ORIGINAL THINKING

SUMMARY

LEGAL DUE DILIGENCE REPORT

South African Wholesale Electricity Market (SAWEM) Market Code

11 September 2025

DUE DILIGENCE METHODOLOGY

- NTCSA issued the March 2025 version of the Market Code to interested parties for purposes of soliciting comments.

- In the process of considering the comments received, NTCSA identified that some of them raised legal issues / questions. ENS was requested to consider those comments, in the context of a revised draft Market Code dated April 2025, and to address them in a due diligence report.

- The due diligence report was therefore not intended as a comprehensive legal review of every aspect of the draft Market Code. It was focussed on the issues / questions raised by stakeholders. ENS also did not perform a legal edit on the draft Market Code, to check for consistent use of terminology etc.

- The legal due diligence analysis has not been repeated since the June 2025 version was issued for further consultation. The key findings covered in this presentation relate to the April 2025 version. You will see from the June 2025 version that the findings have largely been addressed by NTCSA.

OVERVIEW

1. Status of the Market Code
2. NERSA roles and responsibilities
3. System Operator functions
4. Central Purchasing Agency functions
5. Market participation
6. Municipal legislation
7. Dispute resolution
8. Overall governance structures
9. Information and records
10. Intellectual property
11. Environmental/technical

STATUS OF THE MARKET CODE

- TSO, to be established in terms of section 34A of the Electricity Regulation Act, 2006 (**ERA**), will be a market operator. Prior to the establishment of TSO, NTCSA is deemed to be the interim TSO, and must perform its duties, powers

- As Market Operator, NTCSA must “provide for” a transparent, non-discriminatory trading platform for power market participants to trade. The Market Operator is the responsible licensee and administrative authority in respect of the electricity market

- The ERA requires the Market Operator to develop the Market Code and Market Rules, subject to NERSA approval. The Market Code is not a NERSA code of conduct and practice as provided for in section 35 of the ERA

- Amendments to the Market Code and Market Rules would similarly be made by the Market Operator, subject to approval by NERSA

- The Market Operator should ensure consistency between the Market Code and the Grid Codes and amend the Market Code if conflicts arise

NERSA ROLES AND RESPONSIBILITIES

- NERSA may only perform functions and exercise powers that are founded in and accord with empowering legislation

- In relation to the market / Market Code specifically, NERSA has statutory authority to:
  - approve the trading platform established by the Market Operator
  - approve the Market Code and Market Rules
  - approve the transition period for PPAs between Eskom generators and the CPA
  - approve vesting contracts between Eskom generators and distribution licensees, and the CPA

- NERSA also has general powers and duties in terms of s. 4 of the ERA, in relation to licensing, regulation of tariffs, making of rules, establishment and management of monitoring and information systems, enforcement of the ERA and licence conditions. NERSA may also mediate and arbitrate disputes, undertake investigations and inquiries re licensee activities, and perform incidental functions

- Section 35 of ERA regulates the making of guidelines, codes of conduct and practice, and rules, by NERSA

NERSA ROLES AND RESPONSIBILITIES continued

- NERSA may elect to appoint advisory forums (s. 5 of ERA). However, the Market Operator cannot (through the Market Code) require it to do so, nor specify the role of any such forum

- NERSA does not have authority to exercise final decision-making / veto powers relating to enforcement of the Market Code
    - In the June 2025 version, the MGC exercises enforcement and sanction powers. The MGC is constituted and funded by the Market Operator
    - If Market Code compliance becomes a **licence condition**, NERSA may use its statutory enforcement powers for non-compliance with the Market Code, against errant licensees

- Powers allocated to NERSA in the March 2025 version of the Market Code, in relation to approval of vesting contracts, approval of certain import and export agreements, and the conduct of market assessments, were reviewed in the due diligence process. Recommended changes have been implemented

SYSTEM OPERATOR FUNCTIONS

- The Market Code provisions on the role and functions of the system operator (SO), are broadly consistent with the existing System Operation Code, the Distribution SO Code, and Dispatch Rules

- New concepts introduced in the Market Code, such as Network Zones, Balancing Groups and Trading Units, fit within the SO’s authority to operate the integrated power system safely, perform dispatch scheduling, manage constraints and ensure system security, under the ERA and the SO Code

CENTRAL PURCHASING AGENCY FUNCTIONS

- Market Operator and Central Purchasing Agency (CPA) are both functions within NTCSA, along with SO and transmitter. CPA has functions relating to procurement of electricity, imports and exports, and regulated transactions

- Regulated transactions (that require regulatory approval or oversight, specifically where the exercise of market power is likely or evident) in the Market Code:
  - Roles of the CPA and Market Operator have not been conflated in the Market Code, and are consistent with ERA.
  - The terms and conditions of a vesting contract, including the duration, must be agreed between the parties and approved by NERSA, as reflected in the Market Code.
  - The ERA does not stipulate a deadlock-breaking mechanism

- The CPA's lifespan should be considered as indefinite. In relation to regulated transactions, the CPA role is linked to the duration of vesting contracts, legacy IPP contracts, and transition arrangements

- The Market Code correctly allocates to the CPA the function of concluding bilateral import / export agreements for the purposes stated in section 34B(5)(b) of ERA. Market Code can also provide for electricity imports and exports to be traded

MARKET PARTICIPATION

- The trading platform must provide for market transactions, physical bilateral transactions, and regulated transactions
- In relation to regulated transactions, the CPA must trade all energy purchased under the legacy IPP contracts, and conclude vesting contracts with Eskom generators and distribution licensees, to "*manage the transition to a competitive market".* The ERA evidences a clear objective to progressively implement a market model
- Distributors' consent is not legally required for other power market participants to participate in the market, but participation in the market must be consistent with applicable electricity supply agreements, use-of-system agreements and licence conditions
- The ERA imposes a duty on balance responsible parties (BRPs) to carry on balance responsible activities (including submitting forecasts and participating in the energy market), and makes them accountable for deviations through the balancing mechanism used by the SO. Therefore, the Market Code and Rules are enforceable against BRPs, insofar as those instruments regulate balance responsible activities in accordance with the SO's balancing mechanism

MUNICIPAL LEGISLATION

- Section 42 of the MFMA
  - Regulates price increases of bulk resources for the provision of municipal services
  - Section 42 of the MFMA applies to electricity supplies by a national organ of state to a municipality (e.g. CPA or Eskom (Generation))
  - Will be relevant to municipalities purchasing electricity in the market, if the trade entails a purchase of electricity from a national organ of state
  - Exemptions may be warranted during the term of the Vesting Contract, and/or after the Transition Period

- Municipal procurement obligations
  - Municipalities are generally exempt from public procurement processes when buying goods or services from other organs of state under the MFMA
  - However, when buying from non-state entities in the market, procurement rules would normally require a competitive bidding process
  - To enable effective market participation by municipalities in the electricity market, an exemption from the MFMA procurement obligations may be required

DISPUTE RESOLUTION

- The dispute resolution mechanism proposed in the March 2025 version of the Market Code was amended to ensure greater efficiency, certainty and independence:
  - Dispute Resolution Board (DRB) is now the sole dispute resolutions body;
  - the proposed MSP and MSU no longer adjudicate disputes
  - The DRB will consist of independent persons
  - DRB will be a standing body with a minimum term
  - Procedural improvements: adjusting certain timeframes and introducing a default process for written submissions and hearings
  - DRB may award costs and require deposits from parties
  - Appeals now proceed to AFSA arbitration, rather than another internal settlement stage

- Because the Market Code forms the contractual basis for participation, organs of state must use its dispute process and need not follow the procedure set out in the Intergovernmental Relations Framework Act.

OVERALL GOVERNANCE STRUCTURES

- Governance structures proposed in the April 2025 version of the Market Code were redesigned for legal compliance, clarity of roles, effectiveness:
  - Market Governance Committee (MGC) within the Market Operator will oversee governance structures
  - Modifications Subcommittee under the MGC will evaluate and decide on Market Code amendment proposals, subject to NERSA approval
  - Market Code Advisory Committee (MCAC) has been removed, with its advisory role absorbed by the Modifications Subcommittee
  - MGC or Market Operator will handle enforcement actions such as default notices, suspensions and sanctions
  - The MSU's role is limited to monitoring, investigating and reporting non-compliance

INFORMATION AND RECORDS

- Modification Proposals are public by default, but the Market Operator may agree to keep certain information confidential if appropriate. PAIA governs access and allows for confidentiality in specific cases.

- A five-year retention period for dispatch records is reasonable.

- The Market Operator may publish metering data voluntarily but must assess PAIA requests on a case-by-case basis.

INTELLECTUAL PROPERTY

- Requiring proposers to license any intellectual property rights contained in Modification Proposals is legally acceptable.
- Such licences should be irrevocable, non-exclusive, royalty-free, and allow full use, modification and sub-licensing by the Market Operator.
- A standard waiver of moral rights and a warranty of authority to grant the licence are both appropriate.

ENVIRONMENTAL / TECHNICAL

- NTCSA may set dispatch criteria based on production and price
- No legal duty exists to prioritise renewable energy, although broader climate obligations must still be considered

THANK YOU