

# **EuroPEX**

Association of European  
Power Exchanges



## **EuroPEX response to the ERGEG public consultation: *“Implementing the Third Energy Package”***

**30 December 2008**

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*EuroPEX is a not-for-profit association of European power exchanges that represents the interests of the exchange-based wholesale markets for electrical energy with regard to developments of the European regulatory framework for wholesale energy trading and provides a discussion platform on a European level.*

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**Methodology:**

*After a brief introduction emphasising on the main messages of EuroPEX regarding the implementation of the Third Energy Package and the related ERGEG's initial proposals, the questions of the consultation paper are answered separately. The four-part structure of the consultation paper has been kept. Only questions relevant to Power Exchanges business and competencies have been answered.*

## 1. Introduction

1. EuroPEX welcomes the opportunity offered by ERGEG to anticipate the potential implementation of the Third Energy Package, involving stakeholders in that respect. It is indeed essential that consultations remain at the core of the regulators working methodology, and are applied in an efficient, non-discriminatory and systematic way. EuroPEX also welcomes the early beginning of this initiative, taking into account the complexity of the implementation process to come; a well-timed start of the work helps to manage resources efficiently.
2. Thorough consultations, pragmatism and caution will have to be essential characteristics of the ACER and ENTSOs working methods for all their tasks related to the drafting of the codes. In order to ensure the efficiency and the flexibility of the energy markets, the scope of the codes will first need to be seriously addressed, in full consultation with the impacted market actors, and in coherence with the basic principles of **relevance**, **proportionality** and **subsidiarity**. The same principles will of course also need to be equally applied to the actual drafting of the codes.
3. Ensuring a maximum and equal level of accountability to the ACER and the ENTSO should thus not only improve the confidence of stakeholders towards the regulatory framework; but also improve the quality of the new guidelines and codes to be designed, as those will benefit from the practitioners insights, becoming thus more easily applicable.
4. EuroPEX, on behalf of Power Exchanges, commits to be an active participant to any consultations where Power Exchanges insights and expertise is required and/or would be beneficial. Those topics include in particular issues related to market design, trading arrangements in all time frames, regional and interregional integration, and transparency. These are all issues being addressed by EuroPEX and Power Exchanges in several fruitful initiatives and on-going projects, for example the development of regional markets, vital to the integration of energy markets in Europe today.

## 2. 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.*

5. Call for Evidence and Impact Assessments will be useful complementing tools of consultation for the ACER. Their utilisation should help focusing on the most relevant issues of regulation related to the implementation of a well-functioning energy market.
6. Call for Evidence, already broadly used for the European regulation of the financial sector, should allow stakeholders to give their perception of the current functioning of the market and to point out the first matters of concerns related to it; those inputs should thus be used by the ACER to adjust consultation papers and to integrate those points in the main consultation paper to be sent to the stakeholders.
7. Impact Assessment should particularly provide an opportunity to assess the practical consequences related to the implementation of a regulatory decision. Indeed, focusing on the impact (improvements or drawbacks) of decisions will surely help revealing practical issues that more

general consultation processes may not always be able identify. Again, inputs of relevant stakeholders will be crucial for that purpose.

8. More generally, the accountability of the ACER regarding public consultations could be greatly improved if similar obligations to ones that will be applied to the ENTSOs [see *Proposal for a Regulation amending Regulation 1228/2003 on conditions for access to the network for cross-border exchange in electricity, Article 2f*] were also applied to the Agency. The ACER should in particular indicate how the observations received during the consultation have been taken into consideration in their decisions, and provide reasons where observations have not been taken into account: these principles should at least be included in the internal rules of the ACER.

***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?***

9. The fora will remain important events, allowing a general assessment of the status of market development and integration, and offering a platform for stakeholders and main policy-makers to announce and explain their positions and provide high-level directions for the market development.
10. However, it is probably impractical to use these fora as a panel of stakeholders reviewing substantive documents efficiently. Regarding the important number of stakeholders involved, it could prove to be quite cumbersome to ensure at the European level the coherent expression of positions in a fair way, and the emergence of policy directions or decisions.
11. Considering their public nature, the fora could however be used as a good platforms by the ACER to report to stakeholders on its activities and plans. This reporting could be done on the basis of the same Annual reports, Work programmes and Evaluation reports to be presented to the EU Institutions.

***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?***

12. Following again the experience of the European regulation of the financial sector, ad hoc panels may provide important insights to the ACER on the most technical or specific market issues. Their mandate should however remain of an advisory, non-decision making nature, and always be focused on a specific, non-permanent issue.
13. It is essential that the ad hoc panels, although being independent, remain transparent towards stakeholders. In that respect, their work and conclusions should not be subject to confidentiality, and be made public. It is indeed important that all stakeholders are informed of, and can react to the potentially impacting conclusions of such ad hoc panels (in a comparable manner that impact assessments, based on the practical experience of market participants, help clarifying the possible consequences of a new regulatory decision).

14. Yearly-based events like the fora will not be sufficient to provide full accountability and reporting of the ad hoc panel activities. Although it could be interesting to present a general report of the ad hoc panels' findings in these high-level fora, such a yearly reporting is unlikely to enable a timely and efficient follow-up of the specific issues to be dealt by the ad hoc panels. Rather, close cooperation of the ad hoc panels with the various stakeholders groups (and not only energy consumer and network users) should better be ensured by the publicity of the experts' works and findings.
15. Another important issue regarding the ad hoc panels is the selection of their members. It remains today quite unclear what will be the methodology and criteria for selecting panel members. The ERGEG's consultation paper makes clear that the ad hoc panels should be more "expertise-oriented" than "interest-oriented". This statement seems coherent with the purpose of the panel, which is to provide technical inputs to the ACER on specific issues. It must however be underlined that the practicality of the solutions proposed is a crucial element to be taken into account by the experts panels: this is often likely to be done by practitioners close to the operational reality of the market. Provided ad hoc panel members are made accountable to the community through efficient publicity and follow-up mechanisms [see paragraphs 13 and 14], practitioners should be able to deliver expertise of the highest-value to the ACER within the framework of ad hoc panels.
16. A key consideration is the likely workload of the ad hoc panels. In our experience, if the workload is excessive (or the value of the contribution is modest), the panels eventually comprise less experienced individuals or consultants. This is highly undesirable. The panels need to comprise the most qualified experts on specific issues, which usually means people with direct knowledge and experience. These people, almost by definition, are hard to make available. Possible implications of this include:
  - There should be many, focused panels rather than just a few, wide-ranging ones.
  - The panels should focus on key issues rather than large amounts of paper.
  - If the Codes are likely to be large technical documents, this will require a different form of panel from a panel addressing Framework Guidelines or high level Codes.

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

17. As stated in paragraphs 8 and 11, accountability of the Agency could be improved if more explicit rules are established regarding the use of public consultation inputs, and if the activity reports of the ACER are presented publicly to the annual stakeholders fora and not only to the EU institutions.

***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?***

18. The current level of uncertainty about the detailed mandates, scope of work, etc. for the Agency and ENTSOs, and the accountability to the Commission, is still too large to enable a full answer to this question.
19. However, we have a couple of general remarks. First, the process by which NRAs and Agency deal with cases where two or more NRAs disagree or jurisdiction is unclear should be transparent

to and open for inputs from stakeholder, in-line with EC rules, and avoid creating needs for entities to argue legal or process issues both towards local NRAs and Agency.

20. Second, we think that the scope of the Agencies work is potentially enormous - and unworkable. Success, in terms of measurable improvements to the European market, will depend heavily on pragmatism and a focus on the essential issues.

### **3. Framework Guidelines, 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?***

21. The precise purpose and scope of the Network Codes have not been clarified yet – indeed, it is the Framework Guidelines which will eventually set the scope of the codes. The Framework Guidelines are, as a consequence critical. In general, the priorities for the codes and technical areas should be established by reference to a clearer set of overall criteria or objectives. These objectives are not very well defined at present in the legislation, although the grounds for ACER seeking modification to the Codes before the Commission [see Proposal for a Regulation establishing an Agency for the Cooperation of Energy Regulators, Article 6,§5] – namely non-discrimination, effective competition and the efficient functioning of the market – are a useful starting point.
22. Furthermore, prioritising may lead to a sequential constitution of the codes. This could be an issue of concern, both because in order to improve the efficiency and compatibility of local/regional markets, changes may be needed simultaneously in a given country or region on a number of different issues, and also because when priorities also involve a time element, such a methodology may lead to inconsistencies when actually drafting the codes. When prioritising the technical areas, the ACER will have to make sure that such drawbacks are avoided. It may be better to prioritise issues within each Code area (and build up each Code over time) rather than prioritise whole Codes (which may both delay that Code and postpone all other issues in other areas).
23. However, given that one of the main features of the Network Codes will be their ability to remove the inconsistencies between the different legal and regulatory framework existing at the national level, some areas appear as more urgent to focus on than others. Among them, transparency seems to be one of the most critical one, considering the need for enforceable minimum standards and compatibility across regions in that area, in order to ensure a level-playing field for different market stakeholders within the European energy market (e.g. by the means of prompt and standardised means of publication of fundamental information that may explain past volume and price developments, give everyone ability to make short and long term predictions, removes risks of insider trading and reduces market power, where it otherwise would remain a big issue without sufficient transparency).
24. In contrast, new modifications to the European legislation already in place regarding cross border congestion management is, possibly, a lower priority. Certainly there seems little to be gained from simply transposing the current Regulation and Guidelines in to Codes.

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

25. Grouping technical areas into codes, if made relevantly, could ensure more coherence along the Network codes modification process (avoiding that technically related codes evolve in a non-compatible way).
26. Again, the relevancy of grouping the technical areas into codes, and accordingly what the appropriate grouping may be, will greatly depend on the actual scope of each of the technical areas, the latter depending on the Framework Guidelines still to be drafted.

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

27. “Full harmonisation” of network operation and of market design, is an objective that has to be defined and assessed carefully. Relevance, subsidiarity and proportionality tests need to be applied. It is important to focus on what is vital rather than trying to harmonise unnecessary or low impact aspects. This should determine the scope of the codes aiming at harmonising the markets.
28. Full harmonisation, if understood as drafting strictly the same rules all over Europe, could obviously be suitable only on some specific issues. Codes will need to be precise (to allow unambiguous enforceability), especially if they are to be made legally-binding. For feasibility and market flexibility reasons we believe that it is impractical for most detailed issues to be established in Codes. In our experience, such detailed issues are subject to frequent modification and change.
29. Codes appear to be a cumbersome but powerful tool to ensure compliance and harmonisation. As such, they should be seen as a last resort where other mechanisms (including voluntary agreements) have failed. For example, many details linked to market design (such as trading arrangements and associated services rendered in bilateral commercial deals between market parties or via market places and power exchanges) should not be decided via codes, but rather be allowed to develop within the framework of agreements and laws applicable to products/services in any competitive market.

***D. Annex 1 of Appendix 2 we describe 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 the areas?***

30. The descriptions provided in the Appendix of the Consultation Paper are a helpful first insight of the possible scope of content of each technical area of the codes. It remains yet unclear to which extent the Framework Guidelines, which will obviously be the main reference for scoping the actual contents of the codes, will draw from those descriptions and will develop them.
31. In any case, it is absolutely crucial that those Framework Guidelines are subject to a thorough and systematic consultation process with the stakeholders. Clear definition of the scope and contents of the code area will be possible only after fully taking into account the results of these consultations.

32. More specifically, the scoping of the codes should be subject to a particular attention when touching on issues of market design, where adaptation to local specificities and also room for private initiatives need to be preserved – provided of course this does not prevent market integration – in order to preserve the efficiency and the flexibility of the markets. The scoping of areas such as “rules for trading related to technical and operational provision of network access services and system balancing” and “capacity allocation and congestion management rules” are of particular sensitivity in that respect, as they could also relate to activities driven by entities that might need some local flexibility to deliver efficient systems of trading or regional cooperation projects adapted to the need of market participants and local market regulations and features.

#### **4. The ENTSOs and European Energy Regulators**

*A. Are the mechanisms and observations outlined above – 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?*

33. We first note that in its interaction with the ENTSOs, the Agency's primary role will be to ensure the full compliance by TSOs with the public interest obligations placed upon them; the commercial considerations of the latter shall never be an obstacle for the fulfilment of these public obligations.
34. We would also like to remind that the scope of functions entrusted with individual TSOs in relation to certain transmission system operations and grid access related functions vary substantially from country to country: consequently, where certain of these applicable functions are performed by entities outside TSOs (for example power exchanges/market operators in some countries), these entities should also be included in the cooperation between the ACER and the ENTSOs (for the specific regulated operations they endorse).

#### **5. Regional considerations in moving to a single European market**

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

35. Before that question can be answered, we find that clarifications are needed in terms of whom should be entitled to request or launch EU consultations on specific issues that have emerged on regional level, and also by which means and legal authority as well as based on what definitions of “wider European implications”. Likewise more clarification is desirable regarding how the independence of ENTSOs work and Agency decisions will be ensured in light of the suggested effective co-ordination of work plans.



***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?***

36. It is important to note that congestion management projects often do not align with the geographical scope of the European Regional Initiatives (ERIs), especially when it comes to Market Coupling issues.
37. These specific issues are likely to be more efficiently addressed by ad hoc regional or interregional design project initiatives, which better reflect the reality of the network and market environment. Such initiatives and projects, often bottom-up driven, need to be clearly distinguished from the work of “expert ad hoc panel” and from the code development process, even if there might be some interaction between the two.
38. The work to be done within the ERIs should be more focused on areas where a regional focus is helpful - such as information-sharing tasks (also to be occasionally applied for those projects involving more than one region, and where the ERI can be a place for information-sharing) or monitoring and compliance.
39. Generally speaking, the compatibility work within and between the ERIs will probably have to be adjusted according to the scope and contents of the Network Codes that will eventually be drafted, and which will set the compatibility standards to be also implemented at the interregional and overall IEM level.