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THE EU ELECTRICITY NETWORK CODES AND GUIDELINES: A LEGAL PERSPECTIVE

The EU Electricity Network Codes and Guidelines: A Legal Perspective

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Abstract
The EU network codes and guidelines for electricity, first introduced in the third energy package, are designed to enable the implementation of an EU internal electricity market. This text is intended as an introductory guide that highlights some of the legal issues surrounding the drafting, implementation and amendment procedures of these network codes and guidelines.

Key words:
EU electricity market; network codes and guidelines; ACER; ENTSO-E; Clean Energy Package

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Boxes in green refer to changes introduced in the Clean Energy Package (CEP)

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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
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 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 (third package) legislation, as explained below. The framework has now been amended by the newly adopted legislation that forms part of the Clean Energy Package. These new measures will enter 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 basic 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 NLs;
- Who can raise legal challenges during this process and to 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, Regulation 714/2009. It details the role of the European Commission (EC), the European Parliament (EP), and the Council. Part five deals with the process of amendment for both NCs and GLs.

In part six, we will turn to implementation issues. As it currently stands, a total of eight electricity NCs and GLs have been adopted.[3] Post-adoption, one of the main challenges for the EC is to ensure that the Member States (MSs) implement these NCs and GLs 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 terms

2 See Annex I, Section I.

3 The eight network codes and guidelines are outlined in Annex I, Section I.

and conditions or methodologies (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 the one side and the national regulatory authorities (NRAs) (and possibly ACER) on the other side. These methodologies are comprehensive legal acts on their own, each methodology containing dozens of definitions and provisions. While there is still a lot of uncertainty surrounding the adoption and development of TCMs, some crucial TCMs have been adopted of late, which allows 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 body of legislation known as the Clean Energy Package (CEP) (2016). In particular, the recast electricity regulation, Regulation (EU) 2019/943, and the final version of the new ACER regulation, Regulation (EU) 2019/942, introduce substantial changes to the procedures for the adoption, implementation and amendment of the next generation of NCs and GLs. We will highlight the main differences between the adoption of first and next generation codes. Furthermore, we will comment on the interplay between the new CEP rules and existing NCs, GLs and TCMs where appropriate.

2. Characteristics of the EU Electricity Network Codes and Guidelines

Among the overarching goals of the Third Energy Package[4] 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, Regulation (EC) No 714/2009[5] contained provisions that mandated the adoption of further technical, delegated legislation in the form of either NCs or GLs.[6] Together with the creation of the Agency for the Cooperation of Energy Regulators (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 newly adopted CEP legislation 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.

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).[7] The EC's position is that "irrespective of whether codes or guidelines are used, the legal value of the rule is not changed."[8] As EU regulations, they are legally binding, directly applicable,[9] and enforceable in the Member States once they have entered into force.[10] Compliance with these provisions is mandatory,[11] and non-compliance may constitute the basis for judicial action. As EU regulations, the NCs and GLs have primacy over potentially conflicting national legislation.[12]

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

5 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

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

7 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."

8 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.

9 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.

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

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

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

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."[13] 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. However, 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.[14] Article 62 of the Recast Regulation 2019/943 expressly provides however 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 have separate and distinct legal bases:

- Article 6 outlines the requirements for NCs,[15] and
- Article 18 for the GLs.

Article 6(12) of the Electricity Regulation 2009 explicitly states that the prerogative of the EC to adopt a NC will not affect its right to adopt and amend guidelines, in accordance with 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,[16] 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. This also means that, in effect, the EC could 'sidestep' the involvement of 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,[17] GLs require further implementation by way of the adoption of additional regulatory instruments, namely the terms and conditions or methodologies of implementation (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

13 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."

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

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

16 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

17 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

regional or European TCMs. These TCMs are drafted by the market participants, and approved by the national regulators or, in certain cases, by ACER.[18] Conversely, from the EC's standpoint, the NCs should provide comprehensive, detailed provisions[19] to minimise the need for additional decisions to be taken by TSOs or NRAs.[20]

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 level 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.

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

Articles 58-61 of the Recast Regulation 2019/943 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.

18 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."

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

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

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

The third package (2009) enabled the EC to adopt legally binding delegated measures in matters of energy,[21] following a special adoption procedure known as the Regulatory Procedure with Scrutiny ('RPS') or the (old) 'Comitology' system.[22] 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 non-essential elements[23] of a legislative act.[24] 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 elements of a primary act, as both will be adopted as delegated legislation under the TFEU.

The current or first generation of NCs and GLs are adopted as delegated legislation, even if they are not formally designated as 'delegated acts' according to the terms outlined in the TFEU. Since the third package was adopted in July 2009, alignment of the current NCs and GLs with the TFEU provisions did not take place at that time, and so, 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. 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.[25] **Implementing acts** are legally binding acts that enable the EC to set conditions that ensure that EU laws are applied uniformly.

21 Electricity Regulation (EC) No 714/2009, Article 6, 18, 23

22 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 20 January 2020.

23 Instrumental in 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 67-68, '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.'

24 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."

25 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."

Implementing acts are governed by a generic procedure for their adoption,[26] whereas the objective, content, scope and duration of delegated powers 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 European Parliament's scrutiny rights, for example, depends crucially on the category of the acts in question. Whereas, in the case of delegated acts, 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 provides that future NCs and GLs will be aligned to the TFEU. Article 58(1) of the Recast Electricity Regulation 2019/943 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 Directive 2019/944 or the recast Regulation 2019/943) defines the objectives, content, scope and duration of the delegation of power.[27]
- The delegated act cannot change the essential elements of the law – 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.[28]

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

26 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.

27 Recital 72 of the Recast Regulation 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."

28 For a summary of recent case law on delegated and implementing acts, see Ministry of Foreign Affairs, 2019. Recent case law of the Court of Justice on delegated and implementing acts. Available at <https://ecer.minbuza.nl/ecer/bijlagen/eu_essentieel/delegatie_en_uitvoering_comitologie/recent-case-law-of-the-court-of-justice-on-delegated-and-implementing-acts.html> last accessed on 7 December 2019.

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.

The Commission is empowered to adopt delegated acts in accordance with Article 68 concerning the establishment of network codes inter alia, of Article 59(2)(e) on cyber security. Article 59(2) (e) of the Recast Regulation 2019/943 states that "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 has prepared background documents for input to define the Terms of Reference for the Working Group on Cyber Security[29] and the Smart Grids Task Force (Expert Group 2 on Cybersecurity) has also produced, through an interim report, Recommendations for the European Commission on the Implementation of a Network Code on Cybersecurity.[30]

Can all elements of this 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 Commission* of 11 May 2017, [31] at 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

29 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> last accessed on 7 December 2019

30 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 17 January 2020

31 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

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.

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.

Summary of the similarities and differences between NCs and GLs under the Third Package (2009)

Similarities:

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

Differences:

- Legal basis (Article 6 for network codes and Article 18 for guidelines of Regulation (EC) 714/2009);
- Stakeholder involvement – Article 18(3) does not explicitly refer to 'all relevant stakeholders';
- Amendment process (Article 7 for network codes (all interested parties) and Article 18(5) for guidelines of Regulation (EC) 714/2009 (EC only));[32]
- Topics/ scope;

32 However, in practice the GLs often state in their recitals that the Commission will consult ENTSO-E and ACER as well as 'other relevant stakeholders'. See e.g. Recital 14 of the FCA GL, Recital 17 SO GL and Recital 32 CACM GL and Recital 20 EB GL.

- The adoption of further rules for the implementation phase.

As we shall see in section 5, a major difference is that guidelines include provisions requiring Transmission System Operators (TSOs) or Nominated Electricity Market Operators (NEMOs) to develop TCMs. In most cases, these methodologies have to be jointly developed by all TSOs or all NEMOs at the 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 Recast Regulation, many of these important differences remain, as will be highlighted in the next sections.

3. Development of the EU Electricity NCs and GLs

Article 6 of Electricity Regulation 714/2009 details the steps that the institutions involved, namely the EC, ACER (also referred to as the Agency) and ENTSO-E must take in order to develop and submit a draft proposal of a NC. Article 18(3) is of a more general nature, and does spell out the procedural requirements for the relevant stakeholders.[33] The EC may even draft and adopt GLs by itself, bypassing many of the steps necessary for a NC.

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, and relevant stakeholders to establish an Annual Priority List.[34] This was the first step of the four-stage procedure 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 measure, which we will outline in the following sections. The reforms introduced in the Recast Regulation, as examined in further detail below, follow this four-step procedure but aim to reduce the length and complexity of the steps.

Article 59(3) of the Recast Regulation 2019/943 now provides that the EC shall, after consulting the Agency, the ENTSO for Electricity, and now also, the EU DSO entity, 'and the 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.[35]

3.1 The Development of Framework Guidelines

33 The full text of Articles 6 and 8 of the Electricity Regulation are provided in Annex III.

34 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.

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

According to Article 6(2) of Regulation 714/2009, the EC requests ACER to issue a non-binding framework guideline (FG).[36] 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, and the FG and NC or GL should remain aligned in their objectives.[37] These FGs are listed as one of the categories of measures that ACER shall issue.[38]

Under the current system, ACER is expected to produce an FG within 6 months, from the date of request.[39] ACER must then formally consult ENTSO-E and other relevant stakeholders over a two-month period, in an open and transparent manner. This two-month period has been criticised as too short as it may be the first involvement in the process for many stakeholders.[40] After the FG has been issued, the EC could request ACER to further review and resubmit it to the EC, should it not meet their objectives. Should ACER fail to amend the FG, the EC will revise the FG.

3.2 ENTSO-E Drafts the NCs

Under the current Electricity Regulation 714/2009, if the EC is satisfied with the FGs as drafted by ACER, it requests ENTSO-E to draft a proposal for a NC, in accordance the FG and within a reasonable period of time not exceeding twelve months.[41] ENTSO-E submits the draft proposal to ACER. ACER has a three-month period in which to assess the draft proposal, consult relevant stakeholders, and provide a reasoned opinion to ENTSO-E on the draft NC. Should ENTSO-E fail to draft the NC, the EC could request ACER to draft the NC based on the relevant FG.[42]

Under ENTSO-E,[43] 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.[44] As ENTSO-E is not a public body, but a non-profit association,[45] it is not open to the same degree of scrutiny as national entities

36 As an example, please see ACER, 2012a. Framework Guidelines on Electricity Balancing, FG-2012-E-009.

37 Electricity Regulation 714/2009, Article 6(69)

38 According to Article 4 ACER Regulation (EC) No 713/2009: "The Agency shall: (a) issue opinions and recommendations addressed to transmission system operators; (b) issue opinions and recommendations addressed to regulatory authorities; (c) issue opinions and recommendations addressed to the European Parliament, the Council, or the Commission; (d) take individual decisions in the specific cases referred to in Articles 7, 8 and 9; and (e) submit to the Commission non-binding framework guidelines (framework guidelines) in accordance with Article 6 of Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity." See Article 2 Regulation (EU) 2019/942 for the new categories of measures within ACER's power.

39 Article 59(4) of the recast Electricity Regulation 2019/943 maintains these provisions as well as the non-binding nature of the FG.

40 Ch. Vlachou, 'Ensuring Public Participation in ACER's rulemaking'. In G. Della Cananea et al, Torino 2019.

41 Electricity Regulation 714/2009, Article 6(6)

42 Electricity Regulation 714/2009, Article 6(10); Recast Regulation, 2019/943, Article 59(12)

43 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.

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

45 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).

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.[46]

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.[47] 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.[48]

Electricity Regulation 714/2009 also detailed certain scenarios in which a NC could be developed, outside of this more standard process but, as these powers were never used, they are not further discussed here. Nevertheless, it may be noted that the EC could itself adopt a NC if ENTSO-E had failed to draft a NC under Article 6(6),[49] following the request of the EC. In addition, the EC can draft and adopt a NC should ACER and ENTSO-E both fail to draft the code.[50] In this situation, the EC will proceed to adoption, after having consulted ACER, ENTSO-E, and all relevant stakeholders for a period of at least two months. This possibility is seen as a measure of last resort, triggered by exceptional circumstances in which a decision needs to be taken immediately.[51] Article 59(12) to (14) of the Recast Regulation 2019/943 addresses these exceptional procedures.

3.3 ACER Issues a Reasoned Opinion and Recommends Adoption

Currently, ACER is obliged to provide a reasoned opinion on the draft proposal to ENTSO-E within three months of its receipt.[52] If ACER is not satisfied with the text of the draft NC, or if it is deemed to be out of line with the principles of the FGs, ACER will return the draft NC to ENTSO-E, together with its arguments and proposed amendments. ENTSO-E may then decide[53] to amend the draft NC so that it corresponds to the reasoned opinion of ACER, or not.[54] Article 6(8) of Electricity Regulation 714/2009 allows ENTSO-E not to take ACER's requests for amendments into consideration, as per its reasoned opinion.[55] NB according to Vlachou; "Faced with the re-submission by ENTSOs of network codes that

46 cf. Jones (n. 16), p. 638
47 cf. Vlachou (n. 17), p. 2
48 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.
49 Electricity Regulation 714/2009, Article 6(11); Electricity Regulation 2019/943, Article 59(13)
50 Electricity Regulation, Article 6(10)
51 Cf. Vlachou (n. 17), p. 7
52 Electricity Regulation 714/2009, Article 6(7); ACER Regulation 713/2009, Article 6(4). See the recast ACER Regulation 2019/942 Article 4 (5-7).
53 ENTSO-E, 2012. Network Codes Development Process, Section 4.5.1.
54 Electricity Regulation, Article 6(8)
55 If ENTSO-E decides to amend the draft proposal as per ACER's requests in its reasoned opinion, ENTSO-E will proceed to send the amended draft proposal back to ACER. Currently, there is no time limit for ENTSO-E to revise

were not fully in line with the framework guidelines, ACER has indeed resorted to an instrument that is not explicitly foreseen in the letter of the relevant provisions: it issued so-called "qualified recommendations" indicating that the network code can reach the comitology stage provided the Commission proceeds to the amendments indicated by the Agency."[56]

A good example of informal cooperation is provided by the drafting of the CACM GL.[57] In December 2012, ACER submitted its reasoned opinion on the draft network code to ENTSO-E.[58] On 8 February 2013, ENTSO-E submitted its response to ACER, stating that it would not exercise its right to resubmit the network code, and that it believed that the ongoing dialogue between itself, the EC and ACER represented the best approach towards refining the articles of the code challenged by ACER.[59] In addition, on the 14 March 2013, ACER issued a recommendation for adoption, which included the list of amendments it had already put forward in the final text of the NC and with the addition of guidelines on the governance of day-ahead and intraday market coupling.[60] If ACER is satisfied with the text of the draft NC, it will submit it to the EC with a recommendation for adoption within a reasonable period of time.

Box 3: Case Study 2: Development and Adoption of 'First Generation' Guidelines

As mentioned above, to date, the development processes for all first generation NCs and GLs have been launched under Article 6, even if some have been finalised under Article 18. This 'switch' takes place after the EC has received a draft proposal for the NC by ENTSO-E, with recommendation for adoption from ACER.[61]

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. In the case of the CACM GL, the TSOs had drafted the intended NC on Capacity Allocation and Congestion Management, whereas the EC proceeded to draft, internally, the Guidelines 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).[62] The EC "has taken on the responsibility of studying the need for

the draft NC. With the revised draft, ACER will then check to see if the non-binding principles from the FGs have been respected, and if its recommendations from the reasoned opinion have been taken into consideration.

56 Ch Vlachou (n. 17)

57 For a wider perspective on these documents, please consult ENTSO-E's webpage on the history and development of the network code. ENTSO-E, 2018. Capacity Allocation & Congestion Management. Available at <https://electricity.network-codes.eu/network_codes/cacm> last accessed on 12 September 2019

58 ACER, 2012b. Opinion of the Agency for the Cooperation of Energy Regulators No 10/2012 on ENTSO-E's Network Code on Capacity Allocation and Congestion Management

59 ACER's list of reasoned opinions on draft network codes and guidelines can be found here.

60 The amendments proposed by ACER concerned: the dates of entry into force and application of the CACM; the description and coordination of capacity allocation; dispatching and counter trading arrangements; the regulatory approval procedures; the assessment of bidding zones; the intraday regional auctions; the definition of a common timetable; the compensation in case of force majeure and an emergency situation; cost recovery; the objectives of the network code; and had questions concerning transparency and the consultation process.

61 Electricity Regulation 714/2009, Article 6(9)

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

binding legislation in view of a possible legally binding guideline on this topic",[63] targeting especially the relationship between TSOs and Power Exchanges.[64]

In this specific case, after the drafting of the proposal of the CACM NC by ENTSO-E had been finalised,[65] the EC received a recommendation from ACER to adopt a NC.[66] Nevertheless, the EC decided to adopt the rules on capacity allocation, congestion management, and governance of the market coupling in the form of a guideline.[67] 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.[68]

This strategy is interesting with respect to the consultation obligations that the entities involved in the drafting of a NC or GL are bound by. While ENTSO-E and ACER are under strict consultation obligations during the development process of a NC, according to Article 6 and 10 of the then applicable Regulation 714/2009, the EC is only bound to consult ACER and ENTSO-E during the drafting of a GL, as per Article 18(3) of the Electricity Regulation 714/2009.[69] The extent to which the EC had a duty to consult other stakeholders during this process was not clear.

Box 4: Changes introduced by the CEP

Article 59(10) of the Recast Electricity Regulation 2019/943 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, an EU-DSO entity,[70] NEMOs (where appropriate), and 'relevant stakeholders'.

In addition, Article 59(3) of the Recast Electricity Regulation 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 the ENTSO for Electricity, to convene a drafting committee and submit a proposal for a network code to ACER."

63 Ibid.

64 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

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

66 ACER (n. 64)

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

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

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

70 According to Recital 60 and Article 52 of the Recast 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.

However, and in order to streamline the drafting process,[71] ACER will now play a more active role, as ENTSO-E will only develop proposals for NCs while ACER will be given the power to revise the draft NC and directly submit its revised version to the Commission. ENTSO-E will be supported by a 'drafting committee' composed of representatives of ENTSO-E, ACER and the new EU-DSO entity, and potentially representatives of NEMOs as well as 'a limited number of the mainly affected stakeholders'.

Article 59(11) of the Recast Electricity Regulation 2019/943
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. ACER would no longer be required to send a reasoned opinion to ENTSO-E or to submit a recommendation for adoption to the EC.

Article 5 of the ACER Regulation 2019/942
Article 5(1) of the Recast ACER Regulation will require 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 V for the text of Article 5]

ACER would therefore enjoy 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.

Judicial Review of Preparatory Acts
Following the consultation process with stakeholders, as provided for in Article 6, 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.[72] The stakeholder can only bring an action against the legally binding NC or GL that is ultimately developed according to the FG.[73] 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".[74]

The action to annul the final measure would be submitted to the CJEU, according to the provisions of Article 263 TFEU,[75] 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

71 See Recast Electricity Regulation 2019/943, Recital 62.

72 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."

73 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.

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

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

on several grounds[76] including; (i) lack of competence, (ii) infringement of an essential procedural requirement, (iii) infringement of the Treaties[77] or any rule of law relating to their application and (iv) misuse of powers.[78]

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.[79] The procedure means that draft proposals for NCs and GLs shall not be subject to the burdensome and time-consuming ordinary legislative procedure,[80] where the EP and the Council are directly involved as co-legislators.[81]

It is important to bear in mind that despite the measures adopted under the third package, 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 adopts, upon recommendation from ACER,[82] one or more NCs in the areas listed in Article 8(6) of Regulation 714/2009.[83] However, even at this stage, the EC can also significantly amend ENTSO-E's draft network code, both in terms of substance as well as form, as well as introduce substantial changes.[84]

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 network codes. Given the need for adaptation to market or technical evolution in the field and for consistency among the various instruments, amendments can be subsequently introduced to network codes that have entered into force.

76 TFEU, Article 263(2)

77 i.e. TFEU, TEU

78 For a detailed discussion, see Vlachou C., 2012. The adoption of NCs in the field of energy: availability of judicial review in a multi-stage procedure. EUI Working Paper, Robert Schuman Centre for Advanced Studies 2012/39. Available at: http://cadmus.eui.eu/bitstream/handle/1814/23856/RSCAS_2012_39.pdf?sequence=1.

79 Vlachou (n. 17), p. 6

80 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.

81 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.

82 Electricity Regulation 714/2009, Article 6(9)

83 Electricity Regulation 714/2009, Article 6(11)

84 See above, Case Study 1.

The first generation of NCs and GLS were submitted to the 'old' Comitology procedures. In accordance with Article 23 of Electricity Regulation 714/2009, the formal adoption of the first generation of NCs and GLs followed the Regulatory Procedure with Scrutiny (RPS).[85]

As explained above, the next generation of NCs and GLs will be fully aligned with the TFEU. 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. [86][87]

4.1 Composition of the (old) 'Comitology Committee'

For the adoption of the first generation of NCs and GLs, the EC has been assisted by a special Committee, the 'Electricity Cross-Border Committee'. This is composed of representatives of the Member States (specialists from the national energy ministries) and chaired by one representative of the EC. The composition of the Comitology Committee is decided by the EP and Council or by the latter, alone. Experts from ACER and ENTSO-E are invited to the discussions, while third countries, such as Norway, have the status of an observer.[88] Even though they may be present at discussions, ACER's and ENTSO-E's representatives do not have a right to vote.[89] In addition, the representative of the EC, as the chairman of the Committee, will abstain from voting.[90] In accordance with the RPS procedure, the Comitology Committee can issue a positive, a negative or no opinion.

85 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."

86 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.

87 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.

88 European Commission, Electricity Cross-Border Committee, 2014. Minutes and summary report on the Committee meeting with regard to the draft Commission Regulation establishing a Guideline on Capacity Allocation and Congestion Management held in Brussels on 4 and 5 December 2014, CMTD (2014) 1665

89 Ibid.

90 Decision 1999/468/EC, Article 5(a)(2)

4.2 Positive Opinion of the Committee

The Comitology Committee issues its opinion on the NC or GL proposal. The opinion shall be delivered by the majority.[91] As there is no deadline for the Committee to issue its opinion, the discussions will continue until a sufficient number of Member States accept the proposal. The EC will then send the draft NC or GL, along with the opinion of the Comitology Committee to the European Parliament and to the Council.

These two legislators can exercise their right of scrutiny[92] and can block the proposed NC or GL from being adopted, on one of three grounds:

1. The draft proposal exceeds the implementing powers offered to the Commission through the third package, or;
2. The draft is not compatible with the aim or content of the Electricity Regulation or;
3. The draft network code does not respect the principles of proportionality and subsidiarity.[93]

4.3 Negative Opinion or No Opinion

According to Article 5a(4) of Decision 1999/468/EC, should the Electricity Cross-Border Committee issue a negative opinion or issue no opinion on the draft proposal, the EC must send the draft proposal to the EP and to the Council, at the same time.

Within two months of receipt of this document, the Council is required to act, with qualified majority, reaching one of three conclusions:

(i) oppose the proposed measure;
(ii) agree with the proposed measure, or
(iii) not act.

In the first scenario, the draft NC cannot be adopted. In this case, the EC may re-submit to the Council an amended proposal or submit a new legislative proposal on the basis of the Treaties. The Council has the power to stall the entire process, should it reject the proposed measure. In the second scenario, if the Council approves of the proposal, then it will submit it to the EP. Should the Council fail to act in this designated period, the EC will submit the proposal for scrutiny to the EP.

In the two latter situations, if the EP had received the draft proposal previously agreed upon by the Council or, if the Council failed to respond, the EP may oppose the measure within four months from the original date of referral. Should the EP oppose the measure, the draft proposal will not be adopted, and the EC may submit an amended proposal or present a new legislative proposal, to be adopted by

91 As detailed in Article 238 of the TFEU, the majority required is the same as the majority required in case of decisions which the Council must adopt on a proposal it receives from the EC: a qualified majority (55% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States).
92 The EP under majority, and the Council with qualified majority.
93 Decision 1999/468/EC, Article 5.1.3.b

the ordinary legislative procedure. However, if the EP did not oppose it within the four-month period, the measure could be adopted.[94]

Box 5: Understanding the new procedures for the adoption of Delegated and Implementing Acts

The Recast Electricity Regulation 2019/943 states that the future NCs shall be adopted as 'delegated acts'[95] or as 'implementing acts'.[96] To recap, 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.

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 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 to the grounds for objection to a Commission measure unlike 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, 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) 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,[97] the network code or guideline will be simultaneously sent to the EP and to the Council.[98] The network code proposal, therefore, will only

94 For a comprehensive chart of the process, please see Annex II.

95 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.

96 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."

97 As provided for in the Recast Electricity Directive 2019/944, Article 68.

98 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

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.[99] The grounds on which either the EP or the Council could reject the proposal are not further specified in the Article 68(3) of the Recast Electricity Regulation 2019/943.

The procedure for adopting implementing acts (IAs):
Article 59(1) of the Recast Regulation 2019/943 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 Recast Electricity Directive 2019/944 and Regulation 2019/943) stipulates on which part of the legislation the European Commission has to establish implementing measures. The Commission 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 Commission will adopt the implementing act. When a negative response is issued, the Commission 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 Commission to adopt the proposal. The EP and the Council 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 Commission 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 Commission 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

The amendment procedure for the NCs is currently set out in Article 7 of Regulation 714/2009 and, for the GLs, in Article 18(5). The procedure for amending first generation NCs is well-defined, whereas the amendment process for a GL has lacked a clear structure. ACER and other stakeholders must be involved to amend a NC,[100] while the EC can amend a GL without the involvement of any other parties. GLs are, by definition, more flexible instruments and can undergo significant changes through the amendment of relevant implementing TCMs. The EC had, in 2014, announced its intention to run the amendment processes of both the NCs and GLs in 'as similar a way as possible'.[101]

Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, Point 28.

99 Recast Electricity Directive Article 67(6); Recast Electricity Regulation, Article 63(6)

100 For the full wording of Article 7 and Article 18 on the amendment process, please see Annex IV.

101 See Oral Update on the Framework Guidelines and Network Codes of Mr. K. D. Borchardt, ACER, 2014b. Minutes final (39th ACER Board of Regulators meeting), A14-BoR-39-02, p. 8.

5.1 Amendment of the Network Codes

Article 7 of Regulation 714/2009 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 is obliged to organise consultations and involve all relevant stakeholders in the process.[102] ACER collects the comments and feedback on amendments. In 2013, ACER issued a non-binding Guidance on the Evaluation Procedure for Network Codes' amendment proposals. Any party submitting amendments to the NC must also follow the procedure set out in this Guidance.[103] ACER then sends the reasoned proposals for amendment to the EC. The EC can also propose amendments.[104]

Amendments to the third package NCs have been formally adopted following the 'old Comitology' procedure.[105] The EC would submit proposals for the NC amendments to the Electricity Cross-Border Committee to obtain its opinion.[106] 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.[107]

5.2 Amendment of the Guidelines

Article 18(5) provided that amendments to GLs can be made either in the old comitology,[108] 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.[109]

Box 6: Changes introduced by the CEP

When it comes to the development of new network codes, Article 5(1)c) of ACER Regulation 2019/942 envisages that ACER can revise the proposed network code according to Article 59(11) of the Recast

102 ACER Regulation 713/2009, Article 10: "1. In carrying out its tasks, in particular in the process of developing framework guidelines … and in the process of proposing amendments of network codes under Article 7 of either of those Regulations, the Agency shall consult extensively and at an early stage with market participants, transmission system operators, consumers, end users and, where relevant, competition authorities, without prejudice to their respective competence, in an open and transparent manner, in particular when its tasks concern transmission system operators."

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

104 Electricity Regulation 714/2009, Article 7(4)

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

106 Electricity Regulation, Article 7(4)

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

108 Electricity Regulation, Article 18(5)

109 CACM GL, Article 9(6)

Electricity Regulation 2019/943. 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 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.

With respect to amending existing NCs and GLs, the will be no changes to the current procedure for NCs. However, for GLs, the EC will have to consult the stakeholders. According to Article 61(6) of the recast Electricity Regulation 2019/943: "When adopting or amending guidelines, the Commission shall consult ACER, the ENTSO for Electricity, the EU DSO entity and, where relevant, other stakeholders." For more on the revision of guidelines/TCMs as well as a practical example, see sections 6.3.8 and 6.4.2.

6. Implementation challenges: Terms and conditions or methodologies

The goal of the Energy Union is to create an integrated, well-functioning IEM, in which there are no barriers to electricity flows and trade between the borders of 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),[110] 32 bidding zones (BZ),[111] as well as many balancing areas, synchronous areas,[112] and load frequency control blocks (LFC block).[113] 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 terms and conditions or methodologies (TCMs).[114]

The TCM development and adoption process is complex, but it was, nevertheless, considered to be at least 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 proved elusive, necessitating an expanded role for ACER.[115]

The CEP makes provision for the simplification of the TCM development and adoption process for the next generation of GLs.

6.1 Characteristics of the 'Terms and conditions or methodologies'

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:

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

111 The majority of bidding zones are defined by national borders. Nonetheless, some are larger than the country borders (i.e. DE-AT-LX) and some are smaller (Italy is split into 6 bidding zones). 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, Reif and Schittekatte (n. 109), p. 10-12.

112 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.

113 Meeus L., V. Reif and T. Schittekatte, 2019. The EU Electricity Network Codes (Technical Report). European University Institute, Robert Schuman Centre for Advanced Studies. Available at: http://cadmus.eui.eu/handle/1814/61644 , p. 10

114 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.

115 See our accompanying document with the summaries of ACER decisions provided on the course platform.

(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 regional or EU-wide.[116]

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 in a TCM as well as specific deadlines for the submission of drafts to the NRAs.[117] The CACM GL also provides details of the amendment and approval processes of the TCMs and finally the enforcement powers of the EC.[118]

Notably, ACER has held that TSOs must not go beyond the guidelines in drafting TCMs: "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."[119]

6.1.1 Shared Characteristics

The TCMs share the following broad characteristics, 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 by NRAs from the relevant jurisdictions, i.e. 'all EU NRAs' or the NRAs from a specific region,[120] depending on whether the draft proposal for a TCM is sent for approval to all EU NRAs or the NRAs of the region concerned;[121]
- shall be implemented in all relevant jurisdictions, by each of the NRAs involved in the process. The degree of involvement of various stakeholders in the drafting process of these TCMs has also proved a controversial issue.

116 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."
117 Article 17(2) CACM GL provides a minimum set of issues that the TSOs shall include in the proposal for a CGMM.
118 CACM GL, Articles 7-9
119 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
120 Please see below, our case study on 'Dissenting NRAs'.
121 CACM GL, Article 9(7)

6.2 TCMs and Technical Standardisation

The development of the TCMs require the joint participation of public (NRAs) and market parties (TSOs, NEMOs) in the establishment of a transnational technical and or commercial standard, which will foster the shift from domestic regulation to European rule-making.[122]

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."[123] TSOs shall aim to decide on the draft proposal by consensus, and if consensus cannot be reached, by qualified majority.[124] In addition, the NRAs shall approve the proposal for a TCM unanimously.[125]

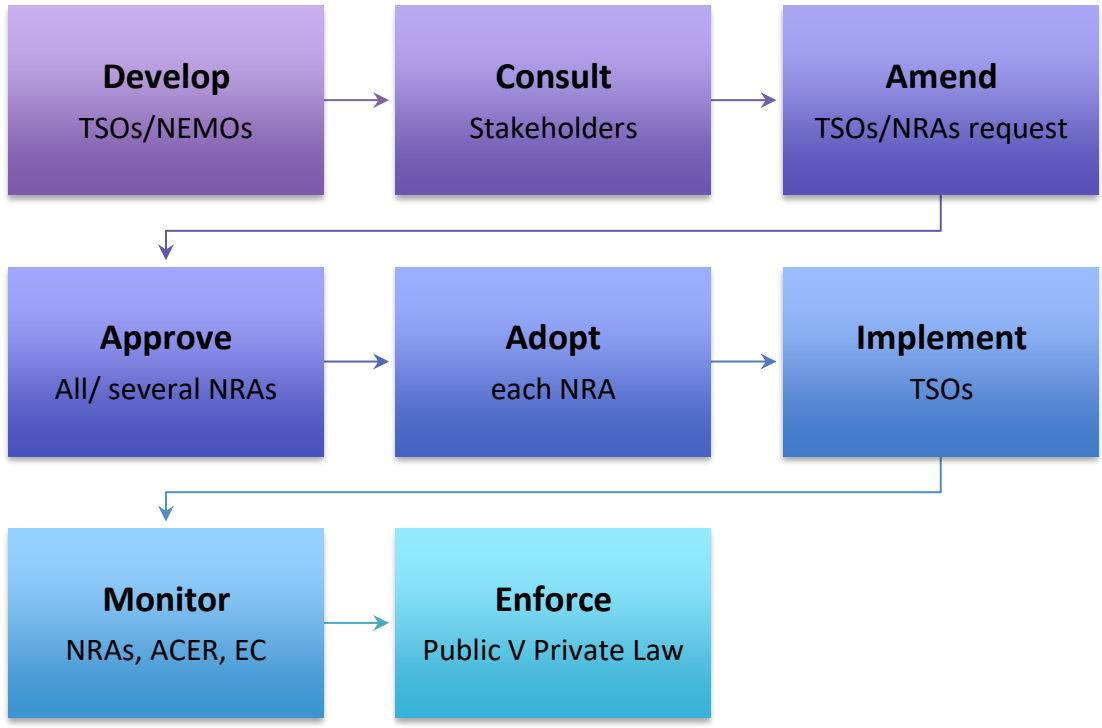
Since the IEM is split into diverse geographical regions and the electricity market functions on various time schedules (intraday, day-ahead, forward) an EU-wide approach to technical regulation may prove controversial and complex, given that TCMs are intended to foster a higher degree of regulatory harmonisation at a regional and eventually European-wide level.[126] Consensus can be difficult to achieve.

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 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.

122 See also Schmidt R., 2015. Public Private Cooperation in Transnational Regulation (PhD Thesis). European University Institute, p. 111.
123 Schmidt (n. 125), p. 109
124 CACM GL, Article 9(2)
125 CACM GL, Article 9(5)
126 Electricity Regulation 2019/943, Article 18(5)(a)

6.3 Lifecycle of a Methodology

Figure 1: Methodology lifecycle



Source: FSR, Energy Union Law Area

6.3.1 Drafting of TCMs

European-wide or regional TCMs

The TCMs adopted under the first generation GLs must be developed either by 'all TSOs' or a specified category or group of TSOs. The latter are required to submit to the NRAs in question, a specific methodology, on a certain topic, by a certain deadline.[127]

Irrespective of their ownership structure,[128] TSOs operate primarily within national jurisdictions. They are, however, under an obligation to cooperate at the EU and regional level in drafting a common TCM

127As an example, please 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."

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

proposal.[129] TCMs 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.

For example, the TSOs from a certain CCR (i.e. GRIT CCR[130]) shall develop a common coordinated capacity calculation methodology,[131] whereas 'all NEMOs' in cooperation with 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.[132]

As a general rule, TSOs agree on the draft text of a proposal for a TCM based on consensus. However, if no consensus can be reached,[133] the drafters shall decide on a qualified majority. If the TCM is put forth by TSOs/NEMOs from a particular region, composed of more than five Member States, the TCM shall be decided upon by consensus.[134] As for the drafting of a TCM by NEMOs, the latter must adopt the proposed text unanimously.[135]

The procedural rules prescribed for the approval of a draft TCM in the first generation GLs are directly applicable and binding on the TSOs.[136] 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.

Importantly, the TSOs use ENTSO-E's online (i.e. website) and physical platform (i.e. meetings at ENTSO-E's premises) for the purposes of drafting and effective consultations on the proposed TCM. The body approving the final draft of the TCM is not ENTSO-E, but 'all TSOs'. This entity is separated from ENTSO-E and does not trigger ENTSO-E's liability in any respect.

Deadlines for Submission

The guidelines usually set fixed deadlines for submission of drafts to the NRAs, deadlines that are directly applicable and binding on the TSOs.[137] TSOs 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". If they do not provide the competent NRAs and ACER with the drafts for the proposal, along with their explanation on their impossibility to reach an agreement, the TSOs

129 CACM GL, Article 9

130 Greece-Italy Capacity Calculation Region

131 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."

132 CACM GL, Article 41(1).

133 According to CACM GL, Article 9(2), qualified majority requires a majority of TSOs or NEMOs representing at least 55% of the Member States, and TSOs or NEMOs comprising at least 65% of the population of the Union.

134 CACM GL, Article 9(3)

135 CACM GL, Article 9(3)

136 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

137 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.

would be considered in breach of the relevant provisions contained in the guidelines.[138] The same holds true if the TSOs fail to include the minimum requirements as specified in the GLs in their drafts.[139]

6.3.2 Consultation

The TSOs/NEMOs shall subject the draft TCM to a public consultation,[140] lasting at least one month and held at EU or regional level, depending on whether the drafting has been performed by all TSOs or only by the TSOs from a certain geographical region.[141] Ideally, even the regional TCMs would be subjected to EU-wide consultations.[142] Following the consultation, the drafters shall justify whether or not they included consultation outcomes into the draft TCM.[143] The feedback obtained from the consultations shall be published before or simultaneously with the publication of the TCM proposal.[144]

6.3.3 Submission for Approval

The TCM proposal is submitted either to all NRAs, or to a group of NRAs from a specific region, for approval depending on whether the methodology was drafted by all TSOs or by the relevant regional TSOs.[145] Some TCMs may be subject to approval by individual NRAs or by other competent authorities of the MS involved.[146] An example is the TCM on the calculation of NEMOs fees for trading in the day-ahead and intra-day markets.[147]

The designated entity shall usually be the NRA unless otherwise provided by the MS.[148] 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.[149]

138 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
139 Article 17(2) of the CACM GL provides the minimum items that the TSOs shall include in the proposal for a CGMM
140 CACM GL, Article 12
141 Some consultations need to be open for at least two months; see, for example, the EB GL, Article 10(2).
142 CACM GL, Article 12(2)
143 CACM GL, Article 12(3)
144 Ibid.
145 CACM GL, Article 9(1)
146 CACM GL, Article 9(8)
147 CACM GL, Article 5(1), 9(8)(b)
148 SOGL, Article 6(1)
149 SOGL, Article 6(4)(a)

6.3.4 NRA's Right to Request Amendments before Approval

NRAs have the right to request amendments to the proposed TCM before final approval.[150] TSOs or NEMOs shall then submit an amended proposal within two months.[151] Once the NRAs have received the amended proposal,[152] they must decide on it within a period of two months.[153]

6.3.5 NRA Approval

According to Article 9(6)-(8) CACM GL, the TCMs shall be approved either by; (i) all NRAs, (ii) by NRAs of the concerned region or by (iii) individual NRAs, within six months of having been received. Article 9(10) of the CACM GL establishes that the NRAs are under a strict obligation to closely consult, cooperate and coordinate with each other to reach a consensus on the proposal of the methodology, be it at EU or regional level.

Framework Agreements

The NRAs meet in an 'All' or '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').[154] 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.

Each NRA will then have to implement the trans-national framework agreement within their national jurisdictions. On the basis of a national decision implementation, the TSOs can be held liable for non-compliance by the NRA or before national judicial courts.

6.3.6 Implementation

The TSOs/NEMOs are obliged to implement the TCM, once approved by relevant NRAs, depending on whether the methodology has been developed by all of the TSOs or by region specific TSOs.

150 CACM GL, Article 9(12); SO GL, Article 7(1)

151 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.

152 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.

153 CACM GL, Article 9(12); SO GL, Article 7(1)

154 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.

The framework agreements concluded between all 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".

6.3.7 ACER Opinions

Proposals on TCMs which are subject to the approval of the NRAs 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.[155] The NRAs shall consider the opinion issued by ACER but are not bound by it.[156]

6.3.8 Approval by ACER

If NRAs cannot reach a consensus on an original proposal of a TCM, within six months from the date of receipt of the TCMs by the regulatory authorities, or where applicable, by the last NRA concerned, or at their joint request, ACER will adopt a decision, in accordance with its obligations under Article 8(1) of ACER Regulation. This process is likely to occur frequently as the distributive effects of a TCM are different for the Member States involved, and the NRA may not agree on those regulatory issues for cross-border infrastructure that falls within their competence. ACER will take a decision after consulting the NRAs, TSOs and/or the NEMOs (when the proposal originates from them).[157] According to ACER's BoA Decision, these consultations grant all relevant stakeholders the 'right to be heard' and protect the rights of all concerned parties.[158] This theme is taken up in the Case Study below.

Box 7: Case Study 3: Dissenting NRAs and the TCM amendment process

There was controversy in November 2016 regarding the TCM amendment process when ACER issued Decision No 06/2016 pursuant to the failure of the NRAs to reach an agreement 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.[159]

The timeline below provides an overview of the different parties' involvement at the various stages of the proceedings:[160]

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'.

155 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

156 CACM GL, Article 9(10)

157 ACER Regulation 713/2009, Article 8(1); CACM GL, Articles 9-15

158 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

159 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')

160 ACER Decision No 06/2016, Section 2 'Procedure'

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 regulatory authorities as required by the CACM GL.
4. On 3 March 2016, the TSOs of the CWE[161] and CEE[162] 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 regulatory authority, Energie-Control ('E-Control'), requested unilaterally all European TSOs to amend the CCRs Proposal to the effect that the bidding zone border between Germany/Luxembourg and Austria would be removed, and the two regions merged into one common CWE-CEE CCR. E-Control used 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,[163] 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.
7. Finally, on 17 November 2016, ACER adopted Decision No 06/2016[164] holding that if the methodology is submitted for approval to all NRAs, but only one NRA makes the request for amendment this does not constitute a sufficient reason to send the TCM back to the TSOs.[165] 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'.[166]

As a result, Article 9(12) of the CACM is to be interpreted to the effect that one NRA can request an amendment unilaterally only where it is solely responsible for approving terms and conditions or methodologies pursuant to Article 9(8) of the CACM.[167]

Appeal before the BoA

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.

Given the overall purpose and structure of CACM, the B of A 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

161 Central West Europe

162 Central East Europe

163 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.

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

165 ACER Decision No 06/2016, para. 25

166 ACER BoA Decision, para. 67

167 ACER Decision No 06/2016, paras. 27-28

submit a further amended proposal, the decision-making process could become inefficient.

The Board similarly rejected arguments by E-Control and others that ACER wrongly rejected 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. 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.

It is therefore clear that – at least as far as ACER's Board of Appeal is concerned - ACER has the power, when deciding on methodologies referred to it under Article 8(1) of Regulation 713/2009, the ACER Regulation:

- to amend the NEMOs' or TSOs' proposals, without needing to request the submission of new proposals; and/or
- to substitute its own decision for that of the TSOs, subject only to complying with whatever conditions are imposed in respect of the adoption of the methodology in the relevant network code.

The BoA therefore dismissed the appeals brought by the applicants as unfounded.[168] Decision No 06/2016 was since appealed to the CJEU. In its decision of 24 October 2019, the General Court rejected the competence of ACER in the CCR case on the grounds of procedural errors. The request for an amendment submitted by E-Control four days ahead of the referral of the CCR-TCM proposal to ACER had to be taken into account.[169]

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 Nominated Electricity Market Operators' 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-compliant with the CACM Regulation).[170]

168 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)

169 Case T-333/17 *Austrian Power Grid and others v ACER*

170 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.

In addition, the NRAs suggested that ACER introduced specific amendments to the amended proposal, before adopting it.[171] ACER therefore 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.[172]

Given that NRAs are required to decide on so many issues under the TCMs, it is likely that a request to ACER for a decision will be submitted, either in relation to the amended TCM proposals or in relation to an original TCM proposal. Indeed, as of March 2019, ACER had adopted 11 decisions of this kind under Article 8(1) ACER Regulation 2009.[173]

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 numerous methodologies envisaged by the GLs necessarily relate to cross-border infrastructure. ACER decisions may face scrutiny as to whether they properly fall within the scope of Article 8(1) of the ACER Regulation.[174]

Box 9: Changes introduced by the CEP

The most important change to the procedures described above for TCMs adopted under the first generation of GLs is ACER's new role in deciding on TCMs. In effect, ACER substitutes for the role of 'all NRAs'. The reasoning behind this is provided in the Recast ACER Regulation 2019/942 at recital 20: "During the implementation of network codes and guidelines it has emerged that it is useful to streamline the procedure for the regulatory approval of regional or Union-wide terms and conditions or methodologies to be developed under the guidelines and network codes by submitting them directly to the Agency in order for national regulators, represented in the Board of Regulators, to be able to decide upon them."[175]

Article 2(d) empowers ACER to "take individual decisions in the specific cases referred to in Articles 4-7 and 9- 10 on terms and conditions or methodologies regarding network codes and guidelines".

As a first step ENTSO-E will draft certain TCMs including but not limited to those concerning the value of lost load, cost of new entry for generation or demand response, the reliability standard expressed as 'expected energy not served' and the 'loss of load expectation'.

171 CEER (n. 173), para. 9

172 ACER Decision No 08/2018, paras. 11-12

173 See our accompanying document with summaries of ACER decisions on the course platform.

174 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> last accessed on 29 January 2020

175 ACER itself should draft a specific methodology, to be approved by the EC - the methodology on the use of revenues resulting from allocation of interconnection capacity.

Article 5(2) of the Recast ACER Regulation 2019/942 then grants ACER the power to revise and change the draft proposal to ensure that it is in line with the NC and GL. Voting in the BoR will be on the basis of the simple majority of the members present, with one vote attributed to each MS.

This reform is intended 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".

Transitional arrangements are provided for in the Recast ACER Regulation 2019/942 so that where a legislative act was adopted before the entry into force of the new Regulation and later revisions of these network codes and guidelines or subsequent implementing acts provide for the development of proposals for terms and conditions or methodologies for the implementation of those network codes and guidelines and require regulatory approval by all competent regulatory authorities of the concerned region, the competent regulatory authorities of the concerned region shall reach an agreement by unanimity.

The proposed TCMs shall be notified to the Agency within one week of the submission of the proposal to the competent regulators. Regulators may refer the proposal to the Agency for approval pursuant to Article 5(3)(b) and Article 6(10) and shall do so pursuant to Article 6(10) (a) in case a unanimous decision cannot be reached.

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 integrated electricity market. 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

It has already become apparent that the NCs and GLs are anything but clear-cut. This can be explained by the technical differences between the European power systems that preclude a "one size fits all" solution. Moreover, the subjects they regulate are also far from straightforward. It is not possible to define 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[176] – were adopted as GLs that establish the outlines for more

176 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 accessed 9 December 2019)

detailed and comprehensive TCMs. As discussed above, their implementation has spawned numerous controversies between and among the concerned TSOs, NRAs and ACER.[177]

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.

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 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.[178] 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 applicable in all Member States and the interpretation and application of these provisions is primarily the responsibility of national authorities and courts.[179] This can be problematic, as the following Case Study illustrates.

Box 10: Case Study 5: The *Baltic Cable* case – resolving congestion in other control areas?

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 (BC), 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.[180] Since the German NRA rejected BC's claims that the curtailments were against the German and EU rules on congestion management, BC challenged the NRA's decision

177 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.

178 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.

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

180 Access to the ECJ is severely restricted for individuals, cf https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en#overview (visited 9 December 2019).

before the competent German court, the OLG Düsseldorf. The OLG also rejected all of BC's claims and upheld the decision of the *Bundesnetzagentur* in its entirety.[181]

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 BC. 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,[182] fell upon BC as the owner of the congested line. The court based 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".[183] 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 BC.[184]

It is doubtful whether the OLG's interpretation is compatible with the principles of congestion management contained in Regulation 714/2009. The way the OLG interprets the CACM has the effect that whenever an interconnector is not owned by a "national" TSO, any congestion within the "national" network that reduces the capacity on that interconnector must be resolved "from the outside" by the owner of that interconnector. Unfortunately, such an understanding reduces the pressure on the TSO whose grid is congested to apply the appropriate measures for relieving the congestion where it originates. Thereby, it fails to provide the "efficient economic signals" required by Article 16 (1) of Regulation 714/2009.[185] In contrast, the definition for congestion contained in Article 2 (2) (c) of Regulation 714/2009 explicitly encompasses capacity limitations on interconnectors both "because of a lack of capacity of the interconnectors **and/or the national transmission systems concerned**". In addition, para 1.7 of Annex I to Regulation 714/2009 generally prohibits reducing interconnector capacity to relieve internal congestion.[186] Therefore, it seems more likely that TSOs must relieve all congestion within their control area before it affects adjacent interconnectors, regardless of whether these interconnectors belong to their own control area or to another TSO's. In fact, given the conditions set by Regulation 714/2009 and the complementary nature of the CACM, the provisions used by the OLG to corroborate its reasoning most likely have an entirely different objective than that assumed by the court, namely to avoid a unilateral application of remedial actions that has detrimental effects on other control areas. This would constitute a faithful implementation of para 3.1 of Annex I to Regulation 714/2009, which establishes that "[NRAs] and TSOs shall ensure that no congestion-management procedure with significant effects on physical electric power flows in other networks is devised unilaterally".

181 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.

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

183 Citation from Article 35 (2) of the CACM GL.

184 The OLG assumes 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).

185 The same requirement is contained in Art. 16 (1) of Regulation 2019/943.

186 This prohibition will be commented on in greater detail in the next section; 6.4.2.

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 OLG 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 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.[187]

The OLG Düsseldorf's decision has been appealed to the German supreme court, the *Bundesgerichtshof*. In addition, the case could be submitted to the ECJ for a preliminary ruling to determine the relationship between the rules in the "traditional" secondary law acts and the CACM and to ensure a uniform application of the rules in the CACM itself. At any rate, considerable time – potentially, several more years – will go by before a final decision on the questions highlighted here is adopted, while the detrimental effects of the curtailments on market integration are 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, comparable e.g. to the already cited Annex I to Regulation 714/2009. 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).[188]

The remaining legal question is how manifest conflicts between a TCM and other acts of EU energy law are to be resolved if these conflicts cannot be reconciled by means of interpretation. What is more, one must 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 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 particularly crucial. This creates an unprecedented challenge for the European regulators, who so far only had the responsibility of scrutinising and approving a comparably

187 For details, see below, at sec 6.4.3.
188 Compare ACER (n 122).

small number of methodologies developed by the national TSOs.[189] In comparison, 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 even though they contain provisions that are incompatible with the overarching principles established in secondary law, the question of what remedies are available gains importance. 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.[190] 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.

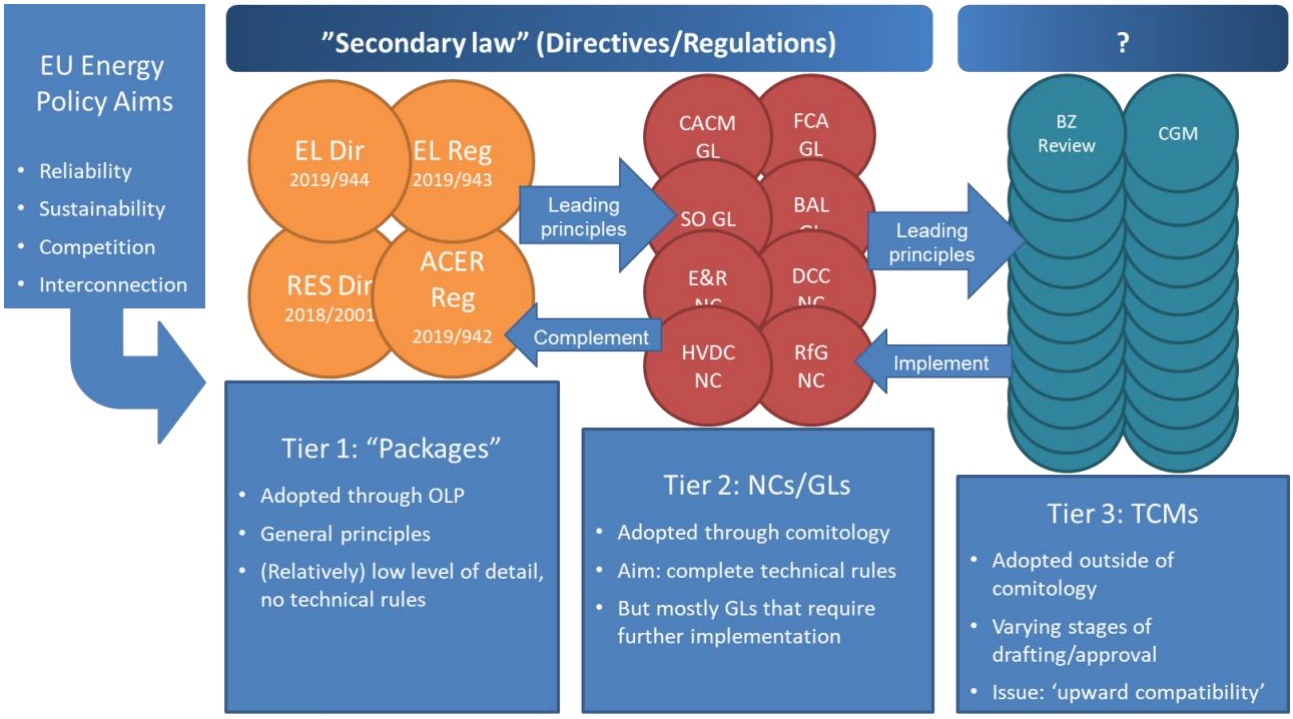
Therefore, the autonomy involved in the creation of TCMs creates a tangible hazard that provisions are adopted that legalise – at least temporarily – situations or practices not permitted under the general principles of EU energy law.

Interim conclusion

189 See Article 37 (6) through (10) of Directive 2009/72.

190 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 2: The three-tier system of substantial EU energy law



As Figure 2 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.

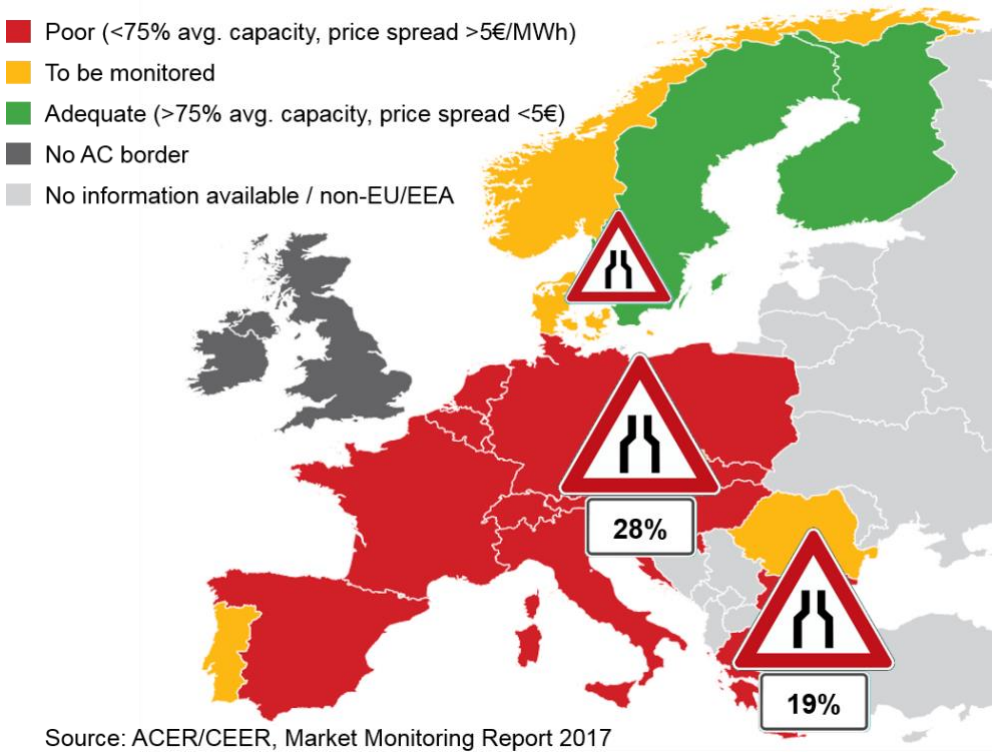
6.4.2 Highlight 1: Congestion displacement

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 Note 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.[191] 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

191 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.

the average percentage of available capacity over the year. As can be seen, the situation is particularly dire in the SEE CCR[192] and the eastern part of the particularly important CORE CCR.[193] 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 3: 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.[194] Therefore, congestion displacement was already generally prohibited in the Third Energy Package.[195] Nevertheless, the relatively low cross-border capacity levels calculated by ACER suggest that this prohibition was – and is – not 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)[196] and the German TSO TenneT TSO GmbH

192 "South East Europe", comprising the BZ borders between Greece, Bulgaria and Romania.

193 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, 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.

194 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.

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

196 *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)*.

(TenneT)[197]. 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 outline 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"

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.[198] In day-to-day grid operation, TSOs manage congestion by using remedial actions.[199] According to Article 16 (3) of Regulation 2019/943, 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 Regulation 2019/943 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 and for reasons of economic efficiency.[200]

The general rules outlined here were essentially already contained in the third energy package. In addition, the CEP has made a substantial modification by prescribing a new minimum capacity level. According to Article 16 (8) of Regulation 2019/943, 70% of the capacity that can be used without compromising reliability has to be made available at all BZ borders.[201] If less capacity is made available,

197 *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)*.

198 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.

199 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.

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

201 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 some (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

the concerned TSOs need to prove that this does not result from congestion displacement to avoid sanctions. This minimum threshold has important implications in practice, since TSOs may no longer displace congestion for reasons of economic efficiency if this entails a lower cross-border capacity than 70%. In practice, most TSOs will likely treat this minimum capacity as a fixed value and aim not to digress from it[202] unless they apply for a derogation.[203]

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.[204] 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.[205] It should be kept in mind that under the new CEP rules, TSOs enjoy unrestricted discretion in this context as long as this amount does not exceed 30% of the capacity at the respective BZ border.[206]

Secondly, the CACM GL orders the creation of detailed common capacity calculation methodologies (CCMs) for each CCR.[207] These must contain safeguards to avoid congestion displacement.[208] 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

August 2019 on the implementation of the minimum margin available for cross-zonal trade pursuant to Article 16 (8) of Regulation (EU) 2019/943'.

202 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.

203 Art. 16 (9) of Regulation 2019/943. Such a derogation request has been filed by Swedish TSO Affärsverket svenska kraftnät (SvK), cf <https://ei.se/sv/nyhetsrum/nyheter/nyheter-2019/svenska-kraftnat-ansoker-om-undantag-fran-70-procent-kravet/> (visited 9 December 2019)

204 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.

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

206 Article 16 (8) of Regulation 2019/943.

207 Article 15 (1), 20 (2) of the CACM GL.

208 Article 21 (1) (b) (ii) of the CACM GL.

calculation currently applied by the TSOs, the level of improvement does not match the expectations and ambition laid down in the [CACM GL]."[209]

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),[210] 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.[211,]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.[212]

However, the aims of electricity market integration require that any cost comparison to determine economic efficiency must be based on the welfare effects at EU level.[213] 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 Regulation 2019/943. 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.

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

210 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).

211 Approved CCMs are available at https://acer.europa.eu/en/Electricity/MARKET-CODES/CAPACITY-ALLOCATION-AND-CONGESTION-MANAGEMENT/Pages/16-CCM---Approved.aspx (visited 9 December2019).

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

213 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.

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.

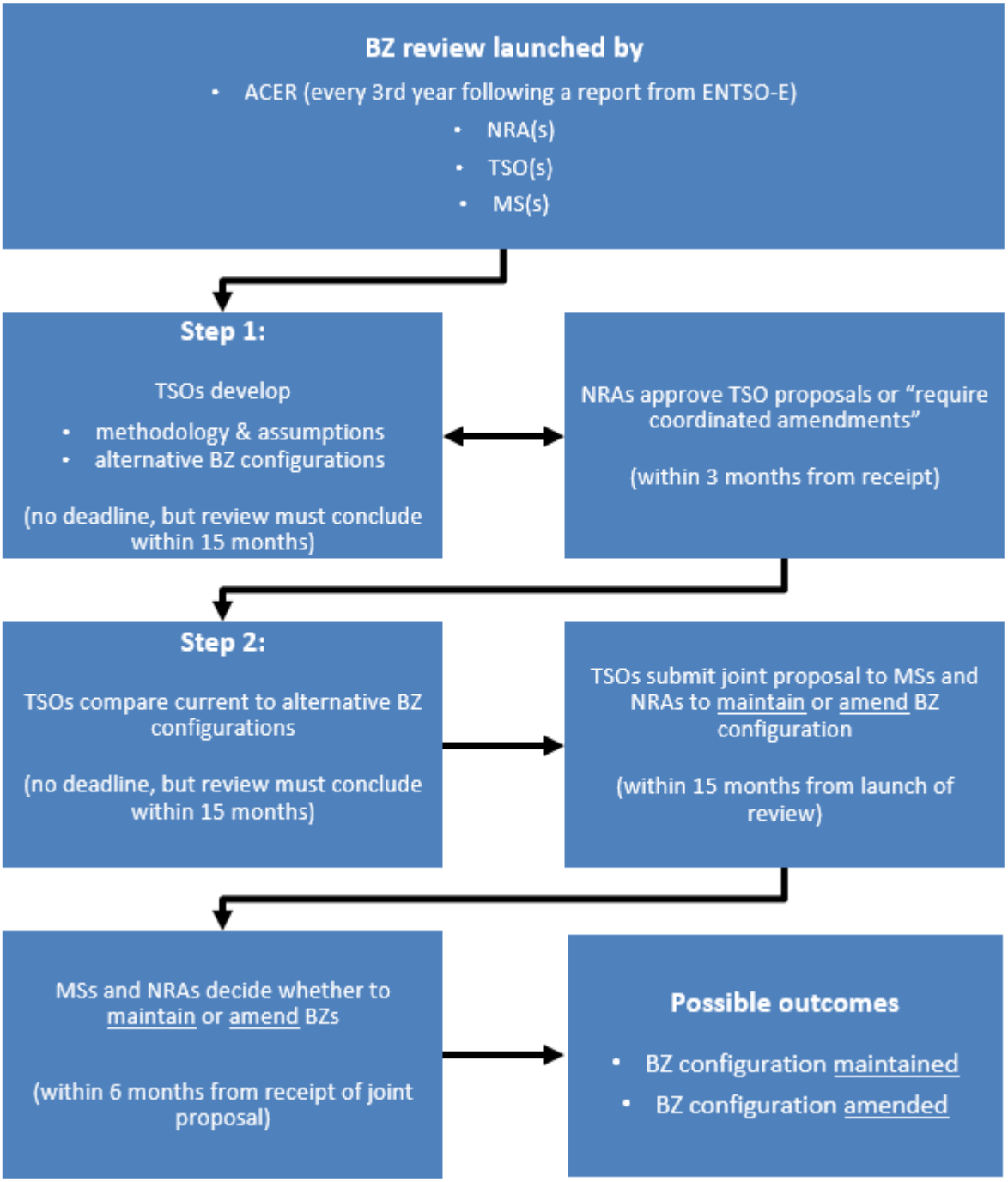
6.4.3 Highlight 2: Individual interests and the failed bidding zone review

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.[214] 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.[215]

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 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" over the course of three months.[216] 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.[217] The Member States – possibly through their respective NRAs – then decide whether to change their BZs.[218] The entire process is subject to a deadline of 15 months. While ACER may initiate the BZ review, it is not permitted to intervene during the review process or to force a change of BZs. The following figure 4 illustrates the process:

214 See case study 3 above.
215 For the case of Sweden, see Małgorzata Sadowska and Bert Willems, 'Power Markets Shaped by Antitrust' (2013) 9 European Competition Journal 131, 154–160.
216 Article 32 (4) (a) of the CACM GL.
217 Article 32 (4) (b) and 33 of the CACM GL.
218 Article 32 (4) (c) of the CACM GL.

Figure 4: BZ review process under the CACM GL



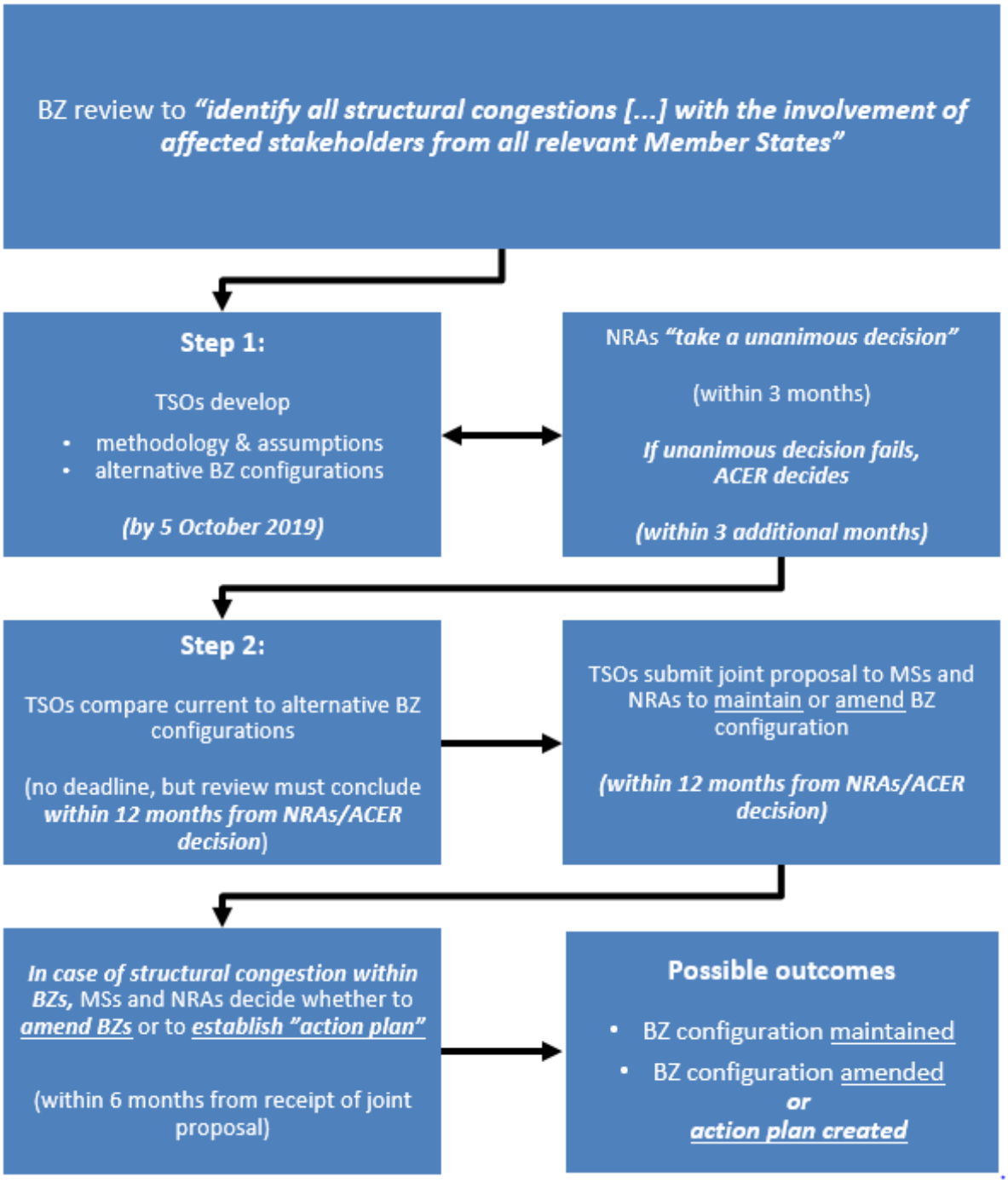
The first review took place recently, albeit not producing any result other than asserting that the current BZ configuration in Europe is inefficient. In its report on the BZ review, ACER asserted an apparent unwillingness of the involved stakeholders – including the TSOs and NRAs – to change the current 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. Due to this, the review did not

produce any meaningful results.[219] The 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".[220]

The changes proposed by ACER could have been implemented by amending the CACM GL according to the procedure explained earlier.[221] Instead, the process was modified in the CEP, more precisely Article 14 of Regulation 2019/943. Since these new rules explicitly modify or override the existing rules in the CACM GL for future BZ reviews,[222] 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, Regulation 2019/943 orders 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.[223] 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***.

219 ACER, 'NC-CACM and NC-FCA Implementation Report' (n 211) 60.
220 ibid 61.
221 See sec. 5.2 above.
222 Article 14 (11) of Regulation 2019/943.
223 Article 14 (3) and (5) of Regulation 2019/943.

Figure 5: Modified BZ review process under the CEP



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 "action plans" to address the structural congestion.[224]

However, 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.[225] 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.[226] Interestingly, Germany lobbied for a cautious revision of the rules for the BZ review during the legislative procedure for the CEP.[227] The enforcement instruments for the actions plans are also quite limited. Each action plan 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. [228]

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. Apparently, the expectation that such controversy can be resolved at the implementation level is overly optimistic.

224 Article 14 (7), 15 of Regulation 2019/943.

225 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.

226 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 (visited 9 December 2019).

227 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> (visited 9 December 2019).

228 Art. 14 (8) of Regulation 2019/943.

- The first illustrative highlight 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 detailed overarching framework with the same aim. 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 “action plans” to address internal bottlenecks. Judging from the issues that typically accompany the implementation of similar plans, there is reason to worry that the new action plans may become mere paper tigers, thus perpetuating internal bottlenecks that impede cross-zonal trade.

Annex I

Section I

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

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')

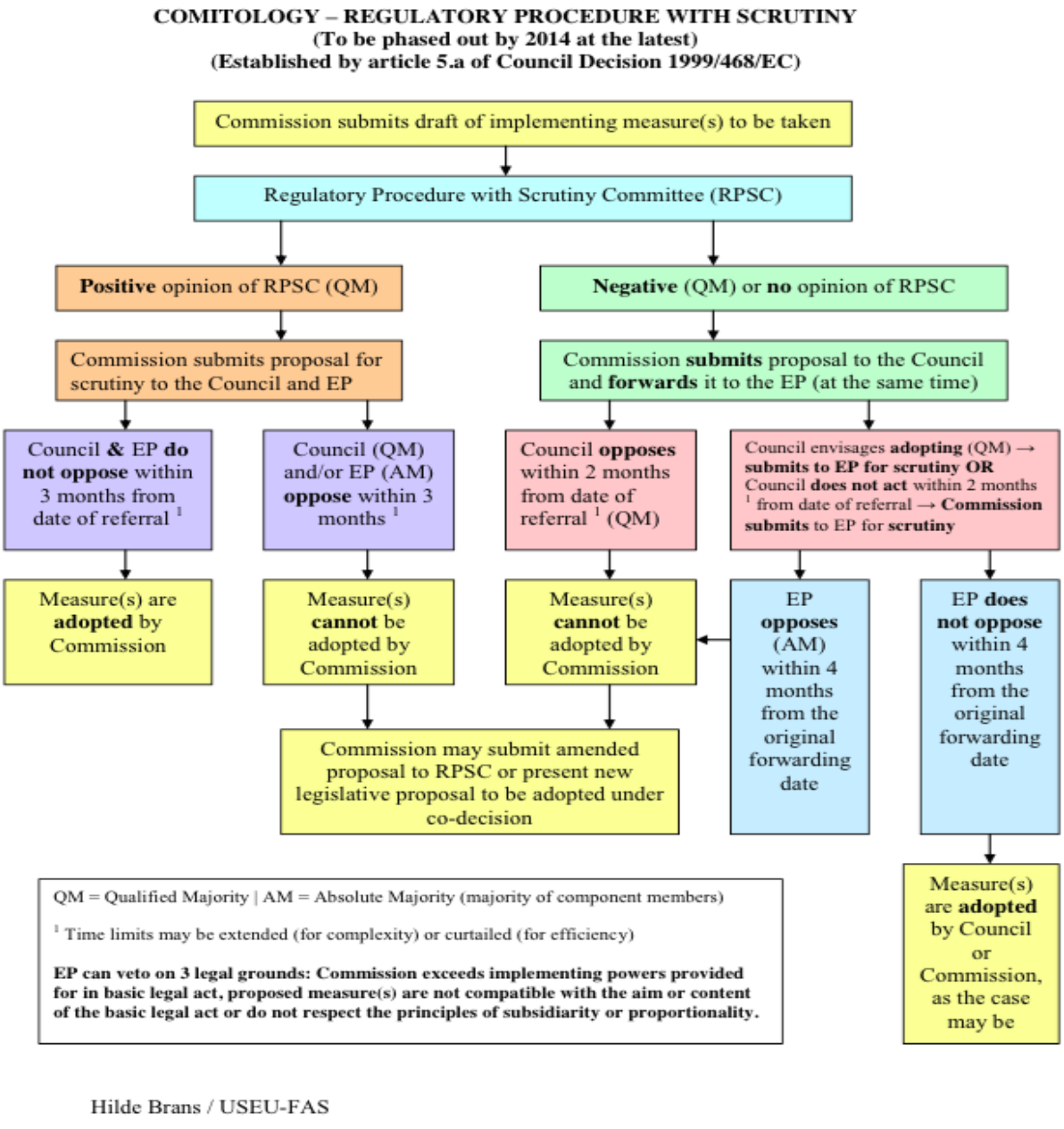
Section III

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



Source: Hilde Brans/USEU-FAS

Annex III

Article 6: Establishment of NCs	Article 18: GLs
1. The Commission shall, after consulting the Agency, the ENTSO for Electricity and the other relevant stakeholders, establish an annual priority list identifying the areas set out in Article 8(6) to be included in the development of network codes. 2. The Commission shall request the Agency to submit to it within a reasonable period of time not exceeding six months a non-binding framework guideline (framework guideline) setting out clear and objective principles, in accordance with Article 8(7), for the development of network codes relating to the areas identified in the priority list. Each framework guideline shall contribute to non-discrimination, effective competition and the efficient functioning of the market. Upon a reasoned request from the Agency, the Commission may extend that period. 3. The Agency shall formally consult the ENTSO for Electricity 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. 4. If the Commission considers that the framework guideline does not contribute to non-discrimination, effective competition and the efficient functioning of the market, it may request the Agency to review the framework guideline within a reasonable period of time and re-submit it to the Commission. 5. If the Agency fails to submit or resubmit a framework guideline within the period set by the Commission under paragraphs 2 or 4, the Commission shall elaborate the framework guideline in question. 6. The Commission shall request the ENTSO for Electricity to submit a network code which is in line with the relevant framework guideline, to the Agency within a reasonable period of time not exceeding 12 months.	1. Where appropriate, Guidelines relating to the inter-transmission system operator compensation mechanism shall specify, in accordance with the principles set out in Articles 13 and 14: (a) details of the procedure for determining which transmission system operators are liable to pay compensation for cross-border flows including as regards the split between the operators of national transmission systems from which cross-border flows originate and the systems where those flows end, in accordance with Article 13(2); (b) details of the payment procedure to be followed, including the determination of the first period for which compensation is to be paid, in accordance with the second subparagraph of Article 13(3); (c) details of methodologies for determining the cross-border flows hosted for which compensation is to be paid under Article 13, in terms of both quantity and type of flows, and the designation of the magnitudes of such flows as originating and/or ending in transmission systems of individual Member States, in accordance with Article 13(5); (d) details of the methodology for determining the costs and benefits incurred as a result of hosting cross-border flows, in accordance with Article 13(6); (e) details of the treatment in the context of the inter-transmission system operator compensation mechanism of electricity flows originating or ending in countries outside the European Economic Area; and (f) the participation of national systems which are interconnected through direct current lines, in accordance with Article 13. 2. Guidelines may also determine appropriate rules leading to a progressive harmonisation of the underlying principles for the setting of charges applied to producers and consumers (load) under

7. Within a period of three months of the day of the receipt of a network code, during which the Agency may formally consult the relevant stakeholders, the Agency shall provide a reasoned opinion to the ENTSO for Electricity on the network code. 8. The ENTSO for Electricity may amend the network code in the light of the opinion of the Agency and re-submit it to the Agency. 9. When the Agency is satisfied that the network code is in line with the relevant framework guideline, the Agency shall submit the network code to the Commission and may recommend that it be adopted within a reasonable time period. The Commission shall provide reasons in the event that it does not adopt that network code. 10. Where the ENTSO for Electricity has failed to develop a network code within the period of time set by the Commission under paragraph 6, the Commission may request the Agency to prepare a draft network code on the basis of the relevant framework guideline. The Agency may launch a further consultation in the course of preparing a draft network code under this paragraph. The Agency shall submit a draft network code prepared under this paragraph to the Commission and may recommend that it be adopted. 11. The Commission may adopt, on its own initiative, where the ENTSO for Electricity has failed to develop a network code, or the Agency has failed to develop a draft network code as referred to in paragraph 10 of this Article, or upon recommendation of the Agency under paragraph 9 of this Article, one or more network codes in the areas listed in Article 8(6).Where the Commission proposes to adopt a network code on its own initiative, the Commission shall consult the Agency, the ENTSO for Electricity and all relevant stakeholders in regard to the draft network code during a period of no less than two months. Those measures, designed to amend non-essential elements of this Regulation by	national tariff systems, including the reflection of the inter-transmission system operator compensation mechanism in national network charges and the provision of appropriate and efficient locational signals, in accordance with the principles set out in Article 14. The Guidelines shall make provision for appropriate and efficient harmonised locational signals at Community level. Any such harmonisation shall not prevent Member States from applying mechanisms to ensure that network access charges borne by consumers (load) are comparable throughout their territory. 3. Where appropriate, Guidelines providing the minimum degree of harmonisation required to achieve the aim of this Regulation shall also specify: (a) details relating to provision of information, in accordance with the principles set out in Article 15; (b) details of rules for the trading of electricity; (c) details of investment incentive rules for interconnector capacity including locational signals; (d) details of the areas listed in Article 8(6). For that purpose, the Commission shall consult the Agency and the ENTSO for Electricity. 4. Guidelines on the management and allocation of available transmission capacity of interconnections between national systems are laid down in Annex I. 5. The Commission may adopt Guidelines on the issues listed in paragraphs 1, 2 and 3 of this Article. It may amend the Guidelines referred to in paragraph 4 of this Article, in accordance with the principles set out in Articles 15 and 16, in particular so as to include detailed Guidelines on all capacity-allocation methodologies applied in practice and to ensure that congestion management mechanisms evolve in a manner compatible with the objectives of the internal market. Where appropriate, in the course of such amendments common rules on minimum safety and operational standards for the use and operation of the network, as referred to in Article 15(2) shall be established. Those measures, designed to amend non-essential elements of this Regulation by

supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(2). 12. This Article shall be without prejudice to the Commission's right to adopt and amend the Guidelines as laid down in Article 18.	supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(2).[229] When adopting or amending Guidelines, the Commission shall: (a) ensure that the Guidelines provide the minimum degree of harmonisation required to achieve the aims of this Regulation and do not go beyond what is necessary for that purpose; and (b) indicate what actions it has taken with respect to the conformity of rules in third countries, which form part of the Community electricity system, with the Guidelines in question. When adopting Guidelines under this Article for the first time, the Commission shall ensure that they cover in a single draft measure at least the issues referred to in points (a) and (d) of paragraph 1 and in paragraph 2.

229 Electricity Regulation, Article 23(2): "Where reference is made to this paragraph, Article 5a(1) to (4), and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof."

Annex IV

Article 7: Amendments of NCs	Article 18: GLs
1. Draft amendments to any network code adopted under Article 6 may be proposed to the Agency by persons who are likely to have an interest in that network code, including the ENTSO for Electricity, transmission system operators, system users and consumers. The Agency may also propose amendments on its own initiative. 2. The Agency shall consult all stakeholders in accordance with Article 10 of Regulation (EC) No 713/2009. Following that process, the Agency may make reasoned proposals for amendments to the Commission, explaining how such proposals are consistent with the objectives of the network codes set out in Article 6(2). 3. The Commission may adopt, taking account of the Agency's proposals, amendments to any network code adopted under Article 6. Those measures, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(2). 4. Consideration of proposed amendments under the procedure set out in Article 23(2) shall be limited to consideration of the aspects related to the proposedsssss amendment. Those proposed amendments are without prejudice to other amendments which the Commission may propose.	5. The Commission may adopt Guidelines on the issues listed in paragraphs 1, 2 and 3 of this Article. It may amend the Guidelines referred to in paragraph 4 of this Article, in accordance with the principles set out in Articles 15 and 16, in particular so as to include detailed Guidelines on all capacity-allocation methodologies applied in practice and to ensure that congestion management mechanisms evolve in a manner compatible with the objectives of the internal market. Where appropriate, in the course of such amendments common rules on minimum safety and operational standards for the use and operation of the network, as referred to in Article 15(2) shall be established. Those measures, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(2). When adopting or amending Guidelines, the Commission shall: (a) ensure that the Guidelines provide the minimum degree of harmonisation required to achieve the aims of this Regulation and do not go beyond what is necessary for that purpose; and (b) indicate what actions it has taken with respect to the conformity of rules in third countries, which form part of the Community electricity system, with the Guidelines in question. When adopting Guidelines under this Article for the first time, the Commission shall ensure that they cover in a single draft measure at least the issues referred to in points (a) and (d) of paragraph 1 and in paragraph 2.

Annex V

Article 5(1) of Recast 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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