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The EU Electricity Network Codes and Guidelines: A Legal Perspective (2nd Edition)

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Abbreviations

ACER – Agency for the Cooperation of Energy Regulators
BZ – Bidding Zone
CACM GL – Capacity Allocation and Congestion Management Guideline
CCR – Capacity Calculation Region
CEP – Clean Energy Package proposal
Council – Council of the European Union
DSO – Distribution System Operator
EB GL – Electricity Balancing Guideline
EC – European Commission
EEA – European Economic Area
EnCT – Energy Community Treaty
ENTSO-E – European Network of Transmission System Operators for Electricity
EP – European Parliament
FCA GL – Forward Capacity Allocation Guideline
GL – Guideline
IEM – Internal Energy Market
MCO function – Market Coupling Operator function
MS(s) – EU Member State(s)
NC – Network Code
NEMO – Nominated Electricity Market Operator.
NRA – National Regulatory Authority
RfG NC – Requirements for Generators Network Code.
SO GL – System Operation Guideline
TCM(s) – Terms and conditions or methodologies
TSO – Transmission System Operator
TEU – Treaty on the European Union
TFEU – Treaty on the Functioning of the European Union

1. Introduction

The technical and economic issues posed by the EU network codes (NCs) and guidelines (GLs) for electricity are manifold. In addition, NCs and GLs raise important and challenging legal issues. To gain a more comprehensive perspective on these regulations, it is important to understand not only their technicalities, but also the legal framework that has been created for their development, adoption, implementation, and amendment. This legal framework was first established in the Third Energy Package (hereafter 'third package') legislation, but has recently been amended under the Clean Energy Package (CEP). New measures affecting the creation and implementation of NCs and GLs, as well as the ever more important terms, conditions and methodologies (TCMs) entered into force in January 2020.

Four guidelines and four network codes for electricity have already been adopted under the third package. We refer to these measures throughout this paper as the **first generation** of NCs and GLs. These codes are categorised into three types – network connection rules, system operation rules and market rules. The market rules which deal with capacity allocation, congestion management, and balancing have been adopted as **guidelines**, whereas the emergency and restoration protocols, provisions for demand connection, as well as the requirements for generators, are comprised within **network codes**.[2]

The goal of this text is to help a reader without detailed legal knowledge to understand some of the legal terms of the NCs and GLs, to consider:

- The legal nature of NCs and GLs;
- How various market players (stakeholders), as well as regulatory and governing authorities at national and European level are involved in the development and adoption processes of NCs and GLs;
- Who can raise legal challenges during this process and on the content of the final text and on what grounds, and;
- Who is involved in the implementation phase at both regional and national level.

This paper is divided into **six sections**. Parts one to five focus on the development and adoption processes for NCs and GLs. The first and second part considers the legal nature of the NCs and GLs. The third part deals with the process of developing both NCs and GLs. The fourth part gives an overview of the 'Comitology' procedure, the formal adoption process currently used for both the NCs and GLs adopted as first-generation codes under the third package and, in particular, the Electricity Regulation (EU) 714/2009[3] (hereafter the 'E-Regulation 2009'). It details the role of the European Commission (EC), the European Parliament (EP), and the Council. Part five deals with the amendment process for both NCs and GLs.

In part six, we will turn to implementation issues. Following the adoption of NCs or GLs, one of the main challenges for the EC is to ensure that the Member States (MSs) implement them

[2] See Annex I, Section I.

[3] Regulation (EC) No 714/2009 of the European Parliament and of the Council on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003

correctly and in a harmonised manner. To give an insight into the most challenging aspects of this process, we will take a closer look at the TCMs. In contrast to the more complete NCs, the GLs contain few directly applicable rules. For the most part, the GLs establish the outlines for detailed TCMs to be developed by the transmission system operators (TSOs) on one side and the national regulatory authorities (NRAs) or – depending on the circumstances in each case – the Agency for the Cooperation of Energy Regulators (ACER) on the other side. Whereas ACER played a strictly subsidiary role in the creation of TCMs under the third package – i.e., ACER only gained competence to decide on a proposal for a TCM if the originally competent NRAs failed to reach an agreement or requested the Agency to take a decision – the CEP has streamlined the procedure for EU-wide TCMs and determined ACER as the competent entity to adopt them.

The TCMs are comprehensive legal acts in their own right, each containing dozens of definitions and provisions. The uncertainty surrounding the adoption and development of TCMs has repeatedly led to litigation in recent months. In addition, some crucial TCMs have been adopted of late. The resulting decisions allow us to scrutinise the implementation issues in some detail. We will endeavour to explain how the TCMs are developed to implement GLs and examine the role of public and private entities in the process of their adoption with the help of two highlights that illustrate the practical implementation challenges.

Throughout this text, we will explain the main changes that result from the adoption and entry in force of the CEP. In particular, the recast electricity regulation, Regulation (EU) 2019/943 (hereafter referred to as the 'E-Regulation 2019'), and the final version of the new ACER regulation, Regulation (EU) 2019/942, (hereafter referred to as the 'ACER Regulation 2019') introduce substantial changes to the procedures for the adoption, implementation and amendment of the next generation of NCs and GLs. Furthermore, we will comment on the interplay between the new CEP rules and existing NCs, GLs and TCMs, where appropriate.

Network Codes and Guidelines Beyond the 27 MS

Before turning to a detailed examination of the NCs and GLs and their application in the 27 EU MS, it is appropriate to include some remarks on (i) the application of the NCs and GLs to the UK after Brexit; (ii) to their application in the EEA; and in the EnCT area. This section is designed to flag some trends only - it is not a comprehensive analysis of theses complex issues.

(i) Network Codes and Brexit

The UK exited the EU on 31st January 2020. By virtue of the transition period in the Withdrawal Agreement concluded between the UK and the EU in 2018, EU energy law will continue to apply in and in relation to the UK until the 31st December 2020. This means that the CEP – including the E-Regulation 2019, the ACER Regulation 2019 and other regulations

forming part of the Clean Energy Package, will in principle be imported as part of what European lawyers refer to as the *acquis*.[4] The UK is no longer a member of ACER.

At the same time, the UK Government has proposed to delete nearly all of the former third package rules, with the exception of the mechanism for the adoption of network codes by ENTSO-E, and rules on congestion management.

Indeed, there are large parts of the EU NCs and GLs that have not been the subject of specific national implementation into the UK system, as a result of their direct applicability as EU regulations – including the Electricity and ACER Regulations. This concept of direct applicability is explained below. These regulations are expected to continue in operation unamended for the remainder of 2020, as will the other GLs and NCs, but in the absence of further agreement with the EU, are likely to be revoked or substantially amended with effect from the exit date.

How will this affect Northern Ireland?[5]

Please note that Northern Ireland is a separate market from the rest of the UK for electricity purposes. Together with the Republic of Ireland, it forms the Single Electricity Market (SEM). For SEM issues, the Irish and NI regulators work together through a joint SEM Committee.[6]

(ii) Brief note on NCS/GLS in EEA - Norway

The third package of 2009 and the new CEP must be adopted into the EEA by a separate procedure – their application in the EEA is not automatic. Even when the legislation is adopted, additional procedures for the adoption of delegated legislation must still be followed. The NCs and GLs have yet to be included in the EEA Agreement and incorporated into Norwegian law, for example. The Norwegian Ministry of Petroleum and Energy has concluded hearing processes on the future incorporation of all four GLs and the NCs may be considered later. Some amendments have been introduced into the Energy Act in order to establish legal competence to adopt and incorporate TCMs to the GLs at a later stage. Norway is also considering post Brexit trading arrangements outside the IEM.[7]

(iii) EnCT

[4] Note that the UK government is currently suggesting it may no longer honour the terms of the Withdrawal Agreement. On 14 September 2020, the 'Internal Market Bill' was passed by the House of Commons, the terms of which would, controversially, override the Northern Ireland Protocol which obliges the UK to maintain EU State aid law in respect of "measures which affect that trade between Northern Ireland the Union", which includes trade in electricity between Northern Ireland and the UK. The UK government announced it would revert to WTO rules in place of State aid law, and also suggested that they may develop a UK State aid regime. At present, it remains unclear whether the terms of the bill are likely to come into effect. The Commission has opposed the bill and imposed a deadline of 30 September for the UK to amend the draft bill.

[5] See footnote above.

[6] See also P. Willis, ' Brexit: Energy market liberalisation implications' available at: https://www.twobirds.com/en/news/articles/2016/uk/brexit-eu-electricity-liberalisation

[7] Nordpool, 2020. Nord Pool proposals for potential post-Brexit trading arrangements outside the IEM, at https://www.nordpoolgroup.com/4a6b52/globalassets/trading-and-services/nord-pool-proposals-for-potential-post-brexit-trading-arrangements-outside-the-iem.pdf

NCs and GLs are not automatically applicable in the Energy Community Treaty (EnCT) area. Adoption depends on an agreement of formal legal reciprocity as a condition sine qua non. In the case of the gas NCs, implementation of the NCs is only relevant to a very small part of the markets covered by the Treaty (UA-MD and SR-BiH) and does not justify the implementation effort and/ or add value in terms of market integration. However, for the electricity sector NCs there is added value. The CACM Regulation requires a common market coupling solution, for example.

Article 13 of SOGL entitled 'Agreements with TSOs not bound by the Regulation' facilitates pragmatic solutions. "Where a synchronous area encompasses both union and third country TSOs, within 18 months after entry into force of this Regulation, all Union TSOs in that synchronous area shall endeavour to conclude with the third country TSOs not bound by this Regulation an agreement setting the basis for their cooperation concerning secure system operation and setting out arrangements for the compliance of the third country TSOs with the obligations set out in this Regulation."

2. Characteristics of the EU Electricity Network Codes and Guidelines

Among the overarching goals of the third package[8] as well as the CEP are market integration and security of supply. Instrumental to achieving this is the development of EU-wide harmonised NCs and GLs. To this end, E-Regulation 2009 contained provisions that mandated the adoption of further technical, delegated legislation in the form of either NCs or GLs.[9] Together with the creation of ACER, the introduction of the power to adopt delegated legislation was a major institutional innovation introduced by the third package. The two prior energy packages did not include such provisions. From a legal perspective, it is important to recognise some fundamental characteristics of the electricity NCs and GLs, and to examine the extent to which these differences will continue to be of importance under the new regulatory framework, as of January 2020. The CEP legislation of 2019 further builds on and refines these two institutional developments. In particular, it extends the role of ACER in the development and adoption of next generation NCs and in the adoption of TCMs.

2.1 Binding EU Regulations

The NCs and GLs are EU regulations that contain common technical and commercial rules, aiming primarily for the integration of national electricity markets across Europe to achieve a well-functioning internal energy market (IEM).[10] The EC's position is that "irrespective of

[8] The three regulations and two directives of the third package are outlined in Annex I, Section II.

[9] Regulation (EC) No 714/2009, Articles 6, 18

[10] For more information, please see Borchardt, K. D., 2010. The ABC of European Union Law. Publications Office of the European Union, p. 79-87. The European Union has at its disposal a range of instruments that allow the Union's institutions to impact on the national legal systems to varying degrees. These instruments can be regulations, directives, decisions, recommendations and are applicable to all Member States: "A Member State has no power to apply a regulation incompletely or to select only those provisions of which it approves as a means of ensuring that an instrument which it opposed at the time of its adoption or which runs counter to its perceived national interest is not given effect. Nor can it invoke provisions or practices of domestic law to preclude the mandatory application of a regulation."

whether codes or guidelines are used, the legal value of the rule is not changed."[11] As EU regulations, they are legally binding, directly applicable,[12] and enforceable in the Member States once they have entered into force.[13] Compliance with these provisions is mandatory,[14] and non-compliance may constitute the basis for judicial action. As EU regulations, the NCs and GLs have primacy over potentially conflicting national legislation.[15]

Dealing with Cross-Border Issues

The NCs and GLs "shall be developed for cross-border network issues and market integration and shall be without prejudice to the Member State's right to establish national network codes which do not affect cross-border trade."[16] The adoption of NCs and GLs does not prevent Member States from adopting their own national NCs and GLs, as long as these do not regulate cross-border issues. In cases where national NCs or GLs prima facie regulate internal issues but in practice have even an indirect cross-border effect, European NCs and GLs take precedence. Moreover, any provision of a national NC or GL that deviates from the provisions of an EU NC or GL is in contravention with EU law and will cease to apply.[17]

However, Article 62 of E-Regulation 2019 expressly provides that MS "have the right to maintain and introduce more detailed provisions than those set out in this Regulation, the GLs or the NCs provided these are compatible with Union legislation."

2.2. NCs and GLs: Different Legal Bases and Degrees of Harmonisation

The **first generation** of NCs and GLs had separate and distinct legal bases:

- Article 6 outlined the requirements for NCs,[18] and
- Article 18 the requirements for the GLs.

[11] See oral update of Mr. K. D. Borchardt in ACER, 2014b. Minutes final (39th ACER Board of Regulators meeting), A14-BoR-39-02, p. 8.

[12] As established in Case C-26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1, 'direct applicability' implies that the EU legislation confers rights and imposes obligations directly, not only on the Member States and EU institutions, but also on its citizens, on the legal and natural persons.

[13] The date of entry into force is usually the twentieth day following publication in the Official Journal of the European Union.

[14] Hart, H. L. A., 1994. The Concept of Law (2nd edn.). Oxford University Press

[15] As illustrated in Case C-6/64 *Costa v Enel* [1964] ECLI:EU:C:1964:66

[16] Regulation (EC) No 714/2009, Article 8(7). See Article 58 of Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (recast) for the new version: "The network codes and guidelines shall… be without prejudice to the Member States' right to establish national network codes which do not affect **cross-zonal** trade."

[17] Borchardt, K. D., 2010. The ABC of European Union Law. Publications Office of the European Union, p. 121

[18] We will further discuss below how GLs can also be developed on the basis of Article 6.

Article 6(12) of E-Regulation 2009 explicitly stated that the prerogative of the EC to adopt a NC will not affect its right to adopt and amend guidelines, in accordance with its Article 18. This ensures that the EC can adopt guidelines, in case the process of development of a network code under Article 6 fails to deliver the expected results,[19] and that the minimum degree of harmonisation envisaged through the adoption of GLs is maintained.

Although the drafting of the GLs often began as NCs, the EC subsequently chose to develop and adopt them as GLs, as it considered this to be a more efficient and effective procedure. It also allowed the EC to, in effect, 'sidestep' the involvement of the European Network of Transmission System Operators for Electricity (ENTSO-E).

It is important to remember that, while the aim of the NCs is to ensure the greater harmonisation of cross-border rules for transmission networks,[20] GLs require further implementation by way of the adoption of additional regulatory instruments, namely the TCMs. Currently, each of the four GLs; the Electricity Balancing GL (EB GL), Capacity Allocation and Congestion Management Guideline (CACM GL), Forward Capacity Allocation Guideline (FCA GL) and System Operation Guideline (SO GL) are to be implemented through more than 100 regional or European TCMs. In accordance with the provisions of Regulation (EC) No 713/2009, which established ACER, and the subsequent ACER Regulation of 2019, these TCMs have been drafted by the market participants, and approved by the NRAs or, in certain cases, by ACER.[21] Conversely, from the EC's standpoint, the NCs should provide comprehensive, detailed provisions[22] to minimise the need for additional decisions to be taken by TSOs or NRAs.[23]

Generally, GLs deal with real-time market and operation issues, providing guidance on a more volatile and dynamic environment. The terms of the GLs also allow the EC a limited margin of discretion, which can be necessary to facilitate the functioning of the IEM.

Despite these differences, the first generation of NCs and GLs have been drafted on the basis of extensive negotiations, conducted by the EC in conjunction with several key stakeholders, including institutional bodies such as ACER and ENTSO-E. The process has, however, proven to be complex and time-consuming, leading to the adoption of various amendments in the CEP.

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[19] Graper F. and W. Webster, 2016. The establishment of common network rules, in Jones, C. (ed.), EU Energy Law (1st vol., 4th edn.). Claeys & Casteels, p. 633

[20] Vlachou C., 2018. New Governance and Regulation in the Energy Sector: What does the Future Hold for EU Network Codes? European Journal of Risk Regulation 9(2), p. 15

[21] Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, Article 8(1): "For cross-border infrastructure, the Agency shall decide upon those regulatory issues that fall within the competence of national regulatory authorities, which may include the terms and conditions for access and operational security, only: (a) where the competent national regulatory authorities have not been able to reach an agreement within a period of six months from when the case was referred to the last of those regulatory authorities; or (b) upon a joint request from the competent national regulatory authorities."

[22] See ACER, 2014b. Minutes final (39th ACER Board of Regulators meeting), A14-BoR-39-02, p. 8

[23] See ACER, 2014b. Minutes final (39th ACER Board of Regulators meeting), A14-BoR-39-02, p. 9

Box 1: Changes provided for in the Clean Energy Package (CEP)

Articles 58-61 of E-Regulation 2019 streamline the development processes for both NCs and GLs but continue to allow the EC to switch from NCs to GLs at its own discretion.

Article 58(1) provides a common set of objectives for both NCs and GLs, stating that the network codes and guidelines shall:
(a) ensure that they provide the minimum degree of harmonisation required to achieve the aims of this Regulation;
(b) take into account, where appropriate, regional specificities;
(c) not go beyond what is necessary for that purpose; and
(d) be without prejudice to the Member States' right to establish national network codes which do not affect cross-border trade.

Article 58(1) sets out the areas on which the EC is empowered to adopt binding NCs while Article 61(1) sets out those areas for which the EC is empowered to adopt guidelines.

Article 61(2) provides (as before) that the EC may adopt a delegated act as a GL in areas where such acts could be developed under the NC procedure.

Article 58(14) provides (as before) that the adoption of an NC is without prejudice to the EC's right to adopt and amend the guidelines on the same matter.

2.3. The Adoption of NCs and GLs under the Delegation of Powers to the EC

The third package enabled the EC to adopt legally binding delegated measures in matters of energy,[24] following a special adoption procedure known at the time as the Regulatory Procedure with Scrutiny ('RPS') or the (old) 'Comitology' system.[25] The Treaty on the Functioning of the European Union (TFEU) of December 2009 codifies, for the first time, the powers delegated to the EC to adopt technical, non-legislative acts that supplement or amend

[24] Electricity Regulation (EC) No 714/2009, Article 6, 18, 23

[25] RPS is provided for in Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1999] OJ L 184, as amended by Council Decision 2006/512/EC [2006] OJ L 200 (Decision 1999/468/EC). The RPS procedure continues to apply until the legal acts which were adopted by RPS are formally amended. See also European Commission, 2018. Comitology in brief. Available at <http://ec.europa.eu/transparency/regcomitology/index.cfm?do=implementing.home> last accessed on 13 September 2020.

non-essential elements[26] of a legislative act.[27] This means that the EC is given powers by the EP and Council to adopt NCs or GLs to amend or supplement the non-essential[28] elements of a primary act, as both will be adopted as delegated legislation under the TFEU.

The current or first generation NCs and GLs are adopted as delegated legislation, even if they are not all formally designated as 'delegated acts' according to the terms outlined in the TFEU. Since the third package was adopted in July 2009, full alignment with the TFEU provisions did not take place at that time, and so several NCs and GLs continued to be adopted under the 'old' Comitology system.

The TFEU foresees two kinds of powers for the EC: delegated powers for quasi-legislative measures and implementing powers.[29] In brief, **delegated acts** are legally binding acts that enable the EC to supplement or amend non-essential parts of EU legislative acts, for example, in order to define detailed measures[30] – they add another layer to the basic legislation. Note that in the case of delegated acts, the Commission adopts the delegated act and if the European Parliament and Council have no objections, it enters into force. **Implementing acts** are legally binding acts that enable the EC to set conditions which ensure that EU laws are applied uniformly. Implementing acts are also non-legislative acts but, as they implement the legislation, they are often deemed essential. In the case of implementing acts, the Commission is allowed to set these conditions under the supervision of committees consisting of EU countries' representatives. Implementing acts include implementation measures whereas delegated acts allow amending, supplementing, or deleting non-essential elements of the basic legislative act. Implementing acts include a right of scrutiny for the EP and Council whereas with delegated acts, the EP or Council can object to an individual act or revoke the delegation entirely.

Implementing acts are governed by a generic procedure for their adoption,[31] whereas the objective, content, scope and duration of delegated acts are subject to a specific procedure

[26] Instrumental to understanding the limits to the delegation of powers to the EC by the EP and the Council is Judgment of 5 September 2012, Case C-355/10 *Parliament v Council* [2012] ECLI:EU:C:2012:516, paragraphs 67-68which stated that "ascertaining which elements of a matter must be categorised as essential […] must be based on objective factors amenable to judicial review. In that connection, it is necessary to take account of the characteristics and particularities of the domain concerned."

[27] TFEU, Article 290(1): "A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power."

[28] We will take a closer look at essential and non-essential elements in the section 2.3.1., which follows.

[29] There are two separate legal frameworks for each: delegated acts are defined in Article 290 TFEU, while implementing acts are defined in Article 291 TFEU.

[30] TFEU, Article 291: "(2) Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council. (3) For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers."

[31] The rules and general principles concerning mechanisms for control by Member States of the EC's exercise of implementing powers under Article 291(3) TFEU are laid down in advance in regulations adopted by ordinary legislative procedure.

that must be explicitly defined in the (primary) legislative acts (namely, regulations and directives).

The novelty of the new provisions introduced by the TFEU is that both types of acts serve different purposes and the rights and prerogatives of the EU institutions differ under each procedure. The extent of the EP's scrutiny rights, for example, depends crucially on the category of the acts in question. In the case of delegated acts, as mentioned, the EP and the Council have important rights to veto a delegated act and/or revoke the delegation. In the case of implementing acts, the veto rights are more indirect as the Council and the EP's rights in the procedure are much less far-reaching. This can be of importance for stakeholders seeking to intervene at this stage of the adoption of NCs or GLs.

2.3.1 Limits to the Powers to Adopt Delegated Acts under the CEP

Delegated Powers under the CEP

The CEP is aligned to the TFEU. Article 58(1) of the E-Regulation 2019 provides that the EC may, subject to Articles 59-61, adopt implementing or delegated acts.

The EC's power to adopt **delegated acts** under the CEP is subject to strict limits – limits that apply to both GLs and NCs:

- The legislative act itself (e.g. the recast Electricity Directive 2019/944, hereafter 'E-Directive 2019' or the E-Regulation 2019) defines the objectives, content, scope and duration of the delegation of power.[32]
- The delegated act cannot change the essential elements of the law. As detailed above, this means that the delegated act can only amend or supplement technical or non-essential provisions in the primary legislation. These terms have been further clarified in the case law of the European Court of Justice.[33]

[32] Recital 72 of the Electricity Regulation 2019/943 states: "In order to ensure the minimum degree of harmonisation required for effective market functioning, the power to adopt acts in accordance with Article 290 of TFEU should be delegated to the Commission in respect of non-essential elements of certain specific areas which are fundamental for market integration. Those acts should include the adoption and amendment of certain network codes and guidelines where they supplement this Regulation, the regional cooperation of transmission system operators and regulatory authorities, financial compensations between transmission system operators, as well as the application of exemption provisions for new interconnectors."

[33] In Case C88/14 *Commission v EP and Council,* the ECJ held that "according to the case-law, the EU legislature has discretion when it decides to confer on the Commission a delegated power pursuant to Article 290(1) TFEU or an implementing power pursuant to Article 291(2) TFEU (judgment in *Commission* v *Parliament and Council*, C-427/12, EU:C:2014:170, paragraph 40). However, that discretion must be exercised in compliance with the conditions laid down in Articles 290 TFEU and 291 TFEU. With respect to the conferral of **a delegated power**, Article 290(1) TFEU states that a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. In accordance with the second subparagraph of that provision, the objectives, content, scope and duration of the delegation of power must be explicitly defined in the legislative act granting the delegation. That requirement implies that the purpose of granting a delegated power is to achieve the adoption of rules coming within the regulatory framework as defined by the basic legislative act (judgment in *Commission* v *Parliament*

We return to the subject of delegated legislation below in section 4.

To give you a fuller picture of the meaning of **essential v. non-essential**, take a look at the case study below.

Box 2: Case Study 1: A NC on Cyber Security: Non-Essential Technical Rules?

The CEP acknowledges the importance of cyber security for the energy sector, and the need to duly assess cyber risks and mitigate the risks identified, and their possible impact on the security of supply in particular, as well as the adoption of technical rules for electricity (i.e. a network code) on cyber security.

In accordance with the powers to adopt delegated acts outlined in Article 68 of E-Regulation 2019, the Commission is allowed to adopt delegated acts to establish a network code on cyber security, among several other subject areas detailed in Article 59(2) of E-Regulation 2019. . Article 59(2)(e) states that this can extend to "sector-specific rules for cyber security aspects of cross-border electricity flows, including rules on common minimum requirements, planning, monitoring, reporting and crisis management."

The EC's Smart Grids Task Force prepared background documents asinput to define the Terms of Reference for the Working Group on Cyber Security[34] and the Smart Grids Task Force (Expert Group 2 on Cybersecurity) also produced, through an interim report and a final report, Recommendations for the European Commission on the Implementation of a Network Code on Cybersecurity.[35] The EC opened consultations on the inclusion of an NC in its list of priorities in February 2020 [see below].[36]

Can all elements of this type of proposal be considered as technical or non-essential? What tests would you apply? Look to guidelines established by the ECJ in Case C-44/16P *Dyson v*

and Council, C-427/12, EU:C:2014:170, paragraph 38). **With respect to the conferral of an implementing power,** Article 291(2) TFEU states that legally binding Union acts are to confer such power on the Commission or, in duly justified specific cases and the cases provided for in Articles 24 TEU and 26 TEU, on the Council, where uniform conditions for implementing those acts are needed. In the exercise of the implementing power conferred on it, the institution concerned must provide further detail in relation to the content of a legislative act, in order to ensure that it is implemented under uniform conditions in all the Member States (see judgment in *Commission* v *Parliament and Council*, C-427/12, EU:C:2014:170, paragraph 39). **It also follows from the Court's case-law that, in exercising an implementing power, the Commission may neither amend nor supplement the legislative act, even as to its non-essential elements (judgment in *Parliament* v *Commission*, C-65/13, EU:C:2014:2289, paragraph 45)."** Paras 28–31. EU:C: 2015:499.

[34] Smart Grids Task Force, 2017. Documents for input to define the Terms of Reference for the Working Group on Cybersecurity. Available at <https://ec.europa.eu/energy/sites/ener/files/documents/eg2_-_tor_cyber.pdf> accessed on 14 September 2020.

[35] Smart Grids Task Force, Expert Group 2 – Cybersecurity, 2017. Interim Report, Recommendations for the European Commission on Implementation of a Network Code on Cybersecurity. Available at <https://ec.europa.eu/energy/sites/ener/files/documents/1st_interim_report_final.pdf> last accessed on 16 September 2020; and <https://ec.europa.eu/energy/sites/ener/files/sgtf_eg2_report_final_report_2019.pdf> last accessed 16 September 2020.

[36] <https://ec.europa.eu/info/news/public-consultation-establish-priority-list-network-codes-2020-feb-11_en>

Commission of 11 May 2017, [37] paragraphs 58-65:

> 58) It must be recalled, first, that the possibility of delegating powers provided for in Article 290 TFEU aims to enable the legislature to concentrate on the essential elements of a piece of legislation and on the non-essential elements in respect of which it finds it appropriate to legislate, while entrusting the Commission with the task of 'supplementing' certain non-essential elements of the legislative act adopted or 'amending' such elements within the framework of the power delegated to it (judgment of 17 March 2016, *Parliament* v *Commission*, C-286/14, EU:C:2016:183, paragraph 54).
>
> 59) It follows that the essential rules on the matter in question must be laid down in the basic legislation and cannot be delegated (see, to that effect, judgments of 5 September 2012, *Parliament* v *Council*, C-355/10, EU:C:2012:516, paragraph 64, and of 10 September 2015, *Parliament* v *Council*, C-363/14, EU:C:2015:579, paragraph 46).
>
> 60) It must be determined, secondly, whether the requirement that the information supplied to consumers must reflect energy consumption while the machine is in use, as follows from Article 1 and the third subparagraph of Article 10(1) of Directive 2010/30, is an essential element of the directive.
>
> 61) The essential elements of basic legislation are those which, in order to be adopted, require political choices falling within the responsibilities of the EU legislature (judgment of 5 September 2012, *Parliament* v *Council*, C-355/10, EU:C:2012:516, paragraph 65).
>
> 62) Identifying the elements of a matter which must be categorised as essential must be based on objective factors amenable to judicial review, and requires account to be taken of the characteristics and particular features of the field concerned (judgment of 22 June 2016, *DK Recycling und Roheisen* v *Commission*, C-540/14 P, EU:C:2016:469, paragraph 48 and the case-law cited).
>
> 63) In view of the general scheme of Directive 2010/30, it must be considered that the requirement mentioned in paragraph 60 above is an essential element of the directive.
>
> 64) It follows from recitals 5 and 8 of Directive 2010/30 that the 'provision of accurate, relevant and comparable information on the … energy consumption' of products 'plays a key role in the operation of market forces' and hence in the guiding of consumption towards products which 'consume … less energy … during use'. Similarly, Article 1(1) of the directive provides that its aim is to harmonise national measures on information for end users on energy consumption 'during use', so that they can choose 'more efficient' products. Information for consumers on the energy efficiency of products during use is therefore the essential objective of the directive, and reflects a political choice falling within the responsibilities of the EU legislature.

[37] Note that the case was referred back to the General Court, and the latter subsequently annulled the measure – see Case T-544/13 RENV - *Dyson v Commission* [2018] ECLI:EU:T:2018:761 of 8 November 2018

> 65) It follows that the question whether, as its wording appears to indicate, the regulation at issue seeks only to supplement and not to amend Directive 2010/30 is not relevant in the present case. As pointed out in paragraph 58 above, in any event neither of those two categories of delegated powers authorises the Commission to disregard an essential element of the enabling act.

2.4. Summary of the Similarities and Differences between NCs and GLs

Similarities:

- Both NCs and GL carry the same legal weight (both are legally binding EU regulations);
- Both are directly applicable – i.e. there is no legal requirement to transpose them into national law, although some countries still do in cases where they impact a wide range of stakeholders;
- Both are subject to the same formal adoption procedure (the 'old' Comitology procedure).

Differences:

- Procedural differences remain – there are no formal rules, for example, on consultation with stakeholders for the adoption of GLs and no formal rules for such procedures on their amendment.

As we shall see in section 5, the **major** difference is that GLs include provisions requiring TSOs or Nominated Electricity Market Operators (NEMOs) to develop TCMs. In most cases, these methodologies have to be jointly developed by all TSOs (and in certain cases, ENTSO-E) or all NEMOs at a pan-European level or by the relevant TSOs/NEMOs at regional level. Furthermore, ENTSO-E, ACER and the EC also have rights and duties in the process – mostly related to monitoring, stakeholder involvement and reporting.

Following the entry into force of the E-Regulation 2019, these differences between NCs and GLs remain, as will be highlighted below.

3. Development of the EU Electricity NCs and GLs

Under the third package, and in order to determine what issues should be prioritised for the development of a NC or GL, the EC conducted a public consultation, and consulted ACER, ENTSO-E, the NEMOs and relevant stakeholders to establish an Annual Priority List.[38] This was the first step of the four-stage process toward the development of the NC or GL and sets in motion the next two complex and lengthy stages in the procedure to produce a legally-binding

[38] Electricity Regulation 714/2009, Article 6(1). As an example, please see the Commission Implementing Decision (EU) 2017/89 of 17 January 2017 on the establishment of the annual priority lists for 2017 for the development of network codes and guidelines [2017] L14/14.

measure, which we will outline in the following sections. The reforms introduced in the 2019 E-Regulation, as examined in further detail below, follow this four-step procedure but aim to reduce the length and complexity of the steps.

As the TSOs represented by ENTSO-E play an important role in the development of the NCs and TCMs, it is useful to consider first the legal status of ENTSO-E, a body established under the third package legislation as well as that of the EDSO. We will then briefly describe the status of the NEMOs who are charged with the development of certain measures, but are also a key stakeholder in the process of the development of the NCs and GLs.

The role of ENTSO-E shall be, in accordance with Article 30 of E-Regulation 2019, to "develop network codes in the areas set out in Article 59(1) and (2) with a view to achieving the objectives set out in Article 28".

Under ENTSO-E,[39] the development process of the network code is implemented according to the Articles of Association of ENTSO-E (AoA), as well as its Rules of Procedure.[40] As ENTSO-E is not a public body, but a non-profit association,[41] it is not open to the same degree of scrutiny as national entities such as regulators, or pan-European public bodies such as ACER, and the Commission. To offset this, ENTSO-E has refined and standardised its network code development process, including its terms for stakeholder engagement.[42]

ENTSO-E's Assembly is the general leading body of the association and is responsible for the network codes, as they have major financial, technical and commercial implications for the TSOs. ENTSO-E's Assembly is composed of all its members. Therefore, according to Article 12(2) of ENTSO-E's AoA, all ENTSO-E members (including under certain conditions, non-EU TSOs), are actively involved in the drafting process of the NCs (and TCMs) and usually have the right to vote on the final document.[43] The Assembly aims at achieving unanimity on its decisions. However, where unanimity cannot be achieved, a special majority is necessary for the adoption of Network Codes.[44]

3.1. The EU DSO Entity and NEMOs

[39] According to Article 5 of Electricity Regulation 714/2009, one of the legal obligations of ENTSO-E, prior to its creation, was to submit the Rules of Procedures and Articles of Association (AoA), including rules for consultation of other stakeholders, to the EC, for opinion.

[40] The Rules of Procedure are composed of Consultation Guidelines, Guidelines for the Development of Network Codes and Internal Regulations.

[41] ENTSO-E is deemed a non-profit association with legal personality, incorporated under Belgian law. See ENTSO-E, Articles of Association, Article 2(2). See also Vlachou (n. 17).

[42] cf. Jones (n. 16), p. 638

[43] cf. Vlachou (n. 17), p. 2

[44] According to Article 12(6) ENTSO-E's AoA, the special majority entails "the approval by Members representing at least 72% of the First Part of the Voting Power attending or represented at the Assembly and 65% of the Second Part of the Voting Power attending or represented at the Assembly." The voting power for each Member is expanded upon in paragraph 6 of Article 12 ENTSO-E AoA.

The E-Regulation 2019 establishes a new European body for DSOs at EU level, the so-called "EU DSO Entity".[45] This is intended to be an expert entity working for the common interest of the Union and to increase efficiencies in the electricity distribution networks in the Union while ensuring close cooperation with TSOs and ENTSO-E. Notably, the EU DSO Entity should function as a genuine counterpart to ENTSO-E on the drafting of NCs affecting distribution matters. On 24 June 2020, the statutes containing the governance rules of the EU DSO Entity, were formally submitted to ACER and the EC. The Entity is expected to become operational by spring 2021.

NEMOs are the organisations mandated to run the day-ahead and intraday integrated electricity markets in the EU. The NEMOS are designated by the competent national authorities.[46] Their governance is based on common proposal developed by all NEMOs for a plan that sets out how NEMOs will jointly set up and perform the Market Coupling Operator (MCO) Functions (the 'MCO Plan') pursuant to Article 7(2) of Commission Regulation (EU) 2015/1222 establishing a guideline on capacity allocation and congestion management (the 'CACM Regulation'). Prior to the entry into force of the CACM Regulation, power exchanges initiated several voluntary regional projects to develop, implement and operate day-ahead and intraday market coupling solutions. These regional projects promoted the completion and efficient functioning of the internal market in electricity. This MCO Plan proposes a governance structure for NEMOs to jointly set up and perform the DA MCO Function and the ID MCO Function which builds on solutions developed as part of these voluntary projects. The governance structure proposed in the MCO Plan includes the following contracts: one 'All NEMO Cooperation Agreement' (the 'ANCA'), two 'NEMO Operational Agreements' (one for the DA and one for the ID), plus a set of contracts between NEMOs and third party service providers needed for the delivery of the MCO Functions.

The MCO Functions comprise developing and maintaining the algorithms, systems and procedures for single day-ahead and intraday coupling, processing input data on cross-zonal capacity and allocation constraints provided by coordinated capacity calculators, operating the price coupling and continuous trading algorithms and validating and sending single day-ahead and intraday coupling results to NEMOs (the 'MCO Functions').

3.2. The NC Adoption Process

Step 1: Establishing the Priority List

Article 59(3) of the E-Regulation 2019 provides that the EC shall, after consulting the Agency, the ENTSO for Electricity, and now also, the EU DSO entity, and 'other relevant stakeholders', establish a priority list every three years, identifying the areas set out in Article 59(1-2) to be included in the development of network codes.[47]

[45] See Recital 60 of the E- Regulation 2019 and its Articles 52 – 55.

[46] According to Article 4 of the CACM Regulation, each Member State electrically connected to a bidding zone in another Member State had to ensure that one or more NEMOs are designated by 14 December 2015 to perform the SDAC and/or SIDC. The designation shall be carried out by a designating authority (that is regulatory authorities, unless otherwise provided by Member States)

[47] If the subject matter of the network code is directly related to the operation of the distribution system and not primarily relevant for the transmission system, the Commission may require the EU DSO entity in

Priority List 2020: Two Topics Proposed for Consultation (Feb 2020)

Cybersecurity: The increased digitalisation of the energy sector brings many advantages toward achieving the objectives of the European Green Deal and brings new business opportunities for the European economy but, at the same time, it brings new challenges for the energy sector regarding cybersecurity. To address potential cyber threats and to be fit for the digital age, Article 59(2)(e) of the E-Regulation provides for the establishment of a network code on sector-specific rules for cyber security aspects of cross-border electricity flows, including rules on common minimum requirements, planning, monitoring, reporting and crisis management.
This NC will be adopted as a delegated act.

Demand Side Flexibility: The cost-effective large-scale integration of renewable energy sources will require demand side flexibility. The aim of the network code is to create a transparent and non-discriminatory flexibility market where the distribution and transmission system operators can procure flexibility products to solve congestion in their grids. It is also to facilitate market access and operation of new market players, such as active consumers and independent aggregators, thanks to transparency and harmonisation of the pre-qualification rules and standardisation of flexibility products.

The network code will be based on Article 59(1)(e), referring inter alia to rules in relation to demand side flexibility."[48] This NC will be adopted as an implementing act.

The responses to the consultation are available on the DG Energy website.[49]

Step 2: The Development of Framework Guidelines (FG)

The FG sets out well-defined and objective principles for the development of a NC in line with the priority list. Each FG is set out to contribute to non-discrimination, effective competition and the efficient functioning of the market. This FG forms the basis of the draft NC or GL.[50]

Art 59(4) of the E-Regulation 2019 provides that the EC shall request ACER to submit to it within a reasonable period of time, not exceeding six months of receipt of the EC's request, non-binding FGs setting out clear and objective principles for the development of network codes relating to the areas identified in the priority list. Upon a reasoned request from ACER, the Commission may extend the period for submitting the FGs.

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cooperation with the ENTSO for Electricity to convene a drafting committee and submit a proposal for a network code to the agency.

[48] https://ec.europa.eu/energy/sites/ener/files/07-02-2020-targeted_stakeholder_consultation-2020-2023-for_europa.pdf

[49] https://eepublicdownloads.blob.core.windows.net/public-cdn-container/clean-documents/news/200512_ENTSO-E_s_reponse_to_the_EC_consultation_on_priority_list_for_network_codes.pdf

[50] Under the former Article 6(2) of Regulation 714/2009, the EC requested ACER to issue a non-binding framework guideline (FG).

ACER shall then consult ENTSO-E, the EU DSO entity, and the other relevant stakeholders in regard to the FG, during a period of no less than two months, in an open and transparent manner. ACER shall then submit a non-binding FG to the EC. If the EC considers that the FG does not contribute to market integration, non-discrimination, effective competition and the efficient functioning of the market, it may request ACER to review the FG within a reasonable period and resubmit it. If ACER fails to do so within the set period, the Commission shall develop the FG in question.

Box 3: Judicial Review of Preparatory Acts

Following the consultation process with stakeholders, if, at this stage of development, the FG of the draft NC fails to meet the expectations or stated interests of the stakeholders, the latter do not have the right to judicial review of the FG or draft NC.[51] The stakeholder can only bring an action against the legally binding NC or GL that is ultimately developed according to the FG. [52] 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 stage".[53]

The action to annul the final measure would be submitted to the CJEU, according to the provisions of Article 263 TFEU,[54] upon which, if the applicant has the requisite standing, the Court would be required to verify the legality of the provisions of the NC or GL. The Court can annul the NC or GL on several grounds[55] including;

(i) lack of competence,

(ii) infringement of an essential procedural principles.

So far, the GC has annulled a decision of the Board of Appeal in Case T-332/17 E-Control and the related Case T-333/17 APG, discussed below. There are presently some nine appeals pending before the GC.

Step 3: Drafting the NC

The EC shall request the ENTSO-E or, where provided for in the priority list, the EU DSO entity in cooperation with the ENTSO-E, to submit a proposal for a NC in accordance with the relevant FG, to ACER within a reasonable period, not exceeding 12 months.

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[51] Lavrijssen S. and T. Kohlbacher, 2018. EU Electricity Network Codes: Good Governance in a Network of Networks. TILEC Discussion Paper No.2018-001. Available at: http://dx.doi.org/10.2139/ssrn.3098081, p. 62. The General Court has acknowledged an exception to the case law when a 'preparatory act' affects the applicant independently from the final decision. As the General Court stressed in its Pfizer judgment (Case T-123/03, at para. 26), 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 case."

[52] See also in relation to challenges to ACER opinions, Case T-63/16 Energie-Control Austria für die Regulierung der Elektrizitäts- und Erdgaswirtschaft (E-Control) v Agency for the Cooperation of Energy Regulators [2017] ECLI:EU:T:2017:456 and Case T-671/15 Energie-Control Austria für die Regulierung der Elektrizitäts- und Erdgaswirtschaft (E-Control) v Agency for the Cooperation of Energy Regulators [2016] ECLI:EU:T:2016:626.

[53] Case T-123/03 Pfizer Ltd v Commission [2004] ECLI:EU:T:2004:167, para. 24

[54] Albors – Llorens, A., 2017. Judicial protection before the CJEU, in Barnard, C. and S. Peers (eds.), European Union Law. Oxford University Press 2017, p 270

[55] TFEU, Article 263(2)

Article 59(10) of the E-Regulation 2019 retains the role of TSOs as the drafters of the NCs, and states that ENTSO-E shall convene a 'drafting committee' composed of representatives of ENTSO-E, ACER, the EU-DSO entity,[56] NEMOs (where appropriate), and 'relevant stakeholders'. In addition, Article 59(3) of E-Regulation 2019 states that; "if the subject matter of the network code is directly related to the operation of the distribution system and not primarily relevant to the transmission system, the Commission may require the EU DSO entity, in cooperation with ENTSO-E, to convene a drafting committee and submit a proposal for a network code to ACER."

However, in order to streamline the drafting process,[57] ACER will now play a more active role. ENTSO-E will only develop proposals for NCs, while ACER now has the power to revise the draft NC and directly submit its revised version to the Commission.

Step 4: ACER Reviews and Submits to the EC for Adoption

Article 59(11) provides that, after ACER receives the draft NC from the drafting committee, it shall check that the NC is in line with the relevant FGs and that it contributes to market integration, non-discrimination, effective competition and efficient functioning of the market. It must then submit the revised NC to the EC within 6 months of receipt of the proposal. Accordingly, ACER is no longer required to send a reasoned opinion to ENTSO-E or to submit a recommendation for adoption to the EC, as had been the procedure under the earlier third package. (See Annex II for the full text of Art 59 (4) to (12))

Article 5 of the ACER Regulation 2019

Article 5(1) of the ACER Regulation requires ACER to follow certain procedures when revising this draft proposal. It shall formally consult relevant stakeholders on the version to be submitted to the EC. [see Annex IV for the text of Article 5]

ACER therefore now enjoys extensive powers in the development process of the NC and it could revise the entire draft, while considering the views provided by all interested parties during the drafting of the proposal by ENTSO-E and/or by the EU-DSO Body.

Box 4: ACER

Article 5(1)c) of ACER Regulation 2019 envisages that ACER can revise the proposed NC according to Article 59(11) of the E-Regulation 2019.

In the proposal submitted to the Commission, the Agency shall take into account the views provided by all involved parties during the drafting of the proposal led by the ENTSO for Electricity or the EU DSO entity and shall formally consult the relevant stakeholders on the version to be submitted to the Commission. To this extent, the Agency may use the committee

[56] As noted, according to to Recital 60 and Article 52 of the Electricity Regulation 2019/943, a new EU-DSO entity shall be established, to increase efficiencies in the electricity distribution networks in the Union and ensure close cooperation with transmission system operators.
[57] See Electricity Regulation 2019/943, Recital 62.

established under the network codes where appropriate. Subsequently, the Agency shall submit the revised network code to the Commission, and report the outcome of the consultations, in accordance with Article 59.

For more on the revision of guidelines/TCMs as well as a practical example, see sections 6.3.8 and 6.4.2.

Box 5: Case Study 2: Development and Adoption of 'First Generation' Guidelines

All first generation NCs and GLs have been launched under Article 6, even if some were finalised under Article 18 of E-Regulation 2009. This 'switch' took place after the EC has received a draft proposal for the NC by ENTSO-E, with recommendation for adoption from ACER.[58]

The Capacity Allocation and Congestion Management (CACM) Guideline was the first measure to begin life as a NC but be finally adopted as a GL. The EBGL also began life as an NC. In the case of the CACM GL, the TSOs had drafted the intended NC on CACM, whereas the EC proceeded to draft, internally, GLs on Coupling Governance.

ENTSO-E drafted a NC on cross-border capacity allocation and congestion management, and the EC had separately developed 'Guidelines on the Governance Framework of the Day-Ahead and Intraday Market' (Governance Guidelines).[59] The EC "has taken on the responsibility of studying the need for binding legislation in view of a possible legally binding guideline on this topic",[60] targeting especially the relationship between TSOs and Power Exchanges.[61]

In this specific case, after the proposal for the CACM NC had been drafted by ENTSO-E and finalised,[62] the EC received a recommendation from ACER to adopt a NC.[63] Nevertheless, the EC decided to adopt the rules on capacity allocation, congestion management, and governance of the market coupling in the form of a GL.[64] In between two meetings of the Comitology Committee, from March to September 2014, the Directorate General for Energy in the EC proceeded to merge the EC's Governance Guidelines with the NC previously drafted by ENTSO-E and recommended for adoption by ACER.[65]

[58] Electricity Regulation 714/2009, Article 6(9)

[59] European Commission, Directorate General for Energy, 2011. Public consultation on the governance framework for the European day-ahead market coupling, D (2011) 1176339.

[60] Ibid.

[61] ACER, 2013. Recommendation of the Agency for the Cooperation of Energy Regulators No 01/2013 on the network code on Capacity Allocation and Congestion Management

[62] ENTSO-E, 2012. Network Code on Capacity Allocation and Congestion Management (final draft)

[63] ACER (n. 64)

[64] European Commission, 'Commission Regulation (EU) No…/… of XXX establishing a Guideline on Capacity Allocation and Congestion Management' (final draft, 2014).

[65] European Commission, Directorate General for Energy, 2014. Summary record of the Electricity Cross-Border Committee meeting, S042769/01. The Comitology Committee discussed the Draft Regulation establishing a Network Code on Capacity Allocation and Congestion Management and a Governance Guideline (CACM), whereas on 10th September 2014, according to European Commission, Directorate General for Energy Summary record of the Electricity Cross-Border Committee (2014) S042935/01, the participants at the meeting were

This strategy is interesting with respect to the consultation obligations that the entities involved in the drafting of a NC or GL were bound by. While ENTSO-E and ACER were under strict consultation obligations during the development process of a NC, according to Article 6 and 10 of the then applicable E-Regulation 2009, the EC was only bound to consult ACER and ENTSO-E during the drafting of a GL, as per Article 18(3) of the E-Regulation 2009.[66] The extent to which the EC had a duty to consult other stakeholders during this process was not clear. The new E-Regulation does not provide any further clarification.

4. Comitology: The Formal Adoption Process of NC/GLs to Date

The 'Comitology' procedure is designed to allow flexibility and accelerate the adoption of the more technical legislation necessary for operation.[67] The procedure means that draft proposals for NCs and GLs shall not be subject to the burdensome and time-consuming ordinary legislative procedure,[68] where the EP and the Council are directly involved as co-legislators.[69]

It is important to bear in mind that despite the extensive consultation procedure that precedes the development of a draft NC, its formal adoption in Comitology could result in significant changes to the version submitted by ACER. The EC adopted a NC upon recommendation from ACER,[70] but even at this stage, the EC can also significantly amend ENTSO-E's draft NC, both in terms of substance as well as form. As Vlachou comments, in reality, informal practices, such as Member State meetings, have helped build consensus well before the formal voting within the electricity cross-border or the gas regulatory committees, thus securing the adoption of NCs. Given the need for adaptation to the market or technical evolution in the field and for consistency among the various instruments, amendments can be subsequently introduced to NCs that have entered into force.

The first generation of NCs and GLS have been adopted as implementing measures under the 'old' Comitology procedures. In accordance with Article 23 of E-Regulation 2009, the formal adoption of the first generation of NCs and GLs followed the Regulatory Procedure with

already discussing about the Regulation establishing a Guideline on Capacity Allocation and Congestion Management (CACM).

[66] As an example, see European Commission, Directorate General for Energy (n. 62).

[67] Vlachou (n. 17), p. 6

[68] The ordinary legislative procedure (also known as the 'co-decision procedure') is the main legislative procedure by which directives and regulations are adopted following the approval of the EP and the Council of the EC's proposal. As outlined in Article 294 TFEU, it implies that representatives of the three institutions will cooperate during sessions of inter-institutional negotiations (also called 'trilogues') and will debate upon the text of the legislative proposal.

[69] According to Article 289(2) TFEU, the legal acts adopted through co-decision are also called 'legislative acts'. The NCs and GLs cannot be called legislative, as they have not been subjected to the same procedure. However, the non-legislative character, used for legal theory purposes, does not undermine their legally binding character.

[70] Electricity Regulation 714/2009, Article 6(9)

Scrutiny (RPS).[71] See, for example, the EBGL: "the measures provided for in this Regulation are in accordance with the opinion of the Committee referred to in Article 23(1) of Regulation (EC) No 714/2009."

It is important to note that the TFEU provision on delegated acts (Article 290) is self-executing – it entails no comitology procedures – whereas the TFEU provision on implementing powers (Article 291) foresees the adoption of a regulation to establish the conditions for control by the Member States of how the EC exercises implementing powers. The mechanism of control, as provided under the relevant Regulation of 182/2011 for implementing measures, is based on a form of 'comitology' – i.e. committees composed by representatives of Member States to which the Commission submits draft implementing measures. Under this 'new Comitology procedure' and in contrast to the 'old Comitology' system, there can be no intervention from the EP or Council as an appeal body. [72]

Box 6: Understanding the procedures for the adoption of Delegated and Implementing Acts

The E- Regulation 2019 states that the future NCs shall be adopted as 'delegated acts'[73] or as 'implementing acts'.[74] Implementing acts are adopted in accordance with what is often referred to as the 'new Comitology procedure'. Article 291 provides that the Commission shall have authority to issue 'implementing acts' where "uniform conditions for implementing legally binding Union acts are needed." In contrast to delegated acts, implementing acts also remain subject to (new) comitology, and Article 291 does not provide for legislative scrutiny over them.

[71] TFEU, Article 290: "A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power."

[72] In some specific cases there might be a need to go to an 'appeal committee', but this is just a 'normal' committee, chaired by the Commission, albeit of a higher level of representation. It provides the opportunity to reconsider the draft measures or to make changes if need be. At the same time, all comitology procedures will be conducted in full transparency: all documents the submitted to the committees are simultaneously disclosed to the European Parliament and to the Council. These two institutions, which are on a completely equal footing, have a 'scrutiny right': they may indicate at any time that they consider the draft implementing act to exceed the powers conferred by the relevant legal basis to the Commission. In such a case, the EC will review the draft measure in question and will explain to the European Parliament and the Council what it intends to do.

[73] Recital (72) of the Recast Regulation 2019/943 provides: "In order to ensure the minimum degree of harmonisation required for effective market functioning, the power to adopt acts in accordance with Article 290 of TFEU should be delegated to the Commission in respect of non-essential elements of certain specific areas which are fundamental for market integration. Those acts should include the adoption and amendment of certain network codes and guidelines where they supplement this Regulation…" See also Recast Electricity Directive 2019/944, Articles 61, 63, 67.

[74] Recital (73) of the Recast Regulation 2019/943 provides: "In order to ensure uniform conditions for the implementation of this Regulation, implementing powers in accordance with Article 291 of TFEU should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council. The examination procedure should be used for the adoption of those implementing acts."

Delegated Acts
It should be recalled that for this type of act, Article 290 TFEU abandons the idea of committees of representatives that provide formal control over, not just informal advice on, the exercise of the Commission's delegated powers. While the Commission will still actively seek out the advice of experts from the national authorities of Member States, these experts have a consultative rather than an institutional role in the decision-making process.

Thus, there are several key differences between the old 'comitology' or RPS procedure, and the review structure created by Article 290 TFEU. Under Article 290, there is *no* role for a comitology committee as a threshold oversight institution; the Parliament and Council review the Commission's measure directly. Under Article 290, there is *no* limitation on the grounds for objection to a Commission measure to the three grounds specified in RPS. A policy difference is, in itself, a good reason for objecting to a Commission's delegated act. Finally, under Article 290, the Council and Parliament are on formally equal footing except for the fact that the Parliament, but not the Council, must satisfy a higher voting rule (absolute majority) than that required for ordinary legislation.

The Procedure under the CEP for the Adoption of Delegated Acts:
Article 59(2) of the E-Regulation 2019 sets out the list of NCs to be adopted by delegated acts and Article 61(3) lists the GLs to be adopted under this procedure. After being adopted by the EC as a delegated act under the CEP provisions, on the advice of the expert committee,[75] the NC or GL will be simultaneously sent to the EP and to the Council.[76] The NC proposal, therefore, will only enter into force if:

(i) no objection has been expressed by the EP or by the Council within a period of two months from the date of notification or;
(ii) before the expiry of the two-month period, if either the EP and the Council have indicated to the EC that they will not object.[77]

The Procedure for Adopting Implementing Acts (IAs):
Article 59(1) of the E-Regulation 2019 contains a list of the NCs to be adopted as IAs. These implementing acts shall be adopted in accordance with the 'examination procedure' in its Art 67(2). In short, this procedure proceeds as follows: the basic legislation (here the E-Directive 2019 and E-Regulation 2019) stipulates on which part of the legislation the EC has to establish implementing measures. The EC drafts an implementing act, which is then subject to a review by a committee of experts from the Member States. If the experts issue a positive response, the EC will adopt the implementing act. When a negative response is issued, the EC will then either amend its proposal or the proposal will be sent to a committee of appeal. The committee of appeal can reject the proposal or allow the EC to adopt the proposal. The EP and the Council

[75] As provided for in the Recast Electricity Directive 2019/944, Article 68.

[76] Experts from the EP and the Council shall have access to the meetings of Commission expert groups to which MSs' experts are invited and concern the preparation of delegated acts, whereas the EC may be invited to the meetings in the EP and the Council to have a further exchange of views on said preparation. See the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, Point 28.

[77] Recast Electricity Directive Article 67(6); Recast Electricity Regulation, Article 63(6)

have therefore no role in the decision-making procedure itself and their involvement is limited to the right of scrutiny under Article 11 of Regulation (EU) No 182/2011.

The reason behind allowing the EC to adopt implementing acts as long as there is no qualified majority of Member States against the measure is to ensure effective implementation of the legislation. Only opposition from a qualified majority of Member States can block the adoption by the EC of implementing acts. There is, therefore, a parallel with the provisions on delegated acts, since for these a (qualified) majority is also needed, albeit not in a committee, but in the European Parliament or in the Council, to prevent an act from entering into force.

5. Flexibility in Amending the Adopted NCs and GLs

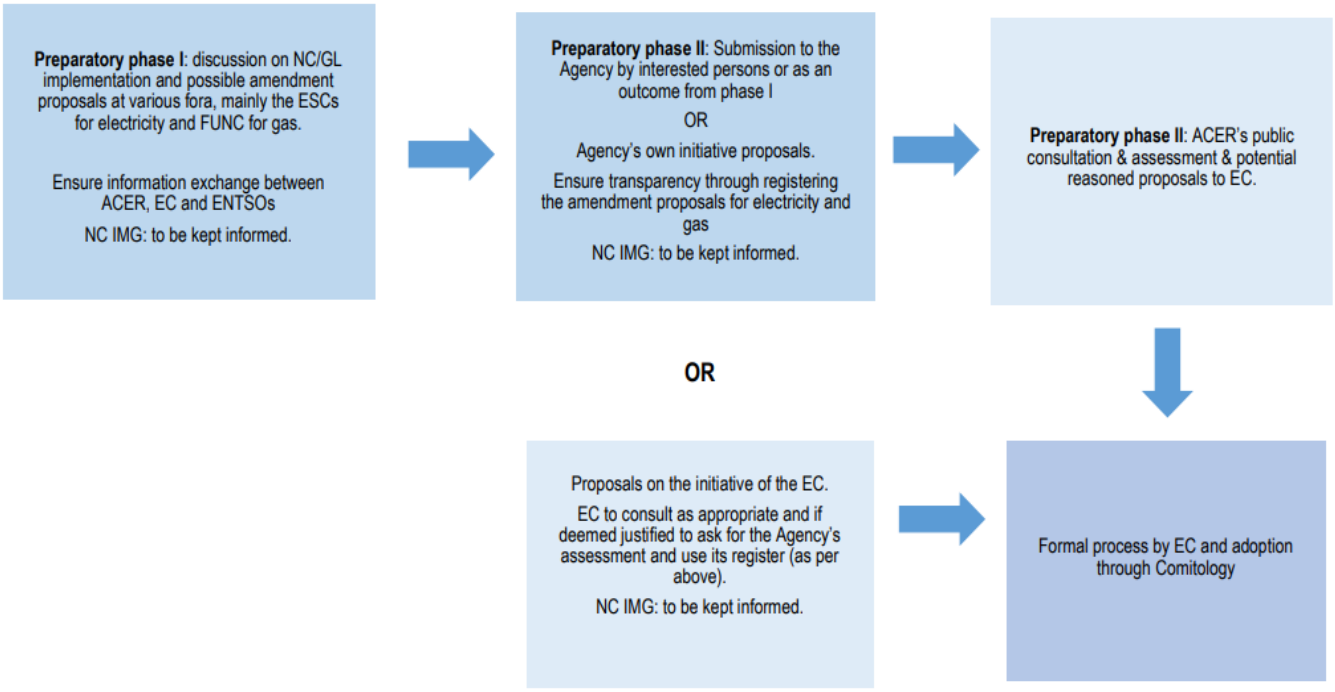
It is worth noting that an informal NC Implementation and Monitoring Group (IMG) was created in 2017 to focus on "strategic" issues such as taking stock and discussing implementation progress, issuing non-binding implementation guidance, and reflecting on the future development and/or amendment of NCs, alongside the applicable legislative procedures.

The Group is chaired by the EC and composed of high-level representatives of ACER and ENTSO-E (and ENTSO-G); stakeholders may ask questions and be involved via consultations and workshops. The Group is not foreseen by EU legislation. The NC IMG focus on strategic issues concerning NC/GL implementation. It is not meant to replace but to complement existing implementation working groups. The latter and the relevant parties remain primarily responsible for the implementation of the rules contained therein.[78] Further guidance is provided in the NC IMG informal guidance for the preparatory phases of the NC and GLs amendment process – the latest version being dated 5 April 2019.

However, the EC is the only responsible party empowered to present the formal amendment proposal and launch the formal process aiming at adopting a NC/GL amendment. This phase follows the EC's internal rules and, where required, a positive vote from Member States in the Cross-Border Committee and after scrutiny by the European Parliament and the Council.

Figure 6: Illustration of NC/ Amendment Process according to IMG Guidance

[78] See the Reference Paper for the NC-IMG - https://www.entsog.eu/sites/default/files/entsog-migration/publications/nc/171002_Final%20reference%20paper%20for%20publication.pdf



Source: NC IMG Guidance

5.1. The Formal Amendment of the Network Codes

Article 7 of E-Regulation 2009 established the right of ACER to submit draft amendments of NCs to the EC at its own initiative or at the request of other interested parties (TSOs, ENTSO-E, system users and consumers). ACER issued a guidance on this process and any party submitting amendments to the NC had to follow the procedure set out in this Guidance.[79] ACER then sends the reasoned proposals for amendment to the EC. The EC can also propose amendments.[80]

Amendments to the third package NCs had to be formally adopted following the comitology procedure.[81] The EC would submit proposals for the NC amendments to the Electricity Cross-Border Committee to obtain its opinion.[82] Once the EC receives a favourable opinion from the Comitology Committee, it could submit proposed amendments to the EP and to the Council who, in turn, could block the amendment by exercising their veto rights on the same three grounds as in the case of the initial adoption.[83]

Amendment of the Guidelines

[79] ACER, 2013. ACER Guidance on Evaluation Procedure for NC Amendment Proposals under Article 7 of Electricity and Gas Regulations

[80] Electricity Regulation 714/2009, Article 7(4)

[81] See above, Chapter 4 on Comitology: The Formal Adoption Process of NC/GLs to date.

[82] Electricity Regulation 714/2009, Article 7(4)

[83] See above, Chapter 4 on Comitology: The Formal Adoption Process of NC/GLs to date.

Article 18(5) of the E-Regulation 2009 provided that amendments to GLs can be made either in comitology, by the EC (without the involvement of ACER, ENTSO-E or other stakeholders) or by amending the GL's implementing methodologies (i.e. TCMS).

Each GL provides specific grounds for amendment. The EC may amend the CACM GL, for example, "if the NEMOs fail to submit a plan in accordance with Article 7(3) to establish the MCO functions referred to in Article 7(2) for either the intraday or the day-ahead market timeframes." In this situation, the EC may propose an amendment to the CACM GL, considering, in particular, whether to appoint ENTSO-E or another entity to carry the MCO functions for single day-ahead coupling or for intraday coupling instead of the NEMOs.[84]

Article 60 of the E-Regulation 2019: The Amendment of Network Codes

The EC is entitled to amend the NCs within the areas listed in Article 59(1) and (2) in accordance with the relevant procedure set out in that Article and ACER may also propose amendments to the NCs in accordance the procedures set out in Art 60(2).

Persons who are likely to have an interest in any NC adopted under Article 59, including the ENTSO for Electricity, the EU DSO entity, regulatory authorities, transmission system operators, distribution system operators, system users and consumers, may propose draft amendments to that NC to ACER. ACER may also propose amendments on its own initiative.

ACER may make reasoned proposals to the EC, explaining how such proposals are consistent with the objectives of the NCs set out in Article 59(3) of the E-Regulation 2019.

Where it considers an amendment proposal to be admissible and where it proposes amendments on its own initiative, ACER shall consult all stakeholders in accordance with Article 14 of ACER Regulation 2019.

As for the GLs, there is no specific procedures provided in Art 61 for their adoption or subsequent amendment. Currently, the two items on the priority list will be adopted as NCs (see section 3 'The NC Adoption Process' above).

In May 2020, the EC launched a consultation[85] on a planned Commission Implementing Regulation to clarify ambiguous wording in the provisions on the process for developing and approving more detailed joint rules or TCMs under the CACM, FCA and EBGL guidelines and to align those provisions with the E-Regulation 2019 and ACER Regulation 2019 and, in particular, its Art 5(2). Pursuant to Art 5(2) of the ACER Regulation, EU-wide TCMs are now directly adopted by ACER. This change has not yet been mirrored in the Electricity Guidelines. In order to avoid legal uncertainty from contradicting legal provisions, the text of the Electricity Guidelines should therefore be aligned to Art. 5(2) ACER Regulation. The ACER Regulation and the Electricity Regulation have also clarified the right of national regulatory authorities and ACER to revise and amend the proposals for TCMs submitted by TSOs and NEMOs. The proposed text adaptations mirror these changes.

[84] CACM GL, Article 9(6)

[85] https://ec.europa.eu/energy/sites/ener/files/20200507_com_e-gls_amendments_-_consultation_document.pdf

Second, in the process of TCM development, NRAs often saw some deficits in the proposals submitted by TSOs or NEMOs and wanted to ask them to submit modified TCM proposals. The question came up whether each single NRA can individually ask for such amendments (potentially leading to a sequence of multiple amendment requests) or whether one amendment request should be agreed in a coordinated manner. While, in practice, a coordinated approach was used for amendment requests in the past, the General Court found in its recent judgement in the E-Control case that the current text of the Electricity Guidelines is not sufficiently clear to allow *only* the coordinated approach for amendment requests. However, the EC considers the current legal situation, which would allow sequential amendment requests of individual NRAs, as highly impractical. The EC has concluded that uncoordinated individual amendment requests may not only lead to significant delays in the development of TCMs; they would also give rise to difficult legal questions, thereby creating legal uncertainty. In order to ensure a smooth adoption process of the TCMs, it is therefore proposed to align the procedure for requests for TCM amendments to the previous practice of coordinated amendment requests.

Article 69: Commission Reviews and Reports

By 1 July 2025, the EC shall review the existing network codes and guidelines in order to assess which of their provisions could be appropriately incorporated into legislative acts of the Union concerning the internal electricity market and how the empowerments for NCs and GLs laid down in Articles 59 and 61 could be revised.

It may be noted that the 2019 E-Regulation in fact incorporates certain provisions previously dealt with in NCs and GLs – such as bidding zones (see its Article 14).

6. Implementation Challenges: Terms, Conditions and Methodologies

The goal of the Energy Union is to create an integrated, well-functioning IEM, in which there are no barriers to electricity trade among the Member States and with non-EU neighbouring countries. Consequently, the design of the electricity market is shifting from a national approach towards a regional and, ultimately, European-wide system.

In order to ensure security of supply and the reliability of the electricity transmission network, the NCs and GLs divide the territory of the European Union into 10 capacity calculation regions (CCRs),[86] over 30 bidding zones (BZ),[87] as well as numerous balancing areas,[88]

[86] According to Article 2(3) CACM GL, a capacity calculation region is a geographic area in which coordinated capacity calculation is applied.

[87] The majority of bidding zones are defined by national borders. Nonetheless, some are larger than the country borders (i.e. DE-LU) and some are smaller (Italy an Sweden, among others, are split into several bidding zones).

[88] The balancing area is necessary to ensure that the market participants may exchange balancing energy and keep the system in balance at all times. For more details, please see Meeus L., V. Reif and T. Schittekatte, 2019. The EU Electricity Network Codes (Technical Report). European University Institute, Robert Schuman Centre for Advanced Studies, p. 10-12. Available at: <http://cadmus.eui.eu/handle/1814/61644> last accessed on 20 September 2020.

synchronous areas,[89] and load frequency control blocks (LFC blocks).[90] It follows that the EU rules governing the functioning of the electricity transmission network and trade must invariably reflect technical diversity between these regions. To this end, a separate category of regulatory instruments has been developed within the framework of the first-generation GLs. These are the TCMs.[91]

The TCM development and adoption process is complex, but it was, nevertheless, considered to be preferable to the cumbersome procedures for amending the NCs and GLS as described in section 5. As we shall see, achieving consensus in the drafting and adoption process for various TCMs has proven difficult and resulted in delays, necessitating frequent intervention by ACER.

The CEP has therefore simplified and streamlined the TCM development and strengthened the adoption process and enhanced ACER's role in the process. These changes concern both the next generation GLs and TCMs yet to be developed,[92] but also remaining TCMs under the first generation GLs.[93]

6.1. Characteristics of the TCMs

The full implementation of the four market guidelines – the CACM GL, EB GL, FCA GL and SO GL – presupposes the further drafting, approval, adoption and implementation of a considerable number of TCMs. In turn, the design and adoption of TCMs, even if primarily technical in their subject matter, remains a complex process, given:

(i) the number of TCMs to be developed,
(ii) the various market participants engaged in the development process,
(iii) the numerous actors involved in their approval (i.e. NRAs/ACER),
(iv) as well as their varying geographical reach, which may be pan-European, regional or national.[94]

[89] Article 2(2) of the RfG NC defines 'synchronous areas' as areas covered by synchronously interconnected TSOs, such as the synchronous areas of Continental Europe, Great Britain, Ireland-Northern Ireland and Nordic and the power systems of Lithuania, Latvia and Estonia, together referred to as 'Baltic' which are part of a wider synchronous area.

[90] Meeus L., V. Reif and T. Schittekatte (2019), fn 88 p. 10

[91] For the purpose of this text, the focus will be on the provisions of the CACM GL and SO GL in relation to terms and conditions or methodologies.

[92] See sections 3 and 4 above.

[93] Art. 5(2) and (3) of Regulation 942/2019.

[94] Vlachou (n. 16) notes: "…the CACM guideline provides a telling example of such complexity, as it contains provisions requiring the development of terms, conditions and methodologies (TCM) by TSOs and NEMOs, which are submitted for approval to "all NRAs" or to a "group of NRAs" within specific deadlines. In this context, around 40 TCM are to be developed on a European level and approved by all NRAs, while over 30 TCM are to be developed and approved by NRAs of individual regions." Note that under the CEP, ACER is competent to decide on proposals for Pan-European TCMs instead of "all NRAs".

Each of the four guidelines provides a general framework for the further development of individual TCMs. For instance, the CACM GL defines the actors in charge of their development and their scope, and contains specific rules to be incorporated into a TCM as well as specific deadlines for the submission of drafts to the NRAs.[95] The CACM GL also provides details of the amendment and approval processes of the TCMs and finally the enforcement powers of the EC.[96]

As the purpose of TCMs is to implement the GLs, TSOs must not go beyond the guidelines in drafting TCMs. ACER explicitly argues that "TSOs cannot make their compliance with Regulation (EU) 2017/1485 dependent upon conditions that have not been recognised by that Regulation or other relevant EU law provisions."[97] In other words, TSOs are bound by all acts of EU energy law when drafting TCMs. Despite their technical nature, TCMs must hence comply with the fundamental principles in the Treaties and in other relevant acts of EU law, including the CEP as well as the NCs and GLs.[98]

The TCMs share the following broad characteristics, as they:

- are drafted by parties with the necessary detailed technical expertise (i.e., usually the TSOs or NEMOs) in order to promote standardisation;
- shall be drafted to cover multiple jurisdictions;
- shall be approved outside a formal legislative procedure by one of the following bodies, depending on the scope of each TCM:
    - in the case of pan-European TCMs, ACER;[99]
    - in the case of regional TCMs, the NRAs from the concerned region; or[100]
    - in the case of TCMs applicable only in one MS, the NRA of that MS;[101]

In contrast, a significant legal difference concerns the form in which TCMs are adopted:

- TCMs adopted by ACER are effective throughout the EU from the moment they are notified to their addressees (i.e., the concerned TSOs and NEMOs)[102]
- TCMs adopted by several NRAs or a single NRA shall be implemented in all relevant jurisdictions, through an act under national administrative law by each of the NRAs involved in the process.

[95] For example, Article 17(2) CACM GL provides a minimum set of issues that the TSOs shall include in the proposal for a methodology to establish a common grid model (CGM).

[96] CACM GL, Articles 7-9

[97] ACER, 2018b. Opinion of the Agency for the Cooperation of Energy Regulators No 03/2018 on the application of Article 5 and Article 141(2) of Commission Regulation (EU) 2017/1485 establishing a Guideline on Electricity Transmission System Operation, point 5

[98] For a critical discussion, see below, at 6.4.1.

[99] Art. 5(2) of the ACER Regulation 2019.

[100] Please see our case study 3 below, on 'Dissenting NRAs'.

[101] CACM GL, Article 9(7)

[102] Art. 288(3), 297(2) TFEU.

6.2. TCMs,Technical Standardisation and Consensus

The development of the TCMs require the joint participation of public actors (NRAs or ACER) and market parties (TSOs, NEMOs or ENTSO-E) in the establishment of a transnational technical and or commercial standard, which will foster the shift from domestic regulation to European rule-making.[103]

Technical standardisation is usually founded on consensus, "meaning that experts in a certain area come together to draft a standard on the basis of consensus".[104] The NCs and GLs take consensus-based decision-making as a starting point, but establish other quorums under certain circumstances for reasons of efficiency. To give an example, TSOs and NEMOs shall aim to decide on the draft proposal by consensus, and if consensus cannot be reached, by qualified majority.[105] Decisions on pan-European TCMs are taken by ACER's BoR with a two-thirds majority, although its "[m]embers should strive to reach consensus."[106] In contrast, the NRAs shall approve the proposal for regional TCMs unanimously.[107]

Since the IEM is split into diverse geographical regions and the electricity market functions on various time schedules (forward, day-ahead, intraday, balancing) an EU-wide approach to technical regulation is controversial and complex, given that TCMs are intended to foster a higher degree of regulatory harmonisation at a regional and eventually European-wide level.[108] Due to the diverging and conflicting interests of the involved actors, consensus is often difficult to achieve. These issues inform and shape the process for the creation of TCMs, especially the recent changes under the CEP.

6.3. Lifecycle of a TCM

To better understand how TCMs are developed, and to identify the main legal issues to be tackled during the process of their drafting, approval and final adoption, a description of their lifecycle, as in the following Figure 7, is essential. In particular, it is useful to identify the legal status of the measures developed in the different stages of the lifecycle to understand their impact on market participants.

[103] See also Schmidt R., 2015. Public Private Cooperation in Transnational Regulation (PhD Thesis). European University Institute, p. 111.

[104] Schmidt (n. 125), p. 109

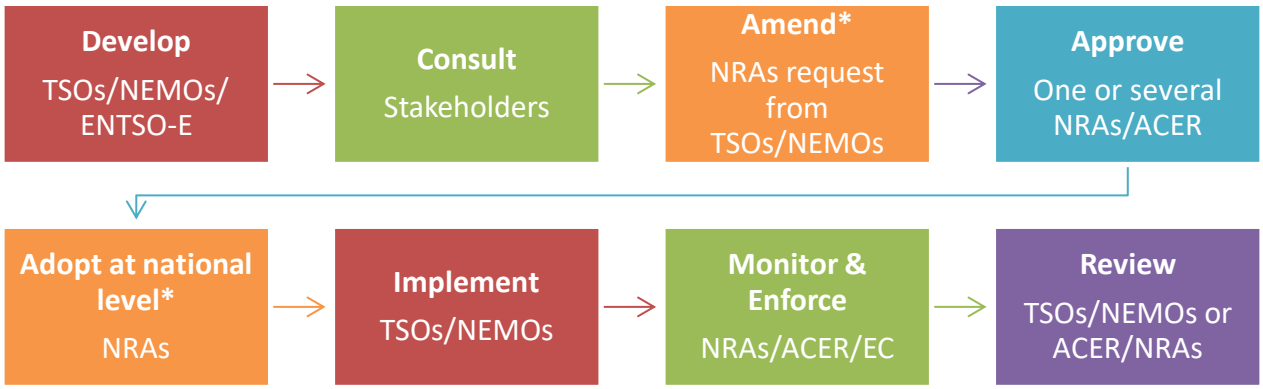
[105] CACM GL, Article 9(2)

[106] Art. 22(1) of the 2019 ACER Regulation; Art. 6.5 of of the BoR's Rules of Procedure, available at http://www.acer.europa.eu/en/the_agency/organisation/board_of_regulators/pages/rules-of-procedure.aspx (last accessed 20 September 2020).

[107] Art. 5(3) of the 2019 ACER Regulation.

[108] Electricity Regulation 2019/943, Article 18(5)(a)

Figure 7: Methodology lifecycle



* Applies only to regional or national TCMs

6.3.1 Developing of TCMs

Scope of TCMs: Pan-European, Regional or National

In most cases, the entities responsible for developing draft TCMs are the TSOs or NEMOs. Irrespective of their ownership structure,[109] TSOs operate primarily within national jurisdictions. They are, however, under an obligation to cooperate at EU and regional level in drafting a common TCM proposal if the TCM in question shall be drafted either at EU level, by "all TSOs", or at a regional level, by the TSOs which perform their activity within a certain geographical region.[110] Some TCMs are developed for a single MS and thus drafted by the TSO(s) or NEMO(s) active in that MS and approved by the regulatory authority or other competent authority of the MS concerned.[111] In any case, the involved TSOs or NEMOs are required to submit to the NRAs in question a specific proposal for a TCM on a certain topic by a certain deadline.[112]

To provide an example, the TSOs from a certain CCR (i.e. GRIT CCR[113]) shall develop a common coordinated capacity calculation methodology,[114] whereas "all NEMOs" in cooperation with

[109] CEER, 2016. Status Review on the Implementation of Transmission System Operators' Unbundling Provisions of the 3rd Energy Package, C15-LTF-43-04

[110] Art. 9(1) CACM GL.

[111] Art. 9(8) CACM GL.

[112] As an example, see CACM GL, Article 15(1): "By three months after the entry into force of this Regulation all TSOs shall jointly develop a common proposal regarding the determination of capacity calculation regions."

[113] Greece-Italy Capacity Calculation Region

[114] CACM GL, Article 20(2): "No later than 10 months after the approval of the proposal for a capacity calculation region in accordance with Article 15(1), all TSOs in each capacity calculation region shall submit a proposal for a common coordinated capacity calculation methodology within the respective region."

the relevant TSOs, shall develop a proposal on harmonised maximum and minimum clearing prices to be applied in all bidding zones which participate in single day-ahead coupling.[115] Likewise, "the TSOs" (meaning all TSOs) are to develop a methodology for the use of congestion income accruing on cross-border interconnections.[116]

In such cases, the TSOs use ENTSO-E's online (i.e., its website) and physical resources (i.e., meetings at ENTSO-E's premises) for the purposes of drafting and effective consultations on the proposed TCM. The body agreeing on the final draft of the TCM is not ENTSO-E, but "all TSOs". ENTSO-E's role in the drafting of most TCMs is thus purely formal and does not imply any liability on ENTSO-E's side.

However, as a novelty introduced under the CEP, some pan-European TCMs will exceptionally be drafted by ENTSO-E itself.[117] In these cases, ENTSO-E passes from informal involvement (by providing the TSOs with a platform for drafting TCMs) to a formal responsibility for developing draft TCMs itself.

Deciding on Proposals and Required Quorums

As a general rule, TSOs and NEMOs agree on the draft text of a proposal for a TCM based on consensus. However, if no consensus can be reached, the drafters shall decide on a qualified majority. The required quorum depends on whether the TCM applies to the entire EU (approval by ACER) or to single regions (approval of the NRAs of the concerned region).[118] Note that NEMOs drafting regional TCMs must always reach consensus.[119]

The procedural rules prescribed for the approval of a draft TCM in the GLs are directly applicable and binding on the TSOs and NEMOs.[120] The latter are not allowed to disregard or deviate from the decision-making rules provided for strictly by the guidelines, by simply agreeing on a deviation or addition.

Deadlines for Submission

[115] CACM GL, Article 41(1).

[116] Art. 19(4) of the 2019 Electricity Regulation. Interestingly, the earliest proposals for the CEP tasked ACER with developing this methodology, thus breaking with the usual system for the developments of TCMs. However, this approach was dropped during the legislative proceedings.

[117] See, for example, Art. 25 (6) of the 2019 Electricity Regulation. ENTSO-E's proposal and accompanying documents are available at <https://consultations.entsoe.eu/entso-e-general/proposal-for-voll-cone-and-reliability-standard-me/> (last accessed on 20 September 2020)

[118] According to CACM GL, Article 9(2), when voting on drafts for Pan-European TCMS, qualified majority means TSOs or NEMOs representing at least 55% of the Member States and at least 65% of the population of the Union. For regional TCMs, Art. 9(3) CACM GL specifies that the qualified majority must encompass TSOs representing at least 72 % of the Member States concerned and at least 65 % of the population of the concerned region.

[119] Art. 9(3) CACM GL.

[120] ACER, 2018b. Opinion of the Agency for the Cooperation of Energy Regulators No 03/2018 on the application of Article 5 and Article 141(2) of Commission Regulation (EU) 2017/1485 establishing a Guideline on Electricity Transmission System Operation, point 6.2

The GLs usually set fixed deadlines for submission of drafts, deadlines that are directly applicable and binding on the TSOs and NEMOs.[121] In case the responsible entities fail to submit their proposal for a TCM within the respective deadline, they are obliged to provide the competent NRAs, as well as ACER with "the relevant drafts of the terms and conditions or methodologies, and explain what has prevented an agreement". A refusal to do so would constitute a breach of the relevant provisions contained in the GLs and could, for instance, lead to fines and sanctions under national law.[122]

The question of whether the deadlines for the submission of TCM drafts may be extended carries significant weight in practice. Although the GLs do not explicitly provide for this, such extensions have been inevitable on a number of occasions. Therefore, the EC is currently considering to modify the procedural rules in the GLs to allow for an exceptional extension of the deadline for reasons outside the sphere of responsibility of the drafters, at the discretion of the body that is competent to decide on the proposal (i.e. ACER or the NRAs).[123] A unilateral extension of the deadline by the drafters is still excluded.

6.3.2 Consultation

The TSOs/NEMOs shall subject the draft TCM to a public consultation,[124] lasting at least one month and held at EU, regional or MS level, depending on the scope of the concerned TCM.[125] Ideally, even regional TCMs would be subjected to EU-wide consultations.[126] Following the consultation, the drafters "shall duly consider the views of stakeholders resulting from the consultations" and justify whether or not they included consultation outcomes into the draft TCM.[127] The feedback obtained from the consultations shall be published before or simultaneously with the publication of the TCM proposal.[128]

6.3.3 Submission for Approval

[121] See ACER, 2018b. Opinion of the Agency for the Cooperation of Energy Regulators No 03/2018 on the application of Article 5 and Article 141(2) of Commission Regulation (EU) 2017/1485 establishing a Guideline on Electricity Transmission System Operation, point 6.7.

[122] CACM GL, Article 9(4), and SOGL, Article 5(9); ACER, 2018b. Opinion of the Agency for the Cooperation of Energy Regulators No 03/2018 on the application of Article 5 and Article 141(2) of Commission Regulation (EU) 2017/1485 establishing a Guideline on Electricity Transmission System Operation, Point 6.8

[123] See the EC's Consultation on amendments to procedural provisions in electricity network codes and guidelines of 11 May 2020, available at https://ec.europa.eu/energy/consultations/consultation-planned-procedural-clarification-four-electricity-guidelines-way_en (last accessed 20 September 2020).

[124] CACM GL, Article 12

[125] Some consultations need to be open for at least two months; see, for example, the EB GL, Article 10(2).

[126] CACM GL, Article 12(2)

[127] CACM GL, Article 12(3)

[128] Ibid.

Once a proposal for a TCM is developed, the concerned TSOs or NEMOs are to submit it to the correct regulatory body for approval. Under the CEP, this can be either ACER or one or several NRAs, depending on the scope of the TCM in question.

There are several ways for ACER to obtain competence for deciding on a TCM proposal (see also Figure 8 below):

- **Direct competence:** as stated before, one of the most significant changes to the TCM adoption process under the CEP concerns the transfer of competence to decide on Pan-European TCMs under the first generation GLs from "all NRAs" to ACER.[129]
- **Derived competence**: the power to adopt a TCM shifts to ACER
    - when NRAs fail to agree on a regional TCM proposal within the legal deadline;
    - upon request by the NRAs;[130]or
    - upon referral of a regional TCM proposal by ACER's Director or the BoR.[131]

Giving ACER **direct competence** to decide on pan-European TCMs instead of "all NRAs" intends to lower the burden on the NRAs by freeing up administrative resources at national level and to "avoid the extra work for the NRAs resulting from potential problems created through the non-aligned national regulatory action".[132] This is a rather euphemistic way of stating that the transfer of competence to ACER is meant to overcome deadlocks among NRAs that frequently hindered and delayed the adoption of TCMs. The implementation of the first generation GLs is severely delayed due to the fact that NRAs often failed to reach an agreement on pan-European or regional TCMs within the deadline specified in the GL (usually six months).[133] In those cases, ACER has to decide on the pertinent draft TCM, within another six months.[134] Given the ambitious deadlines in the GLs, such deferrals pose a considerable problem. Therefore, the CEP aims to streamline the approval process for TCMs,[135] and in the case that a first generation GL assigns the competence to decide on a draft TCM to "all NRAs", this competence is transferred directly to ACER in order to avoid the 'seesaw' effect just described.[136] In addition, some acts of the CEP order the creation of certain TCMs to be approved by ACER.[137] The fact that ACER – a European agency – has replaced a network of "all NRAs" also carries a certain symbolic weight, showing that the MS's firm grasp on energy as a predominantly national matter might gradually be loosening.

In turn, ACER obtains **derived competence** if the NRAs deciding on a regional TCM cannot reach a unanimous decision on the TCM proposal within six months from the date of receipt of the TCMs by the last NRA concerned. The same is true if the involved NRAs issue a joint request. ACER will then adopt a decision, in accordance with its obligations under Article 6(10)

[129] Art. 5(2) Regulation 2019/942
[130] Art 6(10) Regulation 2019/942
[131] Art. 5(3) Regulation 2019/942
[132] See p. 11 in the Explanatory Memorandum in the EC's Proposal for a Regulation of the European Parliament and of the Council establishing a European Union Agency for the Cooperation of Energy Regulators (recast) COM (2016) 863 final.
[133] Art. 9(10) CACM GL.
[134] Art. 9(11) CACM GL.
[135] Recital (20) in the preamble to the 2019 ACER Regulation.
[136] Art. 5(2)(b) of the 2019 ACER Regulation.
[137] See Art. 14(5) and 19(4) of the 2019 Electricity Regulation.

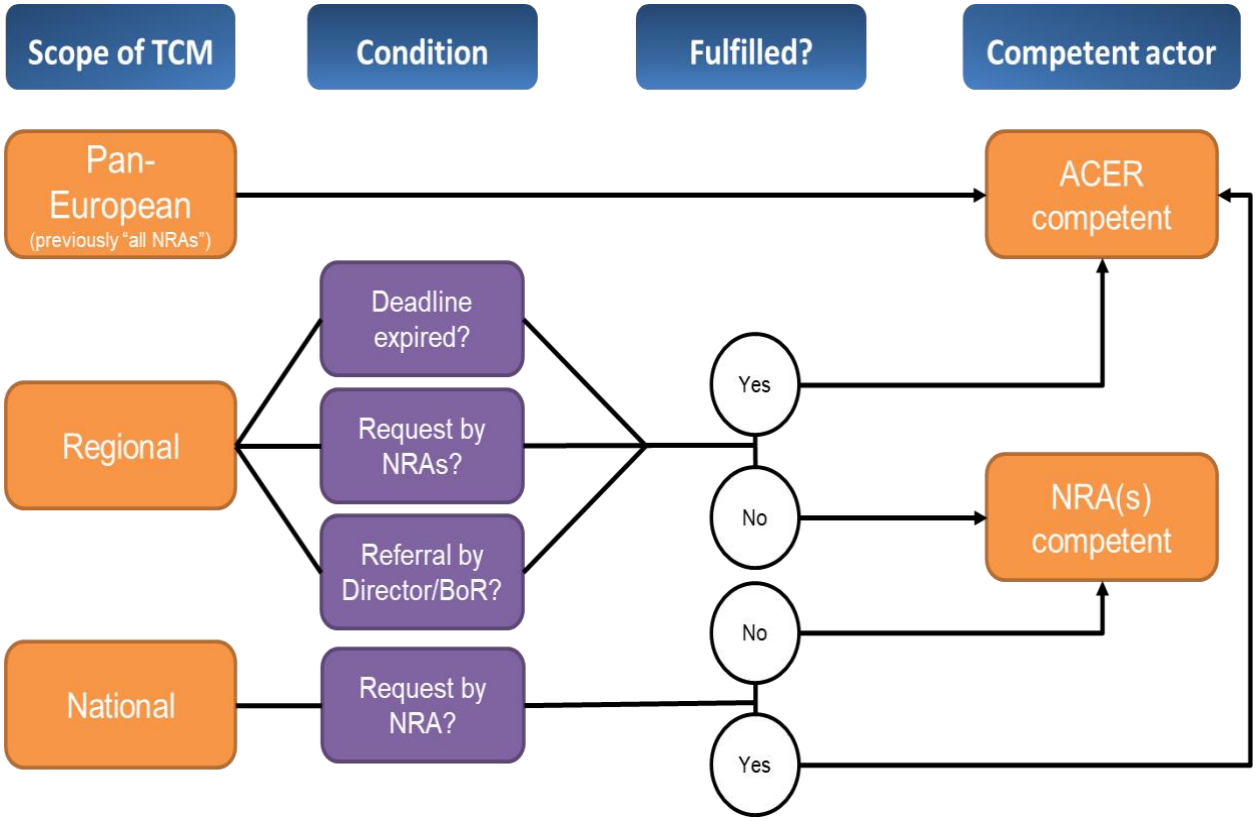
of the ACER Regulation 2019. This process is the rule rather than the exception, as the distributive effects of a TCM are different for each MS, and the NRAs often have different views on regulatory issues for cross-border infrastructure.

In addition, ACER may obtain competence to decide on regional TCM proposals where the Director or the BoR requires the NRAs of the region concerned to refer the proposal to ACER for approval. The Director can issue such a request on its own initiative, while the BoR can act on a proposal from at least one of its members. However, referrals to ACER shall be "limited to cases in which the regionally agreed proposal would have a tangible impact on the internal energy market or on security of supply beyond the region."[138]

It follows from the preceding discussion that NRAs remain directly competent to decide on regional TCMs. In addition, a smaller number of TCMs may be subject to approval by individual NRAs or by other competent authorities of the MS involved. [139]

Figure 9 below provides a schematic overview over the system of competences established under the CEP:

Figure 9: Competence to decide on TCM proposals under the CEP



[138] Art. 5(3) of the 2019 ACER Regulation.

[139] An example is the TCM on the calculation of NEMOs fees for trading in the day-ahead and intra-day markets, see CACM GL, Article 5(1), 9(8)(b).[140] An example is provided by the TCMs, for the Great Britain and Ireland/Northern Ireland synchronous areas, which specify the level of demand loss at which the transmission system shall be in a blackout state, see SOGL, Article 6(4)(a)

Note that under some GLs, the MS may exceptionally designate an entity different from its NRA to decide on TCM proposals of national scope, although the designated entity shall usually be the NRA.[140]

6.3.4 Requests for Amendments and the Power to Revise Drafts

Requests for Amendments by the NRAs

If a submitted proposal for a TCM falls short of the minimum requirements specified in the corresponding GL, the available remedies again depend on which entity is competent to decide on the proposal. NRAs have the right to request amendments to the proposed TCM before final approval.[141] TSOs or NEMOs shall then submit an amended proposal within two further months.[142] Once the NRAs have received the amended proposal,[143] they must decide on it within a period of two months.[144] This process was subject to an extensive litigation, which we discuss in the following Case Study:

Box 7: Case Study 6: Dissenting NRAs and the TCM amendment process

A particularly crucial step in the implementation of the CACM GL – the definition of CCRs by way of a pan-European TCM – stirred up considerable controversy among the involved NRAs. This controversy blocked a decision on the proposal from the TSOs regarding the determination of capacity calculation regions, which the TSOs had submitted to the NRAs for approval, in accordance with Article 15(1) of the CACM GL. Just days before the end of the six-month deadline, the Austrian NRA unilaterally requested amendments from the TSOs that were not backed by the other NRAs.

ACER regarded the Austrian NRA's solo request for amendments as irrelevant, since the other NRAs would not foreseeably endorse the subsequent changes to the proposal. Thus, in

[140] An example is provided by the TCMs, for the Great Britain and Ireland/Northern Ireland synchronous areas, which specify the level of demand loss at which the transmission system shall be in a blackout state, see SOGL, Article 6(4)(a)

[141] CACM GL, Article 9(12); SO GL, Article 7(1)

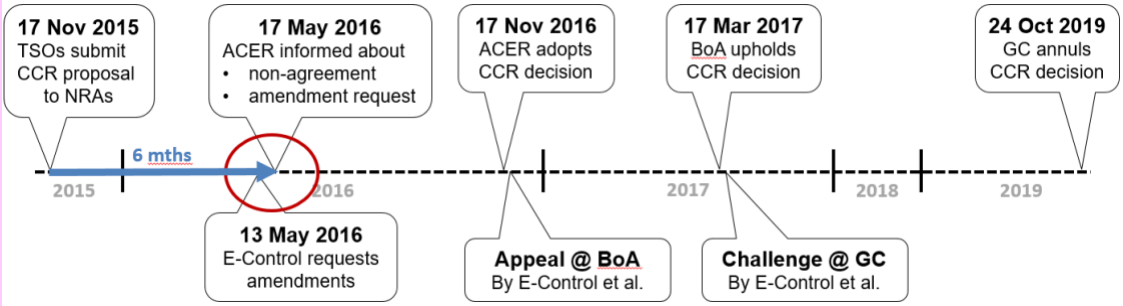
[142] CACM GL, Article 9(12); SO GL, Article 7(1). As an example, please see Request for amendment by all regulatory authorities agreed at the energy regulators' forum on the all NEMOs 'proposal for the price coupling algorithm and for the continuous trading matching algorithm, also incorporating TSO and NEMO proposals for a common set of requirements from 24 July 2017.

[143] As an example, please see 'All NEMOs' proposal for the price coupling algorithm and for the continuous trading matching algorithm, also incorporating TSOs and NEMOs' proposals for a common set of requirements, in accordance with Article 37(5) of the Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management from 13 November 2017.

[144] CACM GL, Article 9(12); SO GL, Article 7(1)

November 2016, ACER issued Decision No 06/2016 pursuant to the failure of the NRAs to reach an agreement on the proposal.[145]

The timeline below provides an overview of the different parties' involvement at the various stages of the proceedings:[146]



1. On 24 August 2015, ENTSO-E and the TSOs responsible under Article 15(1) of the CACM GL published an 'All TSOs' draft proposal for Capacity Calculation Regions' for public consultation – 'the CCRs Proposal'.
2. On 13 November 2015, ENTSO-E published and submitted the CCRs Proposal "on behalf of all TSOs" to ACER.
3. The TSOs then submitted the CCRs Proposal (plus explanatory document) to their respective NRAs as required by the CACM GL.
4. On 3 March 2016, the TSOs of the CWE[147] and CEE[148] regions signed a 'Memorandum of Understanding on the development of a common CWE and CEE CCR's day-ahead flow-based capacity calculation methodology and the merger of the CEE and CWE CCR' ('MoU'). The MoU indicated the intention of all TSOs from the two regions to develop a common flow-based capacity calculation methodology for the day-ahead timeframe within the deadline provided for in the CACM GL and to implement it by Q1 of 2019 at the latest.
5. On 13 May 2016, the Austrian NRA, Energie-Control ('E-Control'), requested unilaterally all European TSOs to amend the CCRs Proposal to the effect that the bidding zone border between Germany/Luxemburg and Austria would be removed, and the two regions merged into one common CWE-CEE CCR. E-Control implored Article 9(12) for the removal of a bidding zone border between Germany and Austria in the determination process of the CCRs.
6. On 17 May 2016, the Chair of the Energy Regulators' Forum[149] informed ACER that the NRAs had been unable to reach a unanimous agreement on that proposal and that ACER therefore had to adopt a decision on the CCR proposal within six months.

[145] ACER, 2016. Decision of the Agency for the Cooperation of Energy Regulators No 06/2016, on the Electricity Transmission System Operators' Proposal for the determination of Capacity Calculation Regions ("ACER Decision No 06/2016").

[146] ACER Decision No 06/2016, Section 2 "Procedure".

[147] Central West Europe.

[148] Central East Europe.

[149] The NRA platform established in order to reach an agreement on the CCRs proposal, in accordance with Article 9(11) of the CACM GL and Article 8(1) of ACER Regulation.

7. Finally, on 17 November 2016, ACER adopted Decision No 06/2016,[150] holding that if the methodology is submitted for approval to all NRAs, request for amendment by a single dissenting NRA does not constitute sufficient reason to send the TCM back to the TSOs.[151] The re-submission of an amended proposal could potentially hinder or overturn the entire TCM adoption process, as the dissenting NRA and TSOs could ”cause significant delays or a stalemate”.[152]
8. ACER’s Decision No 06/2016 was subject to several appeals before the Board of Appeal (BoA) of ACER. E-Control had argued that ACER – like the NRAs – did not have unlimited discretionary power to amend the TSOs' proposal. Nor could it substitute its own decision for the TSOs' proposal, by determining new CCR borders. The BoA rejected this argument. Even if neither the CACM nor Article 8(1) of Regulation 713/2009 provide for ACER to request amendment of the original TSO or NEMO proposals or expressly permit ACER to amend them itself, these provisions do not prohibit it from doing so.
9. Given the overall purpose and structure of CACM, the BoA held that ACER does have power to modify the TSOs' proposals. In a situation where the NRAs have failed to reach agreement, if ACER had no discretion to amend the TSOs' proposal, but could only request the TSOs to submit a further amended proposal, the decision-making process could become inefficient.
10. The BoA similarly rejected arguments by E-Control and others that ACER wrongly disregarded E-Control's request for an amendment of the TSOs' proposal, and that ACER should have used the review process in Article 32 of CACM, rather than the process in Article 15, to change existing bidding zones. The BoA reasoned that it would be inefficient for ACER to be limited to determining CCRs based on the existing bidding zones, rather than being able to change the existing bidding zones as part of the initial definition process. The BoA therefore dismissed the appeals brought by the applicants as unfounded.[153]
11. Consequently, E-Control submitted the BoA’s decision to the General Court of the European Union (GC) and requested its annulment.
12. In its judgment of 24 October 2019,[154] the GC indeed annuled the BoA’s decision, albeit based on procedural considerations only. According to the GC, a request for amendment by any of the competent NRAs stops the regular TCM adoption process with its 6-month deadline and starts the new 2-month countdown (Art. 9 (12) CACM GL). Therefore, the unilateral amendment request by E-Control on 13 May 2016 excluded the possibility of ACER gaining competence when the 6-month deadline ended a few days later, on 17 May 2016. Since ACER was not competent to decide, its decision had to be annulled.
13. As the decision was invalid already for formal reasons, the GC did not discuss ACER’s

[150] Its Article 1 and Annex I determine the capacity calculation regions in accordance with Article 15 of the CACM GL.

[151] ACER Decision No 06/2016, para. 25

[152] ACER BoA Decision, para. 67

[153] Decision of the Board of Appeal of ACER of 17 March 2017 concerning the annulment of ACER Decision No 06/2016 on the determination of capacity calculation regions, A-001-2017 (consolidated)

[154] Judgment of 24 October 2019, Case T-332/17 *E-Control v ACER* [2019] ECLI:EU:T:2019:761. See also the judgment of the same day in the related case T-333/17 *Austrian Power Grid and Vorarlberger Übertragungsnetz v ACER*[2019] ECLI:EU:T:2019:760.

competence to amend submitted proposals. However, with the subsequent entry into force of the CEP, Art. 5 (6) of the 2019 ACER Regulation establishes that both ACER and the NRAs, when deciding on TCM proposals, "*shall revise them where necessary*".

14. While the GC's judgment clearly establishes that according to the wording of Article 9(12) of the of the CACM GL, even uncoordinated requests from single dissenting NRAs trigger the amendment procedure, this conclusion is problematic in practice. According to the EC, "*[u]ncoordinated individual amendment requests may not only lead to significant delays in the development of TCMs; they would also give rise to difficult legal questions [– i.e. in the case of multiple uncoordinated and contradictory amendment requests –], thereby creating legal uncertainty.*" Therefore, the EC has proposed to amend the procedural rules of the existing GLs to clarify that only requests to amend TCM proposals issued jointly by all competent NRAs are effective. If these changes are adopted as proposed, the GC's reasoning will become irrelevant for future cases.

The Power to Revise

As mentioned previously, Art. 5(6) of the 2019 ACER Regulation allows ACER and the NRAs – as the case may be – to revise TCM proposals themselves.[155] This is one of the most significant changes to the TCM creation process under the CEP, as it gives the regulators a far more powerful position via-à-vis the drafters. Previously, the NRAs' powers were limited to requesting amendments from the TSOs or NEMOs, and the scope of ACER's powers was entirely unclear. ACER adopted a decidedly progressive stance on these matters and presumed extensive discretion to revise TCM proposals itself, as the following Case Study further illustrates:

Box 8: Case Study 4: ACER 's Decision on Clearing Prices for Intraday Coupling

As the NRAs were not able to reach an agreement on an original proposal submitted by the NEMOs, ACER adopted Decision No 05/2017 of 14 November 2017 on the NEMOs' Proposal for Harmonised Maximum and Minimum Clearing Prices for Single Intraday Coupling (ACER Decision No 05/2017).

The NRAs had concluded that the NEMOs did not take fully into account the requests for amendments made by the NRAs on 16 elements (i.e., the completeness and relevance of all definitions; the structure of the document, its editing, the references, the consistency with other terms and conditions or methodologies, the clarity of terms and expressions; the existence of an interim solution, which was viewed by some regulatory authorities as non-

[155] See Art. 5(6) of the 2019 ACER Regulation.

compliant with the CACM Regulation).[156] In addition, the NRAs suggested that ACER introduced specific amendments to the amended proposal, before adopting it.[157]

In the end, ACER implemented its own, often far-reaching amendments and adopted a legally binding decision having held public consultations with stakeholders, and in close dialogue with the NEMOs and TSOs.[158]

However, ACER's view was by no means undisputed and was not backed by the wording of the NCs or GLs. Not (explicitly) giving the regulators the power to revise proposals for TCMs posed several pressing problems: for one, it was unclear if an isolated amendment request from a single dissenting NRA triggered the amendment process.[159] Moreover, it was an open question if NRAs could keep requesting amendments from the drafters if they were not satisfied with the revised proposal. The final question concerns what happened if the drafters simply resubmitted their previous proposal without any changes.[160] All of these situations caused dispute, deadlock and delays in the past, so that the discretion to revise proposals has the potential to considerably speed up the implementation of the GLs.

When revising a draft TCM, ACER or the NRAs shall consult ENTSO-E or the EU DSO entity, "in order to ensure that they are in line with the purpose of the [NC] or [GL] and contribute to market integration, non-discrimination, effective competition and the proper functioning of the market."[161]

This notwithstanding, it should be kept in mind that the technical expertise of the TSOs and NEMOs constitutes a valuable asset that cannot be fully exploited in the formal context of a (limited) consultation, so that in practice, NRAs will most likely still request amendments to ensure that the TCM is well-informed and functional before considering a revision. ACER, however, is not entitled to request amendments from the drafters.

6.3.5 Approving TCM Proposals

ACER has replaced "all NRAs" as the competent entity to approve pan-European TCMs under the CEP, see section 6.3.3 above.[162] NRAs remain competent to decide on proposals for

[156] CEER, 2018. Non-paper of all regulatory authorities agreed at the energy regulators' forum on the amended all NEMOs' proposal for the price coupling algorithm and for the continuous trading matching algorithm, also incorporating TSO and NEMO proposals for a common set of requirements, in accordance with Article 37(5) of the Commission Regulation 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management.

[157] CEER (n. 156), para. 9

[158] ACER Decision No 08/2018, paras. 11-12

[159] See our Case Study 3 above, on Dissenting NRAs and the TCM Amendment Process.

[160] On these latter issues, consult ACER, "Monitoring Report on the Implementation of the CACM Regulation and the FCA Regulation" (2019), available here: < https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/FCA_CACM_Implementation_Monitoring_Report_2019.pdf> (last accessed 16 September 2020)

[161] Art. 5(6) of the 2019 ACER Regulation.

[162] Art. 5(2) Regulation 2019/942.

regional or national TCMs. In any case, approval is subject to a six-month deadline that cannot be extended.[163]

Approval by ACER

Although formally, it is ACER who adopts decisions on Pan-European TCMs, this means that representatives of all NRAs in the BoR discuss the corresponding proposals and decide on them with two-thirds majority, even though the BoR's "[m]embers should strive to reach consensus".[164] While this might be seen as a minor change compared to the previous "all NRA" decisions, it should be stressed that the more relaxed quorum makes the adoption of decisions against the will of single dissenting NRAs possible.

ACER will take a decision after consulting the NRAs, TSOs and/or the NEMOs (when the proposal originates from them).[165] According to ACER's BoA, these consultations grant all relevant stakeholders the "right to be heard" and protect the rights of all concerned parties.[166]

NRA Approval

In the case of regional TCMs, Article 9(10) of the CACM GL obliges the NRAs to closely consult, cooperate and coordinate with each other to reach a decision on the TCM proposal. In practice, the competent NRAs meet in a 'Regional Regulators' forum and conclude a framework agreement for the approval of the proposal for a methodology or a framework agreement to request an amendment to the proposed methodology. These fora are organised with the support of the Council of European Energy Regulators ('CEER').[167] A useful example is the approval by all Regulatory Authorities agreed at the Energy Regulators' Forum on the all TSO Proposal for Common Grid Model Methodology ('CGMM'), as amended in March 2017.

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[163] Note that when deciding on regional or national TCMs, the competent NRA(s) may request an amendment from the drafters, which ends the six-month deadline and triggers a new two-month deadline for the drafters to amend the proposal, whereupon the NRA(s) must decide on the amended propsal within two additional months (Art. 6(12) CACM GL). While the approval procedure before the NRAs can thus take up to ten months, this is not the result of an extension of the initial deadline, but of two separate processes running their course. See section 6.3.4 above, particularly Case Study 3.

[164] Art. 6.5 of the BoR's Rules of Procedure, available at <http://www.acer.europa.eu/en/the_agency/organisation/board_of_regulators/pages/rules-of-procedure.aspx

[165] Art. 6(10) and (11) of Regulation 2019/942 and Art. 9(10) and (11) CACM GL.

[166] Decision of the Board of Appeal of ACER of 17 March 2017 concerning the annulment of ACER Decision No 06/2016 on the determination of capacity calculation regions, A-001-2017 (consolidated), para. 124

[167] The Council of European Energy Regulators (CEER) was established in 2000 for the cooperation of the independent energy regulators of Europe. It seeks to facilitate the creation of a single, competitive, efficient and sustainable EU internal energy market. CEER is made up of the General Assembly and the Board of Directors. CEER organises its work through working groups (WGs), which may be supported by work streams (WSs) in charge of specific issues. CEER has 6 working groups.

According to Art. 5(3) of the 2019 ACER Regulation, NRAs are required to decide unanimously on regional TCMs. This means that it is not sufficient that no NRA objects to a draft (i.e., consensus),[168] but that all involved NRAs positively approve of the proposal. The unanimity requirement puts considerable pressure on the NRAs to find a compromise. Judging from the implementation process so far, most regional TCMs will continue to end up on ACER's desk for approval for failure of the NRAs to agree among themselves. The decision will then be taken in ACER's BoR with two-thirds majority, allowing for a limited number of dissenting NRAs to be overruled.

That said, ACER's involvement is limited as long as a proposal remains within the competence of the NRAs. Proposals on regional TCMs shall be sent to ACER at the same time that they are submitted to the NRAs. ACER can issue an opinion within three months from the date of receipt, at the request of the NRAs.[169] The NRAs shall consider the opinion issued by ACER, but are not bound by it.[170] The EC is considering to extend this obligation, so that also proposals for TCMs of national scope are to be submitted to ACER. In theory, this would give ACER greater control to avoid that "rogue" NRAs adopt TCMs that are not in line with the wider aims and legal requirements of EU energy law. Yet the practical impact of this change would be limited, as ACER can only provide an opinion upon request by the NRA competent to decide on the proposal. Moreover, it should be kept in mind that ACER's opinion is non-binding.

6.3.6 Implementation and Legal Recourse

The TSOs/NEMOs are obliged to implement the TCM, once approved by ACER or the relevant NRAs, depending on the scope of each TCM.

ACER decides on pan-European TCM proposals by way of a formal decision directed at the addressees of the TCM (TSOs or NEMOs).[171] That decision is directly applicable and effective throughout the EU[172] and must be published by the TSOs or NEMOs - for example, pursuant to Art. 9(14) CACM GL. It can be appealed to ACER's BoA by the addressees or by other persons to whom the decision "is of direct and individual concern" according to Art. 28 of the 2019 ACER Regulation.[173] If the BoA does not revoke the appealed decision, the affected party can lodge an action for annulment before the GC in accordance with Art. 29 of the 2019 ACER Regulation and Art. 256(1), 263 TFEU, within two months of the publication of the measure,

[168] Cf. the entry for "consensus" in the Max Planck Encyclopaedia of Public International Law, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1387 (visited 20 September 2020)

[169] For an example, see ACER, 2018b. Opinion of the Agency for the Cooperation of Energy Regulators No 03/2018 on the application of Article 5 and Article 141(2) of Commission Regulation (EU) 2017/1485 establishing a Guideline on Electricity Transmission System Operation

[170] CACM GL, Article 9(10)

[171] For an example, consult ACER's Decision No 02/2019 of 21 February 2019 on the Core CCR TSOs' proposals for the regional design of the day-ahead and intraday common capacity calculation methodologies.

[172] The effects of pan-European TCMs on the MS of the EEA (Norway, Iceland and Liechtenstein) are not covered here.

[173] It should be noted that the chances of success before the BoA appear to be slim, as the BoA so far has only revoked ACER's decisions in very few instances.

or of its notification to the addressee, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.[174] If the GC refuses to annul the decision, an appeal to the ECJ is possible within two months of the notification of the GC's decision (Art. 56 of the Statue of the ECJ).

With a view to regional TCMs, the framework agreements concluded between the involved NRAs must state that "following the national decisions taken by each NRA, the TSOs are legally compelled to proceed with: publication of the methodology in question online, pursuant to Article 9(14) of the CACM GL, and meeting of the implementation deadlines provided for within the text of the methodology". Each NRA will then have to implement the trans-national framework agreement within their national jurisdictions on the basis of a decision under national law. The TSOs can be held liable for non-compliance with an implemented TCM by way of fines or other sanctions under national law imposed by the NRA or domestic courts. Market participants seeking to challenge regional or national TCMs must do so through the appropriate procedure in the concerned jurisdiction. Since litigations concerning TCMs will usually revolve around questions of EU law, national courts of the MS may submit the case to the ECJ for a preliminary ruling according to Art. 267 TFEU, however only the court adjudicating at last instance (i.e. the court against whose decisions no further appeal is possible) is obliged to do so, Art. 267(3) TFEU. This raises a series of legal problems, for instance if a national court revokes a TCM in one MS that is part of a larger region. In addition, market participants might have to challenge regional TCMs in more than one jurisdiction, exposing them to the risk of deviating decisions by the different national courts. A binding decision by the ECJ would overcome this risk, but it takes years to exhaust all national legal remedies before involvement of the ECJ becomes mandatory, which poses a significant procedural and financial burden. Moreover, it is not guaranteed that the court adjudicating at last instance recognises its obligation to submit the case to the ECJ.[175]

6.3.7 Amendment of Adopted TCMs

TCMs are highly complex tools for technical standardisation but also subject to the legal requirements of EU energy law. Therefore, it is inevitable to align them to changed factual or legal circumstances after their adoption, lest they become outdated or conflicts with subsequent legislative changes arise.[176] Therefore, Art. 9(13) CACM GL establishes the

[174] For an example, see Case Study 3 above.
[175] Cf. ECJ, Judgment of 30 September 2003 – Case C-224/01 Köbler [2003] ECLI:EU:C:2003:513.

[176] In its proposal for Amendments to Procedural Provisions in Electricity Network Codes and Guidelines, the EC assumes it follows already from the supremacy of secondary law over the Electricity Guidelines that Art. 5(2) of the ACER Regulation prevails and the outdated procedural text in the Electricity Guidelines does no longer apply." One might add that legal acts adopted at a later date generally replace conflicting laws that predate them - procedural rules generally apply from the date of their entry into force, overriding any conflicting preceding procedural rules (see ECJ, Judgment of 26 March 2015 – Case C-596/13 P Commission v Moravia Gas Storage a.s.,[2015] ECLI:EU:C:2015:203. In legal terminology, these concepts are called *lex superior derogat legi inferiori* (a law of superior rank overrides a law of inferior rank) and *lex posterior derogate legi priori* (a later law repeals an earlier law). For the hierarchy of acts of EU energy law, consult Figure 10 in section 6.4.1 below.

procedure for amending TCMs that have already been adopted. Note that the process for amending TCMs discussed in this section must be distinguished from the prerogative of NRAs to request amendments to proposals for regional or national TCMs (cf. section 6.3.4 above).

The amendment process for adopted TCMs can be triggered by the TSOs or NEMOs that were initially tasked with drafting the proposal, or by the originally competent regulatory body (ACER or the NRAs, depending on the scope of the TCM). Nonetheless, while such a request by ACER or the NRAs obliges the drafters to develop a corresponding proposal, a proposal by the drafters (TSOs or NEMOs) does not oblige ACER or the NRAs to consider it.

In case ACER or the NRAs request the TSOs or NEMOs to develop a proposal for amendments, the CACM GL does not specify any deadline for the submission of that proposal. The EC has proposed to amend Art. 6(13) of the CACM GL to give the competent regulatory body the right to determine a deadline. Whereas the wording proposed by the EC does not set any limits as to the duration of that deadline, it follows from general principles of good administration that this deadline should be appropriate in relation to the complexity of the TCM and the amendments requested.

If ACER or the NRAs request a proposal for amendments according to Art. 9(13) CACM GL, or if they take up the request of the drafters, the adoption of the amended proposal follows the same process as the original TCM (i.e., the steps described in sections 6.3.1 through 6.3.6 are followed).

This does not necessarily imply that a role for ACER is always self-evident. While issues relating to the market coupling process under the CACM GL can be said to relate to cross-border infrastructure, in that they address the allocation of capacity on the interconnectors, it is not evident that all of the numerous TCMs envisaged by the GLs necessarily relate to cross-border infrastructure.[177] In the gas sector, the Hungarian NRA has challenged a decision by ACER on the NC on capacity allocation mechanisms in gas transmission systems before the GC, alleging that ACER overstepped the boundaries of its competence under Article 8(1) of the 2009 ACER Regulation.[178] Since the latter reasoning applies regardless of the concerned sector (i.e. gas or electricity), this case could potentially have repercussions on any decisions adopted by ACER under Article 8(1) of the previous 2009 ACER Regulation if the Hungarian NRA is successful.[179] This applies to ACER decisions before 4 July 2019, since Art. 6(10) of the 2019 ACER Regulation has replaced Art. 8(1) of the 2009 ACER Regulation on that date.[180] Under the Clean Energy package, we consider such challenges as less likely to be successful,

[177] Willis P., 2017. Exploring ACER's decision-making powers. Bird&Bird. Available at <https://www.twobirds.com/en/news/articles/2017/global/exploring-acers-decision-making-powers> accessed on 29 April 2019

[178] Case T-684/19 Magyar v Energetikai és Közmű-szabályozási Hivatal v ACER.

[179] This encompasses decisions adopted before 4 July 2019 where ACER obtained competence due to the failure of the originally competent NRAs to agree or where these NRAs have requested ACER to take a decision. On the succession of procedural rules through subsequent changes in legislation, see also fn. 169 above.

[180] On the principles governing the replacement of procedural provisions by subsequent rules, see fn. 169 above.

for the wording of the corresponding provision in Art. 6(10) of the 2019 ACER Regulation gives ACER a stronger position in comparison to the old regime.[181]

Box 9: Changes Introduced by the CEP at a Glance

The process for adopting TCMs has undergone some fundamental changes with the entry into force of the CEP. These changes have shifted the balance of power between the involved actors, introduced a new actor and will – hopefully – streamline and accelerate the adoption and implementation of the TCMs. The most noteworthy changes at a glance are as follows:

- ACER's new role in deciding on PAN-European TCMs, in effect substituting "all NRAs". Voting in the BoR will be on the basis of two-thirds majority of the members present, with one vote attributed to each MS.[182]
- Some TCMs will be drafted by ENTSO-E.[183] In these cases, ENTSO-E passes from informal involvement (by providing the TSOs with a platform for drafting TCMs) to a formal responsibility for developing draft TCMs itself.
- ACER and the NRAs are empowered to revise and change the draft proposal to ensure that it is in line with the NC and GL.[184]

6.4 Where Theory meets Practice

As has been seen, EU energy law and particularly the revisions under the CEP provide a seemingly robust framework for the development of NCs, GLs and TCMs that further the aims of the Energy Union and the creation of an IEM. However, this novel instrument also creates a number of challenges, which will be discussed in this subsection.

6.4.1 General Issue: 'Upward Compatibility' of NCs, GLs and TCMs

The preceding case studies have made apparent that the NCs and GLs are anything but clear-cut - both their terms and their scope exhibit considerable ambiguities that often encumber their implementation. This can be explained by the technical differences between the European power systems that preclude a "one size fits all" solution. Moreover, the subjects that the NCs and GLs regulate are also far from straightforward. It is not possible to define

[181] Cf. the change in wording: The previous wording emphasised that ACER was competent to decide "*only*" where the NRAs were unable to do so (failure to agree or explicit request). This can be understood to the effect that any points that the originally competent NRAs had agreed upon were binding for ACER and restricted its competence. Such a reading can hardly be based in the revised wording of Art. 6(10) of the 2019 ACER Regulation.

[182] Art. 22 of the 2019 ACER Regulation. See also Art. 6 of the BoR's Rules of Procedure, available at <http://www.acer.europa.eu/en/the_agency/organisation/board_of_regulators/pages/rules-of-procedure.aspx>

[183] See, for example, Art. 25 (6) of the 2019 Electricity Regulation.

[184] Art. 5(6) of the 2019 ACER Regulation.

the technical and economic goals of EU energy policy beforehand with definite clarity and precision, so that the creation, but also the implementation, of the NCs and GLs requires an interpretation and balancing of the underlying objectives. In practice, most of the network codes – and perhaps the most controversial ones[185] – were adopted as GLs that establish the outlines for more detailed and comprehensive TCMs. As discussed above, their implementation has spawned numerous controversies between and among the concerned TSOs, NRAs and ACER.[186]

The first and general concern is the compatibility of the resulting detailed rules in the NCs, GLs and TCMs with other acts of EU energy law, particularly those of the CEP. There is a danger of compartmentalisation if these rules are developed or implemented to serve national (or regional) interests rather than the aims of EU energy law. This would jeopardise the core aim of the NCs and GLs: the harmonisation of the rules for the electricity sector. For Pan-European TCMs, the general transfer of competence to ACER under the CEP seems to ensure a high degree of alignment of adopted TCMs with the energy policy goals of the EU. Yet in the case of regional TCMs – which are no less significant – the NRAs remain the first and most important point of contact. The fact that TCMs adopted by ACER are directly applicable throughout the EU, while regional or national TCMs are adopted as decisions under national law, adds to the complexity of the picture.[187]

Whereas the NCs and GLs are adopted as EU regulations and thus formally stand on the same level as acts of the CEP, their nature and purpose is strictly supplementary. This makes it necessary to interpret and apply them in the light of the ”traditional” regulations and directives of the CEP, so that the rules adopted in the NCs and GLs have to comply with the more general principles of EU energy law.[188] Nonetheless, due to unavoidable ambiguities in the wording of the NCs, GLs and the other acts of EU energy law, the relationship between each rule in a NC or GL and these general principles has to be resolved on a case-by-case base. This issue should be taken seriously, since the hundreds of provisions and definitions contained in the NCs and GLs provide an enormous potential for time-consuming conflicts that, if they are not resolved in a uniform way, could result in a fragmentation of the rules on the internal electricity market. Since the NCs and GLs are directly applicable in all Member States, the provisions contained therein are directly effective in all MS and the interpretation

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[185] Paul Giesbertz, ‘The EU Network Codes’, *The Power Market Design Column*, 18 December 2017 <https://www.linkedin.com/pulse/power-market-design-column-eu-network-codes-paul-giesbertz/>. (last visited 17 September 2020)

[186] For an example, see Decision of the Agency for the Cooperation of Energy Regulators No 04/2018 of 24 April 2018 on all Transmission System Operators’ Proposal for Intraday Cross-Zonal Gate Opening and Intraday Cross-Zonal Gate Closure Times.

[187] See sec. 6.3.6 above.

[188] Compare recital (7) in the preamble to Regulation 714/2009 and recital (42) in the preamble to Regulation 2019/943. An indication to that effect can further be found in the preambles to all NCs and GLs, at least with respect to Regulation 714/2009. All of the NCs and GLs explicitly refer to Regulation 714/2009 and the ‘non-discriminatory rules’ contained therein, and establish as their aim to further harmonise these rules ‘*[i]n order to move towards a genuinely integrated electricity market*’ and/or for reasons of operational security. This establishes that the NCs and GLs shall not override, but further specify the broad rules and principles contained in Regulation 714/2009. Given the tight interrelation between the acts of EU energy law, this view extends to all acts of the Third Package and the CEP.

and application of these provisions is primarily a responsibility of national authorities and courts.[189] This can be problematic, as the following Case Study illustrates.

Box 10: Case Study 5: The German *Baltic Cable* Case – Interpreting European Rules through a National Lens

Due to congestion in the North-western part of the German transmission network, operated by the TSO TenneT, the capacity on the Baltic Cable, an interconnector between Sweden and Germany, is frequently reduced. The owner of the Baltic Cable, the Swedish company Baltic Cable AB (BCAB), initiated proceedings against TenneT before the German NRA, the *Bundesnetzagentur*, the mandatory "first stop" for claiming breaches of national energy law or EU energy law with direct effect by grid operators or market participants.[190] Since the German NRA rejected BCAB's claims that the curtailments were against the German and EU rules on congestion management, BCAB challenged the NRA's decision before the competent German court, the OLG Düsseldorf. The OLG also rejected all of BCAB's claims and upheld the decision of the *Bundesnetzagentur* in its entirety.[191]

One of the core issues of the *Baltic Cable* case relates to the question of responsibility to resolve the congestion causing the curtailments. While the congestion occurs within TenneT's network, its effects materialise on the Baltic Cable, which is owned by BCAB. Therefore, the OLG argued, the responsibility to resolve the congestion according to Article 16 of Regulation 714/2009, which was authoritative at the time of the decision,[192] fell upon BCAB as the owner of the congested line. The court founded its reasoning on Articles 25 (2) and (3), as well as 35 (2) of the CACM, which oblige the TSOs within the CCRs to coordinate the use of remedial actions, with the aim of "enabl[ing] all TSOs in each capacity calculation region to effectively relieve physical congestion irrespective of whether the reasons for the physical congestion fall mainly outside their control area or not".[193] This reasoning is pivotal for the litigation itself, since assigning the responsibility to relieve the causative congestion also determines who has to pay for the remedial actions employed in this context – TenneT or BCAB.[194]

A related question concerns the question whether the congestion in TenneT's network is structural according to the pertinent definition in Article 2 (19) of the CACM. As per this definition, congestion is structural if it "can be unambiguously defined, is predictable, is geographically stable over time and is frequently reoccurring under normal power system conditions". The German court limited its scrutiny whether these criteria are fulfilled in TenneT's control area to briefly stating that this is not the case. This is surprising, since the

[189] cf ECJ, Judgment of 14 December 1971 – Case 43/71 *Politi v Italy* [1971] ECLI:EU:C:1971:122.

[190] Access to the ECJ is severely restricted for individuals, cf https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en#overview (last visited 17 September 2019).

[191] For details, see Julius Rumpf, "Does the Energy Union End at the Baltic Sea Coast? Capacity Curtailments on the Baltic Cable" (2019) 3 European Competition and Regulatory Law Review.

[192] Under the CEP, the pertinent rules are contained in Article 16 of Regulation 2019/943.

[193] Citation from Article 35 (2) of the CACM GL.

[194] The OLG assumed a "requester pays" principle, while there are good reasons to favour a "polluter pays" principle; compare the discussion of these approaches in ACER, "Recommendation of the Agency for the Cooperation of Energy Regulators No 02/2016 of 11 November 2016 on the Common Capacity Calculation and Redispatching and Countertrading Cost Sharing Methodologies" (2016).

affected lines can be defined precisely, the congestion is predictable because it depends on the amount of wind power produced in the area, it is geographically stable, and it is not the result of an emergency, but recurring frequently under normal operating conditions. The OLG's somewhat deterministic reasoning results in a failure to implement binding rules contained in the CACM – with potentially severe negative effects on market integration, since a reconfiguration of an inefficient BZ configuration is only required in case of structural congestion.[195]

The OLG Düsseldorf's decision was appealed to the German supreme court, the *Bundesgerichtshof*, which rejected the appeal and upheld the OLG Düsseldorf's decision despite the shortcomings outlined in the preceding paragraphs and without consulting the ECJ on questions of EU energy law. There is reason to assume that the Bundesgerichtshof – as the last adjudicating court in Germany – was obliged to submit the case to the ECJ for a preliminary ruling. Since the central issues of the case depended on the relationship between domestic German energy law and the rules in the "traditional" secondary law acts, as well as in the CACM, in our view a binding statement by the ECJ would have been required to ensure a uniform application of these rules according to the aims of EU energy law.[196] In theory, it is still possible to seek legal remedy against the German supreme court's failure to consult the ECJ. In that case, considerable time – potentially, several more years – will go by before a final decision on the questions highlighted here is adopted. In practice, however, attempting to overrule the "final" decision by the German supreme court would entail significant effort and risk for the appellant. Whatever the final outcome of the case, the detrimental effects of the curtailments and their endorsement by the German authorities on market integration are significant and irreversible.

Apart from the difficulties to apply – sometimes ambiguous – rules in the NCs and GLs in practice, the question of possible inconsistencies of the TCMs with general principles of EU energy law is another pressing issue. Hierarchically, the methodologies occupy an awkward position; in contrast to the NCs and GLs, they are not adopted as secondary law acts. This notwithstanding, their content is decisive for shaping the rights and obligations following from the GLs, so there is good reason to consider them a binding part of the GLs. In case of contradictions or ambiguities, TCMs should therefore be interpreted so that they comply with the GL they implement (which in turn must be interpreted to comply with the other acts of EU energy law, see above).[197]

The remaining legal question is how conflicts between a TCM and other acts of EU energy law are to be resolved. The most straightforward constellation would concern an evident conflict between two acts that cannot be reconciled by means of interpretation, for instance if the wording of a TCM manifestly contradicts an act of the CEP. In cases where the contradiction is less obvious, one must however ask which of several possible interpretations can be considered authoritative. Due to the differences between the electrical systems in the EU, provisions of EU energy law are necessarily ambiguous to a certain extent. Depending on how

[195] For details, see below, at sec 6.4.3.
[196] Art. 267 (3) TFEU. See also ECJ, Judgment of 30 September 2003 – Case C-224/01 *Köbler* [2003] ECLI:EU:C:2003:513.
[197] Compare ACER (n 122).

these ambiguities are understood, the very same provision in a TCM can be considered a successful implementation or a breach of the overarching principles of EU energy law. Needless to say, the understanding itself may differ according to each actor's opinions, interests and agenda. Keeping this in mind, the fact that most TCMs are drafted by the same entities they intend to regulate – usually the TSOs – makes stringent regulatory oversight already during their creation crucial. This creates an unprecedented challenge for the European regulators, who so far only had the responsibility of scrutinising and approving a comparably small number of methodologies developed by the national TSOs.[198] In contrast, the development of TCMs under the GLs and the CEP will lead to an explosion in volume and complexity, especially considering the cross-zonal dimension of most methodologies.

Given that TCMs may potentially be approved on a regional or national level even though they contain provisions that are incompatible with the overarching principles established in EU energy law, the question of what remedies are available gains importance. In theory, NRAs and other national institutions in the MS may not apply TCMs if they are incompatible with EU law,[199] but it seems unlikely that the competent NRAs will question a TCM's legality on their own account, seeing as they have scrutinised the TCM prior to adoption. If an individual network user should challenge a TCM before the NRAs, it seems equally unlikely that they would decide in favour of the network user for the same reason. A review of a TCM before ACER's BoA is only possible if the TCM in question was adopted by ACER. While some TCMs are subject to regular review, this is not true for all.[200] In practice, the only possibility for market participants to overturn faulty provisions in TCMs is therefore to challenge the TCM before the competent NRAs and – if that does not bear fruit – to submit the NRA's decision to judicial review before a court, which can then request a preliminary ruling from the ECJ. Naturally, this presupposes that the court considers the challenged provisions as incompatible with superior acts of EU law in the first place. The considerable time, effort, cost and uncertainty involved in obtaining a definite judgment in this way serves as a major disincentive to challenging TCMs legally.

Therefore, the autonomy bestowed upon actors at national level (TSOs, NEMOs and NRAs) in the creation of TCMs creates a tangible hazard that provisions are adopted that legalise – at least temporarily – situations or practices not permitted under the general principles of EU energy law.

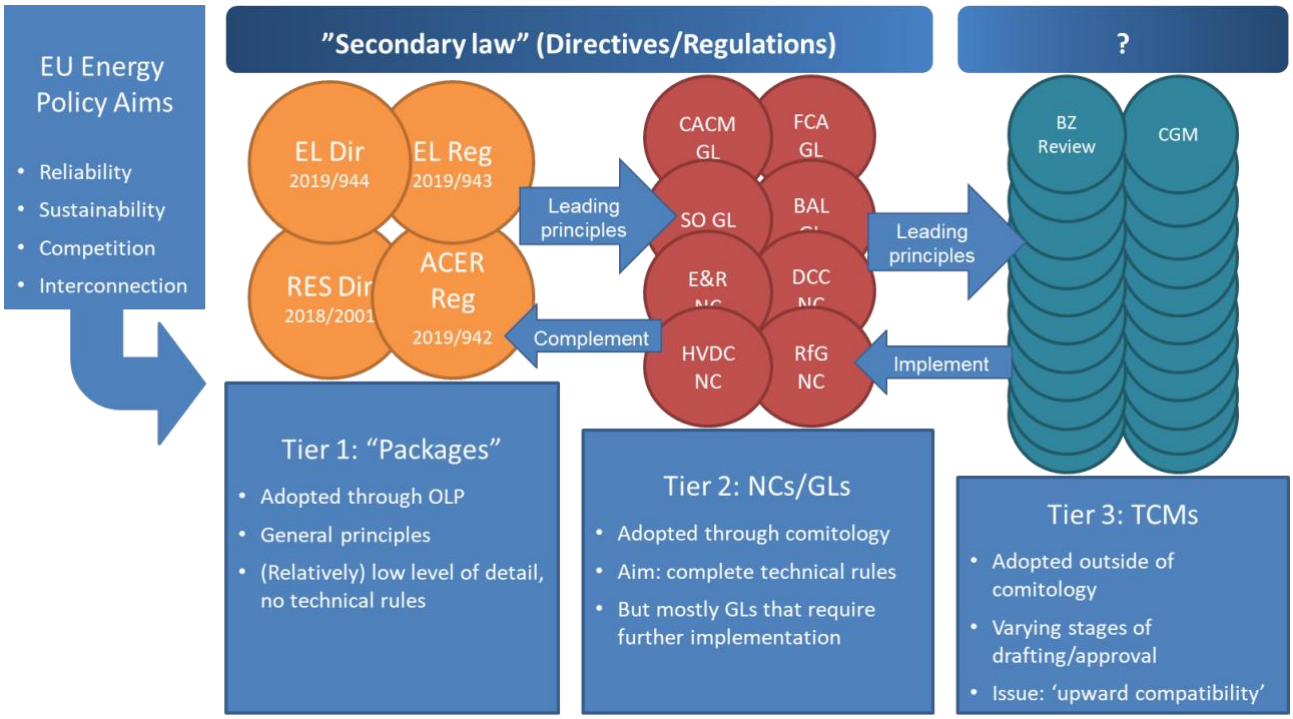
Interim Conclusion

[198] See Article 37 (6) through (10) of Directive 2009/72.

[199] Borchardt, K. D., 2010. The ABC of European Union Law (fn. **Error! Bookmark not defined.**) p. 43-47.

[200] Compare, for example, Articles 37 (6), 43 (4) and 56 (4) of the CACM GL. Another exception concerns CCMs: whenever two or more adjacent CCRs implement flow-based capacity calculation, the relevant TSOs are to submit a common CCM for these CCRs, see Article 20 (5) of the CACM GL. By 31 December 2020, all CCRs shall use a harmonised CCM, Article 21 (4) of the CACM GL.

Figure 10: The three-tier system of substantial EU energy law



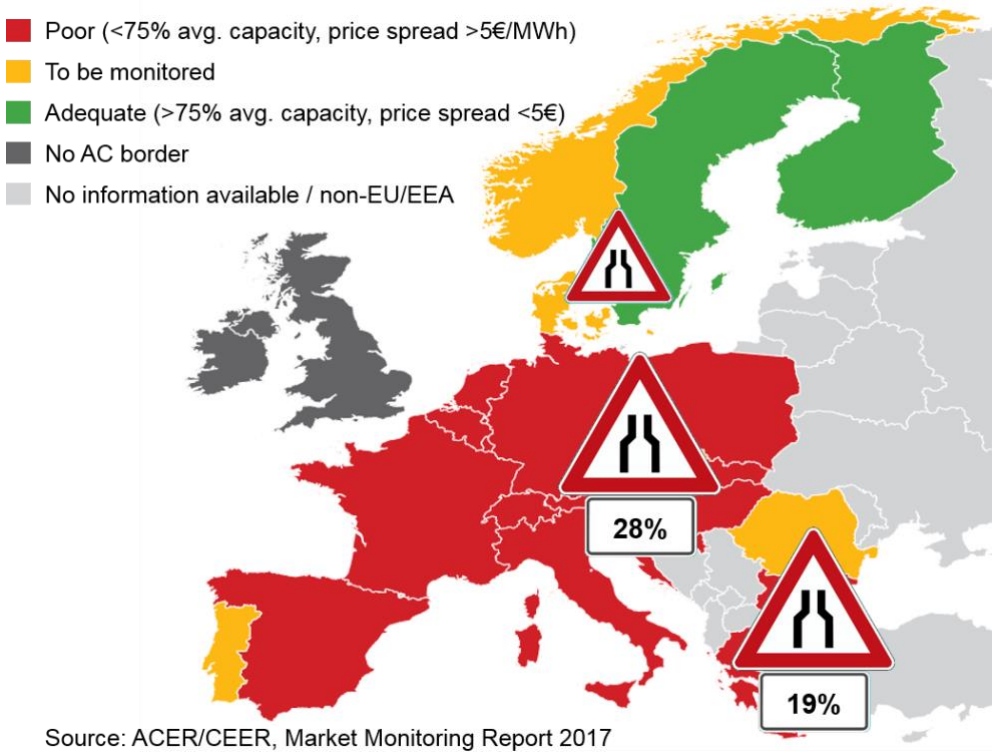
As Figure 10 shows, substantial EU energy law consists of a three-tier system: at the left, the "classical" regulations and directives of the "packages" contain general principles for the electricity sector; in the centre, the NCs and GLs – while legally directly binding in all Member States – complement these general principles and do not, in principle, overrule them; finally, the TCMs depicted on the right act as mere tools of implementation and may not contradict either the NCs or GLs or the general principles established in the "packages". So far for the theory – in practice, however, the resulting interactions and interdependencies between the different types of rulesets open for potential issues and conflicts, two of which will be highlighted in the following section.

6.4.2 Highlight 1: Congestion Displacement

The first practical example for such conflicts concerns the practice of reducing cross-border capacity to relieve congestion within the national electricity grids, already touched upon in the Case Study 5 above. This practice is often referred to as "pushing congestion to the border", while we will use the more concise term "congestion displacement" here. Systematic congestion displacement is nearly ubiquitous throughout Europe – ACER estimates that on average, just under half of the technical capacity is allocated on most bidding zone borders, i.e. those with AC interconnectors. The following figure 3, based on a graphic from ACER's recent Market Monitoring Report on the EU electricity wholesale market, illustrates the

issue.[201] Cross-border capacity performance on AC interconnectors throughout Europe is rated according to a "traffic light" system. In addition, we have marked some especially severe or interesting structural bottlenecks with a corresponding traffic sign, also stating the average percentage of available capacity over the year. As can be seen, the situation is particularly dire in the SEE CCR[202] and the Eastern part of the important CORE CCR.[203] However, also "model students" such as Sweden harbour structural congestion that leads to frequent cross-border capacity curtailments on the Norwegian and Danish borders.

Figure 11: Cross-border capacity availability according to ACER (AC interconnectors only)



Source: ACER/CEER, Market Monitoring Report 2017

Congestion displacement is not the only reason for the low availability of cross-border capacity, but its impact is severe.[204] Therefore, congestion displacement was already generally prohibited in the Third Energy Package.[205] Nevertheless, the relatively low cross-border capacity levels calculated by ACER suggest that this prohibition was – and is – not

[201] ACER and CEER, 'Annual Report on the Results of Monitoring the Internal Electricity and Natural Gas Markets in 2017 - Electricity Wholesale Markets Volume' (2018) 6–9.

[202] "South East Europe", comprising the BZ borders between Greece, Bulgaria and Romania.

[203] In principle, the Core CCR spans all bidding zone borders in Central Continental Europe. However, due to the Western and Eastern parts of the Core CCR following different approaches to calculating capacity at the time, ACER contemplated both parts separately. The average capacity percentage shown in figure 3 applies to the BZ borders between Germany, Poland, the Czech Republic, Slovakia, Hungary, Austria, Slovenia, Croatia and Romania.

[204] ACER and CEER, 'Annual Report on the Results of Monitoring the Internal Electricity and Natural Gas Markets in 2017 - Electricity Wholesale Markets Volume' (n 192) s 3.2.

[205] See Article 16 (3) and particularly para 1.7 of Annex I to Regulation 714/2009.

always respected in practice. This assumption is backed up by two cases in which the EC investigated systematic congestion displacement by the Swedish TSO Affärsverket svenska kraftnät (SvK)[206] and the German TSO TenneT TSO GmbH (TenneT)[207]. These investigations concerned suspected breaches of the EU rules for competition law, which seek to protect trade in the EU from unfair practices and the abuse of dominant market positions. To summarise the complex background of the cases, the EC considered that the EU competition rules prohibit systematic congestion displacement because it is discriminatory and impedes market integration, thereby causing welfare losses.

One important characteristic of competition law is that it provides protection against unfair practices *ex post*, i.e. it focuses on accomplished actions by market actors. However, the EC's conclusion that congestion displacement is incompatible with a liberalised electricity market corresponds with the principles of congestion management in EU energy law. These principles provide *ex ante* protection, i.e. they impose abstract rules on market actors to regulate their actions beforehand. The general principles of congestion management in EU law – which seek to restrict the level of congestion displacement to the necessary minimum – will be outlined in the following. Firstly, we will portrait the general framework established in the CEP and the preceding Third Package before turning to the contribution of the NCs and GLs, more specifically the SO GL and CACM GL.

Box 11: Congestion Management According to the 'Packages' and the 70% Rule

With a view to the general rules, EU energy law establishes a maximum capacity principle, i.e. TSOs must manage congestion in a way that maximises cross-zonal capacity while maintaining reliability.[208] In day-to-day grid operation, TSOs manage congestion by using remedial actions.[209] According to Article 16 (4) of E-Regulation 2019, TSOs are explicitly mandated to use "[c]ounter-trading and redispatch, including cross-zonal redispatch, […] to maximise available capacities […]". Congestion displacement is explicitly forbidden; Article 16 (8) of E-Regulation 2019 states that "[TSOs] shall not limit the volume of interconnection capacity to be made available to market participants as a means of solving congestion inside their own bidding zone or as a means of managing flows resulting from transactions internal to bidding zones." However, this general prohibition is not absolute and permits congestion displacement to safeguard reliability.

It is also argued that congestion displacement should be allowed for reasons of economic efficiency.[210] In this vein, the CEP prescribes mandatory minimum capacity levels. According to Article 16 (8) of E-Regulation 2019, 70% of the capacity that can be used without

[206] Commission Decision of 14042010 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case 39351 – Swedish Interconnectors).

[207] Commission Decision of 7122018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT40461 – DE/DK Interconnector).

[208] Article 16 (1), (4) of Regulation 2019/943. This general rule is reiterated in Article 20 of the SO GL and Article 25 of the CACM GL.

[209] According to Article 2 (13) NC-CACM, a "'remedial action' means any measure applied by a TSO or several TSOs, manually or automatically, in order to maintain operational security". Long-term congestion management measures such as grid reinforcements or redefining bidding zones are not addressed here, since they require considerable implementation time and effort. See, however, section 6.4.4 below.

[210] Note that economic efficiency is understood here as an increase of social welfare on an EU/EEA level.

compromising reliability has to be made available for cross-zonal trade.[211] If less capacity is made available, the concerned TSOs need to prove that this does not result from congestion displacement to avoid sanctions. Thus, TSOs may no longer displace congestion for reasons of economic efficiency if this entails a lower cross-border capacity than 70%.

However, MS can currently set lower minimum capacity values, either by granting their TSOs a derogation[212] or by adopting a national action plan (NAP). In their NAPs, MS must determine a starting capacity value and ensure that capacity is increased annually according to a linear trajectory, so that they reach to 70% value by 31 December 2025.[213] At the moment, progress towards the 70% target is severely delayed in most MS, raising the question whether the 70% threshold is a realistic aim, in particular with a view to the generous concessions in the form of derogations and NAPs. If and when the 70% value is reached in the future, most TSOs will likely treat this minimum capacity as a fixed value and not exceed it[214]

Besides these general rules, the network codes contain more detailed provisions on managing congestion without resorting to congestion displacement. Firstly, the SO GL establishes specific rules for using remedial actions to safeguard reliability. According to Article 22 (1) (d), (e), (f) and (i) of the SO GL, these measures include the use of cross-border curtailment as well as countertrading and redispatching. However, the SO GL explicitly obliges TSOs to *"give preference to remedial actions which make available the largest cross-zonal capacity for capacity allocation, while satisfying all operational security limits"* in Article Art. 21 (2) (d). Therefore, TSOs are formally obliged to exhaust measures that do not reduce cross-border capacity before resorting to curtailing an interconnector. When choosing between these measures, they must adhere to additional criteria, which however are subordinate to the requirement to make available as much cross-zonal capacity as possible.[215] Ergo, only the amount of internal congestion that cannot be handled by countertrading and redispatching – or other suitable remedial actions – may justify congestion displacement for reliability reasons.[216] It should be kept in mind that under the new CEP rules, TSOs enjoy unrestricted

[211] Unfortunately, it is not entirely clear how the reference capacity is to be calculated. In the *DE/DK Interconnector* case, the EC had considerable difficulty determining the technical capacity at the German-Danish border. ACER provides extensive, yet non-binding guidance on the implementation of the new 70% rule in "Recommendation No 01/2019 of the European Union Agency for the Cooperation of Energy Regulators of 08 August 2019 on the implementation of the minimum margin available for cross-zonal trade pursuant to Article 16 (8) of Regulation (EU) 2019/943".

[212] Art. 16 (9) of Regulation 2019/943. The Swedish TSO Affärsverket svenska kraftnät (SvK) has requested two consecutive derogations, cf <https://ei.se/sv/nyhetsrum/nyheter/nyheter-2019/svenska-kraftnat-ansoker-om-undantag-fran-70-procent-kravet/> and < https://www.ei.se/sv/nyhetsrum/nyheter/nyheter-2020/samrad-om-undantag-fran-kravet-pa-70-procents-tillganglighet-pa-sammanlankningar/> (both last visited 20 September 2020)

[213] Art. 15(2) of the 2019 Electricity Regulation.

[214] In fact, in the DE/DK Interconnector case (n 198), TenneT explicitly commits itself to providing 75% of the capacity at the German-Danish border in the future, a value that corresponds with the fixed capacity threshold in earlier proposals for what is now Article 16 (8) of Regulation 2019/943.

[215] The other criteria in the list are effectiveness and economic efficiency, how close to real-time a remedial action can be activated and the risk of failure. See Article 21 (2) (a) through (c) of the SO GL.

[216] In case a TSO considers curtailing cross-border capacity that has already been allocated, Article 16 (2) of Regulation 2019/943 also clarifies that allocated capacity may only be curtailed "in emergency situations,

discretion in this context and may liberally reduce the capacity available for cross-zonal trade by up to 30%.[217]

Secondly, the CACM GL orders the creation of detailed common capacity calculation methodologies (CCMs) for each CCR.[218] These must contain safeguards to avoid congestion displacement.[219] Some of these CCMs have already been approved by the competent NRAs, whereas others are still in the making. Whereas it is hence not yet possible to provide a final verdict on the effect of the CCMs, it is noteworthy that the existing proposals have "largely ignored" the issue of congestion displacement, according to ACER. ACER criticises that "[w]hile there has been some effort to improve the capacity calculation currently applied by the TSOs, the level of improvement does not match the expectations and ambition laid down in the [CACM GL]."[220]

Box 12: Displacing Congestion as a Cheaper Alternative?

In this context, the devil is in the details. The CCM for the IU CCR (IU CCM),[221] covering the border between Ireland and the United Kingdom, allows for the reduction of cross-border capacity in case of internal congestion if the costs of the available remedial actions exceed the cost of compensation to be paid to network users affected by the curtailment. In the words of Art. 11 (2) (a) of the IU CCM, '[i]n determining which costly remedial actions to make available the TSO shall consider whether these are efficient **when compared to the alternative compensation cost of interconnector capacity reduction**'.

The IU CCM has already been approved by the competent NRAs.[222,]However, the provision cited above is quite problematic from a legal point of view. Obviously, the provision aims for economic efficiency. As discussed earlier, congestion displacement can be justified for reasons of economic efficiency. For instance, the SO GL orders TSOs to consider economic efficiency when choosing between different measures to address congestion, which potentially also encompass curtailing cross-border capacity.[223] Moreover, it is not problematic that the IU CCM does not explicitly refer to the 70% rule, since the 2019 E-Regulation is formally superior to the IU CCM and was adopted after it, so that the prohibition to reduce cross-zonal capacity below the legally imposed minimum value can be "read into" the IU CCM. The problem lies elsewhere: the aims of electricity market integration require that any cost comparison to determine economic efficiency must be based on the welfare

namely where the transmission system operator must act in an expeditious manner and redispatching or countertrading is not possible".

[217] Article 16 (8) of Regulation 2019/943.

[218] Article 15 (1), 20 (2) of the CACM GL.

[219] Article 21 (1) (b) (ii) of the CACM GL.

[220] ACER, 'Monitoring Report on the Implementation of the CACM Regulation and the FCA Regulation' (2019) para (163).

[221] Article 11 (2) (a) of the IU TSOs' proposal of common capacity calculation methodology for the day-ahead and intraday market timeframe in accordance with Article 20 of Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management (emphasis added).

[222] Approved CCMs are available at https://acer.europa.eu/en/Electricity/MARKET-CODES/CAPACITY-ALLOCATION-AND-CONGESTION-MANAGEMENT/Pages/16-CCM---Approved.aspx (last visited 17 September 2020).

[223] See Article 21 (2) (a), 22 (1) (i) of the SO GL.

effects at EU level.[224] In contrast, the cited provision in the IU CCM only compares the immediate costs of a certain remedial action with the cost of cross-border curtailment, i.e. it focuses only on the respective TSO's individual economy and each singular case. Social welfare effects for other market participants, beyond the TSO's own control area or over time are not considered. Such a limited cost comparison provides distorted economic signals to the market and thus does not satisfy the mandate to manage congestion in a way that gives efficient economic signals contained in Article 16 (1) of E-Regulation 2019. Therefore, this provision might encourage tolerating congestion and paying a curtailment compensation in cases where in fact reviewing the existing BZs or grid investments would yield an economic benefit over time on a regional or European scale. Thus, when approving a TCM, the involved NRAs must make sure that it satisfies all of the overarching general principles of EU energy law.

With regard to congestion displacement, it can be seen that the NCs and GLs alone do not "automatically" produce an optimal outcome. The achievement of a European "Energy Union" as envisioned by the EU rather depends on stepwise progress through sensible implementation. Unfortunately, the borderlines for the development of TCMs laid down in the GLs do not always provide sufficiently clear and robust guidance to ensure that the resulting TCMs yield such progress.

6.4.3 Highlight 2: Individual Interests and the Failed Bidding Zone Review

This is all the more true seeing as adopting GLs as partially open "compromise texts" and delegating the creation of detailed rules in the form of TCMs to stakeholders only postpones resolving the underlying controversy. Among the subjects governed by the CACM GL, the delimitation of BZs appears to be a particularly delicate subject. Already the definition of the European CCRs according to BZ borders led to a stalemate among the involved NRAs, so that ACER needed to step in and adopt a binding decision, at the same time altering the BZ configuration.[225] These difficulties come as no surprise, since power prices in the Member States depend in part on the BZ configuration, and many Member States endeavour to maintain a single bidding zone in order to avoid expected price increases associated with a bidding zone split.[226] Furthermore, it is sometimes argued that that smaller BZs lead to decreased market liquidity and increased market power in the resulting smaller BZs, although there is no conclusive evidence to that effect.[227]

Nevertheless, due to the complexity of the matter, constant changes to the physical network topology and technical differences across the European electricity systems, the European BZ configuration requires continuous optimisation. Therefore, Articles 32-34 of the CACM GL

[224] Compare ACER, 'Recommendation of the Agency for the Cooperation of Energy Regulators No 02/2016 of 11 November 2016 on the Common Capacity Calculation and Redispatching and Countertrading Cost Sharing Methodologies' (2016) 8–9.

[225] See case study 3 above.

[226] For the case of Sweden, see Małgorzata Sadowska and Bert Willems, 'Power Markets Shaped by Antitrust' (2013) 9 European Competition Journal 131, 154–160.

[227] See Alberto Pototschnig, The importance of a sound bidding-zone review for the efficient functioning of the internal electricity market, FSR Policy Brief 22/2020.

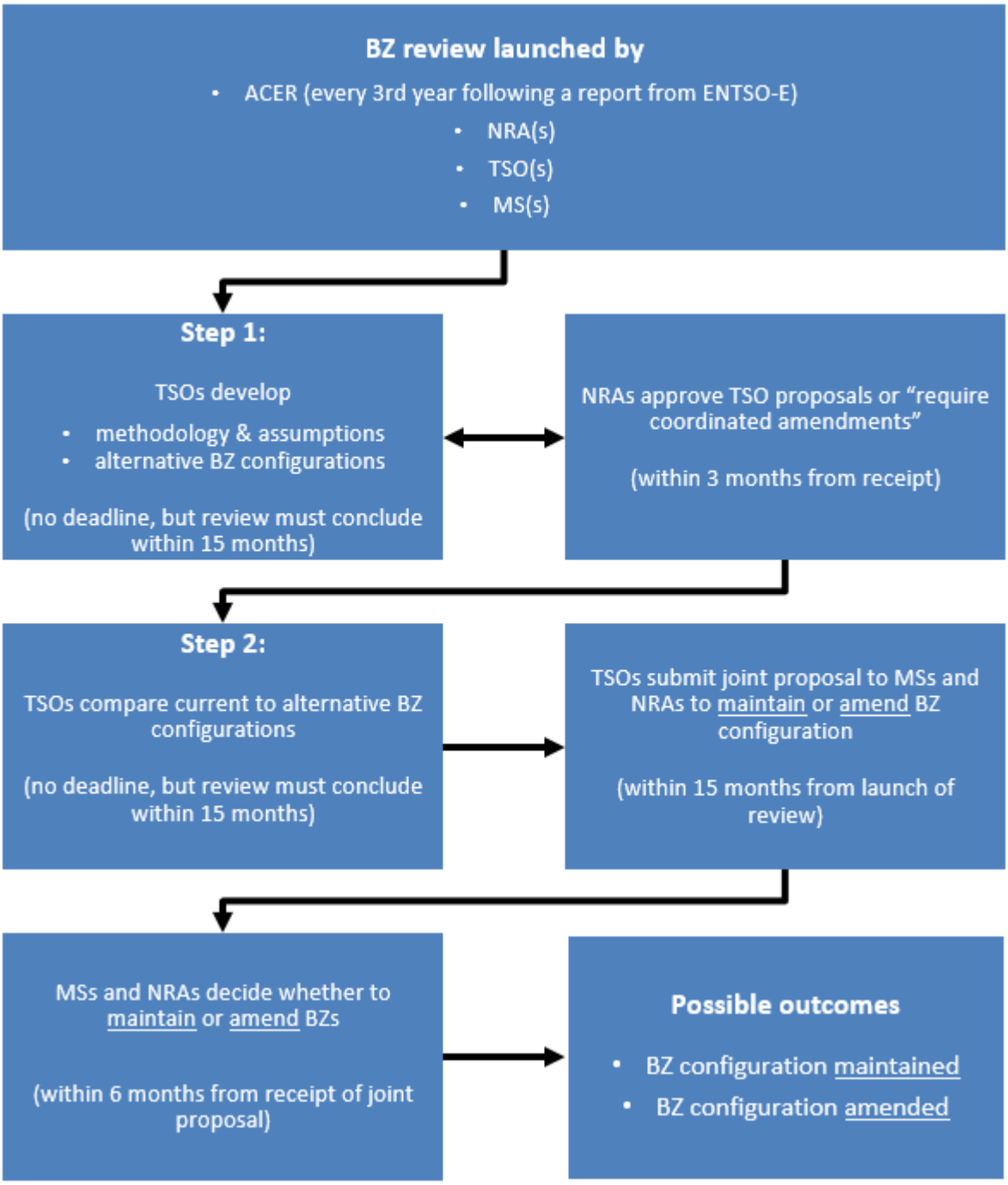
establish a review process to optimise the European BZs, either on the initiative of one or several TSOs, NRAs or Member States or launched by ACER at regular intervals, i.e. every third year. During the review, the involved TSOs develop "a methodology and assumptions that will be used in the review process and propose alternative bidding zone configurations for the assessment"; both the methodology and assumptions and the alternative BZ configurations are then submitted to the concerned NRAs for approval, which can "require coordinated amendments" during three months.[228] Based on the approved proposals, the TSOs then compare the current to the proposed alternative BZ configurations, based on certain predefined criteria and a stakeholder consultation. Ultimately, the involved TSOs submit a joint proposal to maintain or amend the existing BZs to the concerned Member States and NRAs. [229] The Member States – possibly through their respective NRAs – then decide whether to change their BZs.[230] The entire process is subject to a deadline of 15 months. While ACER may initiate the BZ review, it has no possibility to intervene during the review process or to force a change of BZs. The following figure12 illustrates the process:

Figure 12: BZ review process under the CACM GL

[228] Article 32 (4) (a) of the CACM GL.

[229] Article 32 (4) (b) and 33 of the CACM GL.

[230] Article 32 (4) (c) of the CACM GL.



The first review took place recently, albeit not producing any result other than stating the obvious, i.e. that the current BZ configuration in Europe is inefficient. In its report on the BZ review, ACER asserted an apparent unwillingness of the involved stakeholders – including the TSOs and NRAs – to change the current BZ configuration in spite of these inefficiencies. ACER explicitly criticised the TSOs for only considering bidding zone configurations that suited their own interests and would be politically acceptable, instead of contributing to the review as neutral actors. Consequently, the review did not produce any meaningful results.[231] The

[231] ACER, 'NC-CACM and NC-FCA Implementation Report' (n 211) 60.

unwillingness to redefine existing BZs may, according to ACER, "partly be understood from a political perspective" and owing to "partial interests, which sometimes correspond to national interests and sometimes to specific industry's interest". Quite obviously, the BZ review process was not suited to overcoming the underlying controversy, which impeded a successful outcome. ACER therefore recommended a series of amendments to the regulatory framework for the BZ review in the CACM GL. Inter alia, it suggested to be granted a stronger role during the first step of the review to ensure that the adopted methodology and assumptions, as well as the alternative BZ scenarios, are devised with "EU interest [as] the main driving force".[232]

The changes proposed by ACER could have been implemented by amending the CACM GL according to the procedure explained earlier.[233] Instead, the process was modified in the CEP, more precisely Article 14 of E-Regulation 2019. This is less than ideal from a legal point of view: since these new rules explicitly modify or override the existing rules in the CACM GL for future BZ reviews,[234] it will be necessary to consult two different EU regulations with (partially) overlapping provisions on the same matter for determining the process to follow. In addition, E-Regulation 2019 started an immediate additional EU-wide BZ review, obliging the TSOs to submit a methodology and assumptions for the review process and alternative bidding zone configurations to the competent NRAs by 5 October 2019.[235] With regard to the review process itself, ACER's plea for stronger involvement was (partially) taken up: the new rules explicitly require the competent NRAs to "take a unanimous decision" within three months, lest the competence to decide on the TSOs' proposals passes to ACER, whereupon ACER has three additional months to decide. The following figure 5 illustrates the process; differences to the former BZ review process laid down in the CACM GL are ***highlighted***.

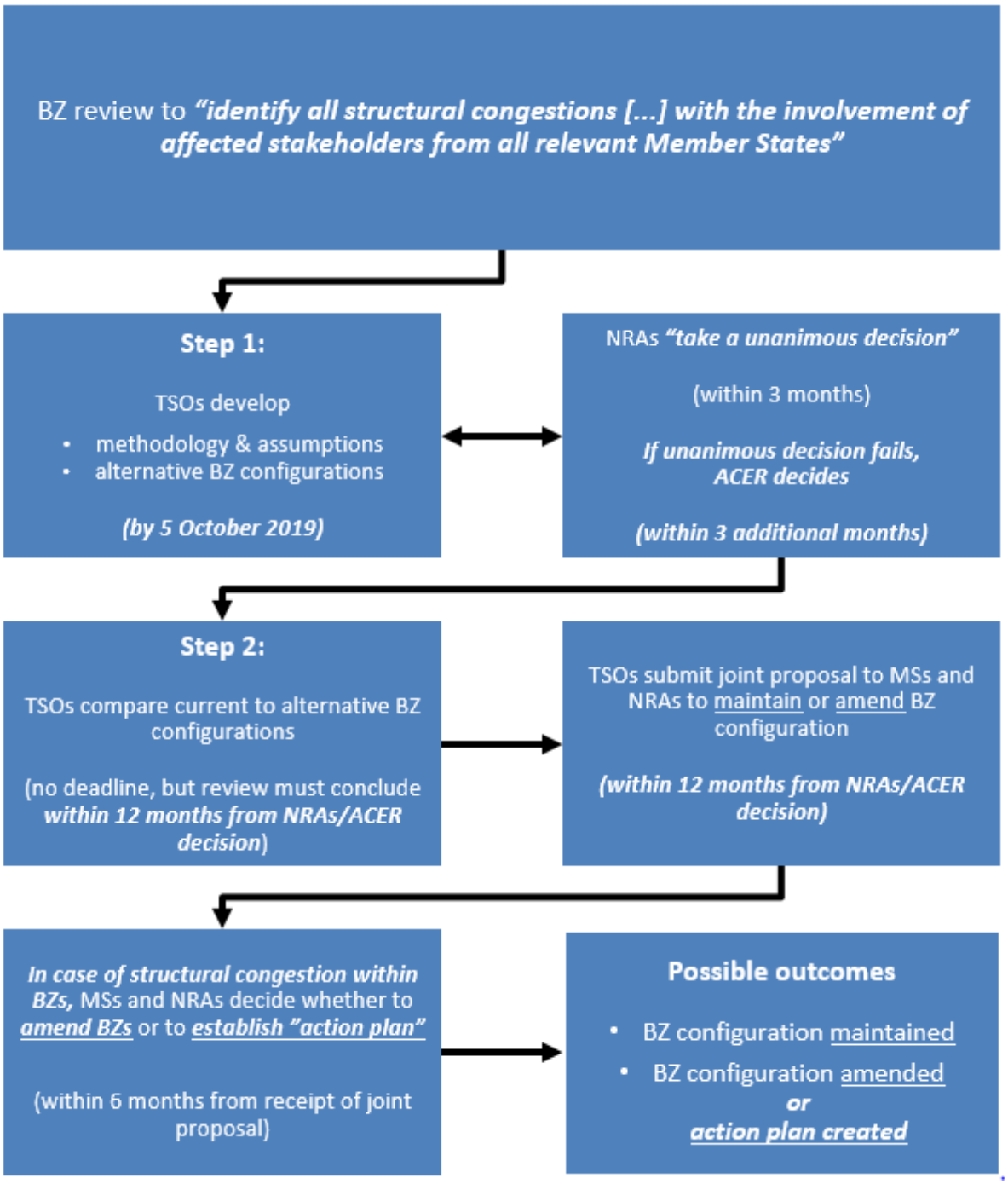
Figure 13: Modified BZ review process under the CEP

[232] ibid 61.

[233] See sec. 5.2 above.

[234] Article 14 (11) of Regulation 2019/943.

[235] Article 14 (3) and (5) of Regulation 2019/943.



As can be seen, the revised BZ review process puts considerable pressure on the involved NRAs to overcome the underlying controversies within the given, rather short deadline. Since the decision on the methodological framework for the BZ review explicitly has to be taken unanimously, each NRA has a de facto veto right and can force a right of the competition to decide to ACER. This seems to resolve the implementation issues that encumbered the first review. However, a closer look reveals that the core controversy regarding the subject of BZs is still unresolved and once more postponed to a later stage. The BZ review ordered in the CEP has two possible outcomes in case there is structural internal congestion: the concerned

Member State(s) can either change their BZ configuration or create NAPs to address the structural congestion.[236]

As already argued above, it is by no means guaranteed that action plans are a sufficiently effective tool for addressing structural internal bottlenecks. Most projects included in the TSOs' investment plans take much longer than anticipated. This is illustrated particularly well by the repeated delays in the realisation of a considerable number of even the highest-priority electricity infrastructure projects at EU level, which are all included in investment plans.[237] Another example is provided by the German "power highways", which shall facilitate an unrestricted flow of the high RES production in the northern part of the country to the industrial centres in Southern Germany. Yet in reality, the construction of the corresponding lines meets vigorous resistance from the local population and faces considerable delays. Apparently, the inclusion of the "power highways" in the investment plans of the German TSOs alone cannot ensure that they are commissioned on time.[238] Interestingly, Germany lobbied for a cautious revision of the rules for the BZ review during the legislative procedure for the CEP.[239]

At present, the NAPs adapted in most MS exhibit a low level of ambition. Instead of structuring and smoothing out the way towards 70% cross-zonal capacity throughout the EU[240] in order to avoid excessive hardships, these NAPs appear to cement the current, inefficient status quo. It is quite possible that several or even most NAPs will prove ineffective in reaching the mandatory minimum capacity levels by the end of 2025. Unfortunately, the enforcement instruments for the NAPs are also quite limited. it is true that each NAP must establish a concrete timetable for the adoption of measures to reduce the identified structural congestion within four years and define a linear trajectory for increasing the available cross-zonal capacity. However, the external intervention by the EC in case a Member State does not implement its action plan as foreseen is only possible "as a last resort" if prior deliberations between the Member States affected by the reduced cross-zonal capacity have failed. [241]

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[236] Article 14 (7), 15 of Regulation 2019/943.

[237] Projects that have particular strategic value for the achievement of the EU's energy policy goals can attain the status of "projects of common interest" (PCIs). PCIs enjoy several privileges and access to dedicated funding, but more than a third of them is nevertheless delayed, compare ACER, 'Consolidated Report on the Progress of Electricity and Gas Projects of Common Interest' (2019) 16–17.

[238] See the press release from the German Ministry of Economic Affairs and Energy, '#NetzeJetzt: Minister Altmaier Takes Grid Expansion into His Own Hands' (24 September 2018) <https://www.bmwi-energiewende.de/EWD/Redaktion/EN/Newsletter/2018/08/Meldung/topthema.html> (last accessed 14 September 2020).

[239] See Fridtjof Nansen Institute and Thema Consulting Group, REMAP Insight 3-2019, 'Clean Energy Package – The battle on bidding zones and cross-zonal capacity allocation' <https://www.fni.no/getfile.php/139736-1559128718/Filer/Publikasjoner/REMAP%20Insight%203%20-%20Bidding%20zones%20and%20capacity%20allocation.pdf> (last accessed 15 September 2020).

[240] Note that this does not imply that 70% capacity constitutes the optimum on all bidding zone borders. In fact, on most bidding zone borders, higher or lower capacity levels are likely more efficient.

[241] Art. 14 (8) of Regulation 2019/943.

6.4.4 Summing Up: Are the Practical Challenges Met?

The preceding section has revealed a series of main takeaways concerning the implementation of the GLs:

- The creation of the NCs, GLs and the detailed TCMs is no end in itself, but a tool to achieve the aims of EU energy law. There is a tangible danger that some of these aims slip from focus when regulating minute details of the electricity sector, i.e. that the resulting rules lack "upward compatibility". This hazard is especially pronounced when conflicting interests have not been resolved during the legislative procedure leading to the adoption of a NC or GL, but have been postponed to the creation of TCMs by stakeholders. The conflicts accompanying the creation of most TCMs reveal that the expectation that such controversy can be resolved at the implementation level is overly optimistic.

- The first illustrative highlight issue concerns the current level of congestion displacement throughout Europe, which encumbers several of the aims of EU energy law. The general framework in the Third Package contained detailed rules and a clear mandate to reduce congestion displacement to the necessary and sensible minimum. The CEP provides an even more rigid framework with the same aim, going so far as prescribing a binding EU-wide 70% minimum capacity value for cross-zonal trade. The CACM GL and SO GL complement this framework by providing detailed rules on using remedial actions and ordering the creation of CCMs that prevent congestion displacement. Nevertheless, the CCMs currently being adopted do not seem to address this issue, and some seem to allow congestion displacement in cases not foreseen in the overarching principles of congestion management.

- The second highlight concerns the unsuccessful bidding zone review. The CACM GL did not contain sufficiently strong instruments to overcome the inherent conflict of interests. Instead of amending the CACM GL to improve the review process, additional rules for the bidding zone review were introduced with the CEP. Regulating this process in two different regulations creates additional complications. Moreover, the revised review creates new implementation problems of its own, since Member States may now forego a bidding zone reconfiguration by creating NAPs to address internal bottlenecks. While a definite verdict can only be reached as the deadline for the attainment of the 70% minimum value at the end of 2025 approaches, the issues that typically accompany the implementation of similar plans provide plenty of reason to worry that the NAPs may become mere paper tigers, thus perpetuating internal bottlenecks that impede cross-zonal trade.

Annex I

Section I - NCs and GLs

Commission Regulation (EU) 2017/2196 of 24 November 2017 establishing a network code on electricity emergency and restoration [2017] OJ L 312 ('E&R NC')

Commission Regulation (EU) 2016/1447 of 26 August 2016 establishing a network code on requirements for grid connection on high voltage direct current systems and direct current-connected power park modules [2016] OJ L244 ('HVDC NC')
Commission Regulation (EU) 2016/1388 of 17 August 2016 establishing a network code on demand connection [2016] OJ L223 ('DC NC')
Commission Regulation (EU) 2016/631 of 14 April 2016 establishing a network code on requirements for grid connection for generators [2016] OJ L112 ('RfG NC')
Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management [2015] OJ L197 ('CACM GL')
Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a guideline on forward capacity allocation [2016] OJ L259 ('FCA GL')
Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing [2017] OJ L312 ('EBGL')
Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation [2017] OJ L 220 ('SOGL').

Section II – Third Package

Regulation (EC) 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators [2009] OJ L211 ('ACER Regulation')
Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211 ('Electricity Directive')
Regulation (EC) 714/2009 of the European Parliament and of the Council of 13 July 2009 on common conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 [2009] OJ L211 ('Electricity Regulation')
Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L 211 ('Gas Directive')
Regulation (EC) 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 [2009] OJ L211 ('Gas Regulation')

Section III - CEP Update

European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a European Union Agency for the Cooperation of Energy Regulators (recast)' COM (2016) 863 final ('ACER Regulation Proposal') ACER Regulation 2019/942 OJ 2019L158/

European Commission, 'Proposal for a Directive of the European Parliament and of the Council on common rules for the internal market in electricity (recast)' COM (2016) 864 final ('Electricity Directive Proposal') 2019/944 OJ 2019 L
European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the internal market for electricity (recast)' COM (2016) 861 final ('Electricity Regulation Proposal') 2019/943 OJ 2019 L

Annex II - The NC Adoption Process

Art 59 (4) – (15)

4. The Commission shall request ACER to submit to it within a reasonable period not exceeding six months of receipt of the Commission's request non-binding framework guidelines setting out clear and objective principles for the development of network codes relating to the areas identified in the priority list (framework guideline). The request of the Commission may include conditions which the framework guideline shall address. Each framework guideline shall contribute to market integration, non-discrimination, effective competition, and the efficient functioning of the market. Upon a reasoned request from ACER, the Commission may extend the period for submitting the guidelines.

5. ACER shall consult the ENTSO for Electricity, the EU DSO entity, and the other relevant stakeholders in regard to the framework guideline, during a period of no less than two months, in an open and transparent manner.

6. ACER shall submit a non-binding framework guideline to the Commission where requested to do so under paragraph 4.

7. If the Commission considers that the framework guideline does not contribute to market integration, non-dis crimination, effective competition and the efficient functioning of the market, it may request ACER to review the framework guideline within a reasonable period and resubmit it to the Commission.

8. If ACER fails to submit or resubmit a framework guideline within the period set by the Commission under paragraph 4 or 7, the Commission shall develop the framework guideline in question.

9. The Commission shall request the ENTSO for Electricity or, where provided for in the priority list referred to in paragraph 3, the EU DSO entity in cooperation with the ENTSO for Electricity, to submit a proposal for a network code in accordance with the relevant framework guideline, to ACER within a reasonable period, not exceeding 12 months, of receipt of the Commission's request.

10. The ENTSO for Electricity, or where provided for in the priority list referred to in paragraph 3 the EU DSO entity, in cooperation with the ENTSO for Electricity, shall convene a drafting committee to support it in the network code development process. The drafting committee shall consist of representatives of ACER, the ENTSO for Electricity, where appropriate the EU DSO entity and NEMOs, and a limited number of the main affected stakeholders. The ENTSO for Electricity or where provided for in the priority list pursuant to paragraph 3 the EU DSO entity, in cooperation with the ENTSO for Electricity, shall develop proposals for network codes in the areas referred to in paragraphs 1 and 2 where so requested by the Commission in accordance with paragraph 9.

11. ACER shall revise the proposed network code to ensure that the network code to be adopted complies with the relevant framework guidelines and contributes to market

integration, non-discrimination, effective competition, and the efficient functioning of the market and, submit the revised network code to the Commission within six months of receipt of the proposal. In the proposal submitted to the Commission, ACER shall take into account the views provided by all involved parties during the drafting of the proposal led by the ENTSO for Electricity or the EU DSO entity and shall consult the relevant stakeholders on the version to be submitted to the Commission.

12. Where the ENTSO for Electricity or the EU DSO entity have failed to develop a network code within the period set by the Commission under paragraph 9, the Commission may request ACER to prepare a draft network code on the basis of the relevant framework guideline. ACER may launch a further consultation in the course of preparing a draft network code under this paragraph. ACER shall submit a draft network code prepared under this paragraph to the Commission and may recommend that it be adopted.

13. The Commission may adopt, on its own initiative, where the ENTSO for Electricity or the EU DSO entity have failed to develop a network code, or ACER has failed to develop a draft network code as referred to in paragraph 12, or upon the proposal of ACER under paragraph 11, one or more network codes in the areas listed in paragraphs 1 and 2.

14. Where the Commission proposes to adopt a network code on its own initiative, the Commission shall consult ACER, the ENTSO for Electricity and all relevant stakeholders in regard to the draft network code during a period of no less than two months.

15. This Article shall be without prejudice to the Commission's right to adopt and amend the guidelines as laid down in Article 61. It shall be without prejudice to the possibility for the ENTSO for Electricity to develop non-binding guidance in the areas set out in paragraphs 1 and 2 where such guidance does not relate to areas covered by a request addressed to the ENTSO for Electricity by the Commission. The ENTSO for Electricity shall submit any such guidance to ACER for an opinion and shall duly take that opinion into account.

Annex III

Source: Hilde Brans/USEU-FAS

Annex IV

Article 5(1) of ACER Regulation 2019/942

Tasks of the Agency as regards the development and implementation of network codes and guidelines

1. ACER shall participate in the development of network codes in accordance with Article 59 of Regulation (EU) 2019/943 and Article 6 of Regulation (EC) No 715/2009 and of guidelines in accordance with Article 61(6) of Regulation (EU) 2019/943 It shall in particular:

(a) submit non-binding framework guidelines to the Commission where it is requested to do so under Article 59(4) of Regulation (EU) 2019/943 or Article 6(2) of Regulation (EC) No 715/2009. ACER shall review the framework guidelines and re-submit them to the Commission where requested to do so under Article 59(7) of Regulation (EU) 2019/943 or Article 6(4) of Regulation (EC) No 715/2009;

(b) provide a reasoned opinion to the ENTSO for Gas on the network code in accordance with Article 6(7) of Regulation (EC) No 715/2009;

(c) revise the network code in accordance with Article 59(11) of Regulation (EU) 2019/943 and Article 6(9) of Regulation (EC) No 715/2009. In its revision, ACER shall take account of the views provided by the parties involved during the drafting of that revised network code led by the ENTSO for Electricity, the ENTSO for Gas or the EU DSO entity, and shall consult the relevant stakeholders on the version to be submitted to the Commission. For this purpose, ACER may use the committee established under the network codes where appropriate. ACER shall report to the Commission on the outcome of the consultations. Subsequently, ACER shall submit the revised network code to the Commission in accordance with Article 59(11) of Regulation (EU) 2019/943 and Article 6(9) of Regulation (EC) No 715/2009. Where the ENTSO for Electricity, the ENTSO for Gas or the EU DSO entity have failed to develop a network code, ACER shall prepare and submit a draft network code to the Commission where it is requested to do so under Article 59(12) of Regulation (EU) 2019/943 or Article 6(10) of Regulation (EC) No 715/2009;

(d) provide a duly reasoned opinion to the Commission, in accordance with Article 32(1) of Regulation (EU) 2019/943 or Article 9(1) of Regulation (EC) No 715/2009, where the ENTSO for Electricity, the ENTSO for Gas or the EU DSO entity has failed to implement a network code elaborated under point (a) of Article 30(1) of Regulation (EU) 2019/943 or Article 8(2) of Regulation (EC) No 715/2009 or a network code which has been established in accordance with Article 59(3) to (12) of Regulation (EU) 2019/943 and Article 6(1) to (10) of Regulation (EC) No 715/2009 but which has not been adopted by the Commission under Article 59(13) of Regulation (EU) 2019/943 and under Article 6(11) of Regulation (EC) No 715/2009.

(e) monitor and analyse the implementation of the network codes adopted by the Commission in accordance with Article 59 of Regulation (EU) 2019/943 and Article 6

of Regulation (EC) No 715/2009 and the guidelines adopted in accordance with Article 61 of Regulation (EU) 2019/943, and their effect on the harmonisation of applicable rules aimed at facilitating market integration as well as on non-discrimination, effective competition and the efficient functioning of the market, and report to the Commission.

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