

Good Governance in the Development of Network Codes for the EU Internal Electricity Market

Thomas Kohlbacher

LLM candidate, Tilburg University

Saskia Lavrijssen*

Professor of Economic Regulation and Market Governance, Tilburg University

Abstract

This article aims to contribute to the further development of the governance structure of the internal energy market by evaluating the process of the development of network codes, that is, the technical rules governing access to – and functioning of the cross border electricity grid, against principles of good governance. It finds that the governance structure does not sufficiently ensure responsiveness to stakeholder input. This is due to a lack of legal accountability mechanisms, which are only insufficiently complemented by means of political-, social-, vertical administrative- and peer-accountability. Legal accountability mechanisms are insufficient to guarantee adequate responsiveness to stakeholder input, due to rigid standing criteria for direct actions at the European Court of Justice against network codes adopted as delegated acts by the Commission. Moreover, there is insufficient possibility of judicial review as regards the roles of various network members in the development of network codes, in particular regarding soft law instruments used by ACER and ENTSO-E. Hence, their factual influence on the technical rules adopted as network codes is not appropriately met by legal accountability mechanisms that would ensure their stakeholder responsiveness. While current means of political-, social-, vertical administrative- and peer-accountability may improve responsiveness to stakeholder input, a thorough analysis of the network code development process shows that they are too weak to meet a level as required by principles of good governance. This lack of accountability also leads to a lack of participation and openness. This article argues that alternative accountability mechanisms need to be strengthened in a way that adapts the present system of accountability mechanisms to the flexible means of exercising authority through network governance. In particular, it advocates a greater role for stakeholder committees as well as ACER in the development of network codes.

I. Introduction

This article assesses the development and implementation processes of network codes for the European Union's internal electricity market

* DOI 10.7590/187479818X15481611819877 1874-7981 2018 Review of European Administrative Law

against the normative requirement of stakeholder responsiveness¹ as it follows from the good governance principles of accountability, participation and openness. In this sense, stakeholder responsiveness goes beyond the promotion of dialogue and provision of participation and feedback mechanisms.² As a normative concept, it requires the legitimate interests of stakeholders, which are brought to the attention of bodies and institutions throughout the development and implementation processes, to be reflected in the acts adopted. Moreover, it requires safeguards in the form of accountability mechanisms to be put in place, enabling stakeholders to hold the involved bodies and institutions accountable in this respect. This paper evaluates the various accountability mechanisms via which stakeholder responsiveness can be enforced regarding network codes. The conclusion suggests that stakeholder responsiveness is not sufficiently safeguarded by available accountability mechanisms as the normative standards of good governance are not met. The article suggests a formalized role for stakeholder committees in the development and implementation of network codes, as well as a larger role for the Agency for the Cooperation of Energy Regulators (ACER) in order to improve stakeholder responsiveness and, thus, good governance in the process.

Network codes contain technical and commercial rules for access to and operation of the cross-border electricity grid within the European Union's internal market for electricity. As such, they constitute the backbone of the internal electricity market as they provide harmonized, binding rules for access and connection to the electricity grid, the operation of the cross-border grid and the functioning of the market using this grid. Thus, these rules provided by network codes level the market's playing field by regulating its functioning and removing barriers to entry.³ Network codes are EU regulations and as such legally binding in their entirety.⁴

In electricity markets, the market outcome for energy consumers, particularly the price, quantity, security and mix of energy supplied, depends crucially on

¹ M. Bovens describes responsiveness to the particular public as accountability in the broad sense. See M. Bovens, 'Analysing and assessing public accountability: A conceptual framework', *European Law Journal* 4 (2007), 449-450.

² Compare Vos, 'Independence, Accountability and Transparency of European Regulatory Agencies' in D. Geradin, R. Muñoz & N. Petit (Eds.), *Regulation through Agencies in the EU* (Cheltenham: Edward Elgar, 2005), 128-129.

³ See Recital (27) Regulation (EC) 713/2009, Energy Union: Key Decisions for the Realisation of a Fully Integrated Energy Market, Study for the ITRE Committee, April 2016, available at [www.europarl.europa.eu/RegData/etudes/STUD/2016/578968/IPOL_STU\(2016\)-578968_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578968/IPOL_STU(2016)-578968_EN.pdf); C. Vlachou, 'New Governance and Regulation in the Energy Sector: What does the Future Hold for EU Network Codes?', *European Journal of Risk Regulation* 9 (2018), 268; M. Zinzani, *Market Integration through 'Network Governance'* (Cambridge: 2012), 136-137.

⁴ Art. 288 TFEU.

the functioning of the electricity grid which connects producers, energy suppliers and, ultimately, consumers. Thus, despite being technical in nature, in order to safeguard legitimate interests, it is of paramount importance that there is adequate representation of the interests of a wider range of stakeholders, and particularly those of energy consumers in the process of designing network codes.⁵

1.1. The need for good governance principles and stakeholder responsiveness to ensure legitimacy of network codes

In principle, as network codes are EU regulations, an analysis of the legitimacy⁶ of the rules contained in them would lend itself to an argument of formal legitimacy; since these regulations have been established through a certain formal procedure provided by higher ranking EU law⁷, it is believed that their provisions are legitimate.⁸ However, the development of network codes (the process of designing the rules to be adopted as EU regulations) and the implementation of network codes (the sub-legislative rule-making leading to the further specification of the rules contained in network codes) are subject to elaborate procedures, which can best be described through the prism of ‘governance’. The processes unite actors from different institutional levels, including from the public and private sectors, at a horizontal level. Hence, power in the development and implementation of network codes is shifted from established institutions to new actors, which focus on coordination, interaction, information exchange and collective problem solving, rather than performance

⁵ Compare S. Lavrijssen, ‘Power to Energy Consumers’, *European Energy and Environmental Law Review* 6 (2017), 172-187.

⁶ An exhaustive discussion of the concept of legitimacy of an authoritative act is beyond the scope of this contribution. We will follow Raz’s understanding that an authoritative act is legitimate if the issuer of the act has the right to rule and the addressee of the act has a correlative duty to obey. This notion of legitimate authority is closely linked to the respect for and promotion of autonomy and, thus, the reasons valid to the addressee of the authoritative act. Hence, there is a connection between legitimate authority and the notion of stakeholder responsiveness discussed below. (Compare J. Raz, *The Morality of Freedom* (Oxford: 2008), Ch. 1-4.). The notion of legitimacy is, hence, also normative in character. Similarly, in the sense that ‘acceptability’ could be interpreted as having good reasons to follow the authoritative act, Ottow assesses the concept of legitimacy specifically in the case of agencies, and defines legitimacy as ‘social credibility and acceptability’ (emphasis added) as distinguished from *acceptance*. See A. Ottow, *Market@Competition Authorities, Good Agency Principles* (Oxford: 2015), 48.

⁷ That is, in this case, adoption by the Commission through Comitology via the regulatory procedure with scrutiny (see discussion below).

⁸ Compare M. Zinzani (2012), 51; P. Fabienne, Political Legitimacy, in Zalta, E.N. (Ed.), *The Stanford Encyclopedia of Philosophy*, s. 4.2, available at <https://plato.stanford.edu/entries/legitimacy/>.

of a function prescribed by a given hierarchy, in an effort to foster interactive and collective problem solving.⁹

ACER and ENTSO-E,¹⁰ two of the actors in the development and implementation processes (see section 2), due to their legal nature or the legal nature of their acts,¹¹ are either not or to a lesser extent subject to procedural rules and safeguards enshrined in higher ranking EU law, which were designed against the background of the community method.¹² That and the informality of interaction within the governance framework reduces the extent to which legitimacy can be lent to the content of draft measures which emanate from the development and implementation phases based on arguments of formal legitimacy. The need for additional requirements of legitimacy¹³ for acts within the development and implementation phases may carry over to the network codes themselves in spite of the latter's adoption as regulations via the legislative procedures designed to provide the codes with formal legitimacy. In so far as the Commission, Parliament and Council¹⁴ are willing to attribute epistemic authority to draft measures elaborated and proposed by ENTSO-E or ACER, the latter gain substantial influence over the rules adopted as network codes.¹⁵ Hence, additional normative standards would have to be applied and safeguards to be put in place concerning the drafting process itself in order to ensure legitimacy of both the drafting process and the measures finally adopted as network codes. The greater the epistemic authority enjoyed by ENTSO-E or ACER, the more substantial their discretionary choices and the greater the reliance by the Commission on the expertise of ENTSO-E or ACER, the greater the need for these additional normative standards and safeguards to be applied.¹⁶

⁹ See discussion in M. Zinzani (2012), 1-4. See also in particular for a description of regulatory networks, D. Coen & M. Thatcher, 'Network governance and multi-level delegation: European networks of regulatory agencies', *Journal of Public Policy* 1 (2008), 50; J. Scott & D. M. Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union', *European Law Journal* 1 (2002), 1-5; H. C. H. Hofman & A. Türk, 'The Development of Integrated Administration in the EU and its Consequences', *European Law Journal* 2 (2007), 253-271; P. Craig & G. De Burca, *EU LAW, Text, Cases and Materials* 5 (Oxford: 2011), 159-161.

¹⁰ The European Network of Transmission System Operators, respectively, see description in s. 2.

¹¹ See description in s. 2.

¹² Compare C. Möllers, 'European Governance: Meaning and Value of a Concept', *Common Market Law Review* 2 (2006), 325.

¹³ Compare A. Ottow (2015), 47-48.

¹⁴ See adoption through comitology via the regulatory procedure with scrutiny, C. Vlachou (2018), 273, to be discussed in s. 2.

¹⁵ Compare S. Lavrijssen & L. Hancher, 'Networks on track: From European Regulatory Networks to European Regulatory "Network Agencies"', *Legal Issues of Economic Integration* 1 (2009), 39-54.

¹⁶ Compare discussion in S. Lavrijssen & L. Hancher (2009).

Compliance with the good governance principles of accountability, participation and openness can be instrumental in achieving legitimacy of the described governance processes in the sense of acceptability and social credibility.¹⁷ Together, they require stakeholder responsiveness on part of the governance network, that is, a balanced reflection of legitimate interests in the acts adopted through these processes.¹⁸ If legitimate interests of stakeholders, among whom are the addressees of network codes, are adequately reflected in the rules contained in network codes, the addressees of the authoritative acts within network codes are more likely to attribute to it the right to rule and to consider themselves as having the correlative duty to obey.¹⁹ Likewise, social credibility and acceptability will be higher.²⁰

Thus, this article takes stakeholder responsiveness and the mentioned good governance principles as a standard of assessment and normative guidance for governance in the development and implementation phases of network codes.²¹ It will look for safeguards of stakeholder responsiveness that would instill the confidence in stakeholders that legitimate interests will adequately be taken into account. The values expressed through stakeholder responsiveness and good governance principles are also expressed in general principles of EU law. Good governance principles help structure the diverse set of values expressed in these general principles of EU law around a common core²² and make them applicable to governance in developing and implementing network codes. Moreover, good governance principles may directly or indirectly, as well as partially, gain legal effect through general principles of EU law.²³ In the case of network codes, stakeholder responsiveness and the principles of accountability, participation and openness will thereby be discussed in connection with

¹⁷ Compare Ottow's discussion that 'principles of good agency behavior' will ensure legitimacy in the sense of social credibility and acceptability, A. Ottow (2015), 48. This paper suggests that stakeholder responsiveness is a necessary condition for legitimacy of the network code development – and implementation processes. Sufficient conditions are beyond the scope of this contribution.

¹⁸ See discussion in s. 3. For the link between the balanced reflection of interests and legitimacy see *supra* 6.

¹⁹ Compare discussion of legitimate authority in J. Raz (1986), *supra* 6. Indeed in accordance with the notion of legitimate authority put forward, the addressees also have a better reason to attribute to the authority the right to rule in this case, irrespective of the actual sentiment expressed.

²⁰ Compare A. Ottow (2015), 47-49.

²¹ Compare A. Ottow (2015), 47-48.

²² D. Curtin & L. Dekker, Good Governance: The Concept and its Applications by the European Union' in D. Curtin & R. A. Wessel (Eds.), *Good Governance and the European Union* (Cambridge: Intersentia, 2005), 7.

²³ Compare L. Hancher, P. Larouche & S. Lavrijssen, 'Principles of Good Market Governance', *Tijdschrift voor Economie en Management* 2 (2004), 341.

the principles of the rule of law, mutual sincere cooperation, good administration and institutional balance.²⁴

Section 2 will outline the development and implementation phases of network codes and introduce the actors that are part of the governance structures. Section 3 will introduce the good governance principles of accountability, participation and openness, as well as the concept of stakeholder responsiveness, and discuss their connection with the EU law principles of the rule of law, good administration, mutual sincere cooperation and institutional balance. An assessment of the separate parts of the governance structure within the development and implementation phases as regards their compliance with the normative standards of stakeholder responsiveness and the good governance principles will be provided in Section 4. Moreover, a greater and more formalized role for stakeholder committees and ACER based on the normative guidance of these principles will be provided. In section 5, the final conclusions will be drawn.

2. The process of the development of network codes

The progression of network codes can be divided into a development phase, which may be described as legislative rule-making, and an implementation phase, which can be described as sub-legislative rule-making.²⁵ In these processes, the Council, Parliament and Commission cooperate with ACER,²⁶ the European Network of Transmission System Operators (ENTSO-E)²⁷ and National Regulatory Authorities (NRAs) in developing the rules contained in network codes. First, ACER and ENTSO-E shall briefly be introduced as their legal nature is of vital importance to a discussion of good governance in the development and implementation of electricity network codes. Then, the development and implementation phases of network codes will be outlined in greater detail.

2.1. Elements of the regulatory network

The cooperation between NRAs, ENTSO-E and ACER in the development of network codes as provided by the Third Energy Package is de-

²⁴ See discussion in s. 3.

²⁵ For a graphical illustration of the network code development process demonstrating the complexity of the process see T. Kohlbacher & S. Lavrijssen, 'EU Electricity Network Codes, Good Governance in a Network of Networks', *TILEC Discussion Paper* 001 (2018).

²⁶ Art. 1(i) Regulation (EC) 713/2009.

²⁷ Art. 4 Regulation (EC) 714/2009.

signed to enable the adoption of binding measures at the EU level, while refraining from transferring the responsibilities of NRAs to a European body. Moreover, technical knowledge provided mainly by ENTSO-E and expertise with particular local conditions provided by NRAs are pooled through a system of manifold interactions in the development and implementation of network codes.²⁸

One might see the network code development process through the lens of a multi-stage principal-agent structure. At the EU level, the co-legislators may be seen as setting the conditions for the development of network codes through Third Energy Package regulations and directives. These conditions include a sequence of acts of ever increasing specificity by ACER and ENTSO-E, each setting conditions for the exercise of the other's use of discretion in the process,²⁹ until a network code is adopted by the Commission via comitology through the regulatory procedure with scrutiny, at which point the network code becomes legally binding as an EU regulation.³⁰ The particular way the process is designed additionally ensures that areas of *substantial* discretion are decided by the legislator at EU level, while technical issues are elaborated by ACER and ENTSO-E in the network code development process.³¹ Even though this is, in theory, designed such that areas of substantial discretion are decided by the legislator through appropriate procedures, non-negligible discretion may still remain with ACER and ENTSO-E as regards the development of draft measures for network codes. This potentially considerable residual discretion may give rise to concerns from a good governance point of view.³²

The complexity of the procedure originates from an impact assessment of the First³³ and Second³⁴ Energy Packages alongside the political, legal and epistemic constraints to a fully centralized development of ex-ante regulation for

²⁸ For a discussion see M. Zinzani (2012), 134-135, as well as Vlachou, C., 'New Governance and Regulation in the Energy Sector: What does the future hold for EU Network Codes?', *European Journal of Risk Regulation* 2 (2018), 268-278.

²⁹ The steps are discussed in greater detail in s. 2.2.

³⁰ See Art. 23(1) Regulation (EC) 714/2009 in connection with Art. 6(9) Regulation (EC) 714/2009, see also C. Vlachou (2018), 273. Vlachou also rightly points out the procedural differences between the adoption of network codes and so-called guidelines as provided by the regulations of the Third Energy Package. However, as Vlachou also notes, the procedures have been aligned by the Commission (see C. Vlachou (2018), 273-274). Hence, the analysis in this paper extends to both network codes and so-called guidelines, which are, contrary to their somewhat misleading denomination, regulations like network codes. Indeed, the implementation phase is illustrated in this article using the 'guideline' on Capacity Allocation and Congestion Management (Commission Regulation (EU) 1222/2015), however, the problems discussed from a good governance point of view are valid in general for network codes and guidelines.

³¹ See M. Zinzani (2012), 136.

³² See discussion in s. 3 and 4.

³³ For the electricity market that is Directive 96/9/EC.

³⁴ For the electricity market that is Directive 2003/54/EC and Regulation (EC) 1228/2003.

the internal electricity market at the EU level.³⁵ Independence requirements for NRAs were necessary conditions, but proved insufficient to achieve the regulatory convergence needed for market integration.³⁶ Informal cooperation at the EU level through various forums³⁷ with mere advisory roles likewise only had limited effect on regulatory convergence.³⁸ The solution envisaged the pooling of knowledge from Transmission System Operators (TSOs), that is, the grid operators, concerning technical issues as regards the transportation of electricity via the grid, and knowledge from independent NRAs concerning local conditions gathered at EU level forums. This form of cooperation also includes new joint and formalized decision-making procedures which would lead to the adoption of binding rules at the EU level.³⁹

The locus of cooperation among NRAs in the development of network codes lies in ACER's Board of Regulators.⁴⁰ ACER is an independent⁴¹ regulatory agency with legal personality, established through Regulation (EC) 713/2009, which is, in turn, based on an internal market clause in Article 114 TFEU.⁴² Thus, cooperation among NRAs was formalized within a newly created central entity with legal personality.⁴³ ACER's Independence requirements ensure that the independence of NRAs is safeguarded even when cooperating at the EU level in the development of network codes.⁴⁴ However, at the same time, there are limits to the accountability mechanisms available with respect to the regulatory agency itself. In case discretionary choices are made by ACER, this may lead to accountability concerns.⁴⁵ Incorporation of ACER into the EU legal order as an EU body ensures that good governance principles as promoted at the EU level are applicable to the agency.⁴⁶

³⁵ For an overview and discussion see M. Zinzani (2012), 94-133; L. Hancher & P. Larouche, 'The Coming of Age of EU Regulation of Network industries and Services of General Economic Interest' in Gráinne de Búrca & Paul Craig (eds.), *The Evolution of EU Law 2* (Oxford University, 2011), 743-782.

³⁶ See *supra* 35.

³⁷ That is in particular the Florence Forum, CEER and ERGEG, for a discussion see D. Coen & M. Thatcher, 'Network Governance and Multi-Level Delegation: European Networks of Regulatory Agencies', *International Journal of Public Policy* b (2008), 49-71.

³⁸ S. Lavrijssen & L. Hancher (2009), 25-28.

³⁹ See *supra* 35.

⁴⁰ See Art. 14 Regulation (EC) 713/2009.

⁴¹ See Recital (5) Regulation (EC) 713/2009, as well as several independence requirements for ACER's organs in Regulation (EC) 713/2009.

⁴² M. Zinzani (2012), 135.

⁴³ Recitals (5) and Art. 2 Regulation (EC) 713/2009.

⁴⁴ See Recitals (16) Regulation (EC) 713/2009.

⁴⁵ S. Lavrijssen & L. Hancher (2009), 38-55; L. Hancher & P. Larouche (2010). This will be discussed more extensively in ss 3 and 4 of this paper.

⁴⁶ European Governance: A White Paper, COM (2001) 428 (henceforth White Paper on Good Governance). Art. 15 TFEU.

ACER contributes to regulatory convergence through joint decision making procedures, both in the development of network codes and in their implementation (see section 2.2.).⁴⁷ Regarding the development of network codes, ACER wields various soft legal powers as will be discussed in section 2.2.⁴⁸ As regards the implementation phase, in particular the decisions taken by NRAs when adopting measures implementing network codes, Regulation (EC) 713/2009 is to some extent unclear about ACER's precise powers. Articles 7, 8 and 9 of the regulation provide ACER with various powers to take binding decisions in case of cross-border disputes with respect to technical issues. Clearly, these decision-making powers contain ex-post regulatory measures to settle disputes between two or more NRAs as regards certain technical issues which are regulated in fully implemented network codes. It is unclear, however, to what extent some of these powers apply to conflicts between NRAs as regards the conformity of a given network code with a decision by another NRA implementing that same code.⁴⁹ Besides individually binding decisions, ACER further issues opinions to the Commission in case an NRA requests an opinion concerning whether a decision taken by another NRA complies with 'guidelines' referred to in Directive 72/2009 or Regulation (EC) 714/2009, following which the Commission has the power to take binding decisions.⁵⁰ While the regulations of the Third Energy Package make a formal distinction between guidelines and network codes, a teleological interpretation would also subsume network codes under the respective provisions as there is no evident reason to have important distinctions in regulatory procedures that are not warranted by a difference in nature of the respective legal acts.⁵¹ Indeed, the Commission has suggested accordingly that its decision-making powers should be extended to network codes.⁵² In summary, ACER has various powers besides monitoring, analyzing and organ-

⁴⁷ L. Hancher & P. Larouche (2010), s. 2(b).

⁴⁸ See in particular Art. 6, Regulation (EC) 714/2009, to be discussed in greater detail in s. 2.2.

⁴⁹ NRAs' decisions on the implementation of a network code, which concerns the cross-border electricity grid, is clearly a 'regulatory [issue] that [falls] within the competence of national regulatory authorities' (Art. 8(1) Regulation (EC) 713/2009). That would suggest that ACER would have the competence to take a binding decision in case, e.g., an NRA contests another NRA's decision not to implement or to implement in a certain way a network code, as regards the conformity of that decision with the network code. However, on the other hand, it is not clear in how far the regulations of the Third Energy Package foresaw the substantial implementation procedures we see with network codes today (see the example of CACM discussed below), as might be suspected given the relative absence of provisions concerning the implementation phase in Regulations (EC) 713/2009 and 714/2009. In that case, we would not expect Art. 8(1) Regulation (EC) 714/2009 to apply to this case.

⁵⁰ Art. 39, Directive 72/2009 as well as Art. 7(4) Regulation (EC) 713/2009.

⁵¹ See *supra* 30.

⁵² C. Vlachou (2018), 282.

izing cooperation between NRAs in the implementation of network codes,⁵³ even though it is unclear how far its powers to take binding decisions to ensure harmonized implementation of network codes can exactly reach.

ENTSO-E, in turn, organizes the cooperation between transmission system operators.⁵⁴ Cooperation among TSOs did not see the same tendency towards formalization as the cooperation among NRAs did and their role remained purely advisory for a long time.⁵⁵ Their position in the network code development process was formalized through the regulations of the Third Energy Package establishing ENTSO-E.⁵⁶ The network is crucial for the process as it develops draft network codes which will, after further steps, ultimately be submitted to the Commission.⁵⁷ This role is owed to TSOs' expertise concerning technical issues facing the electricity grid. In so far as this technical expertise amounts to epistemic authority recognized and potentially relied upon by the Commission when adopting network codes, or by NRAs when adopting implementing measures, ENTSO-E's role may even be described as dominant.⁵⁸ That, in turn, would raise serious questions concerning safeguards for stakeholder responsiveness⁵⁹ considering that ENTSO-E is not an EU body, but an international non-profit organization established under Belgian law.⁶⁰ As such, ENTSO-E is not bound by principles of good governance, unlike EU institutions and bodies.⁶¹ The cooperation between these bodies and institutions in the development and implementation of network codes shall be outlined in the next section.

2.2. Procedures establishing network codes

This section will outline the development and implementation processes of network codes. First, the process of developing a network code up

⁵³ See for example Arts 6(6) and 7(3) Regulation (EC) 713/2009, Art. 9(1) Regulation (EC) 714/2009.

⁵⁴ Art. 4 Regulation (EC) 714/2009.

⁵⁵ M. Zinzani (2012), 108-130.

⁵⁶ Arts 4 and 5 Regulation (EC) 714/2009.

⁵⁷ Art. 6(6) Regulation (EC) 714/2009.

⁵⁸ Some authors have expressed concerns concerning the dominant roles of the TSOs and ENTSO-E, respectively in the development of network codes. See for some critical remarks O. Woolley, J. Schaumberg & G. St. Michel, 'Establishing an Offshore Electricity Grid: A Legal Analysis of Grid Developments in the North Sea and in US Waters' in M.M. Roggenkamp, L. Barrera-Hernández, D.N. Zillman & I. Del Guayo (Eds.), *Energy Networks and the Law; Innovative Solutions in Changing Markets*, (Oxford University Press, 2012), Ch. 10.

⁵⁹ To be discussed in ss 3 and 4.

⁶⁰ Art. 2(2) Articles of Association of ENTSO-E (Edition 30 September 2014). The consequences for safeguards available will be discussed in s. 4.

⁶¹ See White Paper on Good Governance.

to the point that it is adopted as an EU regulation by the Commission⁶² will be discussed. There is a high density of provisions outlining this process in the regulations of the Third Energy Package.⁶³ Second, the implementation phase will be described. Not every network code contains an implementation procedure and the regulations of the Third Energy Package contain relatively few provisions concerning the procedures in the implementation phase. The implementation phase will, thus, be exemplified by discussing the implementation procedure for CACM (Guideline on Capacity Allocation and Congestion Management).⁶⁴

2.2.1. The network code development process⁶⁵

There is a multitude of interactions between the members of the regulatory network in the pre-comitology phase. Some are characterized by principal-agent relationships where one member sets conditions for the actions of the other and subsequently exercises some sort of control over the other member's discretionary choices. Others are characterized by knowledge exchange and mutual support in the absence of hierarchy. We may refer to the former as vertical and the latter as horizontal relationships, respectively.

As regards vertical relationships, the co-legislator has determined the areas for which network codes may be developed.⁶⁶ For these areas, the Commission establishes an annual priority list which may be seen as containing the strategic goals for the development of network codes.⁶⁷ Based on these strategic goals, ACER establishes framework guidelines containing 'clear and objective principles [...] for the development of network codes'.⁶⁸ ENTSO-E then develops network codes 'in line with the relevant framework guideline'.⁶⁹ Finally, the Commission adopts the network codes via comitology through the regulatory procedure with scrutiny,⁷⁰ which is currently planned to be phased out and replaced by adoption as a delegated act.⁷¹

⁶² See *supra* 30.

⁶³ See in particular Art. 6 Regulation (EC) 714/2009.

⁶⁴ Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a Guideline on Capacity Allocation and Congestion Management.

⁶⁵ An exhaustive discussion of the procedure is beyond the scope of this article. For a more detailed discussion and graphical representation of the procedure see T. Kohlbacher & S. Lavrijssen (2018), s. 3.

⁶⁶ Art. 8(6) Regulation (EC) 714/2009.

⁶⁷ Art. 6(1) Regulation (EC) 714/2009.

⁶⁸ Art. 6(2) Regulation (EC) 714/2009.

⁶⁹ Art. 6(6) Regulation (EC) 714/2009.

⁷⁰ See C. Vlachou (2018), 273.

⁷¹ See Art. 290 TFEU, Arts 61, 63, 67, Proposal for a Directive of the European Parliament and of the Council on common rules for the internal market in electricity, COM (2016), 864 (final). See also for a discussion: T. Kohlbacher & S. Lavrijssen (2018), s. 3; C. Vlachou (2018), 274-276.

The regulations of the Third Energy Package and EU procedural law provide for various means for the network members to exercise control over each other. The Council and European Parliament, respectively, exercise political control over the Commission via the regulatory procedure with scrutiny (RPS) through the possibility of using their veto right, which can be used to effectively block the adoption of a network code. One might argue that besides slight procedural differences, this channel of political control by the Council and Parliament, respectively, would be slightly enhanced when the RPS is replaced by adoption as delegated acts given the possibility of vetoing the adoption of a delegated act on any grounds and the possibility to revoke delegation altogether. On the other hand, control by Council and Parliament might be diminished following the replacement of committee procedures with national expert consultations.⁷²

The Commission, in turn, exercises control over ACER and ENTSO-E by ultimately retaining the decision to adopt a network code. It also assesses framework guidelines as regards conformity with non-discrimination, effective competition and efficient functioning of the market goals. As such, the Commission may request ACER to re-submit framework guidelines and can ultimately draft framework guidelines itself to ensure conformity with these goals.⁷³ Finally, ACER exercises some degree of control over ENTSO-E's use of discretion in developing draft network codes by providing ENTSO-E with a reasoned opinion on the proposed draft. Even though ENTSO-E is not under an obligation to amend the draft network code, ACER may wait before submitting the network code to the Commission for adoption until it is satisfied that ENTSO-E's draft is in line with the framework guidelines.⁷⁴

Besides these hierarchical relationships, the members of the regulatory network also provide each other with support in their tasks through consultation exercises and pooling and sharing expertise concerning technical issues and local conditions.⁷⁵ The Commission consults ACER and ENTSO-E when

⁷² D. Chalmers, G. Davies, G. Monti, *European Union Law 3* (Cambridge University Press, 2015), 44-150; Art. 290 TFEU. C. Vlachou (2018), 274-276; Interinstitutional Agreement on Better Law Making, L123/1, 12.05.2016, para. 28.

⁷³ Arts 6(4)-6(5) Regulation (EC) 714/2009.

⁷⁴ Arts 6(6)-6(9) Regulation (EC) 714/2009. The regulation is not entirely clear as regards how long ACER may refuse submission before the Commission may develop the network code by itself due to failure by ACER to submit (Art 6(11) Regulation (EC) 714/2009).

⁷⁵ For an overview, see the graphical illustration in T. Kohlbacher & S. Lavrijssen (2018), s. 3. See in particular Art. 6 Regulation (EC) 714/2009.

developing the annual priority list⁷⁶ and ACER is required to consult ENTSO-E when developing framework guidelines.⁷⁷

Besides ENTSO-E's obligation to 'duly' consider ACER's opinion when drafting network codes,⁷⁸ the provisions concerning the network code development process remain silent as regards the extent to which ACER, ENTSO-E and the Commission are required to take into account each other's opinions. Moreover, the control mechanisms outlined above often function through 'soft' control instruments.⁷⁹ Nevertheless, given their expertise, ACER and ENTSO-E may be expected to have large influence on the content of the draft network code submitted to the Commission.⁸⁰ The regulations of the Third Energy Package, thus, aim at striking a delicate balance between heterogeneous actors using various instruments in developing network codes.

In addition to mutual consultations, the Commission, ACER and ENTSO-E also hold consultation exercises with relevant stakeholders when elaborating the annual priority list, framework guidelines and draft network codes.⁸¹ Further consultations are provided at various instances throughout the network code development process.⁸² The mode of consultations is further provided through self-adopted procedural rules by ACER and ENTSO-E.⁸³ ACER's procedural rules explicitly state that they have a non-binding character.⁸⁴ Moreover, it seems doubtful that ENTSO-E's procedural rules could be seen as binding from an EU law perspective given that ENTSO-E is not an EU body.

⁷⁶ Art. 6(1) Regulation (EC) 714/2009.

⁷⁷ Art. 6(3) Regulation (EC) 714/2009.

⁷⁸ Art. 8(2) Regulation (EC) 714/2009.

⁷⁹ See Art. 6 Regulation (EC) 714/2009.

⁸⁰ Compare S. Lavrijssen & L. Hancher (2009), 39-54.

⁸¹ Arts 6(1), 6(3) and 10(1) Regulation (EC) 714/2009.

⁸² See regulations (EC) 713/2009 and 714/2009. At times, consultations appear obligatory ('consults', 'shall consult'), at times facultative ('may consult'), but in any case ACER and ENTSO-E are under a general obligation to consult 'extensively and at an early stage' (Arts 10(1) Regulation (EC) 713/2009 and 714/2009).

⁸³ ENTSO-E, that is the ENTSO-E Consultation Process 2011 Edition (published 28 June 2011), is available at https://www.entsoe.eu/fileadmin/user_upload/_library/Association/110628_Consultation_Process_Description.pdf, as well as the ENTSO-E Network Code Development Process (published 17 February 2012), available at https://www.entsoe.eu/fileadmin/user_upload/_library/Association/120217_Network_Codes_Development_Process.pdf. For ACER, it is the Guidance Notes on Consultations by the Agency for the Cooperation of Energy Regulators (published 11 September 2013), available at https://www.acer.europa.eu/Official_documents/Other%20documents/Guidance%20Note%20on%20Consultations%20by%20ACER.pdf.

⁸⁴ ACER Guidance Notes on Consultations, para. 1.4.

2.2.2. The Implementation Phase of Network Codes

In the spirit of subsidiarity and proportionality,⁸⁵ implementation procedures for network codes may differ substantially. The regulations of the Third Energy Package do not contain a high density of procedural provisions concerning the implementation phase as they do for the development phase of network codes. They contain general provisions for ACER, ENTSO-E and the Commission to monitor, analyze and report on the implementation of network codes.⁸⁶ ACER has general and wide competences to fill regulatory gaps at Community level,⁸⁷ which, together with ACER's task to provide a framework for cooperation among NRAs,⁸⁸ would imply a role for ACER in bringing together NRAs in the implementation phase. Thus, it appears that ACER has a role in promoting regulatory convergence in the implementation phase of network codes. Without further specification, however, ACER's precise duties and powers in bringing together NRAs in the implementation phase remain unclear. More clarity could be provided by the adoption of binding rules on such cooperation between NRAs,⁸⁹ but no such rules have been adopted yet. As has been discussed in section 2.1, the regulations of the Third Energy Package also remain unclear regarding whether ACER has the power to take binding decisions in cases of conflict among NRAs when the latter take decisions concerning the adoption of implementing measures of network codes. Finally, ACER's general task to hold consultations appears to be primarily directed towards the development phase of network codes,⁹⁰ while ENTSO-E's general duty to organize consultations appears explicitly limited to the development phase.⁹¹

Network codes provide for their own implementation procedure, which can be characterized by a considerable degree of complexity, as exemplified by CACM.⁹² CACM contains detailed rules on the cooperation between TSOs through ENTSO-E including required majority quorums to adopt draft implementation measures, procedures on the adoption of these proposed implementation measures by the NRAs, requests for amendments of the proposed

⁸⁵ Arts 5(3) and 5(4) TFEU.

⁸⁶ Recitals (8) and Arts 6(6) and 9(1) Regulation (EC) 713/2009, Arts 8(8) and 9(1) Regulation (EC) 714/2009.

⁸⁷ Recitals (5) Regulation (EC) 713/2009.

⁸⁸ Arts 7(2) and 7(3) Regulation (EC) 713/2009.

⁸⁹ Art. 7(3) Regulation (EC) 713/2009.

⁹⁰ Art. 10(1) Regulation (EC) 713/2009.

⁹¹ Art. 10(1), together with Arts 8(1), (2) and (3) Regulation (EC) 714/2009.

⁹² See *supra* 64.

measures by NRAs and various other rules concerning monitoring, consultations and stakeholder involvement.⁹³

The absence of safeguards for the involvement of ACER and stakeholder participation in the implementation phase through the higher-ranking regulations of the Third Energy Package raise questions, however, particularly because the presence of a majority quorum in the implementation phase of CACM⁹⁴ suggests the presence of contentious issues. This will further be discussed in section 4.

3. Good Governance and Safeguards for Stakeholder Responsiveness

As will be discussed below, good governance principles are related to general principles of EU law in at least two ways. First, they serve as interpretive concepts, which structure various values around a common core.⁹⁵ Second, they may partially be enforced through principles of EU law and legal safeguards related to these principles.⁹⁶

3.1. Good Governance Principles of Openness, Participation and Accountability

Good governance principles for the EU legal order are proclaimed in the Commission's White Paper on Good Governance.⁹⁷ The principle of openness generally refers to an open manner of work and active communication by the institutions and bodies of the EU. The principle of participation demands 'wide participation throughout the policy chain' and an 'inclusive approach when developing and implementing EU policies'. The principle of accountability, in turn, asks for clarity of roles in 'legislative and executive processes' and includes a duty to provide an explanation and take responsibility on behalf of bodies and institutions.⁹⁸ The principles of good governance offer very general guidance and are not legally binding, with their particular means

⁹³ See Art 9 CACM.

⁹⁴ *Ibid.*

⁹⁵ D. Curtin & L. Dekker, 'Good Governance: The Concept and its Applications by the European Union' in D. Curtin & R.A. Wessel (Eds.), *Good Governance and the European Union*, (Cambridge: Intersentia, 2005), 7-8.

⁹⁶ L. Hancher, P. Larouche & S. Lavrijssen (2004), 341.

⁹⁷ European Governance: A White Paper, COM (2001), 428, henceforth White Paper on Good Governance.

⁹⁸ White Paper on Good Governance, s. II, Art. 15 TFEU.

of enforcement being case dependent.⁹⁹ However, collectively, the duty of openness towards stakeholders and the duty to provide for channels of participation and mechanisms of accountability (in this case, the requirement to be answerable via means of ex-post control)¹⁰⁰ constitute a duty of stakeholder responsiveness¹⁰¹ on part of the members of the regulatory network for network codes. This duty gains effectiveness via various accountability mechanisms, which may include legal,¹⁰² political,¹⁰³ social,¹⁰⁴ vertical administrative¹⁰⁵ and peer accountability.¹⁰⁶ Legal accountability mechanisms may be triggered through violation of legal principles, which will be discussed in section 3.2, whereas the availability of the latter accountability mechanisms are conditional on the particular process and legal status of the members of the ‘network of networks’ described in section 2 above.

3.2. Related General Principles of EU administrative Law

This section will discuss the normative implications of the principles of legality, legitimate expectations, good administration, mutual sincere cooperation and institutional balance with regards to their relation to the normative demands of the principles of good governance, concerning the development and implementation of network codes.

Stakeholder responsiveness is clearly related to the principles of legality, legitimate expectations and good administration. Violation of these principles may trigger legal accountability mechanisms which provide for safeguards for

⁹⁹ D. Chalmers, G. Davies & G. Monti (2014), 382-383. See also M. Bovens, ‘Analysing and assessing public accountability. A conceptual framework’, *European Law Journal* 4 (2007), 449-450.

¹⁰⁰ M. Bovens describes the core of the concept of accountability as ‘a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences’ (M. Bovens (2007), 450) and, thus, an ex-post control mechanism (M. Bovens (2007), 467).

¹⁰¹ M. Bovens describes responsiveness to the particular public as accountability in the broad sense. See M. Bovens (2007), 449-450.

¹⁰² That is means of legal redress via the judiciary, in particular through jurisdiction of the CJEU.

¹⁰³ In particular through elected representatives, see M. Bovens (2007), 455.

¹⁰⁴ In particular through stakeholders and the wider public, see M. Bovens (2007), 457.

¹⁰⁵ This paper will understand vertical administrative accountability as control mechanisms exercised by an administrative body or institution at a different level of the executive branch of government. See E. Vos, ‘Independence, Accountability and Transparency of European Regulatory Agencies’ in D. Geradin, R. Muñoz & N. Petit, *Regulation through Agencies in the EU* (Cheltenham: Edward Elgar, 2005), 128-129.

¹⁰⁶ That is, in our case, mutual monitoring among the network members. See Y. Papadopoulos, ‘Problems of Democratic Accountability in Network and Multilevel Governance’, *European Law Journal* 4 (2007), 480-483.

stakeholders in case the standing criteria for actions under Articles 263 or 267 TFEU are fulfilled.

According to the principle of legality, due consideration must be given to stakeholder input by providing that the ‘factual and legal considerations’ of the case be taken into account and sufficiently and properly stated¹⁰⁷ in the acts adopted by ACER and the Commission and that the respective acts must not be based on arbitrary reasons or improper purpose amounting to misuse of power.¹⁰⁸ Similarly, the principle of good administration implies a duty to care, which requires that the interests of all parties be impartially weighed.¹⁰⁹

The principle of legitimate expectations protects stakeholders in their expectation that the rules adopted as network codes will reflect their input once such ‘justified hopes’ developed from ACER or ENTSO-E taking their input into account. This would not be the case if as a ‘prudent and discriminating trader’, they could have foreseen that their input would not be reflected.¹¹⁰ The soft-law character of framework guidelines issued by ACER does not in itself negate the possibility that legitimate expectations could be raised through the inclusion of stakeholder input in these guidelines.¹¹¹

Concerning the principle of mutual sincere cooperation, a case can be made that it indirectly restricts the Commission particularly, but also ACER, from disregarding legitimate stakeholder interests that have been voiced through consultation exercises in the development phase of network codes. The principle requires the Commission to ‘abstain from any measure that could jeopardize the attainment of the Union’s objectives and to contribute to facilitating the tasks of the other institutions.’¹¹² The co-legislators clearly envisaged an open deliberation process involving all relevant stakeholders for the development of network codes.¹¹³ So long as there was an important channel for stakeholder input in the regulatory framework intended by the co-legislators when adopting the regulations of the Third Energy Package, it could be argued that it would

¹⁰⁷ Case 18/57 *Nold KG v ECSC High Authority* (1959) ECR 89.

¹⁰⁸ H. C. H. Hofmann, ‘General Principles of EU law and EU Administrative Law’ in C. Barnard & S. Peers, *European Union Law* (Oxford University Press, 2017), 208-209.

¹⁰⁹ Case C-248/99 P, *France v Monsanto and Commission*, ECLI:EU:C:2002:1, paras 92-93.

¹¹⁰ Compare Case 265/85, *Van den Bergh, Jurgens BV and Van Dijk Food Products (Lopik) BV v Commission*, ECLI:EU:C:1987:121, para. 44.

¹¹¹ Compare Case C-189/02P *Dansk Rørindustri and Others v Commission*, ECLI:EU:C:2005:408, paras 210-211.

¹¹² Opinion of Advocate General Sharpston, delivered on 26 November 2015, Case C-660/13, ECLI:EU:C:2015:787, para. 128.

¹¹³ Art. 10 Regulation (EC) 713/2009, Art. 10 Regulation (EC) 714/2009, see also consultation exercises discussed in s. 2.

contravene the ‘tasks’ of the co-legislators if the Commission or ACER gave unjustified disregard to stakeholder interests voiced through consultations. Therefore, it can be argued that mutual sincere cooperation indirectly promotes participation in the development of network codes. A breach of the principle may again trigger legal accountability mechanisms, which would give legal effect to the normative requirements of stakeholder responsiveness.

The reasoning for the principle of institutional balance¹¹⁴ can be understood¹¹⁵ as prevention of a situation in which accountability mechanisms protecting interests of the addressees of an authoritative legal act become ineffective due to the delegation of discretionary powers to a body that is not subject to a sufficient degree of such accountability mechanisms itself.¹¹⁶ In the case of pre-decision¹¹⁷ bodies such as ACER and ENTSO-E, which use soft law instruments to influence the rules to be adopted as network codes, it might be argued that no discretionary power has been delegated.¹¹⁸ Firstly, framework guidelines and draft network codes are non-binding.¹¹⁹ Secondly, ACER’s and ENTSO-E’s discretion is limited by the conditions, the interactions between the bodies and the consultation requirements provided by the co-legislators for the development of network codes through the regulations of the Third Energy Package. These conditions, interactions and consultation requirements impose restrictions on ACER and ENTSO-E, respectively, to an extent that one might argue that no ‘real discretion’¹²⁰ remains on their part.¹²¹ However, a teleological argument would extend the application of the principle to the framework guidelines and draft network codes in spite of their respective soft-law and preparatory charac-

¹¹⁴ Case C-270/12, *United Kingdom v European Parliament and Council of the European Union*, ECLI:EU:C:2014:118 (henceforth *ESMA ruling*). Case 9/56, *Meroni & Co, Industrie Metallurgiche SPA v High Authority of the European Coal and Steel Community*, ECLI:EU:C:1958:7 (henceforth *Meroni v High Authority*). Case 98/80, *Romano v INAMI*, ECLI:EU:C:1981:104.

¹¹⁵ Alternatively it has been understood in ‘broader political-constitutional terms’ preserving an ‘ideal dispensation of powers’ (M. Everson & E. Vos, ‘European Agencies: What About the Institutional Balance?’, *Maastricht Working Papers Faculty of Law* 4 (2014), 10).

¹¹⁶ *Meroni v High Authority*, at 151-152. The Court argued that otherwise ‘the balance of powers’, which was a ‘fundamental guarantee’ to undertakings [thus the focus on norm addressees], would be rendered ‘ineffective’.

¹¹⁷ S. Griller & A. Orator, ‘Everything under Control? The ‘way forward’ for European agencies in the footsteps of the Meroni doctrine’, *European Law Review* 1 (2010), 13.

¹¹⁸ Compare Order of the Court of First Instance, 17 June 2008, *FMC Chemical SPRL v European Food Safety Agency*, ECLI:EU:T:2007:67, para. 66.

¹¹⁹ Compare S. Griller & A. Orator (2010), 13.

¹²⁰ ‘involving difficult choices based on a consideration of the economic facts and circumstances in the light of which those choices are made’ (*Meroni v High Authority*, at 152). In its *ESMA ruling*, the Court’s more dynamic interpretation assessed whether the ESMA had ‘a very large measure of discretion’ (*ESMA ruling*, para. 54).

¹²¹ Compare *ESMA ruling*, para. 46-53.

ters.¹²² ACER and ENTSO-E can be expected to have substantial influence over the rules adopted as network codes, particularly given ENTSO-E's epistemic authority. Moreover, the rules concerning grid operation may substantially influence the market outcome for energy consumers regarding electricity provided. In line with a dynamic interpretation of the principle, the question then becomes whether, relative to the amount of discretion, ACER and ENTSO-E are subject to sufficient control mechanisms, considering, besides formal accountability mechanisms, their overall embeddedness in the process and various soft control powers over them.¹²³ As regards the legitimate interests of stakeholders, the sufficiency of control mechanisms will depend on the degree to which ACER and ENTSO-E, respectively, may directly or indirectly be held to account in case the stakeholders' legitimate interests, which have been voiced through consultations, have not been reflected in framework guidelines or draft network codes. This also underlines the connection between the availability of control mechanisms and stakeholder responsiveness.

4. Assessment

This chapter will provide an assessment of the processes of the adoption of framework guidelines, the development of draft network codes, the adoption of network codes and the implementation phase of network codes against the requirements of stakeholder responsiveness following from the principles of good governance. It will also offer remarks on potential improvements of the processes with respect to stakeholder responsiveness, with the guidance of principles of good governance as discussed in section 3.

4.1. Adoption of Framework Guidelines, opinions and recommendations by ACER

Even though ACER is subject to various consultation requirements,¹²⁴ accountability mechanisms available to stakeholders appear limited.

Legal accountability mechanisms are hampered by the soft law nature of ACER's acts in the development phase. ACER's opinions to ENTSO-E on draft

¹²² Compare M. Simoncini, 'The Erosion of the Meroni Doctrine: The Case of the European Aviation Safety Agency', *European Public Law* 2 (2015), 309-342.

¹²³ See *ESMA ruling*, paras 46-53. Lavrijssen and Hancher also argue for strengthened alternative accountability mechanisms. See S. Lavrijssen & L. Hancher (2009), 35 and 46-55. Simoncini argues for flexibility as regards the choice of accountability mechanisms and that the 'nature of control mechanisms can vary according to the status of the delegated subject'. See M. Simoncini (2015), 326-330.

¹²⁴ See in particular Art. 6(3) Regulation (EC) 714/2009 and Art. 10 Regulation (EC) 713/2009.

network codes¹²⁵ and its recommendations to the Commission as regards the adoption of network codes¹²⁶ are explicitly excluded from judicial review under Art. 263 TFEU.¹²⁷ Framework guidelines are merely a procedural step towards the development of draft network codes and, ultimately, network codes. Network codes then give legal effect to the rules that have been developed through the governance process vis-à-vis third parties. The Commission is not bound in its decision to adopt a network code by the content of the framework guidelines issued and draft network codes submitted.¹²⁸ Thus, framework guidelines cannot be assumed to have legal effect¹²⁹ or direct concern.¹³⁰ Thus, they do not appear to be reviewable via direct action under Art. 263 TFEU. A stakeholder would have to wait for a network code to be adopted or even implemented,¹³¹ which seems unsatisfactory given the potential length of development and implementation procedures.¹³²

Moreover, ACER's other accountability mechanisms for enforcing stakeholder responsiveness appear unsatisfactory. ACER's political or vertical administrative accountability is limited by its independence requirements.¹³³ Peer accountability is provided through its formalized interactions with the Commission and ETNSO-E.¹³⁴ However, it appears doubtful that ACER's consultation of ENTSO-E during the development of framework guidelines¹³⁵ or the Commission's power to request a redraft of framework guidelines in case they are found to be out of line with the Annual Priority list¹³⁶ would offer satisfactory safeguards for legitimate stakeholder interests. On the one hand, the legal and political incentives for ENTSO-E and the Commission to consider certain stakeholder interests when reviewing ACER's draft documents might differ

¹²⁵ Art. 6(7) Regulation (EC) 714/2009.

¹²⁶ Art. 6(9) Regulation (EC) 714/2009.

¹²⁷ See Art. 263 TFEU.

¹²⁸ This follows from the absence of specific restrictions in Art. 6(9) Regulation (EC) 714/2009 on the one hand, and on the other hand from the principle of institutional balance discussed in s. 3. If the Commission was bound to framework guidelines or draft network codes, it could be argued that ACER or ENTSO-E would have discretionary powers in conflict with the principle of institutional balance. The freedom of the Commission is, of course, restricted by principles of legality, legitimate expectations, mutual sincere cooperation and Good Administration as discussed in section 3. Hence, Good Governance Principles and related principles of EU law balance the need for the Commission's discretion and its limitations.

¹²⁹ Art. 263 TFEU.

¹³⁰ Art. 263(4) TFEU.

¹³¹ For the availability of direct action under 263 TFEU and Art. 263(4) TFEU or review via Preliminary Reference Procedure under Art. 267 TFEU, see s. 4.3.

¹³² See discussion in s. 2.

¹³³ See *supra* note 43.

¹³⁴ See discussion in s. 2, in particular Art. 6 Regulation (EC) 714/2009.

¹³⁵ Art. 6(3) Regulation (EC) 714/2009.

¹³⁶ Art. 6(4) Regulation (EC) 714/2009.

from incentives on part of stakeholders. A case could be imagined in which legitimate interests of a particular stakeholder are crowded out in the set of wider political considerations on part of ENTSO-E or the Commission. On the other hand, ACER is not bound by ENTSO-E's opinion through its consultation and the annual priority list appears too general as a review standard to enforce particular stakeholder interests. Finally, social accountability depends on provisions that define the extent to which ACER needs to consider stakeholder interests if brought to its attention through consultations. ACER's duty to 'indicate how the observations received during the consultation have been considered and [to] provide reasons where those observations have not been followed'¹³⁷ requires ACER to provide justifications. However, it does not enable stakeholders to 'pose questions' or 'pass judgment'.¹³⁸ ACER's self-adopted procedural rules reiterate ACER's duty to explain and provide reasons; however, these procedural rules are themselves non-binding.¹³⁹ Hence, the consultation exercises provided cannot be said to offer satisfactory channels of social accountability.

Due to the weak accountability mechanisms available to stakeholders, ACER's role in the development phase of network codes does not appear to satisfy requirements for stakeholder responsiveness as they follow from the discussed principles of good governance.

4.2. Adoption of draft network codes by ENTSO-E

Similar to ACER, ENTSO-E is subject to the requirement of holding consultations. However, accountability mechanisms appear insufficient when observing the normative requirements for stakeholder responsiveness.

There is no avenue of legal accountability available to stakeholders via direct action under Article 263 TFEU against ENTSO-E's acts in the development phase, that is, in particular draft network codes, as ENTSO-E is not an EU body.¹⁴⁰ For the same reason, there are no political and vertical administrative accountability mechanisms capable of holding ENTSO-E to account. Peer accountability would mainly function through ACER's review of draft network codes submitted by ENTSO-E¹⁴¹ and the possibility for ACER not to submit a

¹³⁷ Art. 10(3) Regulation (EC) 713/2009.

¹³⁸ M. Bovens (2007), 450. Also general requirements on consultations as listed in Art. 10 Regulation (EC) 713/2009 do not go further than the provision of information and justification.

¹³⁹ See s. 2.

¹⁴⁰ Art. 263 (1) TFEU. As regards ENTSO-E's legal status see Art. 2(2) Articles of Association of ENTSO-E (Edition 30 September 2014).

¹⁴¹ Art. 6(7) Regulation (EC) 714/2009.

draft network code developed by ENTSO-E to the Commission for adoption.¹⁴² The review of draft network codes by ACER, however, appears to be restricted to its conformity with framework guidelines.¹⁴³ Given the potential lack of stakeholder responsiveness for framework guidelines themselves, peer accountability does not appear to be a satisfying accountability mechanism when it comes to the stakeholder responsiveness of ENTSO-E. Finally, similar to the social accountability of ACER, ENTSO-E's general duties concerning consultations do not go beyond information provision and justification¹⁴⁴. Hence, consultations cannot be seen as effective social accountability mechanism in the sense that they do not provide for 'pos[ing] questions' or 'pass[ing] judgment'.¹⁴⁵

The lack of accountability mechanisms as regards ENTSO-E appears particularly worrisome from the point of view of stakeholder responsiveness and good governance because of ENTSO-E's epistemic authority as regards technical issues concerning the electricity grid and resulting great factual influence over the network code development process. While in practice there may be an abundance of consultation exercises, from a safeguarding point of view, the availability of formalized mechanisms for stakeholders to 'pose questions' and 'pass judgments'¹⁴⁶ on draft network codes appears both indispensable and insufficient. Formalized mechanisms would also ensure that such questions or judgment could be officially noted. Resultantly, potential consequences¹⁴⁷ could later follow in case it becomes evident that legitimate stakeholder interests were not sufficiently taken into account by ENTSO-E. A stakeholder's judgment of the incorporation or omission of an opinion put forward through consultation exercises needs to become part of the factual considerations to be considered in accordance with the principle of legality.¹⁴⁸ Formalization of the possibility for stakeholders to provide judgment would thus aid this cause.

4.3. The Commission's decision adopting a network code

Mediated through framework guidelines and draft network codes, the Commission decision on the measures to be adopted as network codes is indirectly also a decision on the extent to which stakeholder input will

¹⁴² Art. 6(9) Regulation (EC) 714/2009.

¹⁴³ *Ibid.*

¹⁴⁴ See Art. 10 Regulation (EC) 714/2009.

¹⁴⁵ Compare M. Bovens (2007), 450.

¹⁴⁶ *Ibid.*

¹⁴⁷ The possibility for the actor to face consequences is the final condition within the concept of accountability proposed by Bovens, *Ibid.*

¹⁴⁸ See s. 3.2.

be reflected in the network codes adopted. The Commission's discretion in this respect is constrained in various ways through the principles of EU law discussed in section 3. The principles of legality, legitimate expectations, good administration and mutual sincere cooperation require the Commission to give due regard to stakeholder input reflected in draft network codes.¹⁴⁹ At the same time, the Commission cannot be bound by the content of draft network codes as this would result in a transfer of real powers to ENTSO-E and, hence, would likely violate the principle of institutional balance. The Commission thus takes its decision based on draft network codes, whilst taking into account the full 'factual and legal considerations'¹⁵⁰ of the case. Given the mostly informal nature of consultation exercises from an EU law perspective, stakeholder interventions appear only capable of contributing to the factual considerations by the Commission through their incorporation into framework guidelines and draft network codes. Stakeholders do not have a possibility to state in a formalized way whether framework guidelines or draft network codes reflect their input. As a result, the possibility for stakeholder input to become part of the factual considerations of the Commission appears reconciled by framework guidelines and draft network codes. This likewise gives rise to concerns from a good governance perspective in light of the absence of accountability mechanisms discussed in sections 4.1 and 4.2 that prevents stakeholders from enforcing responsiveness on the part of ENTSO-E and ACER with respect to their input. The constraint on the Commission's discretion by the principles of legality and good administration may to some extent become ineffective due to the lack of safeguards for stakeholder responsiveness with respect to framework guidelines and draft network codes. Thus, an important accountability mechanism available to stakeholders might be significantly weakened.

Given the absence of consultations with stakeholders at this stage,¹⁵¹ there are no direct and particular social accountability mechanisms keeping the Commission's decision when adopting a network code in check. The same holds true for peer- and vertical administrative accountability. Hence, enforceability of the Commission's duty to give due account to stakeholder input relies on legal and political accountability mechanisms to be made available to stakeholders.

Avenues for legal accountability mechanisms will frequently not be available to stakeholders. Many network codes require implementing measures.¹⁵² Given

¹⁴⁹ See discussion in s. 3.

¹⁵⁰ See s. 3.2.

¹⁵¹ See Art. 6(9) Regulation (EC) 714/2009.

¹⁵² See CACM discussed above as an example.

the formalistic interpretation of the phrase “implementing measures” found in Art. 263(4) TFEU by the CJEU,¹⁵³ the standing requirements for direct action under Art. 263(4) TFEU under the ‘Lisbon test’ will often not be satisfied. Thus, the requirement of ‘individual concern’¹⁵⁴ will have to be satisfied by a stakeholder according to the standing requirements for direct action under the general standing test, which is notoriously hard to meet.¹⁵⁵ Even though the individual concern requirement could potentially be loosened considering that stakeholders participated in the development process, the CJEU has generally been unwilling to accept enhanced prospects of standing.¹⁵⁶ Preliminary reference procedures under Art. 267 TFEU do not provide for satisfactory accountability mechanisms for stakeholders given the potentially lengthy implementation procedures in network codes.¹⁵⁷ Such lengthy procedures would imply that it might take years before a decision by an NRA has been adopted, which could then be appealed at a national court, thus opening avenues for legal redress.

Political accountability would function via the European Council and Parliament’s possibility to veto the adoption of a network code through comitology procedures. Similar procedures remain in place after comitology will be phased out and replaced by delegated acts in the adoption of network codes.¹⁵⁸ However, these accountability mechanisms are contingent on the formation of the required majorities within Parliament and the Council. It is consequently doubtful that they can serve as an effective safeguard for particular legitimate stakeholder interests given that the required vote by the Council or Parliament would be based on a wider range of considerations, which might render the accountability mechanism ineffective as regards the protection of particular interests of stakeholders.

4.4. The Implementation Phase

While an exhaustive discussion of good governance within the implementation phase is beyond the scope of this contribution, particularly regarding accountability mechanisms which rely on procedures according to national administrative law, one remark is in place as regards good governance at EU level. From the point of view of safeguarding stakeholder responsiveness in governance processes concerning network codes, the general lack of safeguards for stakeholder participation in the implementation phase in the higher-

¹⁵³ Case T-380/11, *Palirra Souliotis AE v European Commission*, ECLI:EU:T:2013:420.

¹⁵⁴ Art. 263(4) TFEU.

¹⁵⁵ Case 25/62, *Plaumann v Commission*, ECLI:EU:C:1963:17.

¹⁵⁶ P. Craig & G. De Burca, *EU Law: Text Cases and Materials* (Oxford: 2011), 521.

¹⁵⁷ See for example Art. 9 CACM.

¹⁵⁸ See C. Vlachou (2018), 270-276.

ranking regulations of the Third Energy Package seems surprising. Network codes can be subject to substantial implementation procedures and the particular procedures put in place may be suggestive of ‘difficult’ choices in the implementation phase.¹⁵⁹ The provision of stakeholder consultations in the implementation phase at EU level is, however, contingent on inclusion of such a provision in the network codes themselves. The development phase of network codes, however, does not appear to sufficiently safeguard stakeholder responsiveness, as discussed in sections 4.1 to 4.3. Stakeholders, thus, would not appear to have sufficient accountability mechanisms at their disposal to enforce their interest in having consultation exercises in the implementation phase in the event that a draft network code and, resultantly, a network code did not provide for such consultations. Therefore, from a systematic viewpoint, there seems to be insufficient guarantees that would safeguard stakeholder responsiveness in the implementation phase. The fact that the provisions in network codes governing their own implementation may empirically contain consultation exercises¹⁶⁰ does not eliminate the need for safeguards in higher-ranking EU law to ensure the adherence of future network codes to the standards of stakeholder responsiveness in the implementation phase as well.

Further stakeholder consultations may be provided through national administrative laws; however, the procedures and timeframes provided might be inconsistent across Member States, rendering doubts on whether these national procedures could provide adequate safeguards for the development of implementing measures for European network codes. From a safeguarding point of view as regards principles of good governance and stakeholder responsiveness, a case could be made for the provision of mandatory consultation procedures in the implementation phase of network codes through higher-ranking EU regulations.

4.5. Stakeholder Committees and ACER as a way to improve of stakeholder responsiveness

While it may be concluded that there are insufficient legal safeguards for stakeholder responsiveness in the network code development and network code implementation phases, it has not been argued that all soft law documents (framework guidelines) and draft codes should be subjected to full legal and political accountability mechanisms that are usually applied to legal acts of EU bodies. An overly legalistic approach towards stakeholder re-

¹⁵⁹ See discussion in s. 2.2.2.2, in particular concerning the existence of majority quota according to Art. 9 CACM.

¹⁶⁰ Compare Art. 12 CACM.

sponsiveness could frustrate the evolution of the network code development and implementation process, as there would be a risk of lengthy legal procedures against it. There are also other, softer ways of structuring the voice of the stakeholders and facilitating that the Commission takes due account of stakeholder input when adopting the final codes.

For example, stakeholder committees have been designed to organize stakeholder involvement in the implementation phase of network codes. They are co-organized by ACER and ENTSO-E. Their involvement is supposed to complement existing consultation and participation procedures. The committees serve the information exchange between stakeholders, providing them with the opportunity to participate in the implementation process via consultations, and assist monitoring the implementation process by providing a platform through which progress in implementation procedures can be reported. Stakeholder committees are organized separately by a family of network codes, i.e. market codes, operational codes and connection codes. As regards ACER and the NRAs, stakeholder committees support their monitoring tasks, while with respect to ENTSO-E, the committees further provide a platform for feedback in order to improve decision-making within ENTSO-E.¹⁶¹

Formalizing the role of stakeholder committees and their involvement in both the development and implementation phases would not only strengthen their role and improve their ability to structure dialogue among heterogeneous stakeholders. A formalized role could provide opportunity for stakeholders to ‘pose questions’ and ‘pass judgment’ in a formalized way as regards the incorporation of their interventions made through consultation procedures in framework guidelines or draft network codes. Their ‘questions’ and ‘judgment’ would also become part of the factual considerations to be taken into account by the Commission independent of their incorporation into draft network codes, as stakeholder consultations through stakeholder committees would become a formal part of the network code development process.

A second way to improve stakeholder responsiveness would be to give ACER similar powers to review implementing measures designed by the TSOs in the implementation phase as it has concerning the development phase of draft network codes by ENTSO-E. That would enable ACER to re-submit draft implementing measures to ENTSO-E, with input from the stakeholders, in case its assessment would indicate that a given implementing measure would have some degree of incompatibility with the attainment of goals as mentioned in

¹⁶¹ Terms of Reference for the Grid Connection European Network Code Stakeholder Committee, 22 January 2016, available at http://www.acer.europa.eu/en/Electricity/FG_and_network_codes/Documents/22012016%20Grid%20Connection%20ESC%20Final%20Draft%20ToR.pdf.

the framework guidelines, network codes, priority lists, or the European directives and regulations. Thus, the improvement of stakeholder responsiveness would result from enhanced peer-accountability in the implementation phase of network codes. From the point of view of safeguarding, good governance would suggest that the extended role of ACER be incorporated into higher-ranking EU law such as the regulations of the Third Energy Package.

The abovementioned suggestions might appear to be moderate improvements at best in accountability and stakeholder responsiveness. However, given the difficulty in extending legal accountability mechanisms to soft-law instruments or to bodies outside the EU legal order and the difficulty of extending the political or vertical administrative accountability over either ACER due to its independence requirements or over ENTSO-E given its legal status, an improvement in social accountability through stakeholder committees and peer-accountability via an enhanced role of ACER seems a road worth travelling in a quest for improved stakeholder responsiveness.

5. Conclusions

The processes of the development and implementation of network codes for the EU's internal electricity market appear to have deficits concerning the normative requirement of stakeholder responsiveness as it follows from good governance principles of accountability, participation and openness. Safeguards for stakeholder responsiveness in the development and implementation processes appear to be poor. This is mainly due to the limitations of legal accountability mechanisms, which are insufficiently complemented by political, vertical administrative, peer and social accountability mechanisms. Governance in the development and implementation of network codes uses flexible means of cooperation and non-traditional actors and instruments. These features of the established governance structure stem from historical lessons learned from market integration intertwined with legal, political and epistemic constraints as regards the possibility of providing centralized procedures for the development of network codes. Thus, they need to be considered when suggesting improvements of stakeholder safeguards.

This article does not suggest extending traditional legal and political accountability mechanisms to include intermediate steps of the network code development and implementation process. Instead, it suggests an improved and formalized role of stakeholder committees in the development and implementation phases of network codes, as well as an enhanced review role for ACER in the implementation phase. These rather modest suggestions are capable of enforcing the role of stakeholders and the responsiveness of network code development and implementation to stakeholder input, while concurrently

respecting the nature of the governance structure and the interaction between formal and informal processes.