

## Response on:

# Consultation on Amendments to Procedural Provisions in Electricity Network Codes and Guidelines

15 June 2020

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## BACKGROUND

1. With the present response we wish to submit our comments on the 11 May 2020 consultation of the European Commission on a planned procedural clarification in four electricity guidelines by way of a Commission Implementing Regulation. More specifically the consultation refers to the procedure for adopting Terms, Conditions and Methodologies ("**TCMs**") in implementation of the following Guidelines ("**GL**"):
  - a. Capacity Allocation and Congestion Management ("**CACM**")<sup>1</sup>
  - b. Forward Capacity Allocation ("**FCA**")<sup>2</sup>
  - c. Electricity Balancing GL ("**EB GL**")<sup>3</sup>
  - d. System Operation GL ("**SO GL**").<sup>4</sup>
2. The purpose of the consultation is to bring legal clarity and certainty in the TCMs adoption procedure by amending the texts of the 4 GLs Regulations to mirror the changes introduced by the Clean Energy Package ("**CEP**") as detailed more specifically in the recast Regulation 2019/942 establishing the Agency for Cooperation of the Energy Regulators ("**ACER Regulation**")<sup>5</sup>. The current wording of the GLs is drafted in line with the repealed Regulation 713/2009 establishing ACER and therefore it needs to be updated.
3. The consultation also seeks to clarify the procedure of amending TCMs proposals as a reaction to the recent judgements of the General Court of the European Union on the TCMs determining the capacity calculation regions in implementation of Article 15(1) CACM.<sup>6</sup> The Commission wishes to establish *only* the "coordinated approach" between National Regulatory Authorities ("**NRAs**") when they seek to introduce amendments to TCMs and to remove "uncoordinated individual amendment requests" that might lead to significant delays and to further legal uncertainties.<sup>7</sup>

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<sup>1</sup> Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a Guideline on Capacity Allocation and Congestion Management, OJ L 197, 25.7.2015, p. 24.

<sup>2</sup> Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a guideline on forward capacity allocation, OJ L 259, 27.9.2016.

<sup>3</sup> Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing, OJ L 312, 28.11.2017, p. 6.

<sup>4</sup> Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation, OJ L 220, 25.8.2017, p. 1.

<sup>5</sup> 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, OJ L 158, 14.06.2019, p. 22.

<sup>6</sup> Cases T—332/17 Energie-Control Austria vs ACER and T-333/17 APG vs ACER, judgments of the General Court of 24 October 2019.

<sup>7</sup> Page 2 of consultation text.

## 1 Introduction

4. We welcome the Commission's initiative to amend the GLs for the sake of legal certainty. However, we are sceptical with the "urgent change" approach and the mere amendment of the wording of the GLs. Such an approach can result in bigger uncertainty and vagueness than the one it aims to remedy. Since the adoption of TCMs constitutes a complex procedure resulting in sophisticated and technical implementing decisions, it would be useful to have a more thorough background analysis of the new legal framework envisaged in CEP legislation, which is not limited to the ACER regulation. Such an analysis would allow for an easy consistency check of the proposed amendments with the changes introduced with CEP and therefore contribute to the clarity and legal certainty.
5. In addition to the procedural amendments, we consider that GLs might need to be further amended to reflect material changes that have been introduced by CEP. The current proposal states that "other more far-reaching changes of the substance of the four Electricity Guidelines may be proposed by the Commission at a later stage"<sup>8</sup>, therefore, it envisions material changes. However, if the adoption of TCMs is pending in areas that have been substantially changed by CEP, then the broader amendment of GLs might be required earlier to enhance legal certainty in the material provisions in force.
6. It must be reminded that the adoption of TCMs aims at implementing further Network Codes ("**NCs**") and GLs by bringing together the diverse technicalities and details of operation and management of the different electricity systems and regions in Europe. Through this procedure, TCMs contribute to the achievement of a fully functioning internal energy market and to the decarbonisation targets of the EU.
7. As noted in the consultation<sup>9</sup> according to the hierarchy of EU norms, legislative acts like CEP adopted with the ordinary or special legislative procedure (Article 289 TFEU) prevail over secondary legislation like implementing (Article 291 TFEU) or delegating acts (Article 290 TFEU). The electricity GLs fall under the second category.<sup>10</sup> According to this hierarchy, GLs must be consistent with CEP but also with the norms prevailing over CEP, that is to say primary EU law (like the EU Treaties).<sup>11</sup> Given that the procedure to adopt TCMs derives from GLs and that TCMs contribute to the implementation of the internal energy market and the EU Paris Agreement ambition, they can also be subject to a similar compatibility exercise with secondary and primary EU law to GLs.

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<sup>8</sup> Page 3 of consultation text.

<sup>9</sup> Page 2, footnote 3.

<sup>10</sup> See Articles 59 and 62 EMR, C. Jones and F. Ermacora, *Electricity Market Design in the European Union: The new legal framework for decarbonising Europe's Electricity Market*, Claves & Casteels 2020, 1st edition, para. 7.54, page 40 L. Hancher, A.-M. Kehoe, J. Rumpf, above note 11.

<sup>11</sup> L. Hancher, A.-M. Kehoe, J. Rumpf, *The EU Electricity Network Codes and Guidelines: A legal perspective*, Florence School of Regulation, January 2020, p. 41, available at <https://cadmus.eui.eu/bitstream/handle/1814/66431/QM-02-20-170-EN-N.pdf?sequence=1&isAllowed=y>

## 2 General remarks

8. The following section will describe the legal bases of the legislative framework applicable to GLs and TCMs; the changes in the procedure of adopting TCMs; comments on the deadlines; and the need to consult, where appropriate, with the EU DSO entity.

### 2.1 Legal framework for GL/TCMs

9. The Third Energy Package ("TEP") established rules related to the development and adoption of NCs, GLs and the TCMs procedures. These rules were mainly found within ACER Regulation 713/2019 (namely Articles 6,7,8); Electricity Regulation 714/2009 and Electricity Directive 2009/72/EC. Provisions of those legislative acts are integrated or reflected in GLs either as legal basis (Regulation 714/2009) or as cross-references.
10. CEP repealed Regulation 714/2009 and Regulation 713/2009 as of July 2019 (save for some special provisions), while the Electricity directive 2009/72/EC will be soon repealed (as of 31 December 2020). Those legislative acts are replaced by the Electricity Market Regulation 2019/943 ("**EMR**"), ACER Regulation and Electricity Directive 2019/944. Each of these acts contains an interpretation clause under the title "Repeal", which aims to remedy legal uncertainty stemming from obsolete wording included in secondary legislation enacted on the basis of the pro-CEP framework. According to the wording of Article 45 ACER Regulation:

*"Regulation (EC) No 713/2009 is repealed.*

*References to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex II."*

11. Article 70 EMR and Article 72 Electricity Directive contain a similar clause.
12. In line with the "repeal" clauses, any reference in the GLs to TEP legislative acts are to be read as references to the new framework of CEP. For example, Article 5 ACER Regulation is applicable not only because of the primacy of the Regulation (legislative act) over the GLs (implementing act)<sup>12</sup>, but also because the EU legislator aimed for this provision to be directly applicable and to replace the repealed Article 6 of Regulation 713/2009. In line with the above, the reference in the preamble of the GLs to Regulation 714/2009 as the legal basis should be construed as reference to EMR.

### 2.2 Changes in the adoption procedure of TCMs<sup>13</sup>

13. The detailed procedure of adopting the TCMs can be found within each one of the four electricity GLs. ACER Regulation contains several provisions that regulate the steps in adopting TCMs, deadlines, the role of involved parties etc. In a nutshell, there are three

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<sup>12</sup> Footnote 7, page 2 consultation.

<sup>13</sup> The present analysis will use as a reference example CACM.

types of TCMs: EU-wide (formerly "all NRAs"), regional and individual, respectively described in Article 9 paragraphs 6, 7 and 8 CACM.

14. ACER Regulation "streamlines" the TCMs procedures both in EU-wide and regional level and strengthens ACER's role in coordinating NRAs. According to recital 20 ACER Regulation, regional or EU-wide TCMs may be submitted directly to ACER "to allow regulatory authorities represented in the Board of Regulators to decide on such terms and conditions or methodologies".

### 2.2.1 Adoption of EU-wide TCMs

15. The new ACER Regulation expands the decision-making powers of the Agency. Article 2(d) foresees that ACER can issue individual decisions on TCMS "in accordance with [...] 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); [...]"

16. According to Article 5(2)<sup>14</sup> ACER Regulation, a proposal for the adoption of EU-wide TCMs must be submitted for approval directly to ACER and the NRAs are no longer involved in the approval process. Similarly, pursuant to paragraphs 2 and 6<sup>15</sup> of Article 5, only ACER can revise and change the EU-wide TCMs proposal.<sup>16</sup> Therefore, the NRAs have no longer the option to amend EU-wide TCMs.

17. Moreover, the revision of EU-wide TCMs is allowed under two conditions:

- a. ACER has to consult with ENTSO-E or the new EU DSO body prior to submitting the revision request.
- b. Pursuant to Article 5(6) the aim of the suggested revision must be "to ensure that they [TCMs] are in line with the purpose of the network code or guideline and

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<sup>14</sup>Article 5(2) EMR: " Where one of the following legal acts provides for the development of proposals for common terms and conditions or methodologies for the implementation of network codes and guidelines which require the approval of all regulatory authorities, those proposals for common terms and conditions or methodologies shall be submitted to ACER for revision and approval:

(a) a legislative act of the Union adopted under the ordinary legislative procedure;

(b) network codes and guidelines adopted before 4 July 2019 and subsequent revisions of those network codes and guidelines; or

(c) network codes and guidelines adopted as implementing acts pursuant to Article 5 of Regulation (EU) No 182/2011 of the European Parliament and of the Council (20).

(20) Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13)".

<sup>15</sup> 6. Before approving the terms and conditions or methodologies referred to in paragraphs 2 and 3, the regulatory authorities, or, where competent, ACER, shall revise them where necessary, after consulting the ENTSO for Electricity, the ENTSO for Gas or the EU DSO entity, in order to ensure that they are in line with the purpose of the network code or guideline and contribute to market integration, non-discrimination, effective competition and the proper functioning of the market. ACER shall take a decision on the approval within the period specified in the relevant network codes and guidelines. That period shall begin on the day following that on which the proposal was referred to ACER.

<sup>16</sup> Electricity Market Design in the European Union, paragraph 7.81 above note 10.

contribute to market integration, non-discrimination, effective competition and proper functioning of the market".

18. ACER Regulation does not amend the deadlines contained in the GLs within which the Agency must approve the proposal. Article 5(6) clarifies that deadlines start on the day after the referral of the proposal to ACER. However, the Regulation does not provide any guidance as to whether the 4-month deadline to decide on a change of the TCMs (2 months for NRAs, and 2 months for TSOs according to Article 9(12) CACM) is maintained in the event that ACER decides to amend the proposal.<sup>17</sup>
19. **An interim conclusion of the above analysis is that the second procedural issue the present consultation seeks to address, i.e. to coordinate individual amendments on the proposed TCMs requested by NRAs, is already remedied by ACER Regulation. Only ACER can revise the EU-wide TCMs.**

### 2.2.2 Adoption of regional TCMs

20. By contrast to the streamlining of EU-wide TCMs procedure, the decision to adopt regional TCMs stays with the competent NRAs, who have to agree unanimously on the draft proposal.<sup>18</sup> The TSOs or NEMOs still have to notify ACER of the draft within one week after its submission to the NRAs.
21. Nevertheless, ACER regulation lists three occasions, where the Agency and not the NRAs adopts the decision on regional TCMs:
- a. If NRAs jointly decide to request ACER to approve the proposal (Article 6(10), second subparagraph (b)).
  - b. If NRAs cannot reach an agreement within 6 months after the referral of the TCMs proposal (Article 6(10) second subparagraph (a)).

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<sup>17</sup>Michael Schutz suggests that the revision is included in the overall deadline for ACER to approve the proposal, para 7.82 of Electricity Market Design in the European Union, above note 10.

<sup>18</sup> Article 5(3) ACER Regulation, "3. Where one of the following legal acts provides for the development of proposals for terms and conditions or methodologies for the implementation of network codes and guidelines which require the approval of all the regulatory authorities of the region concerned, those regulatory authorities shall agree unanimously on the common terms and conditions or methodologies to be approved by each of those regulatory authorities:

(a) a legislative act of the Union adopted under the ordinary legislative procedure;

(b) network codes and guidelines that were adopted before 4 July 2019 and subsequent revisions of those network codes and guidelines; or

(c) network codes and guidelines adopted as implementing acts pursuant to Article 5 of Regulation (EU) No 182/2011.

The proposals referred to in the first subparagraph shall be notified to ACER within one week of their submission to those regulatory authorities. The regulatory authorities may refer the proposals to ACER for approval pursuant to point (b) of the second subparagraph of Article 6(10) and shall do so pursuant to point (a) of the second subparagraph of Article 6(10) where there is no unanimous agreement as referred to in the first subparagraph. The Director or the Board of Regulators, acting on its own initiative or on a proposal from one or more of its members, may require the regulatory authorities of the region concerned to refer the proposal to ACER for approval. Such a request shall be limited to cases in which the regionally agreed proposal would have a tangible impact on the internal energy market or on security of supply beyond the region".

- c. If pursuant to Article 5(3) subparagraph 3, ACER finds that the NRAs are about to adopt TCMs that might have an impact on the internal energy market or on security of supply.
22. Unlike the EU-wide TCMs, both ACER and NRAs have the right to propose amendments to the draft proposals for the reasons described in Article 5(6).
- 23. An interim conclusion of this section is that the second procedural proposal to promote only the coordinated approach and practice when amending regional TCMs limits the right of each individual NRA to amend such a proposal despite this right being clearly envisaged in the new ACER regulation. Therefore, the second procedural proposal might be inconsistent with the ACER Regulation. However, the Commission should examine carefully whether for example the principle of proportionality and the principle of energy solidarity may offer adequate grounds to justify the limitation of the rights of the NRAs.**

## 2.3 Deadlines

24. The Commission should ensure that suggested changes in the deadlines of adopting TCMs are aligned with CEP. For example, it should not extend deadlines when such an option is explicitly not available, for example in Article 6(10).

## 2.4 Consultation with EU DSO body

25. The Commission should examine more carefully whether reference to the need to consult with the EU DSO entity prior to the adoption of TCMs must be included where appropriate in the suggested amendments.

# 3 Comments on specific amendment

## 3.1 CACM - Article 9

### 3.1.1 Paragraph 1- Proposal to extend the deadlines

26. ACER Regulation provides several circumstances that deadlines can be extended, for example in Article 5(6). The proposal should take into account these extensions and clarify further what is an "exceptional circumstance". The broad wording of the amendment has to be changed to reflect better the extraordinary nature of the provision. Finally, the Commission should examine to include a maximum extension limit of deadlines to each category of TCMs (EU-wide, regional, individual).
27. The same comment is valid for Article 4(1) FCA, Article 4(1) EB GL, Article 5(1) SO GL.

### 3.1.2 Paragraph 5

28. We understand that the additional second subparagraph mirrors Article 5(6) ACER Regulation. The wording of the subparagraph must be aligned with this Article and provide for consultation with ENTSO-E or where appropriate with EU DSO body. Also, it would be useful if the Commission provided a background comment on the purpose of adding this paragraph in the TCMs.

29. The same comment is valid for Article 4(7) FCA, Article 5(1) EB GL, Article 6(1) SO GL.

### 3.1.3 Paragraph 9

30. Article 5(3) second subparagraph ACER Regulation has amended the time of submission to ACER of proposals for regional TCMs; the latter are notified to ACER within one week of their submission to the NRAs. Therefore, the wording of the second sentence of paragraph 9, needs to replace the words "at the same time" as necessary.

31. The same comment is valid for Article 4(7) FCA, Article 5(1) EB GL, Article 6(1) SO GL.

### 3.1.4 Paragraph 11

32. Paragraph 11 should include in its wording the third option for ACER to adopt a decision on the Regional TCMs instead of the NRAs. This is the case of Article 5(3) subparagraph 3 ACER Regulation. ACER decides to approve the regional TCMS if it finds that those NRAs are about to adopt might have an impact on the internal energy market or on security of supply.

33. The same comment is valid for Article 4(10) FCA, Article 5(7) EB GL, Article 6(8) SO GL.

### 3.1.5 Paragraph 12

34. The third option of Article 5(3) subparagraph 3 must be added to the wording of the second subparagraph of paragraph 12.

35. The same comment is valid for Article 4(11) FCA, Article 6(2) EB GL, Article 7(3) SO GL.

### 3.1.6 Paragraph 13

36. The last sentence of Article 5(6) ACER Regulation needs to be included in the amendment. The deadline determined should start running following the day the proposal was referred to ACER.

37. The same comment is valid for Article 4(12) FCA, Article 6(3) EB GL, Article 7(4) SO GL.

### 3.2 FCA, EB GL, SO GL

38. The comments above to the changes of CACM apply also to the similar amended provisions of FCA, EB GL, SO GL as specified above.

## 4 Conclusions

39. While we welcome the initiative of the Commission to remedy urgently the two procedural issues identified in the present consultation, the repeal provisions in ACER Regulation, EMR and Electricity Directive guarantee an adequate level of procedural and legal certainty. We suggest that the proposal for the amendment reflects better the differences in the procedures of adopting EU-wide and regional TCMs. With regards to the latter, we recommend that the Commission better substantiates the necessity of a coordinated approach in amending proposals on regional TCMs and the limitation the right of each NRA to request such amendments. Finally, we recommend that the Commission proceeds soon to similar amendments of GLs to bring them in line with the material changes that took place through CEP.

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