

How can energy market regulators ensure effective TSO unbundling and greater market transparency and how will these impact on the market?

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SCOPE OF THE THIRD ENERGY PACKAGE

The Package comprises a Regulation establishing the EU Agency for the co-operation of National Energy Regulators (ACER), a Gas and Electricity Directive replacing the existing ones (Directive 2003/55/EC and 2003/54/EC) and a Gas and Electricity Regulation replacing the existing ones (Regulations 1228/03/EC and 1775/05/EC).

The key objectives of the Package are fully effective market opening and the creation of a fully integrated single European gas and electricity market in the interests of consumers and industry in the European Union.

For this to happen, the Package needs to create a consistent regulatory framework based on the following building components:

- a more effective regulatory oversight by independent national regulatory agencies (NRA);
- the establishment of an Agency (“ACER”) ensuring effective co-operation between NRAs and tackling all relevant cross-border issues;
- the creation of a European network of TSOs (“ENTSO”) providing for compulsory co-operation between network operators to ensure harmonisation of all rules relating to the transport of energy across Europe and co-ordination of investment planning;
- the effective unbundling of the generation and supply from transmission of energy eliminating any conflict of interests and promoting network investment;
- increased transparency and better functioning of the retail market;

– increased solidarity and regional co-operation between Member States ensuring greater security of supply.

The European Council conclusions of 15-16 October 2009 call for the finalisation of the Package before the end of the legislative period (much progress was made in the Second Reading with the ITRE vote in Parliament on 31 March). If current progress in the Second Reading is maintained, the European Parliament will adopt the Second Reading Opinion at one of its last plenary sessions in May 2009, allowing for adoption of the Package by Council in the following months.

The adoption of the Package will be a key milestone in the development of European energy policy, with the focus shifting quickly from negotiations to rapid and effective implementation of the Package.

OPTIONS FOR ENSURING EFFECTIVE UNBUNDLING

If the Package is finally adopted in the form agreed in the trilogue negotiations in March 2009, the Package will provide three options for effective unbundling with the same rules applying for gas and electricity. In addition to Ownership Unbundling and Independent System Operator (ISO), a third option, the so-called Independent Transmission Operator (“ITO”), will ensure the independent and non-discriminatory operation of transmission infrastructure in the European electricity and gas market.

The ITO allows Transmission System Operators (“TSO”) to remain part of an integrated undertaking but subject to far-reaching and effective rules on the TSOs autonomy and independence, including investment decisions. Minority shareholdings will be allowed under the ownership >

¹ The author only expresses his personal opinion.

unbundling option (together with financial rights) but without voting rights. This will ensure that no undue cross-influences are being exercised between the TSO and the integrated undertaking.

In its First Reading, the Parliament had deleted the ISO option for both gas and electricity, and retained for electricity only the ownership unbundling option. For gas, it accepted an alternative unbundling option preserving vertical integration of the network, which was very similar to the ITO option endorsed by the Common Position.

This constituted the most important gap between the positions of the European Parliament and the Council, which needed to be overcome during the Second Reading. If confirmed by the Plenary Vote of the European Parliament, the outcome of the Second Reading will codify an ITO option with the following elements ensuring effective unbundling:

- The ITO option can only apply to undertakings which are already vertically integrated upon entry into force of the new Directives (grandfathering clause).
- The TSO has to have all the budget and assets, as well as all human and material resources, to run the grid autonomously and independently from the “parent company”.
- The management in charge of the day-to-day operation of the grid has to be independent from the ITO. It cannot be directly appointed by the “parent company” but has to be appointed by the ITO Supervisory Board. The management should comply with “deontology” rules prohibiting it for a number of years from coming from or returning to the “parent company” (“cooling off” period).
- A supervisory body is charged with preserving the financial interest of the parent company. It cannot be involved in the day-to-day management of the ITO and all its members need to be subject to regulatory oversight regarding termination of office. In general, strict deontology provisions and regulatory oversight need to be applied.

– A compliance officer, with far-reaching powers has to be appointed ensuring non-discrimination in practice. At the last trilogue meeting in March 2009, some strengthening of the role of the compliance officer was agreed.

– There are also important provisions regarding investment. In cases where the vertically integrated company refuses to invest in network projects, which are considered necessary by the national regulatory authority (“NRA”), the NRA can force the ITO to invest, impose tendering of the investments to third parties, or even impose a capital increase of the ITO in order to allow for third party investors to acquire shares of the ITO.

– The regulator has authority over the ITO to ensure that it meets its obligations (including the imposition of severe fines of up to 10% of the turnover of the TSO or even vertically integrated undertaking).

– A specific revision clause provides for an assessment of the ITO option regarding effective unbundling.

THE NEW REGULATORY PROVISIONS

The Package is expected to strengthen national regulators (NRA) so that they become independent from the government and have strong powers concerning both the networks and the supply markets. Member States need to guarantee the independence of NRAs making sure that they exercise their powers impartially and transparently. They need to be legally distinct and functionally independent from any other public or private entity.

The key objectives of NRAs are to promote (in close co-operation with ACER, NRAs and the Commission) a competitive, secure and environmentally sustainable internal energy market and effective market opening. Moreover, they will ensure appropriate conditions for the effective and reliable operation of networks eliminating restrictions on trade between Member States (including developing appropriate cross-border transmission capacities).



There is a comprehensive set of objectives spelt out in the Directives. Beyond the fixing or approving of regulated tariffs (or their methodologies) and ensuring compliance of transmission and distribution system operators, NRAs have a broad range of monitoring obligations. This include investment planning of the transmission system operators, compliance with and reviewing of past performance of network security and reliability rules, level of transparency (including wholesale prices) ensuring compliance with transparency obligations, level and effectiveness of market opening and competition at wholesale and retail levels including on exchanges.

ROLE OF THE ACER

The Agency for the Co-operation of Energy Regulators (ACER) is a key component of the Package since it will have rule- and decision-making powers (e.g. non-binding framework guidelines, TPA exemptions for new interconnectors if NRAs cannot agree) and will provide advice and opinions on a wide range of issues, which are crucial for the functioning of the internal market (e.g. network codes, certification of TSOs where COM may request advice, consistency between TSOs’ 10-year network development plan and the ENTSO Community-wide network plan, draft statutes, list of future members and rules of procedure of ENTSO).

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The Commission understands that the ACER will have an important role in the establishment and monitoring of the network codes by setting out clear and objective principles by means of its draft non-binding framework guidelines.

Only when the ACER is satisfied with the network codes drafted by ENTSO can these be made binding by the Commission. Moreover, ACER will be responsible for monitoring the implementation of the network codes by ENTSO and reporting to the Commission.

ROLE OF ENTSO

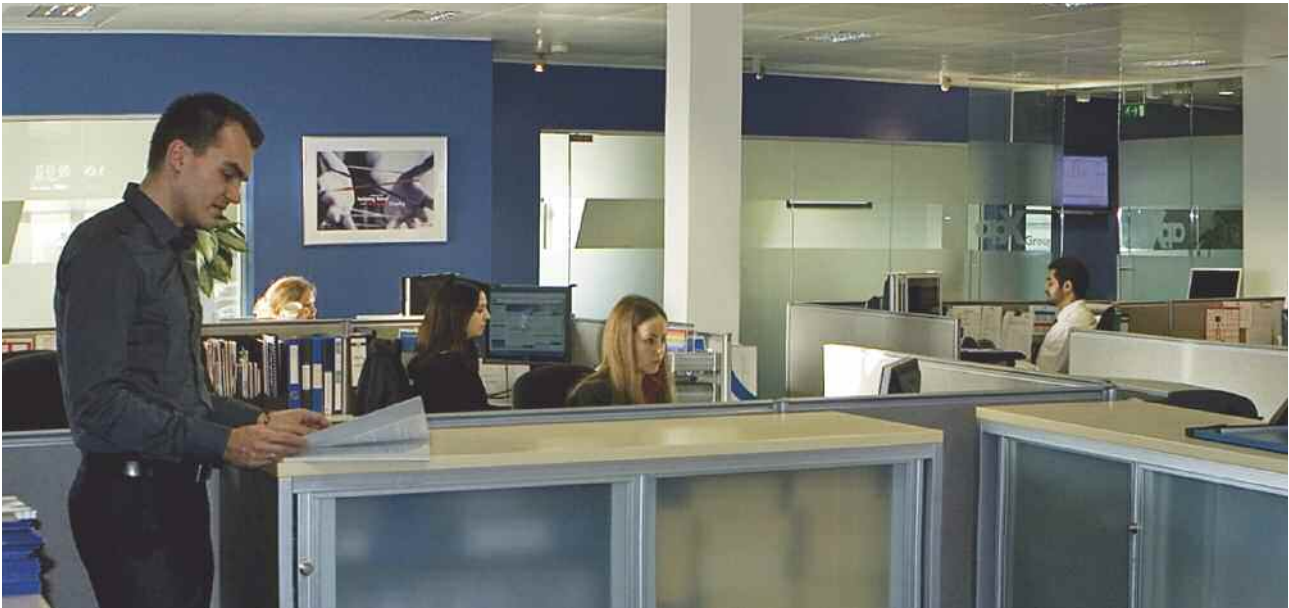
The Commission's proposal made important amendments to Regulation 1228/2003 on cross-border trade on electricity and Regulation 1775/2005 on access to gas transmission networks. The Regulations establish two new TSO bodies; ENTSO for electricity and ENTSO for gas with a clear definition of their respective tasks.

The most important tasks are the preparation of network rules and of a 10-year network investment plan. The Regulations also codify in detail the process of how the European legislation will be developed into the form of framework guidelines prepared by the Agency and network codes drafted by ENTSO. These codes can be made legally binding through comitology. Other important provisions in the Regulations are the provisions spelling out, in detail, how the various parties need to be consulted and how the Agency need to monitor various tasks of the ENTSO.

MARKET TRANSPARENCY

The Package will bring considerable improvements in network transparency and, more specifically, physical data transparency. However, it is not meant to address directly the issue of wholesale trading transparency in a comprehensive and holistic manner. It is obvious that in traded electricity and gas markets effective surveillance can only be achieved if transactions are regularly monitored. In that case market participants would have to regularly report details of their transactions.





Since traded energy markets have a vast range of dimensions (spot vs. forward, financial vs. physical, OTC vs. exchanges, standardised vs. non-standardised, brokered vs. non-brokered) there is a need to determine at some point (but not within the scope of the Package) what will need to be monitored, and by whom, requires detailed consideration.

Currently, the level and quality of fundamental market data made available to market participants differ considerably throughout EU energy markets. The annexes of the electricity and gas Regulations (Congestion Management Guidelines) are legally binding, though considered not sufficiently detailed.

In order to improve the situation there appears to be a good case for amending this framework by detailing the data needed and who should provide it. As for electricity, this could mean including output data of individual generation units made available timely and equally to all market participants. Such measures would force market participants to share data that they deem as proprietary. At the same time, the special characteristics of electricity markets (non-storability, zero short term elasticity of demand) needs to be considered, as does the need of the trading community to be able to make informed trading decisions.

NEXT STEPS

The European Parliament needs to adopt its formal Second Reading Opinion before the Council can formally adopt the Package. The Commission will update the APX Symposium on 22 April 2009, in Brussels, on the state of play regarding the legislative process. The Commission is committed to an effective implementation of the Package in 2009.

Such effective implementation of the Package can be expected to boost further the development of wholesale energy markets in Europe. Regarding the upcoming initiatives on transparency and integrity of energy wholesale markets, the Commission is committed to work closely with stakeholders in the coming months to take forward the ongoing work of CESR/ERGEG.