

INC Research Brief # 2
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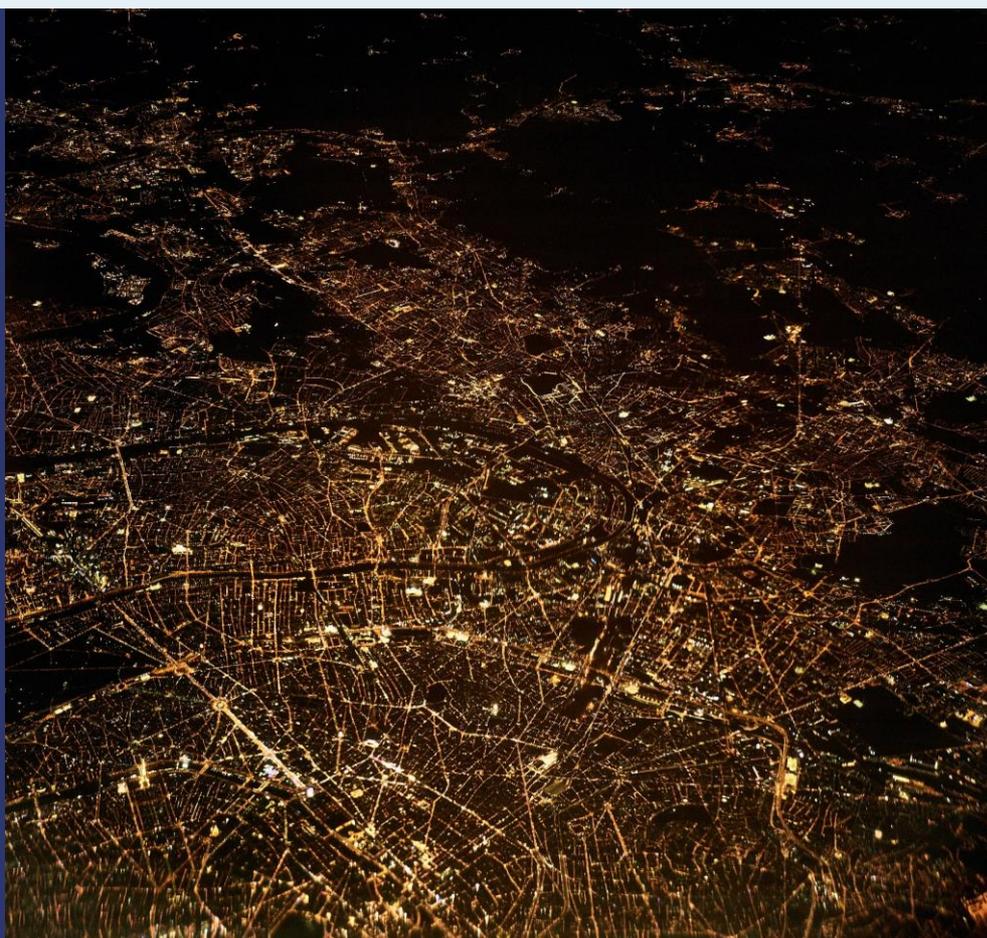
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Electricity in perspective

Comparing the TCM procedure with other sectors

Key points

- EU agencies have generally gained increasing influence on decision-making processes in the EU.
- The decision-making process in the electricity sector stands out in EU decision-making.
- This research brief is based on the INC project and will be presented at the INC workshop in Florence in October 2022.



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Electricity in perspective

This research brief puts the rule-making process in the EU electricity sector in a comparative perspective and asks whether its peculiarities – decision-making by EU agencies, involvement of private actors and rule-making on a regional level – are unique to the electricity sector or part of a broader European trend.

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: flexible for the energy transition?

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).



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Introduction

EU agencies have gained increasing influence on European decision-making processes through their information and networking role (Blom & Vanhoonacker, 2014). With time, they have become important regulatory venues. Initially established to provide expert advice, many have gained far-reaching powers as regards decision-making and enforcement (Joosen, Haverland, & de Bruijn, 2022; Maggetti, Di Mascio, & Natalini, 2022; Scholten, 2017).

EU legislation may require further refinement via more specific decisions by the Commission assisted by a committee of experts or representatives from the member states. This process is frequently referred to as ‘comitology’. While comitology has now been replaced by procedures for implementing and delegated acts, for the sake of simplicity, the term ‘comitology’ is used here. Regulatory EU agencies have often an important role in drafting comitology decisions, although they cannot adopt decisions at this level by themselves. In addition, some agencies have gained full decision-making competences ‘below’ the comitology level — typically to ease or ensure implementation.

A second development has run in parallel. Many EU agencies now invite interest groups to provide inputs to their decision-making, for instance through consultations, stakeholder bodies, or agency boards (Busuioc & Jevnaker, 2022; Joosen et al., 2022). In some fields, this has gone one step further: a formal role is given to a group of private actors in drafting legal texts.

In the field of EU energy policy, both these developments come together: decision-making competences for the agency itself, and a formal role for

private actors in drafting these decisions. Moreover: rules are made not only at the EU and the national level, but also at an intermediate regional level, where EU member-states and private actors cooperate in rule-making. This Research Brief puts these three characteristics of energy policy-making in perspective, asking to what extent research on other policy domains might cross-fertilize research on the TCM (terms, conditions, and methodologies) process – and the converse: to what extent insights from analysis of the TCM process are generalizable.

Presenting results: INC research findings

To develop and harmonize the regulation of electricity markets further – a central goal of the third energy market package of 2009 – public and private actors at the EU and national levels worked together to develop a set of more detailed and binding European rules – referred to as ‘network codes’. These network codes were developed by the European Commission, ACER and ENTSO-E (the network of the European Transmission System Operators) and adopted by comitology procedure.

Between 2015 and 2017, eight network codes were adopted as binding regulations. However, four of these were adopted as ‘guidelines’ by comitology procedure because of disagreements and/or because greater flexibility was sought in the level of harmonization. The resulting guidelines entailed a lower level of harmonization but included a procedure for developing and adopting more specific ‘terms, conditions, and methodologies’ (TCMs). The TSOs (Transmission System Operators) would develop proposals for TCMs across the four guidelines, at the

“EU agencies have gained increasing influence on European decision-making processes”

“Private actors have been accorded a role that goes far beyond typical stakeholder involvement”

national, regional, and European levels, although some TCMs were to be developed by the NEMOs (Nominated Electricity Market Operators). Thus, at the national level, TSOs develop a proposal that must then be adopted by the competent national authority.

At the regional level, the TSOs active in a region cooperate in drafting the proposal; the TCM must be adopted unanimously by the national regulatory authorities. If they do not adopt the proposal, ACER must make the decision. Decision-making on regulatory issues within ACER resides with the Director and the Board of Regulators. In the latter, the national regulatory authorities from all member states are represented with one vote each. Moreover, the European Commission also participates, as an observer.

On the EU level, all TSOs work together in ENTSO-E to develop a draft. All National Regulatory Authorities (NRAs) must then give their consent – otherwise, the decision will be made by ACER. Until the adoption of the Clean Energy Package (2019), the TSOs were ‘formal agenda-setters’ in this procedure (for a discussion of this concept see Pollack, 1997; Ruffing, 2022): If the regulators were not satisfied with a TSO proposal, they could not ignore or change it themselves: they would have to request the TSOs to revise it. This arrangement gave TSOs a particularly strong role in the drafting process.

Two changes came about with the Clean Energy Package: First, the regulatory authorities (including ACER) are now allowed to alter TSO proposals. Second, European TCMs are no longer to be adopted by all NRAs: they are to be decided by ACER.

Thus, ACER has not only full decision-making competences (in both versions of the procedure): in addition, private actors have been accorded a role that goes far beyond typical stakeholder involvement.

The remainder of this Research Brief is organized as follows: First, we discuss which agencies have full decision-making powers, i.e., where formal

consent is not needed from the Commission, a comitology committee, or other actors. Second, we examine the policy domains in which private actors are given formal drafting obligations. As most agencies have comprehensive tasks and are involved in several kinds of procedures, a systematic investigation was not possible here: we decided to concentrate on those fields which have attracted scholarly attention. Third, we discuss the peculiarities of the regional rule-making procedure.

Decision-making power below comitology

Of the 38 EU agencies currently existing (two created only recently), 11 are entitled to take decisions without consent from the EU legislators (the Commission, Council and European Parliament) (Ruffing, Weinrich, Rittberger, & Wonka, 2022). The Appendix at the end of this document gives an overview of the relevant articles of their (consolidated) founding regulations.

Besides ACER, agencies with decision-making competences are the Community Plant Variety Office (CPVO), which can issue Community Plant Variety Rights; and the three financial supervisory authorities EBA, ESMA and EIOPA, which issue guidelines and recommendations to ensure the convergence of supervisory and regulatory practices among the member-states, but also have far-reaching powers in enforcement, where they can issue individual decisions binding on national authorities or financial institutions.

The European Union Aviation Safety Agency (EASA) and the European Union Agency for Railways (ERA) have competency to issue aviation/train certificates; the EASA can also administer inspections and monitoring activities. The European Chemicals Agency (ECHA) can require producers to submit registration for substances regulated by REACH (Registration, Evaluation, Authorisation and Restriction of Chemicals); the European Maritime Safety Agency (EMSA) decides on on-site visits of national ports, the European Intellectual

Property Office (EUIPO) administers the process of trademark registration – which actually means that it decides on these registrations. Further, the European Union Agency for the Space Programme (EUSPA) decides on the use of the European satellite navigation and Galileo systems; and the Single Resolution Board can adopt individual resolution decisions.

In principle, we can differentiate within this diverse group: between agencies which can issue full implementation decisions, such as CPVO, ERA and EASA, and agencies which have their main competences in enforcement, such as EMSA, but also the financial supervisory authorities. The picture would become more diverse if we also took into account those agencies which take decisions de facto without (much) involvement of EU legislators, such as EMA (Ruffing, 2022).

Thus, full decision-making power below the comitology level is not unusual in the realm of EU agencies. However, to our knowledge, ACER is the only agency that decides on legally binding standards below comitology level, whereas ERA, EASA and CVPO apply existing standards to individual cases. However, distinguishing between a one-time decision applying a rule to a specific case on the one hand, and a decision that in practice introduces a more general rule on the other, is not always a straightforward task.

Private actors in rule-making and enforcement

In EU networks we find considerable variation in stakeholder involvement in rule-preparing or enforcement activities. For example, ECHA has an enforcement forum, where the stakeholders can engage directly with Forum members and present enforcement issues to the Forum. Further, they can contribute directly to the work of the Forum by proposing REACH-EN-FORCE projects and by providing input to the compendium of analytical methods for certain restrictions. IN 2020, EUIPO launched the Stakeholder Quality Assurance Panels (SQAP) project, establishing

panels of users representing user associations, who meet on the EUIPO premises to audit a sample of decisions. SQAP auditors check decisions individually assigned to them and present their findings to the panel of users. All findings are recorded in a report that is approved by the panel. EASA and ERA have integrated stakeholder advisory groups which provide technical input and comment on rule-making and enforcement activities.

However, to our knowledge, the TCM process is unique among EU agencies in formally tasking a specific group of private actors to draft the standards, making them formal agenda-setters in the process. A comparable procedure is found otherwise only as regards technical standard setting. Here, standards are developed by private standardization bodies and are then registered with the European Commission, after consultation with a comitology committee (Gehring & Kerler, 2008). This procedure gives private actors a privileged position comparable to the role of TSOs in the TCM procedure.

Rule-making on the regional level

The TCM procedure has a third particularity: Besides rule-making on the national and the EU levels, it also foresees regional standards – bringing together TSOs and regulatory authorities from several member-states. However, as there is no such thing as ‘regional law’, these rules can be adopted only by unanimity by the regulators, and enforcement is difficult. If a decision on a TCM is legally challenged on the regional level, only the individual NRAs can be challenged, as there is no overarching organization or entity that can take such a decision. This procedure of regional rule-making, unparalleled otherwise in EU regulation, is due to the intertwined character of the European electricity system.



“The TCM process is unique among EU agencies in formally tasking a specific group of private actors to draft the standards”

“Who participates in decision-making below comitology, and who gets influence?”

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

Thus, the TCM procedure is unique. Not only has ACER full competences in rule-making: in addition, private actors have institutionalized agenda-setting positions comparable only to those in the field of technical standard-setting. With the Clean Energy Package, these agenda-setting positions as regards the TSOs and NEMOs have been cut back to some extent, as regulators are now allowed to alter a proposal, without being obliged to send them back to the TSOs/NEMOs for revision. The empirical research in our project has shown that TSOs have not always been responsive to NRAs requests for changes, a situation that often led to disagreement between the NRAs and therefore escalation to ACER (see Research Briefs 1 and 3).

However, there are several unanswered questions remaining:

First, participation might also be coloured by the (perceived) relevance of the different rules, with some TCMs concerning issues that directly affect market participants, whereas others might be less relevant, such as TCMs that mainly address TSO matters. Who participates in decision-making below comitology, and who gets influence? Is the procedure an interest- or an expertise-led one?

Second, as regards the rulemaking process in electricity, does the new institutional setting under the Clean Energy Package weaken the position of the TSOs/NEMOs and to some extent ‘normalize’ the procedure? Moreover, ACER’s role has changed over time, with the new rules under the Clean Energy Package? Is ACER further empowered? Finally, how do the actors involved handle the difficulties that come with regional rule-making? Does this regional procedure lead to harmonization? Is there effective enforcement? Can this specific procedure, with its three-level approach, manage to overcome problems in building up the European

market for energy? Or does it take too long/is too inefficient?

Third, decision-making by ACER raises a general question of the role of national authorities and the EU institutions in relation to decision-making by EU agencies. Thus, what have been the experiences so far when ACER is to adopt a TCM, with regard to the role of national regulatory authorities? Moreover, as an observer within the Board of Regulators, what has been the role in practice of the Commission here?

Finally, are the decisions on the TCMs individual decision applying general rules to a specific case, or should they be conceptualised as decisions that de facto create general rules? Moreover, does decision-making by EU agencies represent a new form of EU integration? The TCM process extends the chain of delegation from elected representatives to actual decision-makers: is that acceptable in terms of democratic legitimacy?

Conclusions and recommendations

Comparison of the TCM procedure with other procedures of agency decision-making reveals a particularly far-ranging delegation of decisions, not only to ACER but also to private actors. Although such delegation to EU agencies and private actors is also found in other sectors, the combination is unique, and coincides with the new level of regional rule-making. Several recurrent questions of EU regulation research need to be addressed in view of this new regulatory environment. We want to engage in discussion of these questions at the workshop, as well as in our future research.

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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.

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Appendix

Agency	No. of last consolidated regulation	No. of article and coded segment
ACER	(EU) 2019/942	Article 2: (d) issue individual decisions on the provision of information in accordance with Article 3(2), point (b) of Article 7(2) and point (c) of Article 8; on approving the methodologies, terms and conditions in accordance with Article 4(4), Article 5(2), (3) and (4); on bidding zones reviews as referred to in Article 5(7); on technical issues as referred to in Article 6(1); on arbitration between regulators in accordance with Article 6(10); related to regional coordination centres as referred to in point (a) of Article 7(2); on approving and amending methodologies and calculations and technical specifications as referred to in Article 9(1); on approving and amending methodologies as referred to in Article 9(3); on exemptions as referred to in Article 10; on infrastructure as referred to in point (d) of Article 11; and on matters related to wholesale market integrity and transparency pursuant to Article 12.
CPVO	(EC) 2100/94 Consolidated	Article 62: If the Office is of the opinion that the findings of the examination are sufficient to decide on the application and there are no impediments pursuant to Articles 59 and 61, it shall grant the Community plant variety right. The decision shall include an official description of the variety.
EASA	(EU) 2018/1139 Consolidated	Article 75: (e) conduct inspections, other monitoring activities and investigations as necessary to fulfil its tasks under this Regulation, or as requested by the Commission;
EASO	(EU) 2021/2303	Article 16: 1. The Agency shall provide operational and technical assistance to a Member State in accordance with this Chapter. d) on its own initiative with the agreement of the Member State where the Member State's asylum or reception system is subject to disproportionate pressure
EBA	(EU) No 1093/2010 Consolidated	Article 8: (f) take individual decisions addressed to competent authorities in the specific cases referred to in Articles 18(3) and 19(3); (f) in cases concerning directly applicable Union law, take individual decisions addressed to financial institutions, in the specific cases referred to in Article 17(6), 18(4) and 19(4)
ECHA	(EC) 1907/2006	Article 7: 5. The Agency may take decisions requiring producers or importers of articles to submit a registration, in accordance with this Title, for any substance in those articles, if all the following conditions are met: (a) the substance is present in those articles in quantities totalling over 1 tonne per producer or importer per year; (b) the Agency has grounds for suspecting that: (i) the substance is released from the articles, and (ii) the release of the substance from the articles presents a risk to human health or the environment; (c) the substance is not subject to paragraph 1. A submission for registration shall be accompanied by the fee required in accordance with Title IX.

Appendix

EIOPA	(EU) 1094/2010 Consolidated	Article 8: (e) take individual decisions addressed to competent authorities in the specific cases referred to in Articles 18(3) and 19(3); (f) in cases concerning directly applicable Union law, take individual decisions addressed to financial institutions, in the specific cases referred to in Article 17(6), in Article 18(4) and in Article 19(4);
EMSA	(EC) 1406/2002 Consolidated	Article 3: (1) In order to perform the tasks entrusted to it, the Agency may carry out visits to the Member States in accordance with the policy defined by the Administrative Board.
ERA	(EU) 2016/796	Article 14: The Agency shall issue, renew, suspend and amend single safety certificates and cooperate with national safety authorities in that respect in accordance with Articles 10, 11 and 18 of Directive (EU) 2016/798.
ESMA	(EU) 1095/2010	Article 8: (e) take individual decisions addressed to competent authorities in the specific cases referred to in Articles 18(3) and 19(3); (f) in cases concerning directly applicable Union law, take individual decisions addressed to financial institutions, in the specific cases referred to in Article 17(6), in Article 18(4) and in Article 19(4);
EUIPO	(EU) 2017/1001	Article 151: 1. The Office shall have the following tasks: (a) administration and promotion of the EU trade mark system established in this Regulation; (b) administration and promotion of the European Union design system established in Council Regulation (EC) No 6/2002 (4); (c) promoting convergence of practices and tools in the fields of trade marks and designs, in cooperation with the central industrial property offices in the Member States, including the Benelux Office for Intellectual Property;
GSA	(EU) 2021/696	Article 29: 2. The Commission shall entrust the following tasks to the Agency: (a) managing the exploitation of EGNOS and Galileo, as provided for in Article 44; (b) overarching coordination of user-related aspects of GOVSATCOM in close collaboration with Member States, relevant Union agencies, EEAS and other entities for the purpose of crisis management missions and operations; (c) implementing activities relating to the development of downstream applications based on the Programme's components and fundamental elements and integrated applications based on the data and services provided by Galileo, EGNOS and Copernicus, including where funding has been made available for such activities in the context of the Horizon Europe or where necessary to fulfil the objectives referred to in point (b) of Article 4(1); (d) undertaking activities related to user uptake of data, information and services, offered by the Programme's components other than Galileo and EGNOS; without affecting Copernicus activities and Copernicus Services entrusted to other entities;
SRB	(EU) No 806/2014 Consolidated	Article 8: 1. The Board shall draw up and adopt resolution plans for the entities and groups referred to in Article 7(2), and for the entities and groups referred to in Article 7(4)(b) and (5) where the conditions for the application of those paragraphs are met.