - the need for a flexible approach to consultation (one that can be adapted according to the significance and urgency of an issue);
 - the principles of openness and transparency, consistency, and accountability;
 - the need for clear rule on confidentiality and
 - the need to ensure a high quality to consultation including the use, when appropriate, of regulatory impact assessments.
2. In carrying out consultation EU Regulators will be guided by a number of principles, several of which reflect the Union's approach to better regulation. Whenever adherence to these principles is not possible, an explanation will be given. The principles themselves will be reviewed after one year and regularly thereafter.
3. ERGEG's consultation will provide the basis for its policy recommendations to the European Commission as required in Commission Decision of 11 November 2003 (2003/796/EC). An EU-wide consultation may, however, be reinforced by national or regional consultation to ensure that any particular concern may be adequately explored and represented. Such consultation will not, however, replace the ERGEG consultation nor will it be permitted to delay the timetables agreed for that consultation.

Principles of Consultation

4. On whom they consult, Regulators will, wherever appropriate:

- i) consult the full range of interested parties, including producers, network operators, suppliers, traders and consumers as appropriate; in addition, consultations will be targeted to those more directly affected;
- ii) make consultation proposals widely known and available through all appropriate means but most particularly, the Internet;
- iii) consult at national, regional, European and international levels; and
- iv) make interested parties aware by appropriate means such as the web or email, when the EREG website has been updated.

5. On when they consult, Regulators will:

- i) publish forward annual work programmes on the basis of the Commission mandates to inform all interested parties of the planned consultations;
- ii) publish any request for advice received from the European Commission as appropriate;
- iii) organise, upon request, informal discussions at an early stage with those most directly affected, recognising the limited resources that are available for this;
- iv) consult at a sufficiently early stage to take responses into account;
- v) allow those consulted adequate time to respond, taking account of the complexity of the issue and any deadlines set. An eight weeks minimum period will normally be set for consultation. In practice, proper allowance needs to be made for: the complexity of the issue under consideration; the time of the year consultations are conducted. The maximum consultation period permitted will be four months in order to ensure that the process of policy formation is not unduly delayed.

6. On how they consult, Regulators will:

- i) provide an opportunity for interested parties to comment on proposals following a request for advice from the European Commission or where the Regulators themselves initiate major new pieces of work; A call for evidence should be arranged following publication of a request for advice received from the European Commission.
- ii) when necessary, indicate publicly their thinking on specific initiatives at various stages, (including the use of concept releases) to test preliminary analysis or thinking;
- iii) produce reasoned consultative proposals drafted as clearly and concisely as possible and indicating the objectives pursued. These proposals will be based on a thorough analysis of the issues including, where possible, any relevant economic analysis. Wherever possible, preliminary information on the impact of the proposals, in particular through impact assessments, will be provided;
- iv) will, whenever appropriate establish consultative working groups of experts: in particular when consideration is given to future legislation and on technical content issues, a standing group of experts that may be consulted at any time may be created;
- v) use a variety of media, including public hearings/roundtables, reports and,
- vi) most commonly, internet based consultation;
- vii) use appropriate processes in order better to target consultations at those who are most affected (this will include the use of bilateral discussions, as well as Florence, Madrid and London Regulatory Fora).

viii) publish documents which are easy to read. Special formats and standard templates should be used. The length of a consultation document should not exceed 40 pages.

7. On how they respond to consultation, Regulators will:

- i) give appropriate consideration to all responses received;
- ii) make public all non confidential responses to formal consultations and the total number of all responses;
- iii) make public a summary of the responses received explaining: (a) the reasons why comments have or have not been taken on board in respect of major issues; (b) whether the ERREG position is based on confidential information and why the relevant information cannot be disclosed;
- iv) publish the results and proceedings of public hearings and roundtables;
- v) If necessary, and where timescales permit, consult a second time if the response to the first consultation reveals significant problems, or where revised proposals are radically different from the original proposals on which consultation was based;
- vi) publish and justify all formal proposals and advice, including advice to the European Commission.

7Bis. On how they treat confidential information, Regulators will:

- i) list the names of all respondents (whether confidential or not) or, alternatively, make public the number (but not the names) of confidential responses received;
- ii) assess in co-ordination with respondents explicitly requesting confidentiality which information or data within their response shall not be made public in the summary of responses.
- iii) not link responses to specific respondents in the summary of responses.
- iv) carry out an evaluation of responses in a transparent way to all third parties without undermining their confidentiality rights as protected herein.

8. In respect of the Athens, Maribor, London, Florence & Madrid Fora, the Regulators:

- i) recognise the importance of these for a in the overall consultation process;
- ii) will ensure that all relevant ERREG documents are circulated adequately in advance of such meetings thereby allowing participants the opportunity to provide views on important proposals at the early stages of a consultation process and, when timetables permit, at a later stage before final recommendations are presented to the Commission; and
- iii) encourage participants to provide regular assessments of developments in electricity and gas markets.

9. In respect of the Regional Initiatives, the Regulators:

Recognise that separate public consultations may be organised by regulators at the regional level under the umbrella of the Regional Initiatives. Where the outcome of any such consultation is seen by the Regional Co-ordination Committee of regulators of the Regional Energy Market (REM) in question to have a broader application at EU level, the

RCC may propose to ERGEG that a full public consultation is launched at the European level.

Review

- i) The Regulators will review this consultation practice after one year and on a regular basis thereafter.