

The Agency for the Cooperation of Energy Regulators (ACER) and the Liberalisation of the Energy Markets

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A. Introduction

The establishment of the Agency for the Cooperation of Energy Regulators (hereinafter "ACER" or "the Agency") brought high expectations around its role in the construction and implementation of the Internal Energy Market. Are there well-founded reasons for such expectations? Does the Agency have enough decision-making power to perform its regulatory functions?

The Treaty of Lisbon places energy at the heart of European activity. The creation of a genuine internal market for energy is one of the European Union's priority objectives. For many years, the European Commission had tried to liberalise the European energy market and to introduce effective competition. However, the markets remained national and highly concentrated. Since the Single European Act in 1986, the European Union was laying down the legal foundations of a European energy market. These foundations consist of the so-called first, second and third energy package, which will be briefly described in the following chapter.

In parallel with the process of EU energy market integration, there appeared a need to establish an EU energy regulator with monitoring and controlling powers. For this reason, ACER was established and the present paper is trying to prove that it plays a central role in the liberalisation process. Moreover, the organization and operation of the Agency, as

they are set out in their founding regulation¹ and specified in the other legal acts forming the third legislative package, are described and critically addressed.

With respect to the integration of electricity and gas markets, the Agency has been working, since its opening in 2011, on Framework Guidelines, containing the principles and criteria for the Network Codes to be developed and which contain the new EU-wide market and network rules. Although ACER has little decision-making power at present, I shall endeavour to prove in this paper that it could nonetheless play an important role in this process of liberalisation.

Certain of the activities to be performed by ACER are undertaken upon the request of the National Regulatory Authorities (NRAs) or from the European Parliament, the Council and the Commission. At the moment it is difficult to envisage the exact scale of the effort required to meet these requests. Moreover, the range and nature of the tasks assigned to ACER pose a challenge to the Agency in terms of their substance and the agency's resources.

Therefore, ACER will have to strike a balance between the demanding tasks and responsibilities bestowed upon it. Furthermore, circumstances in the electricity and gas sectors may evolve over the coming years, which may again dictate the necessity of a revision of some activities.

B. The Third Energy Package: Is this the final step towards an integrated European market?

Since the Single European Act of 1986, the European Union has striven to create an integrated European market. In the course of many years, there has been reasonable progress in many areas. Concerning a single European market for energy, however, this process has been less successful and continues to be a prioritized topic on the EU agenda. The European energy market has been a work in progress since the first Directives on the liberalisation of the internal market. The first EU legislation concerning this issue entered into force in 1998, including a directive for both the electricity and the gas markets. The First Directives began liberalising the wholesale energy market and specifying rules on unbundling and regulation in general terms.² The First Energy Package granted new suppliers the right to negotiated access to the transmission networks of the integrated incumbents.³ As a consequence of this initial package, national legislation was adjusted in order to enforce EU standards. The transposition seemed successful at first glance, but the implementation process was not without problems. The provisions of the First Energy Package left room for

1 Regulation (EC) No 713/2009 of the European Parliament and the Council of 13/7/2009 establishing an Agency for the Cooperation of Energy Regulators (hereinafter "ACER Regulation"), OJ L 211 of 14/8/2009, p. 1.

2 ACER/CEER, Annual Report on the Results of the Monitoring the Internal Electricity and Natural Gas Markets in 2011 of 29/11/2012, p. 17.

3 See *von Rosenberg*, Westinghousing Effective Competition – Lessons from the US Electricity Market, *International Energy Law Review* 2 (2009), p. 51.

cross-subsidisation and third party discrimination.⁴ With the benefit of hindsight, it is fair to say that the First Energy Package was only an initial step but not ambitious enough to tackle the challenges of creating a single market as a whole.

The Second Directives reflected very high goals as the new college of commissioners under the leadership of Commission President *José Manuel Barroso* chose the internal market for energy as a pilot project for competition policy.⁵ The Second Energy Package in 2003 foresaw more specific regulatory rules, such as those on tariff setting and the unbundling of network operators. Its main objective was to achieve full ownership unbundling. It also extended liberalisation to include retail markets as it foresaw the full market opening in 2007.⁶ Secondly, it mandated the NRAs to introduce a procedure of regulated Third Party Access. Consequently, the NRAs had to guarantee some kind of regulated Third Party Access to the transmission networks but, apart from that, the design of the national energy sectors remains largely within the jurisdiction of the Member States.⁷ After the results of the first energy sector inquiry, the Directorate-General for Energy was not fully convinced that the Third Energy Package was needed. However, a report in 2006 finally convinced the Commission to proceed with the drafting of a new package. A high concentration and foreclosure of markets were found to be the main causes of the still low level of competition in most markets.⁸ This was the reason that the Regional Initiatives were already set up in 2006 by national energy regulators. Through the discussions in the Regional Initiatives, they were developing common practices which would help the market participants to enter into cross-border markets.

In early 2007, the European Union proposed a new energy policy. The Energy Policy for Europe identified three main objectives:

“(1) increasing security of supply, (2) ensuring EU competitiveness and the availability of affordable energy, and (3) the promotion of environmental sustainability and combating climate change”.⁹

The publication of the new Directives and Regulations occurred on 14 August 2009 and the Member States had less than two years, until March 2011, to implement the main provisions of the Third Energy Package.

I. Objectives: Moving towards a new paradigm?

The overall objective of all three packages was the same; to create a single European market for energy and to increase the overall competitiveness within this sector. At the time of the First Energy Package in 1998, many Member States had monopolist constellations that

4 See *Cameron*, *The Internal Market in Energy: Harnessing the New Regulatory Regime*, *European Law Review* 30 (2005), pp. 631, 640.

5 See *Eickland*, *The Third Internal Market Package: New Power Relations among Member States, EU Institutions and Non-State Actors?*, *Journal of Common Market Studies* 49 (2011), p. 250.

6 ACER/CEER, (fn. 2), p. 17.

7 See *von Rosenberg*, (fn. 3), p. 51.

8 *Ibid.*

9 *De Jong*, *The 2007 Energy Package: The Start of a New Era?*, in: *Roggekamp/Hammer* (eds.), *European Energy Law Report V*, 2008, p. 101.

dominated the market. This was particularly true for France and Germany and many of these former concerns are still operational today. The general goal of creating a single European market for energy remains the same. The opening of the market should be in the interest of the European citizens and the energy industry at the same time. The intended effect is to keep prices for consumers as low as possible and to increase the standards of service together with the security of supply.¹⁰ Therefore, the main objective of the Third Energy Package is to put in place the regulatory framework which is needed in order to fully open the European electricity and gas markets.

II. Measures and main provisions of the Third Energy Package

Main goals of the energy market integration are the improvement of efficiency in the system and a functioning competition. This entails efficient price setting, which, in itself, requires a high level of transparency in a structurally competitive environment.¹¹ Building on these provisions, the Third Energy Package also introduces a set of obligations in terms of consumer protection. These requirements should address the main concerns of energy consumers, including the lack of sufficient competition in the energy market and a deficit in terms of accessible information.

Even after the opening of the energy markets in the 1990s, monopolistic or oligopolistic structures prevailed in many EU Member States. The objective of removing legal monopolies was already part of the First Energy Package of 1998, but the Commission realised that there was a risk at the level of vertically integrated companies.¹² The package included both negotiated Third Party Access and regulated Third Party Access. The 1998 provisions were more a first attempt in realizing Third Party Access than an actual achievement, especially because the directive allowed for temporary derogations.¹³ The Second Energy Package improved on this situation by introducing mandatory Third Party Access. As the results of the first two packages were still not satisfying, the Commission introduced explicit clarifications into the text of the Third Energy Package in order to increase compliance with the provisions of the Second Energy Package.¹⁴ The extent of market concentration is still high today. Therefore, control over networks has proved to be essential for deciding on free competition in this context.¹⁵ If only a few network providers share an entire market, competitiveness is sincerely limited. It remains to be seen, if the provisions of the new package will resolve these discrepancies.

10 *Ermacora*, Implementation of the Third Legislative Package for an Internal EU Gas and Electricity Market, Internal Document, European Commission, Former DG Transport and Energy, Directorate C: Security of supply and Energy markets, 2009, p. 4.

11 ACER/CEER, (fn. 2), p. 18.

12 *Lowe et al.*, Effective unbundling of energy transmission networks: lessons from the Energy Sector Inquiry, Competition Policy Newsletter 2007, p. 23.

13 *Haase*, European gas market liberalisation: Are regulatory regimes moving towards convergence?, Oxford Institute for Energy Studies 2008, p. 50.

14 *Newberry/Goldberg*, The European Energy Handbook 2011, 2011, p. 12.

15 *Reichert/Voßwinkel*, Die Energiepolitik der Europäischen Union, Centrum für Europäische Politik 2010.

The Third Energy Package also addresses structural deficiencies by requiring a high level of independence for the Transmission System Operators and regulators, as well as better cross-border coordination.¹⁶ The separating of transmission from production and/or supply makes the Transmission System Operators neutral, at least with regard to investment. The solution provided in the Third Energy Package in this respect is to foresee a process of the coordinated and, if necessary, enforced development of network plans.¹⁷ The ruling on the deadline for implementing the new unbundling rules passed on 3 March 2011 and the Transmission System Operators had to comply with the new provisions one year later, starting the 3 March 2012. For third country-controlled Transmission System Operators, the deadline was even later, that being in 2013. This indicates that the unbundling regime is one of the most challenging elements of the package. The risks and negative effects of insufficient unbundling could seriously harm the process of liberalisation.¹⁸ Therefore, additional authorities, such as the European Network of Transmission System Operators (ENTSO), National Regulatory Authorities (NRAs) and ACER should have a controlling function to ensure that the unbundling provisions are actually put into practice in a way that contributes to the overall objectives of the Third Energy Package. It remains to be seen, after the full implementation of all of the package provisions, whether this system will stay in place or whether it will evolve and lead to the creation of a single European operator that would be under the authority of ACER.

III. Third Energy Package evaluation

It is important to acknowledge that, so far, no clear best practice model for market integration exists. It is, therefore, problematic to establish elements that relate to an ideal package design. The full harmonization of market rules is not yet in place and the current state of energy markets in Europe is far from evolving into the Internal Energy Market. Evaluating the process towards the Third Energy Package as such, without taking into consideration this and many other external factors that also influence the design of the legislative package, would not lead to a realistic evaluation result. The national regulators are often not provided with the crucial powers and resources they need to ensure that EU rules are complied with. This may be due to the fact that they are not completely independent. The lack of power also implies that many regulators do not manage to impose the necessary penalties that are foreseen for cases of non-compliance.¹⁹ At the same time, many competing policies and programmes in the energy field are slowing down the development of the Internal Energy Market. Concerning infrastructure costs, for example, companies are

16 ACER/CEER, (fn. 2), p. 17.

17 *Ibid.*, p. 18.

18 ERGEG, Guidelines for good practice on Functional and Informational unbundling for Distribution System Operators, 2008, p. 3.

19 European Commission, Internal Energy Market – Time To Switch Into Higher Gear, Non-paper, 2011, p. 2.

not very interested in investing in networks that will be used by the whole market because this means that they will render the market entry of competing companies easier.²⁰

One of the external challenges constantly interfering with progress in the context of the energy packages is the issue of the security of supply. Even if the EU formulates this matter as part of the Third Energy Package, it conflicts with some of the other provisions of the package. At Member State level, the opening of energy markets and assuring the security of supply are often regarded as opposite objectives. As with the gas crisis in 2006, when Russia cut the supply transported via Ukraine, these events can have a serious impact on the European market to the point that they increase protectionist measures at Member State level. The same was visible with regard to the crisis in Libya and the situation after the nuclear accident in Japan.

Currently, the security of supply is at stake again due to the Ukrainian crisis. If the pipelines going through Ukraine are shut down, EU gas supplies can be threatened as half of the gas which the EU gets from Russia passes through the Ukraine. Nevertheless, reducing the EU dependence on Russian gas is possible, but it will take time, money and sustained political will. In March 2014, the EU's heads of government requested the European Commission to produce a plan for reducing energy dependence which is likely to give a push to storage capacity and both more and larger inter-connectors. Moreover, it could strengthen requirements for countries to maintain a strategic gas reserve.²¹ Those events draw the attention from the internal market to different issues that are at the core of national domestic interest. In the end, the security of energy supply seems to be more important for the Member States than the European approach towards a competitive Internal Energy Market.

IV. Policy conclusions and recommendations

According to the European Commission, the Third Energy Package will finally close the gap between the ambitious objectives that were set in the very beginning of the First Energy Package and the implementation results in the respective Member States. The correct implementation of the Third Energy Package is addressed as a “precondition for the development of an open, integrated and competitive energy market in the EU”.²² The Third Energy Package seems to be particularly successful regarding the incorporation of best practices in the provisions for consumer protection. On the other hand, the Third Energy Package was, until now, not very successful in view of the unbundling measures. This is linked to the fact that the provisions of the first two packages are not fully implemented and infringement cases are still ongoing. Those provisions, however, are considered to be a precondition for the successful implementation of the Third Energy Package. In this sense, the new package is not suited to be the final stepping stone towards an integrated market.

20 *Soriano Garcia*, The Internal Gas Market according to the Law of Competition Provisions of the Community's Third Package, *European Energy and Environmental Law Review* 2010, p. 180.

21 See *The Economist* of 5/4/2014, *European energy security: The Conscious Uncoupling of Russian Gas and EU Security*.

22 European Commission, (fn. 19), p. 3.

In the case of the Third Energy Package, the legislators clearly missed an opportunity to create a more powerful energy package and bring the Internal Energy Market an important step forward. It remains to be seen if there will be a need for a fourth package or not. Considering the current implementation status and the fact that the package only came fully into force in 2013, it seems justifiable to conclude that not all issues are resolved yet. It will depend on the Member States' willingness to comply with the new provisions. Different scenarios can be sketched in the context of the Third Energy Package. It is obvious that the EU Member States overall are not very willing to transfer their competencies to the European level. As energy policy touches one of the core competencies at the national level, they refrain from letting the European Union take control of energy supply. Consequently, the final provisions of each package are always the result of intensive intergovernmental bargaining²³ and, many times, the lowest common denominator is agreed upon in order to have at least some overall progress.

For example, the Energy Infrastructure Package is intended to provide additional support in implementing the Third Energy Package. It should ensure that the necessary investments are made to provide for a true common market. The Regulation on Guidelines for trans-European energy infrastructure (TEN-E Regulation) entered into force only in May 2013 and it remains uncertain if its provisions will actually help to solve the infrastructure problems that are hampering the success of the Third Energy Package. Moreover, TEN-E Regulation has assigned additional responsibilities to the Agency in the area of infrastructure development planning and monitoring, beyond its tasks related to the network development plans.²⁴ To sum this up, it is not sufficient to look at the process only in terms of the legislative design, the creation of ACER, the European approach or the incorporation of lessons learnt. As the Member States still have large influence on the final outcome of energy legislation, it will always constitute an important compromise and the compliance with the Third Energy Package measures will most probably be insufficient.

C. EU Agency in the energy sector

The establishment of the Agency for the Cooperation of Energy Regulators is the most evident measure of the Third Energy Package addressing the existing regulatory gap and what should be considered as the missing part of the now-enhanced regulatory framework.²⁵ The creation of ACER brought new relationships between this new regulatory body and the existing regulatory authorities on the EU energy market. In reality, ACER is a "network agency" as the existing networks incorporated into the agencies as Boards of Regulators which, together with the Directors and Administrative Boards, cooperate with the Commission and the NRAs to further the completion of the internal market.²⁶ On the

23 *Eickland*, (fn. 5), p. 250.

24 ACER, Work Programme of the Agency for the Cooperation of Energy Regulators 2014, September 2013, p. 2.

25 *Veiga de Macedo*, The Agency for Cooperation of Energy Regulators: Still Regulation Through Cooperation?, The Centre for Energy, Petroleum and Mineral Law and Policy of 16/5/2011, p. 1.

26 See *Lavrijssen/Hancher*, Networks on Track: From European Regulatory Networks to European Regulatory "Network Agencies", *Legal Issues of Economic Integration* 34 (2008), pp. 23-55.

one hand, with its specific competencies for interconnections or cross-border issues, ACER interacts with the NRAs and, on the other hand, it cooperates with the already existing European regulatory forums, such as the Council of Energy Regulators. Since the late 1990s, the shift from the “traditional regulation of the energy industry” to “regulation for competition” occurred in the European Community and, consequently, the technically centralised industrial model had to be changed.²⁷ The abolishment or reducing of monopolies and oligopolies led to a reduced integration between the governments and energy companies and the need for cooperation on the European level grew.²⁸

I. Regulation and liberalisation of the EU energy market

As early as in 1993, the Member States were required to set up a governing body called the “Electricity and Gas Council”, which consisted of representatives from undertakings in the energy sector, distribution companies, large industrial and small and medium-sized consumers and trade union organisations and was designed to help the national authorities to implement the Directives.²⁹ Further, under the First Energy Package, the Member States were obliged to create an authority which would function as a dispute settlement body for disputes dealing with energy contracts, negotiations and issues related to access to electricity or upstream pipeline networks.³⁰ The Second Energy Package brought new provisions on national regulatory authorities under which the Member States have to ensure that the NRAs are not under the influence of electricity and gas market players and can function in an efficient and independent way. The Second Directives imposed a wider set of functions and responsibilities on the NRAs in order to be able to protect the interests of energy consumers.³¹ They also emphasized the importance of cooperation between the NRAs and required them to liaise regularly with the Commission.³²

Since 1998, the NRAs have cooperated through the Florence Electricity Regulatory Forum, which was set up by the Commission with the purpose of discussing the implementation of the 2003 Electricity Directive.³³ A year later, a similar forum for the cooperation

27 *Cameron*, Competition in the Energy Markets – Law and Regulation in the European Union, 2nd ed. 2007, p. 8.

28 *Haverbeke et al.*, European Energy Markets and the New Agency for Cooperation of Energy Regulators, *Journal of Energy & Natural Resources Law* 28 (2010), p. 404.

29 See European Commission, Proposal of 7 December 1993 for an EP and Council Directive Concerning Common Rules for the Internal Market in Electricity, COM (93) 643.

30 See Article 20(3) of Directive 96/92/EC of the European Parliament and of the Council of 19/12/1996 concerning common rules for the internal market in electricity, OJ L 27 of 30/1/1997, pp. 20-29; Article 23(3) of Directive 98/30/EC of the European Parliament and of the Council of 22/6/1998 concerning common rules for the internal market in natural gas, OJ L 204 of 21/7/1998, pp. 1-12.

31 See Article 23 of Directive 2003/54/EC of the European Parliament and of the Council of 26/6/2003 concerning common rules for the internal market in electricity, OJ L 176 of 15/7/2003, pp. 37-56; and Article 25 Directive 2003/55/EC of the European Parliament and of the Council of 26/6/2003 concerning common rules for the internal market in natural gas, OJ L 176 of 15/7/2003, pp. 57-78.

32 *Haverbeke et al.*, (fn. 28), p. 407.

33 *Veiga de Macedo*, (fn. 25), p. 2.

of the NRAs was established in the gas sector, namely the Madrid Gas Regulatory Forum. The participants in the “Florence Forum” and “Madrid Forum” are the NRAs, representatives of the European Parliament, network users, traders and consumers. Both forums were successful in promoting cooperation among the energy and gas markets participants, however, their informal status and the lack of binding decision-making powers lead to the slowdown of these mechanisms.³⁴ Therefore, it was necessary to create a formal means of cooperation between the stakeholders and NRAs.

Before the Third Energy Package was adopted, two new mechanisms for the cooperation of energy regulators were established on the European level; the Council of European Energy Regulators (CEER) and the European Regulators Group for Electricity and Gas (ERGEG). The Council of European Energy Regulators was launched in 2000 as a non-profit organisation with the aim of facilitating the creation of the Internal Energy Market by providing a voluntary platform for cooperation and an information exchange and between the NRAs and it functions only on a voluntary basis. The Council of European Energy Regulators does not make binding decisions and does not have a formal obligation to give advice.³⁵

Three years later, the European Regulators Group for Electricity and Gas was established by the Commission as an advisory body based on the Second Energy Package.³⁶ The members of ERGEG were heads of the NRAs of the Member States or their representatives as well as Commission representatives with no voting rights. The tasks of ERGEG encompassed assistance to and advising the Commission, particularly with regard to the writing of draft implementing measures in the energy field and, for that purpose, consulting the market participants by launching surveys, enquiries and public hearings. Moreover, ERGEG served as an open platform to facilitate the consistent application of the electricity and gas Directives and Regulations in the Member States by means of consultation, coordination and cooperation between their NRAs.³⁷

As well as the Council of European Energy Regulators, the European Regulators Group for Electricity and Gas did not have the authority to make binding decisions. Nevertheless, ERGEG’s advisory work served as a basis for a number of non-binding codes, work programmes, guidelines of good practices and annual reports. ERGEG’s crucial role in the last years of its functioning, as it was dissolved when ACER became operational, is proof that an independent EU regulation is a pre-requisite to achieving the implementation and consolidation of fully liberalized, competitive and efficient electricity and gas integrated markets.³⁸

If we take a look again at the situation on the EU energy markets, it can be seen that the Second Energy Package had very positive effects on them, but there was still no regulation with respect to cross-border issues, a lack of liquidity on wholesale energy markets and a

34 *Ibid.*, p. 2.

35 *Cameron*, (fn. 27), p. 105.

36 See Commission Decision of November 2003 on establishing the ERGEG, 2003/796/EC, OJ L 296 of 14/11/2003, p. 34.

37 *Westerhof*, Third Internal Energy Market Package, in: Roggenkamp/Hammer (eds.), *European Energy Law Report VI*, 2009, p. 22.

38 *Veiga de Macedo*, (fn. 25), p. 3.

lack of transparency which, according to the Commission, led to the significant increase of wholesale energy prices and created barriers to entry to the energy markets.³⁹ Despite the two above-mentioned bodies on the EU level, the Commission, in its sector inquiry from 2006, came to the conclusion that one of the main shortcomings is the regulatory gap between the decision making of the NRAs and the decision-making of the Commission and that there is a need for a new regulatory mechanism on a European level.⁴⁰

The problem was that the NRAs are national authorities with no competence to regulate the EU energy market. Moreover, the cross-border issues were problematic in those cases in which the concerned NRAs could not agree on the conditions for access to the cross-border infrastructure as the Commission does not have decision-making power in such situations.⁴¹ Furthermore, cross-border issues became more complex and it was increasingly difficult to agree on the necessary adaptations to the European framework as the interests of 27 NRAs could diverge considerably.⁴² This means that the creation of an Internal Energy Market was still mostly dependent on national rules which often had an opposite effect – they were isolating the national markets instead of opening them. According to the Commission, it became necessary that

“the voluntary cooperation of national regulatory authorities evolved towards a well-established Community structure with clear competencies and with the power to adopt individual regulatory decisions in a number of specific cases”.⁴³

In order to strengthen the cooperation of energy regulators on the EU level, which was one of the recommendations from the sector inquiry,⁴⁴ the Commission considered three options for the future regulation: (i) to evolve the approach provided in the Second Energy Package, (ii) to broaden the competencies of ERGEG and create the so-called ERGEG+, or (iii) to set up a completely new EU body. The idea was that such body would be responsible for the adoption of individual decisions with regard to the EU energy market and related to regulatory and technical issues relevant to making cross-border trade work in practice.⁴⁵ The problem is that EU treaties do not provide a legal basis for setting up a strong European energy regulator with the decision-making powers that it would need to carry out its regulatory tasks. Therefore, a change of the treaties would be required but was not considered to be feasible at the time. However, if the ACER structure should prove to be ineffective, this option could be considered again in the future.⁴⁶ In the end, the Commission decided for a middle way and proposed the establishment of a new European agency – the Agency for Cooperation of Energy Regulators. There are many advantages which a regulatory body

39 *Haverbeke et al.*, (fn. 28), p. 408.

40 See Communication from the Commission, Inquiry pursuant to Article 17 of Regulation 1/2003 into the European gas and electricity sectors, Final report, COM (2006) 851 final, pp. 3 and 11.

41 For more about this problem see Communication from the Commission, Prospects for the internal gas and electricity market, COM (2006) 841 final.

42 *Hofer*, *The Future Role of Regulation – More Europe*, in: Buschle/Hirsbrunner/Kaddous (eds.), *European Energy Law*, 2011, p. 135.

43 European Commission, Proposal for a Regulation of 19 December 2007 establishing an Agency for the Cooperation of Energy Regulators, COM (2007) 530 final, para. 9.

44 COM (2006) 851 final, p. 12 et seq.

45 COM (2006) 841 final, p. 14.

46 *Hofer*, (fn. 42), p. 140.

in the form of an agency can offer. Agencies usually have a high degree of expertise and know-how to lead specific policies as well as they are being able to materialize the importance the EU is giving to a certain policy, which, in this way, becomes more visible to European citizens and helps with the decentralization of EU powers.⁴⁷

ACER represents a compromise between the powers of the European Union and powers of the Member States. Its function is to serve as an overarching body able to solve cross-border conflicts by bringing the relevant NRAs together and making binding decisions if necessary without taking over the NRAs' responsibilities.⁴⁸ The Agency is aimed to develop a new regulatory culture that will enable the development of the interconnection capacities and coordination of the Member States' energy policies.⁴⁹ Besides the Agency, one of the major contributions of the Third Energy Package is the establishment of the independence of the energy regulators from market interests and political influence.⁵⁰ The provisions of the Third Energy Package allow for only one NRA to be established in each Member State and the tasks can no longer be given to several bodies. The NRAs' employees and members of their decision-making bodies must act independently and are not allowed to take direct instructions from the governments or other public or private bodies.⁵¹

II. Organisational structure

As a regulatory agency, ACER is an independent EU body with its own legal personality. There is no legal definition of a "regulatory agency" on the EU level but, nevertheless, its practice defines it as a European public law entity, generally constituted by Regulation to fulfil specific tasks which are usually associated with very technical and very complex issues, with the purpose of supporting a policy and assuring the regulation of a sector.⁵² Despite its independence from the different organs, political control and accountability must be ensured for the Agency. Therefore, ACER has to carry out its tasks independent of the interests of the electricity and gas industry, from consumers as well as from the Member States and EU institutions.⁵³ Every year, an annual report must be published and the Director and the Chairman of the Board of Regulators may be invited before the relevant committee of the European Parliament to make a statement or answer questions put forth by the members of that committee.⁵⁴

The ACER Regulation entered into force on 20 September 2009, but the Agency was first operational on a provisional basis for a period of 18 months. The adoption of internal regulations and the development of internal procedures and routines began in the final

47 *Veiga de Macedo*, (fn. 25), p. 4 et seq.

48 *Westerhof*, (fn. 37), p. 22.

49 *Hancher/de Hauteclouque*, *Manufacturing the EU Energy Markets: The Current Dynamics of Regulatory Practice*, EU Working Paper RSCAS 2010/01, p. 2.

50 *Ahner*, *Implementing the EU Energy Packages*, Report on Conference Proceedings, Florence School of Regulation 2009, p. 5.

51 *Haverbeke et al.*, (fn. 28), p. 410.

52 *Veiga de Macedo*, (fn. 25), p. 4.

53 See ACER Regulation, Articles 6 and 17-19.

54 ACER Regulation, Articles 15(5) and 16(8).

quarter of 2010, as soon as the Agency commenced operations in Brussels.⁵⁵ The Agency became fully operational on 3 March 2011, at the same time that the Third Energy Package entered into force. On the basis of a decision taken by the Member States, ACER now has its seat in Ljubljana, Slovenia.⁵⁶ The organs of the Agency are the Director, the Administrative Board, the Board of Regulators and the Board of Appeal. All of these bodies, except the Board of Appeal, had already been established in the first half of 2010 with the Director being appointed in May 2010 and taking up his duties on 16 September 2010.⁵⁷ The institutional set-up was completed in September 2011 with the appointment of the Agency's Board of Appeal.

1. Director

The Agency is managed by the Director who is its legal representative and public face. He must be independent and

“shall neither seek nor follow any instruction from any government, from the Commission, or from any public or private entity”.⁵⁸

The Director is appointed by the Administrative Board for a period of five years, which may be extended once for a maximum of three more years. After a public call of an expression of interest, the Commission must prepare a list of at least three candidates for the position. The final choice is made by the Board of Regulators which, before the appointment of the Director, has to issue a favourable opinion on the nomination. The Director is responsible for representing the Agency and is in charge of its management.⁵⁹ His tasks include: adoption and publishing of opinions, recommendations and decisions issued by the Agency, preparation of the work of the Administrative Board, implementation of the ACER annual work program, preparation of a draft work program, draft budgets and a draft annual report of the Agency. According to Articles 15(1) and 17(3) of the ACER Regulation, almost all of the Director's acts require the favourable opinion of the Board of Regulators, which means that he had to cooperate closely with the Board of Regulators from the beginning.

2. Administrative Board

The Administrative Board must ensure that ACER carries out its mission and performs the tasks assigned to it. It consists of nine members with an alternate for each of them. Five members are appointed by the Council, two by the European Parliament and two by the Commission. This composition reflects the result of a long negotiation between the insti-

55 ACER, Work Programme of the Agency for the Cooperation of Energy Regulators 2012, September 2011, p. 13.

56 Decision taken by Common Agreement between the Representatives of the Governments of the Member States on the location of the seat of ACER, 2009/913/EU, OJ L 322 of 9/12/2009, p. 39.

57 ACER, Work Programme 2012, (fn. 55), p. 13.

58 ACER Regulation, Article 16(1).

59 ACER Regulation, Article 17(1).

tutions on what seemed to be the effort to dominate the Board of Appeals as the Administrative Board nominates its members.⁶⁰ Despite being appointed by the EU institutions, the Members of the Administrative Board are not allowed to take any political instructions, especially not from the Member States who nominated them as candidates.⁶¹ Members of the Administrative Board as well as their alternates are appointed for a period of four years, renewable once. They must appoint a Chairman and a Vice-Chairman from among themselves, both having a two-year term of office, renewable once. If not provided otherwise, decisions of the Administrative Board are adopted by a two-thirds majority of the members present with each member having one vote.⁶² The meetings of the Administrative Board can be called by the Chairman and must take place at least twice a year. The Administrative Board has a general task to ensure that the Agency carries out its mission and performs the tasks assigned as well as having budgetary and disciplinary powers. The most important tasks of the Administrative Board are the appointment of the Director, adoption of the annual work program, duties related to the budget of the Agency, disciplinary authority over the Director, adoption and publication of an annual report and implementation of the measures necessary for the practical functioning of the Agency.⁶³ The Administrative Board also appoints the members of the Board of Regulators and adopts its work programme.

3. Board of Regulators

The Board of Regulators is not a usual part of the organisational structure of regulatory agencies. Some agencies have scientific committees or advisory committees, but those do not have the same powers as the Board of Regulators.⁶⁴ It is the organ which ensures the full and necessary independence of the Agency at the European level.⁶⁵ Members of the Board of Regulators are senior representatives of the NRAs and their alternates are from the senior staff of those authorities. In 2013, the Board of Regulators was enlarged to include one more NRA – the Croatian Energy Regulatory Agency HERA – as Croatia joined the EU in July 2013. There is also one non-voting representative of the Commission participating in the board.⁶⁶ Members of the Board of Regulators elect the Chairman and Vice-Chairman, who have a term of office of two-and-a-half years, with a possibility to be renewed. Members of the Board of Regulators must act independently and

“shall not seek or follow instructions from any government of the Member State, from the Commission, or from another public or private entity”.⁶⁷

60 *Veiga de Macedo*, (fn. 25), p. 6.

61 See ACER Regulation, Article 12(7).

62 ACER Regulation, Article 12(4).

63 ACER Regulation, Article 13(8), (10), (11) and (13).

64 *Hofer*, (fn. 42), p. 150.

65 *Haverbeke et al.*, (fn. 28), p. 415.

66 ACER Regulation, Article 14(1).

67 ACER Regulation, Article 14(5).

The Board of Regulators acts by a two-thirds majority of the members present who each have one vote. The most important task of the Board of Regulators is to provide opinions to the Director on the recommendations, opinions and decisions considered for adoption by ACER. In addition, the board provides guidance to the Director in the execution of their tasks⁶⁸ and approves the work programme of the Agency. Moreover, the Director's appointment depends on the Board of Regulators' approval. The inclusion of the Board of Regulators among the Agency governance bodies and its power predominance in ACER clearly show that it is the driver of the Agency.⁶⁹

4. Board of Appeal

The Board of Appeal has six members and the same number of alternates who are selected from among the current or former senior staff of NRAs, competition authorities or other national or EU institutions with relevant experience in the energy sector.⁷⁰ Following a public call of an expression of interest and after the consultation of the Board of Regulators, the members of the Board of Appeal are appointed by the Administrative Board per a proposal from the Commission for a period of five years, with a possible renewal of the function. In order to act independently, the members of the Board of Appeal may not take part in appeal proceedings in which they would have any personal interests, or in which they would have previously been involved as representatives of one of the parties, or if they participated in the original decision under appeal.⁷¹ The role of the board is to decide on appeals, as petitioned for by natural or legal persons, against the acts of the Agency. For a decision of the Board of Appeal to be taken, a qualified majority of at least four out of six members is required. The decisions of the Board of Appeal may themselves be subject to appeal before the Court of Justice of the European Union.⁷²

5. Working Groups

ACER Working Groups were established to promote cooperation between the NRAs and the Agency's staff at the early stages of the preparation of the Agency's deliverables.⁷³ They are composed of the representatives of regulatory authorities, ACER staff and the Commission. The Working Groups were created by the Decision of the Director and are chaired by a senior representative of the NRA on the Board of Regulators. The Working Groups' objectives and deliverables are steered by the Director in consultation with the Working Groups' chairs. Both the Agency's Electricity Working Group (AEWG) and Gas Working Group (AGWG) were established on 1 March 2011 and they are now fully oper-

68 ACER Regulation, Article 15(1).

69 *Veiga de Macedo*, (fn. 25), p. 7.

70 ACER Regulation, Article 18(1).

71 ACER Regulation, Article 18(4).

72 See ACER Regulation, Article 20.

73 ACER, Work Programme of the Agency for the Cooperation of Energy Regulators 2013, September 2012, p. 66.

ational.⁷⁴ In 2012, two additional Working Groups were established, one being the Monitoring, Integrity and Transparency Working Group (AMITWG) and the other being the Implementation, Monitoring and Procedures Working Group (AIMPWG). They both assist the Agency in performing its monitoring tasks under the ACER Regulation. Each Working Group has established one or more Task Forces to address specific issues.

The objectives of the ACER Working Groups are to provide input to the Director for the preparation of opinions, recommendations and decisions to be submitted for the consideration of the Board of Regulators. They also support the Agency on other tasks, such as analysing stakeholders submissions and providing information to the Board of Regulators on issues that are relevant to the proposals prepared by the Director and they further facilitate the necessary decisions of the Board of Regulators on the favourable opinions which are required before the documents of the Agency are adopted.⁷⁵

6. ACER Departments

ACER staff is divided into five departments: the Director's office, the Administration Department, Electricity Department, Gas Department and Market Monitoring Department.

D. Tasks of ACER

ACER was established with the purpose of fulfilling the regulatory gap which existed due to the lack of competence of the NRAs in the field of the cross-border energy trade and the non-existence of a legal framework under which such trade should take place.⁷⁶ This regulatory gap was mentioned also by the Commission in its energy sector inquiry from 2006, by stating that

“only a strengthened regulatory framework can provide the transparent, stable and non-discriminatory framework that the sector needs for competition to develop and for future investments to be made”.⁷⁷

The main mission of the Agency is to support the NRAs in performing their regulatory functions at the EU level and to coordinate their actions where necessary. ACER is not a regulatory authority as such, since its purpose is to facilitate the cooperation between the NRAs. Moreover, a distinction must be made between the advisory and decision-making competencies of ACER.

While Articles 5 to 11 of the ACER Regulation define most of the Agency's tasks, some of these are also defined in the Electricity and Gas Regulations. According to the ACER Regulation, the tasks of the Agency are to complement and coordinate the work of the NRAs as well as to participate in the creation of the European network rules. Under certain conditions, it can take binding individual decisions on the terms and conditions for access

74 ACER, Work Programme 2012, (fn. 55), p. 32.

75 ACER, Work Programme 2013, (fn. 73), p. 67.

76 *Veiga de Macedo*, (fn. 25), p. 8.

77 COM (2006) 851 final, p. 13.

and operational security for cross-border infrastructure and give advice on various energy-related issues to the European institutions. Its role is also in monitoring and reporting developments on the EU energy markets.

The most important task of the Agency is issuing opinions and recommendations which can be addressed to the Transmission System Operators, National Regulatory Authorities, European Parliament and the Council or the Commission. A narrow mandate of the Agency influences its scope and, therefore, ACER has rather limited competencies and powers for the time being.⁷⁸ The provisions of the ACER Regulation as well as the Electricity and Gas Regulations list the tasks of the Agency, but do not assign them to the different organs of the Agency.⁷⁹ Therefore, the functioning of the Agency will evidence how the relationship between the Director and his staff, on one side, and the different boards, on the other, will be developed in practice.

The ACER Regulation enables the Commission to give additional powers to the Agency that are not foreseen in the Third Energy Package without going through the legislative process. This possibility is, of course, very limited as Article 9(3) of the ACER Regulation clearly states that additional tasks shall not include decision-making powers. Since most of the Member States were very reluctant to accept this provision, ACER will most probably not get many new powers through comitology process.⁸⁰ Thus far, ACER has been assigned additional tasks and responsibilities by Regulation (EU) No 838/2010 on laying down guidelines relating to the inter-transmission system operator compensation mechanism and a common regulatory approach to transmission charging and by Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency (REMIT) and by the Regulation (EU) No 347/2013 on guidelines for trans-European energy infrastructure⁸¹ (TEN-E Regulation).

ACER, as most of the EU institutions and bodies, works in an open and transparent manner. It is obliged to consult the market participants, Transmission System Operators, consumers, end-users and, where relevant, also competition authorities in the process of the preparation and adoption of its documents, in particular, the draft framework guidelines, and to publish on its website its agendas, background documents and sometimes even the meeting reports of the Board of Regulators, the Administrative Board and the Board of Appeals.⁸²

I. Opinions and recommendations to the ENTSOs

Under the Third Energy Package, not only the cooperation of the NRAs through ACER is required, but also the cooperation of the Transmission System Operators through the Euro-

⁷⁸ *Hofer*, (fn. 42), p. 155.

⁷⁹ *Ibid.*, p. 144.

⁸⁰ *Ibid.*, p. 156 et seq.

⁸¹ See Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17/4/2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009, OJ L 115 of 25/4/2013, p. 39.

⁸² See ACER Regulation, Article 10.

pean networks of transmission system operators (ENTSOs). The relation between the Agency and ENTSOs and ACER's ability to be involved in the ENTSOs' work, programme and operations will determinate the success of the Agency in its role in the consolidation of the Internal Energy Market.⁸³ By 3 March 2011, ENTSO-G, for gas, and ENTSO-E, for electricity, were established. ENTSO-E replaced all of the previous Transmission System Operators associations in Europe when it became fully operational in July 2009, and it represents 42 Transmission System Operators from 34 countries.⁸⁴ In order to ensure their cooperation, ACER has to monitor the execution of the ENTSOs' tasks.⁸⁵ Moreover, it has to provide its opinion on the ENTSOs' network codes, the annual draft work programme and the ten-year EU network development plan. Sometimes ACER has to give its opinion also on other ENTSO documents which may be of relevance. When giving its opinion, the Agency has to keep in mind the principles of non-discrimination, effective competition and the efficient and secure functioning of the European internal energy and gas markets.⁸⁶ Regarding the ENTSOs draft work programme and ten-year EU network development plan, ACER has to ensure that they will bring a sufficient level of cross-border interconnection open to third-party access. If this cannot be ensured, the Agency has to prepare a duly reasoned opinion, together with recommendations, and present it to the ENTSOs. It has to send it also to the Commission, the Council and the European Parliament.⁸⁷ Further, ACER has to render an opinion on the consistency of the national ten-year network development plans with the EU plan. In the event that inconsistencies are identified, the Agency should recommend the changes necessary to the national plans.

II. Framework guidelines

One of the important tasks of the Agency is also the development of framework guidelines which are to serve the ENTSOs as guidance for the network codes for providing and managing effective and transparent access to the transmission networks across the borders. The procedure for the participation of ACER is defined in Article 6 of the Electricity and Gas Regulations. Under these regulations, the ENTSOs are obliged to develop network codes for 12 different areas.⁸⁸ First, the Commission defines the annual priority areas to be addressed in the network codes and then asks the Agency to submit non-binding framework guidelines. After consulting with the ENTSOs, ACER is to prepare and send a framework guideline to the Commission. A two month consultation with the ENTSOs and other rele-

83 *Veiga de Macedo*, (fn. 25), p. 9.

84 *Ahner*, (fn. 50), p. 5.

85 See ACER Regulation, Article 6(2); Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13/7/2009 on conditions for access to the network for cross-border exchanges in electricity (hereinafter "Electricity Regulation"), OJ L 211 of 14/8/2009, p. 15, Article 9; Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13/7/2009 on conditions for access to the natural gas transmission networks (hereinafter "Gas Regulation"), OJ L 211 of 14/8/2009, p. 36, Article 9.

86 ACER Regulation, Article 6(3) and (4).

87 ACER Regulation, Article 6(4); Electricity Regulation, Article 9(2); and Gas Regulation, Article 9(2).

88 Electricity Regulation, Article 8(6); and Gas Regulation, Article 8(6).

vant stakeholders is required during the development of the guidelines.⁸⁹ The draft framework guidelines are sent to the Commission where they are analysed to see if they comply with the principles of non-discrimination, effective competition and the effective functioning of the market. In cases of discrepancies, the Commission can ask ACER to review the framework guideline and submit the new version to the Commission. When the Commission is satisfied with the framework guideline, it will request the ENTSO responsible for the preparation of the relevant network code to elaborate it in line with the framework guideline and in a reasonable period of time, which must be shorter than one year.

When the draft framework code is prepared, the Agency then has three months to check its compatibility with the framework guideline. Before a reasoned opinion is provided to the ENTSO in question, ACER has to again consult with all of the relevant stakeholders. This network code will eventually be adopted by the Commission and the European Parliament.⁹⁰ Once the network code becomes legally binding, the role of the Agency is to monitor its implementation and to prepare a duly reasoned opinion for the Commission in case the ENTSOs fail to implement the network code.⁹¹ The EU network codes are directly applicable in the Member States and have primacy over national law. It is important to point out that such network codes are developed only for cross-border network issues and market integration issues, whereas, in the case of non-cross-border issues, the provisions of the national network codes apply.⁹²

The framework guidelines prepared by ACER are non-binding but, as the network codes have to be in line with them, in practice, they have a quasi-binding effect. Moreover, the Electricity and Gas Regulations do not oblige the ENTSOs to amend the network code according to the reasoned opinion of the Agency. However, seeing that ACER will only submit the network code to the Commission when its evaluations shows it is in line with the framework guidelines, this will have an indirect compulsory effect on the ENTSOs to comply with the ACER opinion.⁹³ Some authors believe such an exaggerated power of the Agency could lead to an imbalance of powers.⁹⁴ But prevailing opinion is that it cannot be reasonably argued that the framework guidelines are quasi-binding for the ENTSOs, however, also in the context that ACER has to consult the ENTSOs before delivering these guidelines and all of the guidelines also go through the scrutiny of the Commission. Also, in my view, the Agency is not vested with additional powers in the procedure for the adoption of the framework guidelines.

89 Electricity Regulation, Article 6(3); and Gas Regulation, Article 6(3).

90 *Veiga de Macedo*, (fn. 25), p. 10.

91 ACER Regulation, Article 6(5).

92 *Hofer*, (fn. 42), p. 162.

93 *Ibid.*, p. 164.

94 See *Gottschal*, *The Role of an Energy Agency in Regulating an Internal Energy Market: Cross-Border Regulation Across the Line?*, in: Roggenkamp/Hammer (eds.), *European Law Review Report VI*, 2009, pp. 51-59.

III. Cooperation and other tasks connected with the NRAs

With regard to the cooperation of the NRAs, ACER should have a role as facilitator. The obligations of the NRAs on the national level correspond to the ACER obligations on the EU level. The NRAs are obliged to cooperate with each other and with the Agency on cross-border issues.⁹⁵ This obligation arose with the Third Energy Package and it is new, as well as the provisions on the regional cooperation of the NRAs. Both serve as an important tool towards the achievement of the Internal Energy Market. The regional cooperation should focus especially on the creation of a compatible regulatory framework that should slowly evolve into European framework.⁹⁶ ACER also has the ability to make recommendations to the Commission to adopt certain binding rules for regional cooperation, if it considers them necessary. With regard to the national regulatory authorities, the most important powers the Agency possesses are exemption decisions regarding Third Party Access and decisions on access to the cross-border infrastructure.⁹⁷ Further, ACER must work together with the NRAs and assist them with recommendations and guidelines on how to share good practices. For example, an NRA may request ACER's opinion if it is having difficulties with the application of the specific guidelines referred to in the new Directives or Regulations. The Agency also has power to review the decisions of the NRAs, sometimes referred to as peer review, and provide assistance to those who are having difficulties applying the guidelines.⁹⁸

IV. Peer review

The provisions on peer review can be found in the ACER Regulation as well as in Article 39 of the Electricity Directive and Article 43 of the Gas Directive. The problem is that the application areas and the processes defined in each of these provisions vary, which means that different procedures apply if a peer review has been requested in relation to an NRA decision based on the ACER guidelines or on the Third Energy Package legislation.⁹⁹ As both sets of provisions are legally binding, the best way is to apply both when required. ACER cannot commence a peer review *ex officio* when it believes an NRA decision is not in compliance with the relevant legislation. Peer review can only be initiated through a Commission request or request of another NRA. Therefore, the only option for the Agency is to convince the Commission or a relevant NRA to file a request they deem necessary. The ACER Regulation does not prescribe a deadline for the opinion of the Agency. However, on the other hand, the Electricity and Gas Directives give ACER three months from the date the request was received to provide an opinion.¹⁰⁰ In practice, ACER should also comply with the three month deadline in cases in which a peer review is requested under the ACER Regulation.

95 See Electricity Directive, Article 37(1)(c); Gas Directive, Article 41(1)(c).

96 Electricity Directive, Article 38(2); Gas Directive, Article 42(2).

97 See ACER Regulation, Articles 8 and 9(1).

98 ACER Regulation, Articles 7(4) and (6).

99 *Hofer*, (fn. 42), p. 168.

100 *Ibid.*

The scope of the peer review must address only a factual assessment of the NRA decision, since Article 7(4) of the ACER Regulation says an opinion of ACER must be based on matters of fact. Seeing that this is very hard to achieve in practice, the Agency usually first looks at the facts, then checks if the NRA has applied the applicable legal provisions and, in the end, makes a decision on the compliance with the guidelines to which the NRA decision makes reference. Once the ACER issues an opinion, the concerned NRA has four months to comply with it. Otherwise, the Agency has to inform the Commission and the Member State concerned.¹⁰¹ The Commission can start an infringement procedure against the Member State if it considers the NRA's non-compliance to be a violation of EU law. Despite the clear obligation prescribed by the ACER Regulation as well as the Electricity and Gas Directives, only by stating that the given NRA should comply with the opinion of the Agency or decision of the Commission, it cannot be forced to do so. Therefore, the only encouragement for the NRA to comply is a possible infringement procedure started by the Commission.¹⁰²

V. Decision-making of ACER

According to the ACER Regulation, the decision-making powers of the Agency are very limited.¹⁰³ Firstly, the Agency is competent to adopt individual decisions on technical issues where those decisions are stipulated in Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 and Regulation (EC) No 715/2009. For example, ACER will be able to decide on the terms and conditions for the access to and operational security of a cross-border infrastructure.¹⁰⁴ ACER's second type of decision-making competencies is granting exemptions from Third Party Access to new major electricity inter-connectors or gas infrastructures if the respective infrastructure is located on the territory of at least two Member States. It is important to point out that such decisions can be taken only as a last resort when the NRAs, where the new infrastructure is located, cannot reach an agreement or they ask the Agency to make a decision.¹⁰⁵ When the Agency is asked to do so, it has six months to make the decision. ACER must consult the NRAs and applicants concerned before it makes a decision.¹⁰⁶

Besides the subsidiary character of ACER's decision-making powers, the problem is also a lack of provisions on the procedure on the exemptions of new infrastructure to be followed by the Agency. Compared to the draft legislation, the competence to take exemption decisions for new infrastructure is within the scope of ACER powers, and was the aspect changed the most. The Council did not want to accept the primary decision-making competence of the Agency and watered it down to being a last resort decision-making

101 ACER Regulation, Article 7(5).

102 *Hofer*, (fn. 42), p. 171.

103 See ACER Regulation, Articles 8 and 9(1).

104 *Haverbeke et al.*, (fn. 28), p. 419.

105 See ACER Regulation, Article 9(1); Electricity Regulation, Article 17; Gas Directive, Article 36(4).

106 Electricity Regulation, Article 17(5); Gas Directive, Article 36(5).

power.¹⁰⁷ The third type of ACER's decision-making powers lies in its general jurisdiction relating to cross-border infrastructure, which is in parallel to that described above.¹⁰⁸ Although the main role of the Agency lies mainly in the preparation of framework guidelines as well as monitoring and advising the ENTSOs, a delegation of legally binding decision-making powers being given to ACER means a step forward in the energy sector regulation. For the achievement of the Internal Energy Market, it is important that an enforcement mechanism was established on the European level, which was lacking before.

VI. Monitoring role

With the Third Energy Package, a great number of monitoring tasks was given to the Agency. The objective of ACER's market monitoring is to explain how the energy market can perform more efficiently, with a view to making energy more affordable for the consumers.¹⁰⁹ Moreover, the Agency has to prepare an annual market monitoring report in cooperation with the European Commission, the NRAs and other relevant organizations. ACER delivered its first market monitoring report on 29 November 2012, covering the year 2011, which was prepared jointly with the Council of European Energy Regulators and in close cooperation with the European Commission.¹¹⁰ In November 2013, a second market monitoring report was issued by ACER and the Council of European Energy Regulators and includes an assessment of the internal energy market, where it particularly concentrates on retail electricity and gas prices, access to networks including access of electricity produced from renewable energy sources, compliance with the consumer rights and on the remaining barriers to the completion of well-functioning electricity and gas markets.¹¹¹ Further, the report provides an indication of the degree to which rules are implemented in practice and of the barriers which must still be overcome, particularly relevant given the approaching 2014 deadline.

It is very important to have a monitoring body at EU level, but it is problematic that the resources for the Agency did not increase with the expanded tasks.¹¹² Therefore, for the moment, ACER has to help itself with the information that the NRAs are obliged to provide to the Agency under the Third Energy Package. The problem is that this obligation covers only the Directives and cross-border issues, but ACER was also entrusted with certain monitoring tasks that are not in relation to cross-border issues. Nevertheless, it is clear from the Directives that the NRAs are obliged to provide ACER with all of the "information necessary for the fulfilment of tasks".¹¹³

107 *Ermacora*, The Agency for the cooperation of Energy Regulators, in: Jones (ed.), *EU Energy Law*, Volume I – The Internal Energy Market – The Third Liberalisation Package, 3rd ed. 2010, para. 7.75.

108 See ACER Regulation, Article 8.

109 See ACER Website, Market Monitoring, www.acer.europa.eu/Electricity/Market%20monitoring/Pages/default.aspx (25/6/2014).

110 ACER/CEER, (fn. 2).

111 See ACER/CEER, *Annual Report on the Results of the Monitoring the Internal Electricity and Natural Gas Markets in 2012*, November 2013.

112 *Hofer*, (fn. 42), p. 173.

113 See Electricity Directive, Article 38(5); Gas Directive, Article 42(1).

The most important monitoring tasks of ACER are the following:

- Monitoring and reporting on the electricity and natural gas sectors: according to Article 11(1) of the ACER Regulation, the Agency shall “monitor the internal markets in energy and natural gas, in particular the retail prices of electricity and natural gas, access to the network including access of electricity produced from renewable energy sources, and compliance with the consumer rights”. On the results of the monitoring mentioned above, the Agency is to publish an annual report which should also include the identification of the barriers to the completion of the internal energy markets and possible measures on how these barriers could be removed;¹¹⁴
- Monitoring and analysis of the implementation of the network codes, the guidelines adopted by the Commission and the Community-wide network development plans, as well as “their effect on the harmonization of applicable rules aimed at facilitating market integration as well as non-discrimination, effective competition and efficient functioning of the market”.¹¹⁵ They should report these results to the Commission;
- Monitoring of progress in the field of the implementation of new inter-connector capacity and the Community-wide network development plans;¹¹⁶
- Monitoring of the regional cooperation of the Transmission System Operators and making recommendations when it considers that such cooperation is not producing the required results;¹¹⁷
- Central role in the monitoring of wholesale energy markets in close collaboration with the NRAs and with the objective of detecting and deterring market manipulation, which was additionally assigned to the Agency in December 2011 under Regulation (EU) No 1227/2011 on wholesale market integrity and transparency, the so-called REMIT.

VII. Advisory role

ACER took over the advisory function which was previously performed by the European Regulators Group for Electricity and Gas. The Agency is entitled to provide EU institutions with opinions and recommendations on issues relating to the purpose of ACER meaning the Agency has a general advisory role in relation to market regulation and can issue non-binding guidelines and recommendations also to national regulators and market actors.¹¹⁸ Advice can be provided either at the initiative of the Agency or upon a request of the European Parliament, the Council or the Commission.¹¹⁹ Since the role of the Agency is the coordination of the NRAs activities on the European level, ACER’s advisory function covers only European and cross-border issues. Generally, the Agency cannot be asked to give advice on national issues if they are not related to cross-border matters.

114 ACER Regulation, Article 11(2) and (3).

115 ACER Regulation, Article 6(6).

116 ACER Regulation, Article 6(7) and (8).

117 ACER Regulation, Article 6(9).

118 *Haverbeke et al.*, (fn. 28), p. 417.

119 ACER Regulation, Article 5.

VIII. Role of the Agency under REMIT

Before December 2011, national regimes for market monitoring varied widely between Member States and only certain of the NRAs monitored the wholesale markets. This changed when REMIT entered into force on 28 December 2011. Under this Regulation, ACER is responsible for analysis of the wholesale markets and other relevant data in order to identify possible abusive behaviour on the energy market. This is an important task as market integrity and transparency are essential for a well-functioning energy market and for the confidence of the market participants and consumers.¹²⁰ Provisions, which became applicable the same day REMIT came into force, are the prohibition of insider trading and market manipulation; obligation to publish inside information; obligation for persons professionally arranging transactions to establish and maintain effective arrangements and procedures to identify suspected breaches and market manipulation. With the entry of REMIT into force, the Agency made also a platform available through its website for the notification of suspicious transactions and of delayed disclosure of inside information.¹²¹ However, the obligations of wholesale energy market participants to register with the competent NRA and to provide ACER with records of transactions and information related to the capacity and use of energy facilities will come into force only after the adoption of the implementing acts which will be developed by the Commission.¹²² Adoption of implementing acts is expected in 2014, therefore, the rules, procedures, IT platforms and systems to support new monitoring framework should be ready by the end of 2014.

Although the NRAs should carry out their monitoring and enforcement tasks, ACER is expected to play a central role in the REMIT monitoring framework. A consistent European approach to market monitoring should avoid the risk of energy market transactions being relocated to jurisdictions where monitoring is considered to be less effective.¹²³ The Agency is best placed to carry out such monitoring as it has both a Union-wide view of the electricity and gas markets and the necessary expertise in the operation of electricity and gas markets and systems within the Union.¹²⁴ For this reason, the Agency has been tasked with the collection and screening of the wholesale market transaction data across the European Union and an initial assessment of the anomalous events before notifying suspected cases to the national regulatory authorities for investigation.

Further, ACER is required to collect information regarding the physical state of the energy systems, e.g. availability of generation and transport facilities.¹²⁵ Pursuant to Article 16(1) of REMIT, the Agency should try to ensure that the NRAs carry out their tasks under REMIT in a coordinated and consistent way. Therefore, the Agency published non-

120 ACER, Work Programme 2012 – Director’s Foreword, (fn. 55), p. 2.

121 ACER’s Annual Report on its Activities under REMIT in 2012, November 2013, p. 10.

122 ACER, Guidance on the application of the definitions set out in Article 2 of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25/10/2011 on wholesale energy market integrity and transparency, 1st ed. 2011, p. 3.

123 ACER, Work Programme 2012, (fn. 55), p. 3.

124 Regulation (EU) No 1227/2011 of the European Parliament and the Council of 25/10/2011 on wholesale market integrity and transparency (hereinafter “REMIT”), OJ L 326 of 8/11/2011, p. 1, recital 17.

125 See REMIT, Article 8(5).

binding Guidance on the application of the definitions set out in Article 2 of REMIT¹²⁶ which should help the NRAs with the performance of their monitoring activities.¹²⁷ Moreover, the concrete modalities for coordination and cooperation in dealing with suspected breaches of market abuse under REMIT are defined in the Memorandum of Understanding between the Agency and NRAs which was signed on 17 July 2013. Furthermore, the effective implementation of REMIT requires the ACER's cooperation with entities tasked with wholesale market monitoring responsibilities in the countries outside the EU. Wholesale energy markets are becoming increasingly global and effective cooperation of monitoring authorities is essential to protect the integrity and transparency of these markets.¹²⁸

The Agency is also responsible for the establishment of the Centralised European Register of wholesale Energy Market Participants (CEREMP), to be based on national registers.¹²⁹ However, the operational stage of REMIT, when ACER will be required to operate CEREMP and to monitor the wholesale energy markets, will only start sometime during 2014. Provisions on market participant registration were added by the European Parliament during the legislative process, as the CEREMP was not envisaged in the original Commission proposal of December 2010. Moreover, pursuant to Article 8 of REMIT, the Agency is to be provided with the records of wholesale market transactions, including orders.

ACER should also coordinate the investigation of suspected cases of market abuse by national competent authorities when they involve more than one jurisdiction.¹³⁰ Further, the Agency shall, at least once a year, submit a report to the Commission on its activities under REMIT, with an assessment of the operation and transparency of different categories of market places and ways of trading, as well as highlighting flaws in market rules, standards and procedures which could facilitate insider trading and market manipulation or undermine the internal market, as defined in Article 7(3) of REMIT. It should also prepare recommendations on how to improve the integrity and the functioning of the internal market.

The activities of ACER with respect to REMIT will be performed in two stages, the first one being the implementation stage, in which the Agency will put in place IT tools and the procedures for effective monitoring of wholesale energy markets, and the second one the operational stage, in which the Agency will be responsible for active monitoring of trading activities in wholesale energy markets to identify possible market abuse. However, the way in which the monitoring of the wholesale energy markets will be organized in the future is still unclear and will crucially depend on the human resources, in terms of expert market analysis capabilities which will be available to ACER.¹³¹

126 ACER, Guidance on the application of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25/10/2011 on wholesale market integrity and transparency, 2nd ed. 2012.

127 See REMIT, recital 27.

128 ACER, Work Programme 2014, (fn. 24), p. 41.

129 REMIT, Article 9(3).

130 REMIT, Article 16(4)(c).

131 ACER's Annual Report on its Activities under REMIT in 2012, (fn. 121), p. 4.

E. The limitations of ACER's powers in light of the principle of subsidiarity and the Meroni doctrine

The tasks of the Agency are not connected only to its monitoring, advisory and network functions, but also to its decision-making powers. The possibility of a delegation of decision-making powers to the EU Agencies has been addressed in the Commission's Communication European Agencies – The way forward,¹³² by stating that some of the regulatory agencies were indeed given powers to adopt individual decisions with direct effect, applying agreed EU standards, however, there are clear limits to such powers. Agencies do not have the power to adopt general regulatory measures, but only individual decisions in specific areas where a defined technical expertise is required, under clearly and precisely defined conditions and without genuine discretionary power.¹³³ Further, such decision-making powers shall not affect the responsibilities that the Treaty has explicitly conferred on the Commission. These limitations result from the *Meroni* judgement, which will be explained in more detail below.

I. Subsidiarity principle

It is clear from the jurisprudence of the European Court of Justice that existing powers on the European level exclude the possibility of concurrent powers existing on the national level. Consequently, the same powers cannot be exercised by both the NRAs and the Agency.¹³⁴ If we take a closer look at the competencies of the NRAs on one hand and the powers of ACER on the other, we can see that many of these competencies are exclusive and can be performed only on the EU level or only on a national scale. Nevertheless, there are some areas which do not easily fall into the exclusive competence of one or the other of the mentioned bodies. In such cases, according to the subsidiarity principle, the European Union

“shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”.¹³⁵

Also, recital 29 of the ACER Regulation explicitly states that the Agency cannot go beyond what is necessary in order to achieve the objectives of the participation and cooperation of the NRAs at the EU level. Nevertheless, a broad interpretation of these objectives could lead to an extensive interpretation of ACER's competencies. Even in those regulatory areas in which there seem to be reasons in favour of national, regional or local regulation, it would always be possible to argue that, due to the close relationship between these areas and the

132 Communication from the Commission, European agencies – The way forward, COM (2008) 135 final.

133 *Ibid.*, p. 6.

134 See ECJ, case 22/70, *European Agreement on Road Transport, Commission v Council*, ECR 1971, 263, 276.

135 Article 5(3) TEU.

development of the Internal Energy Market, some intervention on the EU level will always be necessary.¹³⁶ Moreover, as the application of the subsidiarity principle in practice does not always give a clear answer, in some cases both bodies might have competence, while in the others neither ACER nor the NRAs might be competent.¹³⁷ To sum up, we can say that if one of these situations occurs, the Court of Justice of the European Union will have to decide which body has competence in the case at hand.

II. Meroni doctrine

In the *Meroni* case of 1958, the ECJ annulled the decision of the High Authority¹³⁸ based on the assessment of two private agencies. The court had to decide whether the delegation of tasks to these agencies was in accordance with the provisions of the Treaty establishing the European Coal and Steel Community. The *Meroni* doctrine provides for the following principles: (i) a delegation of powers can only relate to powers of the Commission itself;¹³⁹ (ii) it can only involve clearly defined executive powers, the use of which must be entirely subject to the supervision of the Commission, and (iii) it must be ensured that the delegation of powers does not distort the guarantees resulting from the balance of powers established by the treaties.¹⁴⁰

In the case of ACER, the question arises whether the *Meroni* doctrine should apply with regard to powers which may be delegated to the Agency. The first principle is not relevant in the case of ACER, as it was the legislator that conferred powers on the Agency and not the executive authority – the Commission in this case.¹⁴¹ The second principle requires “clearly defined executive powers”. Also, the second principle does not apply in the case of ACER as the Commission decided not to give executive powers to the Agency. With regard to the third principle and the balance of powers, a shift of power from the Commission to an agency is acceptable under EU law if powers given to it are accompanied by reinforcement or a rebalancing of the existing institutions, which would mean a strengthening of the controlling and supervisory mechanisms for the Commission and/or the Court of Justice.¹⁴² The ACER powers appear to be well balanced seeing that its decisions on access to cross-borders are technical and very specific and its exemption decisions are still subject to Commission or Member State approval. A breach of institutional balance could most probably occur only if ACER would not be legally and politically accountable to the

136 *Estella*, The EU Principle of Subsidiarity and Its Critique, 2002, p. 114.

137 *Veiga de Macedo*, (fn. 25), p. 422.

138 ECJ, case 9/56, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European and Steel Community*, ECR 1958, 133; ECJ, case 10/56, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European and Steel Community*, ECR 1958, 157 (hereinafter “*Meroni*”).

139 *Ibid.*, 150.

140 *Ibid.*, 152.

141 *Hofer*, (fn. 42), p. 142.

142 *Vos*, Reforming the European Commission: What Role to play for the EU agencies?, *Common Market Law Review* 37 (2000), p. 1123 et seq.

same extent as the delegating authority.¹⁴³ We can conclude that the current powers of ACER reflect a strict application of the *Meroni* doctrine.

F. Legal protection against the acts of ACER

Regarding the legal protection against the acts of ACER, a distinction has to be made between individual decisions and other acts of the Agency. As provided in the ACER Regulation, individual decisions can be challenged in an appeal procedure before the Board of Appeal. Article 19(1) of the ACER Regulation, where the appeal procedure is prescribed, makes reference only to Articles 7, 8 and 9 of the same regulation, which means that only binding individual decisions and decisions which have a direct or indirect effect on the person filing the appeal can be challenged before the Board of Appeal.¹⁴⁴ The appeal has to be filed in writing at the Agency within two months from the day the decision was published and then the Board of Appeal has two months to decide it.¹⁴⁵ First, it has to check whether the appeal is admissible. If it is considered as such, the Board of Appeal will examine whether it is well-founded. During the appeal procedure, the board can ask the parties to provide additional information and the parties are allowed to make an oral presentation before the board.

Decisions of the Board of Appeal can be brought before the European courts in accordance with Article 263 TFEU.¹⁴⁶ It was also made clear in the *Sogelma* case that as long as the acts of the Agency, even if they are not formal decisions, have binding legal effects on the applicant and are capable of affecting their interests, they can be the subject of an action for annulment.¹⁴⁷ In cases in which the Court of First Instance or the Court of Justice renders a judgement, the Agency is required to take all of the necessary measures to comply with it. Whereas, legal protection against individual decisions is clearly defined in the EU legislation, it is more difficult to determine legal protection against the other acts of the Agency which affect natural or legal persons only indirectly.¹⁴⁸ Seeing that such acts cannot be directly challenged,¹⁴⁹ legal protection can only be ensured by challenging the Commission's or NRA's decision which was adopted on the basis of an ACER opinion or recommendation.

G. ACER regulatory activities and priorities for the future

During its first two years of the operation ACER focused on the development of framework guidelines, which set out the principles and objectives for Network Codes. These represent the backbone of the Internal Energy Market rules, particularly for market and network

143 *Hancher/De Hauteclocque*, (fn. 49), p. 7.

144 *Ermacora*, (fn. 107), para. 7.128.

145 ACER Regulation, Article 19(2).

146 ACER Regulation, Article 20.

147 CFI, case T-411/06, *Sogelma*, ECR 2008, II-2771, para. 85.

148 *Hofer*, (fn. 42), p. 177.

149 For more details see *Saurer*, Individualrechtsschutz des Handelns der Europäischen Agenturen, EuR 2010, p. 61.

operation.¹⁵⁰ The regulatory activities of the Agency in 2013 were related to the priorities for the completion of the Internal Energy Market by 2014, the removal of energy islands by 2015, the effective monitoring of the internal energy market and wholesale energy markets and the implementation of the TEN-E Regulation. ACER has been also working to promote early voluntary implementation of the most relevant rules contained in the network codes, even before they were formally adopted, so that benefits to the European energy consumers and citizens can be delivered as soon as possible.¹⁵¹

As already mentioned above, some of the activities to be performed by ACER are undertaken upon requests made by NRAs, the European Parliament, the Council and/or the Commission. Therefore, it is impossible to calculate the exact timing that these requests will be met and deliverables presented in the ACER Work Programme may have to be adapted over the year. Also, the circumstances in the energy sector may change and lead to a modification of the priorities of the EU institutions, which could also bring new tasks for the Agency.¹⁵²

With regard to the framework guidelines and network codes, the priorities are established annually by the European Commission.¹⁵³ When the priority list is prepared for the following year, the Commission invites ACER to develop framework guidelines which will form the basis for the network codes. Thus far, the Agency was mainly dealing with the preparation of framework guidelines and now the priority is to complete the work on the network codes based on those guidelines and to provide the minimum set of rules to support the completion of the Internal Energy Market by 2014.¹⁵⁴ In 2014, the Agency will start the process for the development of framework guidelines in two new areas: Rules regarding harmonised electricity transmission tariff structures and rules for trading related to technical and operational provisions of network access services and system balancing in gas.¹⁵⁵

So far the Agency delivered the following framework guidelines: framework guideline on Electricity Grid Connections, framework guideline on Capacity Allocation and Congestion Management for the Electricity, framework guideline on Electricity System Operations, framework guideline on Electricity Balancing, framework guideline on Capacity Allocation Mechanisms for the European Gas Transmission Networks, framework guideline on Gas Balancing in Transmission Systems, framework guideline on Interoperability and Data Exchange Rules for European Gas Transmission Networks and framework guideline on Harmonised Gas Transmission Tariff Rules.¹⁵⁶

ACER is not only involved in the early stage of the procedure by preparing the framework guidelines. It also provides reasoned opinions and assessments of the compliance of network codes within the corresponding guidelines. Since 2012 ACER has already recommended six network codes for adoption to the European Commission.¹⁵⁷ The Agency ex-

150 ACER, Work Programme 2014, (fn. 24), p. 8.

151 Ibid.

152 ACER, Work Programme 2012, (fn. 55), p. 12.

153 See Electricity Regulation, Article 6(1); Gas Regulation, Article 6(1).

154 ACER, Work Programme 2013, (fn. 73), p. 7.

155 ACER, Work Programme 2014, (fn. 24), p. 9.

156 See ACER Website, www.acer.europa.eu (25/6/2014).

157 ACER, Work Programme 2014, (fn. 24), p. 2.

pects that a number of network codes will be submitted by the ENTSOs in 2014 on which it will be called to provide opinions and recommendations.¹⁵⁸ If an assessment is positive, the Agency will recommend the adoption of the network code to the Commission. But it can happen that the work on reasoned opinions will be disrupted due to the limited staff resources of the Agency. Currently, experts from different NRAs are strongly contributing to the work of ACER's Working Groups, but since this cooperation is voluntary and many of the NRAs are in financial difficulties, the participation of such national experts in the work of the Agency can be reduced. Therefore, it can happen that the Work Programme for the coming year will not be completely realized.

In 2013, ACER also started the implementation of the monitoring activities provided under REMIT, with a view to be ready to operate the new monitoring framework envisaged therein in 2014. The Agency focused on the development of the IT system for the market participant registration and effective monitoring of the markets for wholesale energy products.¹⁵⁹ In 2014, the Agency will continue with its monitoring activities, both on regional energy markets and the Internal Energy Market, whereas at the same time, this year will be crucial for the transition from the preparatory design phase to the operational phase of REMIT.¹⁶⁰ Significant developments in the field of trans-European energy infrastructure are also to be expected, seeing that TEN-E Regulation will be fully implemented in 2014. ACER will be called to perform the tasks assigned to it, mainly related to the process of identification of Projects of Common Interest, development of the cost benefit analysis methodology and the exchange of best practices on incentives.¹⁶¹

H. Interaction between the Agency and other energy regulators

It can be seen from previous chapters that various regulatory authorities and platforms coexist on the European energy market. Therefore, the question arises of how these bodies are to interact when performing their tasks?

I. Relationship between ACER and the Council of European Energy Regulators

The Council of European Energy Regulators was created to foster the dialogue among national regulatory authorities and between them and the Commission.¹⁶² At the beginning, the Council of European Energy Regulators acted as a preparatory body for the European Regulators Group for Electricity and Gas work. However, nowadays, its tasks are much broader and they include issues such as smart grids and smart meters, quality of electricity supply and energy efficiency, gas storage and retail market monitoring.¹⁶³ The Council of European Energy Regulators works closely with ACER and supports its work, especially

158 Ibid., p. 9.

159 ACER, Work Programme 2013, (fn. 73), p. 5.

160 ACER, Work Programme 2014, (fn. 24), p. 10.

161 Ibid.

162 *Hancher/De Hauteclocque*, (fn. 49), p. 2.

163 Website of the Council of European Energy Regulators (CEER), www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_ACTIVITIES (25/6/2014).

since the European Regulators Group for Electricity and Gas was repealed in 2011. The Council of European Energy Regulators currently has 30 members – the energy regulators from all of the 28 EU Member States plus Iceland and Norway – as well as two observers – energy regulators from Switzerland and Macedonia.¹⁶⁴ Seeing that the Council of European Energy Regulators members are NRAs, it could be described more as a regulators' club due to its non-formal influence on the energy policy-making on the EU level.

II. Relationship between the NRAs themselves

The competence of each NRA is limited to the territory of the Member State, which should, in principle, prevent conflicts between the NRAs. However, the Gas Directive provides that national “regulatory authorities shall cooperate with each other for the purpose of integrating their national markets”.¹⁶⁵ Therefore, the NRAs have regular meetings within the Council of European Energy Regulators activities as well as the Florence and Madrid Forums, where they voluntarily develop principles concerning cross-border electricity trading. Cooperation between regulatory authorities is not present only at the European and national level, but also at the federal and regional ones as some of the Member States have separate regional authorities, which are supervised by a federal regulatory authority.¹⁶⁶

III. Relationship between the NRAs and ACER

It was already explained that if we want to achieve a consistent application of European energy law, the NRAs and the Agency have to cooperate. Regulatory cooperation is reflected already in ACER's internal organisational arrangements, foreseen in the Third Energy Package and reinforced in REMIT and TEN-E Regulation, which reflect mutual responsibility of the Agency and the NRAs to closely consult and cooperate with each other.¹⁶⁷ One of ACER's tasks is to monitor and analyse the implementation of the network codes and guidelines adopted by the Commission but, as the Agency does not have any enforcement powers, it has to rely on the NRAs to enforce the codes in a correct and consistent way.¹⁶⁸ Moreover, the ACER Regulation provides that the NRAs should comply with the legally binding decisions of the Agency. The NRAs are also obliged to send annual reports on their activities and fulfilment of their obligations to the Agency and the Commission.¹⁶⁹ As the cooperation between the NRAs and ACER should work both ways, the Agency consults with them and gives them an opportunity to comment on proposed measures. Of course, these consultations should not influence the work of the Agency since it is not allowed to follow instructions or accept recommendations from the Member States.¹⁷⁰

164 Ibid.

165 Gas Directive, Article 7.

166 *Veiga de Macedo*, (fn. 25), p. 425.

167 ACER, Work Programme 2014, (fn. 24), p. 33.

168 Ibid., p. 427.

169 Electricity Directive, Article 37(1)(e); Gas Directive, Article 41(1)(e).

170 ACER Regulation, recital 18.

Even though the NRAs should be independent regulatory authorities, it can happen that Member States try to influence the Agency through them. Therefore, ACER has to pay attention to the comments received from the NRAs that they might be influenced by the government(s). On the other hand, the fact that there are representatives of the NRAs on the Board of Regulators gives assurance that the competencies of the NRAs and ACER will not overlap and the Agency will not exceed its powers.¹⁷¹ In the future, the Agency could be also a facilitator of the exchange of best practices between the Member States as well as it could create a database concerning energy markets in the EU. It remains to be seen how many such new tasks will be assigned to the newly established ACER.

I. Budgetary aspects of the Agency

With regard to ACER's finances, the Administrative Board has to prepare the budget of the Agency, which must be based on the draft budget proposed by the Director. The budget becomes final when the general EU budget is adopted. On the basis of the forecast of the activities which the Agency will be called upon to perform in 2014, including the implementation of REMIT and TEN-E Regulation, the Director drafted a preliminary budget as required under Article 23(1) of the ACER Regulation. The Board of Regulators already gave its reasoned opinion on the preliminary draft budget to the Administrative Board.¹⁷² The Board of Regulators emphasized in its opinion that additional regulatory duties and responsibilities assigned to ACER, notably by REMIT Regulation and by the new TEN-E Regulation, also have important resource implications. It has considered the preliminary budget to be well balanced, reflecting also the investments which are required to implement REMIT and TEN-E Regulation in 2014. Moreover, if REMIT and TEN-E Regulation are to be implemented effectively, the Agency will require additional staff. Therefore, the ACER's draft budget for 2014 envisages an increase in the number of staff to perform the new tasks. Taking the reasoned opinion of the Board of Regulators into account, the Administrative Board made an estimate of the revenue and expenditure of the Agency for the following financial year,¹⁷³ which was sent to the Commission.

The Administrative Board's estimate of the revenue and expenditure of the Agency for the financial year 2014 was approximately 15.5 million Euro. The problem was that the draft ACER budget prepared by the Commission was almost 5 million Euro lower than the one prepared by the Administrative Board. In the justification of needs the Commission explained it cannot support in full the Agency's request, and in particular the demand for 35 extra personnel related to the implementation of REMIT. Based on its analysis, the Commission concluded that the reinforcement of nine temporary agents and six seconded national experts granted over 2012-2013 in that regard is sufficient for ACER to meet its

171 *Veiga de Macedo*, (fn. 25), p. 429.

172 See Board of Regulators, Opinion No. 1/2013 on the Preliminary Draft Budget for 2014 Financial Year of 20/3/2013.

173 See Administrative Board, Decision No. 7/2013 on the Estimate of Revenue and Expenditure of the Agency for the 2014 Financial Year of 20/3/2013, Annex I.

additional obligations.¹⁷⁴ Moreover, in its assessment of the Agency's staffing needs, the Commission acknowledges the adoption of TEN-E Regulation that introduces additional tasks for ACER. However, the Commission gave its approval to ACER to expand the number of its staff by only five extra temporary agents. Seeing that the Agency was allocated only five out of the 49 additional staff members requested for 2014, some of the activities assigned to ACER under REMIT and TEN-E Regulation have already been re-prioritized and postponed to 2015. At the same time the adoption of the implementing acts on the records of energy market transactions by the Commission, expected for the end of 2013, is now planned for June 2014 which means that reporting obligations for market participants and other stakeholders will come into the effect only at the end of 2014.

A detailed analysis of the tasks and activities assigned to the Agency and the resulting IT requirements indicate that, despite an approach which will seek to maximise the synergies within the monitoring activities performed by the NRAs, the effective implementation of REMIT and TEN-Regulation requires larger investments than envisaged in the draft ACER budget prepared by the Commission.¹⁷⁵ According to the Administrative Board, additional resources will probably also be needed for the selection of Projects of Common Interest and the monitoring of the development of such projects, as defined under TEN-E Regulation.¹⁷⁶ There could be a possibility to get some financing from the NRAs, but that is highly unlikely. Moreover, most of the NRAs are already facing significant budget limitations or even cuts, while, at the same time, REMIT is assigning them additional investigation and enforcement tasks. The cooperation and coordination between ACER and NRAs can deliver expected synergies and benefits only if the Agency is able to perform monitoring activities assigned to it in a highly effective manner as possible.¹⁷⁷ Therefore, ACER will need to secure the appropriate human resources and IT tools and unless the Agency is assigned more resources than those envisaged in the Commission's budget proposal, the implementation of REMIT and TEN-E Regulation will have to be suspended or delayed. This would mean a big step backwards in the common effort to complete the Internal Energy Market. For example, the prohibitions of market abuse introduced by REMIT are already in force, but the Agency currently does not have the resources to effectively monitor compliance with them.

The proper implementation of REMIT is clearly an important part of the energy market integration. Since the Agency is not in a financial position to complete the development of the IT infrastructure and to cover the additional staff required, in my opinion there is no chance that effective monitoring will be in place in 2014. Moreover, the Board of Regulators considers it is essential that ACER is not only provided with the necessary human resources but resources which have adequate expertise to undertake both the REMIT responsibilities and tasks assigned to it by the new TEN-E Regulation.¹⁷⁸

174 European Commission, Draft General Budget of the European Commission for the financial year 2014, Working document part III – Bodies set up by the European Union and having legal personality and Private Public Partnership, COM (2013) 450 final, p. 192.

175 See Administrative Board, Decision No. 7/2013, (fn. 173).

176 Ibid.

177 See Board of Regulators, Opinion No. 1/2013, (fn. 172).

178 Ibid.

The EU General Budget for the financial year 2014 was adopted on 20 November 2013, whereby ACER annual budget for 2014 was estimated at 10.8 million Euro. Seeing that the adopted ACER annual budget for 2014 is lower than the estimate of the Administrative Board, the work programme for 2014 will need to be revised and a number of activities planned for this year, especially with respect to the implementation of REMIT and TEN-E Regulation, will be postponed. According to the opinion of the Director of ACER this could jeopardise the timely achievement of proper market integration.¹⁷⁹

On 19 March 2014 the Administrative Board already adopted the decision on the estimate of revenue and expenditure of the Agency for the financial year 2015,¹⁸⁰ which is based on the draft budget proposed by the Director and the reasoned opinion of the Board of Regulators on the preliminary draft budget, whereby total draft budget of the Agency for 2015 is estimated to 16.5 million Euro. According to the opinion of Board of Regulators, preliminary draft budget for 2015 is well balanced and proportionate to the wide and important range of activities that ACER will be called to perform in 2015.¹⁸¹ An increase in the budget amount is envisaged in view of the Agency's need to recruit additional staff to perform new tasks imposed on ACER by REMIT and the TEN-E Regulation. The Board of Regulators endorsed the draft ACER's budget, proposed by the Director, as it reflects the staffing requirements for the Agency to perform its tasks and responsibilities under the Third Energy Package.¹⁸² Hopefully, sufficient financial resources for the financial year 2015 will be assigned to the Agency by the Commission.

J. Possibility of third countries to participate in ACER

Soon after the Agency was established in 2010, Norway, Switzerland and the Energy Community expressed their wish to participate in ACER. Similar questions were also raised with respect to the participation in ENTSO whereby the third country's Transmission System Operators expressed their interest in contributing actively to the drafting of network codes. ENTSO-E already opened its working groups to the Transmission System Operators of almost all of the members of the Energy Community¹⁸³ and allowed their participation under its statutes. On the other hand, the ENTSO-G's statutes do not provide for third country Transmission System Operators participation.¹⁸⁴ However, the implementation of the network codes inevitably requires the coordination with third countries whose systems are interconnected with the EU networks, even more so in the case of synchronous elec-

179 ACER, Work Programme 2014, (fn. 24), p. 3.

180 Administrative Board, Decision No. 4/2014 on the Estimate of Revenue and Expenditure of the Agency for the 2015 Financial Year of 19/3/2014.

181 Board of Regulators, Opinion No. 1/2014 on the Preliminary Draft Budget for 2015 Financial Year of 18/3/2014.

182 Ibid.

183 Croatia, Serbia, Bosnia and Herzegovina, Montenegro, the Former Yugoslav Republic of Macedonia (FYROM).

184 See Commission Staff Working Paper on the Possibility of Neighbouring Countries and their Transmission System Operators to Participate in ACER and in the ENTSOs, SEC (2011) 546 final/2 of 20/6/2011, p. 2.

tricity transmission systems.¹⁸⁵ With regard to ACER, the conditions for any participation of third countries in the Agency are set out in Article 31 of the ACER Regulation which, in the first paragraph, states that

“the Agency shall be open to the participation of third countries which have concluded agreements with the Community whereby they have adopted and are applying Community law in the field of energy and, if relevant, in the fields of environment and competition”.

Further, the second paragraph of the same Article provides that such international agreements must also specify the nature, scope and procedural aspects of the involvement of those countries in the work of ACER, as well as their having to include provisions on financial contribution and staff.

I. Possibility of EEA countries to participate in ACER

Countries which are parties to the European Economic Area (EEA) are already obliged to implement the EU energy law under the EEA Agreement. In addition to this general obligation, the EEA countries are, by means of a specific decision, bound to apply the Second Energy Package.¹⁸⁶ Therefore, the EEA countries are the best candidates to participate in ACER once the Third Energy Package is also incorporated in the EEA Agreement under the condition that the requirements of Article 31 of the ACER Regulation are fulfilled.

II. Possibility of Energy Community members to participate in ACER

Also, for the members of the Energy Community, the participation in the Agency would be possible once they implement the Third Energy Package. It is hard to predict the timing of the participation of the individual members of the Energy Community in ACER because the scope of national measures that are needed to implement the Third Energy Package differs from one member to another.¹⁸⁷ For third countries other than EEA and Energy Community members, participation in ACER would be possible as well. They would need to conclude an international agreement with the EU by which they would oblige themselves to apply the EU energy law and to fulfil the conditions of Article 31 of the ACER Regulation.¹⁸⁸

III. Participation of third countries in ACER bodies

If third countries would be involved in the work of ACER and even financially contribute to it, the question of their participation in the bodies of the Agency would arise as well. Giving third countries a possibility to appoint members to the Administrative Board would

185 ACER, Work Programme 2014, (fn. 24), p. 40.

186 See the EEA Joint Committee Decision No 146/2005 adopting the 2nd energy package of 2/12/2005.

187 SEC (2011) 546 final/2, p. 4.

188 Ibid.

be understood as a privilege, seeing that even EU Member States do not have such rights as the members of the Administrative Board are appointed by EU institutions. Therefore, the appointment of its members by third countries should be excluded, but there may be a possibility for third countries to send an observer to the Administrative Board.¹⁸⁹ In the case of the Board of Regulators, which is composed of NRA representatives, the situation is different. Nevertheless, an observer status of third countries on the Board of Regulators seems a more appropriate solution than full membership seeing that the ACER Regulation reserves membership status to EU Member States.¹⁹⁰ Further, in the view of the “one country, one vote principle”, granting voting rights to third country members could also have negative effects on the Board of Regulators’ deliberations.¹⁹¹

K. Regional cooperation

Under the Third Energy Package, one of the tasks of the Agency is also the promotion of regional cooperation. The liberalisation of the European energy market is not progressing with the same speed and it is, therefore, not at the same stage in all of the Member States. As a response to this, a number of regional initiatives were established by the Commission at the European Electricity Regulatory Forum in 2004.¹⁹² The main purpose of all of the regional initiatives is to achieve more coherence between the regions in Europe. Regional cooperation presents an important step on the way to the Internal Energy Market, as well as in speeding up the integration of the national energy markets.¹⁹³ In 2006, seven regional electricity markets and three regional gas markets were established on the basis of the European Regulators Group for Electricity and Gas discussion papers.¹⁹⁴ In 2013, the Agency has given renewed emphasis to the regional initiatives process in an effort to promote the early implementation of some of the most critical provisions contained in network codes for the integration of the electricity and gas markets.

Regional initiatives can be described as factual assemblies of the NRAs, the Commission, governments of the Member States and other relevant parties.¹⁹⁵ They were set up by the European Regulators Group for Electricity and Gas in 2006 with the purpose of bringing together regulators, the Transmission System Operators, the European Commission, national governments and other stakeholders in a voluntary process leading to advances in integration at the regional level. During 2011, they were given greater emphasis in promoting the completion of the Internal Energy Market with ACER being assigned a leading coordination role.¹⁹⁶ The Agency has created two internal coordination groups, one for the

189 Ibid, p. 5.

190 See ACER Regulation, Article 14.

191 SEC (2011) 546 final/2, p. 5.

192 Eleventh Meeting of the European Electricity Regulatory Forum, Conclusions, http://ec.europa.eu/energy/gas_electricity/electricity/forum_electricity_florence_en.htm (25/6/2014), p. 5.

193 *Cameron*, (fn. 27), pp. 109-111.

194 ERGEG, Discussion Paper: the Creation of Regional Electricity Markets, 2005; ERGEG, Roadmap to a Single Competitive Gas Market in Europe, 2005, www.ceer.eu/portal/page/portal/EER_HOME/EER_ACTIVITIES/EER_INITIATIVES/ERI (25/6/2014).

195 *Haverbeke et al.*, (fn. 28), p. 425.

196 ACER, Work Programme 2012 – Director’s Foreword, (fn. 55), p. 2.

Electricity Regional Initiative and one for the Gas Regional Initiative, which are composed of the NRAs' and Commission's representatives. These groups usually meet once a month and report regularly to the Director and the Board of Regulators.¹⁹⁷ The regional initiatives represent a bottom up approach to the completion of the Internal Energy Market in the sense that they are bringing all of the market participants together to notably test solutions for cross-border issues, to carry out early implementation of the EU *acquis* and to come up with pilot-projects which can be exported from one region to the others.¹⁹⁸

Regional initiatives, especially the ones established under the European Regulators Group for Electricity and Gas, have so far delivered promising results in the electricity sector. They have created several regional wholesale markets (in the Nordic area, Central-Western Europe, the Iberian Peninsula, Ireland, between Italy and Slovenia as well as between the Czech Republic and Slovakia). Important achievements were also made in the gas sector, but, nevertheless, progress with regard to the market integration has been much slower than in the electricity sector because many EU regions are heavily dependent on gas supplies from third countries.¹⁹⁹ Therefore, ACER already put significant effort into the development of regional initiatives at the beginning of its operations. The Agency was aware of the fact that cooperation between the NRAs, the Commission and other relevant stakeholders would not be sufficient to meet the 2014 target for market integration. Since its creation in 2011, ACER has enhanced its role of coordination and promoting a new vision for the regional initiatives, based on the four following principles: (i) a more project-oriented approach to help focus the limited resources of stakeholders on a few specific and common projects; (ii) a pan-European dimension to ensure involvement of all Member States and the allocation of resources; (iii) enhanced stakeholder involvement and (iv) a more adequate governance structure to improve the decision-making process.²⁰⁰

Regional initiatives act by using working arrangements familiar to the stakeholders in a way which ensures that relevant stakeholders are effectively engaged. Regional initiatives also have the advantage of enabling closer interaction between the market participants as well as providing opportunities to work on more concrete projects.²⁰¹ Regional coordination committees, composed of the national regulators of each region, are tasked with the coordination and facilitation of the priorities in each region under the guidance of the lead negotiator. For example, the establishment of the Electricity Regional Initiative Coordination Group and the designation of a specific lead NRA for each key project are important elements of regional governance structure in the electricity sector.²⁰² Another form of regional cooperation is the Implementation Groups composed of market operators, such as the Transmission System Operators and inter-connector operators, which deal mostly with the implementation of practical solutions. A third form of regional cooperation is the

197 ACER, Work Programme 2013, (fn. 73), p. 68.

198 ACER, Getting to 2014: The Role of Regional Initiatives, Regional Initiatives Status Review Report 2011, p. 8.

199 *Ibid.*, p. 9.

200 ACER, Final Steps Towards the 2014 Deadline, Regional Initiatives Status Review Report 2013, February 2014, p. 17.

201 *Ibid.*, p. 12.

202 *Ibid.*, p. 19.

Stakeholder Groups, which bring together important market participants in each region, including traders, suppliers and customers.

Regarding the progress made in the Electricity Regional Initiative, the final versions of the four cross-regional roadmaps²⁰³ were endorsed in December 2011 after several months of working together with the NRAs and other stakeholders. These cross-regional roadmaps are being used as the main reference for the Electricity Regional Initiative market integration process for the 2011 to 2014 period. In order to monitor the progress in the implementation of the roadmaps and to ensure that any obstacle is well identified and can be tackled in the most efficient and effective way, the Agency is publishing reports on the Electricity Regional Initiatives quarterly. The role of ACER is also to provide effective and efficient decision-making in cases of delays, obstacles or disputes in the implementation process, in line with Article 8 of the ACER Regulation.

Progress was also made in the gas sector as the Council of European Energy Regulators developed a vision for the future of gas markets and adopted a proposal for a Gas Target Model which was endorsed by the Madrid Forum in 2012.²⁰⁴ The Council's vision paper includes key principles on which the Gas Target Model should be based: enabling and connecting functioning wholesale markets as well as ensuring secure supply and economic investment.²⁰⁵ ACER is currently updating the model in light of new developments on gas markets and the challenges that are likely to be faced in the medium and long term. The Agency also created the Gas Regional Initiative Coordination Group and initiatives have been taken to increase the level of engagement of stakeholders. The ACER/CEER Market Monitoring Report for the year 2012 has shown that, although progress is observed in some areas, there are particular features of the gas markets that still lack a sufficient degree of integration or competition and require improvement.²⁰⁶ Therefore, ACER's vision for the Gas Regional Initiative is that it should remain focused on the early implementation of the network codes and develop regional projects that contribute to the Internal Energy Market. The Agency believes that the Gas Regional Initiative should no longer be involved in infrastructure matters as they are already dealt with by the groups set up under TEN-E Regulation.²⁰⁷

According to the ACER Regional Initiatives Status Review Report for the year 2013, until now relevant achievements have been reached in the field of regional cooperation in both gas and energy sector. The Electricity Regional Initiative and the Gas Regional Initiative have proven to be a useful tool to foster implementation of EU rules, complementing the development of framework guidelines and promoting early implementation of network codes, while remaining an appreciated framework for cooperation among National Regu-

203 The Cross-Regional Roadmap on Day-Ahead Market Coupling, The Cross-Regional Roadmap on Continuous Intraday Trading, The Cross-Regional Roadmap on Long-Term Transmission Rights, and the Cross-Regional Roadmap on Capacity Calculation Method.

204 ACER, Final Steps Towards the 2014 Deadline, (fn. 200), p. 42.

205 CEER, Vision for a European Gas Target Model, Conclusions Paper, Ref: C11-GWG-82-03 of 1/12/2011, pp. 8-12.

206 ACER/CEER, Annual Report on the Results of the Monitoring the Internal Electricity and Natural Gas Markets in 2012, (fn. 111).

207 See ACER, Final Steps Towards the 2014 Deadline, (fn. 200).

latory Authorities, Transmission System Operators and other stakeholders at regional level.²⁰⁸

L. Conclusions

In parallel with the process of EU energy market integration, there appeared a need to establish an energy regulatory authority with monitoring and controlling powers. Initially, the establishment of ACER might seem to be a small step forward since we cannot discuss an independent energy regulator as the Agency is categorized as a “networking” body and its decision-making powers seem too weak for the regulation of the EU energy markets. But looking on the bright side, we should take ACER as a small but smart move on the way to a true European regulator. The creation of the Agency represents a new stage in European energy regulation by establishing a multi-level system of cooperation with different lines of responsibility for the regulatory actors involved (the Commission, the Agency, the Member States and their NRAs).

The analysis of the current situation on the EU energy markets still shows a lack of effective competition. Moreover, a vertical overlap of competencies between the Member States and the EU means a challenge for the process of the EU energy market liberalisation. There are also differences between the powers and independence of the NRAs and their cooperation on the European level is still insufficient. Therefore, it is important that the competencies of ACER and the NRAs are clearly delineated and consistently applied in order to avoid conflicts. Another problem is that the overlap of competencies complicates the allocation of accountability as well as the responsibility of these different actors from a political and legal perspective. An exact division of competencies between the Commission and ACER, on one hand, and the Agency and NRAs, on the other, is still to evolve in practice through continuous interaction. Therefore, one of the challenges for ACER will most probably be solving the problems which may occur during the interactions with the Commission, ENTSOs and NRAs.

The cooperation of energy regulators at the European and national level is also decisive for efficient and transparent regulation. At the European level, the NRAs should cooperate with ACER and with each other through the platforms offered by the Council of European Energy Regulators and other energy organizations, as well as in the context of regional initiatives. On a national level, the cooperation among the NRAs and the NRAs with regional regulators is needed. The future will show whether the expected cooperation between ACER, regional regulators and the NRAs will lead to a better regulation of the EU energy markets.

Contrary to those who believe that the influence on the EU energy markets lies mostly in the delegation of decision-making powers, I believe that the main tools of the Agency to achieve the Internal Energy Market are its involvement in the work of the ENTSOs, by rendering the necessary opinions and recommendations, and participating in the development of network codes. However, we have to be aware of the fact that the results of this involvement will only be seen in the long-term. Therefore, patience is needed on the part

208 *Ibid.*, p. 61.

of the NRAs as well as the consumers. I believe that, after some initial disappointment, the positive influences of ACER's work will be visible in lower and fair energy prices on a competitive energy market. In the first years of its functioning, it is important that the Agency takes good advantage of the experience gained by the European Regulators Group for Electricity and Gas and the Council of European Energy Regulators and, with their help, establishes efficient ways for the NRAs to cooperate on the European level. Moreover, the NRAs and transmission system operators should perform their role to the full extent on the national and European level. Regional cooperation should also be seen as an important milestone on the way to the Internal Energy Market. To sum up, we can say that ACER has sufficient powers for taking steps towards the Internal Energy Market, but they will only be efficient when it works with the other actors and stakeholders on the EU energy markets.