

CEER response to the
European Commission's public consultation on a planned procedural clarification in four electricity
guidelines by way of a Commission Implementing Regulation
16 June 2020

Link to the Consultation: https://ec.europa.eu/energy/consultations/consultation-planned-procedural-clarification-four-electricity-guidelines-way_en
Consultation Period: 11.05. – 15.06.2020

The Council of European Energy Regulators (CEER) welcomes the Commission's initiative to clarify – through an Implementing Regulation – ambiguous wording in the provisions on the process for developing and approving more detailed joint rules under the guidelines (Network Codes/Commission Regulations) governing key cross-border aspects of the electricity wholesale market in the EU and to align those provisions with the new Electricity Regulation (EU) 2019/943 and the ACER Regulation (EU) 2019/942 adopted in 2019.

The proposed amendments to the procedural provisions in the 4 guidelines (CACM, FCA, EB, SO) - as provided in the consultation document - are generally supported by the CEER, except for the issues of NRAs' concern listed in the table below. An alternative formulation is suggested in column 3 with marked changes (**underlined in red font**) as compared to the EC's proposed amendments of column 2. The CEER proposal mainly aims at giving NRAs/ACER a bit more flexibility to handle cases where no (final) draft terms, conditions or methodologies have been submitted by TSOs or NEMOs to NRAs/ACER for adoption. A justification and explanation for the suggested changes are provided below the table.

<p>Article 9 (4) CACM GL (equivalent wording also in Articles 4(4) FCA GL, 4(7) EB GL and 5(9) SO GL)</p>	<p>Proposed EC amendments on Art. 9 (4) CACM GL (equivalent amendment proposals by EC also in Articles 4(4) FCA GL, 4(7) EB GL and 5(9) SO GL)</p>	<p>CEER Proposal for Art. 9(4) CACM GL (an equivalent rewording as below is proposed by CEER also for Articles 4(4) FCA GL, 4(7) EB GL and 5(9) SO GL)</p>
<p>If TSOs or NEMOs fail to submit a proposal for terms and conditions or methodologies to the national regulatory authorities within the deadlines defined in this Regulation, they shall provide the competent regulatory authorities and the Agency with the relevant drafts of the terms and conditions or methodologies, and explain what has prevented an agreement. The Agency shall inform the Commission and shall, in cooperation with the competent regulatory authorities, at the Commission's request, investigate the reasons for the failure and inform the Commission thereof. The Commission shall take the appropriate steps to make possible the adoption of the required terms and conditions or methodologies within four months from the receipt of the Agency's information.</p>	<p>If TSOs or NEMOs fail to submit <u>or resubmit</u> a proposal for terms and conditions or methodologies to the national regulatory authorities <u>or the Agency in accordance with paragraphs 6 to 8 or 12</u> within the deadlines defined in this Regulation, they shall provide the competent regulatory authorities and the Agency with the relevant drafts of the terms and conditions or methodologies, and explain what has prevented an agreement. The Agency shall inform the Commission and shall, in cooperation with the competent regulatory authorities, at the Commission's request, investigate the reasons for the failure and inform the Commission thereof. The Commission shall take the appropriate steps to make possible the adoption of the required terms and conditions or methodologies within four months from the receipt of the Agency's information. <u>The regulatory authorities, or, where competent, the Agency, shall revise and complete the drafts pursuant to paragraph 5, including where no drafts have been submitted, and approve them.</u></p>	<p>If TSOs or NEMOs fail to submit or resubmit <u>an initial or amended</u> proposal for terms and conditions or methodologies to the <u>competent</u> national regulatory authorities <u>or the Agency in accordance with paragraphs 6 to 8 or 12</u> within the deadlines defined in this Regulation, they shall provide the competent regulatory authorities and the Agency with the relevant drafts of the terms and conditions or methodologies, and explain what has prevented an agreement. The Agency shall inform the Commission and shall, in cooperation with the competent regulatory authorities, at the Commission's request, investigate the reasons for the failure and inform the Commission thereof. The Commission- <u>Agency, all competent regulatory authorities jointly, or where the competent, the Agency, regulatory authority shall take the appropriate steps to make possible for the adoption of the required terms and conditions or methodologies in accordance with paragraphs 6, 7 and 8 respectively,</u> within four months from the receipt of the Agency's information for instance by requesting amendments or revising and completing the drafts pursuant to <u>this paragraph-5</u>, including where no drafts have been submitted, and approve them.</p>

<p>Article 9 (10) CACM GL</p>	<p>Proposed amendments by EC on Article 9 (10) CACM GL <i>(equivalent amendment proposals by EC also in Article 4 (9) FCA GL, Article 5(6) EB GL and Article 6 (7) SO GL.)</i></p>	<p>CEER Proposal for Article 9 (10) CACM GL <i>(an equivalent rewording as below is proposed by CEER also for Article 4 (9) FCA GL, Article 5(6) EB GL and Article 6 (7) SO GL.)</i></p>
<p>10. Where the approval of the terms and conditions or methodologies requires a decision by more than one regulatory authority, the competent regulatory authorities shall consult and closely cooperate and coordinate with each other in order reach an agreement. Where applicable, the competent regulatory authorities shall take into account the opinion of the Agency. Regulatory authorities shall take decisions concerning the submitted terms and conditions or methodologies in accordance with paragraphs 6, 7 and 8, within six months following the receipt of the terms and conditions or methodologies by the regulatory authority or, where applicable, by the last regulatory authority concerned.</p>	<p>10. Where the approval of the terms and conditions or methodologies <u>according to paragraph 7 or the amendment according to paragraph 12</u> requires a decision by more than one regulatory authority, the competent regulatory authorities shall consult and closely cooperate and coordinate with each other in order reach an agreement. Where applicable, the competent regulatory authorities shall take into account the opinion of the Agency. Regulatory authorities <u>and the Agency</u> shall take decisions concerning the submitted terms and conditions or methodologies in accordance with paragraphs 6, 7 and 8, within six months following the receipt of the terms and conditions or methodologies by the <u>Agency or the</u> regulatory authority or, where applicable, by the last regulatory authority concerned.</p>	<p>10. Where the approval of the terms and conditions or methodologies according to paragraph 7 or the amendment according to paragraph 12 requires a decision by more than one regulatory authority, the competent regulatory authorities shall consult and closely cooperate and coordinate with each other in order reach an agreement. Where applicable, the competent regulatory authorities shall take into account the opinion of the Agency. Regulatory authorities or, where competent, the Agency, and the Agency shall take decisions concerning the submitted terms and conditions or methodologies in accordance with paragraphs 6, 7 and 8, within six months following the receipt of the terms and conditions or methodologies by the Agency or the regulatory authority or, where applicable, by the last regulatory authority concerned.</p>

Explanation and Reasoning:

- An amended proposal further to a request for amendment by NRAs/ACER cannot be considered as a new submission, as it is still in the process of approval.
- The further proposed EC amendments in Article 9(4) CACM GL (and equivalent abovementioned Articles in FCA GL, EB GL and SO GL) aim to reflect the competence and responsibility of NRAs and ACER to decide on the final text of TCMs for which TSOs and NEMOs submit proposals.
- The main objective of the EC is to avoid a “standstill” as occurred several times in the situation that TSOs/NEMOs did not (timely) submit a TCM proposal or did not re-submit a proposal following a request for amendment.
- While we support the underlying objective of the proposed EC amendments, we believe the consequences of the proposal could be far-reaching, since NRAs/ACER are put in a position where potentially they need to draft TCMs themselves in case no proposal is submitted at all, or in case a very immature proposal has been submitted. This would not be proportionate due to a lack of necessary expertise and/or a lack of available resources at NRAs.
- As an alternative text CEER proposes: *“The Agency, all competent regulatory authorities jointly, or the competent regulatory authority shall take the appropriate steps for the adoption of the required terms and conditions or methodologies in accordance with paragraphs 6, 7 and 8 respectively, for instance by requesting amendments or revising and completing the drafts pursuant to this paragraph, including where no drafts have been submitted, and approve them”*.
- We would like to point out that this is a combination of the current text and the new text proposed by the Commission.
- We firmly believe that with this text the key objective of the EC (i.e. to avoid a standstill) will still be met, whereas it provides more leeway for NRAs/ACER to consider available and feasible alternative routes to arrive at a final regulatory decision for instance by (i) investigating and establishing the main reasons for disagreement, (ii) giving TSOs concrete material guidance on how to finalize the proposal, and (iii) setting a new deadline for submission of the (revised) proposal.
- Still, the responsibility to finalise the process would be shifted from the EC to regulators, but NRAs/ACER would have more flexibility to choose the most optimal way forward and would not be forced to start drafting or redrafting TCMs in all situations.
- To avoid for an NRA taking action in an uncoordinated way e.g. in regional methodologies, we propose to tackle this issue with the same approach used for the amendment of Article 9(12) CACM by clearly specifying the competent authority / authorities for each methodology contained in paragraphs 6,7 and 8. Respecting the spirit of the CEER proposal, this clarifies a potential legal concern.
- In order to reflect that Article 9(4) CACM deals with the situation where no proposal was submitted, we suggest to change the reference to the drafts to reflect that these drafts have been submitted in the process described by paragraph 4. The reference to the drafts in Article 9(5) CACM seems unnecessary.
- Article 9(10) of the CACM Regulation (with equivalents in Article 4 (9) FCA GL, Article 5(6) EB GL and Article 6 (7) SO GL) structures the collaboration among NRAs and, where competent, the Agency in shaping TCM. In particular, the third sentence describes the delay for decision-making since the receipt of the TCM by the respective counterparties. The legal analysis performed by CRE pointed out that the wording *“and the Agency”* proposed by the EC in the third sentence of Article 9(10) could lead to potential misinterpretation. For the sake of clarity, CRE would like to propose a slightly louder wording and replace aforementioned wording by the words *“or, where competent, the Agency”*. This would be perfectly aligned with the role and responsibilities of the Agency as defined in (EU) 2019/942.