*European Journal of Risk Regulation* (2024), **15**, 827–845
doi:10.1017/err.2024.85

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

# Balancing Power: The Impact of Legal Review on Harmonising the European Electricity Market

Leigh Hancher[1] and Julius Rumpf[2,3]

[1]Tilburg University, Tilburg, Netherland, [2]Department for Energy and Natural Resources Law, University of Oslo, Scandinavian Institute of Maritime Law, Oslo, Norway and [3]Fridtjof Nansen Institute, Lysaker, Norway

**Corresponding author:** Julius Rumpf; Email: julius.rumpf@jus.uio.no

## Abstract

European electricity regulation has evolved to include a novel category of binding sectoral rules known as terms, conditions, and methodologies (TCMs). These are created within a regulatory framework outlined in delegated Commission regulations by private electricity firms and approved by technocratic agencies, most notably the EU Agency for the Cooperation of Energy Regulators (ACER). Despite their technical nature, TCMs have significant economic impact. This prompts frequent appeals of ACER's TCM decisions, questioning ACER's role and the overall institutional equilibrium of the TCM procedure. ACER's TCM decisions are subject to dual-level legal review – internal by ACER's Board of Appeal and external by European Courts. This paper uses two case studies to examine how dual-level legal review impacts the institutional balance of the TCM procedure. We find that the two levels of review engage poorly, so that contrary to expectations, legal review creates uncertainty rather than clarity, allowing for considerable pragmatism. These findings show the importance of considering legal review when studying sectoral governance. Policy implications are also significant, as the identified issues inhibit innovation and problem-solving, the raison d'etre of the TCMs.

**Keywords:** Electricity regulation; ACER; legal review; European network codes and guidelines; terms, conditions and methodologies; EU law

## I. Introduction

The Energy Union aims to create a cohesive internal energy market (IEM) by transitioning electricity and gas markets from national to regional and, ultimately, European harmonised systems. This paper focuses on a unique category of legally binding, delegated rules – known as terms, conditions, and methodologies (TCMs) – that has redefined EU electricity network regulation in recent years.[1] Notably, the development of TCMs largely occurs in the implementation phase within a co-regulation framework.[2] These TCMs are developed by a specific group of private actors[3] and adopted by specialised

[1] Art 9 of Commission Regulation (EU) 2015/1222 of 24 July 2015 Establishing a Guideline on Capacity Allocation and Congestion Management OJ L197/24 (hereafter CACM-GL) is titled "*Adoption of terms and conditions or methodologies*."

[2] See also Torbjørg Jevnaker and others, "De Facto Rule-Making Below the Level of Implementing Acts: Double-Delegated Rule-Making in European Union Electricity Market Regulation" [2024] European Journal of Risk Regulation 1, in this issue

[3] These are transmission system operators (TSOs) and nominated electricity market operators (NEMOs). TCMs developed by NEMOs raise identical issues but remain outside the scope of this paper.

regulators, including the European Agency for the Cooperation of Energy Regulators (ACER).[4] This "TCM procedure" is not straightforward. It involves multiple rounds of formal negotiations to achieve consensus on complex issues. If consensus cannot be attained, the decision is referred to ACER. At the same time, ACER's role is influenced by legal review, as its TCM decisions are subject to two iterative tiers of administrative and legal review: internally to ACER's own Board of Appeal (BoA), and externally to the European Courts.[5]

This paper is grounded in legal theory; however, we find that the perspective of experimentalist governance reverberates exceptionally well with our observations of the legal procedure for adopting TCMs. While we thus do not aim to engage in a theoretical discussion of experimentalist governance, this line of scholarship helps illustrate the legal argument we make in this paper. In particular, the design of the TCM process allows for experimentation and diversity, so that its outcome is not always predictable. Such uncertainty has been recognised in the literature as an opportunity for learning.[6] However, it also enhances the discretion of actors that work against harmonisation.[7] In principle, legal review would delimit such discretion and ensure that the TCM procedure runs its course according to the parameters defined in the legal framework. However, in practice, the TCM process evolves through political but, importantly, also legal contestation. Whereas the involved actors and their respective roles in the TCM procedure are set out in EU legislation, the true extent of their powers (and duties) is ultimately determined through legal review. Yet the impact of legal review on the TCM procedure is still under-researched. In this article, we aim to fill this research gap and explore how legal review shapes the regulatory process for the ongoing development of TCMs.

Building on two case studies, our study focuses on two questions. First, how does internal and external review affect the balance of power in the TCM adoption process? Second, does legal review ensure that the TCM procedure properly reflects the institutional balance posited in EU legislation? We arrive at a surprising conclusion: instead of providing clarity and legal certainty, legal review of TCMs generates uncertainty among the involved actors. In contrast to the "constructive uncertainty" discussed in the literature, the uncertainty surrounding the TCM procedure results in a power struggle, which uses resources that could otherwise be used for iterative improvement. This kind of uncertainty is clearly not constructive or desirable. We identify the following three main issues with regard to legal review in the TCM context:

(1) **Opposition rather than complementarity** Internal review bolsters ACER's hierarchical authority, while external review constrains it. However, the rapid development of new TCMs often outpaces the impact of external review, curbing the latter's effectiveness.

[4] The Agency was established in 2011 as an independent body to foster the integration and completion of the EU's internal energy market for electricity and natural gas. The current legal base for ACER is Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 Establishing a European Union Agency for the Cooperation of Energy Regulators (Recast) [2019] OJ L158/22 (ACERReg-2019). ON EU agencies in general, see Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press 2016); David Levi-Faur, "Regulatory Networks and Regulatory Agencification: Towards a Single European Regulatory Space" (2011) 18 Journal of European Public Policy 810; Stefan Griller and Andreas Orator, "Everything under Control? The 'Way Forward' for European Agencies in the Footsteps of the Meroni Doctrine" (2010) 35 European Law Review 3.

[5] See also Jevnaker and others (n 2).

[6] Charles F Sabel and Jonathan Zeitlin, "Learning from Difference: The New Architecture of Experimentalist Governance in the EU" (2008) 14 European Law Journal 271, 278.

[7] See Torbjørg Jevnaker and others, "Stocktaking of the Adopted TCMs—Towards Harmonization or Diversity?" (Fridtjof Nansen Institute 2022) INC Research Brief #3 <https://www.fni.no/publications/stocktaking-of-the-adopted-tcms-towards-harmonization-or-diversity> (last accessed 7 October 2024).

(2) **Incongruent expertise** European courts typically focus on procedural aspects and defer to ACER's assessment (as well as its BoA) on complex technical matters, further reducing the impact of external review.
(3) **Feedback loop** Due the lack of suspensory effect of external review, the negotiation of new or amended TCMs may be affected by contested, but still legally effective TCMs. These effects detract from problem-solving and curb innovation – an undesirable outcome in a procedure aimed at swiftly addressing challenges to the EU's supply with electricity. This underscores the need to pay more attention to legal review in delegated policymaking.

Our discussion proceeds as follows. In section II, we first describe the theoretical embedding of this article. Section III introduces TCMs as a regulatory instrument, including the institutional framework and the evolving role of the respective parties in their adoption. In section IV, we examine the role of ACER's BoA and the process of legal contestation through internal review, with a particular focus on the alleged "bottom-up" nature of the TCM adoption process. In section V, we then turn to the external review by the European courts. Our two case studies highlight various issues that curb the effectiveness of litigation against ACER-adopted TCMs. In section VI, we conclude that the poor engagement of the two levels of legal review currently contributes to widespread contestation and an excessive fluidity of the TCM process, curbing its problem-solving capacities. Subject to further study of the emerging European jurisprudence on TCMs, a re-appraisal of the pertinent legislation may be required to provide a stable institutional framework while allowing for much-needed experimentation in EU electricity regulation.

## II. Theoretical embedding

This paper is grounded in legal theory[8] and studies the effects of legal review on the specialised procedure for adopting TCMs. Despite their highly interesting and novel features, TCMs as an essential part of the widening body of EU electricity regulation remain understudied in legal literature, however they have recently garnered attention within experimentalist governance scholarship.[9] The perspective of experimentalist governance reverberates exceptionally well with our observations of the legal procedure for adopting TCMs and helps illustrate the legal argument we make in this paper. It is thus useful to reflect – on a high level – on the conceptual foundations of experimentalist governance.[10]

Experimentalist governance emphasizes deliberation, learning and alternative pathways to overcome shortcomings of hierarchical top-down policies.[11] This is achieved through governance techniques centred on an iterative governance cycle with built-in revision mechanisms, giving the involved actors leeway to share and negotiate

[8] Legal theory is the systematic study and analysis of law aimed at understanding, explaining, and critically evaluating legal systems, legal reasoning, and legal institutions. For encompassing discussions of legal theory, consult Jan M Smits, *The Mind and Method of the Legal Academic* (Edward Elgar 2012); Rob van Gestel, Hans-Wolfgang Micklitz and Miguel Poiares Maduro, "Methodology in the New Legal World" (2012) No. 2012/13 EUI Working Papers; Herbert Lionel Adolphus Hart, *The Concept of Law* (Clarendon Press 1961).

[9] Jonathan Zeitlin and Bernardo Rangoni, "EU Regulation between Uniformity, Differentiation, and Experimentalism: Electricity and Banking Compared" (2023) 24 European Union Politics 121, 129; Bernardo Rangoni and Jonathan Zeitlin, "Is Experimentalist Governance Self-Limiting or Self-Reinforcing? Strategic Uncertainty and Recursive Rulemaking in European Union Electricity Regulation" (2021) 15 Regulation & Governance 822, 832–833.

[10] Note that a theoretical discussion of experimentalist governance is outside the scope of this legal paper. However, we believe that our findings may be valuable for scholars of experimentalist governance.

[11] Riina Antikainen, Katriina Alhola and Tiina Jääskeläinen, "Experiments as a Means towards Sustainable Societies – Lessons Learnt and Future Outlooks from a Finnish Perspective" (2017) 169 Journal of Cleaner Production 216; Sandra Eckert and Tanja A Börzel, "Experimentalist Governance: An Introduction" (2012) 6 Regulation & Governance 371.

appropriate solutions, while learning from comparing their individual implementation experience.[12] Experimentation is believed to improve problem-solving.[13] However, it is recognised that the effectiveness of experimentalist governance may still depend on hierarchical intervention,[14] also described as a 'shadow of hierarchy'[15] or a 'penalty default'[16]. Both notions refer, for example, to a central authority taking over in case negotiations stall or fail, to incentivise the involved actors to conduct effective negotiations and exchange the required information.[17]

This approach fits well with the process for the development of TCMs, which is highly experimental for several reasons.[18] First, its very architecture is experimental and, at the outset, non-hierarchical.[19] It is a unique legal and institutional framework that involves extensive delegation of powers and a wide deference to the specialized knowledge and experience of the regulated parties – the Transmission System Operators (hereafter: TSOs).[20] Second, TCMs frequently represent leaps in technical innovation, concerning e.g. the development of a new flow-based approach to calculating network capacity.[21] Such unprecedented endeavours require the involved actors to come up with experimental solutions. Third, the TCMs themselves are continually improved through amendments when factual circumstances change, however usually at the discretion of the involved actors.[22] Fourth, and most importantly for our study, the outcome of legal review redefines the meaning and scope of the legal framework for TCMs, rendering this framework itself experimental.

Legal contestation thus provides an important impulse to the iterative cycle of the TCM process.[23] This raises interesting questions from an experimentalist governance perspective, most importantly how legal review engages with the experimentalist governance cycle. Yet the function and impact of legal review on the process of experimental governance appears to be neglected in existing studies. Rangoni refers to existing studies that name the threat of intervention by courts as part of the shadow of hierarchy.[24] However, these studies do not seem to discuss the conditions for and effects of legal review beyond this high-level statement. Moreover, the effect of an additional stage of internal legal review before the BoA has not been discussed yet in the context of experimentalist governance, perhaps given its relative novelty.

[12] Rangoni and Zeitlin (n 9) 822; Charles F Sabel and Jonathan Zeitlin, "Experimentalism in the EU : Common Ground and Persistent Differences" (2012) 6 Regulation & Governance 410, 412.

[13] Kanerva Sunila and Ari Ekroos, "Regulating Radical Innovations in the EU Electricity Markets: Time for a Robust Sandbox" (2023) 41 Journal of Energy & Natural Resources Law 5.

[14] Sandra Lavenex, "The UN Global Compacts on Migration and Refugees: A Case for Experimentalist Governance?" (2020) 26 Global Governance: A Review of Multilateralism and International Organizations 673, 690.

[15] Tanja Börzel, "European Governance: Negotiation and Competition in the Shadow of Hierarchy" (2010) 48 JCMS: Journal of Common Market Studies 191; Adrienne Héritier and Sandra Eckert, "New Modes of Governance in the Shadow of Hierarchy: Self-Regulation by Industry in Europe" (2008) 28 Journal of Public Policy 113.

[16] Charles F Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford University Press 2012) 14.

[17] Bernardo Rangoni, "Experimentalist Governance" in Christopher K Ansell and Jacob Torfing (eds), *Handbook on Theories of Governance* (Second edition, Edward Elgar Publishing 2022) 599.

[18] Likewise: Rangoni and Zeitlin (n 9) 830–832.

[19] Ibid 822.

[20] See also Jevnaker and others (n 2).

[21] Art 20 CACM-GL.

[22] The most far-reaching amendment endeavour to date concerns ACER's proposal to amend several of the GLs to create a "CACM Regulation 2.0." The process has currently stalled following a consultation by the Commission; see European Commission, "Consultation on the revision of the Capacity Allocation and Congestion Management Regulation" <https://energy.ec.europa.eu/consultations/consultation-revision-capacity-allocation-and-congestion-management-regulation_en> (last accessed 7 October 2024). One point of discussion amongst stakeholders concerns proposed changes to the Market Coupling Operation (MCO) governance, in order to make it more efficient.

[23] Other drivers include political contestation or changes in the factual situation.

[24] Rangoni (n 17) 598.

The TCMs procedure provides a particularly interesting opportunity to close this research gap. Unlike similar regulatory frameworks, the TCM procedure experiences extensive legal contestation, as evidenced by numerous appeals and our case studies. Broad contestation has so far been considered to inhibit the emergence and functioning of experimentalist governance models.[25] Nevertheless, in the specific setting of EU electricity regulation, the TCM procedure has emerged despite widespread contestation. Given that information asymmetry makes hierarchical modes of governance appear unfeasible in electricity, experimentalism appears as a favourable approach to addressing the increasingly complex challenges electricity regulation faces today. However, the TCM procedure is not a free-for-all: checks and balances are required to ensure that experimentation occurs according to the principles of EU law. Here, legal review comes into play.

Legal review leads to authoritative court decisions that ensure legal consistency and clarity, contributing to the iterative learning and problem-solving central to experimentalist governance. The TCM process is particularly noteworthy due to its two levels of legal review, each with distinct scopes and purposes. Given the technical complexity of TCMs, external court reviews are inherently limited, necessitating an additional internal review for expertise.[26] This raises the question what we can expect theoretically from the interaction between internal and external review. Ideally, specialised internal review should mitigate the complexities, enabling legal review to fulfil its clarifying function. Yet as our case studies illustrate, the two forms of review do not seamlessly engage within the TCM context. External review often overturns the legal conclusions of the internal reviewers, but usually defers to their technical expertise. Meanwhile, the long duration of legal proceedings and a lack of suspensory effect expose the involved actors to prolonged uncertainty as how to position themselves. Thus, instead of acting as a clarifier, legal review becomes an additional arena for contestation, impeding the capacity of the TCM procedure for iterative problem-solving. These issues are explained further in the following sections.

## III. TCM Adoption beneath an evolving European shadow of hierarchy?

We use the metaphor of the "shadow of hierarchy" to illustrate the current state of European electricity governance. This image helps explain that sectoral regulation often defies simple categorization: formal "top-down" or "command and control" regulation – or its threat – may be required if "softer" forms of regulation (self-regulation, co-regulation, or "bottom-up" coordination by private actors) are likely to fail.[27] In this sense, the TCM procedure is subject to a European shadow of hierarchy.

The technical complexity of the TCMs renders authorities such as the Commission unable to unilaterally develop functioning, harmonised rules.[28] The TCM process therefore involves ongoing negotiation among national TSOs and is often described as bottom-up. However, since the TSOs negotiate under the aegis of national regulatory authorities (NRAs) who remain formally responsible for adopting the TCMs,[29] the TCM procedure

[25] Gráinne De Búrca, Robert O Keohane and Charles Sabel, "Global Experimentalist Governance" (2014) 44 British Journal of Political Science 477, 484; Burkard Eberlein, "Experimentalist Governance in the Energy Sector" in Charles Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford University Press 2010).

[26] Case C-46/21 P *ACER v Aquind* [2023] ECLI:EU:C:2023:182 [56–57].

[27] Héritier and Eckert (n 15).

[28] Rangoni (n 17) 599.

[29] The powers and duties of independent NRAs have been developed in the consecutive packages of IEM legislation. See further Leigh Hancher and Francesco Maria Salerno, 'Energy Policy after Lisbon' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (Oxford University Press 2012).

constitutes co-regulation rather than pure TSO self-regulation.[30] Furthermore, the development of TCMs occurs under the "European-wide shadow of hierarchy" cast by ACER.[31] When NRAs fail to co-operate to agree on a TCM, ACER intervenes. Due to conflicting interests, consensus is often hard to achieve, and ACER-adopted TCMs represent a considerable share of all TCMs – giving the Agency a deeper hierarchical shadow than it would seem from the terms of the legal framework alone.[32]

This leads us to another layer of the shadow of hierarchy and the core topic of this article. As noted by Bellenghi and Vos, regulatory agencies like ACER operate under a constitutional shadow of hierarchy when adopting binding executive acts, such as TCMs.[33] Legal review ensures they do not exceed their delegated powers. Dissenting NRAs and TSOs often use legal review to challenge the limits of ACER's powers at both internal and external levels of review. While ACER is thus not the only EU agency subject to dual-level review, it faces particularly frequent contestation.[34] At the same time, the outcome of legal contestation is essentially unpredictable, so that the intensity of the shadow of hierarchy, particularly ACER's role, can vary. This raises the question of whether internal administrative review and external judicial review enable a pragmatic and non-hierarchical process for TCM adoption to thrive in the long term.

## *1. The legal status and role of TCMs within the regulatory framework for electricity*

As with many legal frameworks creating harmonised markets, a basic legislative act – here the Electricity Regulation[35] – envisages that the Commission can adopt further delegated measures to foster a higher degree of regulatory harmonisation.[36] In the IEM legislation, the Commission may adopt directly applicable, delegated or implementing Commission regulations: the network codes or guidelines (hereafter: GLs).[37] These Commission regulations form a third level of electricity legislation, below the primary law of the Treaties and the secondary law acts of the packages. Here, we are mainly interested in the GLs, because they take delegation a step further by establishing an intricate and iterative process for the drafting and adoption of a fourth level of delegated rules: the TCMs (see Figure 1 below). Over the last decade, European energy regulation has been characterised by the adoption of several hundred TCMs to further European energy policy aims in the electricity sector. The geographical ambit of TCMs can vary between European, regional or national TCMs. The Commission is not involved in the development of TCMs, which is

[30] Julius Rumpf and Catherine Banet, "Energy Law" in Miroslava Scholten (ed), *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing 2023) 373–375.

[31] See Rangoni (n 17) 592; Sandra Eckert and Burkard Eberlein, "Private Authority in Tackling Cross-Border Issues. The Hidden Path of Integrating European Energy Markets" (2020) 42 Journal of European Integration 59; Martijn LP Groenleer, "Redundancy in Multilevel Energy Governance: Why (and When) Regulatory Overlap Can Be Valuable" [2016] TARN Working Paper 06/2016 <https://papers.ssrn.com/abstract=2865683> (last accessed 7 October 2024).

[32] NRAs failed to agree on more than half of the EU-wide TCMs that they had to unanimously approve pursuant to the CACM-GL and on many regional TCMs. See also Jevnaker and others (n 2).

[33] Guido Bellenghi and Ellen Vos, "Rethinking the Constitutional Architecture of EU Executive Rulemaking: Treaty Change and Enhanced Democracy" [2024] European Journal of Risk Regulation 1.

[34] Note that a fully-fledged comparison of the review processes before different EU agencies is beyond the scope of this article. For further discussion, consult Merijn Chamon, Annalisa Volpato and Mariolina Eliantonio (eds), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press 2022).

[35] Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the Internal Market for Electricity [2019] OJ L158/54 (ElReg-2019).

[36] Art 58(2)(a) ElReg-2019. See also recital (21) of the ACERReg-2019 and recital (3) of the CACM-GL.

[37] Network codes are adopted according to Art. 58 ElReg-2019, while guidelines are adopted pursuant to Art. 61 ElReg-2019. See further Leigh Hancher, Anne-Marie Kehoe and Julius Rumpf, 'The EU Electricity Network Codes and Guidelines: A Legal Perspective (Second Edition)'. <https://cadmus.eui.eu/handle/1814/69718> (last accessed 7 October 2024).

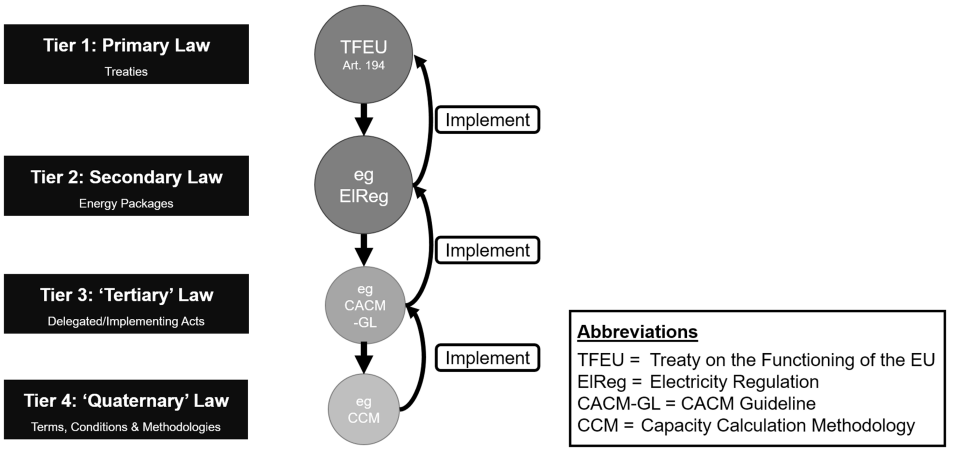


**Figure 1.** Role of the TCMs within the Electricity Regulatory Framework.[39]

instead entrusted to private actors, national energy regulatory authorities (hereafter: NRAs, for national regulatory authorities) and, in the case of European-wide TCMs, to ACER.[38]

The typical content of a TCM consists in detailed rights and obligations for TSOs to secure the optimisation of electricity network capacity for cross-border trade. The GL on Capacity Calculation and Congestion Management (CACM Guideline) – described by the TSOs as "the cornerstone of the IEM" – is a good example. It sets out the methods for calculating how much transmission capacity market participants can use on cross border lines without endangering system security and how to deal with congestion in the electricity grids.[40] The CACM Guideline further provides for the adoption of a series of TCMs to deal with real-time market and operational issues and is thus a part of the framework for the detailed regulation of a volatile and dynamic environment. Although the terms of individual TCMs are thus highly technical, they may also reflect normative and policy choices.[41] Furthermore there is a strong functional interdependency within and between TCMs, which have a Russian doll-like, nested structure. TCMs of different ambits often interlink to form a larger framework. For example, a European TCM – such as the "Common Grid Code" to be developed in accordance with the 2017 GL on system operation may leave further operational details to be developed in regional and in national TCMs.

## 2. *The TCM adoption process – bottom-up co-ordination*

As a result of four successive packages of EU internal energy market legislation, the status and duties of TSOs has evolved.[42] TSOs are now independent entities that provide grid access to users on a non-discriminatory and transparent basis. Initially pan-European

[38] See also Jevnaker and others (n 2); Julius Rumpf, "Quaternary Law in EU Electricity Regulation: Stretching *Meroni* Too Far?" (2024) 33 European Energy and Environmental Law Review 2.

[39] Based on Julius Rumpf, "Network Codes and Cross-Border Interconnectors: Analysing the Legal Framework for Achieving the Aims of European Electricity Market Integration" (University of Oslo 2024) fig 1.

[40] For an encompassing introduction, refer to Leonardo Meeus, *The Evolution of Electricity Markets in Europe* (Edward Elgar Publishing 2020).

[41] Rumpf (n 38).

[42] Rumpf (n 39) 41–47.

TCMs were adopted unanimously by "all NRAs."[43] Under the new ACER Reg-2019, and for efficiency reasons, ACER now replaces "all NRAs" in the TCM adoption process.[44] ACER was established in March 2011 as an independent body to foster the integration and completion of the EU's internal energy market for electricity and natural gas.[45] ACER is often described as a network agency given that its primary task is to co-ordinate the currently 27 NRAs.[46] Its powers with respect to the adoption of network codes and guidelines as well as TCMs have been modified and expanded by the Recast ACER Regulation of 2019.[47] ACER must adopt its decision within 6 months of receipt of the TSOs' proposal.[48]

Although the delegation of decision-making power to an Agency is not unusual, ACER is unique. It is the only EU agency that is empowered to develop and decide upon legally binding standards in the form of TCMs "below comitology level."[49] ACER may adopt decisions that address one or several TSOs, so that TCMs may potentially impact every TSO in the Union. Nevertheless, as these addressees may have diverging interests either at regional or at European level, some, if not all may well be inclined to appeal to the BoA and eventually to the EU Courts.[50] Thus the potential for legal contestation is an important dimension in the development of TCMs.

Furthermore, NRAs remain directly involved in adopting "regional" TCMs. The relevant guidelines divide the territory of the European Union into 8 capacity calculation regions (CCRs) of varying sizes, the largest being the so-called "Core region."[51] Where the regional NRAs remain primarily responsible for the adoption of TCMs affecting their own territories they must do so unanimously and by a prescribed deadline, and in cases of disagreement the regional NRAs lose competence as the decision is escalated up to ACER.[52] Whereas the BoA describes the corresponding process as "bottom-up" initiated by private actors, we observe that it is in fact subject to a strong shadow of hierarchy, forcing these NRAs to reach compromises to avoid losing competence to ACER.

[43] According to Art 57(4) of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on Common Rules for the Internal Market for Electricity (Recast), NRAs must be independent from both industry interests and government. For a recent discussion by the ECJ, see Case C-718/18 *Commission v Germany* [2021] EU:C:2021:662.

[44] Art 5(2) ACERReg-2019.

[45] Art 1 ACERReg-2019.

[46] See further Carlo Tovo, "The Boards of Appeal of Networked Services Agencies: Specialized Arbitrators of Transnational Regulatory Conflicts?" in Merijn Chamon, Annalisa Volpato and Mariolina Eliantonio (eds), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press 2022).

[47] C.f. on this point also Case T-631/19 *BNetzA v ACER* [2022] ECLI:EU:T:2022:509.

[48] Art 6 ACERReg-2019.

[49] Other EU agencies, such as ESMA, ERA, EASA and CVPO only *apply* existing standards to individual cases or *propose* new standards to be adopted by the Commission. See further, Rumpf (n 38); Eva Ruffing, Selma Schwensen Lindgren and Torbjørg Jevnaker, "Electricity in Perspective—Comparing the TCM Procedure with Other Sectors" (Fridtjof Nansen Institute 2022) INC Research Brief #2 <https://www.fni.no/publications/electricity-in-perspective-comparing-the-tcm-procedure-with-other-sectors> (last accessed 7 October 2024).

[50] For an example, see the discussion of the European TCM determining capacity calculation regions (CCRs) at section V.1 below This example is also discussed by Jevnaker and others (n 2). For another example, see the different Member States' interests affected by the capacity calculation methodology (CCM) for the Core CCR have resulted in both Germany – in its capacity as a Member State – and the German NRA appealing ACER's decision on the Core CCM to the GC, Case T-631/19 *BNetzA v ACER* [2022] ECLI:EU:T:2022:509.; Case T-283/19 *Germany v ACER* (pending).

[51] CCRs are defined as "*the geographic area in which coordinated capacity calculation is applied*" in Art 2(3) CACM-GL. The Core CCR covers central Europe, as defined in Art 5 of Annex III to ACER Decision 08/2023 of 31 March 2023 on the Amendment to the Determination of Capacity Calculation Regions.

[52] See Art 5(3), 6(10) ACER Reg-2019.

**Table 1.** Stages of the TCM adoption process.

| Stage | Description |
|---|---|
| 1 | TSOs negotiate among themselves to come up with a draft by a deadline specified for each TCM in the relevant GL. |
| 2 | NRAs have 6 months to negotiate informally among themselves to revise/adopt the TCM; the adopted TCMs are binding on the individual TSOs. |
| 3 | ACER may become involved as the 'official regulator or arbitrator' if this process fails and TSOs are unable to propose, or NRAs are unable to adopt the TCM in question within the requisite time limits. |
| 4 | ACER must then follow the prescribed procedures and find a position that is backed by a two-thirds majority in its Board of Regulators within 6 more months. |
| 5 | As TCM adoption is frequently an iterative process, the adoption of a particular TCM may set the terms to be developed in a subsequent TCM (feedback loop).[54] |

## 3. Procedures for escalation

The following Table 1 highlights the stages of the process for the adoption of all cross border TCMs prior to 2019 and for regional TCMs thereafter. Table 1 focuses on "escalated" TCMs, where competence passes from the NRAs to ACER. In the case of pan-European TCMs, steps 2 and 3 do not apply since ACER is competent from the start.[53] Note that all TCMs adopted by ACER are subject to the same procedure of internal and external review.

In conclusion, the extent of ACER's powers of revision of the TCM proposals in Step 3 may be disputed by both the TSOs and the NRAs involved. Decisions by ACER are, at least initially, not "top down" but build on negotiation at the first stages (Step 1 and 2) and may represent a compromise among the European NRAs as represented in ACER's Board of Regulators (step 4).

As noted above, ACER's formal or substantive powers to adopt a decision on a TCM are delineated by the specific conditions provided in the GL and by the general principles on the delegation of powers to agencies, as developed by the European courts in the "*Meroni*" doctrine and related case law.[55] Moreover, in designing each GL, the Commission may not

[53] According to Art 5(2)(b) ACERReg-2019, ACER is directly competent to decide on TCMs covering the entire EU and based in GLs adopted before 4 July 2019.

[54] See for example, ACER Decision 30/2020 of 30 November 2020 on the Core CCR TSO's Proposal for the Methodology for Cost Sharing of Redispatching and Countertrading. This TCM overlaps significantly with the earlier ACER Decision 02/2019 of 21 February 2019 on the Day-Ahead and Intraday Capacity Calculation Methodologies in the Core Region. ACER based Decision 30/2020 on the premises established in Decision 02/2019 even though some of the TSOs of the Core CCR had appealed the earlier decision, c.f. BoA Decision A-001-2019 (consolidated) of 11 July 2019. Also in 2019 and in accordance with Commission Regulation (EU) 2017/2195 of 23 November 2017 Establishing a Guideline on Electricity Balancing [2017] OJ L312/6, ACER adopted a series of decisions on balancing platforms for frequency restoration and it went on to adopt further legislation in 2022 amending the earlier decisions, even although its initial decision was under challenged before the GC and the ECJ. <https://www.acer.europa.eu/sites/default/files/documents/Individual%20Decisions/ACER%20Decision%2013-2020%20on%20Implementation%20framework%20for%20imbalance%20netting_0.pdf> (last accessed 7 October 2024).

[55] The labeling of ACER's decisions as "individual decisions" is inspired by a strict approach to the powers which may be delegated to an EU Agency under the *Meroni* doctrine (also called non-delegation doctrine) developed by the ECJ *inter alia* in Case 9/56 *Meroni & Co, Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* [1958] ECR 11 and Case C-270/12 *United Kingdom v Parliament and Council* (2014) ECLI:EU:C:2014:18 (*ESMA*). For a discussion of the *Meroni* doctrine in the context of the adoption of TCMs, see Rumpf (n 38). See also Carlo Tovo, 'Delegation of Legislative Powers in the EU: How EU Institutions Have Eluded the Lisbon Reform' (2017) 42 European Law Review 677 and generally Takis Tridimas, "Financial Supervision and Agency Power:

go beyond the terms of delegation and amend or supplement essential elements of the enabling legislative act (in the case of delegated acts), or even non-essential elements (in the case of implementing acts), as the ECJ recently reiterated.[56].

ACER has however maintained that its powers to adopt decisions on TCMs are directly conferred to it by the EU legislature through Articles 5(3) and 6(10) of the ACER Regulation, so that the scope of its powers is not directly delineated by the GL in question. The content and scope of ACER's final decision on a TCM can and indeed has been tested before the BoA,[57] as well as the European courts. The GC, without commenting on the scope of the GL at issue, has recently confirmed that

> *ACER has been granted, inter alia, regulatory functions and decision-making powers of its own, which it exercises independently and under its own responsibility, in order to be able to deputise for the NRAs when their voluntary cooperation does not allow them to take individual decisions on particular issues falling within their regulatory competence.*[58]

In this context, the GC considers that the NRAs' "*central role*" is maintained since ACER's decisions require a favourable two-thirds majority in the Agency's Board of Regulators.[59] It will be up to the ECJ to shed further light on this matter in pending cases in which the scope of the GL is central.[60]

## IV. Internal review before ACER's Board of Appeal

ACER-adopted TCMs are subject to two levels of internal and external legal review. Both levels of review interact to shape the dynamic regulatory space in which TCMs are developed, however the scope of review and the possible outcomes of the respective review procedures differ considerably. Therefore, it is important to regard internal and external review as two related, but different procedures. We now explain the impact of the first level of internal review before ACER's BoA on the regulatory space in which TCMs are developed and implemented. The BoA acts as a strategic "gatekeeper" insofar as the internal appeal procedure is a mandatory first stop, before recourse to the European courts becomes available.[61] Only the BoA's decision – and not ACER's original decision – may be further submitted to external review before the European Courts.[62] The BoA must conduct a full review of the decision, including its legality as well as any underlying technical and economic assessments.[63] In turn, the Courts only review whether the BoA's reasoning is in line with the legal framework or otherwise vitiated by manifest errors. In the past, internal review has

Reflections on ESMA" in Niamh Nic Shuibhne and Laurence W Gormley (eds), *From Single Market to Economic Union* (Oxford University Press 2012). We note in passing that the Meroni doctrine is also considered to be outdated and does not reflect the reality of how European agencies function at present. For a further discussion, see the recent opinion of AG Cápeta in Case C-551/22 P *Commission v SRB* C:2023:846.

[56] On delegated acts, see Case T-684/19 *MEKH v ACER* [2022] ECLI:EU:T:2022:138. On implementing acts, see Case C-695/20 *Fenix International* [2023] ECLI:EU:C:2023:127.

[57] See, for example BoA Decisions A-002-2022 and A-003-2022, both of 9 December 2022.

[58] Quote from para 48 of the judgments in Case T-606/20 *Austrian Power Grid and Others v ACER* [2023] ECLI:EU:T:2023:64 and Case T-607/20 *Austrian Power Grid and Others v ACER* [2023] ECLI:EU:T:2023:65.

[59] Ibid para 52.

[60] See for example Case C-281/23 P *Polskie Sieci Elektroenergetyczne and Others v ACER* (pending).

[61] Art 29 ACERReg-2019. For recent case law, see *BNetzA v ACER* (n 50).

[62] *BNetzA v ACER* (n 50) para 27; Case T-735/18 *Aquind v ACER* [2020] ECLI:EU:T:2020:542 para 31.

[63] AG Campos Sanchez-Bordona stressed the hybrid nature of these boards in his opinion in Case C-46/21 P *ACER v Aquind* [2022] ECLI:EU:C:2022:695 paras 40-41:"*They are administrative review bodies, internal to the agencies, which enjoy a degree of independence. They are not judicial in nature, although they perform quasi-judicial functions through adversarial proceedings.*"

frequently legitimised attempts by ACER to extend its own mandate, whereas external review has curbed such attempts, as our case studies in the following section V illustrate.

### 1. Standing to challenge and procedural rules

ACER's BoA describes itself as "*a constituent part of the Agency and its governance system [that] operates independently of the Agency when reviewing Agency decisions.*"[64] The BoA shares a similar organizational structure with several other boards of appeal within the European agencies.[65] It is composed of six members elected for five years and who must have a high degree of expertise in the energy sector.[66] The ACER Regulation prescribes the formal independence of the BoA vis-à-vis the Agency.[67] Nonetheless, the BoA is financed from ACER's budget (albeit through a separate budget line).[68] The BoA is competent to review individual decisions adopted by ACER, including decisions on TCMs.[69] Appellants must either be addressees of the contested decision, or show that it is of direct and individual concern to them. This means that both TSOs and NRAs are generally free to challenge ACER-adopted TCMs before the Agency's BoA. However, it is important to bear in mind that the BoA procedure generally has no suspensory effect unless the BoA decides otherwise.[70] Again, this is standard practice for similar boards at other EU agencies. The duration of the procedure before the BoA has recently been extended to four months.[71] However, as with most comparable internal review bodies, the competences of ACER's BoA are restricted, as it currently may not annul an appealed decision or replace it with its own. The BoA may either confirm the contested decision or remit it to ACER. The BoA considers that when remitting a decision to ACER, it may choose freely whether to provide the Agency with binding instructions.[72]

### 2. Scope and conduct of review by the Board of Appeal

The high number of decisions by ACER on TCMs has led to a rise in the number of appeals before the BoA.[73] One possible explanation for the high litigation rate before ACER's BoA when compared to the BoAs of other EU agencies is that the adoption of a TCM by ACER submits the underlying normative policy choices to qualified majority voting in the Board of Regulators. Actors – TSOs as well as NRAs – whose interests are impeded by the resulting compromise have no choice but to proceed legally to safeguard their interests. The case studies we discuss in section V seem to corroborate this assumption. Initially the BoA only checked appealed decisions by the Agency for "manifest errors," as the European Courts do

[64] Pt 2 of the Considerations in the Administrative Arrangement for Ensuring the Support by the Agency for the Cooperation of Energy Regulators for the Agency's Board of Appeal.

[65] For a detailed examination, see Chamon, Volpato and Eliantonio (n 34).

[66] See Art 25(2), 26(1) ACERReg-2019

[67] Art 26(2), 27(4) ACERReg-2019.

[68] Art 25(3) ACERReg-2019.

[69] Art 2(d) ACERReg-2019.

[70] Art 28(3) ACERReg-2019. We discuss problematic side effects of this rule in section V below.

[71] Art 28(2) ACERReg-2019.

[72] Art 28(5) ACERREg-2019. If the BoA gives no instructions, it in fact reinstates ACER's discretion, as we discuss below in section V.1.

[73] Approximately one third of ACER decisions on TCMs have been appealed; these currently make up almost three quarters of the BoA's caseload. See also Luca De Lucia, "The Boards of Appeal as Hybrid Adjudicators: On Some Shortcomings of Article 58a of the Statute of the Court of Justice of the European Union" in Merijn Chamon, Annalisa Volpato and Mariolina Eliantonio (eds), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press 2022) 188.

when scrutinizing decisions that build on complex technical and economic assessments.[74] However, the ECJ has ruled recently in the case *ACER v Aquind* that the BoA must exercise full powers of review over ACER's decisions, albeit that it has limited time and means at its disposal.[75] The "manifest error" standard only applies in the case of judicial review before the European courts.[76] The BoA therefore owes a full review of all technical, economic and legal considerations underlying the appealed decision by ACER.[77] In doing so, the BoA must consider all relevant and applicable general principles of EU law.

This latter point follows from another recent judgment by the GC in *BNetzA v ACER*.[78] In this judgment, the Court quashed the BoA's decision because it had failed to consider legislative changes that had entered into force while the Agency's decision was under review. The GC reasoned that obliging the BoA to a full legal review was the way only to avoid "*the paradoxical situation that ACER could – through the BoA [ . . . ] adopt TCMs into the legal order, which, at the time of their final adoption, are based on provisions that are no longer in force and are thus inconsistent with the new regulation in force.*"[79] While it is bound by all relevant acts of EU law, the BoA may not rule on the legality of such acts. This follows from the GC's judgment in *MEKH v ACER*, where the Court stated that '*the EU Courts alone are entitled, under the terms of Article 277 TFEU, to rule that an act of general application is unlawful*'.[80]

The European Courts have refined the BoA's role so that the BoA must perform an objective, methodologically and legally sound review of decisions that concern highly complex and contentious topics. These high demands may clash with the BoA's limited resources and the tight deadlines of the appeals procedure.

### 3. *Impact of internal review on a bottom-up process*

The BoA has frequently held that the Agency's competence is situated in a bottom-up rule making process.[81] This means that the role of the regulators – either the NRAs or ACER – is to assess whether proposals submitted by TSOs comply with the applicable regulatory framework before granting approval. As stated earlier, the BoA's notion is that the bottom-up nature of the TCM adoption process grants ACER extensive powers. It is important to understand the meaning the BoA attaches to the bottom-up nature of this process because the BoA's understanding impacts the parameters of the regulatory space for TCM adoption, tilting the institutional balance to give ACER greater influence.

First, in the BoA's view, supervision by non-market actors (by the NRAs or ACER) is required to avoid a capture of the TCM process, which begins with negotiation amongst "market" or "private" parties who develop TCM proposals based on "private interests." Second, the Board considers that the bottom-up process justifies a potentially wider competence for ACER. Somewhat paradoxically, the BoA refers to the bottom-up nature of the process to dismiss the appellant's legal arguments and interpret the "parent" GL

[74] For the energy sector, see most recently the order of the GC in Case T-212/20 *Gaz-System v ACER* [2023] T:2023:525. For a general discussion of the intensity of review in such cases and the underlying case-law, see Joana Mendes, "Discretion, Care and Public Interests in the EU Administration: Probing the Limits of Law" (2016) 53 Common Market Law Review 419.

[75] *ACER v Aquind* (n 26), confirming the GC's judgment in *Aquind v ACER* (n 62).

[76] *ACER v Aquind* (n 26) para 57; *Aquind v ACER* (n 62) para 46.

[77] *ACER v Aquind* (n 26) para 67.

[78] *BNetzA v ACER* (n 50). The case concerned ACER's Decision 02/2019 (n 54).

[79] *BNetzA v ACER* (n 50) paras 78–87. Our translation.

[80] *MEKH v ACER* (n 56) paras 50–51. The background to the case is a gas network code, which the Hungarian NRA, MEKH, considered illegal. However, MEKH had not raised this claim during the procedure before the BoA. The GC ruled that since the BoA was not empowered to judge on the validity of the network code at issue, there was no need to raise such claims of illegality before the case had reached the GC.

[81] BoA Decision A-001-2021 (consolidated) of 28 May 2021 para 807, with reference to further BoA decisions.

teleologically, legitimizing ACER's view.[82] Third, this bottom-up process is seen as informal, meaning that the parties to initial negotiations have no formal way to "finalise" their respective positions.

One particularly important issue concerned the creation of "non-papers," which the negotiating parties sometimes issue to document their positions on the TCM in question. However, it was unclear whether such non-papers bound ACER when deciding on an escalated TCM proposal. Some NRAs argued that the Agency could not diverge from the agreed points as documented in the non-paper. By contrast, ACER – and the BoA – did not attach any particular status or significance to the non-papers and considered that the Agency was free to diverge from them or pick and choose different positions at will. The GC confirmed the BoA's understanding in *BNetzA v ACER*, ruling that the NRAs' positions as documented in a non-paper were not binding for the Agency.[83] The Court argued that competence to decide on a TCM passes to the Agency as an "*indivisible whole*."[84] Moreover, ACER must be able to overturn the NRAs' compromise if it breaches EU law.[85] The GC further emphasised that the functional interdependency of the TCMs often makes it impossible to dissect a TCM and identify the points on which the NRAs had agreed.[86]

Pending further guidance from the ECJ, ACER seems to enjoy the competence to reach often pragmatic compromises in order to adopt decisions, endorsed by the required two-thirds majority within its Board of Regulators, within the required timeframe. Negotiation among the TSOs and between the involved NRAs might be important at the initial stages of the drafting of a TCM, but this process takes place in the shadow of hierarchy for both TSOs and NRAs. Where they fail to reach unanimous agreement, ACER's eventual involvement may overturn any compromises they have reached with a formal binding decision. In this light, the BoA's labelling of the TCM adoption process as "bottom-up" is disputable – the process is increasingly hierarchical.[87]

## V. The impact of external review

We observe that ACER's BoA interprets the legal framework for the creation of TCMs in a way that supports the Agency's attempts to solidify and extend its own powers to the detriment of the TSOs and even NRAs. However, the BoA's interpretation is not authoritative – this is the domain of the European courts, which provide external review of BoA decisions and binding guidance on how the legal framework delimits the powers of each actor involved in the TCM procedure.[88] Yet how do internal and external review interact in practice? As the following case studies show, the European courts frequently rein ACER in. The two levels of review thus pull in different directions. This creates legal uncertainty. Since external legal review is formally authoritative, a quick and straightforward resolution of proceedings before the European courts appears essential. However, external legal review has no suspensory effect.

Our case studies show that the interaction between both observations – the opposing effect of both levels of review, paired with the lack of suspensory effect – raises a number

[82] See the numerous references to the bottom-up nature of the TCM process in BoA Decision A-002-2020 of 16 July 2020.

[83] *BNetzA v ACER* (n 50).

[84] Ibid, para 39. Our translation.

[85] Ibid, 50; see also Case T-606/20 *Austrian Power Grid and Others v ACER* [2023] ECLI:EU:T:2023:64 [50].

[86] *BNetzA v ACER* (n 50) para 55.

[87] A related question is how the far-reaching involvement of private actors in rulemaking affects the institutional balance. For a discussion, see Eckert and Eberlein (n 31) 61, who consider that the procedures for rule-making in the electricity sector entail a "*lateral displacement of authority, from public to private actors*."

[88] Only the BoA's decision, but not the Agency's original decision, may be submitted to external control before the European Courts; see *BNetzA v ACER* (n 50) para 27; *Aquind v ACER* (n 62) para 31.

of issues. The first case study *E-Control v ACER* emphasises that a successful appeal of a BoA decision to the GC is not the end of the story: after the Court has passed judgment, it is up to the BoA to remit the contested decision back to the Agency – possibly with binding instructions. This process is time-consuming and may create additional uncertainty, especially if the BoA decides against giving ACER binding instructions.[89] At the same time, the GC's decision may be appealed further to the ECJ on legal grounds.[90] Our second case study, *Aquind v ACER*, reveals that internal and external review are not "synchronised," so that ACER decisions on TCMs may be subjected to various stages of internal and external review at the same time, further exacerbating legal uncertainty. This creates an undesirable "feedback loop" effect.

## *1.* E-Control v ACER*: the issue of "non-decisions"*

The case E-*Control v ACER* concerned a matter to be decided by "all NRAs," the initial determination of the capacity calculation regions (CCRs).[91] In this instance, only one NRA opposed the TSOs' proposal: the Austrian NRA, E-Control.[92] The reason was that the TSOs had proposed to split the unified bidding zone covering Germany, Luxemburg and Austria. This split would alleviate uncontrolled "loop flows" that took up considerable grid capacity in Eastern Europe but increase costs for electricity exchanges between Austria and Germany. Just days before the end of the deadline for the NRAs' decision, E-Control sent a solitary amendment request to the TSOs, prompting them to forego splitting the bidding zone. According to the CACM Guideline, the TSOs had two months to submit a revised proposal following such a request.[93]

ACER argued that following up on E-Control's amendment request was futile, since it was not backed by the remaining NRAs and would thus never attain the unanimity required by the CACM Guideline. ACER therefore adopted Decision 6/2016, which, in addition to defining the CCRs, introduced a new bidding zone border between Austria and Germany.[94] E-Control, together with several Austrian market participants, appealed Decision 6/2016 to the BoA, which considered ACER's course of action as justified for reasons of effectiveness and confirmed the Agency's decision (see step 1 in Figure 2).[95] The Austrian NRA successfully requested the General Court (GC) to annul the BoA's decision (see step 2 in Figure 2).[96] The GC ruled that by sidestepping E-Control's amendment request, the Agency had violated E-Control's right to request amendments, as well as the TSOs' right to produce an amended proposal for the TCM in question.[97] Most importantly, the GC clarified that ACER may not extend its own procedural competences on the adoption of TCMs for motives of effectiveness – implicitly reflecting the ECJ's *Meroni* doctrine.[98]

[89] Case T-332/17 *E-Control v ACER* [2019] ECLI:EU:T:2019:761.

[90] Art 59 of the ECJ Statute.

[91] The determination of CCRs is governed by Art 15 CACM-GL.

[92] Notably, Germany did not resist the bidding zone split, while Poland and the Czech Republic – the Member States most severely affected by the loop flows – intervened in ACER's support before the GC, see *E-Control v ACER* (n 89) para 37.

[93] Art 9(12) CACM-GL.

[94] For details, see ACER Decision 6/2016 of 17 November 2016 on the Determination of Capacity Calculation Regions.

[95] BoA Decision A-001-2017 (consolidated) of 17 March 2017 paras 79–80.

[96] See *E-Control v ACER* (n 89) para 26. Similar appeals were launched against ACER's and/or the BoA's decision by other Austrian market participants. However, these appeals did not yield additional insight.

[97] Ibid, 50–55.

[98] Ibid, 69.

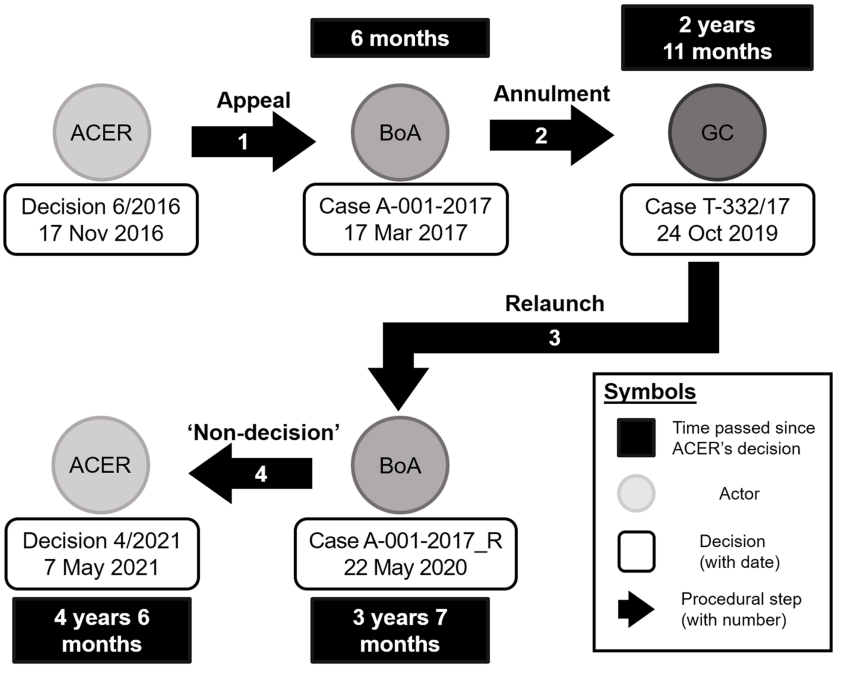


**Figure 2.** Schematic Overview over Stages and Duration of the Case E-Control v ACER.

After almost three years, the question of competence at the heart of *E-Control v ACER* had finally been resolved. However, the highly dynamic regulatory space for the development of TCMs made implementing the GC's judgment challenging. Similar to *BNetzA v ACER* – discussed above[99] – the legislative framework changed while the external review took place. In the timeframe between the BoA's first decision and the time when the BoA "relaunched" the case to implement the Court's judgment (see step 3 in Figure 2), the ACER Regulation was revised and the Agency obtained the competence to decide on pan-European TCMs instead of "all NRAs."[100] This also concerned the decision on CCRs.[101] The Agency argued that this change (retroactively) provided it with a legal basis to adopt Decision 6/2016.[102] The BoA therefore had to decide whether to apply the old or the new rules.

Relying on the case law of the European Courts, the BoA reasoned that the transfer of powers from "all NRAs" to ACER concerned the substance of the case and could thus not be applied retroactively.[103] Consequently, ACER still lacked competence to decide on the original CCR proposal.[104] Nevertheless, the BoA's conclusion remained remarkably vague:

> *[T]he competent party or parties – based on the rules of competence provided for by regulations currently in force – should review the Contested Decision and amend it, replace it or confirm it, as they see relevant, and based on current circumstances.*[105]

[99] See section IV.3.
[100] See above, section III.
[101] Art 9(6)(b) CACM-GL.
[102] BoA Decision A-001-2017_R of 22 May 2020 para 38.
[103] Ibid, paras 16, 17 and 40.
[104] Ibid, para 41.
[105] Ibid, para 49.

Under the new rules, this task fell to ACER.[106] However, the BoA did not provide the Agency with any guidance, de facto issuing a "non-decision" that fully restored ACER's discretion. The BoA's failure to restrict the Agency's discretion creates considerable legal uncertainty. Meanwhile, the original Decision 6/2016 remained in force for another year, until it was repealed by ACER Decision 4/2021 of 7 May 2021.[107] As can be seen from step 4 in Figure 2, review of ACER's contentious decision on CCRs took four and a half years. The dispute over the bidding zone configuration between Austria and Germany was resolved politically in the meantime.[108] Even if declared illegal by the GC, Decision 6/2016 was fully effective in the end.

The judgment in *E-Control v ACER* is important insofar as the GC clarified that ACER's competences are delimited by EU rules only – and not by considerations of effectiveness.[109] Yet these rules may be changed to accommodate a greater degree of pragmatism. In the aftermath of *E-Control v ACER*, the Commission amended the procedural rules for amendment requests by NRAs. These can no longer be submitted by any NRA, but only by "*all competent regulatory authorities jointly*."[110] In the accompanying public consultation, the Commission acknowledged that this change is a reaction to *E-Control v ACER*. Apparently, the Commission backs ACER's ambitions and is prepared to amend delegated legislation in order to set aside legal boundaries that it considers detrimental to the effectiveness of the TCM procedure. As we see, not only the substance of the TCMs, but also the underlying procedures are experimental in nature and may be adapted based on experience gathered during implementation.

## 2. Aquind v ACER: *a race between appellate bodies*

For our second case study, we return to the GC's judgment in *Aquind v ACER* (steps 1 and 2 in Figure 3 below).[111] The implementation of this decision revealed a remarkable feature of annulled BoA decisions: such decisions can move in several directions at once. Since an appeal of the GC's decision to the ECJ has no suspensory effect, a simultaneous relaunch of the procedure by the BoA remains possible. This can result in a "race between appellate bodies": while ACER appealed the GC's judgment in *Aquind v ACER* to the ECJ (step 3A in Figure 3 below), the Agency was aware that due to the lack of suspensory effect, the BoA could implement the GC's judgment in the meantime by relaunching the appeals procedure. The Agency disagreed with the GC's judgment and tried to stop the BoA from taking an irreversible decision based on the GC's interpretation. Therefore, ACER also sought interim relief before the ECJ, requesting the Court to suspend immediately the operation of the GC's judgment (step 3B in Figure 3).

Shortly after ACER submitted its appeal and the request for interim relief to the ECJ, the BoA relaunched the appeals procedure. In fact, the BoA concluded the relaunched procedure before the ECJ even dealt with ACER's request for interim relief (step 3C in in Figure 3). The BoA dismissed Aquind's appeal as inadmissible due to the UK's withdrawal

[106] The CACM Guideline was amended in the meantime to mirror the transfer of competence from "all NRAs" to ACER, see Commission Implementing Regulation (EU) 2021/280 [2021] OJ L62.

[107] <https://www.acer.europa.eu/sites/default/files/documents/Individual%20Decisions/ACER%20Decision%2004-2021%20on%20the%20CCR_0.pdf> (last accessed 7 October 2024).

[108] Bundesnetzagentur, "Austria and Germany: Agreement on Common Framework for Congestion Management" (15 March 2017). <https://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/EN/2017/15052017_DE_AU.html> (last accessed 7 October 2024).

[109] In particular, the GC's statement that ACER's competences must be "*clearly established in EU rules*" constitutes a plain nod to the ECJ's *Meroni* doctrine; see *E-Control v ACER* (n 89) 67–69.

[110] Art 9(12) CACM-GL.

[111] See section IV.2 above.

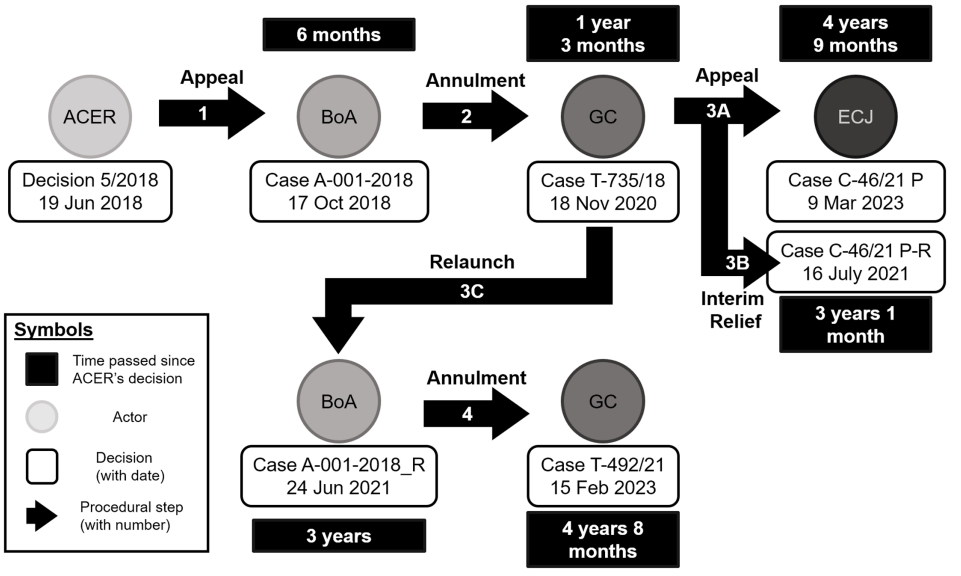


**Figure 3.** Schematic Overview over Stages and Duration of the Case Aquind v ACER.

from the EU,[112] which thwarted ACER's request for interim relief: the ECJ concluded that since the BoA had declared Aquind's appeal as inadmissible, there was no longer any reason to grant the Agency's request for interim relief.[113] It took two more years before the ECJ issued its judgment in this case and confirmed the GC's decision.[114] Aquind also requested the GC to annul the BoA's "relaunched" decision – however without success, as the GC rejected Aquind's request and confirmed the BoA's argumentation (step 4 in Figure 3).[115] This last judgment of the GC has not been appealed further to the ECJ. Thus, as in *E-Control v ACER*, the "Aquind saga" has continued for nearly five years after ACER's initial decision, which was never formally annulled. Once again, it was factual changes that occurred in the meantime – in this case, Brexit – that rendered Aquind's appeal ineffective in the view of the BoA.[116]

Review of ACER decisions, including decisions on contentious TCMs, does not follow a straight path, but rather takes place within a complex web. Due to the interplay between internal and external review, and the lack of suspensory effect, several actors may have a say on the validity and content of an appealed TCM. The functional interdependence of the TCMs makes this procedural jumble particularly problematic. Where a challenged TCM interacts with another TCM to be developed, the TSOs must continue with the development even after challenging the "root" TCM.[117] As both *E-Control v ACER* and *Aquind v ACER* demonstrate, reviewing a decision by the Agency can take considerable time. This raises the questions on which premises the TSOs and NRAs shall proceed in the meantime: their own, which ACER overruled – or the Agency's, which they may consider illegal? It is further noteworthy that in both cases, despite the successful appeals before the European

[112] BoA Decision A-001-2018_R of 4 June 2021 para 82.
[113] Order of the Vice-President of the Court of 16 July 2021 in Case C 46/21 P-R *ACER v Aquind*.
[114] *ACER v Aquind* (n 26).
[115] Case T-492/21 *Aquind and Others v ACER* [2023] ECLI:EU:T:2023:67.
[116] Note that ACER's failure to take further action following the GC's judgment in *Aquind v ACER* (n 62) is now subject to separate proceedings before the GC, registered as Case T-342/23 *Aquind v ACER* (pending).
[117] See the examples in n 54 above.

courts, ACER's decision remained fully effective due to changes of the factual circumstances during the appeals procedures.

## VI. Conclusion: TCMs – a bottom-up process in constant flux

This legal article enhances our understanding of EU governance in a vital policy area, i.e. the supply of electrical energy across the EU. We address legal review as a crucial, yet often overlooked element of governance. Our study focuses on the impact of legal review in the specific context of the TCM procedure, discussing two illustrative case studies. This yields a surprising conclusion: instead of providing clarity and legal certainty, legal review of TCMs generates uncertainty among the involved actors because the two levels of review mesh poorly in three regards.

(1) **Opposition rather than complementarity** Internal review bolsters ACER's hierarchical authority, while external review constrains it. However, the rapid development of new TCMs often outpaces the impact of external review, curbing the latter's effectiveness.
(2) **Incongruent expertise** European courts typically focus on procedural aspects and defer to ACER's assessment on complex technical matters, further reducing the impact of external review.
(3) **Feedback loop** Due to the lack of a suspensory effect, legally contested TCMs remain effective and continue to influence new negotiations, causing an unfortunate "feedback loop." It may be unclear whether an eventual court decision resolves legal questions or whether these are simply no longer relevant due to changes in the factual or legal situation during the appeals procedure. In some cases, court decisions produce no specific follow-up actions.[118]

Concerning research implications, this article is grounded in legal theory and focuses on legal issues in the context of the TCM procedure. Our findings thus inform legal scholarship first and foremost. Nevertheless, our findings yield two useful take-aways also for other lines of investigation, especially experimentalist governance. First, taking legal review into consideration to a larger degree than what has been the case so far would yield a more complete picture of the governance cycle. The availability of, and conditions for, legal review affect stakeholders' negotiating positions and overall accountability. Our case studies show that stakeholders strategically mobilise legal review to influence the outcome of the governance cycle. Future research could determine more precisely how legal review engages with the governance cycle, or if it indeed forms part of it. Second, the theoretical problem-solving capacity of legal review should always be tested against its real-world performance. In doing so, the formalised context of legal review, including rules on legal standing, burden of proof, and intensity of review, require meticulous attention. In our case studies, these factors limited the impact that legal review had on the result of the governance cycle, contrary to expectations.

Regarding the policy implications of our findings, the poor interaction between the two levels of review causes prolonged uncertainty within the ongoing TCM procedures. This

[118] In addition to our case studies, the ongoing "Core CCM saga" is especially illustrative. ACER's Decision 02/2019 of 21 February 2019 on the Core CCR TSOs' Proposals for the Regional Design of the Day-ahead and Intraday Common Capacity Calculation Methodologies was subjected to a full first round of (successful) appeals leading to the GC's decision in *BNetzA v ACER* (n 50). In its decision A-003-2019_R of 7 July 2023, which implemented the GC's judgment, the BoA largely reiterated its argumentation in its earlier decision, which the GC had annulled. The contesting parties have now appealed decision A-003-2019_R to the GC with the same arguments they used in their first appeal, cf. Cases T-600/23 *BNetzA v ACER* and T-621/23 *Germany v ACER* (both pending). Over the course of five years, the substantial questions underlying the case have not been resolved. In the meantime, the Core CCM is being implemented and amended.

kind of uncertainty limits the capacity for innovation, learning, and problem-solving, contrasting sharply with the "constructive uncertainty" that is regarded as an opportunity for learning. This dilemma is even more acute because the technical and procedural questions raised during legal reviews reflect deeper political struggles for authority over the TCM process. Each appeal may, depending on the outcome, reshuffle the institutional balance. The formalistic nature of appeals must thus not obscure the core issue: currently, legal review may be unable to impede that the exceedingly pliable TCM adoption process slowly and gradually diverges from the institutional balance mandated by EU law.

Most importantly, the long duration and the lack of suspensory effect in legal reviews, coupled with the BoA's tendency to endorse ACER's decisions, invites the Agency to advance its agenda, creating *faits accomplis* that undermine ongoing TCM negotiations and even legal procedures. ACER argues that the obvious solution – introducing suspensory effect by default[119] – could halt the development of TCMs, asserting that its decisions must be shielded from suspensory effect to push the market integration process forward.[120] Whether or not this effectiveness-driven argumentation is convincing, in legal terms it is a general rule under the Treaties that the launch of proceedings before the European Courts lacks suspensory effect.[121]

However, numerous BoA rulings are currently under challenge and the jurisprudence of the European Courts on TCMs is still evolving, so that the effect of legal review warrants further investigation. Future research should assess whether continued European court interventions enhance control over ACER or if "internal" pragmatism prevails. If future research confirms that the challenges discussed in this article contribute to a discrepancy between the formal TCM procedure in EU law and its operation in practice, a re-appraisal of the pertinent legislation may be in order. But even then, it must not be overlooked that information asymmetry makes top-down governance unfeasible in electricity, while the energy transition demands innovative solutions. Thus, despite the legal drawbacks discussed in this article, a certain degree of pragmatism may be necessary to address the increasingly complex challenges in electricity regulation.

Our findings also have broader relevance beyond the TCM procedure. They may inform research on policymaking in other sectors with complex regulatory challenges, such as finance[122] and e-commerce.[123] In this areas, extensive delegation and legal contestation are becoming more common, a trend that may engender similar issues as those discussed in this article. Future research could thus compare ACER's review process to that of other agencies, to see if our findings for the TCM procedure can be generalised.

**Acknowledgments.** This paper was written as part of the project "Implementing Network Codes" (2020–2024), funded by the Norwegian Research Council (grant no. 308855). We thank our colleagues from the project for valuable discussions and feedback. We also thank Gro Gagnat, senior consultant at the Norwegian Water Resources and Energy Directorate (NVE), for compiling and analysing data on the BoA's practice and caseload. Finally, we thank Martijn Groenleer, professor at Tilburg University for valuable input to an earlier draft of this paper and the anonymous reviewer for very helpful comments. The usual disclaimer applies.

**Competing interests.** The author(s) have no conflicts of interest to declare.

[119] A solution also advocated in Chamon, Volpato and Eliantonio (n 34).

[120] BoA Decision A-001-2017_R (n 102) para 43.

[121] Art 278 TFEU.

[122] Joana Mendes, "Law and Discretion in Monetary Policy and in the Banking Union: Complexity Between High Politics and Administration" (2023) 60 Common Market Law Review 1579; Zeitlin and Rangoni (n 9).

[123] *Fenix International* (n 56), discussed by Merijn Chamon, "Only Fans of the Council's Implementing Powers in Luxembourg: *Fenix International*" (2023) 60 Common Market Law Review 1683.

**Cite this article:** L Hancher and J Rumpf (2024). "Balancing Power: The Impact of Legal Review on Harmonising the European Electricity Market". *European Journal of Risk Regulation* **15**, 827–845. https://doi.org/10.1017/err.2024.85