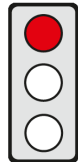


## KEY ISSUES

**Objective of the Regulation:** The reform of the EU Energy Agency ACER and the creation of additional organisations aims to improve regulation of cross-border electricity networks and the wholesale electricity market.

**Affected parties:** Network operators and electricity traders and producers



**Pro:** –

**Contra:** (1) Passing decisions in the ACER Board of Regulators with a simple majority contradicts ACER's mandate of strengthening cooperation between the national regulatory authorities.

(2) ACER's extensive final decision-making power on all cross-border regulatory issues is in breach of settled CJEU case law.

## CONTENT

### Title

**Proposal COM(2016) 861** of 30 November 2016 for a **Regulation** of the European Parliament and of the Council **on the internal market for electricity** (recast)

**Proposal COM(2016) 863** of 30 November 2016 for a **Regulation** of the European Parliament and of the Council establishing a European Union **Agency for the Cooperation of Energy Regulators** (recast)

### Brief Summary

Article numbers refer to the Proposal for a Regulation COM(2016) 863.

#### ► Context and objectives

- Current regulation of electricity markets (“Electricity Market Design”) in the EU is based on the “Third Internal Energy Market Package” which consists of the Internal Electricity Market Directive [2009/72/EC], the Network Access Regulation [(EC) 714/2009] and the Regulation [(EC) 713/2009] establishing the EU Agency for the Cooperation of Energy Regulators (ACER) (see [cepCompass Climate and Energy](#), p. 46 et seq.; see [cepPolicyBrief](#)).
- The legislation contained therein aims to ensure free competition in the internal electricity market and cross-border trade in electricity by way of (p. 3)
  - unbundling the formerly vertically integrated electricity companies, that not only produced and sold electricity but also controlled its network transport to the consumers,
  - the right of access for all electricity suppliers to the electricity grids,
  - the free choice of electricity supplier for electricity consumers,
  - the removal of barriers to the electricity trade within the EU,
  - market supervision by independent national regulatory authorities and
  - cooperation between regulators via ACER and between national transmission system operators (TSOs) within the European Network of Transmission System Operators (ENTSO-E).
- This proposal for a Regulation provides for the reform of an existing regulatory organisation and the establishment of new ones (“electricity market institutions”):
  - The EU Agency for the Cooperation of Energy Regulators (ACER) is to be reformed.
  - To be established by
    - the transmission system operators (TSOs) are “Regional Operational Centres” (ROCs) and
    - the distribution system operators (DSOs) is a “European entity of distribution system operators” (EU-DSO).
- The Regulations amend the ACER Regulation [(EC) 713/2009] and the Network Access Regulation [(EC) 714/2009]. They are part of an energy package which also includes inter alia the recast of the Internal Electricity Market Directive [2009/72/EC; COM(2016) 864, see [cepPolicyBrief 2017-9](#)].

#### ► ACER's Responsibilities and Powers

- ACER (Agency for the Cooperation of Energy Regulators) is an EU agency with its own legal identity, based in Ljubljana (Art. 17).

- ACER aims to assist the national regulatory authorities at EU level “in exercising regulatory tasks performed in the Member States” and – where necessary – “coordinate” their measures (Art. 1 (2)).
  - ACER decides upon all regulatory issues with cross-border relevance that basically fall within the competence of national regulatory authorities where (Art. 6 (8))
    - the competent national regulatory authorities have not been able to agree on a joint regulation within a period of six months, which can be extended to a maximum of twelve months, or
    - the competent national regulatory authorities request it.
  - The Commission can commission ACER to carry out additional tasks, with or without decision-making powers, which fall within ACER’s area of responsibility (Art. 14).
- **ACER’s Organisational Structure**
- ACER will be managed by a Director, as legal representative, and will also consist of an Administrative Board, a Board of Regulators and an independent Board of Appeal (Art. 18).
- **Administrative Board**
    - The Administrative Board consists of nine members, two each appointed by the Commission and the Parliament and five by the Council. Each member has a deputy. The term of office for members is four years and may be extended once by four years. (Art. 19 (1) and (2))
    - The Administrative Board decides by way of a two-thirds majority on (Art. 20 (1))
      - the adoption of the annual work programme and
      - the approval of the budget.
    - It decides by way of a simple majority on (Art. 20 (1), Art. 19 (5))
      - on the appointment of the Director following consultation with the Board of Regulators,
      - all other administrative activities.
    - The members of the Administrative Board must act independently and “objectively” (Art. 19 (8)).
  - **Board of Regulators**
    - The Board of Regulators is composed of (Art. 22 (1))
      - one “senior” representative from each of the national regulatory authorities of each Member State and their deputies,
      - one non-voting representative of the Commission.
    - The Board of Regulators submits opinions to the Director on the regulatory issues relevant to ACER and provides guidance to the Director in the execution of his tasks (Art. 23 (5)).
    - The Board of Regulators takes decisions by simple majority of its members (Art. 23 (1)).
    - The Board of Regulators acts independently when carrying out the regulatory tasks conferred upon it. It is not authorised to seek or follow instructions from any government, the Commission, or from any other public or private entity. (Art. 23 (3)).
- **Regional operational centres (ROCs) of the transmission system operators**
- In a multilateral agreement, the transmission system operators (TSOs) have undertaken to set up Regional Security Coordinators (RSCs) to support the TSOs in operating cross-border electricity networks. The RSCs are subordinate to the TSOs and do not have their own decision-making powers. [SWD(2016) 410, p. 72 et seq.]
  - In future, ACER must define cross-border system operation regions [Art. 33 COM(2016) 861].
  - The definition takes place [Art. 33 COM(2016) 861]
    - on the proposal of the ENTSO-E and
    - by way of criteria such as the number of cross-border electricity network interconnections.
  - For every system operation region, the TSOs must create a “Regional Operation Centre” (ROC) with its own legal structure which must be based in a Member State in the system operation region [Art. 32 COM(2016) 861].
  - The ROCs must coordinate the network operations in the system operation region. They can also [Art. 34 and 38 COM(2016) 861]
    - adopt decisions, which are binding on the TSOs and relevant to system security, inter alia on security analyses and on the sizing of reserve capacity,
    - submit recommendations to the TSOs, inter alia on the creation of common system models.
  - ACER must monitor the work of the ROCs and issue opinions and recommendations in this regard, addressed to the Commission, the Council and the European Parliament or the ROCs (Art. 8).
- **European entity of distribution system operators**
- Distribution system operators (DSOs) with at least 100,000 customers are not permitted to be part of a vertically integrated company or must be independent of such a company at least as regards legal structure, organisation and decision-making power (Network Access Regulation [(EC) 714/2009], Art. 26).
  - All distribution system operators (DSOs) with at least 100,000 customers must set up a “European entity of distribution system operators” (EU-DSO) and in future cooperate through this entity on cross-border issues [Art. 49 COM(2016) 861].

- The EU-DSO will in particular
  - design common electricity market rules for the distribution networks (“network codes”) [Art. 55 Abs. 8 COM(2016) 861],
  - cooperate with ENTSO-E on the operation and long-term planning of the transmission and distribution networks [Art. 53 (1) COM(2016) 861].

### Main Changes to the Status Quo

- ▶ Until now, the ACER Board of Regulators passed decisions with a two-thirds majority. In future, it will pass decisions with a simple majority.
- ▶ In future, ACER will be able to make decisions on all cross-border issues if the competent national regulatory authorities fail to agree within the time limit. Until now, this only applied to regulatory issues on cross-border infrastructure.
- ▶ New: the requirement to set up regional operational centres (ROCs) that can pass decisions which are binding upon the TSOs.
- ▶ New: the requirement to set up the European entity of distribution system operators (EU-VNB).

### Statement on subsidiarity by the Commission

Cooperation between the national regulatory authorities at EU level requires common EU rules (Recital 37).

### Policy Context

The European Parliament, the Council and the European Commission have jointly declared that the organisation of ACER and the other EU agencies, currently numbering thirty, is to be unified.

### Legislative Procedure

30 November 2016	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

### Options for Influencing the Political Process

Directorates General:	DG Energy (leading)
Committees of the European Parliament:	Industry, Research and Energy (leading), Rapporteur: Morten Helveg Petersen (ALDE, DK),
Federal Ministries:	Economic Affairs and Energy (leading)
Committees of the German Bundestag:	Economic Affairs and Energy (leading)
Decision-making mode in the Council:	Qualified majority (acceptance by 55% of Member States which make up 65% of the EU population)

### Formalities

Legislative competence:	Art. 194 TFEU (Energy)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU) Legislative procedure:
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure)

## ASSESSMENT

### Economic Impact Assessment

#### Ordoliberal Assessment

The Commission’s proposal **conferring decision-making powers upon ACER** basically **in relation to all cross-border regulatory issues, exceeds its original mandate** which was to promote cooperation between national regulatory authorities. **Since ACER itself is not a European regulatory authority, it should only be able to make its own decisions** to a very limited degree in the case of regulatory issues and **with the consent of the competent national regulatory authorities**.

**Decisions in the ACER Board of Regulators** should not be made – as the Commission is requiring – **by way of a simple majority**. They **contradict ACER’s mandate of strengthening cooperation between the national regulatory authorities, because cooperation requires greater consensus in the decision-making process**. Since every Member State – irrespective of its size – is represented in the Board of Regulators with precisely one vote, there is also the danger that a majority of small countries will be able to outvote a minority of large countries. This means that the interests of the Member States are very unevenly represented. Thus – similar to

the rules on decision-making in the Council – the size of a Member State should be taken into account when weighting the votes in the Board of Regulators.

#### Impact on efficiency and individual freedom of choice.

Regional cooperation between the TSOs is essential for a functioning internal energy market and optimum utilisation of transmission system network capacity. In order to take account of the peculiarities and differences between the individual regions of Europe, voluntary regional initiatives, such as the Regional Security Coordinators (RSCs) – in addition to the European Network of Transmission System Operators (ENTSO-E) – have proven to be of value. The Commission fails to substantiate why the existing cooperation between the TSOs via the RSC is insufficient to ensure an efficient network operation and a high level of security of supply, and why it is therefore necessary to create Regional Operational Centres (ROCs).

**The power of the ROCs to pass binding decisions independently of the TSOs**, makes the responsibilities of the ROCs and the TSOs unclear because a sharp differentiation is not possible. This both **jeopardises system security due to a lack of clear areas of responsibility** and risks creating unnecessarily expensive duplicate structures to ensure system security. Clarity is therefore required regarding the fact that, in future, only the TSOs will be responsible for the system security of their network region.

The increasing proportion of electricity from renewable energy sources, which is predominantly fed into the distribution network, as well as growing demand-side flexibility of electricity consumers connected to the distribution network, increases the technical demands on distribution system operators. These should therefore, as specified, assist in the development of network codes which mainly contain technical rules on the distribution network. Establishing the common European entity, EU-DSO, is appropriate for this because it can pool the issues at least of the large DSOs. In this regard, however, efforts must be made to ensure that the influence of the new entity remains limited to purely technical questions and the rules do not run counter to the development of a common internal electricity market.

#### Impact on growth and employment

Negligible.

#### Impact on Europe as a business location

Negligible

## Legal Assessment

### Legislative Competency

Unproblematic. The EU is entitled to issue energy policy measures in order to secure the functioning of the energy market, to guarantee security of energy supply, to promote the interconnection of energy networks as well as to support energy efficiency, energy savings and the development of new and renewable energy sources (Art. 194 TFEU).

### Subsidiarity

EU action is justified for creating an internal electricity market.

### Compatibility with EU Law in other Respects

According to CJEU case law in the case of Meroni (Judgements of 13 June 1958, C-9/56 and C-10/56, ECLI:EU:C:1958:7 and ECLI:EU:C:1958:8), in principle, the EU cannot set up independent authorities with their own decision-making powers because this would alter the institutional balance enshrined in the Treaties. Only the transfer of precisely defined implementing and executive powers is permitted, the exercise of which is subject to strict control by the Commission. Relaxation of this CJEU case law is likely since, under the Lisbon Treaty actions can now be brought against decisions of EU agencies. **The proposed extensive final decision-making power of ACER on all cross-border regulatory issues** is not limited in this regard, however, and gives rise to additional scope for political decision-making. It therefore **breaches the settled CJEU case law** in the Meroni Judgements.

The Commission fails to indicate the extent to which it is necessary to supplement the existing cooperation of the TSOs in the framework of ENTSO-E and the RSCs by **setting up regional operational centres (ROCs)**. The creation of such a duplicate structure is not necessary and therefore **breaches the principle of proportionality** (Art. 5 TEU).

## Conclusion

Since ACER is not a regulatory authority, it should only be able to make decisions with the consent of the national regulatory authorities. Passing decisions in the ACER Board of Regulators with simple majority contradicts ACER's mandate of strengthening cooperation between the national regulatory authorities. The ROCs' power to adopt binding decisions on system security, independently of the TSOs, creates an increased risk to system security because areas of responsibility are not clearly defined. ACER's extensive final decision-making power on all cross-border regulatory issues is in breach of settled CJEU case law. Establishing Regional Operational Centres (ROCs) is in breach of the principle of proportionality.