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14 March 2019
Third edition

The 'EU Legislation in Progress' briefings are updated at key stages throughout the legislative procedure. Please note this document has been designed for on-line viewing.

New rules for the Agency for the Cooperation of Energy Regulators (ACER)

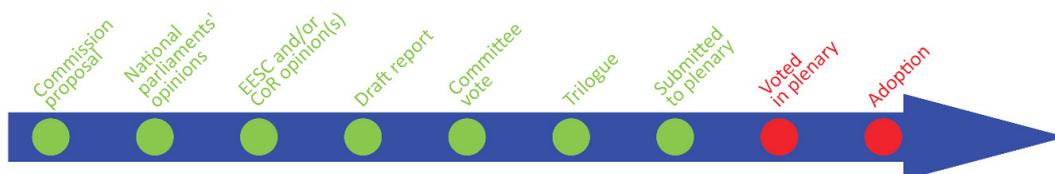
On 30 November 2016, the European Commission presented a legislative proposal for a regulation on the Agency for the Cooperation of Energy Regulators (ACER), as part of the 'clean energy for all Europeans' legislative package. The proposed regulation recasts the legislation establishing the agency (Regulation (EC) No 713/2009), adapting it to changes in the energy markets and addressing the need for enhanced regional cooperation. It gives ACER a stronger role in the development of network codes and the coordination of regional decision-making. It furthermore assigns it a number of new tasks related to the regional operational centres that are to be established, the supervision of nominated electricity market operators and the assessment of generation adequacy and risk preparedness.

In the European Parliament, the proposal has been referred to the Committee on Industry, Research and Energy (ITRE), which adopted its report in February 2018. A provisional trilogue agreement was reached on 11 December 2018. Parliament is expected to vote on the agreement during the March II 2019 plenary session.

Proposal for a Regulation of the European Parliament and of the Council establishing a European Union Agency for the Cooperation of Energy Regulators (recast)

COM(2016) 863, 30.11.2016, 2016/0378 (COD), Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')

Committee responsible:	Industry, Research and Energy (ITRE)
Rapporteur:	Morten Helveg Petersen (ALDE, Denmark)
Shadow rapporteurs:	Werner Langen (EPP, Germany), Miroslav Poche (S&D, Czech Republic), Hans-Olaf Henkel (ECR, Germany), Neoklis Sylikiotis (GUE/NGL, Cyprus), Davor Škrlec (Greens/EFA, Croatia), Rolandas Paksas (EFDD, Lithuania), Barbara Kappel (ENF, Austria)
Next steps expected:	First-reading vote in plenary





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The [proposal](#) for a regulation establishing an EU Agency for the Cooperation of Energy Regulators (ACER) (hereafter the 'recast ACER regulation') is part of a legislative [package](#) which the European Commission presented on 30 November 2016. The package consists of a communication on clean energy for all Europeans, eight legislative proposals, and a number of reports and communications. The bundling of these legislative proposals into a single package aims to ensure their mutual coherence.

The recast ACER regulation adapts the roles and responsibilities of the existing [ACER](#) so as to strengthen its role in developing network codes and coordinating regional cooperation between national regulators. It also adapts the agency's tasks to bring them in line with the new energy market design introduced by other proposals¹ in the legislative package. Yet another couple of regulations within the package: the recast one on the internal electricity market ([COM\(2016\) 861](#), hereafter the 'recast internal electricity regulation') and the new one on risk preparedness in the electricity sector ([COM\(2016\) 862](#), hereafter the 'risk preparedness regulation'), also introduce new tasks for ACER, which the recast ACER regulation duly reflects. These tasks involve, among others:

- > approving and amending methodologies for European generation adequacy assessment;
- > analysing proposals for new national adequacy assessments;
- > monitoring market performance, in particular 'flexibility barriers' at national level;
- > creating a methodology for the security of supply indicators;
- > deciding upon the configuration of new regional operation centres (ROCs) and, once they become operational, monitoring and analysing their performance on a regular basis;
- > developing methodologies and rules for improving the efficiency of cross-border wholesale electricity markets;
- > establishing an EU entity for distribution system operators (EU DSO) and ensuring its smooth functioning; and,
- > approving and amending methodologies for the identification of regional electricity crisis scenarios.

1 Proposal for a directive on common rules for the internal electricity market ([COM\(2016\) 864](#)), proposal for a regulation on the internal market for electricity ([COM\(2016\) 861](#)), proposal for a new regulation on risk preparedness in the electricity sector ([COM\(2016\) 862](#)).



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Existing situation

Established in 2010 by [Regulation \(EC\) No 713/2009](#) and launched in March 2011,² ACER coordinates the regulatory decisions of independent national energy regulators (NRAs) at EU level. It is an EU agency whose governance structure is adapted to the EU energy market, still mostly regulated at national level. The board of regulators, ACER's governing body, is composed of NRA representatives and a Commission official who does not have voting rights. It elects its chairman with a two-thirds majority for a renewable two-and-half year term. Originally established as a coordinating body issuing opinions, recommendations and decisions, ACER subsequently received additional powers in the monitoring of wholesale markets (see below).

The creation of ACER was part of the [third energy package](#) adopted in 2009, which further liberalised the internal EU electricity and gas markets by unbundling supply, generation and networks; providing market access to third parties; increasing the transparency of retail markets and obliging suppliers to provide a universal service to all households. The package also established European networks of transmission system operators for electricity and gas ([ENTSO-E](#) and [ENTSO-G](#)), which are responsible for developing network and market rules ('network codes') and for drawing up 10-year network development plans.

ACER plays a central role in the development of the network codes with a view to enhancing competition. It coordinates regional and cross-regional initiatives which favour market integration. Its responsibilities include monitoring functions with regard to progress in the implementation of the 10-year network development plans, the functioning of gas and electricity markets in general, and wholesale energy trading in particular. In its advisory role, ACER makes recommendations to the Commission regarding market regulation and priorities for transmission infrastructure.

[Regulation \(EU\) No 1227/2011](#) on wholesale energy market integrity and transparency ('REMIT') introduces a comprehensive monitoring framework for wholesale markets aimed at detecting and deterring market abuse, and gives ACER a key role in monitoring these markets. ACER has been performing the initial screening, analysis and assessment of a large number of market transactions since October 2015, when the reporting obligation for wholesale energy market transactions came into effect. ACER has the competence to investigate cases of market abuse and coordinate the imposition of penalties with Member States, which are ultimately responsible for their enforcement.

Parliament's starting position

The European Parliament's [resolution](#) of 15 December 2015 on a European energy union requests the Commission to increase ACER's funding and staff in order to support the full and effective implementation of the monitoring of energy markets.³ Parliament calls for strengthening ACER's competences vis-à-vis ENTSO-E and ENTSO-G and believes that ACER should engage with organisations representing distribution system operators, consumer organisations and other civil society groups.

² The predecessor of ACER was the European Regulators Group for Electricity and Gas (EREG), which was established by Commission Decision 2003/796/EC and dissolved with effect from 1 July 2011.

³ On 15 March 2015, the issue of adequate financial and personnel resources for ACER was the subject of a parliamentary [question for oral answer](#).



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Parliament's [resolution](#) of 15 December 2015 on achieving the 10 % electricity interconnection target asks the Commission to give ACER adequate competences and powers to gather information on individual cross-border transmission capacities, in order to address the lack of transparency with regard to the calculation of cross-border capacities made available to the market and the curtailment of interconnectors.

Parliament's [resolution](#) of 13 September 2016 on a new energy market design welcomes ACER's work and calls for providing it with sufficient human and financial resources to carry out its current and future tasks. It notes ACER's importance in connection with energy market monitoring and looks forward to the Commission's position on strengthening the agency's powers on cross-border issues. It calls for ACER to support and coordinate increased regional cooperation regarding system security and adequacy, and calls for giving the agency decision-making powers regarding the coordination of increased regional cooperation in respect of cross-border and interregional issues.

Council and European Council starting position

The [conclusions](#) of the March 2015 European Council on the energy union outline the Council's views on energy market design, but do not specifically address ACER's role. The 19 May 2016 [messages from the Council Presidency](#) on electricity market design and regional cooperation conclude that measures are needed to improve market functioning and remove flexibility barriers, again without mentioning ACER specifically.



Proposal

Preparation of the proposal

ACER's role was addressed in the [stakeholder consultation](#) on electricity market design, which ran from July to October 2015. Stakeholders expressed divergent views about a possible strengthening of its competences. While many favoured increasing its powers, others (notably Member States and national energy regulators) preferred to keep the status quo. Some advocated making ACER's decisions more independent from national interests. The need to provide ACER with adequate human and financial resources as would allow it to fulfil its tasks was also mentioned.

Due to the inter-relations between the different proposals in the legislative package, the Commission produced a single [impact assessment](#) for four legislative proposals,⁴ including the proposed ACER regulation. It is based on almost 30 studies and modelling tools, conducted mostly by external experts. The impact assessment considered various options regarding ACER's institutional framework and role. The option of stronger enforcement under the existing legal framework was rejected as it would fail to bring any needed improvements. The option of transforming ACER into something similar to a pan-European regulator was dismissed, as this would require a significantly bigger budget and staff and would weaken the role of national regulators in ACER's decision-making. The favoured option was an adaptation of the existing legal framework to the changes in the energy market, which also addressed the need for increased regional cooperation. The [initial appraisal of the impact assessment](#) by EPRS is generally positive, but notes its length and complexity and raises doubts as to whether the sequential process required in the better regulation guidelines has been followed.

The changes the proposal would bring

The recast ACER regulation updates the list of ACER's tasks to include responsibilities that were delegated to it following the adoption of Regulation (EC) No 713/2009, notably in the areas of wholesale market supervision and cross-border infrastructure (introduced by REMIT Regulation (EU) No 1227/2011). The recast ACER regulation would extend the agency's competences to 'regulatory issues with cross-border relevance' that fall within the competence of NRAs. The proposal introduces a regional decision-making process that would apply only to a limited number of national regulators. The agency's director would have to give an opinion as to whether an issue is primarily of regional relevance or not. If the board of regulators agrees that this is the case, it should task a regional sub-committee with preparing a decision to be approved or rejected by the board of regulators. If the board of regulators disagrees about the regional relevance, it would make a decision without involving a regional sub-committee.

ACER would monitor wholesale and retail markets in electricity and natural gas including for their compliance with the new consumer rights laid down in the proposed recast directive on common rules for the internal market in electricity ([COM\(2016\) 864](#)). The agency would monitor potential barriers to cross-

4 The impact assessment covers the following proposals: COM(2016) 864; COM(2016) 861; COM(2016) 863, and COM(2016) 862.



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border trade and state interventions that prevent prices from reflecting actual scarcity, and assess the performance of Member States regarding the security of electricity supply.

ACER would have a new task, that of regulatory oversight of the regional operational centres, new entities covering several Member States at a time, which are being introduced as part of the recast internal electricity market regulation ([COM\(2016\) 861](#)). ACER would supervise nominated electricity market operators (NEMOs),⁵ designated by the competent national authorities to perform tasks related to single day-ahead or single intraday coupling.

ACER would have new powers to amend and approve methodologies developed by ENTSO-E for generation adequacy assessments and regional electricity supply crisis scenarios. Relevant provisions on these new powers are laid out in the recast internal electricity market regulation and in the proposed risk-preparedness regulation ([COM\(2016\) 862](#)).

ACER would have more responsibility in elaborating electricity network codes and submitting the final proposal to the Commission, while maintaining the role of ENTSO-E as a technical expert. ACER would get the competence to decide on terms and methodologies for the implementation of electricity network codes and guidelines.

ACER would have a role in the regional electricity markets ('bidding zones') review process introduced in the recast internal electricity market regulation.

In general, the rules on ACER would be adapted to the '[common approach](#)' agreed between the European Parliament, the Council and the Commission in June 2012⁶ with regard to the financial, organisational and administrative provisions applicable to decentralised EU agencies. However, some deviations from the common approach are justified by the fact that ACER has the task of coordinating the regulatory decisions of independent national regulators and not of executing delegated regulatory competences of the Commission. The decision-making power would remain with the board of regulators (instead of the management board as set out in the common approach), but only a simple majority (instead of a two-thirds majority) would be required. Likewise, ACER's administrative board would not be adapted to the common approach.

The agency's objectives, mandate, tasks and governance structure would be evaluated no later than five years after entry into force of the regulation, and every five years thereafter.

According to the legislative financial statement accompanying the proposal, ACER would need 18 additional full-time staff by 2020 to carry out the newly assigned tasks arising from the recast ACER regulation, the recast internal electricity market regulation and the risk-preparedness regulation. However, the assignment of new tasks to ACER is expected to reduce the need for resources at national level.

5 NEMOs were introduced by [Commission Regulation \(EU\) 2015/1222](#) of 24 July 2015 establishing a guideline on capacity allocation and congestion Management - CACM (the 'Market Coupling Regulation').

6 [Joint statement](#) of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, 19 July 2012.

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Views

Advisory committees

The European Economic and Social Committee (EESC) [opinion on electricity market design](#) (rapporteur Alfred Gajdosik, Various interests – Group III, Austria), adopted on 1 June 2017, endorses the Commission's proposal to strengthen the competencies of ACER, against the background of the growing strategic importance of distribution networks and interconnection of national grids.

The Committee of the Regions, with Daiva Matonienė (ECR, Lithuania) as rapporteur, adopted its [opinion on renewable energy and the internal electricity market](#) on 12 July 2017. It welcomes the stronger role of ACER in devising and implementing network codes, and stresses that ACER must have the competence to obtain information from institutions in the Member States. It points out that regulatory measures of ACER do not replace national decisions (in accordance with the principle of proportionality), and also recommends strengthening national regulatory authorities to guarantee their independence and unimpeded functioning.

National parliaments

The proposal has been scrutinised by [national parliaments](#). Three parliamentary assemblies (French Senate, German Bundestag, and Romanian Senate) submitted reasoned opinions on the grounds of subsidiarity. Six others⁷ entered into political dialogue with the Commission.

Stakeholders' views⁸

The Council of European Energy Regulators⁹ (CEER), together with ACER, [welcomed](#) the Commission's proposals contained in the 'clean energy for all Europeans' package.

[ENTSO-E](#) opposed the Commission's proposals to give ACER additional competences in the network code development process and considered the oversight role of ACER on regional cooperation as counter-productive and at odds with better regulation.

7 Austrian Federal Council, Czech Chamber of Deputies, Danish Parliament, German Bundesrat, Italian Chamber of Deputies, Portuguese Assembleia da República.

8 This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'EP supporting analysis'.

9 The Council of European Energy Regulators ([CEER](#)) was established in 2000 as a non-profit organisation whose members are national energy regulatory authorities of the EU and the European economic area. It aims to facilitate the creation of a single, competitive, efficient and sustainable EU internal energy market. Its work complements that of ACER but does not overlap with it. ACER performs tasks as required by the legislation, while CEER addresses all other issues.



Legislative process

EU energy ministers had a first [exchange of views](#) on the Clean Energy package of proposals at the Council meeting on 27 February 2017 and [discussed](#) the various legislative proposals again on 26 June 2017. However, the ACER proposal was not discussed in detail. On 18 December 2017, the Council reached a general approach on two related proposals in the clean energy package: regulation on the internal electricity market and directive on common rules for the internal electricity market. The working party is continuing to discuss the ACER proposal.

In the Parliament, the proposal was assigned to the Industry, Research and Energy (ITRE) Committee. Morten Helveg Petersen (ALDE, Denmark) was appointed rapporteur and presented his draft report in June 2017. The Budgets Committee adopted its opinion on 30 August 2017. The ITRE committee adopted its [report](#) on 21 February 2018, along with a mandate to enter into trilogue negotiations. It broadly supports the Commission proposal, but also proposes some improvements and clarifications:

- > primary responsibility for regional terms and conditions or methodologies would rest with the regulatory authorities of the region concerned; they would only be referred to ACER for a decision if the issue at stake has a tangible impact on the internal energy market, or otherwise if the concerned regulatory authorities fail to agree, or upon their joint request; ACER would issue a recommendation where joint agreements are inconsistent with the objectives and the provisions of the Electricity Directive and Regulation, and the network codes and guidelines.
- > ACER would intervene with a binding decision when it detects that an ENTSO, a Nominated Electricity Market Operator (NEMO), a Regional Operational Centre (ROC) or any other entity operating at cross-border, regional or EU-wide level (e.g. the future EU DSO entity) does not comply with the objectives and provisions of the Electricity Directive and Regulation, and the network codes and guidelines;
- > ACER would have the power to request any information it requires to carry out its tasks effectively from market participants and other entities, if necessary through binding decisions; this would strengthen ACER's ability to perform its monitoring function;
- > to address ACER's lack of financial and human resources, ACER would be allowed to collect fees for the registration of Registered Reporting Mechanisms, reporting trade and fundamental data under REMIT, and for the oversight of TSO activities, including their cooperation through the ENTSOs; however, revenue received by ACER must not compromise its independence or objectivity.
- > ACER's decisions would have to be fully reasoned and justified to allow judicial review; they would have to be made public, whilst preserving the confidentiality of commercially sensitive information;
- > national regulators would continue to vote by a two-thirds majority within the ACER Board of Regulators (rejecting the simple majority voting proposed by the Commission).

On 11 June 2018, the Council agreed its [general approach](#) on the proposal. Like the Parliament, it rejects the Commission proposal for simple majority voting in the Board of Regulators and the Administrative Board, and calls for adequate involvement of the Member States in decisions on new regulatory tasks and



competences for ACER. It would require ACER to adopt rules of procedure and procedural safeguards to ensure transparent and reasonable decision-making. The role of the Board of Regulators in annual and multiannual programming and in establishing working groups would be strengthened. ACER would receive fees for the registration of market participants under the REMIT Regulation (EU) No 1227/2011.

Trilogue negotiations started in June 2018 and were concluded with an informal agreement in the fourth trilogue meeting on 11 December 2018.

The [agreed text](#) aligns the ACER Regulation with the provisional agreements on the other files regarding the EU energy market (revised [Electricity Directive](#), revised [Electricity Regulation](#), and revised [Regulation on risk-preparedness](#) in the electricity sector), broadening ACER's role in regulating the EU energy markets. It extends the list of bodies to which ACER can address opinions and recommendations to ENTSO-E, ENTSO-G, the EU-DSO entity and the Regional Coordination Centres, and further strengthens the role of the agency in regulatory oversight. ACER will be represented in the gas coordination group in line with Regulation (EU) 2017/1938 on the security of gas supply.

The agreed text rejects the Commission's proposal to allow the assignment to ACER of new tasks that would involve decision-making powers. It also retains two-thirds majority voting for decisions of the Administrative Board and the Board of Regulators, rejecting the Commission proposal for simple majority voting.

ACER will have a stronger supporting role in identifying whether EU-DSO, ENTSO-E and Regional Coordination Centres have breached obligations under EU law. It will act as an arbitrator in the event that different national regulatory authorities disagree on whether there has been a breach of obligations.

ACER will have to adopt rules of procedure and procedural safeguards to ensure transparent and reasonable decision-making. The Board of Regulators will have a stronger role in annual and multiannual programming and in establishing working groups. ACER must inform the European Parliament about the draft agenda of upcoming meetings of the Board of Regulators, and send Parliament the draft minutes of those meetings.

ACER will receive fees for the registration of market participants under the REMIT Regulation (EU) No 1227/2011. These fees, which must be proportionate and non-discriminatory, will be set by the Commission after a public consultation and after consulting the ACER Administrative Board and the Board of Regulators.

The Commission must evaluate the adequacy of the financial and human resources of ACER within 12 months after entry into force of the regulation. By 2023 and then every three years, the Commission will have to evaluate the need for involving ACER in the development of terms and conditions or methodologies in connection with network codes.

The ITRE committee endorsed the agreement on 23 January 2019. The European Parliament is expected to vote on this during the March II 2019 plenary session. Once the regulation has been formally adopted by the Parliament and the Council, it will be published in the Official Journal and enter into force 20 days later.



References

EP supporting analysis

[\(Re-\)Designing the internal market for electricity](#) (initial appraisal of European Commission impact assessment, EPRS, European Parliament, April 2017).

[Understanding electricity markets in the EU](#), EPRS, November 2016.

[Energy Union: key decisions for the realisation of a fully integrated energy market](#), Policy Department for Economic and Scientific Policies, European Parliament, April 2016.

Other sources

[European Union Agency for the Cooperation of Energy Regulators. Recast](#), European Parliament, Legislative Observatory (OEIL).

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