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Lavrijssen, S.A.C.M.; Bordei, I.E.

Published in:
Oil, Gas and Energy Law

Citation for published version (APA):

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ACER: Demystifying the European Energy Supervisor from a Consumer Perspective
by S.A.C.M. Lavrijssen and I. Bordei

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ACER: Demystifying the European Energy supervisor from a consumer perspective

Prof. dr. S.A.C.M. Lavrijssen & mr. Irina Bordei

Abstract

The European energy regulatory triangle, consisting of National Regulatory Authorities (NRAs), the European Commission and the newly established Agency for the Cooperation of Energy Regulators (ACER), has an important role in enhancing cross border trade and wholesale market competition and ultimately in protecting and promoting the interests of the energy consumers on the basis of the Third Energy Package. Generally it is assumed that ACER’s tasks mainly concern the regulation of access to the transmission networks for the promotion of efficient cross-border trade and that they will have limited (direct) relevance for the consumers. In line with the Meroni-doctrine it is assumed that ACER has limited decision-making powers and no powers to make policy choices or complex legal and economic assessments. This article argues, however, that the first experiences with ACER’s practice show that the new European supervisor may have a substantial influence on crucial regulatory aspects relating to the technical and economic conditions governing access to and investments in the cross border energy networks. ACER’s powers are gradually being extended for example through the binding comitology guidelines of the European Commission. Therefore, ACER may develop into a crucial player in realizing the right conditions for competitive retail markets and ultimately ensuring choice for the consumers.

Introduction

Recently the third energy legislative package consisting of two directives and three regulations (hereinafter "Third Package"), entered into force. By promoting further integration of the EU energy market, these directives and regulations aim at offering a real choice for all consumers, both individuals and businesses, new opportunities for economic growth and promoting cross-border trade to achieve efficiency gains, competitive prices, higher standards of service and to contribute to security of supply and sustainability. A

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crucial part of the Third Package is the focus on the regulation of the access to the transmission networks\(^2\) across borders and this can be explained by the important role of the transmission networks for an efficient cross-border transportation of energy. Unlike almost all other goods the supply of the electricity and gas is inextricably linked to the networks.\(^3\) Therefore, ensuring enough transmission capacity, and also access to the networks\(^4\) on a non-discriminatory basis is essential for the completion of the internal energy market, the creation of a level playing field for all energy undertakings in the EU and subsequently for the achievement of one of the key objectives set out in the Third Package: the protection and promotion of the interests of the European energy consumers.

Three main consumer interests can be distinguished in the Third Package directives and regulations: affordable energy prices achieved by effective competition, sustainable development of energy production, transport, and consumption and security of supply.\(^5\) National Regulatory Authorities (NRAs), the European Commission and the newly established Agency for the Cooperation of Energy Regulators (ACER) have an important role in protecting and promoting those consumer interests. Together these authorities form a regulatory triangle\(^6\): a multi-level system for the governance of the EU energy sector in which the three authorities have to cooperate with each other and with the market parties to promote and protect consumer interests in several ways.\(^7\)

This contribution focuses on the role of ACER in protecting and promoting the interests of consumers within this regulatory triangle. Generally it is assumed that ACER’s tasks mainly concern the regulation of access to the transmission networks for the promotion of efficient cross-border trade. Therefore, in many cases its tasks and powers only indirectly affect the position of consumer. Moreover it is assumed that, in line with the Meroni-doctrine, ACER has limited decision-making powers and no powers to make policy choices or complex legal and economic assessments.

However, the following question raises: how ACER’s activities in practice may ultimately affect the interests of consumers?

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\(^2\) Transmission means “transport of electricity on the extra high-voltage and high-voltage interconnected system with a view to its delivery to final customers or to distributors, but does not include supply” (art 2 Directive 2009/72) and “transport of natural gas through a network, which mainly contains high-pressure pipelines, other than an upstream pipeline network and other than the part of high-pressure pipelines primarily used in the context of local distribution of natural gas, with a view to its delivery to customers, but not including supply” (art 2 Directive 2009/73).


\(^6\) The concept of “triangular relationship” is borrowed from P. Larouche and M. de Visser, “The Triangular Relationship between the Commission, NRAs and National Courts Revisited”, TILEC discussion paper, Communications & Strategies 2006, 64, 125–145.

\(^7\) S. Lavrijssen and L. Hancher, “Networks on Track: From European Regulatory Networks to European Regulatory Network Agencies”, Legal IEI 2009, 1, 23–55.
This article will go beyond a formal legal analysis of the tasks and powers of ACER. It will look at the material relevance of ACER’s activities from the perspective of consumers by analyzing how its activities relating to the promotion of cross-border trade may ultimately benefit consumers in terms of more choice, affordability (affordable energy bills), sustainability and security of supply.

**Regulatory background**

The gradual creation of an internal energy market started with the First Energy Package which led to partial market opening as large consumers were given the right to choose their supplier. In 2003 these first electricity and gas Directives were replaced by the Second Energy Package, which strengthened the harmonization measures. The Second Package was directed at creating a competitive market in which all consumers, including households, could choose their supplier by July 2007.

However, the Second Package failed to reach its central objectives: a competitive market and protection of consumer interests. Its implementation has not been done in a harmonized way across the Union and in many aspects the harmonization itself did not go far enough. In its Communication regarding prospects for the internal gas and electricity market the Commission has identified several deficiencies in the transposition of the directives of the Second Energy Package such as:

- regulated prices preventing entry from new market players
- insufficient unbundling of transmission and distribution system operators which cannot guarantee their independence
- discriminatory third party access to the network
- insufficient political independence and competences of the regulators
- insufficient information given to the Commission on public service obligations, especially as regards regulated supply tariffs
- insufficient indication of the origin of electricity which is essential in particular for the promotion of renewable energy and insufficient cooperation between NRAs.

These deficiencies, while emphasizing the need for further regulation and harmonization, constituted the trigger for the Third Package which brought along new and

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8 Without going into a detailed analysis, we consider the energy bill of consumer to be made up of transport tariffs and supply prices. Transport tariffs are regulated by the National Regulatory Authorities and cover costs related to connection to the network, but also effective transport services costs which consist of charges related to access to national and cross-border networks as well as costs related to balancing services (see 37 (6) Directive 2009/72). The fiscal aspects of an energy bill will not be discussed in this article.


stricter rules on the unbundling of the transmission networks from production and supply activities, stricter independence requirements and extended powers for the NRAs, new transparency requirements for market participants on the wholesale markets, enhanced cooperation between NRAs (through ACER) and the cooperation between transmission system operators in the European Networks of transmission System Operators for Electricity and Gas (ENTSO-E and ENTSO-G). This contribution will focus on how the cooperation between NRAs within the context of ACER as well as the cooperation between ACER and the individual NRAs and the positions of the NRAs and ACER vis-à-vis the European Commission may affect the interest of the consumers.

**Consumer interests**

Before analysing with which powers and practices ACER may ultimately affect the legal and economic position of consumers, consumers interests relevant for the EU energy market will shortly be addressed.

There are three main consumer interests which can be distinguished on the basis of the Third Package: affordable energy prices which can be achieved through effective competition; sustainable development of energy production, transport and consumption and security of supply.\(^{14}\) When this contribution refers to the concept of consumer, it refers to final consumers, including business and households, buying energy for their own use.\(^{15}\)

In the foreword to the Energy 2020, “A strategy for Competitive, Sustainable and Secure Energy”, the European Commissioner for Energy, G. Oettinger, has pointed out that a pan-European infrastructure similar to those in other fields such as telecommunications or transport is needed in the energy sector to truly integrate the internal market, but also plays a crucial role in meeting the EU’s energy policy objectives and the abovementioned consumer interests as set up in the Energy Policy for Europe.\(^{16}\) The current infrastructure is not up to these challenges.\(^{17}\) Thus, in the view of the Commission, investing in infrastructure should be prioritized. The importance of energy security measures and measures aimed at promoting infrastructure investments which would ensure uninterrupted energy supplies, having thus direct influence on the interests of consumers, was also pointed out in the Commission Working Paper “An Energy Policy for Consumers”.\(^{18}\)

\(^{14}\) In the Communication from the Commission: Europe 2020. A strategy for smart, sustainable and inclusive growth COM(2010) 2020 final, the consumer is being mentioned on several occasions (for example under handling of climate and resource challenges, industrial policy, promoting of the corporate social responsibility or under the reinforcing of a single market for the 21\(^{st}\) century, geared to meet the Europe 2020 goals) emphasizing thus the increased attention which consumers receive in the future European policies aiming at achieving a well-functioning Single Market.

\(^{15}\) According to the Third Package the concept of consumer encompasses citizens and businesses (“the interests of competitive prices, security of supply and sustainability should be achieved for all consumers of the European Union, be they citizens or businesses”). The term “customer” is used more frequent then the term “consumer” and various distinctions such as between wholesale customer and a final customers or household and non-household customers are being made.

\(^{16}\) According to the Communication from the Commission: Energy infrastructure priorities for 2020 and beyond COM(2010) 677/4 final, the internal energy market has to be completed in the coming years and by 2020 renewable sources have to contribute 20% to the final energy consumption, greenhouse gas emissions have to fall by 20% (30 % if conditions are right) and energy efficiency gains have to deliver 20% savings in energy consumption.


In the literature the term affordable prices is translated into “access to energy at reasonable and stable prices”\(^\text{19}\). Furthermore affordable prices are seen as an economic category having to do with ability of consumers or consumer groups (for example vulnerable consumers) to pay for a minimum level of service.\(^\text{20}\)

In the view of the Commission, as expressed in the Green Paper on Services of General Interest, the concept of affordability is narrower than the concept of “reasonable prices” (frequently used in the Third Package) because while affordability is a criterion that mainly takes into account the customer perspective, the principle of “reasonable pricing” also implies other elements (such as incurred costs and a fair share of profit).\(^\text{21}\) In the context of citizens’ right to enjoy universal service, the reasonableness of the prices is being referred to as affordable prices.\(^\text{22}\) Furthermore in various documents related to the policy in the energy sector the Commission talks about “affordability” of energy.\(^\text{23}\)

The Commission seems to desire a situation in which prices reflect costs and fair profits (which would work as an incentive for investments), but as the same time remain affordable for consumers.\(^\text{24}\) Providing affordable, but cost-reflective and reliable supplies to consumers is mainly the task of the internal market.\(^\text{25}\) Competition between suppliers is intended to keep prices under pressure, guarantee consumer choice and thus reach the objective of affordability of energy. Whether the focus on competitive markets is a sufficient policy tool to these ends will have to be assessed\(^\text{26}\) especially when having in mind that reasonable is not necessarily affordable.\(^\text{27}\)

The relationship between effective competition and investing in infrastructure is two sided: for achieving a well-functioning internal energy market characterized by effective competition, a physically interconnected Europe-wide electricity grid is a condition sine qua

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\(^{21}\) S. Pront-van Bommel, “De elektriciteitsconsument centraal?” in S. Pront-van Bommel (ed.) *De consument en de andere kant van de elektriciteitsmarkt* (Amsterdam: Universiteit van Amsterdam, 2010), pp 42-43.

\(^{22}\) Pront-van Bommel, “De elektriciteitsconsument centraal?” in S. Pront-van Bommel (ed.) *De consument en de andere kant van de elektriciteitsmarkt*, 2010, p.42.


\(^{24}\) In this context of affordability Member States are empowered to take necessary measures to determine the categories which need more specific protection in respect to energy prices- the so called vulnerable customers and the measures needed to realize their protection.


\(^{27}\) Pront-van Bommel, “De elektriciteitsconsument centraal?” in *De consument en de andere kant van de elektriciteitsmarkt*, 2010, p.43.
non.28 Fully interconnected markets based on sufficient transmission and storage infrastructure will be the best guarantee for stable consumer prices by ensuring that electricity and gas goes where it is needed.29 Furthermore, one of the key aims of competition in liberalized markets is to create incentives for adequate investment in power generation.30 On short term, network investments, the costs of which will have to be recovered through the networks costs, will most likely lead to an increase in the end energy bills. However, on the long-term, these investments will lead to the connected European-wide grid which will translate into stable consumer prices.

_Sustainable energy_

According to the Green Paper ”A European Strategy for Sustainable, Competitive and Secure Energy” the interest of sustainability entails “developing competitive renewable sources of energy and other low carbon energy sources and carriers, particularly alternative transport fuels, curbing energy demand within Europe and leading global efforts to halt climate change and improve local air quality”.31 Sustainable development of energy resources will not only help meeting the 20% target regarding the decrease in gas emissions (30% if conditions are right), a needed step in fighting climate change issues which affect each and every one of us, but also ensure that future generations will not suffer from the depletion of fossil fuels resources.32 Currently Europe is lacking the grid infrastructure which would enable the development of renewable energies to compete with traditional resources. New and better power grids are needed for the EU-wide shift towards renewables.33

_Security of supply_

The above mentioned Green Paper describes the interest of security of supply as “tackling the EU’s rising dependence on imported energy through an integrated approach – reducing demand, diversifying the EU’s energy mix with greater use of competitive indigenous and renewable energy, and diversifying sources and routes of supply of imported energy, creating the framework which will stimulate adequate investments to meet growing energy demand, better equipping the EU to cope with emergencies, improving the conditions for European companies seeking access to global resources, and making sure that all citizens and business have access to energy”.34 Promoting infrastructure investments is essential to ensure uninterrupted and reliable energy supplies to consumers.

Role of ACER: Basic legal assumptions

To understand how ACER’s powers may ultimately affect consumer interests it is important to examine the rationale behind the creation of ACER, its legal basis and the boundaries of its powers.

In March 2011, ACER replaced the ERGEG (European Regulators’ Group for Electricity and Gas), an informal network of NRAs. The idea behind the creation of ERGEG was to facilitate a better cooperation between the NRAs of the Member States and between the NRAs and the European Commission in order to achieve a uniform application of EU (energy) law in the Member States. One of the most important tasks of ERGEG was, at its own initiative or upon request by the Commission, to advise and assist in respect to the consolidation of the internal energy market, particularly in the preparation of draft guidelines later to be adopted through comitology. Besides its advisory and harmonizing activities, ERGEG functioned as a platform of the Commission for controlling the correct implementation by the Member States of EU law in the energy field and its effective application by the national authorities.

It should be noted that in the context of enhancing the dialogue among NRAs and the NRAs and the Commission, before the creation of the ERGEG, a Council of European Energy Regulators (CEER) was created in 2000. The CEER acts as a platform for cooperation, information exchange and assistance between Europe's national energy regulators in an effort to improve market functioning across Europe and to ensure a fair and consistent regulatory framework for market participants, ultimately to the benefit of all consumers. Regarding EU issues, CEER still works very closely with (and supports) ACER.

While recognizing the important role of ERGEG in fostering the internal market in gas and electricity, the Commission also acknowledged in the preamble of the Regulation establishing ACER, that the cooperation of the NRAs should happen within the EU structure. This acknowledgement by the Commission showed of the wish to create a more formalized institutional approach to the cooperation between these national authorities. Previously, ERGEG could gather data and make recommendations, but had no power to adopt legally binding decisions or to enforce them. This hindered the coordination of the application of the European energy directives and regulations by the NRAs and the further integration of the internal market. This drawback became the basis for creating ACER. Enhancing further cooperation between NRAs, within a formalized context and filling in the regulatory gap was one of the main thoughts behind establishing ACER, although its tasks, powers and influence on consumers, as we will show below, may go far beyond this.

36 For more details regarding comitology see fn. 68.
38 For more information see http://www.energy-regulators.eu/. Unlike ERGEG which has been replaced by ACER, CEER continued its existence.
39 See points 4 and 5 preamble Regulation 713/2009.
ACER was established as a connection between the Commission and the NRAs.\footnote{A. de Moor- van Vugt, “Handhaving en toezicht in een Europese context”, in S. Pront- van Bommel (ed.) De consument en de andere kant van de elektriciteitsmarkt (Amsterdam: Universiteit van Amsterdam, 2010), p. 63}

According to Chiti the Commission and ACER create ‘regulatory dualism’ at an EU level. ‘On the one side, a strictly supranational regulator, the Commission, which does not represent national administrations, but expresses EU’s point of view; on the other side, a European but composite or mixed regulator, which gives voice to the various Member States’ regulators’.\footnote{E. Chiti, “An important part of the EU’s institutional machinery: features, problems and perspectives of European Agencies”, CML Rev. 2009, 46, 1395–1442, p. 1431. Regarding ACER’s structure see A. Ottow, “Europeanisation of the Supervision of Competitive Markets”, CML Rev. 2012, 191–221.}

The fact that it gives voice to the NRAs of the Member States should under no circumstance affect its independence. The independence of ACER is safeguarded by provisions of the European energy directives requiring the Members States to guarantee the independence of the individual NRAs at the national level. The NRAs should be legally and functionally independent from any private and public party and do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks.\footnote{See Article 35 of Directive 2009/72/EC and Article 39 of Directive 2009/73/EC. For a discussion of these requirements see: S. Lavrijssen and A. Ottow, “The Legality of Independent Regulatory Authorities” in Besselink, Pennings and Prechal (eds.) The Eclipse of the Legality Principle in the European Union, (Kluwer Law, 2011), pp. 73-95.}

These provisions also help to ensure that the individual NRAs can act independently from their governments when they are participating in ACER’s Board of Regulators. Moreover, the regulation on ACER requires, that ACER itself should perform its regulatory functions independently from electricity, gas producers and TSOs and should not seek to follow instructions or accept recommendations from the governments of the Member States, from the Commission or another public or private entity.\footnote{See point 18 preamble and art.14(5) of Regulation 713/2009.}

**Meroni-doctrine**

While the Commission strived towards the formalization of the cooperation and coordination between the national regulatory authorities, this has not resulted in the creation of a new European supervisor with broad legal powers such as the adoption of binding regulatory measures.

The formal limited powers that ACER has been granted can be explained with the help of the largely debated *Meroni-doctrine*.\footnote{Meroni v. High Authority, [C-9/56] [1958] E.C.R 133. For more elaborated discussions concerning the Meroni-doctrine: M. Chamon, “EU Agencies between Meroni and Romano or the Devil and the Deep Blue Sea”, CML Rev. 2011, 48, 1055–1075; Chiti, “An important part of the EU’s institutional machinery” CML Rev. 2009, 46, pp. 1404-1406 and 1420-1424; Hancher and de Hautecloque, “Manufacturing the EU Energy Markets”, CRNI 2010, 11, pp. 307-335.}

In the legal debate concerning EU agencies, but also in the political discourse at EU level, the assumption is that the establishment and functioning of these bodies (thus also of ACER) are limited by the *Meroni-doctrine*.\footnote{See Lavrijsen and Hancher, “Networks on Track”, LIEI 2009, 1, p. 38.} This judgment is invoked by the European Commission and the Council of ministers to defend a “restrictive approach to the delegation of powers involving discretion in policy or in interpretation, to independent agencies”.\footnote{See point 18 preamble and art.14(5) of Regulation 713/2009.} This restrictive approach entails, among other things that “the delegation of powers to an agency must be necessary for the performance of tasks assigned to the delegating institution by the
and even more relevant, that “the powers delegated may only involve clearly defined executive powers, the use of which must be entirely subject to the supervision of the delegating institution”. It should be noted that according to various authors Meroni can be read in different ways. For example, it has been argued that the Meroni doctrine can be reinterpreted in that independent European supervisors may be attributed powers to make policy choices or to adopt regulatory measures, provided that the European supervisors are made politically and legally accountable in a manner comparable to the European Commission. Furthermore according to Chamon, even though the Meroni doctrine is frequently cited and analyzed in the legal debate on agencies, the Romano judgment, seems to be more relevant for current day agencies. By applying the reasoning in Romano (which is even more restrictive than Meroni) to the EU agencies it is revealed that the ongoing agencification rests on very shaky legal grounds.

It is not the purpose of this paper to get into a debate surrounding a possible reinterpretation of the Meroni doctrine, but instead this doctrine will be accepted as being the fundament for the establishment and functioning of ACER.

At first glance the powers of ACER are in line with the Meroni doctrine: its decision-making powers are limited and its opinions, recommendations and guidelines are not binding and lack formal enforcement mechanisms. However, it has yet to be seen to what extent ACER’s powers in theory and practice may influence key decisions in the energy sector. For example this could imply setting more specifically investment policies, trespassing the boundaries of the Meroni doctrine and eventually exerting a larger influence than perhaps intended on consumer interests.

ACER’s role in promoting and protecting infrastructure investments

Because the European legislator assumes that infrastructure investments are important for realizing consumer interests, it is worthwhile to look at how ACER may exercise its influence on policies relating to infrastructure.

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49 See Lavrijssen and Hancher, “Networks on Track”, LIEI 2009, 1, pp. 38-39. In the same line of thinking, Ottow points out that the situation of the new European agencies (such as ACER) cannot be compared with the situation in the Meroni judgment because sufficient safeguards have been put in place to compensate for the substantial independence of these authorities ( A. Ottow, “Europeanization of the Supervision of Competitive Markets”, 1, EPL 2012, 191–221 p. 21). Griller&Orator, while accepting that in principle the concept of European legitimacy and institutional balance which are the foundation of the Meroni doctrine are still relevant, are also pleading for a reassessment of this doctrine which would allow more flexibility respecting in the same time the constitutional limits. See A. Orator and S. Griller, “Everything under control? The “way forward” for European agencies in the footsteps of the Meroni doctrine”, E.L. Rev 2010, 34, 3–35.
51 In respect to their effects, there is no difference between opinions and recommendations: they are both “soft law” (F. Ermacora, “The Agency for the cooperation of Energy Regulators (ACER)” in C. Jones, EU energy law: The internal market: the third liberalization package, (Belgium: Claeys&Casteels, 2010), Vol. I, p. 277). A certain difference might arise from their intrinsic meaning. According to the Oxford dictionary a recommendation is a suggestion or proposal as to the best course of action, especially one put forward by an authoritative body and an opinion is a view, a judgment, an advice by an expert on a professional matter. Therefore, it appears that most of the times a recommendation will contain a proposal for a certain course of action while an opinion may, but will not necessarily always contains such a proposal.
Regulation 713/2009 of the Third Package lays down the tasks and powers delegated to ACER.\(^{52}\) By taking a closer look at the tasks and powers one sees that ACER has been given a certain role in matters which are extremely relevant for promoting directly or indirectly, investments in infrastructure in order to achieve the completion of a well-functioning energy market which will ultimately lead to a more sustainable and secure energy supply for consumers. From the perspective of the promotion of wholesale competition and investments in infrastructure, the most relevant tasks and powers are the ones related to the involvement of ACER in the development of network codes, monitoring implementation projects to create new interconnector capacity\(^{53}\), the development and the implementation of EU-wide network development plans and granting exemptions for new infrastructures from certain obligations following from the regulatory regime. Furthermore, under the new Regulation on Wholesale Energy Market Integrity and Transparency\(^{54}\), ACER has been given significant competences in monitoring and coordinating the supervision of the wholesale energy markets in order to prevent and detect market abuse. This Regulation deals mainly with trade practices at wholesale level where producers, traders and suppliers are involved. The fact that prices on the wholesale market are directly influencing the prices consumers will eventually pay in retail markets, makes the Regulation relevant for consumers.\(^{55}\) In addition, the Regulation aims at creating a transparent environment which would boost market confidence and give the right signals for investments in new infrastructure. This paper deals with those powers of ACER which have a more specific impact on the regulation of access to cross border energy infrastructures and investments in infrastructure, promoting in this way competition in the energy market and hence consumer interests. Therefore the new regulation will not be analyzed in this paper.

In continuation, it will be examined the way ACER can promote or influence investments in the European energy infrastructure through its tasks under the Third Package.

**Involvement in the development of network codes**

In the area of the regulation and supervision of access to the cross-border transmission networks, ACER works closely with the two new European networks of transmission operators for electricity and respectively for gas (ENTSO-E and ENTSO-G)\(^{56}\), the creation and functioning of which are based on Regulation 714/2009 and Regulation 715/2009. These are networks within which transmission system operators cooperate at European level.\(^{57}\) Although the idea of collaboration between TSOs is not new (prior to this TSO’s were also associated to a certain extent), the tasks given to these networks, within the Third Package, such as drafting network codes, common network operation tools and non-binding

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\(^{53}\) Art. 6(7) of Regulation 713/2009.


community-wide 10-year network development plans widens this cooperation within a formalized structure.

One significant area in which ACER cooperates with ENTSOs (and also the Commission) is the development of the network codes.\textsuperscript{58} These codes are important for providing and managing effective and transparent access to the transmission networks for cross-border transport of electricity and gas and to ensure a coordinated operation and evolution of the transmission system in the EU\textsuperscript{59} and also to fight market segmentation.\textsuperscript{60} The areas in which these networks codes have to be adopted essentially pertain to network operation and market-related issues.\textsuperscript{61} Thus these codes might not only have an impact on the development of cross-border infrastructure, but also directly on competition (for example through establishing rules regarding harmonization of transmission tariffs including locational signals and inter-transmission system operator compensation rules and rules on access to transmission networks). In line with a very strict interpretation of the Meroni-doctrine ACER was not granted binding decision-making powers in the area of developing and enforcing network codes.

The procedure of adopting these codes involves several steps. First, the Commission consults ACER and the involved ENTSOs to make an annual priority list identifying important areas mentioned in Articles 8(6) of the Electricity and Gas Regulations that should be included in the network codes. Examples of important areas include network security and reliability rules, network connection rules, third party access rules or rules regarding harmonized transmission tariff structures including locational signs and inter-transmission system operator compensation rules. The Commission requests ACER to submit non-binding framework guidelines setting out clear and objective principles that are the basis for the development of the network codes. When preparing these guidelines, ACER should formally consult the ENTSOs and other relevant stakeholders including consumers\textsuperscript{62} and make sure that the framework guidelines contribute to non-discrimination, effective competition and the efficient functioning of the market.\textsuperscript{63}

Secondly, ENTSOs have the task to draft a network code, which has to be in line with the framework guidelines and they have to send this draft code to ACER.\textsuperscript{64} ACER must provide a reasoned opinion to the concerned ENTSO on the submitted network code and as


\textsuperscript{59} Regulation 714/2009, point 6 of preamble.


\textsuperscript{62} Art. 10(1) Regulation 713/2009

\textsuperscript{63} Art. 6(3) Regulation 714/2009 and art. 6(3) Regulation 715/2009. If the Commission considers that the framework guidelines proposed by ACER do not comply with these interests, it may request ACER to review its framework guidelines, or eventually the Commission can choose to draft the guidelines themselves (art. 6(4) and art. 6(5) of Regulation 714/2009 and art. 6(4) and art. 6(5) of Regulation 715/2009).

\textsuperscript{64} Art. 6(6) Regulation 714/2009 and art. 6(6) Regulation 715/2009.
a result the network code may be amended and resubmitted to ACER. When ACER is satisfied with the network code, it shall submit it to the Commission and recommends the adoption of the code. The Commission is not obliged to follow this recommendation provided that it gives reasons for its decision to deviate. It is assumed that the Commission will often follow such recommendations: reference is made to the so-called “rubber stamping” practice which has been analyzed in the literature with respect to other agencies (such as the European Medical Agency). This practice entails the adoption by the Commission, as final decision maker of opinions and recommendation issued by agencies which formally do not have any decisions making powers.

There are several reasons to believe that, in practice, the Commission will adopt these codes and make them binding through the Regulatory Committee with Scrutiny procedure.

First, the preparation of these codes require specific and extended technical knowledge which is not, to a limited extent, available to the Commission. Secondly, the codes are the result of several consultations between ACER, the ENTSOs and other stakeholders, at the stage of developing the non-binding framework guidelines and also at the stage of reviewing these draft codes. This means that, as a result of extensive consultations a certain consensus may be reached among the parties involved about crucial elements of the non-binding framework guidelines and the network codes. Due to this procedure, the process itself becomes time consuming and if the Commission self was to replicate it, it might become so long that one may suspect it as being inefficient. In the same line of thinking one must not forget that after the draft is ready it still has to go through the comitology procedure as mentioned above. Given all the requirements for the start of this procedure, it is expected that, after finalization of the codes, 3 to 6 months will still be needed before the first meeting of the Member States committee. Thirdly, the draft codes must be in line with the non-binding framework guidelines prepared by ACER (on the basis of the Commission’s priority list) and reviewed by the Commission. It is assumed that through this procedure the Commission has already given its input in what constitutes the basis of the network codes, even before the pre-final stage of the process (which is submitting the codes by ACER with the recommendation of making them binding) and thus it would not make that much sense for the Commission to raise objections in this later phase.

In case ENTSOs fails to develop a network code within the timeframe set by the Commission, the Commission may request ACER to draft a code. The Commission may also

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65 Art. 6(7) and 6(8) Regulation 714/2009 and art. 6(6) and 6(8) Regulation 715/2009.
66 Art. 6(9) Regulation 714//2009 and art. 6(9) Regulation 715/2009.
68 See Council Decision of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, [2006] OJ L 200/11. TFEU has introduced a new EU decision-making procedure (see article 290 and 291 TFEU). However, the Third Package has been adopted before the entering into force of the TFEU and the “regulatory procedure with scrutiny” remains the decision-making procedure for the Guidelines. Until now no final codes have been submitted to the Commission.
adopt, on its own initiative, a network code if ENTSO and ACER fail to draft one.\textsuperscript{71} The NRAs should ensure that energy undertakings comply with the binding network codes\textsuperscript{72} and ACER should monitor and analyze the implementation of the binding network codes by the NRAs.\textsuperscript{73}

ENTSOs seem to be the key players in the adoption of the codes, as in fact they prepare the drafts. Even though the codes have to be drafted in line with the framework guidelines set up by ACER and approved by the Commission it is not clear if ENTSOs are actually bound by these framework guidelines.\textsuperscript{74} However, ACER has final say on whether or not a certain code should be submitted to the Commission. It may be assumed that if the draft does not comply with the framework drew by ACER the procedure will be stopped. Therefore, despite the fact that ACER is not empowered with true decision-making powers, there is a gate left open for ACER to exert its influence. Furthermore, as also noticed above, the influence of ACER becomes significant if the Commission generally complies with its opinions and recommendations.\textsuperscript{75}

\textit{Involvement in network development plans}

Of relevance for promoting investments in infrastructure and subsequently promoting consumers interests is also ACER’s involvement in the development of network plans.

ACER also monitors the implementation of projects to create new interconnector capacity and oversees the development and implementation of EU-wide network development plans as prepared by the ENTSOs.\textsuperscript{76} These development plans have the role of identifying infrastructure gaps and concrete investment projects across Europe and contributes to better transparency, market integration and security of supply.\textsuperscript{77} Furthermore every national investment plan made by national TSOs should be derived from this EU-wide network plan. ACER supervises whether the national plans are in line with the EU-wide plans and, in case of inconsistencies, it can recommend changes to the national plans or EU-wide plans.\textsuperscript{78} ACER’s opinions and recommendations are however “soft law” provisions which most likely, in case of non- compliance, would not trigger any procedures against ENTSOs or any other parties involved. However, by using its general powers (see art 5 of Regulation 713/2009) of providing opinions and recommendations to the EU institutions, ACER might exercise sufficient political pressure to ensure the implementation of interconnector projects, making investments in line with network development plans or enhancing regional relations.\textsuperscript{79}

\textit{Exemption decisions}

\textsuperscript{73} Art. 6(6) Regulation 713/2009.
\textsuperscript{74} See art. 6 (par. 4 and 6) Regulation 714/2009.
\textsuperscript{75} Hancher and de Hauteclouque, “Manufacturing the EU Energy Markets”, CRNI 2010, 11, p. 317.
\textsuperscript{76} Art. 6(7) Regulation 713/2009, art. 8(10) Regulation 715/2009 and art. 8(10) Regulation 714/2009.
\textsuperscript{78} Art. 8 (11) Regulation 715/2009, and art. 8 (11) Regulation 714/2009.
ACER may decide on granting exemptions for new interconnectors and other infrastructures from the rules of third party access and/or use of congestion\textsuperscript{80} rent of the European directives and regulations.\textsuperscript{81} The interest of security of supply requires major investments in energy infrastructure guaranteeing that sufficient energy can be imported and exported to meet demand for energy throughout the Member States. Investors need to receive incentives, including the temporarily exemption of certain regulatory obligations, to make these large investments in cross-border infrastructure projects. ACER can only intervene with such a decision when the concerned NRAs cannot reach an agreement within six months from the date the exemption has been requested or when NRAs jointly request so.\textsuperscript{82} These exemptions are supervised by the Commission who may ask the ACER to withdraw an exemption decision.\textsuperscript{83} Once again the influence of ACER, though limited, is obvious: ACER may, under certain conditions, promote investments in infrastructure, and subsequently consumers interests, by granting these exemptions.\textsuperscript{84}

*Future developments: proposal for new Energy Infrastructure package*

The above analyzed tasks of ACER are the novelties of the Third Energy Package. Within the current legal framework (outside the Third Package) which focuses on the development of trans-European energy networks (TEN-E framework), ACER has no role. The TEN-E framework includes some degree of supranational energy network planning, a funding scheme and coordination support for key interconnector projects\textsuperscript{85} (projects having a cross-border nature or having significant impact on cross-border capacity). Unlike the Third Package which contains various regulatory provisions which undoubtedly impact the investments in infrastructure, the TEN-E framework deals with the practicalities of actually making these investments. The main and direct focus of TEN-E framework is on identifying actual bottlenecks hampering European electricity market integration as well as finding ways to fund the needed investments and allocating the costs between various Member States.\textsuperscript{86}

In the Commission’s Proposal for a Regulation on "Guidelines for trans-European Energy Infrastructure which aims at revising the current TEN-E framework and which takes into account the new regulatory framework created by the Third Energy Package, ACER receives new roles.

Within the proposed Regulations the focus lies on a stronger cooperation between the Members States, the Commission and ACER on cross-border investments.

\textsuperscript{80} Congestion means a situation in which an interconnection linking national transmission networks cannot accommodate all physical flows resulting from international trade requested by market participants, because of a lack of capacity of the interconnectors and/or the national transmission systems concerned.
\textsuperscript{81} Hancher and de Hauteclouque, “Manufacturing the EU Energy Markets”, CRNI 2010, 11, p. 316.
\textsuperscript{82} Art. 17(5) Regulation 714/2009; art. 36(4) Directive 2009/73.
A better identification of the infrastructure priorities is the starting point. The proposed Regulation grants priority to 12 strategic trans-European energy infrastructure priorities and areas and it sets rules to identify, within a set of defined energy infrastructure categories, projects of common interest (PCIs), necessary to implement these priorities.

Without going into further details of this proposed regulation, it is important to note its relevance in enhancing investments in developing a trans-European energy infrastructure and also the extended role of ACER within this new approach which will ultimately promote the consumers’ interests. In addition to its involvement in the process of selecting and supervising PCIs, ACER will provide an opinion on the methodology for a harmonised energy cost-benefit analysis at Union-wide level for PCIs. The NRAs concerned shall primarily be responsible for the joint approval of investments in PCIs and for the decision on the cross-border allocation of corresponding costs for PCIs as well as the inclusion of investment costs in the transmission tariffs. In case the NRAs have not reached agreement, they may refer the case to ACER whom shall take a final decision. This means that, under certain circumstances, ACER will be delegated the power to take a binding decision which implies making legal and economic choices as regards the allocation and calculation of investment costs and their inclusion in the transmission tariffs. These transmission tariffs may be (partly) reflected in the energy bill of the consumers affecting thus the affordability of the energy supply.

First experiences

In the first year of its existence, ACER has prepared and adopted non-binding framework guidelines on various topics. A closer examination of these documents shows that these non-binding framework guidelines, which constitute the basis for the developing of the network codes, may provide for rules and principles that have a substantial impact on the market parties, competition in the wholesale markets and subsequently on consumers. Notable is the adoption of the principle of bundling addressed in the “Framework guidelines on Capacity Allocation Mechanisms for the European Gas Transmission network”.

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87 The Commission has found that within the current framework of the TEN-E the categorisation is confusing. See Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Implementation of the Trans-European Energy Networks in the period 2007-2009, COM(2010) 203 final, p. 10.
88 According to the Proposal for a Regulation of the European Parliament and Council on Guidelines for trans-European energy infrastructure, COM(2011) 658 “project of common interest means a project, which is necessary to implement the energy infrastructure priority corridors and areas set out in the Annex I to the Regulation”.
89 See art. 12 of Proposal for a Regulation on Guidelines for trans-European energy infrastructure.
90 See art 13(6) Proposal for a Regulation on Guidelines for trans-European energy infrastructure.
92 Important to note is that as of 22 May Gas Transport Services B.V. (GTS) and Gasunie Deutschland Transport Services GmbH (GUD) have started auctioning bundled capacity at Oude Statenzijl via TRAC-X, the German primary capacity platform. The firm day-ahead service is the first bundled cross border capacity auction that is offered between two EU Member States and it serves as a pilot for the full implementation of the European Network Code (see website Gasunie, http://www.gasunie.nl/en/news/gasunie-tsos-veilen-gebundelde-grensoverschrijdende-capaciteit).
93 ACER, Framework Guidelines on Capacity Allocation for the European Gas Transmission Network, 3 August 2011. Par. 2.4. The relevance of these guidelines is given by the fact that it aims at creating a well-defined
Currently the seller and buyer have to book exit capacity in the network of the upstream TSO and respectively entry capacity in the network of the downstream TSO (“TSO down”). Therefore two allocations and nomination procedures have to take place before the transport could be executed between the supplier and the off taker. According to the principle of bundling, the capacity needed at entry and exits points for the performance of supply contracts shall be integrated in such a way that the transport of gas from one system to an adjacent system is provided on the basis of a single allocation procedure and a single nomination. It is assumed that the delivery point of the commodity contract will move from the border flange to a within zone hub either further upstream or downstream from the flange and this will cause economic effects. The gas will be delivered at Virtual Trading Points or trading hubs providing more possibilities for hub trading and for more flexibility for the seller in deciding how to meet his contractual obligations.

The assumption is that the application of the principle of bundling will lead, amongst others, to reduction of transaction costs and transactions risks and the improvement of the liquidity at the hubs. By increasing the liquidity at the hubs and by reducing transaction costs and risks Member States would be better connected which will foster cross-border trading, improve the EU internal market and support competitive benefits. These competitive benefits will ultimately also be translated in benefits for the consumers, in terms of choice and perhaps affordable prices.

Relevant is that ACER has made the economic and legal choice that the principle of bundling also has to be applied to existing contracts within a period of five years to fully realize the estimated effects of bundling and to prevent unjustified discrimination between existing and new contracts. This so called “Sunset clause” limits the commercial freedom and mechanism for assigning network capacity which would address the congestion which currently exists on the transmission networks and which is a hinder for cross-border gas trading.

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94 When a shipper wishes to ship gas from one zone to another the shipper will require exit capacity in one zone and entry capacity in the next zone.
96 A hub is a point at which title to gas can be transferred between buyers and sellers. It may be either physical or virtual. Gas hubs provide an apt platform for short-term trading and foster competition through trade with multiple buyers and sellers.

99 Liquidity means a sufficient number of willing buyers and sellers with no single participant being able to exert undue influence on prices.
property rights of the contracting parties, but is seen by ACER as necessary and proportional to achieve more competition in the wholesale markets for gas.  

Another important principle of the Guidelines on Capacity Allocation Mechanisms for the European Gas Transmission network is the principle of reserve prices. Regulated tariffs shall be used as reserve prices in auctions for firm and interruptible capacity, if not otherwise specified in Commission Guidelines for tariff methodologies related to cross border trade of natural gas or in the Framework Guidelines for network codes on rules regarding harmonized transmission tariff structures. Reserve prices raise a number of policy issues and can create significant disagreement across the industry because conceptually, reserve prices are used to ensure that assets receive a fair rate of return which can clash with the concept of fair economic value (i.e. the market value) where capacity may be worth more or less than the rate of return on an investment. However, in the conditions of heading to a growing market for short term capacity release which brings along uncertainty about capacity booking levels and subsequently uncertainty for TSOs in respect to the recovery of their allowed revenues, the reserve prices represent an important incentive for the TSOs to continue investing in new capacity. Through the introduction of reserve prices in an attempt to provide sufficient investment incentives to the TSOs, it does not seem that ACER has made a pure technical decision. This resembles to making specific economic choices in respect to safeguarding an adequate level of infrastructure investments needed to achieve consumers’ interests.

Along the above mentioned Framework Guidelines, ACER has also adopted an opinion on the European Ten Year Network Development Plan 2011-2020 (TYNDP) published by ENTSOG. In its opinion, ACER admits that the TYNDP contributes (“though in a limited way”) to non-discrimination, efficient functioning of the market and to a sufficient level of

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101 RAUE, “Legal Impact Assessment” http://www.acer.europa.eu/portal/page/portal/ACER_HOME/Stakeholder_involvement/Public_consultatation/Closed_Public_Consultations/PC-02_FG_Gas_CAM/Evaluation_of_responses [Accessed April 16, 2012], p. 24. “The implementation of the new system will require several changes to existing long-term capacity contracts”. “(...) we note that the implementation of the bundling system in the capacity contracts could entail several changes in the supply contracts. For instance, the shippers might have to renegotiate contractual stipulations with respect to the definition of gas delivery and the gas prices.”

102 See par. 3.1.2. of the Guidelines on Capacity Allocation for the European Gas Transmission Network.

103 Any over- or under- recovery of allowed revenues has to be compensated by network users. Reserve price design is a key to managing over- and under- recovery of allowed revenues (ACER Presentation on Draft Framework Guideline on Capacity Allocation Mechanisms for the European Gas Transmission Network Insight on tariff development).


106 The network code for gas on Capacity Allocation Mechanisms has officially been submitted to ACER on the 6th of March 2012. It is interesting to see that despite strong opposition from network users regarding the mandatory bundling of new capacity and the belief of ENTSOG that a voluntary model is preferable and that flange trading should remain possible under the new regime, ENTSOG chose to follow the guidelines as set up by ACER. Also the controversial “sunset clause” has been included in the code as this was the wish of ACER (see ENTSOG, Letter accompanying the Network Code on Capacity Allocation Mechanisms, March 2012 available at http://www.entsog.eu/publications/camnetworkcode.html and ENTSOG, Network Code on Capacity Allocation Mechanisms available at http://www.entsog.eu/publications/camnetworkcode.html
interconnection capacity open to third parties. ACER concluded that the future TYNDP must actually provide the necessary guidance for identification of infrastructure gaps and for a subsequent decision-making procedure on project selection and prioritization.

The role of ACER and the link with consumer interests

The foregoing paragraphs have illustrated, that ACER’s tasks and powers related to the network codes, the EU-wide network development plans and the exemptions granted to new interconnectors all have the potential of promoting and/ or affecting the level of investments in cross-border energy infrastructure, the promotion of cross-border trade and the competition on the wholesale markets, thus mostly indirectly affecting consumers interests. Within the framework of the above analyzed competences it can be seen that de facto ACER may have an important role in enhancing investments, especially if its opinions and recommendations are readily endorsed by the Commission, ENTSOs and the NRAs. Even though de jure, within the Third Package, its influence seems limited by the fact that it cannot for example adopt binding decisions or enforce penalties for non-compliance. The first experiences with the European procedure for the adoption of the Framework Guidelines on Capacity Allocation Mechanisms for the European Gas Transmission network, provides indications that ACER is in the position to play a major role in regulating the conditions and tariffs for access to the cross-border gas transmission networks. The principle of bundling of capacity and the sunset clause, as provided for by the aforementioned framework guidelines, have been adopted by ENTSOG in the draft network codes, despite opposition from network users and ENTSOG itself.

The Commission’s recent proposal to extend ACER’s powers to approve investments relating to a PCI, may influence the interests of the consumers in a more direct way. According to the draft regulation on trans-European energy infrastructure, ACER will, under certain circumstances, be empowered to make a binding decision on the approval of specific investments in cross-border infrastructure, including the cross-border cost allocation and the way the costs have to be reflected in the transport tariffs that are part of the end-consumers bills.

Relation ACER-Commission

In addition to the European Commission’s general role to oversee the application of EU law on the basis of Article 17 TFEU and its role to enforce European competition law, the sector-specific Third Package gives the Commission further powers. The Commission is the initiator of the process of adopting network codes and at the same time it makes this procedural circle complete by adopting the codes at the recommendation of ACER. As

109 See art. 13 of the Proposal for a Regulation on Guidelines for trans-European energy infrastructure.
pointed out above, it is expected that the Commission will follow the recommendations of ACER when it comes to adopting these codes.

Perhaps the Commission’s most important power within the Third Package is the power to adopt binding Guidelines related to cross-border issues, necessary to provide a minimum degree of harmonization and that have to be followed by the NRAs. Subjects on which the Commission can adopt Guidelines include the inter-transmission system operator compensation mechanisms, the determination of rules leading to a progressive harmonization of the principles for setting network charges applied to producers and consumers under national tariff systems and aspects which in the same time may be covered by network codes such as third-party access rules, capacity allocation rules and congestion-management rules. These aspects may impact the energy bills to be paid by consumers and also the promotion of infrastructure investments which, as has been clarified above, in its turn also influence consumer interests.

The Commission may ask ACER to prepare the draft guidelines, to organize public consultations and to submit a proposal for the guidelines to the Commission. Past experiences show that ACER’s influence on the definitive text of the guidelines may be substantial. ACER’s predecessor, ERGEG, also prepared draft guidelines regarding congestion management in electricity, which were submitted by the Commission through the comitology procedure to the Comitology Committee. The latter unanimously approved the proposal. The measures were then sent to the European Parliament, which raised no objections. Subsequently, the proposed guidelines were adopted in an unchanged form by the Commission.

Some Guidelines have already been annexed to the Regulations of the Third Package.

The Guidelines attached to Regulation 714/2009 contain specific provisions concerning imbalance caused by market participants in the interconnection systems. “Where market participants fail to use the capacity that they have committed to use, or, in case of explicitly auctioned capacity, fail to trade on a secondary basis or give the capacity back in due time, they shall lose the rights to such capacity and pay a cost-reflective charge.” These charges should be justified and proportionate. Thus, the market participant causing the imbalance by non-usage of the allocated capacity, would pay directly

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111 Recitals 63 and 64 Directive 2009/72; recitals 61 and 63 Directive 2009/73. See for example art. 17 and 18 Regulation 714/2009 and art. 23 Regulation 715/2009. To be noted is that these guidelines are adopted via the comitology procedure, more precisely the Regulatory Committee with Scrutiny procedures. See above fn. 68.

112 Art. 23 and art. 8(6) of Regulation 715/2009 and art. 18 and art. 8(6) Regulation 714/2009.


114 Regarding the competence of the Commission to adopt such binding guidelines see art. 18 of Regulation 714/2009 and art. 23 of the Regulation 715/2009.

115 Imbalance appears when, on the electricity transmission networks, power generation and demand are not matching. Maintaining a constant balance between electricity supply and demand on these networks is important to ensure system stability. This requires TSOs to constantly monitor the network and to take corrective (balancing) measures when needed. In practice this means that a TSO in charge of a control area must either be able to call on certain generators to increase or decrease production at short notice. However, as balancing services do not come for free, they are being paid for by network users either in form of network tariffs and/or in form of direct payments for balancing energy and then passed on to the end users of electricity (see DG Report on Energy Sector Inquiry, pp.295-310).

for the balancing services that the TSO would deploy in this situation. This means that the balancing costs might not automatically become a part of the network tariffs paid by other network users, tariffs which in the end would be reflected in the bill of the end users of electricity. According to the Guideline, the key concepts and methods for the determination of the cost-reflective charges shall be subject to review by the relevant NRA or NRAs. In case NRAs cannot agree on the terms and conditions within six months, ACER shall make a decision.\footnote{Art. 8 Regulation 713/2009.}

The second set of guidelines have been adopted to establish a stable basis for the operation of an inter-transmission system operator compensation mechanism aiming at covering the network losses resulting from hosting cross-border flows of electricity (i.e. facilitating the transit of electricity between two other countries), but also the costs of making the infrastructure available for such flows.\footnote{These electricity flows are not benefiting the network users within the control area of the transmission system operator which incurs these costs. Commission Regulation no. 838/2010 of 23 September 2010 on laying down guidelines relating to the inter-transmission system operator compensation mechanism and a common regulatory approach to transmission charging, [2010] OJ L250/5.} Therefore, the goals are to ensure fair compensation of the TSOs, but also a fair allocation of these costs: if in a particular Member State investments are only needed to increase the amount of cross-border flows, the citizens of that Member State should not be paying for the transport costs of citizens in another Member States through increased transport tariffs necessary to cover the investment.

Once again the Commission works closely with ACER who is responsible for monitoring the implementation of the inter-transmission system operator compensation mechanism and reports to the Commission on this annually. ACER also carries out a Union-wide assessment of electricity infrastructure associated with facilitating cross-border flows of electricity.\footnote{See art. 5.2 of Annex Commission Regulation 838/2010.} Furthermore, it is at the proposal of ACER (proposal based on the above mentioned Union-wide assessment) that the Commission will decide on an annual cross-border infrastructure compensation sum which shall be apportioned among TSOs as compensation for the costs incurred as a result of making infrastructure available to host cross-border flows.\footnote{See art. 5.1 of Annex Commission Regulation 838/2010.} This may impact the bill of the end consumers because, depending on the amount of compensation and its ability of covering the actual costs incurred, the TSOs still might chose to pass on a part of their costs further to the network users within their control areas. They in turn would charge them to consumers under transport tariffs.

Compliance with Commission’s binding guidelines

Compliance with the Commission’s binding guidelines by the NRAs is an essential element in the creation of an internal energy market.\footnote{F. Gräper and C. Schoser, “The establishment of common network rules” in C. Jones, EU energy law: The internal market: the third liberalization package, (Belgium: Claeys&Casteels, 2010), Vol. I, pp. 520-521. See also Proposal concerning common rules for the internal market in electricity, COM(2007) 528 final, p. 25. For an accurate description see Kooij, “The Energy Regulatory Triangle and the Enhancement of Consumer Interests”, Legal Research Master, July 2011, University of Utrecht, pp. 43 and further.} To ensure this compliance, a specific review procedure is outlined in the Third Package in which ACER and the Commission monitor the
performances of the NRAs. According to art. 39 of Directive 2009/72 and art. 43 of Directive 2009/73, a NRA or the Commission may request the opinion of ACER on the compliance of a decision taken by the NRA with the guidelines, which may provide for provisions that may directly or indirectly affect the network tariffs. ACER will inform the Commission and the NRA of its opinion. If according to the opinion of ACER, the decision of the NRA does not comply with the Commission’s guidelines, the NRA has four months to comply with the opinion of ACER. In case of non-compliance, ACER will inform the Commission. NRAs can also inform the Commission if they consider a decision made by another NRA, which is relevant for cross-border trade, does not comply with the Commission’s guidelines. The Commission will investigate the information received from ACER or the NRA. If this raises serious doubts as to the compatibility of the decision with the Guidelines, the Commission may decide to examine the case further. The Commission issues a final decision: it can decide not to raise objections against the decision or require the NRAs concerned to withdraw its decision on the basis that the guidelines have not been complied with.

ACER is the one providing the Commission with the decisive input for taking a decision against the NRAs. It is obvious that in this way ACER has the ability to indirectly influence the decisions of the NRAs in matters relevant to cross-border trade which might also translate in influencing consumers interests (for example when NRAs decide on the charges for non-usage of capacity).

The role of Commission and the link with consumer interests

Looking at the above mentioned sector-specific regulatory powers of the Commission and analyzing them together with the role of ACER and the relation vis-à-vis the NRAs, it is understandable why some authors are claiming that the regulatory position of the Commission has shifted from “meta-regulator” to “co-regulator”. Indeed, its role goes beyond supervising the NRAs, because it is (together with ACER, ENTSOs and the NRAs) involved in the regulation of complicated technical and economic aspects concerning cross-border access to energy infrastructure, which is influencing the realization of the consumer interests as shown above.

The comitology guidelines, which have so far been adopted by the Commission, have the ability of promoting and protecting cross-border trade in the energy sector and investments in cross-border infrastructure. Ultimately, this will lead to more competitive and liquid wholesale markets, being an important condition for well-functioning retail markets. ACER will play a prominent role in ensuring that these guidelines are applied by the NRAs, by means of the specific review procedures created by the Energy directives. Therefore the guidelines as well the review of their application may ultimately help to achieve consumers benefitting from security of supply, choice and affordable energy prices. Given past experiences with ERGEG it can be expected that ACER’s influence on adoption of binding guidelines may be significant.

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Through these guidelines the formal role of ACER is being extended in such a manner that its actions (such as, under certain circumstances, deciding on charges for failing to use the allocated capacity) may imply, at times, making legal and economic based choices which have the ability to affect investments in infrastructure, network costs and subsequently the consumers. This means that through the delegation of new powers via the comitology guidelines the tasks and powers of ACER might deviate from the above discussed Meroni-doctrine. Due to the very technical character of such decisions it becomes quite difficult to differentiate the technical and truly political powers and thus this exceeding of the Meroni-doctrine boundaries may go unnoticed.

Relation ACER-NRAs

The Third Package introduces that “each Member State shall designate a single NRA at national level” that has the task of applying the European directives and regulations at the national level. Moreover, it strengthens the regulatory position of NRAs. It introduces more objectives, duties (for example in relation to consumer protection such as helping to ensure, together with other relevant authorities, that the consumer protection measures, including those set out in Annex I, are effective and enforced) and powers for NRAs and enhances their independence. NRAs have, among others, the power to monitor the retail markets and the handling of household consumers’ complaints.

From a consumer perspective, fixing or approving transmission tariffs or their methodologies is perhaps one of the most important duties of the NRAs. Its importance is given by the fact that electricity and gas transmission are regulated sectors within which the costs for network investment, operation and maintenance should be recovered through tariffs fixed by national regulation leading to a direct influence on promoting and protecting an adequate level of investment. NRAs are solely responsible for the fixing or approving of the transport tariffs or the methodologies. The NRAs are influencing the consumer interests through the promotion of investments in infrastructure and by simply deciding the

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tariffs which are to be paid by consumers for their use of the energy networks. The NRAs are in a position of weighing short term consumers’ interests (cheaper electricity bills) against longer term consumers interests (promotion of investments in new capacity). In fixing and approving the tariffs or methodologies, NRAs should “ensure that transmission and distribution system operators are granted appropriate incentive, over both short and long term, to increase efficiencies, foster market integration and security of supply and support the related research activities”.\textsuperscript{133} Furthermore the transport tariffs or methodologies approved or fixed by the NRAs should, in principle, be cost-reflective.\textsuperscript{134} They “shall allow the necessary investments in the networks to be carried out in a manner allowing those investments to ensure the viability of the networks”.\textsuperscript{135} According to art. 14 of Regulation 714/2009 that deals with “Charges for access to networks”, besides the investment costs, charges applied to consumers shall take into account the amount of network losses\textsuperscript{136} and congestion.\textsuperscript{137} The payments and receipts resulting from the inter-transmission system operator compensation mechanism (covering, as seen above, losses and cost incurred for the provision of infrastructure for cross-border flows of electricity) have to be taken into account when setting the charges for network access.\textsuperscript{138}

NRAs have many monitoring duties including monitoring and evaluation of the implementation of the ten-year network development plan by the TSOs (after verifying the national plans are in line with the EU-wide ten-year network development plan).\textsuperscript{139}

The role of the NRAs and the link with consumer interests

From the above, it can be concluded that in general the NRAs still enjoy a large degree of discretion and perhaps the most relevant is the involvement in setting transmission and distribution tariffs.\textsuperscript{140} Through these powers, unlike ACER, NRAs have a direct influence on consumers interests: by regulating network tariffs and enforcing consumer protection measures they can directly promote affordable energy prices and a secure energy supply.

\textsuperscript{136} Network losses are inherent to the transmission of electricity and have to do with either the design of the power grid, the voltage and transformation levels and the length of the power lines or metering errors. European Regulators Group for Electricity and Gas, “Treatment of Electricity Losses by Network Operators, ERGEG Position Paper”, 19 February 2009, http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EERConsultaTIONS/ELECTRICITY/Treatment%20of%20Losses/CD/EN8-ENM-04-03c_Treatment%20of%20losses_Conclusions_2009-02-1.pdf [Accessed April 19, 2011]
\textsuperscript{138} Art. 14(3)(a) Regulation 714/2009; see also art. 2.1 of Annex Commission Regulation 838/2010.
\textsuperscript{140} However, according to article 18 sub 2, “the Commission may adopt rules leading to a progressive harmonization of the underlying principles for the setting of charges applied to producers and consumers under national tariff system”. 23
Nevertheless, as some authors and also the Commission in its Impact Assessment\textsuperscript{141} have observed, in most Member States cost recovery for infrastructure projects is based on verified national market needs and cheapest available solutions, in order to ensure cost-efficiency and keep tariffs low for national consumers. This however does not make the existing framework suited for delivering a pan-European infrastructure and, subsequent, further integrate the European energy networks and meet the European climate and energy objectives.\textsuperscript{142} Some countries have recently introduced, in addition to the existing third market legislative framework additional incentive schemes in their regulatory framework to promote certain categories of investments. For example, France (for gas) and Italy (for electricity and gas) give explicit incentives for congestion reduction and cross-border investments. Some NRAs have also introduced explicit incentives for innovation (UK, Italy).\textsuperscript{143} However, such mechanisms exist only in certain Member States, remain limited with regard to the types of investment they cover and are only partly in line with the EU's infrastructure priorities.\textsuperscript{144}

An extended discretion may be observed in case of the national development plans: the NRAs have to ensure that the national plans are in line with the EU-wide development plans, but they are not bound by the recommendation of ACER in this respect. In the absence of clear enforcement mechanisms the investment plans might remain nationally oriented and while this may ensure short term affordable energy prices (by promoting limited investments, the transmission tariffs are kept at bay as there would be no need for these tariffs to cover huge investment related costs) for the national consumers it may not be suitable for achieving the infrastructure needed to accommodate the renewable energy resources and to ensure the secured supply of energy.

In the proposal of the new infrastructure package the formalized approach for the implementation of PCIs, which aims at creating 12 strategic trans-European energy infrastructure corridors, ensures a better coordination of Member States for the creation of a pan-European networks shifting the focus from national to European level and ensuring that long term consumers interests are weighed heavier.

Conclusion

European energy consumers, large undertakings as well as household consumers, essentially want uninterrupted access to energy - now and in the future – delivered at a price they can afford. On a European level these consumer interests can be found as policy objectives in the Third Package.

The main question addressed in this article is how ACER can ultimately influence the position of the consumers and their interests, by exercising its tasks and powers that are mainly aimed at enhancing cross border trade, infrastructure investment in cross border networks and the promotion of wholesale market competition in the EU markets for gas and electricity.

\textsuperscript{141} Impact Assessment Accompanying the Proposal for a Regulation on guidelines for trans-European energy infrastructure, p. 14.


\textsuperscript{143} For example in Italy there are investment premiums of 2\%-3\% granted for certain categories of investments.

\textsuperscript{144} Impact Assessment Accompanying the Proposal for a Regulation on guidelines for trans-European energy infrastructure, p. 14
It has been illustrated, that through its involvement in the development of network codes, monitoring implementation projects to create new interconnector capacity, the implementation of EU-wide network development plans and granting of exemptions for new infrastructures, ACER has the potential of promoting and protecting the consumer interests, though most of the times in an indirect manner. This is the result of its limited powers to take binding decisions. In case of network codes and EU-wide network plans or analysis of the consistency of these plans with the national ones, ACER can only make proposals or issue opinions to the Commission. Thus, despite the fact that the guidelines, opinions and recommendations that ACER produces may contain far-reaching measures their non-binding character might not take them further than the stage of ink on a piece of paper. On the other hand this is also not to say that ACER’s influence is to be neglected. Having analysed ACER’s role in different European regulatory procedures and the first experiences with the European procedures for the drafting of the network codes, it is to be expected that de facto ACER may have an important role in enhancing cross border trade and infrastructure investments, especially if its opinions and recommendations are readily endorsed by the Commission, ENTSOs and the NRAs. The role of ACER is gradually being extended and more powers, including at times making economic and legal choices are being assigned to it, for example through the binding comitology guidelines of the Commission. The proposal for the new infrastructure package also strengthens its position. Its role in developing of a pan-European infrastructure becomes more clear because of its involvement in the identification of the PCIs and its competence to decide on the approval of specific investments in cross-border infrastructure, including the cross-border cost allocation and the way the costs have to be reflected in transport tariffs.

But of course this is one side of the story. In many aspects and especially from a formal perspective the powers of ACER continue to be limited. Furthermore, the NRAs still enjoy significant discretion in key aspects such as setting-up transmission tariffs and ultimately deciding who pays for transport: producers or consumers or both and on which basis. When regulating transport tariffs, especially with regard to needed investments, NRAs have to balance the short-term interests of their “national consumers” and the long-term interests of all “European consumers”, who also include their own citizens. On the short-term needed investments will raise the transport costs of the citizens of the Member State involved, while on the long-term the investments may be necessary to safeguard the security of supply and competition within the EU. Without sufficient investments that can cover cross-border flows, energy markets remain nationally oriented and the energy flows throughout Europe may be curtailed, possibly reducing wholesale market liquidity and raising energy prices in the longer term. This has a negative effect on all consumer interests. Furthermore, it has to be noted that market integration does not necessarily mean that commodity prices go down in all EU Member States. Typically market integration leads to price convergence across the Member States. This means that prices may increase in countries with cheap energy production. Consumers in those countries will therefore pay higher energy prices, and loose consumer surplus. On the other hand consumers in high price countries may benefit from international trade flows and consequently from lower prices. Therefore, when NRAs are deciding on investment plans and the recovery of investment costs, they have to take a broad and long term perspective on the necessity of (cross-border) infrastructure investments and the impact on the affordability of energy prices. A trade-off has to be made between the interest of affordable energy prices on the short term, their affordability on the
long term and the costs of security of supply. The result of this trade-off will depend, on the
development of the energy markets in the EU, including the development of the demand for
energy, the development of cross-border flows, the improvement of energy efficiency by
consumers, the growth of local renewable energy production units and external and
geopolitical relations.

The fact that ACER’s recommendations in respect to the consistency of the national
ten year development plans with the EU-wide ones, are not binding and lack specific
enforcement mechanisms might keep NRA’s national and more short term orientation.
However, the proposal for the new infrastructure package might be seen as a first step in
harmonizing investment policies, and structuring the costs and benefit analysis of
infrastructure investments by ACER and the NRAs, despite being restricted to some crucial
areas which do not include national infrastructure projects. In the future it will have to be
assessed whether, for achieving of the objectives set in the energy field, such a harmonized
approach will have to be extended to other projects including national ones. The role that
ACER will play in this harmonization process will further develop. If it gains a status of
autonomous expert EU body, its influence and powers may well go beyond its original
limited mandate moving further also the debate regarding the status and legitimacy of
European agencies.