



Publishing date: 13/09/2013

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ACER Public Consultation on a Draft Guidance Note on Consultation

Evaluation of Responses

**Ref: PC_2012_E_12
11 September 2013**

I. General remarks

1. To clarify the process of running its public consultations, the Agency drafted a note on how it intends to conduct public consultations ('Draft Guidance Note'). Since this has an impact on stakeholders and how they can provide their views to the Agency, a public consultation was launched on the Draft Guidance Note from 3 August 2012 until 30 September 2012. The objective of the public consultation was to seek broad feedback from stakeholders on the Agency's planned public consultation policy. Therefore, the call for feedback was not limited to specific questions, but invited generally to present views on the Draft Guidance Note.
2. The Agency received a total of seven responses, of which four were from industry associations and three from companies. None of the responses was marked as confidential. The responses are published on the Agency's website¹.
3. In general there was acceptance of the Agency's draft consultation policy described in the Draft Guidance Note, though for particular aspects several suggestions were made. The main focus of the comments was on the consultation period of no less than four weeks (unless specific circumstances require a shorter deadline) in cases not related to Framework Guidelines², on the Agency's website³, on the scope and format of responses (i.e. questionnaires and online submission)⁴, on workshops, public hearings and conferences⁵, on the work of expert groups⁶, and on the conduct of second round consultations⁷.
4. In the following, the Agency provides its summary of and conclusions on the issues raised in the responses. For ease of reference those issues are grouped along the main sections of the Draft Guidance note. Amendments introduced into the final guidance note are highlighted by reference to the revised wording.

II. Summary and conclusions

1. Introduction

¹ http://www.acer.europa.eu/Official_documents/Public_consultations/Pages/Public-Consultation-on-ACER-Guidance-Note-on-Consultation.aspx

² See below II.4.3.

³ See below II.5.2.

⁴ See below II.5.3.

⁵ See below II.5.5.

⁶ See below II.5.7.

⁷ See below II.6.3.

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- 1.1 One stakeholder expressed its preference for an explicit commitment by the Agency to review its guidance note on consultation on a regular basis, with appropriate attention to be paid to best practices, and not just when appropriate.

When the Agency, in point 1.5 of the Draft Guidance Note, related its review of the guidance note to appropriate instances, it had no intention to thereby exclude regular reviews or the consideration of best practice developments. To clarify this, the Agency amended the wording of the guidance note accordingly.⁸

- 1.2 One stakeholder advocated for consistency of the Agency's approach with the CEER guidelines for public consultation and suggested to follow the CEER guidelines as much closely as possible.

The Agency acknowledges that such consistency has indeed advantages. In fact, the Agency did take into account the consultation experience of CEER as well as of other institutions when developing its Draft Guidance Note. In any case it is the Agency's objective to strive for best practice consultation.

- 1.3 Similarly, it was suggested that the Agency should learn from ENTSOG's experience in consulting market parties during the network code development process and to follow ENTSOG's example of open and fair consultation.

The Agency is always happy to learn from the experience of other institutions, including ENTSOG, to improve its own public consultation process. The principle of an open and fair consultation is essential to the Agency and is already reflected in point 2.1 the Draft Guidance Note⁹.

2. Objectives

- 2.1 One stakeholder stressed that the process should be more than just consultation, that it should be fully inclusive, involving stakeholders early, and that it should be regarded as multilateral for both development and consultation.

The Agency acknowledges the benefits which early stakeholder involvement can bring both for the Agency and for stakeholders. On the other hand it is also vital to maintain efficiency during the development phase as well as during the actual consultation. The intensity of stakeholder involvement may therefore vary. A flexible approach is needed

⁸ “The Agency will review this note and its consultation practices on a regular basis to ensure that its consultations are effective and give due consideration to best practices. The Agency encourages stakeholders to provide input if they consider this could be useful to enhance the Agency’s consultation practices.”

⁹ “The Agency’s consultations aim at involving all affected and interested parties in an open, transparent, coherent, timely and efficient manner [...].”

and, in the Agency's view, has been reflected particularly in points 4.2 and 5.4 of the Draft Guidance Note¹⁰.

- 2.2 One stakeholder wondered why the scope of public consultation is limited to formal positions and acts of the Agency though other documents would also be worth being consulted on (e.g. REMIT deliverables, annual work programme, other public reports, annual activity report, etc.).

By referring to formal positions and acts the Agency aimed at clarifying which activities it considers relevant and suitable for public consultation because they are intended to finally become external and represent the Agency's official views, as opposed to preliminary, internal or retrospectives activities. Therefore, "other documents" can also be relevant for a public consultation. In fact the Agency has already consulted on REMIT deliverables¹¹ or the annual work programme¹². In order not to give the false impression of unduly limiting the scope of public consultations, the reference to "formal" (positions and acts) was deleted.

3. Target group

One stakeholder proposed that there would be a role for national regulatory authorities to use their close contacts with market players for encouraging further engagement of stakeholders because to some market players the impact of a network code on their business might not always be obvious.

The Agency aims at consulting all relevant stakeholders, including those who are probably not aware that they are affected by a position or act of the Agency. Through their work within the Agency, national regulatory authorities are well aware of the documents released for consultation and therefore are in the best position to assess which constituencies, within each Member State, should be involved in the consultation. Where national regulatory authorities can offer assistance in identifying and reaching relevant stakeholders, this is of course welcome by the Agency. Regarding the specific consulting on network codes and targeting the stakeholders concerned, it is to note that this is primarily the responsibility of the ENTSOs and not of the Agency.

4. Timing

¹⁰ "The Agency will consult at a sufficiently early stage during the preparation of its positions/acts, in order to take, as far as possible, all responses into account." „The Agency may also informally discuss its views with relevant stakeholders, including bilaterally, ahead of or during the public consultation period.”

¹¹ E.g. on the REMIT registration format and on recommendations to the European Commission regarding the records of wholesale energy market transactions according to REMIT, see:
http://www.acer.europa.eu/Official_documents/Public_consultations/PC_%202012_R_08_on_REMIT_Registrat ion_Format/default.aspx;

http://www.acer.europa.eu/Official_documents/Public_consultations/Pages/PC_2012_R_10.aspx.

¹² Public workshop on the 2014 Work programme Outline on 6 June 2013, as announced by email alerts and on the Agency's website calendar.

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- 4.1 Stakeholders noted that the indication of planned consultations in the annual work programme could be more useful if the publication dates of more contentious papers were not expressed by season or two-month window, but by month or even date, and that a regular update on the website would help stakeholders to better structure their work and contribute more often and precisely. In the same context, though not explicitly stated so, it was also pointed out that email alerts to interested parties on the issuance of new consultations would be essential because in tight consultation timing even one more day of awareness could help planning.

The Agency understands that it is important for stakeholders to learn as early and as precisely as possible about forthcoming consultations to prepare themselves adequately. Considering that the annual work programme is in general drafted well ahead of the publications listed therein, it is usually not possible to indicate an exact date or month for a planned public consultation. The Agency is however confident that a rolling six-month calendar on its website updating the status of planned consultations as well as its newsletter and email alerts can provide the necessary information timely. Therefore, in addition to the rolling six-month calendar already referred to in point 4.1 of the Draft Guidance Note, the Agency included as information tools also its newsletter and email alerts in point 5.2 of the guidance note.¹³

- 4.2 One stakeholder argued that consulting at an early stage would not be sufficient, but the Agency should take the stakeholders' position also into account, which would have not always been the case in the past (c.f. CAM: mandatory bundle products, sunset clause).

The Agency will carefully consider the positions received from stakeholders, as already indicated in point 6.1 of the Draft Guidance Note¹⁴. This, however, is not to mean that the Agency will automatically follow all positions. This is obvious where the stakeholder's position differ from each other, but is also true for any case in which the Agency has good reasons for taking a different position.

- 4.3 While one stakeholder asked to stick to the consultation periods stated in point 4.3 of the Draft Guidance Note, the majority of respondents seemed to agree with a minimum period of two months for Framework Guidelines, but to have concerns over the consultation period of no less than four weeks, unless specific circumstances require to set a shorter consultation period, for cases not concerning Framework Guidelines. In conclusion they were concerned that such period would not allow adequate analysis, particularly in complex subject matters, and internal coordination, particularly within associations. Their propositions were punctuated differently though, including:

¹³ “When public consultations are launched or other events aimed at involving stakeholders are organised, the Agency will inform all parties registered on its website through its newsletter or email alerts.“

¹⁴ “The Agency shall carefully consider all responses received (whether confidential or not), but anonymous responses will generally not be taken into consideration.“

- the mere observation that the four-week period may appear quite short to deal with complex regulatory issues;
- the proposal of allowing a shorter period than four weeks only in exceptional circumstances and reviewing the timing to see how it works out in practice;
- the suggestion of maintaining the practice of a minimum of two months in all of the upcoming processes; and
- the recommendation that the consultation period should be at least eight weeks, if not possible, no less than six weeks, but in any case refer only to working weeks or, if the holidays season is included, be extended accordingly.

The Agency notes those concerns and appreciates stakeholders' efforts to provide feedback within tight deadlines. It is also in the Agency's interest to receive well prepared and substantiated responses. However, the Agency has only a limited scope of maneuver when determining consultation periods because in general its deliverables are subject to short deadlines which cannot be extended. To accommodate nevertheless the stakeholders' concerns within this time setting, the Agency decided to provide for non-Framework Guidelines consultations a general target of six weeks, while keeping a non-binding minimum of four weeks.¹⁵

- 4.4 Stakeholders emphasized the importance of engaging stakeholders earlier and in a more active way in the process of drafting the network codes and suggested that the consultation periods for ENTSOs' draft network codes be reconsidered because their analysis would require specialised knowledge and finding positions on all relevant aspects within two months would be very challenging. The publication by the ENTSOs of pre-draft versions was appreciated.

The Agency is not in a position to consider those comments for its own consultation policy because it is the responsibility of the ENTSOs to consult on their draft network codes.

5. Means and Process

- 5.1 One stakeholder mentioned that the Agency's documents would sometimes contain terms having different meanings in different Member States (e.g. balancing). It proposed the Agency should develop an EU wide glossary of key terms for all documents of ENTSO-E, ENTSOG and the Agency to eliminate possible confusion caused by differences between national and European uses of such terms.

The Agency notes the importance of using consistent terminology and is willing to help increasing the level of consistency. An EU wide glossary of key terms might have

¹⁵ "... in general six weeks, but no less than four weeks in any other case, unless specific circumstances require setting a shorter consultation period."

benefits in this respect, but must also be considered carefully with regard to definitions in different layers of EU legislation as well as forthcoming EU legislation.

- 5.2 Several stakeholders mentioned that the Agency's website would be quite complex and time consuming to use and would not provide easy access to the latest documents as well as to relevant public consultation documents. They recommend revising the website, in particular the navigational tools and the section on public consultations.

The Agency regrets any inconveniences the design of its website may have caused. It fully agrees that information on a website should be clear and easy to be found and accessed. The Agency already tried to improve its website and will continue its efforts for improvements.

- 5.3 Almost all stakeholders provided comments on the scope and format of responses and pointed to possible negative effects of using a fixed questionnaire format. Questions with pre-formatted answers or with limited space for responses might not satisfy the complexity of a regulatory issue and not allow stakeholders to present their views adequately, e.g. to introduce their approach to a regulatory issue or to develop a reasoning and explain it. It was recommended that response formats, in particular online questionnaires, should be flexible enough to allow stakeholders to express their views freely, including sufficient capacity for each answer and the possibility to provide general comments as well as comments in aggregated form, and to submit additional material as background to the main answer. It was further proposed that the Agency should consult on the technical characteristics and format of its future online questionnaires. Also in this context it was proposed that a respondent should receive an email confirmation when his response was submitted.

The Agency understands the importance of having user-friendly consultations. It will take due account of those considerations when defining the format of consultations. Yet, it does not seem appropriate to establish a detailed set of general rules for the format of responses, in particular not in the guidance note. Before issuing such general rules, more experience should be gained in order not to risk abandoning the necessary flexibility. The Agency will make sure that respondents receive a confirmation of their submissions to the Agency.

- 5.4 One stakeholder proposed that the Agency should always be open to receive and take into account position papers which are not sent through the official consultation channel because it might include additional information not covered by the consultation questions or the consultation format (graphs etc).

While in principle a flexible approach can help increasing the benefits of public consultation, the Agency considers a structured consultation process and adherence to this process essential for an efficient and effective outcome of public consultation. In the Agency's view it would therefore not be advisable to accept in general any submission outside the structure of a particular consultation process, without taking into account the peculiarities of the individual case.

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- 5.5 Stakeholders called for easier access to workshops, hearings and conferences, e.g. through live streaming via internet or by holding events in other European cities than Ljubljana (e.g. Brussels).

The Agency will endeavour to improve accessibility of workshops, hearings and conferences.

- 5.6 One stakeholder highlighted that the Agency should be able to informally discuss its views with relevant stakeholders not only ahead or during consultation, but also after public consultation finished and the Agency is analysing the answers.

The Agency believes that the wording of point 5.4 of the Draft Guidance Note allows also informal follow-up discussions because it does not define exhaustively the possible instances of informal discussions. An amendment to the Draft Guidance Note is therefore not necessary. However, it is important to note that informal discussions are not intended to be a standard tool that may apply in any case. It is in the Agency's discretion to decide whether informal discussions are appropriate. The Agency will pay particular attention that stakeholders do not use informal discussions to delay the finalisation of a public consultation or to unduly influence the Agency's position.

- 5.7 Stakeholders noted that expert groups should not replace the orderly, transparent and fair consultation of stakeholders and that membership in them should not result in exclusive knowledge on processes and outcomes. It was suggested to increase their transparency, especially by providing their agendas and minutes in due time and by opening up of some meetings to all interested stakeholders to avoid possible exclusion of key interests, as well as to improve the representativeness in the selection process by using simple quota (balance of experts from NRAs/TSOs/generators/distributors/suppliers).

Expert groups are one tool of how to involve stakeholders in a targeted way, which can be very effective. The Agency has no intention to replace stakeholder consultation by expert groups. The Agency will therefore pay attention to the appropriate transparency and representativeness of expert groups.

- 5.8 One stakeholder proposed for Framework Guidelines ad-hoc expert groups the introduction of 'concept releases' reflecting the work done in those expert groups and sharing those releases with the wider stakeholder circle to address the information gap.

It is to note that the ad hoc expert groups for Framework Guidelines are a platform for exchanging ideas and have not been specifically tasked with presenting concepts that could be released. Further it is to note that in any case the minutes of those groups are published and thereby provide transparent account of the groups' work.

- 5.9 Further it was submitted that the documents to be discussed at the Madrid Forum for consultation purposes should be circulated timely in advance.

The Agency agrees with this position which more generally has already been reflected in point 2.1 of the Draft Guidance Note.¹⁶ It appears neither necessary nor appropriate to highlight especially for the Madrid Forum the importance of timely and efficient consultation.

6. Feedback

- 6.1 One stakeholder questioned whether the Agency should not have a maximum period for analysing the responses and publishing the responses to help third parties to follow the process more easily.

The Agency supports the view that third parties should be able to follow the consultation process easily. However, it also believes that setting a maximum period for analysing the responses and publishing them would not be an appropriate means towards this end. The time required for publishing and in particular for analysing the responses will vary from case to case, depending on the scope and complexity of both the subject matter and the responses received. Thus, a maximum period runs the risk of being too short and of being extended anyway, or of being too long and of being outdated by an earlier feedback on the responses. In either case, the maximum period would not increase the foreseeability of the Agency's reaction. The Agency considers it more appropriate to adjust its time of reaction to the specific consultation case and indicate it individually, as proposed in point 5.1 of the Draft Guidance Note¹⁷.

- 6.2 Two stakeholders claimed that in the past answers were evaluated by “counting” them and urged for caution in such practice because its result could be misleading and not representative. It would be important to explain and justify why the amendments or comments received have not been considered.

The Agency notes this concern. Yet, the amount of supporters of a particular position may indeed indicate that on balance this position is worth being supported. In the Agency's opinion, addressing this issue in the guidance note would not add clarity to the Agency's commitment, as already stated in points 6.1 and 6.3 of the Draft Guidance note, of carefully considering the responses and of explaining why it has or has not taken the comments on board.

- 6.3 One stakeholder indicated that a public workshop after the publication of the final document/act could be very useful and necessary to explain the reasons of the Agency's decision and to exchange views with stakeholders to guide future work on the relevant topic.

¹⁶ “The Agency's consultations aim at involving all affected and interested parties in an open, transparent, coherent, timely and efficient manner [...]”

¹⁷ “The Agency will also indicate – in the consultation documents and/or on its website – [...] the steps of the consultation process (e.g. when the non-confidential responses, the Agency's evaluation of responses or its final formal position/act are likely to be published).“

The Agency believes that the most efficient tools for explaining its reasons are the evaluation of responses, as described in point 6.3 of the Draft Guidance Note, as well as the reasoning outlined in the final document. The Agency expects that those tools will usually provide the information relevant for understanding the Agency's position. There may be instances where an additional public workshop could indeed be useful for a better comprehension of the Agency's conclusions. To clarify this possibility, the Agency included a respective reference in point 6.4 of the guidance note.¹⁸

- 6.4 Stakeholders encouraged consulting a second time regularly, or at least more often, if the responses to the initial consultation reveal significant problems, or if the revised documents are substantially different from the proposal on which the initial consultation was based.

While under those circumstances a second consultation could appear to be useful, the time factor must also be considered. In many cases the Agency has to comply with short deadlines which cannot be extended. Therefore it is essential that a second consultation is only held if time permits, as already explained in point 6.4 of the Draft Guidance Note.¹⁹

- 6.5 One stakeholder proposed that the Agency should clarify whether the second consultation would follow the same rules and timing as for the initial consultation.

In principle, a second consultation would follow the same rules and timing as for the initial consultation. In accordance with point 1.4 of the guidance note the Agency may however deviate from the standard process, e.g. set a different timing, if following the standard procedure is not possible.

- 6.6 Two stakeholders argued that the Agency should conduct an additional consultation if the network codes drafted by the ENTSOs proved to be controversial (e.g. RfG or CACM) or deviated substantially from the version under consultation; for that purpose an extension of the Agency's three-month period for issuing an opinion on the network code should be considered. Further it was proposed that the Agency should be involved earlier to facilitate the elaboration of network codes and to ensure that convergence of views can be found.

¹⁸ “When time limitations do not permit to run a second public consultation, a workshop or similar event can be organised instead.”

¹⁹ “If necessary and if time permits, the Agency will consult a second time if the responses to the initial consultation reveal significant problems, or if the revised documents are substantially different from the proposal on which the initial consultation was based. The Agency may limit the scope of the second consultation to the significant problems revealed and to the substantial amendments on its initial proposal.”

As already mentioned²⁰, it is the responsibility of the ENTSOs to consult on their draft network codes. If appropriate the Agency, in the course of preparing its opinion on ENTSOs' network codes, will however collect stakeholder views on such network codes through, in particular, the holding of public workshops, as it did in the past. In the Agency's opinion it is not necessary to mention this in the guidance note explicitly. Regarding earlier involvement of the Agency, it is worth pointing out that the Agency did attend ENTSO-meetings concerning the network code development and will continue to do.

7. Confidentiality

- 7.1 One stakeholder commented that in most cases the financial impact of regulatory change would be likely to be market sensitive, sometimes with very material potential impacts.

The Agency is of the opinion that even potential financial impact of regulatory changes on the business of stakeholders does not imply a confidentiality interest in every aspect of a stakeholder's response to a public consultation. It may well be that a response contains only partly information that justifies to be treated as confidential. Therefore, it is in the Agency's view necessary to maintain the approach proposed in section 7 of the Draft Guidance Note and to assess confidentiality on a case-by-case basis. Point 2.1 of the guidance note was clarified.²¹

- 7.2 One stakeholder was concerned that the break-up of anonymity or confidentiality might be counterproductive, bearing the risk that stakeholders would not provide input to the Agency when they suspect their confidentiality request could be rejected. As solution, stakeholders could be permitted to withdraw their input from the consultation if the Agency rejects their anonymity or confidentiality request.

The Agency acknowledges that such risk might occur and agrees that the proposed possibility of withdrawing an input could be an appropriate solution. It therefore clarified this possibility in point 7.2 of the guidance note with regard to confidentiality²². In the interest of a stable and efficient process as well as of legal certainty a deadline of three days was set for exercising this withdrawal option. Concerning anonymity, however, the Agency still deems it crucial to know the identity of the respondent. It therefore will generally not consider anonymous responses and will

²⁰ See above II.4.4.

²¹ "The Agency's consultations aim at involving all affected and interested parties in an open, transparent, coherent, timely and efficient manner, while ensuring confidentiality of responses, whenever justified, and allowing a flexible approach."

²² "If the Agency does not recognize the confidentiality interest requested by the respondent, the respondent may withdraw his input or parts thereof within three days upon notification of non-recognition. In case of such withdrawal the Agency shall not consider the withdrawn input."

not take into consideration those responses for which it did not recognize a request for not disclosing the respondent's identity²³.

²³ See above II.7.1.



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