

INC Research Brief # 1

September 2022

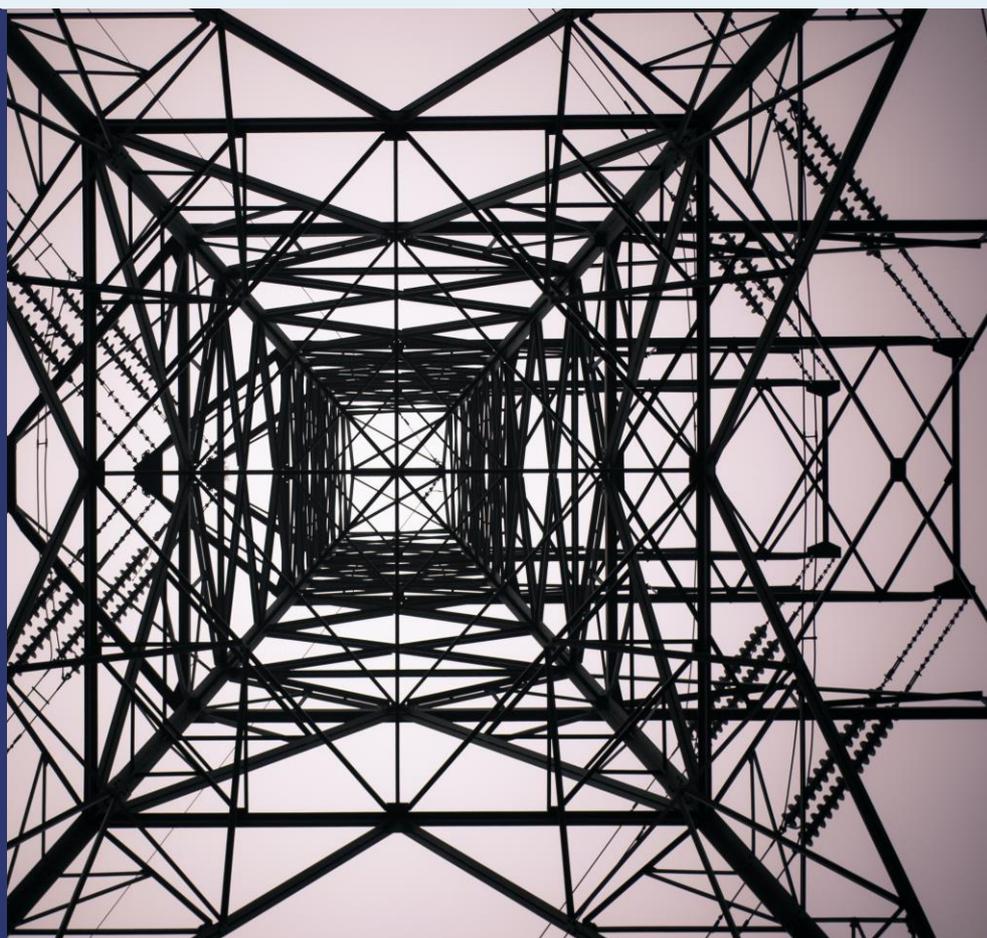
TORBJØRG JEVNAKER, LEIGH HANCHER AND
KARIANNE KROHN TARANGER

The evolving role of ACER

Emergence, practice and review of terms, conditions and methodologies (TCMs)

Key points

- Level of hierarchy involved in TCM processes is dynamic
- ACER's role shaped by actor interaction within TCM process and feedback from legal review
- This research brief is based on the INC project and will be presented at the INC workshop in Florence in October 2022



FRIDTJOF NANSENS INSTITUTT
FRIDTJOF NANSEN INSTITUTE

The evolving role of ACER

This Research Brief examines the evolving role of the Agency for the Cooperation of Energy Regulators (ACER), formally and in practice. It presents ACER's evolving formal mandate and ACER's role in TCM adoption processes, and considers the dynamic aspects of the TCM process, in response to internal and external reviews of ACER's decision-making.

The current document is one of four research briefs prepared for the workshop 'Electricity rules: towards unity or diversity?' in Florence 12–13 October 2022:

1. The evolving role of ACER: emergence, practice, and review of the TCMs
2. Electricity rulemaking in perspective: comparing the TCM procedure with other sectors
3. Stocktaking of the adopted TCMs – towards harmonization or diversity?
4. Implementation and adjustment ahead: Enforcing, applying, and revising the TCMs during transition and crisis

This is based on research conducted within the project 'Implementing Network Codes' (INC). Funded by the Norwegian Research Council, INC examines the EU's energy market policy: specifically, the terms, conditions and methodologies (TCMs) that are required variously at national, regional or European level under four electricity guidelines. INC asks whether TCMs entail greater European harmonization or enable diverse regulation across countries and regions.

TCMs are detailed and binding rules that regulate a range of issues concerning electricity trade (e.g., market platforms) and the operation of electricity networks. TCMs thus concern how the existing electricity system should be managed – in contrast to regulating, e.g., the construction of new production or transmission capacity. The objective is to integrate markets and harmonize rules so as to make electricity trade more efficient.

TCMs are drafted by the transmission system operators (TSOs), and adopted by regulators. Some TCMs are (co-) drafted by Nominated Electricity Market Operators (NEMOs), which are electricity exchanges in charge of certain specific tasks. National TCMs are adopted by each national regulator. Regional and European TCMs are adopted unanimously by the national regulators in a region, or across Europe. If the latter disagree or decide to refer it, decision-making is moved to ACER.

With the Clean Energy Package, ACER became the default decision-maker for European TCMs. To adopt a TCM, ACER needs a favourable opinion from its internal Board of Regulators, where national regulators have one vote each, and where the Commission also participates (without voting rights).

1 Introduction

This research brief focuses on the role of ACER with regard to terms, conditions and methodologies (TCMs), and detailed rules adopted within an EU framework for regulating market and system operation issues. The creation of TCMs – as well as the broader regulatory approach – has been described as an ‘experimental’ (Rangoni 2017) or ‘bottom-up’ process initiated primarily by the TSOs (see ACER Board of Appeal, 2020, e.g., para 5 and 104). However, there is also a hierarchy involved, via decision-making by national regulators (NRAs), or ACER.¹

This Research Brief focuses on the hierarchy represented by decision-making by ACER: if the national regulators fail to agree, ACER can superimpose its decision on both the TSOs and the national regulators. Decision-making could be conducted horizontally – as represented by unanimity among the national regulators, but vertical, hierarchical decision-making – as represented by escalation to ACER – is also possible. The horizontal or vertical nature of decision-making depends on the specific development of each process under the TCM procedure.

The extent and nature of such hierarchy among national regulators and an EU agency are not preordained; they have evolved dynamically in response to developments in each TCM process as well as legal challenges. With the emergence of the TCM procedure in 2015 (via the CACM guideline), the role of ACER as a decision-maker for TCMs was originally made conditional on failure to reach agreement among, or referral from, national regulators. The level of hierarchy in each process depended on whether decision-making had escalated up to ACER for a given TCM. Once ACER had adopted a decision, this could be challenged or revised following internal and external review by the EU courts. Moreover, experiences from various TCM processes and the case law of the European courts have fed back into revisions to EU legislation regulating the tasks and authority of ACER.

¹ This was confirmed by a ruling of the General Court in 2020 in case brought by the German NRA against decisions by

The level of hierarchy has implications for EU harmonization and integration via the TCM process. Decision-making by an EU agency, as opposed to collaborative decision-making by or through national regulators, entails deeper EU *integration*, defined as the transfer of certain tasks to the EU level. Moreover, decision-making by an EU agency could mean that TCMs adopted this way reflect a stronger European perspective, with greater harmonization than what national regulators from all EU member-states (acting together), or in a given region, might otherwise agree on.

This Research Brief examines how the competence of ACER in relation to TCMs has changed over time, via revision of EU primary and delegated legislation (section 2.1). Decision-making by ACER depends on what other actors do, and the relations among them, in specific TCM processes (section 2.2); and its competence is shaped by internal legal appeals to ACER decisions as well as external case law (section 2.3). In section 3, the emerging questions and unaddressed issues stemming from a bottom-up process interspersed with a dynamic hierarchy are presented.

2 Presenting results: INC research findings

2.1 ACER’s formal mandate:

From advisor to decision-maker

Network codes and guidelines were introduced by the EU’s 3rd Energy Market Package, as delegated measures to be adopted by the Commission. These rules would be drafted by ENTSO-E, screened by ACER and adopted by the Commission together with a committee of member-state representatives (comitology) (Hancher, Kehoe, and Rumpf 2021). ACER’s role within this part of the EU’s electricity market regulation was initially limited to providing non-binding inputs, including drafting framework guidelines prior to code drafting by ENTSO-E, and issuing opinions and recommendations on drafts.

ACER and its Board of Appeal (T-631/19 BNetzA v. ACER).

“described as an ‘experimental’ (...) or ‘bottom-up’ process initiated primarily by the TSOs (...). However, there is also a hierarchy involved, via decision-making by national regulators (NRAs), or ACER”

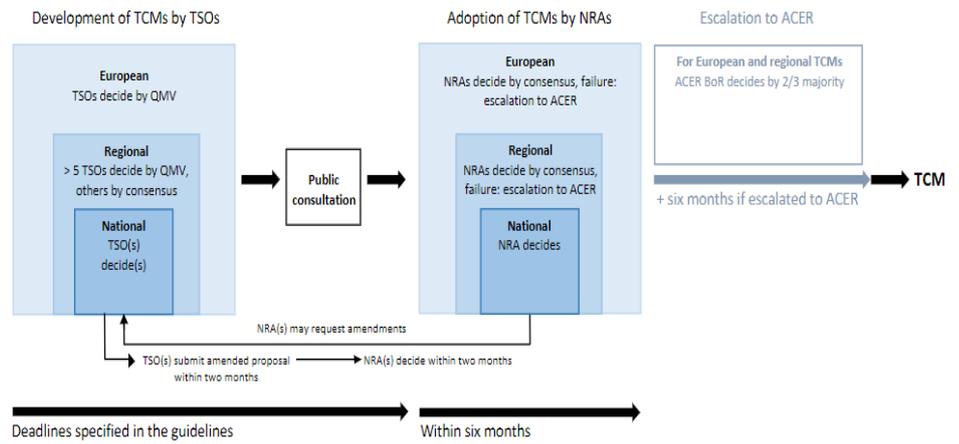


Figure 1: Development and adoption of TCMs (prior to the Clean Energy Package). Source: INC project.

“With the adoption of the Clean Energy Package in 2019, the role of ACER changed”

ACER could not revise drafts, but would have competency to draft a proposal itself, should ENTSO-E fail to submit a draft network code (Jevnaker 2015). Although the latter did not occur, ACER did occasionally return drafts to ENTSO-E; and it adopted a detailed recommendation on ENTSO-E’s proposal for an electricity balancing network code that could be seen as an actual revision. As for network code implementation, ACER’s role was restricted to monitoring and reporting on ENTSO-E tasks.² Overall, then, ACER’s formal role was that of an advisor for the network codes.

ACER acquired new tasks with the emergence of the market and system operation guidelines.³ These required TCMs at national, regional, and European level via a specified procedure.⁴ TSOs (in some cases: and/or NEMOs) to develop proposals for TCMs, for adoption by national regulators (see Figure 1). If national regulators failed to agree (or if subject to their common request), ACER would become competent to adopt a TCM. Thus, the TCM procedure gave ACER formal decision-

making power for escalated regional and European TCMs.

The concept of ‘TCM’ was not defined, but TCMs were to regulate the technical aspects of trade and system operation. Decision-making by national regulators and ACER on the TCMs was anchored in the Third Energy Package: TCM-adoption by ACER was anchored in ACER’s role as an arbitrator among national regulators in the 2009 ACER Regulation.⁵ However, only one of the four guidelines (as originally adopted) – the Electricity Balancing Guideline (Art. 4[1]) – referred to the 2009 Electricity Directive’s Article 37 on approval by national regulators of methodologies or terms and conditions (see also Article 59 of the recast 2019 Electricity Directive).

With the adoption of the Clean Energy Package in 2019, the role of ACER changed. First, regarding network codes and guidelines, ACER was now granted the right to revise draft codes from ENTSO-E.⁶ The preamble noted: ‘Experience with the development and adoption of network codes has shown

² ACER’s approach to ensuring implementation has been described as one of facilitating dialogue and exchange (Rumpf and Banet 2023).

³ Regulations (EU) 2015/1222, (EU) 2016/1719, (EU) 2017/2195 and (EU) 2017/1485.

⁴ Network codes were adopted pursuant to the provisions of Article 6 of Regulation 714/2009, whereas guidelines were adopted on the basis of its Article 18 of the same. Article 6 set out the steps to be

taken by the European Commission, ACER and ENTSO-E in developing the draft regulation. For more on the distinction between network codes and guidelines in practice, see Terna. (n.d.).

⁵ Art. 8(1) of the 2009 ACER regulation. This is maintained in Art. 6(10) in Regulation 2019/942 (the ‘recast’ ACER Regulation).

⁶ Art. 5(1) of the 2019 ACER Regulation and Art. 59(11) of Regulation 2019/942 (the ‘recast’ 2019 Electricity Regulation).

that it is useful to streamline the development procedure by clarifying that ACER has the right to revise draft electricity network codes before submitting them to the Commission' (Preamble, point 62, Electricity Regulation 2019).⁷

A second set of changes concerned the TCM procedure: TCMs that had previously required the approval of all regulatory authorities would now be directly adopted by ACER. Thus, ACER effectively replaced the national regulators for European TCMs: the TSOs would now submit a proposal directly to ACER for adoption.⁸ Moreover, both national regulators and ACER became entitled to revise and amend the proposals for all TCMs (not just European ones) submitted by TSOs and/or NEMOs.⁹ National regulators and ACER 'shall' revise the TCM proposals in order to ensure that they are in line with the objectives of the guidelines and contribute to market integration, non-discrimination, effective competition and the proper functioning of the electricity market.¹⁰

The changes to the TCM procedure were further elaborated in a 2021 Commission Regulation amending the four guidelines: 'Experience with the existing development process of terms and conditions or methodologies, including recent jurisprudence and delays in agreeing on certain terms and conditions or methodologies, have made it necessary to revise the regulatory procedure for defining terms and conditions or methodologies in order to ensure their timely adoption' (Preamble point 8).¹¹ Now it was specified that national regulators, or ACER, were to revise the proposals 'where necessary'.¹²

The process for amendment requests from national regulators regarding regional and European TCMs under the guidelines was also changed, i.e. the possibility for national regulators to send a TCM proposal back to the TSOs for further work and re-submission before adoption.¹³ The General Court had confirmed in the *E-Control* case¹⁴ that the then current text of the Electricity Guidelines was not sufficiently clear to allow only the coordinated approach for amendment requests – thus permitting every single national regulator to request amendments to proposals. The Commission deemed a legal situation that allowed for sequential amendment requests of individual national regulators to be highly impractical: 'with no realistic perspective of a timely approval and implementation', this could lead to significant delays' and 'legal uncertainty' (2021 Commission Regulation, preamble point 9). This possibility was therefore removed from the guidelines, replaced by a clear procedure for the coordination of amendment requests for terms and conditions or methodologies.

In sum, ACER's role regarding electricity market regulation has evolved over the past decade, from its initial role as *advisor* during network code development, to *arbitrator* when national regulators were unable to agree on TCMs under the network codes adopted as guidelines, and then becoming the main *decision-maker* for European-wide TCMs. The evolution is particularly marked for the European TCMs, whereas ACER remains an arbitrator as regards regional TCMs.



Photo: Unsplash

“ACER’s role (...) has evolved over the past decade, from its initial role as advisor (...) to arbitrator (...) and then becoming the main decision-maker for European-wide TCMs”

⁷ See Research Brief 4 for a discussion of revision of existing network codes and guidelines.

⁸ Art. 5(2) of the 2019 ACER Regulation.

⁹ Art. 5(2) of the 2019 ACER Regulation.

¹⁰ Art. 5(6) of the 2019 ACER Regulation.

¹¹ Commission Implementing Regulation (EU) 2021/280 of 22 February 2021 amending Regulations (EU) 2015/1222, (EU) 2016/1719, (EU) 2017/2195 and (EU) 2017/1485 to align them with Regulation

(EU) 2019/943, *OJ L 62*, 23.2.2021, p. 24–40

¹² Arts. 1–4 of the 2021 Commission Regulation (referring to revised Articles 9[5] for CACM, 4[5] for FCA, 5[1] for EB, and 6[1] for SO). This Regulation also generally refers to i.a. Art. 59(1) of the 2019 Electricity Directive.

¹³ Regulations (EU) 2015/1222, (EU) 2016/1719, (EU) 2017/2195 and (EU) 2017/1485].

¹⁴ Case T -331/17 *E-Control*.

EU	34	13	21
	Adopted in total	Adopted by all national regulators	Adopted by ACER
REG	88	68	20
	Adopted in total	Adopted by all national regulators	Adopted by ACER

Table 1: Adopted European and regional TCMs (counting each region's version of a regional TCM as 1), by the end of 2021. Source: INC project.

2.2 ACER's actual decision-making within the TCM processes

Before the Clean Energy Package, ACER was a fall-back decision-maker for regional and European TCMs: ACER could adopt TCMs following request from, or failure to reach agreement among, national regulators. With the Clean Energy Package, ACER became the default decision-maker on European TCMs. Before this, an overview of European and regional TCM processes shows that ACER had been the one to decide on most – but not all – of the European TCMs, and some of the regional TCMs (see Table 1).¹⁵

ACER could adopt decisions on TCMs, but it also held some decision-making powers regarding other energy-market issues. Figure 2 below shows that the number of decisions made by ACER grew with the emergence of the TCM procedure. Of the 92 decisions ACER adopted, a sizeable chunk concerns TCMs: ACER adopted 54 TCMs, and if we include 'guideline-related decisions' – i.a. extension requests for national regulators to get more time to adopt a TCM – the number of decisions jumps to 64.

How and when did ACER gain competency to adopt the TCM decisions? Escalation had been foreseen as a fall-back solution, should national regulators not agree on time. However, escalation could ensue for various reasons:¹⁶

1. disagreement on the proposal (*illustrated by European and regional TCMs*)
2. disagreement on requesting amendments (*illustrated by European and regional TCMs*)
3. disagreement on how to respond to a re-submitted proposal (*illustrated by regional TCMs*)
4. referral due to the belief that an amendment request would be futile, and the wish to avoid delays (*illustrated by European TCM*)
5. referral to ensure consistency with other, escalated TCMs (*illustrated by regional TCM*)

“Before the Clean Energy Package, ACER was a fall-back decision-maker for regional and European TCMs”

¹⁵ Each region, consisting of several countries, was to adopt its own geographic version of a regional TCM. Thus, there would be multiple versions of the same regional TCM (e.g., a Nordic capacity calculation methodology, and a Core capacity calculation methodology).

Each geographic version of a regional TCM is counted as 1 here.

¹⁶ Jevnaker et al, 'Rulemaking for harmonization or diversity in EU electricity regulation?', and 'Re-organizing the EU regulatory state', INC papers presented at ECPR General Conference, 22–26 August 2022, Innsbruck.

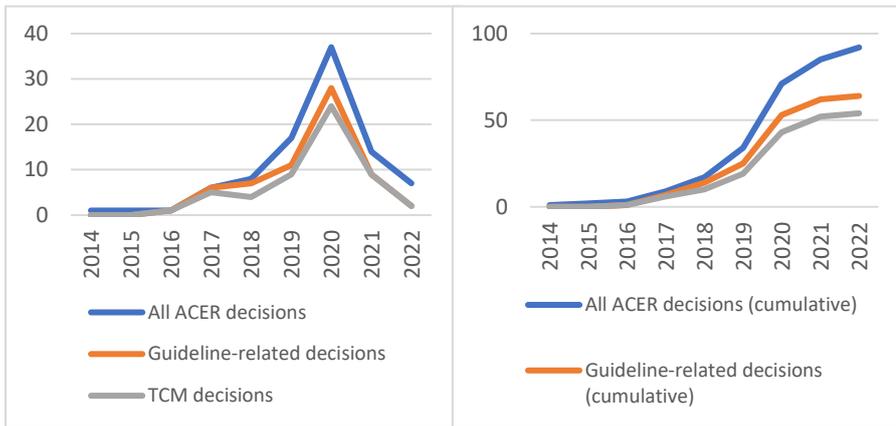


Figure 2a and 2b: ACER-adopted decisions 2014–2022 (per July 2022). Source: INC project.

There were TCM processes in which the national regulators in a region managed to agree on requesting the TSOs to re-submit a proposal: however, after having received such an amended proposal, they were not always able to agree on the next steps. The national regulators were not always satisfied with the new version (as seen with some regional TCMs). Moreover, there were processes for European TCMs where the national regulators had also informally requested changes via ‘shadow opinions’ on European TCM proposals before submission – but in some cases, they did not feel that the TSOs had been responsive to their demands.

Whereas disagreement among national regulators can prevent decision-making, because of the unanimity requirement, referral to ACER has also been used to avoid unnecessary delays among the national regulators in cases where these did not expect the TSO to re-submit a proposal that could be adopted (as illustrated by one of the European TCM processes). Moreover, the links across TCMs entailed that, should the process for one TCM become prolonged (e.g., via a request for amendment to the TSOs), that could affect the timeline for subsequent TCMs.¹⁷

Even as a TCM moved to ACER, national regulators sought to inform and support, and possibly influence, ACER’s decision-making. A practice

emerged among the national regulators, at European level as well as across regions – to notify ACER not only of the failure to reach agreement and thus that decision-making would be moved upwards to ACER, but also of submitting a document outlining their positions. These ‘non-papers’ presented the issues on which the national regulators had agreed or disagreed. ACER took such documents into account but did not base its decisions solely on this input from the national regulators: it sought additional input, as well as basing decisions on its interpretation of its own mandate and role concerning the regulation and harmonization of the European electricity market. Moreover, ACER was required to adopt a decision within six months. Individual national regulators could, and occasionally did, lose a vote in ACER’s Board of Regulators. However, adoption by ACER was not always the end of the story, as some of ACER’s TCM decisions were legally challenged – including by national regulators (see section 2.3).

Even before ACER was accorded competency to adopt a TCM, it was also used to provide advisory input at earlier stages, including ahead of the formal start of a TCM process. Thus, ACER could become involved in an issue prior to TCM escalation – as seen with the TCMs on capacity calculation regions (EU TCM), and on capacity calculation methodologies (core regional TCM), respectively.

“ACER could become involved in an issue prior to TCM escalation”

¹⁷ In contrast, a legal challenge would not entail a delay for linked TCMs (see section 2.3). Research Brief 3 has further

discussed the links across TCMs and the resultant implications.

“The TCM procedure led to a significant rise of decisions adopted by ACER, even when its competence to decide was conditional”

This section of the Research Brief has shown how the TCM procedure led to a significant rise of decisions adopted by ACER, even when its competence to decide was conditional upon failure to reach agreement or active referral from national regulators. The national regulators sought to cooperate with the TSOs – but also assert themselves vis-à-vis them. The upwards shift in decision-making to ACER could help regulators to rein in the TSOs. ACER could adopt decisions despite disagreements among the national regulators – from all member-states, or in a region – but it first sought extensive dialogue with these alongside the involved TSOs and other stakeholders. While responsive to such input, ACER also adopted decisions that went beyond the least common denominator. The revision of the TCM procedure in 2021 (direct adoption by ACER, and the requirement that amendment requests be joint rather than issued by an individual national regulator) might have reflected an attempt to address some of the challenges that had been experienced with the European TCMs processes. While these reforms were meant to improve efficiency, the effect could also be to carve out a greater role for ACER for European TCMs. For regional TCMs, however, ACER would still be accorded competency only after disagreement among, or referral from, the national regulators in a region.

2.3 ACER’s role as shaped by internal and external review of ACER decisions

Even after adoption, TCMs remained subject to contestation and evolution in a highly dynamic regulatory space. TCMs are subject to a specialized internal review procedure within ACER by its Board of Appeal, and the latter

in turn is subject to external legal control.

In a separate legal paper, we focus on ‘escalated’ TCMs that are submitted to scrutiny by the Agency because negotiation among the competent national regulatory authorities (NRAs) failed.¹⁸ We argue that the shadow of hierarchy cast by ACER over the negotiation of a TCM is not of a straightforward hierarchical, ‘top-down’ nature. Instead, it is determined by the contours of a dynamic regulatory space. This regulatory space is shaped by the scope for legal review, as ACER’s decisions on TCMs are often appealed –internally to its Board of Appeal, and externally to the European Courts (see below). Due to the high number of internal appeals,¹⁹ the Board of Appeal occupies a strategic ‘gatekeeper’ role in the TCM implementation process. As shown in Table 2, the Board of Appeal has heard many appeals concerning TCMs, and has generally upheld the original ACER decision. The decisions of the Board of Appeal on several TCMs have now been challenged by both TSOs and NRAs before the European courts.²⁰

Until September 2022, the only ruling from the General Court (*E-Control v ACER*) concerned procedural issues in relation to the implementation of the CACM Guideline. On 7 September 2022, the General Court handed down an important judgment on the scope of ACER’s competences in Case T-631/19 *BnetzA v ACER*. In addition, there are several currently pending cases that involve ACER’s substantive competence. So far, the General Court has overruled the Board of Appeal’s decisions on electricity issues. Moreover, the General Court has also done this in a case on the interpretation of a network code for the internal gas market: in *MEKH v ACER*, the General

¹⁸ Leigh Hancher and Julius Rumpf, ‘Shadow Law-Making and TCMs’, unpublished INC paper.

¹⁹ See Chamon et al. (2022) for a comparison of the role of Board of Appeal of EU Agencies.

²⁰ T-684/19, *MEKH v ACER* - the General Court declared Chapter V of gas network code on capacity allocation management (CAM NC) inapplicable under Article 277

TFEU: As the legislature made a political choice consisting of attributing the implementation of relevant EU rules relating to the creation of incremental capacity to the Member States alone, without delegating competence to that effect to ENTSOG and/or the COM, the relevant provision of the CAM NC was contrary to Art 290(1) TFEU.

	Appeals received (total)	Appeals received (TCMs)	Appeals (partly) upheld (TCMs)	Appeals not upheld (TCMs)	Appeals pending (TCMs)
Board of Appeal	22 (21 adopted)	16 (14 adopted)	3	11	2
General Court	17 (5 adopted)	13 (2 adopted)	3	0	10
European Court of Justice	1 (no decisions yet)	0	N/A	N/A	N/A

Table 2: Number of appeals received and decisions for TCM cases as of September 2022.²¹

Court held that the Commission did not have the competence to delegate powers to itself in a network code in the first place.²² This entailed that ACER did not have the competence to adopt a decision under this network code.

Evolution of internal review: the Board of Appeal as gatekeeper

The appeal procedure before the Board of Appeal of ACER is a mandatory ‘first stop’ for addressees of ACER’s decisions, before recourse to the European courts becomes available.²³ ACER’s Board of Appeal is subject to more legal challenges before the General Court than similar boards at many other EU Agencies.²⁴ It has now become an important ‘gate-keeper’.

The high number of decisions by ACER on TCMs has led to a challenging situation, in view of the complexity and potential economic impact of the issues addressed. In the latest review (2019) of the ACER Regulation, the deadline for the Board of Appeal decision was extended from two to four months.²⁵ The General Court has ruled that the Board of Appeal must conduct a full examination of the cases before it, including all economic and technical

assessments informing the appealed decision.²⁶

Following the latest revision of the ACER Regulation 2019, and in common with most boards, the Board of Appeal has two options following a challenge: confirming the appealed decision or remitting it to the Agency with binding instructions.²⁷ It cannot annul the Agency’s decision: even a successful internal legal review of TCMs has no automatic suspensory effect, which means an extended period of legal uncertainty for the affected stakeholders.

In the view of the Board of Appeal, TCM adoption is bottom—up or negotiated process as one that begins with co-ordination and negotiation — amongst ‘market’ or ‘private’ parties who take the initiative on the basis of ‘private interests’ (TSOs); this requires supervision by non-market actors (by the NRAs or ACER)—i.e., co-regulation and eventually, hierarchy. The Board of Appeal considers ACER as having competence to reach (often-pragmatic) compromises to adopt decisions, endorsed by the required majority within its Board of Regulators.²⁸

In the view of the General Court, the Board of Appeal must ensure that the

“The Board of Appeal considers ACER as having competence to reach (often-pragmatic) compromises to adopt decisions”

²¹ On 7 September 2022, the General Court partly upheld the appeal from the German NRA in its ruling in case T-631/19 BNetzA v. ACER.

²² In case T-684/19, *MEKH v ACER*, the general Court declared Chapter V of CAM NC inapplicable under Article 277 TFEU: As the legislature made a political choice in attributing the implementation of relevant EU rules relating to the creation of incremental capacity to the Member States alone, without delegating competence to that effect to ENTSOG and/or the Commission, the relevant provision of the CAM NC was deemed contrary to Art 290(1) TFEU. For a useful summary and discussion see Willis (2022).

²³ Art. 29 ACERReg-2019.

²⁴ See Chamon et al. (2022).

²⁵ Art. 28(2) ACERReg-2019.

²⁶ See Case Study 2.

²⁷ Art. 28(5) ACER Reg-2019.

²⁸ This is confirmed by case T-631/19 BNetzA v. ACER.

“...each procedure contributes to the continuous re-shaping of the regulatory space for the adoption of TCMs”

interests of the affected parties are fully protected.²⁹ The Board must conduct a full review of the technical and economic —considerations underlying the concerned decision of the Agency, as ‘a system of “limited review of a limited review” fails to offer the guarantees of effective judicial protection’.³⁰ The General Court has *refused* to accept pragmatic reasons for extending the Agency’s hierarchical shadow, even – or perhaps especially – given the technically and economically complex context of the TCMs.³¹

Impact of internal and external review

The legal review of contentious TCMs does not follow a straight path, but takes place within a complex web, where the decision may move forward, backward or even in both directions at the same time, and where several actors may have a say on the validity and content of the TCM in question. This procedural jumble is especially problematic in cases where several TCMs build upon each another. For example, the TSOs must continue with the development of additional or supplementing TCMs, even after challenging the ‘root’ TCM legally.³² Considerable time may pass from the adoption of a decision by the Agency to an annulment of the Board of Appeal ruling by the General Court. Following *E-Control v ACER*, the Agency stressed the critical importance – for the sake of legal certainty – of *not* removing the original decision with immediate effect.³³

Conclusions

ACER has acquired more powers – at the expense of NRAs – to adopt TCMs in the Clean Energy Package and subsequently the revised Regulation of 2021. Although the number of appeals against ACER decisions has risen, the Board of Appeal has rarely found against ACER. Stakeholders are increasingly raising competence issues – in the consultation process on amendments to TCMs as well as with guidelines such as the proposed CACM 2

case. As seen in the legal paper³⁴ the potential scope for internal and external review inevitably shapes the parameters of the TCM process, but not necessarily in a predictable fashion. On the one hand, the shadow of hierarchy – the scope of ACER’s powers over the TCM adoption procedures – may be growing longer, even despite a successful legal challenge.³⁵ On the other hand, external *ex-post* scrutiny of ACER and the Board of Appeal decisions by the European courts creates a feedback loop for future decisions on TCMs– in turn determining how those decisions are taken, and their content.

Is the TCMs a bottom–up process in constant flux? This process does not end with a decision by ACER, which may be subject to internal appeal to the Board of Appeal. In turn, the Board of Appeal’s decision may be subjected to further judicial review by the European courts. The General Court has submitted the Agency to more stringent control. Each new appeals procedure reveals new areas of contestation, which may take the shape of procedural or substantive arguments in law. Depending on the outcome, each procedure contributes to the continuous re-shaping of the regulatory space for the adoption of TCMs. Future research could examine whether intervention by the European courts facilitates more stringent control of the Agency, or whether ‘internal’ pragmatism prevails. Ultimately, future studies should investigate whether the dynamics of the TCM process in fact enable a more pragmatic process to thrive in the ‘institutional shadow’ than what is *prima facie* apparent from the formal architecture. If so, this gives rise to important issues of governance.

3 Setting the stage for the Florence workshop: Unanswered questions and emerging issues

²⁹ *ibid* 51.

³⁰ *ibid* 58.

³¹ See also Tovo in Chamon, et al. (2022).

³² See for example ACER Decision 30/2020.

³³ At para 43 of A-001-2017_R

³⁴ See Hancher and Rumpf (unpublished).

³⁵ See in this respect, *E-control* case study and Aquind case study in the legal paper.

Several questions emerge from the evolving role of ACER. First, *the impact on the (internal) functioning of ACER itself*. ACER and its Board of Appeal had been set up with a limited budget and a relatively low number of staff. They received a high number of TCMs to adopt, or appeals to consider within a relatively short timeframe, for highly specialized and frequently interdependent issues. What were ACER's priorities under an increased workload of adopting (and coordinating across) multiple TCMs? Has the TCM procedure changed how ACER operates, or how it interprets its mission? Several of these questions are relevant for the Board of Appeal as well. More of the interaction among national regulators would be re-directed to inside ACER structures with ACER becoming the default decision-maker on European TCMs. How might this affect the substantive deliberations and decision-making among them? Finally, how does the new role of the Board of Appeal shape 'revision' decisions when a challenged TCM is referred back to ACER again after appeal?

Second, *the feedback on strategic calculations*. Experiences with decision-making by ACER, legal reviews of its decisions and legislative reform might affect actors' interpretation of whether it is worth the effort to get TCMs escalated, or their calculus of whether to appeal an ACER decision. When ACER became the default decision-maker on European TCMs, did this make it less attractive to challenge a decision that had been adopted by ACER after escalation? For instance, when an appeal against an ACER decision to the Board of Appeal, on a European TCM, was not upheld in 2020, this case was not taken further.³⁶

Third, *the impact of decision-making by ACER for harmonization, and the future role of ACER* within rulemaking

processes for electricity. Has the presence of ACER as a fallback decision-maker should national regulators not agree (the threat or promise of escalation) been more important than the question of who adopts the decision in the end? Moreover, what has been ACER's role so far as regards revision of the guidelines themselves (e.g., the ongoing revision of the CACM Guideline – CACM 2.0'), and what are the prospects going forward? As to harmonization across EU member states and countries that participate in the internal energy market via the European Economic Area (EEA) Agreement, adjustments were made as regards implementation of ACER decisions: ACER decisions under the third energy package can be implemented in Norway (subject to an additional approval process),³⁷ but the Clean Energy Package has not been incorporated into the EEA Agreement. What are the implications for the implementation and/or applicability of ACER decisions adopted under the Clean Energy Package in the EEA EFTA countries?

Finally, on the *nature of the rule-making processes* in electricity market regulation. Is the discourse moving from a more technical orientation towards political contestation and juridification? In step with growing awareness of, and attention to, the distributive implications and political trade-offs stemming from the technical rules for the electricity market, more contestation among policymakers could ensue. This was observed during the negotiations on the Clean Energy Package (e.g., on bidding zone review), which however also extended the technical rulemaking approach to new issues within electricity market regulation.³⁸ Will policymakers regulate further in detail the substantive issues for which additional technical rules are to be made, and the procedures for such rulemaking? Is this workable – or inevitable – given the rapid pace of

³⁶ This concerned the platform for the imbalance netting process under the Balancing Guideline Art. 22(1).

³⁷ For an overview, see Dyrby and Jevnaker (2022).

³⁸ The rulemaking approach from the network code and TCM processes was copied into other processes regulated by

the Clean Energy Package (methodology drafting by ENTSO-E and adoption by ACER on cross-border participation in capacity mechanisms, and on the resource adequacy assessment) and also in the later recast TEN-E Regulation (ACER development of framework guidelines for ENTSO-E's network scenarios).

“Has the TCM procedure changed how ACER operates, or how it interprets its mission?”

“Is the discourse moving from a more technical orientation towards political contestation and juridification?”

“Have such developments affected the work of the Board of Regulators (...)?”

events and developments in European energy policy today? Proliferation of binding rules that regulates the behaviour of, and interaction among, different actors (juridification) can also emerge via case law. This could constrain ACER’s competence,³⁹ and also entails a clearer delimitation of ACER’s competence in legal terms. Have such developments affected the work of the Board of Regulators, and the role of the legal committee that advises the Board of Regulators? Is juridification of the TCM process optimal, or are there trade-offs against flexibility and mutual trust?⁴⁰ Finally, to what extent does this affect the drafting (or revision) of framework guidelines, network codes, guidelines and TCMs, or the discussions among the various actors via consultations?⁴¹

4 Conclusions

This Research Brief has provided an overview of how formal role of ACER within electricity market regulation has changed over time: from providing advisory input to network codes, to becoming a decision-maker with the emergence of the TCM procedure whereby ACER could adopt legally binding TCMs. With the Clean Energy Package, ACER became the default decision-maker on European TCMs. Before this, ACER had already been the one to adopt European TCMs, but not in all instances.

Escalation to ACER depended on the extent to which TSOs, and national regulators, respectively, could cooperate within specific TCM processes – as well as the extent to which the national regulators believed that the TSOs would deliver, or whether they saw decision-making by ACER as offering some benefits (e.g., coordination with linked TCMs also shifted upwards to ACER).

The internal and external review of ACER-adopted TCMs fed back into the

processes, but not necessarily in a predictable manner. Depending on the outcome, each procedure contributes to the continuous re-shaping of the regulatory space for the adoption of TCMs.

The evolving role of ACER – formally, as observed in decision-making, and as shaped via legal challenges – gives rise to a range of issues and questions in need of further exploration and discussion.

³⁹ The General Court’s ruling in case T-684/19, *MEKH v ACER* illustrated the centrality of the distinction between essential and non-essential rules for decision-making under the network codes and guidelines (from which TCMs evolve), which, legally speaking, should only add non-essential elements.

⁴⁰ The flexibility of the rulemaking process is also discussed in Research Brief 4.

⁴¹ E.g., the ongoing work on revising the CACM Guideline (CACM 2.0), and on a framework guideline for demand response.

5 References

- ACER. 2020. 'DECISION No 30/2020 OF THE EUROPEAN UNION AGENCY FOR THE COOPERATION OF ENERGY REGULATORS'.
acer.europa.eu/Official_documents/Acts_of_the_Agency/Individual%20decisions/ACER%20Decision%2030-2020%20on%20Core%20RDCT%20ost%20Sharing.pdf
- ACER Board of Appeal. 2020. 'Decision of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators: Application for annulment – ACER Decision No. 10/2020 – duty to state reasons – Charter of Fundamental Rights of the EU – proportionality – access to documents', Case number A-007-2020, 24 September 2020.
acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Decisions/A-007-2020%20Decision%20of%20the%20BoA.pdf
- Case T-631/19. 2022. BNetzA v. ACER. ECLI:EU:T:2022:509
- Case T-735/18. 2020. Aquind v ACER. ECLI:EU:T:2020:542
- Case T-684/19, MEKH v ACER. ECLI:EU:T:2022:138
- Chamon, Merijn, Annalisa Volpato and Mariolina Eliantonio, eds. (2022) 'Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?'. Oxford University Press.
- Dyrby, Sophia and Torbjørn Jevnaker. 2022. 'Norge i EUs energimarked: norske aktørers mulighet til å påvirke, delta og klage ved gjennomføring av metoder og vilkår' (in Norwegian). FNI Report 1/2022. Lysaker: Fridtjof Nansen Institute.
- Hancher, Leigh, Anne-Marie Kehoe, and Julius Rumpf. 2021. 'The EU Electricity Network Codes and Guidelines: A Legal Perspective' (2nd Edition).
cadmus.eui.eu/bitstream/handle/1814/69718/RSC_FSR_RR_2021.pdf?sequence=3&isAllowed=y
- Hancher, Leigh and Julius Rumpf. Unpublished. 'Shadow Law-Making and TCMs'.
- Jevnaker, Torbjørn. 2015. 'Pushing Administrative EU Integration: The Path towards European Network Codes for Electricity'. Journal of European Public Policy 22(7): 927–47.
- Jevnaker, Torbjørn et al. 2022. 'Re-organizing the EU regulatory state', INC paper presented at ECPR General Conference, 22–26 August 2022, Innsbruck.
- Jevnaker, Torbjørn et al. 2022. 'Rulemaking for harmonization or diversity in EU electricity regulation?', INC paper presented at ECPR General Conference, 22–26 August 2022, Innsbruck.
- Rangoni, Bernardo. 2017. 'Architecture and Policy-Making: Comparing Experimentalist and Hierarchical Governance in EU Energy Regulation'. Journal of European Public Policy: 1–20.
- Rumpf, Julius and Catherine Banet. 'Energy Law', in Mira Scholten (ed) Research Handbook on the Enforcement of European Union Law (Edward Elgar Publishing, 2023), Chapter 22.
- Terna. N.d. 'European Network Codes'.
www.terna.it/en/electric-system/grid-codes/european-network-codes
- Willis, Peter. 2022. 'EU General Court rules on scope of network codes'.
www.twobirds.com/en/insights/2022/uk/eu-general-court-rules-on-scope-of-network-codes.



Research Fellow
Torbjørg Jevnaker
tjevnaker@fni.no



Professor
Leigh Hancher
leigh.hancher@gmail.com



Researcher
Karianne Krohn Taranger
kktaranger@fni.no

© Fridtjof Nansen Institute,
September 2022

ISBN 978-82-7613-740-8

**The evolving role of ACER:
Emergence, practice and review of terms,
conditions and methodologies (TCMs)**

*Torbjørg Jevnaker, Leigh Hancher and
Karianne Krohn Taranger*

Front page photo: Unsplash

The Fridtjof Nansen Institute is a non-profit, independent research institute focusing on international environmental, energy and resource management. The institute has a multi-disciplinary approach, with main emphasis on political science and international law

Fridtjof Nansens vei 17 | P.O. Box 326 |
NO-1326 Lysaker | Norway
Telephone (+47) 67 11 19 00
E-mail post@fni.no | www.fni.no

The INC project

The research project ‘Implementing Network Codes’ examines EU electricity market regulation from political, legal and economic perspectives, in collaboration with stakeholders. It is led by the Fridtjof Nansen Institute in Norway. Participating research institutions are the Florence School of Regulation, the Scandinavian Institute of Maritime Law (University of Oslo), Osnabruck University, University of Göttingen, Thema Consulting Group and DNV. INC is funded by the Research Council of Norway as a collaborative research project (2020-2024; grant agreement no. 308855), with co-funding from, Energy Norway, Statkraft, Statnett, the Norwegian Ministry for Petroleum and Energy, Elvia, Hafslund E-CO Vannkraft, Skagerak Kraft and Nord Pool.

Read more at fni.no/INC

Acknowledgements

We would like to thank the researchers and financing partners in the INC project for questions and feedback along the way. In addition, we would like to thank Gro Gagnat for research assistance, Susan Høivik for proof reading and Claes Lykke Ragner and Selma S. Lindgren for formatting.

About the authors

Torbjørg Jevnaker is a Research Fellow at the Fridtjof Nansen Institute. Her research is focused on EU energy and climate policy from the perspective of public policy and administration. She is currently researching EU electricity market regulation, specifically rulemaking within the implementation stage of policymaking and the role of the EU energy agency ACER. Jevnaker is the principal investigator of the INC project.

Leigh Hancher is Professor of European Law at the University of Tilburg, and a part-time Professor at the Florence School of Regulation. Her research interests include energy market regulation, EU state aids and energy market governance.

Karianne Krohn Taranger is a Researcher at the Fridtjof Nansen Institute. Her research is focused on EU energy and climate policy, low-carbon transitions, and windpower governance and acceptance.



FRIDTJOF NANSENS INSTITUTT
FRIDTJOF NANSEN INSTITUTE