



Clean Energy Package – Will the recast ACER regulation change things?

Something old and something new? The ACER Regulation was recast as part of the Clean Energy Package. As a result, ACER is given some new tasks, but mainly these are adjustments to its existing role. National regulatory authorities maintain strong influence over ACER via representation in its internal board.

ACER's role and tasks have evolved over time, with stepwise extensions of the legislation. Included in the Clean Energy Package, adopted by the EU in 2019, was a recast of the ACER Regulation that revises and updates ACER's mandate. New tasks and roles include approving EU-level resource adequacy assessments and updated risk-preparedness routines drafted by European TSOs (ENTSO-E). Also adjusted were ACER's existing tasks and roles related to development of network codes and ACER's internal governance (balance between ACER director and the board of regulators, i.e. the national regulatory authorities). This REMAP insight presents and assesses the main changes pertaining to ACER in the Clean Energy Package.

How ACER's role evolved before the CEP

The third energy market package of 2009 introduced new EU-wide organizations for the energy sector, including the Agency for the Cooperation of Energy Regulators (ACER). ACER was set up to facilitate the cooperation of national regulatory authorities. Where necessary, ACER would coordinate and mediate among national regulatory authorities. European-wide associations for transmission system operators for electricity (ENTSO-E) and gas (ENTSO-G) were also established.

ACER's initial tasks included contributing to the making of network codes. Network codes would become European rules for operation of electricity and gas networks. The objective was to harmonize practices in order to remove technical barriers to trade between Member States. Initial tasks also included monitoring of cross-border infrastructure projects and the realization of the European-wide network development plan. Moreover, if the involved national regulatory authorities could not agree within a set timeline, ACER

could decide on applications for granting new interconnectors exemptions from specified rules like third party access and unbundling. Finally, ACER was to monitor the work carried out by the ENTSOs, and regularly report on energy market developments. Under the third energy market package, ACER did not have any decision-making power over grid investments.

In 2011, ACER's tasks were significantly expanded by the Regulation on Wholesale Energy Market Integrity and Transparency (dubbed the "REMIT" regulation). This regulation sought to increase the transparency and improve the stability of wholesale energy markets in Europe and to combat insider trading and market manipulation. ACER was to monitor energy trade in order to detect, prevent and stop trade based on inside information and market manipulation. For this purpose, ACER would register and collect data from market players; and analyze and share this information with other relevant authorities. Moreover, ACER would coordinate investigations involving multiple national regulatory authorities. ACER was not empowered to sanction criminal activities but would report instances to the responsible national regulatory authority.

In 2013, the EU adopted the TEN-E Regulation to enhance physical integration of markets via new cross-border projects. Regional groups consisting of national governments, national regulatory authorities and transmission system operators, as well as of the Commission, ACER and ENTSO-E, would contribute to a short-list of projects eligible for prioritized status – and thus also for EU financial support. Note that only the Commission and Member States have decision-making power *inside* the regional groups. Further, no projects receive prioritized status without consent from the member states on whose territory the project spans. When applying for project funding, the affected national

regulatory authorities have to agree on the distribution of costs and benefits. If they fail to agree, ACER was empowered to adopt a decision.

The CEP legislative process

The Commission tabled the proposal for a recast ACER Regulation alongside the rest of the Clean Energy Package on 30 November 2016. While Council had adopted a general approach on the Electricity Directive and the Electricity Regulation already in December 2017, it did not adopt a general approach on the ACER Regulation until June 2018. The European Parliament adopted final reports on all three dossiers in February 2018. Trilogue discussions for all legislative texts took place autumn 2018. Agreement on the ACER Regulation was reached on 11 December 2018 and on the Electricity Directive and the Electricity Regulation on 19 December. Formal adoption followed in 2019.

The main sticking point during the negotiations on the ACER Regulation were the proposed rules on internal governance of ACER. The Commission had proposed to change the voting rules for the Board of Regulators. Here, each of the 28 national regulatory authorities have a single vote, with a two-thirds majority (qualified majority) required for decision-making. The Commission wanted to change this to simple majority. Both the Council and the European Parliament shot down the proposal early in the negotiations. Other issues that saw lengthy discussions were the relationship between the director and the Board of Regulators, as well as the division of labour between ACER and the national regulatory authorities in the adoption of follow-up rules under the network codes (i.e. who would decide what and when).

Adopted legislation

New tasks

The adopted new legislation includes two new major tasks to be regulated at European level, regarding resource adequacy assessments and risk-preparedness.

First, the Electricity Regulation required *resource adequacy assessments* to be carried out at national, regional and European levels. Member states will be required to carry out such assessments before they may introduce capacity mechanisms (see REMAP Insight No. 5). While national actors and TSOs will do most of the assessment work, ACER's new role is to *approve the methods* as well as specifications for cross-border participation in capacity mechanisms – both drafted by ENTSO-E.

Also new is revamping plans for *risk-preparedness and crisis management* in the electricity sector. The Risk-preparedness Regulation requires the identification of crisis scenarios and resource adequacy assessments. Here too, most of the tasks will be done at national level and involve TSOs, but similarly as above, ACER will *approve methods* developed by ENTSO-E for identifying regional scenarios as well as for short-term and seasonal generation adequacy assessments.

Additionally, ACER is to *approve the method* by which ENTSO-E will carry out the *bidding zone review* if all the national regulatory authorities do not agree unanimously within a set timeframe. Another method made by ENTSO-E that ACER is to approve is on the *use of congestion revenues*. The latter applies to the provision in Article 19 of the Electricity Market Regulation¹ that in the use of congestion revenue, priority should be given to two types of measures that:

1. guarantee the actual availability of the allocated capacity, or
2. maintain or increase cross-zonal capacity through a) optimizing the use of existing interconnectors via coordinated remedial actions, or b) covering costs resulting from network investments relevant to reduce interconnector congestion

The method is made by ENTSO-E and approved by ACER. As a third option, congestion revenue can be used for reducing tariffs.

Changes in existing tasks

While ACER received some new tasks and powers, changes were also made to its existing tasks concerning rules for the use of existing interconnectors, i.e. *network codes*. ACER was already involved in the development of network codes by making framework guidelines as a basis for the drafting of network codes by ENTSO-E. While ACER would give an opinion on the draft network codes from ENTSO-E, ACER was not allowed to make any changes to the text. In practice, this had created delays as ACER was forced to reject draft codes and return them to ENTSO-E or, in some cases, leaving incorporation of changes to the Commission (a more generalist organization), by writing a very detailed letter outlining its suggested changes as part of its opinion on the draft network code. With the new legislation, ACER has been authorized to rewrite draft codes that are then sent directly to the Commission.

The network code development process started after the adoption of the third package. However, it resulted in some codes being adopted only as guidelines with extensive follow-up procedures

¹ Regulation (EU) 2019/943.

rather than as complete 'finished' network codes. However, the third energy market package had not foreseen such follow-up processes for Terms, Conditions and Methodologies (TCM). The procedures and responsibilities for adopting the TCMs were therefore regulated in the guidelines themselves. TCMs would be variously developed at national, regional and European levels.

New legislation revises the division of labour between national regulatory authorities and ACER. First, *ACER's Board of Regulators is now directly responsible for adopting European TCMs* according to qualified majority voting among its members. Before, the 28 national regulatory authorities had sought (and failed) to agree unanimously outside the realms of ACER. Second, *regional TCMs will still be adopted by the national regulatory authorities in that region*, but if they fail to agree unanimously or if the decision has a 'tangible' impact on the internal energy market or on security of supply beyond the region in question, *the decision moves to ACER*, i.e. its Board of Regulators. It should be noted that ACER's role described here applies to network codes or guidelines adopted before July 2019 or as implementing acts. For European or regional TCMs under network codes or guidelines adopted after July 2019 and as delegated acts, national regulatory authorities still get the opportunity to find agreement amongst themselves before decision-making moves to ACER.

While ACER originally was tasked with monitoring the ENTSOs (although without decision-making powers), the new legislation expands *monitoring tasks* over other actors with roles in market regulatory work such as Regional Coordination Centers (RCC), Nominated Electricity Market Operators (NEMO) and the new European organization of distribution system operators (EU-DSO). For ENTSO-E, EU-DSO and RCC: If ACER issues an opinion on potential rule-violation by one of these, all national regulatory authorities (in a region, for RCC) shall adopt a coordinated decision on whether there is a breach and on corrective measures. If regulatory authorities fail to agree, ACER decides. Ensuring compliance with the decision is subsequently in the hands of the national regulatory authority in the member state where the entity has its seat (for instance, ENTSO-E has its seat in Belgium).

New powers and changes in internal governance

ACER also received new powers in the recast ACER Regulation: First, it was empowered to adopt binding individual decisions to *request information* from public and private actors, such as TSOs, national regulatory authorities and power exchanges. This is to ensure that ACER gets the information it needs to carry out its mandate, such as market oversight. Secondly, ACER was authorized to *collect fees for its services* related to market players' reporting on trade, and to the processing of applications for exemptions.

New legislation additionally entails some changes in ACER's internal governance: First, the role of the director vis-à-vis the Board of Regulators was further specified. This legislation reins in the scope for maneuver of the director whose actions are now more firmly subject to guidance from the Board of Regulators. As noted, the Commission had sought to change the voting rules inside the Board of Regulators (from qualified to simple majority), but this proposal was shot down early in the negotiations by both the Council and the European Parliament. A table summarizing the changes in ACER tasks over time can be found at the end.

Assessing the outcome

The changes pertaining to ACER's roles and tasks reflect the traditional rhyme for what a bride should wear for good luck in the wedding: *Something old, something new, something borrowed, something blue, and a sixpence in her shoe.*

ACER's roles and tasks under the new legislation is mostly *old*, as it builds on its existing mandate under the third energy market package. Nevertheless, some roles have been somewhat revised – ACER shall now not just approve or reject draft network codes but may also rewrite such drafts (network codes are however still made legally binding via adoption by the Commission). Still, there is also something *new*: with the creation of new tasks at EU level – such as the assessment of resource adequacy – ACER has received a new role here, notably in its power to approve and rewrite, if needed, methods and specifications drafted by ENTSO-E. Further, there is something *borrowed*, because the recast ACER Regulation has been fully updated to account for ACER tasks laid down in other EU legislation. This includes both the TEN-E and the REMIT regulations, but also the network codes and guidelines adopted under the 2009 electricity regulation.

The *blue* is reflected in the horizon included in the regulation itself, with several provisions requiring the Commission in the future to re-open discussions and, if needed, table new legislative proposals. This is a common practice for EU legislation. Where highly specific issues are put up for prospective evaluation, this might indicate that there was some political backing for a proposed amendment (but not enough to be adopted). The Commission is to evaluate specific parts and the ACER regulation as a whole by the mid-2020s and may propose changes based on this. Thus, new legislative processes are on the horizon. Finally, ACER was authorized to collect fees for some of its services. ACER has repeatedly called for more funding of ACER's activities, but it remains to be seen whether this is a mere *sixpence* or can ensure adequate funding.

In sum, the changes in the Clean Energy Package reinforce ACER's existing role. *ACER does not replace national regulatory authorities.* Decision-making on energy mix and licensing remains

a national prerogative. ACER is an entity that *ensures cooperation and coordination among the national regulatory authorities*. At times this entails resolving a deadlock among them. ACER's coordinating role has been reinforced, but this is a role that is carried out by the Board of Regulators – i.e. the 28 national regulatory authorities acting together. Finally, the authority to mandate information-provision *is an extension of ACER's decision-making powers*, although admittedly a minor one.

The Clean Energy Package as a whole reflects member states' interest in working together for a better and more efficient energy system in Europe. In the regulation of that energy system, however, national representatives have not been left behind, but are part and parcel of the EU's energy governance.

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References

Commission (2016). 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/2016/0863 final/2 - 2016/0378 (COD)

Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators

Issues	2009 Third energy package	2011 REMIT regulation	2013 TEN-E regulation	2018 CEP
<i>Network codes and subsidiary rules (terms, conditions and methodologies, TCMs)</i>	Make framework guidelines as basis for the development of network codes and give opinions on network codes drafted by ENTSO-E. TCMs not foreseen in 3rd package legislation.			Opinion on/rewrite draft network codes from ENTSO-E. ACER's Board of Regulators directly responsible for adopting European TCM (qualified majority voting), but regional TCMs adopted by regional NRAs unless no agreement on time or if SoS/IEM impact beyond region
<i>Market monitoring</i>	Monitoring cross-border infrastructure projects and realization of network plans. Decides on exemptions for new infrastructure projects if national regulatory authorities don't agree.	Monitoring wholesale trade. Coordinating investigations, reporting incidents to national authorities		May adopt binding requests for information from actors (TSOs, national regulatory authorities, power exchanges) and collect fees for services related to market players' reporting on trade and applications for exemptions.
<i>Prioritized infrastructure projects (Projects of Common Interest, PCI)</i>			ACER, ENTSO-E, TSOs, national regulatory authorities and member states make short-lists. ACER decide on cost-benefit distribution if national regulatory authorities fail to agree.	
<i>Resource adequacy assessment</i>				Approve methods and specification of cross-border participation in capacity mechanisms drafted by ENTSO-E
<i>Risk-preparedness and crisis management</i>				Approve methods for identification of scenarios and short-term and seasonal adequacy assessments, developed by ENTSO-E
<i>Bidding zone reviews</i>				Approve method for bidding zone review (carried out by TSOs) if national regulatory authorities fail to agree.
<i>Methodology for use of congestion income</i>				Approve methodology for use of congestion income for ensuring that allocated capacity is available, and to remedial actions and investments to reduce cross-zonal congestion.
<i>Monitoring of actors with roles in market regulatory work</i>	ENTSO-E, ENTSO-G			Expanded to Regional Coordination Centers (RCC), Nominated Electricity Market Operators (NEMO) and the new European organization of distribution system operators (EU-DSO).
<i>Internal ACER governance</i>	Decisions according to two-third majority in Board of Directors (BoR)			No change in voting rules in BoR. Expansion of tasks where Director must have approval from BoR.