Implementing REMIT: What a Legal Analysis Tells about the (Regulatory) Role of ACER

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Abstract

The purpose of this contribution is to analyse the role granted to – or assumed by – the Agency for the Cooperation of Energy Regulators ("ACER") in relation to the implementation of Regulation 1227/2011[1] ("REMIT"), with a specific focus on the electricity market. It ultimately calls for a clarification of the status of ACER in the European energy regulatory framework.

I. Introduction

Based on a legal analysis, this article analyses the role of ACER in relation to the implementation of REMIT, against a background of theoretical input on EU Agencies, on the governance structure of the EU electricity market, on the ACER Regulation and on soft law. We will demonstrate that ACER has used its (quasi-regulatory) powers in a legally doubtful manner in order to develop a comprehensive legal framework concerning the implementation of REMIT. Ultimately, our contribution addresses the evolving role of ACER in an energy sector where current regulatory developments at European Union ("EU") level generate the need for conceptual clarifications on respective statuses and roles.

In terms of structure, this contribution first discusses the concept of EU Agencies, and more specifically the regulatory or decentralised agencies. It then outlines the regulatory governance structure of the EU electricity market, with a specific focus on ACER. Next it addresses REMIT and its implementation package, outlining ACER's role in relation to it in four steps: what is the role granted to ACER by REMIT; what is the role actually assumed by ACER under REMIT; what are the legal issues raised by this role; and what does this say about ACER. Finally, our conclusion will sum up the main findings of this contribution and suggest a further course of study.

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[1] Parliament and Council Regulation (EU) 1227/2011 of 25 October 2011 on wholesale energy market integrity and transparency [2011] OJ L326/1 ("REMIT").

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II. EU Agencies

It is commonly agreed that there is no one-fits-all model or official definition of EU Agencies.[2] The European Commission ("Commission") recognised that "the establishment of agencies case by case (…) has not been accompanied by an overall vision of the place of agencies in the Union".[3]

Nevertheless, they share common features: they are legal bodies that stand separate from the EU institutions, established by secondary legislation (they do not, however, have a proper legal basis in the treaties, be it regarding their creation or their attributions) and governed by EU public law, enjoying administrative and financial autonomy to a certain extent.[4]

Their most important common feature is their crucial importance for the EU: they tackle complex scientific and technical issues by providing expertise, thereby allowing the Commission to focus on its core business.[5]

The Commission formerly distinguished the regulatory agencies, active in specific policy areas, from the executive ones, entrusted with assisting the Commission in implementing EU programmes.[6] Following the severe criticism of the term "regulatory",[7] regulatory agencies were renamed "decentralised agencies" in 2013.[8] For the sake of clarity, this contribution only considers decentralised agencies and refers to them as "EU Agencies".

EU Agencies are most present in the field of shared competences (Article 4(2) TFEU[9]) requiring a close cooperation between the EU and the Member States.[10] They are mostly structured via national independent authorities, and are expected to exercise their function independently from private stakeholders and from all political institutions, including the Commission.[11] As such, they provide an intermediary level of governance between the Commission and national bodies.[12]

Their roles and powers vary from adopting individual decisions with direct effect to simply providing technical expertise, based on which the Commission can make appropriate decisions.[13] However, in the Commission's view and subject to nuances provided hereunder, EU Agencies cannot be granted the power to adopt general

[2] M Chamon, *Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press 2016) 5.

[3] Commission, "European agencies – The way forward" (Communication) COM(2008) 135 final, 2.

[4] E Vos, "European Agencies in between and the Composite EU Executive" in M Everson, C Monda and E Vos (eds), *European Agencies in between Institutions and Member States* (Kluwer Law International 2014) 19.

[5] M Everson, C Monda, E Vos, "European Agencies in between Institutions and Member States" in Everson, Monda and Vos, supra, note 4, 2–3.

[6] Vos, supra, note 4, 20.

[7] ibid 19; Parliament, "Financial management and control of EU agencies" (Resolution) P6_TA(2009)0274 para. 6.

[8] Vos, supra, note 4, 19–20.

[9] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/51, Art 4(2) (TFEU).

[10] Commission, "European agencies – The way forward", supra, note 3, 5.

[11] E Chiti, "Existe-t-il un modèle d'Agence de l'Union européenne?" in J Molinier (ed.), *Les agences de l'Union européenne* (Bruylant 2011) 68–69.

[12] J Alberti, "L'utilisation d'actes de soft law par les agences de l'Union européenne" (2014) 576 Revue de l'UE 163.

[13] Commission, "European agencies – The way forward", supra, note 3, 5; for a more thorough analysis of the categories of acts adopted by EU Agencies, refer to Alberti, supra, note 12, 163 ff.

regulatory measures, but are limited to taking individual resolutions in certain areas where a specific technical expertise is required, under clearly and precisely defined conditions. Per se, they do not enjoy a genuine discretionary power.[14]

This results from the following legal considerations: the extent to which powers can be delegated to EU Agencies is indeed limited by the so-called "*Meroni doctrine*"[15] (drawn from the *Meroni* case of 1958[16]); and two fundamental principles of EU law that must be observed, namely the principle of pre-eminence of the Commission for exercising executive functions (Article 17 TEU;[17] Articles 290–291 TFEU) and the principle of indirect administration (Article 4 TEU and Article 291(1) TFEU).[18]

The *Meroni* doctrine was recently reviewed by the European Court of Justice ("ECJ") in the context of an action seeking the annulment of a Regulation's provision whereby powers were delegated to the European Security and Markets Agency ("ESMA"): the claimant alleged that these breached the principles relating to the delegation of powers laid down by the *Meroni* case.[19]

The ECJ noted that the delegation "does not confer any autonomous power on that entity that goes beyond the bounds of the regulatory framework"[20] and that "unlike the case of the powers delegated to the bodies concerned in *Meroni v High Authority*, the exercise of the powers (…) is circumscribed by various conditions and criteria which limit ESMA's discretion".[21]

Following these considerations, the ECJ concluded that:

> "[T]he powers available to ESMA (…) are precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority. Accordingly, those powers comply with the requirements laid down in *Meroni v High Authority*."[22]

Although most scholars agree that the *Meroni* doctrine prohibits the delegation of general discretionary powers to EU Agencies,[23] the bodies to whom these powers were delegated in the *Meroni* case were entities governed by private law.[24] In this respect, the more recent ECJ Case 270/12 may be a more appropriate reference in the assessment of whether the discretionary power granted to EU Agencies remains within reasonable bounds. Appropriately, in its last decision of 17 March 2017, the Board of Appeal of ACER referred to the criteria of ECJ Case 270/12 to sustain that ACER was entitled to take the contested decision.[25]

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[14] Commission, "European agencies – The way forward", supra, note 3, 5.

[15] Vos, supra, note 4, 40.

[16] Case 9/56 *Meroni & Co, Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* [1957–1958] ECR 133.

[17] Consolidated Version of the Treaty on European Union [2012] OJ C326/25 Art 17 (TEU).

[18] Alberti, supra, note 12, 162.

[19] Case 270/12 *UK v European Parliament and the Council of the European Union* [2014] ECLI:EU:C:2014:18 para. 26ff.

[20] ibid para. 44.

[21] ibid para. 45.

[22] ibid para. 53.

[23] M Chamon, "Le recours à la soft law comme moyen d'éluder les obstacles constitutionnels au développement des agences de l'UE" (2014) 576 Revue de l'UE 153.

[24] Case 270/12, supra, note 19, para. 43.

[25] ACER Board of Appeal case A-001-2017 17 March 2017 <www.acer.europa.eu>.

Nevertheless, the main consideration is that EU Agencies are not meant to be regulatory agencies in the sense that they are not granted the power to adopt general discretionary regulatory measures (ie autonomous power going beyond the bounds of the regulatory framework).

III. Governance of the EU energy market

The first cornerstone of the current energy market governance framework was the 1988 Commission Working Document on the Internal Energy Market.[26]

The single energy market process kicked off with Directive 96/92 on the internal energy market[27] ("First Electricity Directive"), which laid the foundations for a regulatory framework addressing the free movement of electricity. It required Member States to "designate a competent authority (…) to establish (…) efficient mechanisms for regulation (…)",[28] but it did not provide much detail in terms of competences.[29] Then came Directive 2003/54[30] ("Second Energy Directive") which defined the powers and competences of the national regulatory authorities ("NRAs").[31] Regarding these NRAs, the major shortcoming identified was the excessive variety in terms of powers and competences. Acknowledging the need for a further push towards an integrated market, the EU legislator adopted the Third Energy Package[32] which came into force in 2009. It effectively enhanced the NRAs' powers and set up ACER to enable the NRAs to better integrate the single market, thereby formalising the cooperation network in place.[33]

At EU level, the current governance of the energy sector is twofold: the Commission acts as a strict supranational regulator[34] and ACER voices (and coordinates) the views of the Member States' regulators (see section IV below).[35]

Other bodies at EU level play an important role, amongst which: the European Network of Transmission System Operators for Electricity ("ENTSO-E") established by

[26] Commission, "The Internal Energy Market" (Commission Working Document) COM(88) 238 final.

[27] Parliament and Council Directive 96/92/EC of 19 December 1996 concerning common rules for the internal market in electricity [1997] OJ L27/20 ("First Electricity Directive").

[28] First Electricity Directive, Arts 13–22.

[29] M Zinzani, *Market Integration Through "Network Governance": The Role of European Agencies and Networks of Regulators* (Intersentia 2012) 104–105.

[30] Parliament and Council Directive 2003/54/EC of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/37 ("Second Electricity Directive").

[31] Second Electricity Directive, Art 23.

[32] The Third Energy Package refers to the following Directives and Regulations (for electricity): Parliament and Council Regulation (EC) 713/2009 of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators [2009] OJ L211/1; Parliament and Council Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55 and Parliament and Council Regulation (EC) 714/2009 of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 [2009] OJ L211/15.

[33] Zinzani, supra, note 29, 130ff; Parliament and Council Directive (EC) 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55 ("Electricity Directive") Art 35.

[34] This does not suggest that the Commission is to the internal market what the NRAs are to their national markets. However, the Commission's role in developing and implementing the EU's energy policy makes it a supranational regulator in the sense that it adopts general regulations within its competencies, and does this at EU level according to its mandate. In particular, the Commission regulates the electricity markets by adopting delegated and implementing acts.

[35] Chiti, supra, note 11, 72.

Regulation 714/2009,[36] which plays a central role within the governance network, especially with respect to the elaboration of network codes covering most of the important aspects of the energy market;[37] the Florence Forum ("Forum"), set up by the Commission, which allows discussions between national ministries, Community institutions and stakeholders[38] in order to go forward with the implementation of EU energy law; and the Council of European Energy Regulators ("CEER"), a bottom-up[39] initiative in 2000 by the national regulators to discuss urgent issues more efficiently than in the Forum.[40]

At national level, EU law provides for the NRAs.[41] For the purpose of conceptual clarification, these regulatory authorities are established by law and remain independent[42] from government and political interest, as well as from other stakeholders (especially the industry they have been tasked to regulate), and are meant to impartially and transparently exercise their powers, carrying out (public interest) missions/tasks that the (EU) legislator wanted to subtract from the government.[43] These should not be confused with the EU Agencies described above. Both play a regulatory role, yet their powers are of a different nature: NRAs are entitled to adopt general regulatory measures, to issue binding decisions on electricity undertakings, to carry out investigations into the functioning of the electricity markets, to request all information about electricity undertakings, etc.[44]

IV. ACER IN EU LAW

1. Creation of ACER

The core spirit of ACER results from the recognition that the contribution of the CEER and the self-regulatory forums "has not resulted in the real push towards the development of common standards and approaches that is necessary to make cross-border trade and the development of first regional markets, and ultimately, a European energy market a reality",[45] and that several shortcomings remain, including insufficient transparency, vertical integration, market concentration, etc.[46]

[36] Parliament and Council Regulation (EC) 714/2009 of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 [2009] OJ L211/15 (Electricity Regulation).

[37] P Sester, "The Regulatory Framework for Cross-Border Electricity Trade in the European Union" in D Buschle, S Hirsbrunner and C Kaddous (eds), *European Energy Law* (Coll. Dossiers de droit européen, n° 22, Helbing Lichtenhahn 2011) 120–121.

[38] B Blottin, *Concurrence, Régulation et Energie : Rôle des Autorités de Concurrence et des Autorités de Régulation Sectorielle* (Coll. Droit de l'Union Européenne, Bruylant 2016) 668; Zinzani, supra, note 29, 106.

[39] Chamon, supra, note 2, 105.

[40] Zinzani, supra, note 29, 114.

[41] Electricity Regulation, Art 2(2)a.

[42] This is their quintessential characteristic, according to J-F Furnémont and M Janssen, "Independence of regulatory authorities in the network industries: when (and why) the European lawmaker does the split" (2016) 2 RDIR 160.

[43] P de Bandt and A de Bandt, "Gouvernance des Régulateurs" (2016) 2 RDIR 132–133.

[44] Electricity Directive, Art 37(4), (5) and (6).

[45] Commission, "Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity" COM(2007) 531 final 9–10.

[46] Commission, "Progress in Creating the Internal Gas and Electricity Market" (Report) 2008, 2–3.

In order to advance the achievement of the European energy market, ACER was established by Regulation 713/2009[47] ("ACER Regulation"). It was conceived as an overarching body whose purpose is to assist, complement and coordinate the work of NRAs at EU level.[48]

2. Role, status and composition of ACER

Regarding its structure, ACER comprises an Administrative Board,[49] a Board of Regulators,[50] a Director[51] and a Board of Appeal.[52]

ACER's administrative function is entrusted to the Administrative Board,[53] while the policy function is entrusted to the Board of Regulators.[54] This separate Board of Regulators is solely responsible for all regulatory matters and decisions.[55] Furthermore, the composition of the Board of Regulators shall in principle guarantee the cooperation between ACER and the NRAs as well as ensure that ACER's competence does not conflict with the NRAs' competence,[56] since it is composed of one senior representative of each NRA and one non-voting representative of the Commission.[57] From a broader perspective, the cooperation between ACER and the NRAs also appears inevitable, as ACER has no enforcement powers and therefore relies on the NRAs to enforce the European energy law in a consistent manner.[58]

Furthermore, ACER is provided with an independent Board of Appeal that processes the complaints filed against ACER decisions.[59] This results from ACER's decision-making power that directly affects the legal position and interests of private parties.[60] The inclusion of this board aims to limit the number of cases brought before the General Court by serving as a specialist in the concerned matter.[61]

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[47] Parliament and Council Regulation (EC) 713/2009 of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators [2009] OJ L211/1 ("ACER Regulation").

[48] ACER Regulation, Art 1; see also Vos, supra, note 4, 24; E Hofer, "The Future Role of Regulation – More Europe" in Buschle, Hirsbrunner and Kaddous, supra, note 37, 134–135.

[49] ACER Regulation, Art 12.

[50] ibid Art 14.

[51] ibid Art 16.

[52] ibid Art 18.

[53] ibid Arts 12–13.

[54] ibid Arts 14–15.

[55] S Goldberg and H Bjornebye, "Introduction and Comment" in B Delvaux, M Hunt, K Talus (eds), *EU Energy Law and Policy Issues* (Coll. ELRF, Vol 3, Intersentia 2012) 24.

[56] According to Haverbeke, Naesens and Vandorpe, the respective competences of the NRAs and ACER have not been clearly defined in many ways. They therefore question whether ACER's competence will effectively reduce the NRAs' competences (Zinzani, supra, note 29, citing Haverbeke, Naesens and Vandorpe, "Strengthening Europe Regulatory Powers" (25 January 2010) European Energy Review).

[57] ACER Regulation, Art 14(1).

[58] D Haverbeke, B Naesens and W Vandorpe, "European Energy Markets and the New Agency for the Cooperation of Energy Regulators" (2010) 28(3) Journal of Energy & Natural Resources Law 428.

[59] ACER's Board of Appeal has decided on six appeals so far, see <www.acer.europa.eu>; two were dismissed, as they were deemed inadmissible (an opinion only *invites* the addressee to follow the Agency's indications and cannot thus be considered as a 'formally binding decision with direct and immediate legal consequences'). The four other appeals (consolidated) were made against a decision of ACER and dismissed as inadmissible in one case, and admissible but unfounded in the others.

[60] All decision-making agencies (ie ACER, EASA, EBA, EIOPA, SRB, ECHA, ESMA, CPVO, EUIPO, ERA) are assisted by one or more board(s) of appeal; see Chamon, supra, note 2, 340 and Zinzani, supra, note 29, 150.

[61] M Chamon, "Agences Décentralisées et Droit Procédural" (2016) 2 Cahiers De Droit Européen 555.

3. Tasks of ACER

ACER's tasks were laid down in the Third Energy Package and in particular in the ACER Regulation. It was then assigned specific tasks in 2011 by REMIT, and in 2013 by Regulation 347/2013.[62] This section shall briefly address the tasks entrusted to ACER by the ACER Regulation, using an intermediary typology between a functional, instrumental and powers classification, which we believe is the most appropriate to understand the various aspects of ACER.[63] Sections V and VI below shall then specifically address the REMIT aspects.

While in the process of adopting the ACER Regulation, the Parliament suggested establishing a strong role for ACER which would, among other tasks, adopt the network codes itself as well as guidelines for the Member States, receive a delegated power from the Commission to take suspensive decisions, be empowered to fine TSOs, etc.[64] All except one of these amendments were rejected by the Commission pursuant to the *Meroni* doctrine. The only amendment that made it to the final Regulation is ACER's power to step in when NRAs cannot agree according to Article 8(1) of ACER Regulation.[65]

Regarding the tasks entrusted to ACER by ACER Regulation, ACER qualifies as: (i) a decision-making agency; (ii) a quasi-regulatory agency;[66] and (iii) an assistance and monitoring agency.

Firstly, ACER qualifies as a decision-making agency. It is granted binding powers via individual binding decisions on technical issues.[67] For cross-border infrastructure and in cases where the NRAs have not been able to reach an agreement, ACER is competent to decide on the regulatory issues that fall within the competence of the NRAs,[68] on the terms and conditions for access to electricity and its operational security,[69] and finally on the new infrastructures' exemption from the third party access rules.[70] Such powers are concurrent to the NRAs' powers, as these decisions relate directly to their field of competence and are immediately binding, and therefore not subject to approval by the Commission.

Secondly, ACER qualifies as a quasi-regulatory agency in the drafting of network codes. Formally, the drafting of network codes is carried out by ENTSO-E and the

[62] Parliament and Council Regulation (EU) 347/2013 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 [2013] OJ L115/39; Regulation 347/2013 lays down rules for the timely development and interoperability of trans-European energy networks in order to achieve the energy policy objectives of the TFEU; in this framework, which is not relevant for our purpose, ACER is allocated assistance and monitoring tasks.

[63] For further information about this typology, see Chamon, supra, note 2, 18–39; see also Commission, "European agencies – The way forward", supra, note 3, 2; ACER Regulation Recital 11; Sester, supra, note 38, 123ff.

[64] Parliament, Proposal for a regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators (Resolution) P6_TA(2008)0296 OJ C 286.

[65] Chamon, supra, note 2, 208–209.

[66] On this classification see Chamon, supra, note 2, 20 citing M Busuioc, *The Accountability of European Agencies: Legal Provisions and Ongoing Practices* (Eburon 2010) 26–27.

[67] ACER Regulation, Art 7(1).

[68] ACER Regulation, Art 8(1).

[69] ACER Regulation, Art 7(7) and Art 8(1); see also ACER Regulation, Art 8(4).

[70] ACER Regulation, Art 9(1); Electricity Regulation, Art 17(5); see also P Larouche and P Cserne, *National Legal Systems and Globalization: New Role, Continuing Relevance* (Asser Press 2013) 198.

network codes are approved by the Commission; nonetheless, ACER is highly involved at all steps of this process: (i) preparation by ACER of the framework guidelines setting out clear and objective principles for the development of network codes by ENTSO-E; (ii) ENTSO-E must then develop network codes, which must be in line with the relevant framework guideline, and submit them to ACER; (iii) ACER provides ENTSO-E with its reasoned opinion of the draft network code; and (iv) assesses whether the concerned network code is in line with the relevant framework guideline; (v) ACER then submits the draft network code to the Commission; (vi) if ENTSO-E fails to develop a network code in time, the Commission may request that ACER prepare a draft network code to be approved by the Commission.[71] Therefore, although ACER does not per se possess a regulatory power in this regard, it is at least entrusted with quasi-regulatory tasks.

Finally, ACER qualifies as an assistance and monitoring agency (non-binding advisory powers[72]). ACER is entrusted with broad monitoring tasks including the monitoring of the execution of certain tasks entrusted to ENTSO-E, the monitoring and analysis of the implementation (and effects of the implementation) of the network codes and the guidelines, etc,[73] but also with broad assistance tasks, providing reasoned opinion and recommendations to ENSTO-E,[74] to the Commission,[75] Parliament and Council,[76] and to the NRAs.[77]

As a general consideration, the tasks and related powers entrusted to ACER are not to be underestimated. The authoritative quality of ACER's intervention results from its position as a primary European expert in the field concerned. Its opinions and/or recommendations are therefore highly relevant and are usually taken into account. Consequently, ACER's position in the EU electricity market is far more than that of a limited decision-making agency or a broad non-binding advisory agency. The analysis of ACER's tasks and powers regarding the implementation of REMIT further develops this argument (see section VI below).

V. REMIT

1. Introduction to REMIT

The Third Energy Package did not initially include specific provisions about the transparency and integrity of the wholesale electricity market.

REMIT first established the rules for the prohibition of abusive practices affecting wholesale energy markets and for the monitoring of wholesale energy markets by ACER

[71] Electricity Regulation, Art 6 and ACER Regulation, Art 6(4).

[72] ACER Regulation, Art 6(2), (3) and (5) and Art 7(2); see also L Calandri, "L'Emergence d'une Régulation Européenne" in C Boiteau (ed.), *Energies renouvelables et marché intérieur* (Bruylant 2014) 398.

[73] ACER Regulation, Art 6(2), (5), (6), (7) and (8), Art 11(1) and (2); Electricity Regulation, Arts 7–9.

[74] ACER Regulation, Art 6(3)b, Art 6(4) al 1, and Art 9(2); Electricity Regulation, Art 7(1) and Art 8(11).

[75] ACER Regulation, Arts 4, 5, 6(1) and (5), 7(3) and 9(2); Electricity Regulation, Art 6(11) al 2 and Art 7(2).

[76] ACER Regulation, Art 5 and Art 6(4) al 1.

[77] ACER Regulation, Art 7(2), (4) and (6); Electricity Directive, Art 39(1); C Van Den Bergh, "The Relationship Between Sector Specific Regulation and Competition Law in the Energy Sector" in Delvaux, Hunt, Talus, supra, note 55, 201.

in close collaboration with NRAs.[78] Specifically, REMIT prevents market manipulation[79] and the (attempted) use of inside information to trade.[80] In relation to inside information, REMIT also obliges market participants to publicly disclose the inside information which they possess.[81] The timing and method of publication are specified in the guidelines adopted pursuant to the Third Energy Package.[82] Finally, REMIT provides for penalties to be established by Member States.[83]

2. Role of ACER according to REMIT

According to REMIT, ACER is entrusted with consistent supplementary monitoring tasks (monitoring and reporting), but also with a marginal quasi-regulatory task (issuing non-binding guidelines). Legally speaking, this quasi-regulatory task is marginal, but from a practical point of view it is in fact essential, as explained below.

Under REMIT, ACER holds the responsibility to monitor wholesale markets in order to detect and deter market abuse, in close collaboration with the NRAs which are also involved in monitoring their national markets.[84] To that end, market participants shall report transactions and fundamental data to ACER.[85] The REMIT Implementing Regulation[86] ("REMIT IA") defines the rules for the provision of data to ACER, provides a list of contracts whose details must be reported on a regular basis, as well as an obligation to report other contracts' details on an ad hoc basis, and mandates ACER to issue a user manual explaining the content of the reportable information, as well as the procedure, standards and electronic formats for reporting, and the technical and organisational requirements for submitting data. Market participants are obliged to register with their NRA,[87] and ACER is given the task to constitute a "European register of market participants" based on the NRAs' input.[88] Finally, ACER shall report to the Commission[89] and may issue recommendations.[90]

The enforcement of prohibitions under REMIT is conferred to NRAs under the coordination of ACER.[91] ACER is mandated to coordinate NRAs and to publish a non-binding guidance of the definitions set out in REMIT.[92]

78 REMIT, Art 1(1).

79 ibid, Art 2(2) and (3) and Art 5.

80 ibid, Art 3.

81 ibid, Art 4.

82 ibid, Art 4(6).

83 ibid, Arts 13–18.

84 ibid, Art 1(1) and Art 7.

85 ibid, Art 4(2), Art 7(1) and Art 8(1) and (5).

86 Commission Implementing Regulation (EU) 1348/2014 of 17 December 2014 on data reporting implementing Article 8(2) and Article 8(6) of Regulation (EU) No 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency [2014] OJ L363/121 ("REMIT IA").

87 REMIT, Art 9(1).

88 ibid, Art 9(3).

89 ibid, Art 7(3) al 1.

90 ibid, Art 7(3) al 2–3.

91 ibid, Art 16(5).

92 ibid, Art 16(1).

This role granted to ACER (ie monitoring, coordinating, publishing a guidance, etc) is strictly in line with the ACER Regulation and the concept of an EU Agency. However, as we will now see, ACER's role has in fact acquired a far broader reach.

VI. ACER PACKAGE UNDER REMIT

Based on REMIT and REMIT IA, in application of its quasi-regulatory tasks, ACER adopted a whole set of documents including guidance, recommendations, Q&A, FAQ, etc ("ACER Package"), which is regarded as the REMIT implementation package.[93]

1. ACER Guidance

ACER's main piece of work is its non-binding "Guidance on the application of REMIT" ("Guidance"), which is currently in its fourth edition. It aims to specify the scope of REMIT; further define concepts used in REMIT; clarify the prohibition of market abuses and identify its applications and possible signals of potential insider trading or market manipulation; elaborate on the obligation of market participants to register with their NRA and to disclose inside information; further specify disclosure mechanisms and set minimum quality and timing requirements of effective disclosure; and more recently, define a whole regulatory framework applicable to persons professionally arranging transactions ("PPATs").

2. Other ACER documents

In addition to the Guidance explicitly required by REMIT and REMIT IA, ACER has adopted five types of documents.

a. Recommendations

ACER adopted its "Recommendations to the Commission as regards the records of wholesale energy market transactions, including orders to trade, according to Article 8 of Regulation (EU) No 1227/2011", dated 23 October 2012 and 26 March 2013 ("Recommendations 2012 and 2013"), wherein ACER indicates which records it considers as necessary to effectively monitor wholesale energy markets. These recommendations were produced with the intention to assist the Commission in drafting the implementing acts according to Article 8(2) and Article 8(5) of REMIT.

b. REMIT Reporting User Package

In order to streamline the reporting obligation under REMIT and REMIT IA, ACER adopted the so-called REMIT Reporting User Package, in which it specifies the rules applicable to the reporting obligation.

[93] ACER Package documents available at <www.acer-remit.eu/portal/public-documentation> last accessed 18 October 2017.

This includes a "List of Organised Market Places", a "List of Registered Reporting Mechanisms", a "List of standard contracts" and a "REMIT Guidance on the list of Standard Contracts", a "Template and Schema" for the reporting, requirements for the registration of RRMs ("RRM Requirements"), a "Transaction Reporting User Manual" ("TRUM"), a "Manual of Procedures on transaction data, fundamental data and inside information reporting" ("MOP"), and a "REMIT Guidance on the implementation of web feeds for Inside Information Platforms".

c. ACER Staff Letters

ACER, or more specifically the Market Monitoring Department of ACER, also published a "No-action Relief Letter",[94] dated 7 January 2015, whereby it issued a time-limited (until 31 December 2016) no-action relief for the requirement to report upon reasoned request by ACER the contracts and transactions listed in Article 4(1) of REMIT IA.

This No-action Relief Letter was followed by another letter, dated 15 December 2016, in which the concerned department extended the time-limited no-action relief until 31 December 2017. ACER issued communications to the market in open letters on two other occasions.[95]

d. Q&A and FAQ on REMIT

ACER has published and regularly updated three documents including questions addressed to it regarding REMIT and ACER's answers: a "Frequently Asked Questions on REMIT fundamental data and inside information collection" ("FAQ Collection"), about the collection of inside information and fundamental data in relation to the MOP; a "Questions and Answers of REMIT" ("Q&A"), about REMIT in general; and a "Frequently Asked Questions on REMIT transaction reporting" ("FAQ Transactions"), relating to the TRUM.

e. REMIT Quarterly

ACER has published a REMIT Quarterly newsletter titled "ACER guidance on the application of REMIT and transaction reporting" since 2015, in order to communicate with stakeholders on REMIT-related matters.

3. Analysis

Apart from ACER's responsibilities to organise the reporting of fundamental and transaction data, and to monitor the market in order to deter and detect market abuses, which shall therefore include developing technical and organisational requirements for submitting data (ie reporting formats, a user manual, etc), the role granted to ACER by REMIT is rather limited, as it is only mandated to publish a non-binding guidance on the

[94] Although the legal nature of such letter is unknown, it emanates from a department of ACER and indicates to the market that ACER will take no action in relation to the enforcement of some applicable provisions of REMIT IA.

[95] ACER Open letter on REMIT transaction reporting data quality dated 16 February 2017 and ACER Open Letter dated 17 March 2015.

application of the definitions set out in Article 2 of REMIT, and to ensure that NRAs carry out their tasks under this Regulation in a coordinated and consistent manner.

However, in practice, ACER's role has had a much broader reach. An in-depth analysis of the ACER Package can therefore raise, on a non-exhaustive basis, some legal questions as to the (quasi-)regulatory role of ACER, or more generally on governance structure and process in relation to REMIT.

a. Scope of the Guidance

ACER seems to have interpreted the text of REMIT in a loose manner and despite the lack of formal mandate, it adopted the Guidance which covers all aspects of REMIT (and not only those strictly defined in Article 16(1) of REMIT), as do the Q&A, FAQs and REMIT Quarterly.

An interesting example is provided by Article 15 of REMIT which provides for a specific market surveillance role for PPATs. This obligation, set out in general terms in REMIT, has led ACER to develop a detailed regulatory framework for market surveillance by PPATs. Among others, ACER details who is to be considered a PPAT, what is comprised in the duty to notify potential breaches of Article 3 or 5 of REMIT, and what is expected from PPATs regarding effective arrangements and procedures to identify these breaches. Concerning this last element, ACER has developed a full regulatory framework defining the PPATs' obligation to proactively monitor the wholesale energy markets and establish dedicated surveillance teams, according to minimal organisational and procedural arrangements.

This issue is not unknown to ACER who took the precaution of framing its intervention with a notice for the readers:

> "According to (a first provision of) REMIT, 'the Agency shall publish non-binding guidance on the application of the definitions set out in Article 2 [of REMIT], as appropriate'. In addition, according to (a second provision of) REMIT, 'the Agency shall aim to ensure that national regulatory authorities carry out their tasks under [that] Regulation in a coordinated and consistent way'. For this purpose, the Agency may issue guidance both on the application of the definitions set out in Article 2 of REMIT and on other issues of application of REMIT (…)."[96]

A final comment should be made on the fact that the Guidance and the Q&A provide an explanation of the role of ACER, leaving aside the role of NRAs, even though the main purpose of ACER is to ensure that the NRAs' role is carried out in a coordinated and consistent way.

b. Inside Information Reporting

This goes a step further when ACER's interpretation of REMIT develops a reporting regime not foreseen by the Regulation. Indeed, based on Article 8 of REMIT, ACER has developed a framework for inside information reporting by market participants (thereby confusing the *reporting* of data provided by Article 8 of REMIT and the *disclosure* of inside information provided by Article 4 of REMIT).

[96] ACER Guidance on the application of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (4th edn) 7.

This is exemplified by the MOP, which covers the reporting of transaction data, fundamental data and inside information. According to ACER, the MOP is based on Article 10(1) and 10(3) of REMIT IA. However, Article 10(3) of REMIT IA explicitly refers to the transaction and fundamental data reporting (ie not the reporting of inside information) and Article 10(1) provides that market participants disclosing inside information on their website shall organise a web feed allowing ACER to easily collect this data. It is also to be noted that the MOP is directly addressed to entities with reporting obligations, therefore directly addressing market participants (while ACER's role under its establishing regulation, REMIT and REMIT IA, is rather the coordination of the NRAs' actions).

The notion of reporting inside information to ACER was in fact developed by ACER itself in its Recommendations 2012 and 2013, where it put forward the idea that inside information should be reported alongside other reportable information. For that purpose, it developed the concept of Regulated Information, meaning both inside information and transparency information, and recommended that all such Regulated Information be reported. The Commission did not consider this as adequate and kept it out of REMIT IA (except for the web feed). Not taking this Commission decision into account, ACER Guidance developed a regulatory framework in relation to inside information reporting, against the provisions of applicable legislation (and certainly without legal basis).

c. Relief Letters

Through its No-action Relief Letter presented above, ACER has in fact without any legal mandate suspended some legally binding provisions of REMIT and REMIT IA (binding for ACER as much as for market participants). This creates legal uncertainty, further increased by the fact that this letter was issued by a department of ACER, allegedly not representing the view of ACER itself, and that the letter could therefore be considered void at any moment:

> "This letter, and the positions taken therein, represent the view of the Department only, and do not necessarily represent the positions or views of the Agency or of any other office or department of the Agency. The relief issued by this letter does not excuse persons relying on it from compliance with any other applicable requirements stipulated in REMIT or in Commission Regulation (EU) No 1348/2014. Further, this letter, and the relief contained therein, is based upon the information currently available to the Department. Any different, changed or omitted material facts or circumstances might render this no-action relief void."[97]

Furthermore, if this relief letter follows a recommendation of a similar nature made by ACER to the Commission in its Recommendations 2012 and 2013 (temporarily suspending reporting for specific transactions), such recommendation was not followed by REMIT IA which chose instead a different option (ie making the concerned contracts reportable only upon request). Therefore, ACER not only creates legal uncertainty, but also clearly breaches the regulations adopted by the Commission.

4. Nature of the ACER Package

According to ACER, none of the documents listed in the ACER Package are legally binding, and most of these documents are addressed to the NRAs only and published for transparency purposes. When a document of the ACER Package is addressed to market

[97] ACER letter "No-action Relief: List of contracts reportable at request of the Agency" 7 January 2015, 2.

participants, it specifies that it does not provide a legal interpretation of REMIT and does not by any means substitute binding provisions.

In reality, however, the actual wording of the Guidance contradicts its supposedly non-binding character. See, for example section 4.6, last § of the Guidance, where ACER directly addresses market participants (although it allegedly addresses NRAs) in typically binding legal terms ("shall"). The same can be said of the provisions for PPATs in the Guidance, which lays out the PPATs' obligations in legal terms (eg Article 9.4.3.a of the Guidance).

Further, ACER's stance regarding the legal enforceability of the ACER Package should not obviate the fact that these documents, due to their author (ie a body made of all NRAs) and their public nature, do not lack legal significance.

In the reflection on norms and normativity, the ACER Package qualifies as "soft law",[98] which is defined as the "rules of conduct that are laid down in instruments which have not been attributed legally binding force as such but nevertheless may have certain (indirect) legal effects and that are aimed at or may produce practical effects".[99] Soft law has been identified as the main way for EU Agencies to indirectly exercise regulatory powers. Such acts therefore have a definite effect, despite not having any binding normative effect based on the treaties.

Regarding the ACER Package, its legal significance is obvious for market participants, NRAs and judges.

Market participants cannot reasonably overlook documents issued by their regulators' association. Furthermore, and for the same reason, it is complicated for them to legally challenge such provisions, as: (i) they fear coming under their regulator's scrutiny; and (ii) formally, soft law is not binding law (and therefore not challengeable).

As for the NRAs, having participated in the process of enacting the ACER Package within ACER,[100] they cannot be expected to disregard provisions which they accepted. Therefore, one can reasonably anticipate that NRAs will rely on the ACER Package to enforce some obligations towards market participants.[101] This means that this soft law would become obligatory for market participants through NRAs.[102]

Furthermore, even if soft law is not supposed to have a binding legal effect, it will without doubt play a role in the way judges interpret hard law norms.[103] In this context, soft law may receive proper normative power by direct judicial recognition via: (i) acceptance by national authorities; (ii) general principle of law such as legal certainty; and/or (iii) influencing the decision of jurisdiction (soft law is given a normative value by providing interpretational expertise) and indirect judicial recognition (via a recognition that soft law is part of a broader normative network).[104]

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[98] In the standard classification of soft law, the ACER Package qualifies as post-legislative soft law, which pursues the objective of accompanying the enacting or application of a norm (B Bertrand, "Rapport introductif: Les enjeux de la soft law dans l'Union européenne" (2014) 575 Revue de l'UE 81; H Rassafi-Guibal, "De quelques aspects des usages des instruments de soft law comme vecteurs de normativité économique" (2014) 575 Revue de l'UE 87ff).

[99] Chamon, supra, note 23, 152–153 citing L Senden, *Soft Law in European Community Law* (Hart 2004) 112.

[100] To the exception, notably, of the Relief Letters, which have been adopted by a department of ACER and therefore not formally approved by NRAs.

[101] See Case 410/09 *Polska Telefonia Cyfrowa* [2011] ECR I-3853, para. 39 cited in Bertrand, supra, note 98, 76.

[102] Bertrand, supra, note 98, 76.

[103] ibid 77–78.

[104] Rassafi-Guibal, supra, note 98, 89ff.

Via the ACER Package, ACER provides its own understanding of REMIT and REMIT IA. For the reasons stated above, one can reasonably anticipate that market participants, NRAs and judges alike will rely on this same interpretation of REMIT and REMIT IA to assess the obligations of market participants.

This process poses certain risks. The first issue lies in the function of soft law, its aim to ensure a uniform application of EU law through the adoption of explanatory documents. This practice may reinforce legal certainty, but may also cause counterproductive side effects when it creates norms intended to have legal effects without stating so (and more specifically without stating on which basis the obligatory force proceeds).[105] It therefore allows some organs to acquire a hidden regulatory power, with norms having a true normative effect through their insertion into a hierarchised normative network.[106]

Secondly, there is no proper judicial protection from the jurisdiction of the EU against the soft law adopted by ACER.[107] The ECJ has not yet – to our knowledge – issued a case law allowing for soft law instruments to be challenged before it under Article 263 TFEU.[108] A preliminary ruling based on Article 267 TFEU in relation to the validity or interpretation of any acts of EU agencies seems to be possible (the ECJ has already scrutinised soft law in this frame, *in casu* recommendations[109]). Other soft law instruments are also under debate.[110] At ACER level, the ACER Board of Appeal dismissed an appeal against an opinion (that may be seen as "soft law"), stating that it was a mere "invitation to act", not "intended to have legal effects capable of affecting the interests of the applicant by bringing about a distinct change in his legal position" and that "no legal effects derive from non-compliance with it".[111]

Thirdly and finally, the most problematic issue is that this implicit regulatory role is not granted to ACER by applicable legislation. On this point the ECJ stated that:

> "[T]he fact that a measure (…) is not binding is [not] sufficient to confer on that institution the competence to adopt it. Determining the conditions under which such a measure may be adopted requires that the division of powers and the institutional balance established by the Treaty in the [given] field of (…) policy be duly taken into account (…)."[112]

There is therefore no clearance for ACER to outreach the scope of its role as defined under the EU framework, even if this outreach is "only" based on soft law.

VII. Conclusion

ACER was set up as an EU Agency tasked with decision-making power in a limited number of cross-borders issues, quasi-regulatory powers regarding the adoption of the

105 Bertrand, supra, note 98, 80.

106 Rassafi-Guibal, supra, note 98, 85ff.

107 Alberti, supra, note 12, 167–168.

108 General Court recently asserted this in case T-671/15 *E-Control v Acer* [2016] ECLI:EU:T:2016:626 para. 92.

109 See, for instance, case 113-75 *Giordano Frecassetti v Amministrazione delle finanze dello Stato* [1976] ECR 1976-00983 a. o. cited in Bertrand, supra, note 98, 77, n 47.

110 Bertrand, supra, note 98, 77.

111 ACER Board of Appeal decision A-002-2015 16 December 2015 para. 21ff <www.acer.europa.eu>.

112 Case 233/02, *French Republic v Commission of the European Communities* [2004] ECR I-02759, para. 40.

network codes and broad assistance and monitoring powers where its expertise was deemed useful.

With REMIT, ACER received additional competences through a sectoral regulation for the first time. Legally, its role was limited to monitoring tasks and a marginal quasi-regulatory power, although the coordinated action of a central regulatory authority was certainly needed.

However, ACER's role in implementing REMIT has in fact extended far beyond both what is permitted under EU law and what was intended by the EU Institutions, as expressed in REMIT and REMIT IA. Upon implementing REMIT and REMIT IA, ACER morphed from a marginal quasi-regulatory power (issuing guidelines) into a regulatory power through the adoption of soft law. The legal issues that have been identified in this contribution each lead to this conclusion.

Consequently, through the ACER Package, ACER has effectively shaped the market surveillance function in the energy markets and is directly addressing market participants with general discretionary regulatory measures, if not *de jure*, at least *de facto*.

Our opinion is that this situation is problematic, not only because in doing so ACER lacks the required legal basis, but also more generally because there is a clear discrepancy between ACER's actual role under REMIT and its role as defined in the ACER Regulation. This is true for the REMIT implementation but also, for example, for the actual role granted to – and the role assumed by – ACER in the process of adopting the methodologies requested by network codes.

In view of the above, for the sake of legal certainty, we must recall the only two possibilities regarding the general role of ACER on the EU market: either the applicable legislation adequately reflects the current – modified – role of ACER in the European energy regulatory framework; or a proper oversight of ACER must be enforced by the Commission, in order to make sure that ACER complies with its role as described in the ACER Regulation (and REMIT and REMIT IA).

From our side, we consider it urgent to acknowledge, in the relevant regulations, the role assumed by ACER as a regulatory authority at EU level (and more generally specify the actual standing of EU agencies in the EU constitutional law, and nuance the exclusive authority of the Commission to exercise executive power). In many cross-border individual cases, as well as for the adoption of norms, this is in fact the adequate level of decision-making. Indeed, due to its composition, ACER boasts an unmatched regulatory expertise concerning energy markets in the EU, and an unrivalled capacity to identify compromise solutions at EU level.

This would increase the legitimacy of the ACER Package (and ACER's role in general), and ensure an increased judicial protection for market participants.

The Winter Package[113] could be a missed opportunity in this respect: as we know, it largely preserves ACER in its role as an agency coordinating NRAs, rather than as an agency truly exercising delegated regulatory competencies from the Commission.[114]

[113] On 30 November 2016, the Commission released a package of proposals released by the Commission on 30 November 2016, titled "Clean Energy for All Europeans", consisting of both legislative as well as non-legislative initiatives, basically replacing the Third Package.

[114] Commission, "Proposal for a Regulation of the European Parliament and of the Council on the internal market for electricity" COM(2016) 861 final 22.