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THE ADOPTION OF NETWORK CODES IN THE FIELD OF
ENERGY:
AVAILABILITY OF JUDICIAL REVIEW
IN A MULTI-STAGE PROCEDURE

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Availability of Judicial Review in a Multi-Stage Procedure*

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Abstract

The adoption of network codes is a crucial step towards the conclusion of the internal energy market by the year 2014. This paper aims to assess the availability of judicial review in the multi-stage procedure established by the Electricity and Gas Regulations. In this respect, it first provides a brief overview of the establishment of the European Networks of TSOs (ENTSOs), whose expertise serves as the basis for the elaboration of the network codes. Subsequently, it critically assesses the three-stage adoption procedure set in the Regulations. The analysis then shifts to a more normative dimension through the examination of the legal characterization of the basic acts involved in the adoption procedure, namely, the framework guidelines and network codes, and of the availability of judicial review.

Keywords

ACER, Comitology, Delegated Acts, ENTSO-E/G, Framework Guidelines, Judicial Review, Legal Characterization, Network Codes, Preparatory Act.

I. Introduction*

Despite being amongst the least mediatised elements of the third energy package, the adoption of common network codes figures as its most promising one¹ against the background of inadequate market integration identified by the 2007 Sector Inquiry². The adoption of network codes is, indeed, a key component on the road towards the envisaged conclusion of the internal energy market by the year 2014³ and a core priority for the institutions involved in the meantime. The magnitude of the task, its importance for the European energy market, as well as, the interesting legal questions it gives rise to render it a challenging topic suitable for in-depth examination.

The present paper aims to assess one of the legal questions arising from the currently ongoing process of the adoption of network codes, namely, the availability of judicial review. In this respect, it will, firstly, provide an overview of the fora of institutionalized cooperation among the Transmission System Operators (TSOs), namely, the European Networks of Transmission System Operators (ENTSOs), whose expertise serves as the basis for the drafting of the codes and, secondly, critically present the three-stage adoption procedure set by Regulations (EC) 714/2009 and 715/2009 (Electricity and Gas Regulations). The analysis then shifts to the more normative dimension of the legal characterization of the acts adopted during the three-stage procedure and the availability of judicial review.

II. The Legislative framework for the adoption of network codes

A. European Networks of TSOs for the Elaboration of Network Codes

The Gas and Electricity Regulations provide for the adoption of network codes through a procedure based on the institutional interplay among the European Commission, the Agency for the Cooperation of Energy Regulators (ACER) and the ENTSOs. The latter are entrusted with a central role in the drafting of the network codes given their considerable technical expertise and have traditionally been at the heart of the establishment of common technical rules. For this reason, prior to focusing on the procedure itself, we will examine the framework for their cooperation as established under the third energy package.

The cooperation of Transmission System Operators is not a novel phenomenon⁴; on the contrary, voluntary cooperation associations⁵ already dated many years of life before the adoption of the third package, while the Florence and Madrid Fora have also represented crucial platforms of informal

* The article is based on an intervention made at the 9th International Conference on the European Energy Market (EEM12) in Florence (May 2012). The author would like to sincerely thank Dr. K. Sardis and Mr. D. Lelovitis from the Greek Regulatory Authority for Energy (RAE) and the anonymous reviewers of the EEM12 conference for their valuable comments on earlier drafts of the paper. Any errors or omissions are of the author's sole responsibility.

¹ See An. Piebalgs, "Europe's New Energy Policy", in *Europe's New Energy Policy*, An. Piebalgs, Ed. Leuven: Claeys&Casteels, 2009, pp. 20.

² See European Commission, Communication from the Commission, Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Reports), 10.01.2007, COM(2006) 851 final.

³ See European Council, Conclusions of the 4th of February 2011, EUCO 2/1/11. [Online]. Available: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/119175.pdf.

⁴ See C. Musialski, "The ENTSOs Under the Third Energy Package", in *EU Energy Law and Policy Issues*, B. Delvaux, M. Hunt, K. Talus, Ed. Cambridge-Antwerp-Portland: Intersentia, 2012, pp. 33.

⁵ Such as the Union for Coordination of Transmission of Electricity (UCPTE) and the European Transmission System Operators (ETSO) in the field of electricity and Gas Transmission Europe (GTE) in the field of gas.

discussion and cooperation among TSOs and other stakeholders⁶. More recently, the Regional Initiatives equally played an important role in ensuring full compliance with the European legislative framework and removing technical and legal barriers from the markets⁷. However, faced with the deficiencies identified in the 2007 Sector Inquiry, the adoption of the third energy package marked a turning point for the cooperation of TSOs in several respects.

First of all, it introduced, for the first time, a specific legal basis for the cooperation of TSOs with each other in the article 4 of the Electricity and Gas Regulations and provided for the establishment of ENTSO-E and ENTSO-G in the article 5 of the Electricity and the Gas Regulations. As a result, the ENTSO-E has been established in December 2008 and is operational since the 1st July 2009, having replaced all former TSO associations in Europe⁸ and aiming to “complete the internal market for electricity and to ensure optimal management, coordinated operation and sound technical evolution of the electricity network⁹”. Respectively, the ENTSO-G has been established in December 2009 with the same aim in the field of gas¹⁰. The Regulations remain “minimalistic” with regard to the specific organization of the ENTOS¹¹, which allowed their setting up under the, flexible and common for TSOs, form of an international non-profit Association (AISBL) governed by Belgian law¹². A comparative examination of the ENTOSs reveals differences both in terms of the available status of participation for TSOs and their institutional structure.

In particular, the ENTSO-E has been established by its Founding Members with the possibility to admit new members under specific requirements by a decision of its Assembly¹³. The participation of TSOs of third countries as members¹⁴ reflects the recognition of their importance for the good functioning of the EU electricity market for technical and market reasons¹⁵. It should be noted that all ENTSO-E members, non-EU ones included, participate in the network code drafting process and have the right to vote¹⁶. Additionally, the status of observer can be attributed to candidates which act as

⁶ The most accomplished outcome of this cooperation are the rules developed within the Florence Forum with respect to cross-border trade, congestion management, transparency and tariff principles, as well as, the Guidelines for Good Practice developed by the Madrid Forum, which ultimately formed the basis for Regulations (EC) 1228/2003 and (EC) No 1775/2005. On the key strengths and weaknesses of the “Forum concept”, see P. Cameron, *Legal Aspects of EU Energy Regulation. Implementing the New Directives on Electricity and Gas Across Europe*, OUP: Oxford, 2005, p. 75.

⁷ See http://www.acer.europa.eu/portal/page/portal/ACER_HOME/Activities/Regional_Initiatives.

⁸ Namely ETSO, ATSOI, BALTSO, NORDEL, UCTE, UKTSOA.

⁹ See article 4 of the Electricity Regulation.

¹⁰ See article 4 of the Gas Regulation.

¹¹ No specific requirements are set apart from the obligation of regional cooperation within the context of the ENTOSs established under the article 12 of the Electricity and Gas Regulations.

¹² See articles 2 par. 1, 3 AoA ENTSO-G, article 1 par. 2 AoA ENTSO-E. Since the ENTOSs essentially constitute professional associations that could be prone to collusion particular attention is due to EU competition law which remains applicable to their decisions, see recitals 7 and 16 of the Electricity and Gas Regulations respectively.

¹³ See article 6 AoA. See also ACER, Opinion on the ENTSO-E Statutes, Rules of Procedure and List of Members, 05.05.11, pp. 3-5, discussing alternative approaches for the admission of new members regarding TSOs from EU Member States and third countries. [Online]. Available: http://www.acer.europa.eu/portal/page/portal/ACER_HOME/Public_Docs/Acts%20of%20the%20Agency/Opinions/2011

¹⁴ A typical example in this respect is Swissgrid, which plays a key role in the functioning of the EU electricity grid and is currently a member of the ENTSO-E.

¹⁵ The Electricity and Gas Regulations acknowledge this fact in their article 8 par. 3 entrusting the ENTOSs with the task of adopting recommendations relating to the « coordination of technical cooperation between Community and third-country transmission system operators ».

¹⁶ Article 12 par. 6 AoA clarifies that the voting power of TSOs from third countries is calculated as if they were members of the European Union. However, the Assembly is, at the same time, bound to « ensure that the total sum of the voting rights of Members from countries that are not members of the European Union will not exceed 28% of the First Part of

TSOs and create a “reasonable expectation” that they will qualify for membership in the near future following an assessment by the Association based on technical, regulatory and market conditions¹⁷. Observers have the right to attend the meetings of the Assembly without voting rights¹⁸, they may be invited by a body of the Association to appoint representatives to its meetings, be provided with information and publications of the Association¹⁹ and are subject to financial obligations²⁰.

On the contrary, the ENTSO-G distinguishes between three status of participation. First of all, new members may be admitted upon decision of the General Assembly provided that they are TSOs²¹. Secondly, the status of an Associated Partner may be attributed by decision of the General Assembly to TSOs from Member States to which apply the derogations and exemptions of the article 30 of the Gas Regulation in conjunction with article 49 of the Directive 2009/73/EC, such as Latvia and Lithuania²². This status allows the attendance of the meetings of the General Assembly without voting rights, the participation in Working Groups, to the extent allowed by the Board, and entails financial obligations²³. Finally, TSOs from countries that are candidates for accession to the EU, parties to the Energy Community Treaty or parties to the Convention establishing the European Free Trade Association can be designated as Observers by decision of the General Assembly²⁴. This status allows the attendance of meetings of the General Assembly without voting rights and may lead to financial obligations²⁵.

In terms of institutional structure, the ENTSO-E presents an increased complexity compared to its gas homologue²⁶; it comprises the Assembly and the Board, as well as four Committees in crucial areas of electricity²⁷, a Legal and Regulatory Group composed of experts from each Member²⁸, Regional Groups²⁹ and a Secretariat³⁰.

The Assembly is the general leading body of the Association enjoying residual power. It is responsible for decisions concerning the functioning of the Association as well as for transmission system matters of a major strategic, financial or other significance for TSOs, among which, the development of network codes³¹. The Annual Assembly is held in the second quarter of each calendar year and extraordinary meetings may also be held under certain conditions³². The voting system

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the Voting Power and/or 35% of the Second Part of the Voting Power », reducing proportionately their voting power in case one or both of these thresholds are exceeded.

¹⁷ See article 7 AoA.

¹⁸ See article 12 par. 4 AoA.

¹⁹ See article 7 AoA.

²⁰ See article 19 par. 3 AoA.

²¹ See article 7 par. 1 AoA. Pursuant to article 1 par. 42 AoA, TSOs are defined by reference to article 10 of the Directive 2009/73/EC.

²² See article 9a par. 1 AoA.

²³ See article 9a par. 2, 9a par. 5 and 36 par. 4 AoA.

²⁴ See article 9d par. 1 AoA.

²⁵ See articles 9d par. 2, 5 and 36 par. 4 AoA.

²⁶ See article 11 AoA.

²⁷ Namely, the System Development Committee, the System Operations Committee, the Market Committee and the Research and Development Committee, see article 15 AoA.

²⁸ See article 16 AoA. The Legal and Regulatory Group is entrusted with an advisory role towards the other bodies of the ENTSO-E on legal issues and with the task of ensuring legal and regulatory compliance of the Association’s activities.

²⁹ See article 17 AoA.

³⁰ It also acknowledges Voluntary Regional Groups, see article 17 par. 2 AoA.

³¹ See article 12 par. 2 AoA.

³² See article 12 par. 5 AoA.

applied provides for a voting power of each member composed of two parts³³, the first attributing equal voting weight to each member according to the “one country, one vote” principle, and, the second voting weight reflecting the comparative weight of each member in view of its population. Pursuant to article 12 par. 7 of the Articles of Association (AoA), the Assembly aims to achieve unanimity of all voting power present or represented. If that is not possible, it decides by simple majority except for specific cases where a special voting procedure is provided for or a special majority is necessary; such a special majority is applicable in the case of network codes³⁴.

The second most important body of the ENTSO-E, the Board, is composed of maximum twelve members appointed by the Assembly for a term of two years, renewable once³⁵. It is entrusted, among other tasks, with the coordination of the work of and between the Committees and the Legal and Regulatory Group and the follow-up and execution of the decisions of the Assembly³⁶.

On the contrary, the institutional structure of the ENTSO-G is fairly simple, comprising the General Assembly and the Board³⁷. The General Assembly is here again the general leading body, enjoying residual power and being entrusted with a series of responsibilities³⁸, including, the adoption of network codes. It has an ordinary meeting at least twice within a calendar year, while extraordinary meetings may also be held under certain conditions³⁹. In terms of voting process, a two-tier system is set⁴⁰, the first part conferring equal voting weight to each Member State represented in the Association and the second conferring voting weight reflecting the population of Member States and the status of certain among them as “countries of a special EU grid connection significance”. With respect to the decision-making processes, the General Assembly uses two types, depending on whether the decision is taken on a single proposal or whether there is a choice to be made among more⁴¹. Decisions such as the adoption of network codes require a simple majority⁴², namely the approval by votes cast by members present or represented representing at least sixty per cent of both the first and the second part of the voting rights cast⁴³.

The second body of the ENTSO-G, the Board, is composed of a minimum of three up to a maximum of twelve persons, elected by the General Assembly for an official term of three years⁴⁴. It is entrusted with a series of responsibilities, among which, notably, day-to-day management tasks, representation tasks, the preparation of the meetings of the General Assembly, the proposal to the latter of draft resolutions and the proposal of draft network codes⁴⁵.

³³ See article 12 par. 6 AoA.

³⁴ As well as for the amendment of the AoA and the Internal Regulations and the dissolution of the Association, see article 12 par. 7 AoA.

³⁵ See article 13 par. 1, 2 AoA.

³⁶ See article 13 par. 5 AoA.

³⁷ See article 10 AoA. A General Manager and Business Area Managers, as well as Subject Managers are designated upon a non binding recommendation of the Board, pursuant to article 33 par. 1, 5 AoA and article 15 of the Rules of Procedure and article 34 and article 16 of the Rules of Procedure respectively. Working Groups may also be established by the General Assembly, see article 35 AoA and article 19 of the Rules of Procedure.

³⁸ See article 11 par. 3 AoA.

³⁹ See article 12 AoA.

⁴⁰ See article 17 AoA.

⁴¹ See article 19 par. 3 AoA.

⁴² Special majority is required for amendments to the AoA, see article 37 par. 4 AoA, and the dissolution of the Association, see article 38 par. 4 AoA.

⁴³ A special majority is required for decisions such as the amendment of the AoA and the dissolution of the Association, see articles 37 par. 4, 38 par. 4 AoA.

⁴⁴ See articles 22 par. 1, 2, 24 par. 2 AoA.

⁴⁵ See articles 23, 32 AoA.

The second major change under the third energy package regarding the cooperation of all TSOs is the obligatory participation of the latter in the ENTSOs, pursuant to article 4 of the Electricity and Gas Regulations, which lays in sharp contrast with the voluntary nature of previous cooperation schemes. As ACER has observed membership to the ENTSOs is “not an option but a legal obligation for TSOs”, therefore, “TSOs should also have the right to be admitted to (ENTSOs) after meeting the membership conditions⁴⁶”.

Finally, apart from being statutorily defined, the tasks assigned to the ENTSOs are also much broader than those of previous cooperation schemes. In particular, the ENTSOs have been entrusted, apart from the elaboration of network codes whose examination will follow, with the adoption of common network operation tools and research plans, the adoption of community-wide TYNDPs, of recommendations on the technical cooperation of EU and third-country TSOs, annual work plans, reports and annual summer and winter supply (generation adequacy in the case of electricity) outlooks⁴⁷.

Having examined the framework for the cooperation of TSOs, mainly in charge for the elaboration of network codes, the focus of the paper now turns to the exact procedure for their adoption.

B. A Three-stage Procedure for the Adoption of Network Codes

The adoption of common network codes follows an essentially three-stage procedure involving an institutional interplay among the ENTSOs, the ACER and the Commission⁴⁸ and allowing for extensive consultations with stakeholders⁴⁹. The procedure is designed so as to take advantage of the technical expertise of the ENTSOs, which are mainly responsible for the drafting, while at the same time ensuring regulatory review from the ACER, and a legally binding outcome through the adoption by comitology from the Commission. In comparison to technical rules adopted in the context of previous cooperation schemes the adoption of network codes under the third package represents significant progress in two respects⁵⁰; firstly, network codes are adopted in more areas than previous technical rules. Secondly, their adoption by comitology renders them legally binding for all market participants contrary to the previous practice of the adoption of technical rules through contractual agreements among TSOs.

More in detail, the procedure begins with the establishment of an annual priority list by the Commission after consultation with the ACER, the ENTSOs and other relevant stakeholders⁵¹. In this respect, network codes are developed in specific areas, defined in article 8 par. 6 of the Electricity and Gas Regulations, namely, (a) network security and reliability rules (including rules for technical transmission reserve capacity for operational network security in the case of electricity), (b) network connection rules, (c) third-party access rules, (d) data exchange and settlement rules, (e) interoperability rules, (f) operational procedures in an emergency, (g) capacity allocation and congestion management rules, (h) rules for trading related to technical and operational provision of network access services and system balancing, (i) transparency rules, (j) balancing rules (including

⁴⁶ See ACER, Opinion on the ENTSO-E Statutes, Rules of Procedure and List of Members, 05.05.11, p. 4, ACER, Opinion on the ENTSGO Statutes, rules of Procedure and the List of Members, 05.05.11, p. 4. [Online]. Available: http://www.acer.europa.eu/portal/page/portal/ACER_HOME/Public_Docs/Acts%20of%20the%20Agency/Opinions/2011

⁴⁷ See article 8 par. 3 of the Electricity and Gas Regulations.

⁴⁸ See Fl. Gräper, Ch. Schoser, “The Establishment of Common Network Codes”, in *EU Energy Law, Volume 1, The Internal Energy Market, The Third Liberalization Package*, 3rd Edition, Chr. Jones, Ed. Leuven: Claeys&Casteels, 2010, p. 496.

⁴⁹ Apart from the importance of stakeholders’ input for the elaboration phase, consultations could also facilitate the subsequent acceptance of network codes from the energy sector.

⁵⁰ See C. Musialski, *op.cit.*, p. 60.

⁵¹ See article 6 par. 1 of the Electricity and Gas Regulations.

network-related reserve power rules in the case of electricity / network-related rules on nominations procedure, rules for imbalance charges and rules for operational balancing between transmission system operators' systems in the case of gas), (k) rules regarding harmonized transmission tariff structures (including locational signals and inter-transmission system operator compensation rules in the case of electricity), (l) energy efficiency regarding electricity / gas networks. It should be noted, that ENTSOs can adopt by themselves network codes that are not included in the areas defined by the annual priority list⁵².

After the establishment of the priority list, the Commission requests ACER to establish a framework guideline within an extendable timeline of six months and following a two-month period of consultation with stakeholders⁵³. The framework guideline sets clear and objective principles on which the network code will be subsequently developed and must contribute to non-discrimination, effective competition and the efficient functioning of the market⁵⁴. If the Commission considers that these objectives are not achieved it may request ACER to review the framework guideline and resubmit it⁵⁵. In case ACER fails to submit or re-submit it, the Commission ultimately ensures its elaboration itself⁵⁶. The Commission then requests the ENTSOs to develop a network code in line with the framework guideline within a maximum period of twelve months to be submitted to ACER⁵⁷. This represents the current stage of the most advanced of the ongoing procedures since the ENTSO-G has recently submitted the first network code on Capacity Allocation Mechanisms (CAM) to ACER⁵⁸.

ACER then gives a reasoned opinion on the draft network code developed by the ENTSOs within three months, following consultation with the relevant stakeholders⁵⁹, and may request them to amend and resubmit it. It will finally submit the network code to the Commission recommending its adoption once it is in line with the framework guidelines⁶⁰. It should be noted that if the ENTSOs have failed to develop the network code within the above-mentioned time period, the Commission may ask ACER to prepare a draft network code itself following consultation and submit it for adoption⁶¹.

The final stage of the procedure is the adoption of the network code from the Commission by comitology and, in particular, through the regulatory procedure with scrutiny⁶². Nevertheless, the

⁵² Since they do not follow the typical procedure ending up in their adoption by comitology, these network codes will not have binding force against all market participants. In order for them to be binding on TSOs they will have to be adopted via contractual agreements among them mirroring, thus, the practice of previous cooperation associations, see C. Musialski, *op.cit.*, p. 61.

⁵³ See article 6 par. 3 of the Electricity and Gas Regulations.

⁵⁴ See article 6 par. 2 of the Electricity and Gas Regulations.

⁵⁵ See article 6 par. 4 of the Electricity and Gas Regulations.

⁵⁶ See article 6 par. 5 of the Electricity and Gas Regulations.

⁵⁷ See article 6 par. 6 of the Electricity and Gas Regulations. The ENTSO-E has recently published the "Network Codes Development Process" paper defining the characteristics of network codes, the respective roles attributed to each of its bodies and describing the development process itself, see ENTSO-E, Network Codes Development Process, 17.02.2012. [Online]. Available: <https://www.entsoe.eu/the-association/association-documents/>. The respective procedure for ENTSO-G is set in article 28 of its Rules of Procedure.

⁵⁸ See ENTSO-G, Press Release. ENTSG submits first network code to ACER, PR018-12, 06.03.12 final. [Online]. Available : <http://www.entsoe.eu/publications/index.html>.

⁵⁹ See article 6 par. 7 of the Electricity and Gas Regulations.

⁶⁰ See article 6 par. 9 of the Electricity and Gas Regulations.

⁶¹ See article 6 par. 10 of the Electricity and Gas Regulations.

⁶² See article 23 par. 2 of the Electricity and Gas Regulations. It should be noted that article 6 does not prejudice the Commission's right to adopt and amend Guidelines pursuant to article 18 of the Electricity and Gas Regulations, see article 6 par. 12 of the Electricity and Gas Regulations.

Commission has the right not to adopt the network code despite ACER's recommendation, in which case it is under the obligation to state the reasons why⁶³.

The Electricity and Gas Regulations also provide for an alternative institutional route bypassing the ENTSOs in their article 6 par. 11, pursuant to which the Commission can adopt one or more network codes on its own initiative in case the ENTSOs have failed to develop it or ACER has failed to develop a draft network code or upon the recommendation of ACER pursuant to article 6 par. 9 of the Electricity and Gas Regulations following a two month period of consultations. The procedure to be followed is again the regulatory procedure with scrutiny. This institutional route should, however, be understood as an *ultimum refugium* for resolving eventual blockages, aiming mostly to put pressure on the actors to deliver the expected outcome.

It should be added that the Electricity and Gas Regulations envisage the possibility of an amendment of network codes, a procedure which could prove useful in the future in view of eventual adaptations to the market or technical evolution in the field and the need for consistency among the network codes adopted in related fields themselves or with the Electricity and Gas Target Models. The amendment procedure is "simpler, quicker and more flexible⁶⁴" than the adoption one, the central role in it being entrusted to ACER; pursuant to article 7 par. 1 of the Electricity and Gas Regulations, draft amendments to network codes may be proposed to it by any person likely to have an interest in it⁶⁵ or on ACER's own initiative. Following consultation with stakeholders, ACER makes reasoned proposals to the Commission explaining the consistency of draft amendments with the overall objectives of network codes. The Commission may adopt these amendments on non-essential elements of the Electricity and Gas Regulations by comitology, without prejudice to further ones it may wish to propose. It should be noted that the amendment procedure is established under the Regulations only for network codes and not for framework guidelines, the latter being, thus, reviewable only after the inclusion of the relevant area in the annual priority list by the Commission.

Finally, with respect to the recurrent obligation of conducting a consultation with stakeholders, article 10 par. 1 of the Electricity and Gas Regulations states that the ENTSOs "shall conduct an extensive consultation process, at an early stage and in an open and transparent manner, involving all relevant market participants (...)⁶⁶". Before the adoption of network codes, the ENTSOs are required to indicate how the observations received during the consultation have been taken into consideration or state the reasons for the contrary⁶⁷. Both ENTSOs have specified the precise forms such processes could take⁶⁸. In practice, however, consultations seem to be put under considerable strain due to the tight deadlines set by the Electricity and Gas Regulations and possibly limited resources; both

⁶³ See article 6 par. 9 of the Electricity and Gas Regulations.

⁶⁴ See Fl. Gräper, Ch. Schoser, op.cit., p. 526.

⁶⁵ In an indicative reference, the article mentions the ENTSOs, transmission system operators, network users and consumers.

⁶⁶ However, the article does not establish a corollary obligation for stakeholders to participate in the consultation process, see C. Musialski, op.cit., p. 46. On consultations, see also ACER, Opinion on the ENTSO-E Statutes, Rules of Procedure and List of Members, 05.05.11, p. 6, Opinion on the ENTSO-G Statutes, Rules of Procedure and List of Members, 05.05.11, p. 7-8. [Online]. Available: http://www.acer.europa.eu/portal/page/portal/ACER_HOME/Public_Docs/Acts%20of%20the%20Agency/Opinions/2011

⁶⁷ See article 10 par. 3 of the Electricity and Gas Regulations.

⁶⁸ In addition to the formal consultation processes, the ENTSO-E can have recourse to informal discussions, especially in the case of stakeholders that are more directly affected by network codes, and the organization of workshops and information forums, see ENTSO-E, Consultation Process, 2011 Edition, 28.06.11, [Online]. Available: <https://www.entsoe.eu/the-association/association-documents/>. In the case of the ENTSO-G, article 26 of its Rules of Procedure distinguishes between formal consultation processes, Stakeholders' Joint Working Sessions, Stakeholder Support Processes and Interactive Data Collection Processes.

stakeholders⁶⁹ and ACER⁷⁰ have stressed the need for more extensive and transparent consultations from ENTSOs, which would ensure full compliance with the obligation set in the article under discussion. Confidentiality issues also represent a source of potential concern during this process, both ENTSOs having, however, imposed relevant obligations to their participants⁷¹.

The multi-stage procedure presented sets a number of interesting legal questions with respect to the legal nature of the acts adopted during its course and the availability of judicial review to which we now turn.

III. Legal characterisation of the acts adopted and availability of judicial review

The paper has so far focused on the actors involved and the procedure applied for the adoption of common network codes. Turning to a more normative dimension, the subsequent analysis will assess the legal nature of the acts adopted during this procedure and the availability of judicial review. In this respect, the focus will, firstly, be put on the framework guidelines (A) and, secondly, on the network codes (B).

A. Framework Guidelines as Non-reviewable “Preparatory” Acts

The legal characterization of framework guidelines is not as straightforward as one could imagine; on the one hand, the Electricity and Gas Regulations specifically refer to their “non binding” nature⁷², a qualification by law which, however, is not definitive for the assessment of the Court of Justice. Legal doctrine, on the other hand, seems to be endorsing the same view but in a somewhat hesitant manner, given the requirement of the Electricity and Gas Regulations that network codes be “in line with” framework guidelines⁷³. The question is far from being insignificant in view of the legal debates that may arise from the principles and objectives set by the framework guidelines; an illustrative example in this respect are the disputed implications of the provisions of the Capacity Allocation and Congestion Management Framework Guidelines on long-term contracts⁷⁴. In this context, it is necessary to turn more in detail to the case law of the Court of Justice of the European Union, so as to assess whether framework guidelines may be considered as reviewable acts or whether, on the contrary, they fall under the category of “preparatory acts” which escape judicial review.

⁶⁹ See Eurelectric, Europex, IFIEC, EWEA, Letter to ENTSO-E on the network codes, 02.02.2012. [Online]. Available: <http://www2.eurelectric.org/Content/Default.asp>.

⁷⁰ See ACER, Opinion no 01/2012 on ENTSOG’s 2012 Annual Work Programme, [Online]. Available: http://www.acer.europa.eu/portal/page/portal/ACER_HOME/Public_Docs/Acts%20of%20the%20Agency/Opinions/2011

⁷¹ Compare articles 33 of the ENTSO-G Rules of Procedures and article 35 of the ENTSO-E Internal Regulations, whose definitions of confidential information and exceptions from it follow more or less the same logic. The ENTSO-E has further indicated that all responses will be typically treated as non-confidential, apart from what the consulted party itself claims as confidential, see ENTSO-E Consultation Process, 2011, Edition 28.06.11, p. 6, [Online]. Available: <https://www.entsoe.eu/the-association/association-documents/>. It should be noted that the breach of confidentiality and non-disclosure obligations is treated in a stricter manner in the context of the ENTSO-E, as it could lead to the exclusion of the Member or Observer of the Association from using its respective rights as appropriate, see article 35 par. 1 of the ENTSO-E Internal Regulations.

⁷² See article 6 par. 2 of the Electricity and Gas Regulations.

⁷³ See St. De Moel, F. Melchior, “Cooperation Between TSOs: Background, Organisation and Netcodes”, in *European Energy Law Report VIII*, M.M. Roggenkamp, Ul. Hammer, Ed. Cambridge-Antwerp-Portland: Intersentia, p. 37.

⁷⁴ See RAUE LLP, “Legal Impact Assessment of the Framework Guidelines on Capacity Allocation Mechanisms for the European Gas Transmission Network”. [Online]. Available: www.acer.europa.eu, M. Gillis, “Network Codes and Compulsory Contract Modification: Framework for Analysis and Case-Study”, in Roundtable-Contracts under Threat, FSR EU Energy Law&Policy Workshop, 23.05.12, [Online]. Available: www.florence-school.eu

Following the adoption of the Lisbon Treaty, article 263 par. 1 TFEU clarifies that the Court of Justice of the European Union “shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties”. Privileging substance over form⁷⁵, the Court of Justice provides for a definition of the “reviewable act” in its *Commission/Council* judgment, by concluding that an action for annulment must be available for “all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects⁷⁶”. The concept of “legal effects” has been subsequently clarified in the *International Business Machines Corporation/Commission* judgment, in which the Court of Justice has specified that a reviewable act is “binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position⁷⁷”.

The question of what constitutes a reviewable act becomes more complex when the act under examination is part of a multi-stage procedure before the Commission or involving the Commission, national authorities and European agencies. In the above-mentioned *International Business Machines Corporation/Commission* judgment, the Court of Justice concluded that judicial review was possible only if the act was “a measure definitively laying down the position of the Commission or the Council on the conclusion of that procedure and not a provisional measure intended to pave the way for the final decision⁷⁸”. With respect to cases involving European agencies, in its *Nancy Fern Olivieri/Commission and European Agency for the Evaluation of Medicinal Products* judgment, the General Court concluded, when assessing the nature of a revised opinion of the Committee for Proprietary Medicinal Products acting for the European Agency for the Medicinal Products (EMA), that the latter was “an intermediate measure whose purpose was to prepare for the marketing authorization decision” taken by the Commission and that it, thus, “(did) not definitively lay down the Commission’s position⁷⁹”. In the same vein, a referral by the European Commission to the EMA under the article 30 of the Directive 2001/83/EC, has been considered by the General Court as an act setting “in motion the consultative procedure” which “does not definitively determine the position of the Commission⁸⁰”.

The General Court, however, acknowledges an exception to the case law when a “preparatory act” affects the applicant independently from the final decision⁸¹; in particular, as the General Court stressed in its *Pfizer* judgment, preparatory acts can be considered as reviewable when, apart from having legal effects, they are “in addition (...) themselves the culmination of a special procedure distinct from that intended to permit the institution to take a decision on the substance of the case⁸²”.

When assessing the case of framework guidelines in view of the case law of the Court of Justice, one must therefore examine, firstly, whether they produce certain legal effects and, secondly, whether they are the culmination of a “special and distinct” procedure. With respect to the first condition, the relationship between framework guidelines and network codes is indeed somewhat ambiguous; despite their alleged “non binding” character, article 6 par. 6 of the Electricity and Gas Regulations provides

⁷⁵ CFI, Case T-369/03, *Arizona Chemical BV and Others / Commission*, 14.12.05, ECR 2005.II-05839, par. 56.

⁷⁶ ECJ, Case 22-70, *Commission / Council*, 31.03.71, ECR 1971.00263, par. 42.

⁷⁷ ECJ, Case 60/81, *International Business Machines Corporation / Commission*, 11.11.81, ECR 1981.02639, par. 9.

⁷⁸ ECJ, Case 60/81, *International Business Machines Corporation / Commission*, 11.11.81, ECR 1981.02639, par. 10, CFI, Case T-369/03, *Arizona Chemical BV and Others / Commission*, 14.12.05, ECR.2005.II-05839, par. 66.

⁷⁹ CFI, Case T-326/99, *Nancy Fern Olivieri / Commission and European Agency for the Evaluation of Medicinal Products*, 18.12.03, ECR 2003.II-06053, par. 53.

⁸⁰ CFI, Case T-123/03, *Pfizer Ltd / Commission*, 02.06.04, ECR 2004.II-01631, par. 26.

⁸¹ See Al. Türk, *Judicial Review in EU Law*, Cheltenham: Edward Elgar Publications, 2009, p. 21.

⁸² CFI, Case T-123/03, *Pfizer Ltd / Commission*, 02.06.04, ECR 2004.II-01631, par. 23 with references to ECJ, *Joined Cases 8 to 11-66, Société anonyme Cimenteries C.B.R. Cementsbedrijven N.V. and others / Commission*, 15.03.67, ECR 1967.00075, par. 92 and ECJ, Case 60/81, *International Business Machines Corporation / Commission*, 11.11.81, ECR 1981.02639, par. 11.

that “the Commission shall request the (ENTSOs) to submit a network code which is *in line with* the relevant framework guideline (...)”, the same expression being repeated in the recitals 6 of the Electricity Regulation and 15 of the Gas Regulation which add that ACER “should have a role in reviewing, based on matters of fact, draft network codes, *including their compliance with* the framework guidelines (...)”. In this sense, framework guidelines do seem to have a *de facto* binding effect when setting the objectives and principles of the network codes, since the latter are expected to abide by them. Nevertheless, it is highly doubtful that they constitute by themselves the culmination of a special and distinct procedure, since they are part of a whole process, giving ground to a “chain” of acts such as the draft network code, the reasoned opinion of the ACER on it, and, finally, the network code itself which is adopted by comitology. In terms of legal certainty, of course, a judgment of the Court of Justice definitively clarifying the legal nature of these acts, which are novel in EU energy regulation, would be welcome in the future.

As it has been rightly stressed, the absence of judicial review at this specific stage necessarily puts additional focus on the very same process that suffers under timeliness considerations, namely the consultations prior to the adoption of framework guidelines⁸³. However, it does not result, in parallel, in an absolute gap in judicial control; the rationale of the availability of judicial review against the final act in a multi-stage procedure lies in the efficiency and timeliness gains that can be achieved, but not at the expense of judicial review altogether. On the contrary, according to settled case law any legal defects of a preparatory act “may be relied upon in an action directed against the definitive act for which they represent a preparatory step⁸⁴”. In this sense, the legal defects of framework guidelines can be invoked against the network codes that constitute the final outcome of the procedure. It is to them that we now turn.

B. Common Network Codes as Legally Binding Reviewable Acts

As it has been previously noted, network codes are market and technical rules which, by themselves, do not produce binding force. They are vested with the latter through their formal adoption by comitology from the Commission, a procedure that bears advantages in terms of adaptability, flexibility and timeliness compared to the adoption by formal legislation.

In particular, article 23 par. 1 of the Electricity and Gas Regulations defines the regulatory procedure with scrutiny (RPS procedure) as the applicable one. The latter affords more control – without it being equal to that of the Council- to the European Parliament than in the past with respect to delegation involving the amendment or supplementation of non-essential elements of “sensitive” secondary legislation in case of basic acts adopted by co-decision⁸⁵. The procedure relies on two levels of control, namely, the Regulatory Committee control and the control by the two legislators⁸⁶ depending on the initial position of the Regulatory Committee.

⁸³ See St. De Moel, F. Melchior, *op.cit.*, p. 37.

⁸⁴ CFI, Case T-123/03, Pfitzer Ltd / Commission, 02.06.04, ECR 2004.II-01631, par. 24.

⁸⁵ See Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission.

⁸⁶ The exact process is the following: if the Committee agrees with the draft measure after qualified majority voting, then the Commission submits it to the Council and the European Parliament within three months, both legislators enjoying a veto right. The scrutiny exercised by them can be based on three grounds, namely, the Commission having exceeded the competence afforded to it under the basic act, incompatibility with the aim or the content of the basic act, or violation of the principles of subsidiarity or proportionality. If, on the contrary, the Regulatory Committee opposes the draft measure or does not pronounce itself, then the measure is first referred to the Council; in the event of a rejection, the draft measure is referred to the Commission, no further right of scrutiny being given to the European Parliament. In case the Council agrees with the draft measure or does not pronounce itself, then the Commission submits the measure to the European Parliament for control within two months. See article 5a of the Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.

One of the interesting questions arising from the use of the RPS procedure for the final adoption of network codes relates to the transition from comitology⁸⁷ to the new regime of delegated and implementing acts established under articles 290 and 291 TFEU following the adoption of the Lisbon Treaty⁸⁸. Of particular interest with respect to network codes, delegated acts are “non-legislative acts of general application” which supplement or amend certain non-essential elements of the legislative act⁸⁹. Contrasted with the regulatory procedure with scrutiny, the new regime implicates, firstly, the absence of a general horizontal framework regarding the objectives, scope, duration and conditions to which delegation is subject, each legislative act defining them explicitly on a case-by-case basis⁹⁰. Secondly, it is characterized by the absence of comitology committees⁹¹. Thirdly, both the Council and the European Parliament have a right of opposition to an individual delegated act, from now on, on any grounds. Finally, a novel right of revocation of the delegation altogether is entrusted to both legislators⁹². Contrary to implementing acts, the transition to delegated acts is not automatic; the effects of the RPS procedure are maintained for the purposes of existing basic acts making reference to it⁹³, such as the Electricity and Gas Regulations, until the latter are revised, a process which the Commission envisages to complete altogether for basic acts referring to this procedure by 2014⁹⁴.

Given their nature as “non legislative acts of general application” delegated acts can, in principle, take the form of a secondary Regulation, Directive or Decision⁹⁵. The specific legal instrument that will be used for network codes is not specified in the Electricity and Gas Regulations. Nevertheless, network codes should normally be adopted as EU Regulations, an instrument capable of ensuring speed and effectiveness in its implementation given its distinct characteristics: legally binding force, direct applicability to market participants without the need for a lengthy transposition as in the case of EU directives, and primacy over national arrangements. Regarding the last characteristic, pursuant to article 8 par. 7 of the Electricity and Gas Regulations, the network codes are adopted with respect to “cross-border network issues” and “market integration issues” and do not prejudice the right of Member States to establish national rules not affecting cross-border trade. However, a “spill-over” effect of the common network codes on national arrangements, ultimately forcing Member States to change the latter, cannot be excluded⁹⁶. It should, also, be noted that network codes are binding on the

⁸⁷ On the evolution of comitology itself, see El. Vos, “50 Years of European Integration, 45 Years of Comitology”, Maastricht Faculty of Law Working Paper 2009-3. [Online]. Available: www.unimaas.nl

⁸⁸ Despite its merits in terms of simplification and enhanced control rights for the European Parliament, the new regime has been criticized as introducing an obscure dichotomy which is difficult to apply, prone to instrumentalisation and a potential source of interinstitutional tensions, see P. Craig, “Delegated Acts, Implementing Acts and the New Comitology Regulation”, *E.L.Rev.* (36) 2011, pp. 671-677. The criticism is not purely theoretical given the consequences of the distinction in terms of differentiated oversight and accountability regimes.

⁸⁹ See article 290 par. 1 TFEU.

⁹⁰ It should be noted, however, that the specification of such elements in the text of the basic act was not subject to an intensive control by the Court of Justice prior to the adoption of the Lisbon Treaty, see ECJ, Case C-156/93, European Parliament / Commission, 13.07.95, ECR 1995.I-02019, par. 18-25.

⁹¹ Contrary to article 291 TFEU, article 290 TFEU makes no reference to comitology, maintaining the equality of control rights of the two legislators on which it is based, see P. Craig, *The Lisbon Treaty. Law, Politics and Treaty Reform*, Oxford: OUP, 2011, pp. 264-265.

⁹² See Al. Hardacre, M. Kaeding, “Delegated and Implementing Acts: the New Worlds of Comitology - Implications for European and National Public Administrations”. [Online]. Available: www.eipa.eu

⁹³ See article 12 of the Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers.

⁹⁴ See Al. Hardacre, M. Kaeding, *op.cit.*

⁹⁵ See P. Craig, *The Lisbon Treaty...*, *op.cit.*, p. 254.

⁹⁶ See Cl. Marcellis, “EU Network Codes: Legal Nature, Enforcement, Amendment”, 2nd FSR&BNetzA Forum on Legal Issues of Energy Regulation, 07.10.11. [Online]. Available: www.florence-school.eu.

territory of the European Union⁹⁷; in this respect, binding force on third countries would require the adoption of specific instruments of international law⁹⁸.

In terms of direct judicial review, common network codes adopted as EU regulations will evidently constitute “reviewable acts” under article 263 par. 1 TFEU according to the previously analyzed case law. A further question relates to the possibility of judicial review through proceedings instituted by private applicants, such as for example TSOs, in view of the changes brought about by the Lisbon Treaty with respect to the standing of non-privileged applicants. In particular, article 263 par. 4 TFEU currently provides for judicial review against an act addressed to non privileged applicants or “which is of direct and individual concern” to them and against a “regulatory act which is of direct concern to them and does not entail implementing measures”. The question is, thus, reformulated into whether judicial review against network codes adopted as EU Regulations is available under both restrictive conditions of direct and individual concern or whether they fall under the category of “regulatory acts”, for which the latter condition is relaxed⁹⁹.

In this respect, it should be stressed that “regulatory acts” fit rather uneasily with the formalistic hierarchy of norms established under the Lisbon Treaty between legislative, delegated and implementing acts; legal doctrine admits their exact content is a source of ambiguity, depending on the broad or narrower interpretation to be adopted¹⁰⁰. In its first judgment on this question the General Court has, by virtue of a literal, historical and teleological interpretation, concluded that the term refers to “all acts of general application apart from legislative acts¹⁰¹”. This approach is not exempt to criticism since counter-arguments can be raised claiming a formalistic vision resulting in a mere *a contrario* definition of the category and persisting gaps in the judicial protection on an EU level¹⁰². However, both this initial case law of the General Court and the various interpretations envisaged by legal doctrine confirm that non-legislative measures of general application adopted as EU Regulations, such as the future network codes, are to be considered as “regulatory acts¹⁰³”.

With respect to the condition of a “direct concern” also required under article 263 par. 4 TFEU, in its recent *Microban International Ltd and Microban (Europe) Ltd / Commission* judgment, the General Court has clarified that it is to be interpreted in the same manner both under the general and the specific legal standing conditions¹⁰⁴. In that sense, non privileged applicants turning against network codes adopted as EU Regulations will have to prove that the measure directly affects their legal situation and that its implementation is purely automatic and results from EU rules alone without the application of other intermediate rules¹⁰⁵. In the same judgment, faced with a direct prohibition of a

⁹⁷ See articles 52 TEU and 355 TFEU.

⁹⁸ This could involve the adoption of a new international treaty, the “exportation” of the new *acquis* via an amendment of existing treaties, such as the Energy Community Treaty, or the adoption of specific bilateral agreements, see C. Musialski, *op.cit.*, p. 61.

⁹⁹ See St. Balthasar, “Locus Standi Rules for Challenges to Regulatory Acts by Private Applicants: the new art. 263 (4) TFEU”, *E.L.Rev.* (35) 2010, pp. 542-550.

¹⁰⁰ See P. Craig, *The Lisbon Treaty...*, *op.cit.*, pp. 130-132. The ambiguity is more acute with respect to EU Regulations adopted through the legislative procedure and, hence, constituting formal “legislative acts” under the hierarchy of the Lisbon Treaty.

¹⁰¹ GC, Case T-18/10, *Inuit Tapiriit Kanatami and Others / European Parliament and Council*, 06.09.11, ECR 2011, par. 56, currently under appeal, Case C-583/11 P brought on 23.11.11.

¹⁰² See Al. Albers-Llorens, “Sealing the fate of private parties in annulment proceedings ? The General Court and the new standing test in article 263 (4) TFEU”, *Cambridge Law Journal* (71) 2012, p. 54.

¹⁰³ See Al. Turk, *op.cit.*, p. 168-169.

¹⁰⁴ GC, Case T-262/10, *Microban International Ltd and Microban (Europe) Ltd / Commission*, 25.10.11, ECR 2011, par. 32.

¹⁰⁵ CFI, Case T-69/99, *DSTV A/S / Commission*, 13.12.2000, ECR 2000.II-4039, par. 24. This condition can be satisfied in the case of EU Regulations, see ECJ, Cases 41 to 44/70, *NV International Fruit Company / Commission*, 13.05.71, ECR 1971.411.

chemical substance, the General Court has also concluded that the final condition of the absence of implementing measures was fulfilled¹⁰⁶. The facts of the case having been quite straightforward in this respect, further clarifications will need to be provided from case law with respect to the precise content of this last condition¹⁰⁷. In conclusion, direct judicial review against network codes adopted as EU regulations for non-privileged applicants should follow the more flexible variant for regulatory acts introduced by the Lisbon Treaty provided the rest of the above-mentioned conditions are fulfilled.

In what the Court of Justice has consistently described as “a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions¹⁰⁸”, private parties may also have recourse to indirect means of judicial review against EU network codes and, especially, to references for a preliminary ruling on their validity under article 267 TFEU in the event of actions filed before national courts¹⁰⁹.

The relationship between the two means of review is governed by the *Textilwerke Deggendorf* (*TWD*) case law, which precludes whomever –addressee or third party- had undoubtedly the right to challenge an EU act within the time-limit set by article 263 par. 6 TFEU to plead the illegality of this act in proceedings before national courts¹¹⁰, provided he had the opportunity to learn of the contested measure and of his having legal standing against it¹¹¹. The *TWD* case law has been found to apply to EU Regulations¹¹², despite the notorious difficulties in “undoubtedly” establishing a direct and individual concern for non-privileged applicants under the pre-Lisbon regime. The Court of Justice has proceeded to its expansive application in its *Nachi Europe HmbH* judgment by concluding that an anti-dumping regulation could become definitive against an individual “in regard to whom it must be considered to be an individual decision and who could undoubtedly have sought its annulment under Article (263 TFEU)¹¹³”. However, the relaxation of the conditions for legal standing under the new variant of article 263 par. 4 TFEU discussed above seems to refuel the debate as to the extent of the applicability of this case law¹¹⁴.

With regard to the powers and obligations of national courts, article 267 TFEU distinguishes between courts or tribunals of a Member State¹¹⁵ whose decisions are subject to a judicial remedy under national law and those where no such remedy exists; the former may, if they consider that a decision on the question is necessary to enable them to give judgment, request the Court of Justice to give a ruling thereon while the latter are obliged to do so. Regardless of whether they fall under article

¹⁰⁶ GC, Case T-262/10, *Microban International Ltd and Microban (Europe) Ltd / Commission*, 25.10.11, ECR 2011, par. 33-38.

¹⁰⁷ Such clarifications could be made in the decision on the second *Inuit* case, see Case T-526/10, *Inuit Tapiriit Kanatami and Others / Commission*, brought on 09.11.10. The direct applicability characterising EU regulations and the essentially technical character of network codes could render needless the adoption of implementing measures.

¹⁰⁸ ECJ, Case C-50/00 P, *Unión de Pequeños Agricultores / Council of the European Union*, 25.07.02, ECR 2002.I-6677, par. 40. See, however, the objections of Advocate General Jacobs in his Opinion in Case C-50/00 P, *Unión de Pequeños Agricultores / Council of the European Union*, 21.03.02, ECR 2002.I-6677.

¹⁰⁹ The Court has also consistently held that the validity review under article 234 TFEU does not amount to a right to remedy for individuals, see ECJ, C-344/04, *The Queen on the application of International Air Transport Association and European Low Fares Airline Association / Department of Transport*, 10.01.06, ECR 2006.I-403.

¹¹⁰ ECJ, Case C-241/01, *National Farmers' Union / Secrétariat général du gouvernement*, 22.10.2002, ECR 2002.I-9079, ECJ, Case C-182/92, *TWD Textilwerke Deggendorf / Germany*, ECR 1994.I-833.

¹¹¹ ECJ, Case 216/82, *Universität Hamburg / Hauptzollamt Hamburg-Kehrwieder*, 27.09.83, ECR 1983.2771.

¹¹² ECJ, Case C-241/95, *The Queen / Intervention Board of Agricultural Produce ex parte Accrington Beef Co. Ltd and Others*, 12.12.96, ECR 1996.I-6699.

¹¹³ ECJ, C-239/99, *Nachi Europe HmbH / Hauptzollamt Krefeld*, 15.02.01, ECR 2001.I-1197.

¹¹⁴ See R. Schwensfeier, “The *TWD* principle post-Lisbon”, *European Law Review* (37) 2012, pp. 156-175.

¹¹⁵ The terms “court” and “tribunal” are autonomous concepts under EU law, see ECJ, C-96/04, *Standesamt Stadt Niebüll*, 27.04.06, ECR 2006.I-3561.

267 par. 2 or 3 TFEU, national courts will be precluded from declaring EU network codes invalid, pursuant to the *Foto-Frost* case-law, due to the need to ensure the uniformity and coherence of EU law¹¹⁶; on the contrary, they can consider their validity concluding that they are indeed valid and rejecting opposite grounds as unfounded¹¹⁷. As confirmed in the *Zuckerfabrik*¹¹⁸ and *Atlanta*¹¹⁹ judgments, national courts will be able to grant interim relief against EU network codes in proceedings before them if they are persuaded that serious doubts exist as to their validity.

As regards the powers of the Court of Justice, pursuant to article 267 par. 1 TFEU, it has jurisdiction to give “preliminary rulings concerning: a) the interpretation of the Treaties; b) the validity and interpretation of acts of the institutions, offices or agencies of the Union”, which, obviously, also concerns EU Regulations. The review entrusted to the Court of Justice when assessing the validity of EU network codes will be conducted only in light of the grounds referred to it by the national court¹²⁰ employing the same grounds of review as in actions for annulment under article 263 TFEU¹²¹. An eventual declaration of invalidity of an EU network code under article 267 TFEU will be binding on the referring national court and, for the needs of the uniform application of EU law and legal certainty, will constitute “sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give¹²²”. At the same time any EU institution concerned will be expected to take all necessary measures to comply with the judgment¹²³.

Despite the absence of a right to remedy for individuals¹²⁴ and the limitations in the effectiveness of the judicial protection afforded to them against measures of general application¹²⁵, preliminary references constitute an important indirect means of judicial review for EU network codes to be considered by non-privileged applicants against EU network codes.

IV. Conclusions

The aim of this paper has been to assess the legal nature of the acts involved in the adoption procedure of network codes and the subsequent availability of judicial review. In this respect, it first provided an analysis of the current legislative framework by initially identifying the substantial progress marked under the Electricity and Gas Regulations with respect to the cooperation of TSOs within the ENTSOs, mainly responsible for the elaboration of network codes. At the same time, the actual procedure for the adoption of network codes has been critically assessed as an adequate framework for

¹¹⁶ ECJ, Case 314/85, *Foto-Frost / Hauptzollamt Lübeck-Ost*, 22.10.87, ECR 1987.4199.

¹¹⁷ ECJ, Case 314/85, *Foto-Frost / Hauptzollamt Lübeck-Ost*, 22.10.87, ECR 1987.4199.

¹¹⁸ ECJ, Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen AG / Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn*, ECR 1991.I-415.

¹¹⁹ ECJ, Case C-465/93, *Atlanta Fruchthandelsgesellschaft mbH and others / Bundersamt für Ernährung und Forstwirtschaft*, ECR 1995.I-3761.

¹²⁰ ECJ, Case C-305/05, *Ordre des Barreaux francophones et germanophone and Others / Conseil des ministres*, 26.06.07, ECR 2007.I-5305.

¹²¹ ECJ, Joined Cases 21 to 24-72, *International Fruit Company NV and others / Produjtschap voor Groenten en Fruit*, 12.12.72, ECR 1972.1219.

¹²² ECJ, Case 66/80, *SpA International Chemical Corporation / Amministrazione delle finanze dello Stato*, 13.05.81, ECR 1981.1191, par. 13. The Court of Justice has, however, clarified that further references in relation to an act declared void by the Court may be made “in particular if questions arise as to the grounds, the scope and possibly the consequences of the invalidity established earlier”.

¹²³ ECJ, Joined cases 117-76, 16-77, *Albert Ruckdeschel&Co. And Hansa-Lagerhaus Stroh&Co. / Hauptzollamt Hamburg-St. Annen, Diamalt AG v Hauptzollamt Itzehoe*, ECR 1977.1753.

¹²⁴ See footnote 109.

¹²⁵ See Al. Turk, *op.cit.*, pp. 231-237.

the final adoption of network codes, taking advantage of the particular strengths of each implicated actor but being put under considerable strain under tight deadlines.

Subsequently, the analysis shifted towards the examination of the legal characterization of the acts adopted in the course of the procedure. In this respect, the paper reached the conclusion that framework guidelines should be considered as non-reviewable preparatory acts. On the contrary, network codes are the definitive acts of the procedure, drawing their legally binding nature from their formal adoption by comitology from the Commission most probably in the form of an EU regulation, and subject to direct and indirect means of judicial review as analyzed.

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