

# Budget and staffing needs at the Agency for the Cooperation of Energy Regulators (ACER)

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## **Abstract**

This study analyses the role, organisational structure, tasks and financial and human resources of the Agency for the Cooperation of Energy Regulators (ACER). ACER plays an important role in the development, integration and functioning of the electricity and gas systems and markets in the EU, and its responsibilities in these domains have since its establishment in 2011 substantially increased. Although its resources have also significantly grown, ACER is facing a structural budget shortage and had to deprioritise, delay or cancel some tasks in recent years. Collection of fees from 2021 should alleviate these limitations. ACER's request for a higher budget appears reasonable and appropriate given its important contribution to major energy policy priorities, and the fact that its functioning seems efficient and effective.

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## LIST OF ABBREVIATIONS

|              |   |
|--------------|---|
| <b>AB</b>    | Administrative Board  |
| <b>ACER</b>  | Agency for the Cooperation of Energy Regulators                   |
| <b>BoA</b>   | Board of Appeals  |
| <b>BoR</b>   | Board of Regulators   |
| <b>CA</b>    | Contract agent  |
| <b>CEER</b>  | European Council of Energy Regulators                             |
| <b>CEP</b>   | Clean Energy for All Europeans Package                            |
| <b>ECA</b>   | European Court of Auditors  |
| <b>ENTSO</b> | European Network of Transmission System Operators                 |
| <b>FERC</b>  | Federal Energy Regulatory Commission                              |
| <b>FR</b>    | Financial resources   |
| <b>FTE</b>   | Full-time equivalent  |
| <b>GL</b>    | Guideline   |
| <b>HR</b>    | Human resources   |
| <b>IEM</b>   | Internal energy market  |
| <b>MFF</b>   | Multi-annual financial framework                                  |
| <b>MIT</b>   | Market integrity and transparency                                 |
| <b>MSC</b>   | Market surveillance and conduct                                   |
| <b>NC</b>    | Network code  |
| <b>NRA</b>   | National regulatory authority                                     |
| <b>REMIT</b> | Regulation on Wholesale Energy Markets Integrity and Transparency |
| <b>RRM</b>   | Registered Reporting Mechanism                                    |
| <b>SoS</b>   | Security of Supply  |
| <b>TA</b>    | Temporary agent   |
| <b>TEN-E</b> | Trans-European Networks for Energy                                |
| <b>TSO</b>   | Transmission system operator                                      |

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## EXECUTIVE SUMMARY

The Agency for the Cooperation of Energy Regulators (ACER) was set up in 2011 to play a pivotal role in the development and integration of electricity and gas systems and markets. ACER's objective is to facilitate cooperation among National Energy Regulatory Authorities (NRAs) and to ensure that markets' integration and the implementation of national legislations are achieved according to the EU's energy policy objectives and regulatory frameworks. Like most other EU agencies, ACER is an independent body financed by the EU general budget. ACER is one of the few EU agencies that has also the possibility to raise financial resources by charging fees to parties it regulates. ACER will implement this option beginning in 2021.

This report presents the evolution of ACER's role, its organisational structure and the tasks it carries out as well as potential additional tasks that may be assigned to it following changes envisaged in EU legislation. This report specifically analyses ACER's financial and human resources, and the impact of budget limitations on its capacity to properly fulfil its legal mandate and to deliver on the achievement of the EU energy policy objectives.

This report was prepared while the European Commission was discussing the ACER budget for 2021 in the context of the multiannual financial framework 2021-2027. Therefore, some of the figures presented for 2021 and onwards are based on forecasts that may not reflect the latest changes. The report's conclusions are, however, not affected by these changes.

Since its creation, the number and extent of **ACER's responsibilities** have substantially increased. Its initial and basic mission, as defined in the Third Energy Package legislation, focused on fostering cooperation among NRAs in view of facilitating the European Internal Energy Market (IEM) both for electricity and natural gas. Since the Regulation on Wholesale Energy Markets Integrity and Transparency (REMIT) entered into force, ACER also plays a fundamental role in monitoring the behaviour of wholesale electricity and gas market participants. This activity aims to limit the risks for abusive market practices and to enhance fair competition and transparency. ACER also plays a role in the implementation of EU legislation regarding security of electricity and gas supply as well as the TEN-E regulation. With the latest provisions adopted in the Clean Energy Package in 2019, ACER has further strengthened its responsibilities on the coordination of NRAs and cross-border cooperation.

To cope with its increasing responsibilities, ACER's **financial resources** provided by EU allowances increased from €8.9 million in 2013 to €16.5 million in 2020 and its **allowed (permanent) staff** evolved from 49 to 71 FTEs. However, since 2013, there has been a structural gap between the financial and human resources requested by ACER's management and the resources allocated from the general EU budget. While it is not uncommon that EU agencies receive lower budget allocations than requested, the discrepancy for ACER was quite high: between 2013 and 2020, ACER was on average assigned 26% less financial resources and 31% fewer staff than requested by its management.

Several factors are at the basis of this **structural budget shortage**, among others:

- resources' needs seem to have been underestimated during legislative processes that have assigned new responsibilities to ACER. The actual workload appeared in practice higher than initially estimated, e.g. due to a higher number of interventions and an increasing number of market participants and transactions that have to be registered and monitored (REMIT);
- the number of appeals and recourse decisions has also substantially increased; and

- there may have been divergences in interpretation of specific ACER roles between ACER's management and parties responsible for the EU legislation and budget (European Commission, Parliament and Council).

The budget constraints have led to **deprioritising, delaying or cancelling tasks**, such as REMIT data collection and processing, and tasks related to the Clean Energy Package and markets' monitoring. From 2021, ACER will fund its costs associated with the operation of the REMIT system via fees, which should enable ACER to better cope with its REMIT and market surveillance functions. These fees will be paid by market participants according to the monitoring cost of their market operations for ACER. This new financing source should enable ACER to supply the related services in time while also respecting high quality standards, and should also allow the NRAs to better cope with their market monitoring responsibilities.

**ACER's budget request seems reasonable and justified** given the overall benefits it generates and the fact that its activities seem to be delivered efficiently and effectively. While it is difficult to objectively evaluate the cost-effectiveness of an agency with a unique mandate, there is evidence that:

- ACER's appropriations are low compared to the budget of most NRAs;
- stakeholders expressed an overall positive view of ACER's output, and appreciation for the services it provides. ACER's activities also enhance the effectiveness of NRAs; and
- ACER's budget request seems justified given the benefits of adequate integration of the electricity and gas systems and markets and the risks and costs of not properly integrated energy systems due to diverging national rules and approaches. Organising regulatory oversight for cross-border issues at EU level is obviously less costly and more effective than doing so at national level.

Stakeholders also expressed the view that ACER's mandate is clear and complements the roles of other institutional actors. There is no indication that ACER's mandate overlaps with the mandates of DG ENER or DG COMP, and similarly there is no major overlap with NRAs or other EU organisations such as CEER.

## 1. INTRODUCTION

The Agency for the Cooperation of Energy Regulators (ACER) was established by Regulation (EC) 713/2009 as part of the Third Energy Package. Its initial and basis mission focuses on fostering cooperation among National Regulatory Authorities (NRAs) in view of facilitating the European Internal Energy Market (IEM) both for electricity and natural gas. The number and extent of the tasks assigned to ACER have substantially increased since its creation, especially related to the implementation of the Trans-European Networks for Energy (TEN-E) and REMIT regulations, the implementation of network codes and guidelines, and the Clean Energy for All Europeans Package.

To cope with its increasing responsibilities, ACER's financial resources provided by EU allowances have increased from €8.9 million in 2013 to €16.5 million in 2020 and its allowed (permanent) staff has evolved from 49 to 71 FTEs. However, since 2013, the allowed resources were each year substantially lower than requested by its management.

This study was commissioned by DG Internal Policies of the EU on behalf of the Committee on Industry, Research and Energy (ITRE) of the European Parliament, to provide an independent expert opinion regarding the budget and staffing needs of ACER.

Based on a rigorous analysis of the tasks assigned to ACER, the study compares past and current (ie. 2020) budgets as well as its budget requests for 2021-2023, to the needs for ACER, in terms of human and financial resources, to properly execute its mandate. The analysis also considers the fees foreseen in Art. 32 of the recast ACER regulation, which will start to be collected from market parties in 2021. This analysis also identifies the main risks of under-resourcing of ACER, including risks of not fully or sub-optimally fulfilling its mandate, as well as risks of legal challenges and reputational damage to ACER.

The main sources for this study comprised public documents, confidential documents and data provided by ACER, interviews with ACER, DG ENER and DG BUDG staff, and written inputs provided by European and national stakeholders.

The results of this analysis are presented in the next chapters:

- 2.** Evolution of the roles and responsibilities of ACER
- 3.** Actual functioning of ACER
- 4.** Past and current resource appropriations, and effects on task delivery
- 5.** Future role, resources and delivery risks of ACER
- 6.** Conclusions and recommendations

## 2. EVOLUTION OF THE ROLES AND RESPONSIBILITIES OF ACER

### 2.1. Main legal provisions

#### KEY FINDINGS

ACER's role has grown from originally supporting the development of the internal electricity and gas markets and the associated system operation rules to more and new tasks related to EU electricity and gas infrastructure, security of energy supply and market integrity and transparency.

The mandate of ACER has evolved over the years, not only due to new legal tasks that have been assigned, but also due to the transition from the development to the implementation phase of network codes, TEN-E and REMIT.

The division of responsibilities between ACER and especially DG ENER, NRAs and the European Network of Transmission System Operators (ENTSOs) has played a central role in determining the tasks of ACER since its creation, and is also central to its future mandate.

ACER's work is, depending on the type of its tasks:

- Recurrent, arising from (bi) annual obligations, such as issuing opinions on the draft non-binding Community-wide Ten-Year Network Development Plan (TYNDP), monitoring Projects of Common Interest (PCIs).
- Punctual and concentrated in specific periods, related to e.g. development and subsequent implementation of network codes and guidelines, and implementation of Clean Energy Package legislation.
- Reactive, depending on requests from the Commission, NRAs and other stakeholders, including appeals on specific ACER decisions, or acting as recourse decision maker upon request following lack of agreement of NRAs.

ACER was created by the Regulation (EC) 713/2009, as part of the Third Energy Package. It took over the activities of the then existing European Regulator Group for Electricity and Gas (ERGEG), an advisory body to the European Commission on internal energy market issues created in 2003<sup>1</sup>. Its first Director took office in September 2010, and ACER started to exert its tasks in March 2011 (dissolving ERGEG), when many of the dispositions of the Third Energy Package entered into force.

The number and extent of the tasks assigned to ACER have substantially increased since its creation, as presented in Figure 1. Besides the ACER Regulation, several EU legislative pieces contain legal provisions assigning tasks to ACER, classified in the categories of:

- Electricity market design and security of supply (SoS).
- Gas market design and security of supply.
- Electricity and gas markets integrity and transparency (REMIT).
- Trans-European Networks for Energy (TEN-E).
- Electricity and gas network codes (NCs) and guidelines (GLs).

<sup>1</sup> European Commission (2011) *Q&A on the third legislative package for an internal EU gas and electricity market*.

## 2.2. Evolution of ACER's tasks since its establishment

Initially, the Third Energy Package assigned to ACER a role to advance the completion of the internal electricity and gas markets and to complement the NRAs regarding issues with cross-border relevance. As embodied in its name, fostering cooperation between national regulators and with the Commission was from the start a main objective of ACER.

This role in developing the internal energy market and the associated system operation rules manifested itself especially through supporting the development of the electricity and gas network codes and guidelines, initially drafted by the European Network of Transmission System Operators for Electricity (ENTSO-E) and Gas (ENTSOG).

The initial role has gradually evolved since its establishment due to a number of new tasks being added to ACER's mandate, and due to the transition from the development of the network codes and guidelines to their implementation and monitoring. This has also led to ACER being assigned a greater number of decision-making powers, as detailed in this chapter.

The mandate assigned to ACER takes into account that energy is a shared competence between the EU and its Member States, as stated by the Art. 194 of the Treaty on the Functioning of the European Union (TFEU). In line with this article, measures taken by the EU *"shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply"*.

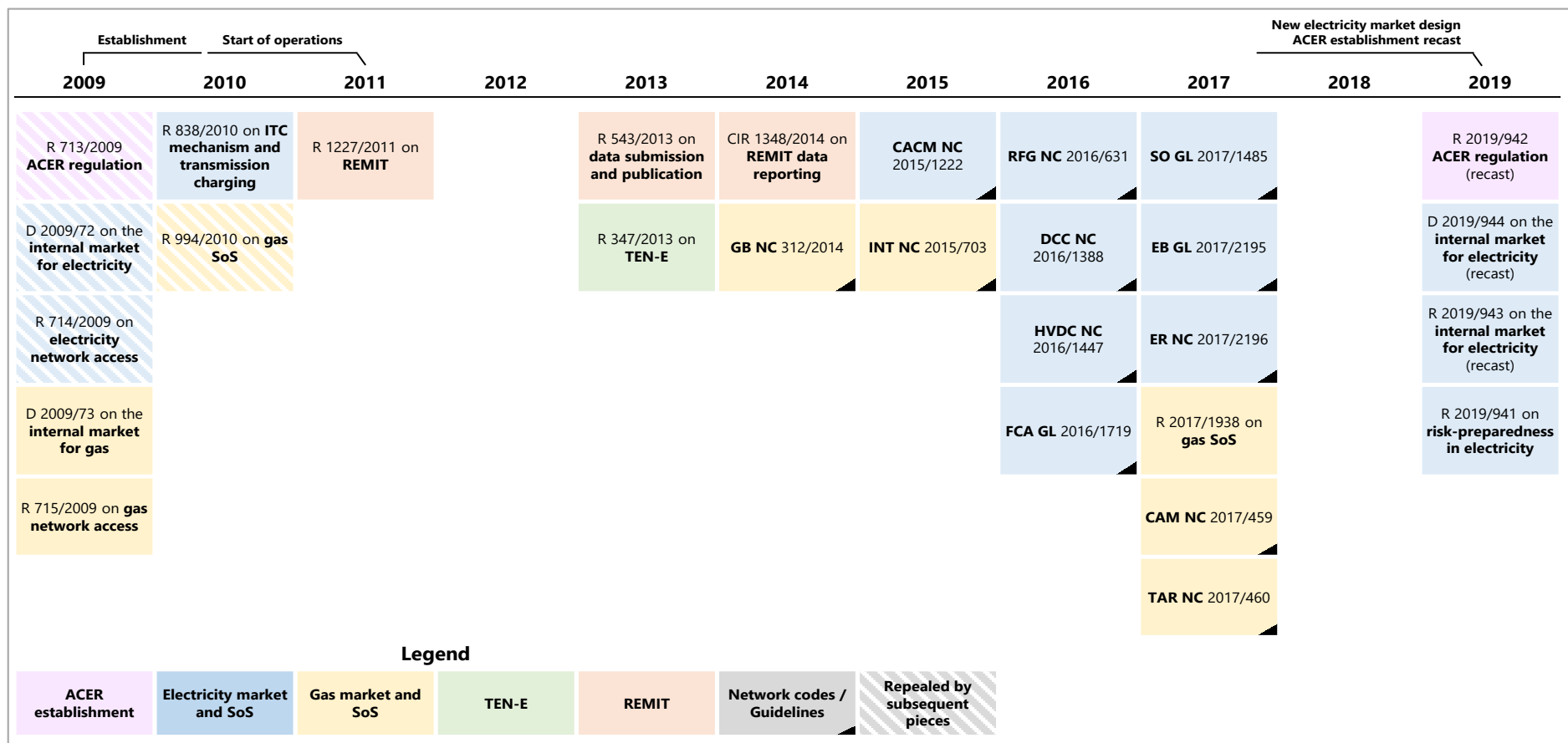
When tasks were assigned to ACER, including certain decision-making powers, the appropriate scope of ACER's tasks considering the subsidiarity principle has been an important topic of negotiation between the EU institutions and Member States. This has been the case since the first discussions in 2006 on the creation of ACER and potential alternatives, such as strengthening the then existing ERGEG (the so-called ERGEG+). The Director for Energy Security and the Internal Energy Market at the time has indicated there were concerns not only from national regulators that ACER would have decision-making powers, but also from the European Commission that discretionary powers would be assigned to an EU agency<sup>2</sup>.

Nonetheless, these initial discussions regarding the role of ACER do not seem to have affected the level of resources that have been allocated to ACER. There are indeed no indications that the gap between the requested and allocated budget was (partly) related to political intentions to limit ACER's intervention in national energy matters. As the allocation of roles between EU organisations and Member States is decided during legislative processes and enacted in legislation, EU agencies including ACER should in principle be allocated sufficient resources to properly fulfil the mandate that was agreed between the EU institutions.

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<sup>2</sup> See Hilbrecht (2016) Presentation in Session I: How ACER came about, in the ACER 2016 Annual Conference.

Figure 1: EU legislative pieces assigning tasks to ACER



Source: Authors' own elaboration.

Note: R - Regulation; D - Directive; NC - network code; GL - guideline; CIR - Commission Implementing Regulation; CD: Commission Decision; SoS: security of supply. Network codes and guidelines: DCC - demand connection code; EB - electricity balancing; ER - emergency and restoration; CACM - capacity allocation and congestion management; CAM - congestion management procedures; FCA - forward capacity allocation; GB - gas balancing; INT - interoperability and data exchange; RFG - requirements for generators; SO - system operation; TAR - harmonised transmission tariff structures.

The following sections describe the evolution of ACER's tasks, organised through its main strategic areas:

- completion of the internal electricity and gas markets and monitoring of their functioning;
- EU electricity and natural gas infrastructure and security of energy supply challenges; and
- wholesale electricity and gas markets' integrity and transparency.

The 2014 Commission evaluation on ACER<sup>3</sup> indicates that in the period of 2011-2013 ACER had adequately focused on its priorities to support the completion of the internal energy market, the development of transmission networks and the implementation of REMIT.

The following sections provide a summary of ACER's tasks. The Clean Energy Package has assigned a number of new task to ACER regarding the electricity sector - these are discussed in the respective sections, and also highlighted in Box 1.

#### Box 1: New ACER tasks arising from the Clean Energy Package legislation

The main new tasks assigned to ACER in the context of the Clean Energy Package comprise:

- issuing best practice report on transmission and distribution tariff methodologies;
- issuing opinion providing technical guidance for calculation of CO<sub>2</sub> emission limits in generation capacity;
- approving the proposal for the geographical scope of Regional Coordination Centres;
- approving the methodology for identifying the most relevant electricity crisis scenarios in a regional context;
- approving the methodology for assessing seasonal and short-term system adequacy;
- approving the methodology for the EU resource adequacy assessment;
- approving the methodology for the calculation of the value of lost load, the cost of new entry for generation and demand response and reliability standards;
- approving the EU DSO Entity statutes and list of members; and
- approving the methodologies and common rules for cross-border participation in capacity mechanisms;
- approving the methodology for the use of congestion revenues.

Source: Own elaboration based on ACER (2020) *draft financial statement for 2021*.

### 2.2.1. Completion of the internal energy market and monitoring of its functioning

As indicated, supporting the completion of the internal energy market is ACER's main objective since its establishment. The specific tasks initially assigned to ACER are detailed in the Regulation 713/2009 establishing ACER and in the 2009 Electricity and Gas Directives and Regulations of the Third Energy Package. Their main tasks related to the internal energy market completion and monitoring are:

- **Advise the EU institutions**, especially the Commission and to a lesser degree also the Parliament and Council;
- **Support NRAs in conducting their regulatory tasks**, by issuing opinions and (assisting the Commission in) monitoring compliance;

<sup>3</sup> European Commission (2014). *Evaluation of the activities of the Agency for the Cooperation of Energy Regulators (ACER) under article 34 of Regulation (EC) 713/2009*. C(2014) 242.



- **Promote cooperation and knowledge sharing**, by providing a framework for the cooperation of NRAs at the regional and EU level, assisting NRAs and market players in sharing good practices, and monitoring and reporting on the electricity and natural gas sectors;
- **Support the harmonisation of energy regulation** at the regional and EU level, cooperating with NRAs and transmission system operators (TSOs) to ensure the compatibility of regulatory frameworks, and participating in the development of network codes and guidelines;
- **Support the prioritisation, development and amendment of network codes and guidelines**, and develop them in case the ENTSOs fail to do so according to schedule; and
- **Support the certification of TSOs**, including those controlled by person(s) from third countries.

ACER also plays a role **in the inter-transmission system operators' compensation (ITC) mechanism and in guaranteeing a common approach to transmission charging**<sup>4</sup>. ACER oversees the implementation of the ITC mechanism and reports yearly on the ITC fund management. ACER also verifies the criteria for the valuation of energy losses in the TSO grid and monitors the appropriateness of the ranges of allowable transmission charges.

ACER has since its establishment been assigned an important role in the **electricity and gas network codes and guidelines**<sup>5</sup> development, implementation and monitoring. The 2014 evaluation<sup>6</sup> indicates that ACER has gradually exerted a more active role in this development. Framework Guidelines have become more concrete, guiding the ENTSOs on expectations, and the evaluation expected ACER's oversight on the network code development process to address concerns from stakeholders.

After their publication, the implementation of network codes and guidelines requires further actions from stakeholders at the EU to the regional and national levels. ACER needs to approve the implementation activities of the ENTSOs and TSOs in several occasions, including at the regional level if NRAs cannot agree on the approval<sup>7</sup>.

ACER is furthermore required to report both on the monitoring of the implementation of the network codes and their effects on the harmonisation of internal energy market rules. It reports on the implementation through specific yearly reports, while the effects of the network codes are assessed within the Market Monitoring Reports of ACER. The ENTSOs are also required to monitor the implementation of the network codes, which may lead to some overlap.

### 2.2.2. The European infrastructure and security of supply challenges

The 2009 Electricity and Gas Directives and Regulations of the Third Energy Package have assigned the following initial tasks to ACER regarding the European infrastructure and security of supply challenges:

- **Issue opinions on the electricity and gas development plans**, namely the TYNDP and the consistency between the TYNDP and the national development plans;
- **Support exemption decisions to new interconnectors**, advising NRAs and taking decisions upon the request of involved NRAs, or if those are unable to reach an agreement;

<sup>4</sup> Regulation (EU) 838/2010 on laying down guidelines relating to the inter-transmission system operator compensation mechanism and a common regulatory approach to transmission charging.

<sup>5</sup> Framework Guidelines, developed by the Agency in consultation with stakeholders (including the appropriate ENTSO), set out clear and objective principles for the development of network codes and guidelines. Network codes and guidelines carry the same legal weight, are directly applicable and are adopted by the Comitology procedure. However, they differ in their legal basis, amendment process, topics and work during the implementation phase.

See Schittekatte et al. (2019). *The EU electricity network codes – 2019 edition*. FSR technical report.

<sup>6</sup> European Commission (2014). *Evaluation of the activities of the Agency for the Cooperation of Energy Regulators (ACER) under article 34 of Regulation (EC) 713/2009*. C(2014) 242.

<sup>7</sup> Adapted from ENTSO-E (2019) *Annual Work Programme 2020* - draft version.



- **Take binding decisions on cross-border interconnectors** and exemptions regarding terms and conditions for new interconnectors.

In addition, ACER participates in the process for defining the **Projects of Common Interest (PCIs) in the context of the TEN-E regulation**, also providing an opinion on the draft PCI lists and on the cost-benefit analysis methodologies of the ENTSOs. ACER also assists NRAs in the evaluation of the PCIs (including as a recourse decision maker regarding cross-border cost allocation decisions), and monitors the PCI progress.

**Regulation 994/2010 on security of gas supply** did not assign tasks to ERGEG/ACER, except by making it a member of the Gas Coordination Group. It was, however, superseded by **Regulation 2017/1938**, which established that ACER became responsible for issuing opinions on proposals for physical reverse flow capacity or exemption requests to it, and for cross-border cost allocation on reverse flow decisions taken by the Commission.

### 2.2.3. Wholesale electricity and gas markets' integrity and transparency

**Regulation 1227/2011 on wholesale energy market integrity and transparency (REMIT)** created a framework for monitoring wholesale energy markets, to detect and deter market manipulation. As such, it contains market abuse definitions and prohibitions, as well as market monitoring & data collection and investigation & enforcement provisions.

REMIT assigned important new responsibilities in market monitoring to ACER. Being the main organisation for REMIT's implementation and operation, ACER's responsibilities include<sup>8</sup>:

- establishing and maintaining a central European register of energy market participants;
- collecting information, to be reported by market participants on transactions in wholesale energy products;
- collecting "fundamental data" on the physical state of the energy systems;
- performing an initial assessment of wholesale energy market transactions, to identify instances of possible market abuse, and to notify such cases to competent national authorities;
- coordinating the investigation of suspected cases of market abuse by national competent authorities, in particular when they involve more than one jurisdiction; and
- assessing the operation and transparency of different categories of market places and ways of trading.

The **Commission Implementing Regulation 1348/2014 on REMIT data reporting** specified further roles of ACER for the implementation and operation of REMIT, including to:

- draw up, update and publish lists of standard contracts and organised market places;
- establish procedures, standards and electronic formats based on established industry standards for reporting of information;
- develop technical and organisational requirements for submitting data; and
- assess whether reporting parties comply with the requirements.

Finally, Regulation 543/2013 requires ACER to provide an opinion on the proposal concerning the operation of the **ENTSO-E central information transparency platform** and on any update of the manual of procedures.

<sup>8</sup> ACER (2013). *REMIT annual report 2013*.

### 3. ACTUAL FUNCTIONING OF ACER

#### KEY FINDINGS

- ACER has a unique organisational structure among EU agencies, with the Board of Regulators having final authority over regulatory aspects, and administrative powers resting with the Administrative Board;
- While NRAs contribute significantly to ACER's work through active participation in Working Groups and Task Forces, much of the work related to these groups, including operational aspects, is done by ACER staff. Other stakeholders such as ENTSOs/TSOs and grid users contribute more punctually and for specific topics to ACER's work, mainly through Expert Groups and consultations;
- The most resource-intensive work of ACER is related to REMIT (38% of operational staff in 2020) and to the development and implementation of network codes and guidelines (28%). More limited resources are allocated to infrastructure and Security of Supply related issues (18%), and to market monitoring (15%);
- ACER's volume of work has in recent years:
  - Increased for several tasks: implementation of network codes and guidelines, individual decisions, CEP implementation, REMIT-related activities (increased number of reporting parties, monitored transactions, triggered alerts and suspect cases), and decisions on appeals. At least the latter two are expected to continue increasing in the coming years, as well as the work related to amending network codes and guidelines;
  - Remained stable/without a clear trend for tasks regarding non-network code related ACER opinions, especially concerning ENTSOs' documents;
  - Decreased concerning the development of network codes, all of which are now in the implementation phase.

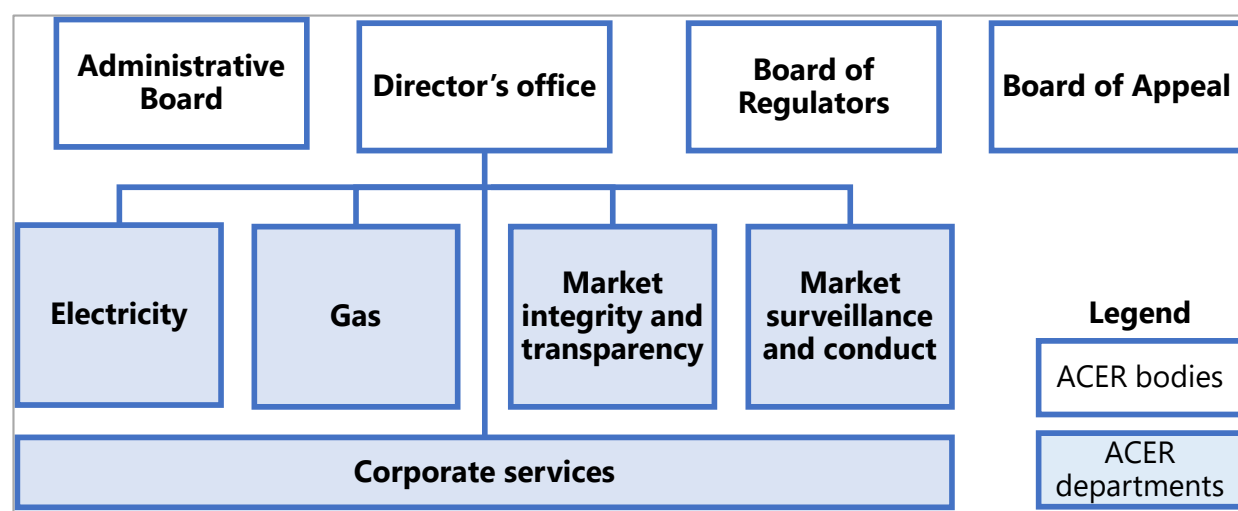
Between 2017 and 2019, ACER has fully accomplished its tasks related to the internal energy market, infrastructure and security of energy supply. However, REMIT-related tasks (both on market integrity and transparency, and market surveillance and conduct) were significantly affected by lack of resources.

The following sections present the functioning of ACER, the division of responsibilities between ACER and its main stakeholders, and the delivery of its mandated tasks.

#### 3.1. Organisational structure

This section describes the organisational structure of ACER - its bodies and departments as shown in Figure 2 - and their main functions as of March 2020. Other organisational elements not relevant to this study, such as the Data Protection Officer, are not analysed.

Figure 2: ACER bodies and departments in March 2020



Source: Own elaboration based on publicly available information.

### 3.1.1. Bodies of ACER

Due to its specific role, ACER counts not only with an Administrative Board, but also with a Board of Regulators<sup>9</sup>. This particular structure was chosen in order to separate administrative issues, which are the prerogative of the EU institutions, from regulatory issues, which are the prerogative of national regulators<sup>10</sup>.

While it is the role of the ACER director to “draft, consult upon, adopt and publish opinions, recommendations and decisions” as indicated below, most of the documents with a regulatory character can be adopted “only after having obtained the favourable opinion of the Board of Regulators”<sup>11</sup>. As such, the Director is required to follow the Board of Regulators regarding regulatory issues, on which the decision-making authority ultimately rests.

#### Administrative board

The Administrative Board (AB) governs ACER and is composed of nine members, each with an alternate. Two are appointed by the Commission, two by the Parliament, and five by the Council<sup>12</sup>. The Administrative Board has the following main functions, with most decisions taken by a two-third majority of members present:

- guaranteeing ACER carries out the tasks of its regulatory mandate;
- appointing the members of the main bodies, including the BoR members nominated by the respective NRA;
- adopting the work programme and the multi-annual programme;
- drafting the financial rules of ACER; and

<sup>9</sup> The Body of European Regulators for Electronic Communications (BEREC office) has also a Board of Regulators, and the European Securities and Markets Authority (ESMA) has a Board of Supervisors.

<sup>10</sup> Hilbrecht (2016) Presentation in Session I: How ACER came about, in the ACER 2016 Annual Conference.

<sup>11</sup> Art. 24 of Regulation (EU) 2019/942 establishing a European Union Agency for the Cooperation of Energy Regulators.

<sup>12</sup> Members in June 2020: from the Commission, Ms. Juul-Jørgensen, Ms. Montagnon; from the Parliament, Dr. Jordan, Ms. Herczog; from the Council, Mr. Chirîtoiu, Ms. Lunning, Dr. Penker (chair), Dr. Spiridonovs (vice-chair), Mr. Thiollere.

- submitting an estimation of annual revenues and expenditures to the Commission, based on a draft budget elaborated by the Director.

### **Board of Regulators**

ACER's Board of Regulators (BoR) is composed of representatives from the NRAs, with one alternate (i.e. substitute) each, as well as one non-voting representative of the Commission. The Board of Regulators takes decisions by a two-third majority of members present, and performs the following main functions:

- providing opinions and eventual comments and amendments on draft opinions, recommendations and decisions of the Director;
- guiding the Director and ACER working groups; and
- approving the programming documents and the annual report section on regulatory activities.

Since October 2019, the Decision of the Joint Committee No 93/2017 of 5 May 2017, amending Annex IV (Energy) to the EEA Agreement, grants the NRAs of the EFTA States (Iceland, Liechtenstein and Norway) and the EFTA Surveillance Authority (ESA) full access to the BoR without voting rights, the AWGs and their substructure.

### **Director**

The Director, appointed by the Administrative Board with an office term of five years extendable once to another five, has the following main functions:

- representing and managing ACER in its day-to-day activities;
- preparing the work of the Administrative Board;
- adopting and publishing opinions, recommendations and decisions having received a favourable opinion of the Board of Regulators;
- drafting and implementing the annual work programme;
- preparing and submitting to the Administrative Board an annual draft report; and
- elaborating a preliminary draft budget, and implementing the approved budget.

### **Board of Appeals**

The ACER Board of Appeals (BoA) is composed of six members, with an alternate each, proposed by the Commission and appointed by the Administrative Board. BoA members are selected from former or present staff with relevant energy sector experience of regulatory authorities, competition authorities or other EU or national institutions.

The Board of Appeal takes decisions by a two-third majority (i.e. a minimum of four members) on appeals submitted by a party regarding a decision of ACER addressed to a person, when it is of direct and individual concern. ACER decisions addressed to a person include those regarding:

- requests for information provision to various stakeholders;
- approving methodologies, terms and conditions on congestion revenue use and network codes and guidelines;
- bidding zone reviews;
- electricity and gas technical issues concerning NRAs;

- arbitration between NRAs;
- regional coordination centres;
- methodologies, calculations and technical specifications on generation adequacy and risk preparedness;
- exemptions related to the Electricity and Gas Directives and Regulations, such as on third-party access, ownership unbundling of network operators and tariff regulation;
- PCI investment decisions requests taken by ACER; and
- REMIT.

### 3.1.2. Departments of ACER

ACER counts an administrative department, the Director's office, and four operational departments. Figure 3 presents the departments, along with their respective teams in March 2020<sup>13</sup>. The colours indicate which operation teams address the main legislative pieces assigning tasks to ACER (such as REMIT). The number of full-time equivalent employees (FTEs) allocated directly to operational tasks in the 2020 budget was 70 FTEs, with additionally 14 FTEs in corporate services and 16 other FTEs in teams responding to the Director but involved in operational work (addressing e.g. data excellence and information resources management and security). 7 FTEs working in strategy delivery and communications as well as the data protection office (DPO) and the local informatics security office (LISO) are not shown<sup>14</sup>. The allocation of staff per activity of ACER is further analysed in section 4.4.

In 2020, around 78% of ACER's human resources (70 FTEs) are allocated directly to the operational departments. REMIT represents the major share (44%), followed by network codes, which require 23% of the operational FTEs (with electricity network codes requiring substantially more FTEs than gas network codes). 11% of the operational FTEs are allocated to task related to infrastructure and security of energy supply, and another 11% to market monitoring. There are 2 FTEs for leading the electricity and gas departments (3%), and the new electricity system adequacy team employs the remaining 7%. This team addresses the adequacy tasks assigned to ACER by the CEP (such as approving or amending the ENTSO-E's draft methodology for the European resource adequacy assessment).

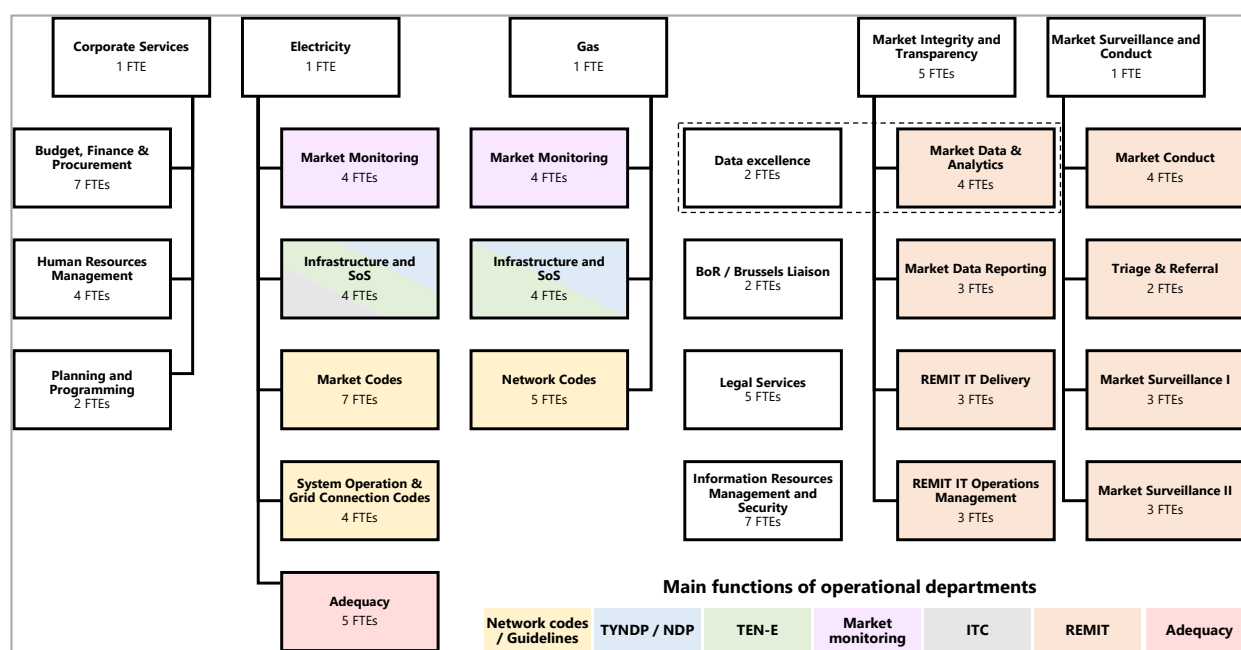
ACER stresses in its Programming Document 2021-2023 that, to increase operational efficiency, it aims to be able to shift 10-15% of its financial and human resources to priorities. Moreover, cooperation between the gas and electricity teams, and the REMIT departments is and will be promoted. Also, staff members working on the development of network codes and guidelines are re-assigned to their monitoring, as well as the monitoring of their effects on the internal market<sup>15</sup>.

<sup>13</sup> Only statutory staff (contract and temporary agents) and SNEs. The 12 interim staff members (beginning 2020), providing secretarial and clerical support across ACER's teams, are not included.

<sup>14</sup> ACER (2020) *Job allocation - 2 March 2020*.

<sup>15</sup> ACER (2020) *Draft Programming Document 2021-2023*.

Figure 3: ACER department teams and human resources allocation in March 2020



Source: Own elaboration based on ACER (2020) *Job allocation - 2 March 2020*.

ACER departments are staffed with temporary and contract agents (further detailed in chapter 4) or seconded national experts (SNEs). Seconded national experts are national (Member State) or international experts working temporarily for the Commission or its decentralised agencies. SNEs contribute to sharing knowledge between Member States, the Commission services and EU agencies.

For ACER, SNEs serve to fill positions requiring specific expertise. Secondment rules for ACER are defined in the Administrative Board decision AB No. 02/2011 of 3 March 2011. ACER SNEs may come only from national governmental, educational or research organisations, except when authorised by the Director.

### 3.1.3. ACER Groups

ACER Working Groups are composed of experts from ACER and NRAs, as well as, occasionally, from the Commission; they support the work of the Director and the Board of Regulators on regulatory issues. ACER is not responsible for the costs of experts from the NRAs and the Commission. ACER has gradually increased its internal expertise, which has allowed it to rely less on (seconded) national experts, although these are still highly relevant to ACER's work.

The recast ACER Regulation formalised the Working Groups (Art.30). Following this, the Administrative Board formally established the **Electricity and the Gas Working Groups**. In addition, the Director established the **Market Integrity and Transparency Working Group**. Working groups are chaired and co-chaired by NRAs' staff members.

The Working Groups can establish specific **Task Forces, Standing Committees and User Groups** to address particular issues within the scope of the Working Group. As of May 2020, ACER counted seven task forces under the Electricity Working Group, six Task Forces under the Gas Working Group and two Task Forces under the Market Integrity and Transparency Working Group<sup>16</sup>. Each Task Force can have

<sup>16</sup> ACER (2020) Working Groups. Available at [https://acer.europa.eu/en/The\\_agency/Organisation/Working\\_groups](https://acer.europa.eu/en/The_agency/Organisation/Working_groups).

up to three co-conveners, either staff from ACER or from NRAs. As of May 2020, out of the 34 co-conveners, 29 (85%) were NRA staff.

Table 1 presents a non-exhaustive list of the annual number of meetings for selected Tasks Forces, User Groups and Standing Committees under the ACER Working Groups, along with the meeting's typical duration and number of participants. The current working structure constitutes a significant workload to ACER's staff, as, next to its participation in the meetings, significant resources are required for the preparation and follow-up.

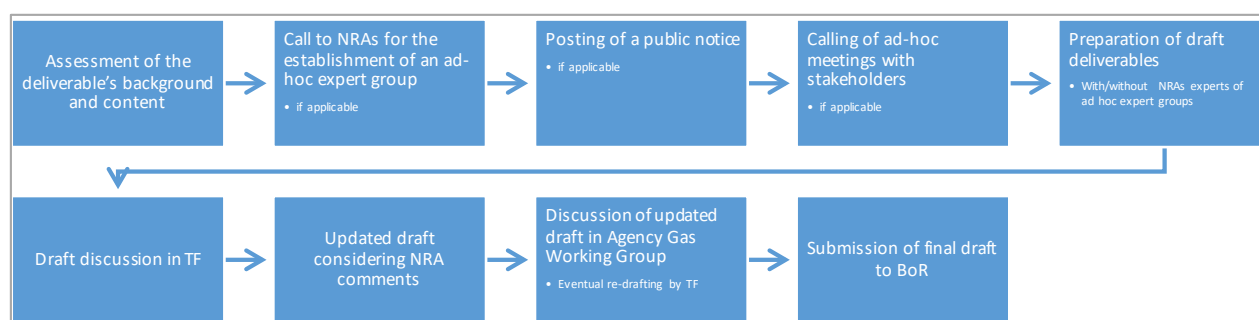
Table 1: Illustration of required resources for ACER Task Forces and other groups

| Task Force / User Group / Standing Committee |  | Number of meetings | Typical duration                  | Typical number of participants |
|--|--|--------------------|-----------------------------------|--------------------------------|
| Gas  | Gas Network Codes                              | 36                 | Virtual: 2-3 h<br>Physical: 1 day | 10-20                          |
|  | Gas Market Monitoring                          | 3                  | ½ day                             | 8                              |
|  | Gas Infrastructure and SoS                     | 16                 | ½-1 day                           | 10-20                          |
| Electricity                                  | Electricity Market Codes                       | 60                 | 1-2 days                          | 20                             |
|  | Grid Connection and System Operation           | 5                  | 4-5h                              | 15-20                          |
|  | Electricity Infrastructure                     | 8                  | ½-1 day                           | 15-20                          |
|  | Adequacy                                       | 25                 | ½-1 day                           | 20-25                          |
| Market Integrity and Transparency            | REMIT Market Data Reporting Standing Committee | 4                  | 1                                 | 15                             |
|  | Market Coupling Project                        | 20                 | 1.5 h                             | 3 NRAs                         |
|  | REMIT IT Management & Governance               | 10                 | 1 day                             | 14                             |
|  | ARIS NRA User Group                            | 7                  | 1 h                               | • 13                           |
| Market Surveillance and Conduct              | Market Monitoring Standing Committee           | 5                  | 1 day                             | 20 NRAs                        |

Source: Own elaboration based on information provided by ACER.

Figure 4 presents the workflow for Task Forces with participation of ACER's gas infrastructure team, which is largely applicable to the gas network codes team as well as to the respective electricity teams. For certain deliverables, especially individual decisions, additional meetings with concerned parties are held outside the Task Forces and Working Groups, as indicated. Also, coordination between electricity and gas teams, Task Forces and Working Groups is organised where needed (cross-cutting tasks such as opinions on the ENTSOs' TYNDP scenarios or consolidated reports on the progress of PCIs). Throughout this process, the gas infrastructure team leads the organisational and content-related work, with the majority of work being handled by ACER staff to ACER. The number of participating non-ACER experts varies depending on the specific TF meeting, ranging from 8 to 25 experts from the NRAs and possibly the Commission.

Figure 4: Workflow for Task Forces related to gas infrastructure



Source: Own elaboration based on information provided by ACER.

The **REMIT Coordination Group** is managed by ACER. It was established to ensure that NRAs carry out their REMIT tasks in a coordinated and consistent way. ACER also participates in the **Gas Regional**



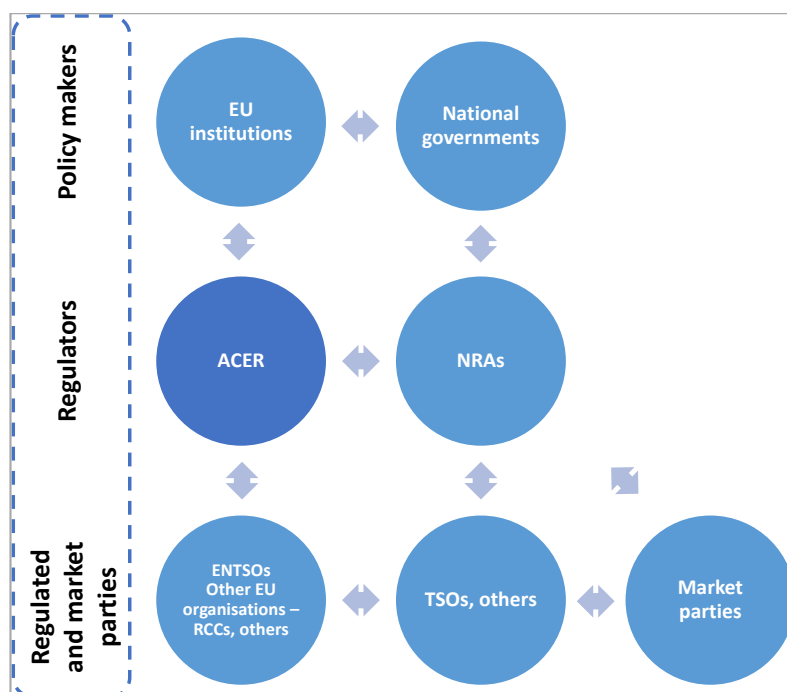
**Initiatives (GRI) Groups**, that address market integration issues at the regional level in the framework of the GRIs established in 2006 under ERGEG. At present, the following GRI groups “South” and “South, South-East Regions” are active.

In addition, ACER is authorised to form *ad hoc* expert groups composed of members appointed by ACER to provide support in the development of regulatory policies. The first expert groups created were the electricity stakeholder advisory group, and the expert groups on the electricity balancing and the gas interoperability rules framework guidelines.

### 3.2. Main stakeholders

In its 2021-2023 draft Programming Document, ACER indicates as a main challenge “engaging stakeholders for greater impact, communicating strategically and via modern tools”. Given the coordination aspect of many of ACER’s responsibilities, ACER naturally maintains a strong cooperation with the EU institutions, the NRAs, the Council of European Energy Regulators (CEER), and the TSOs and market parties, mainly via their European associations. The relationship of ACER with those organisations is presented in the following figure, the relationship of the stakeholders is sketched along the levels of policy-making, regulation, and regulated and competitive activities. The interaction of ACER with the main stakeholders is briefly summarised next.

Figure 5: Interaction of ACER with policy makers, national regulators and regulated and market parties



Source: Own elaboration based on publicly available information.

ACER interacts with the **European Commission** in several processes, including:

- in the development process of draft network codes and guidelines;
- by providing opinions or recommendations on issues related to its mandate;
- by providing opinions on non-network code documents of the ENTSOs, such as administrative aspects and draft TYNDPs; and



- by providing opinions on the compliance of NRAs with network codes and guidelines and by informing the Commission and MSs in case of non-compliance.

In addition, DG ENER plays an important role in the budgetary process related to ACER, as explained in chapter 4. It discusses with ACER the draft budget before it is submitted to DG BUDG, and conducts the subsequent budget negotiations with DG BUDG, representing ACER's interests.

ACER also closely interacts with the **NRAs/CEER**. The NRAs are the voting members of ACER's Board of Regulators, and provide a significant contribution to ACER to support the implementation of its mandate, both through SNEs and active participation in ACER's Working Groups, Task Forces and other groups. Moreover, NRAs formally interact with ACER in activities focusing on fostering the completion of the internal energy market, developing EU infrastructure, safeguarding security of energy supply, monitoring markets and addressing market surveillance and conduct issues. The cooperation between ACER and CEER results in joint publications, for example the Market Monitoring Reports and position papers such as the Bridge Beyond 2025 Conclusions<sup>17</sup>. While ACER's activities cover its regulatory mandate following the different EU legislative pieces, CEER promotes the cooperation of EU energy regulators and represents them at the EU and international level. Nonetheless, the 2014 Commission evaluation of ACER noted that there was some confusion among stakeholders regarding the roles of ACER and CEER, and indicated that there was room for improvements in order to clarify the relationship between the two organisations. Also, in 2016, issues that had to be taken up in the Board of Regulators were being previously discussed and agreed upon within CEER, which pre-empted the discussions taking place in the Board of Regulators itself<sup>18</sup>.

The interaction between ACER and the **ENTSOs** is defined in processes such as for developing the TYNDPs, opining on CBA methodologies or developing, implementing and amending networks codes. ACER and the ENTSOs are jointly responsible for the amendment of network codes following proposals from stakeholders submitted through the functionality platforms. TSOs participate furthermore in some expert groups that are set up by ACER.

ACER has furthermore interaction with other stakeholders, through institutionalised mechanisms such as expert groups (with frequent participation of network users). The Clean Energy Package has also determined specific **other organisations** with which ACER needs to interact, to monitor the Regional Coordination Centres (RCC) and the Nominated Electricity Market Operators (NEMOs), and to request information from and provide opinions to the EU DSO entity.

Given its role to monitor wholesale energy markets integrity and transparency, **market authorities** at the European and national level constitute another relevant stakeholder group for ACER. However, cooperation with authorities such as ESMA has in recent years been deprioritised due to lack of resources. The draft European Court of Auditors (ECA) report on the future of EU agencies indicates that one third of the surveyed stakeholders think that major improvements are required in the relationship of ACER and the European Securities and Markets Authority (ESMA)<sup>19</sup>.

### 3.3. Delivery of ACER's tasks

In this section, the main actions taken by ACER to execute its legal mandate are overviewed. Next to the number and timeliness of documents delivered by ACER, also their quality and scope are considered in this analysis. It is possible for ACER to comply only with its minimum legal mandate, or

<sup>17</sup> ACER and CEER (2019) *The Bridge Beyond 2025 Conclusions Paper*.

<sup>18</sup> Hilbrecht (2016) Presentation in Session I: How ACER came about, in the ACER 2016 Annual Conference.

<sup>19</sup> European Court of Auditors (2020). *Future of EU agencies – Potential for more flexibility and cooperation. Preliminary observations*. EMA is actually indicated, but most likely ESMA is meant.

alternatively to extend the scope and depth of analysis with which it executes its tasks and which would entail increased added value to the EU (such as more extensive Market Monitoring Reports' scope and analysis, or enhanced interaction with stakeholders).

ACER disposes of a key performance indicator (KPIs) system tracking its performance. The indicators have evolved over time, impeding direct comparison across years. Table 2 presents the most relevant operational KPIs for 2017-2018, directly related to the delivery of ACER's mandate.

The table shows that almost all of the deliverables related to the integration of the internal energy market, EU infrastructure and security of supply were provided on time in 2017 and 2018. However, due to lacking resources, ACER's capacity to collect, analyse and provide high-quality REMIT data was partially compromised, although improvements were made with increased NRAs' engagement. Concerning market surveillance and conduct, resource constraints also impeded the assessment of the majority of triggered alerts, and their dissemination to NRAs. These topics are further discussed below and in section 5.2.

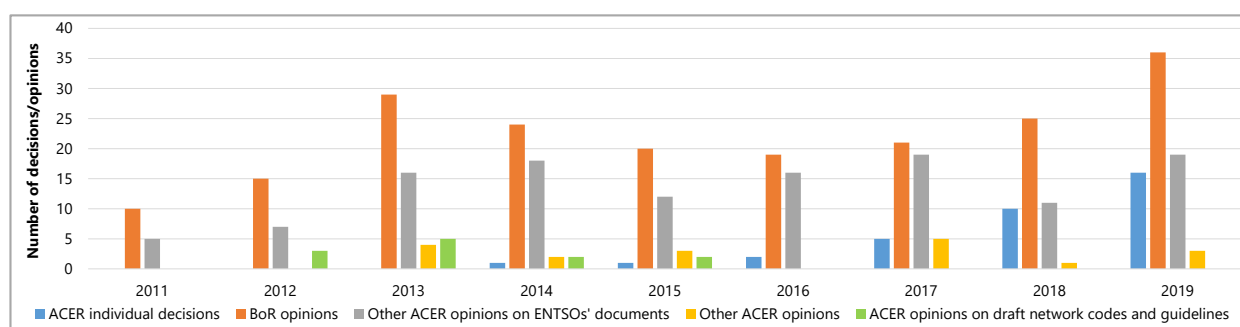
Figure 6 presents the number of ACER opinions and decisions and BoR opinions in the 2011-2019 period. BoR decisions are not presented as they generally refer to administrative and reporting tasks of ACER.

ACER opinions on non-network codes related documents of the ENTSOs refer mainly to documents related to EU infrastructure and security of energy supply as well as ENTSOs' documents (TYNDPs, work programmes, winter/summer supply outlooks, etc.). Other ACER opinions concern especially the PCI lists.

From Figure 6 a number of aspects can be identified:

- ACER opinions on non-network codes related documents of the ENTSOs represent an important work volume, but there is no clear observable trend on the number of opinions emitted throughout the period;
- The number of individual ACER decisions has strongly increased, from no decisions in 2013 to 16 in 2019;
- BoR opinions have consistently increased in number since 2016, after a first peak in 2013. As BoR opinions usually address ACER documents (such as opinions and recommendations), its number is largely related to the development and subsequent implementation of network codes and guidelines; and
- The number of ACER opinions on draft network codes and guidelines was specifically high in 2012-2015, in line with their development process (further discussed below).

Figure 6: Number of ACER and BoR opinions/decisions in 2011-2019



Source: Own elaboration based on ACER's summary documents of BoR opinions and decisions.

Table 2: Selected ACER operational KPIs for 2017-2019

| Area / objective                              |   | 2017  | 2018   | 2019   |
|---|---|---|--|--|
| Internal energy / market infrastructure / SoS | Timely electricity-related deliverables   | 5 network code deliverables on time; 8 electricity ENTSO-E-related opinions on time                                     | All electricity-related deliverables on time   |  |
|   | Timely gas-related deliverables   | 4 network code deliverables on time; 65 ENTSG-related opinions on time  | 14 gas-related deliverables on time, Balansys decision delayed   | All gas-related deliverables on time   |
|   | Cross-cutting issues  | PCI monitoring and MMR reports published on time. 86% positive feedback on MMR received from online stakeholder surveys | MMR very useful to 71% of respondents, somewhat useful to 28.5%  | MMR delivered on time, 85% average level of satisfaction   |
| Market integrity and transparency             | REMIT data quality, measured by the number of yearly internal REMIT data quality reports          | Not monitored   | Work in progress; lack of resources hampered completion, but progress made with increased NRA engagement                 | REMIT data quality work de-prioritised   |
|   | System availability and security breaches with data leakage                                       | ARIS system available, no breaches with data leakage  | ARIS system available, no breaches with data leakage <sup>20</sup>   | ARIS system available, no breaches with data leakage<br>Registration of RRM applications suspended |
| Market surveillance and conduct               | Preliminary assessment of cross-border triggered alerts and dissemination to NRAs in a secure way | Number of alerts triggered exceeded the resources available to perform the required manual assessment                   | Lack of resources led to prioritisation in the manual assessment of triggered alerts, data quality requires improvements |  |
|   | Notification of priority cases to the relevant authorities  | All priority cases notified   | All priority cases notified  |  |
|   | NRA decision consistency with ACER  | 100% of NRA decisions consistent with the ACER guidance   | Not monitored  |  |

Source: Own elaboration based on ACER *Consolidated Annual Activity Reports* - Years 2017, 2018, 2019.

<sup>20</sup> The ARIS Business Intelligence components were temporarily unavailable, and the transition to a new IT service provider faced difficulties.

In the following sections, further details on ACER's tasks are provided, organised in three categories:

- Infrastructure, security of supply and completion of the internal energy market;
- Wholesale energy markets' integrity and transparency; and
- Appeals.

Except for the work of ACER's Board of Appeals, details are provided on the prioritisation of specific tasks by ACER and the deprioritisation measures it has taken in recent years. Further details on deprioritisation of activities are provided in section 4.4.

### 3.3.1. Infrastructure, security of supply and completion of the internal energy market,

Figure 7 presents the development process of the network codes and guidelines, with the actions taken by ACER in the 2011-2017 period. For each code/guideline, ACER is responsible for adopting the Framework Guideline, issuing an opinion on the draft code/guideline elaborated by the ENTSOs, and eventually recommending its adoption. Additional steps such as the consultation of stakeholders in the context of the Comitology process are not represented in the figure.

Moreover, network codes and guidelines may assign decision-making tasks to ACER, such as the choice of a gas Booking Platform.

In addition, ACER is required to monitor the implementation of the network codes and their effects on the internal energy markets, as indicated in section 2.2.3. Specific monitoring reports are not available for a number of codes/guidelines as their implementation is ongoing, but ACER is expected to start publishing a number of monitoring reports in the 2020-2021 period, among which for the electricity balancing NC, the electricity emergency and restoring NC, and a common implementation report for all three electricity connection NCs.

Figure 7: Network codes & guidelines development actions by ACER and the ENTSOs

|   |         | 2011 | 2012                 | 2013           | 2014           | 2015           | 2016 | 2017 |
|---|---------|------|----------------------|----------------|----------------|----------------|------|------|
| Electricity   | CACM GL | FG   | SUB + OP             | REC            |                | PUB            |      |      |
|   | EB GL   |      | FG                   | SUB            | OP + REV       | REC            |      | PUB  |
|   | FCA NC  | FG   |                      | SUB + OP       | REV + REC      |                | PUB  |      |
|   | RfG NC  | FG   | SUB + OP             | REC            |                |                | PUB  |      |
|   | DCC NC  | FG   |                      | SUB + OP + REC |                |                | PUB  |      |
|   | HVDC GL | FG   |                      |                | SUB + OP + REC |                | PUB  |      |
|   | SO NC   | FG   |                      | SUB + OP + REC |                |                |      | PUB  |
|   | ER NC   | FG   |                      |                |                | SUB + OP + REC |      | PUB  |
| Gas   | GB NC   | FG   | SUB                  | OP + REV + REC | PUB            |                |      |      |
|   | CAM GL  | FG   | SUB + OP + REV + REC |                |                |                |      | PUB  |
|   | TAR NC  |      |                      | FG             | SUB            | OP + REV       |      | PUB  |
|   | INT NC  |      | FG                   | SUB + OP       | REC            | PUB            |      |      |
| <b>Legend: Network code development process</b><br> |         |      |                      |                |                |                |      |      |

Source: Own elaboration based on network code/guideline documents available on ACER's website.

As the network codes and guidelines are meanwhile implemented, ACER will have to support their eventual amendment by reviewing requests for amendments from stakeholders, or proposing revisions on its own initiative. Also, ACER may need to take decisions on the related terms and

conditions or methodologies proposed by TSOs and NEMOs, and should provide a framework for and support the regional cooperation among NRAs. ACER already notes that amendment work has stalled in recent years, and that there is a need to resume the process in collaboration with the ENTSOs<sup>21</sup>.

### Internal Electricity and Gas Markets tasks and (de)prioritisation

The supervision of the Network Codes implementation process should remain a top priority for ACER. With the adoption of the “Clean Energy for all Europeans” legislation, ACER has been assigned new tasks and responsibilities in the area of tariff methodologies and use of congestion income, as presented in section 2.1.

This activity concerns ACER’s work in monitoring and supporting the implementation of network codes across Member States. The priority tasks concern decisions upon regulatory issues where the competent NRAs have not been able to reach an agreement; tariffs reporting and associated obligations; and work to improve the quality of data used to monitor the application of network codes.

In terms of resources, the number of decisions to be taken by ACER (under Art. 8) and the number of Network Code issues raised have grown significantly over the last years. ACER considers its available resources insufficient to properly carry out these tasks, which has led to the cancellation or deprioritisation of some activities in 2020. The risks associated with the deprioritisation of tasks related to the internal gas market are potential inefficiencies, inconsistencies in the functioning and delays in the implementation of the IEM.

#### Electricity tasks (priority level as defined by ACER)

##### Network Codes, implementation, monitoring and amendments

- Assistance to NRAs on Network codes and guidelines (1)
- EU-wide Decisions on methodologies (1)
- Facilitating the implementation of specific obligations (1)
- Reporting on the implementation of the Network Codes or Guidelines (1)
- Data collection for monitoring the Network Codes and Guidelines - tools (1)
- Data collection for monitoring the Network Codes and Guidelines - data quality (1)
- involvement of stakeholders in implementation and monitoring of NC (1)
- Review of the requests for amendments of NC (variable)

##### Tariff Methodologies

- Best practice report (1)

##### Use of Congestion Income

- Use of congestion revenues review (1)

##### Other Tasks subject to specific conditions

- Peer reviews (1)
- Opinions requested by NRAs on EU law (1)
- Opinions requested by European Parliament, Council, Commission (2)
- Recommendations to assist NRAs and market players (3)
- Opinions and Recommendations on ACER’s own initiative (variable)

<sup>21</sup> ACER (2020) *Draft Programming Document 2021-2023*.

**Gas tasks (priority level as defined by ACER)****Network Codes, implementation, monitoring and amendments**

- ACER decisions under Art. 8 (1)
- Recommendations, assistance and support to NRAs (2)
- Follow-up reporting - tariffs (1)
- Follow-up reporting - other (2)
- Data quality on codes applications - tools (2)
- Data quality on codes applications - data quality (1)
- Review of the requests for amendments to the adopted Network Codes (variable)

**Tasks subject to specific conditions**

- Recommendations to assist NRAs and EC (variable)
- Opinions requested by NRAs on EU law (2)
- Opinions requested by European Parliament, Council, Commission (2)
- Opinions and Recommendations on ACER's own initiative (2)

**Electricity and Gas Internal Markets Monitoring tasks and (de)prioritisation**

Art. 15 of Regulation (EU) 2019/942 specifies the tasks of ACER in regard to the monitoring of the wholesale and retail markets in electricity and natural gas. These include monitoring of:

- retail prices of electricity and natural gas;
- compliance with the legal requirements regarding consumer rights laid down in Directive (EU) 2019/944 and Directive 2009/73/EC;
- the impact of market developments on household customers;
- access to the networks (including access of electricity produced from renewable energy sources);
- progress made with regard to interconnectors;
- potential barriers to cross-border trade, regulatory barriers for new market entrants and smaller actors, including citizen energy communities;
- state interventions preventing prices from reflecting actual scarcity;
- performance of Member States in the area of security of electricity supply.

The main output of this activity is the Market Monitoring Report, which comprises different volumes covering all major aspects of the internal electricity and gas market. In recent years, due to resources constraints, ACER has either segmented the publication or reduced the scope of some volumes. According to ACER, this deprioritisation puts at risk the main transparency tool that provides an analysis of the implementation status and compliance of national legislation with the EU legal requirements regarding consumer protection.

**Tasks (priority level as defined by ACER)**

- Market Monitoring Report - market volumes (1)
- Market Monitoring Report - customer protection (2)

## Infrastructure and Security of Supply tasks and (de)prioritisation

Infrastructure and security of supply are the domains with the highest share of critical activities. Some of these tasks are of a responsive nature, related to opinions, peer-reviews and recommendations.

ACER has identified several risks resulting from potential deprioritisation of these tasks, among others inefficiencies in the functioning of the IEM; uncertainty and inconsistencies across Member States concerning the interpretation and application of directives and regulations, such as TEN-E; delays in the implementation of various aspects of the IEM; and major overall risks related to security of supply for both gas and electricity.

### Tasks (priority level as defined by ACER)

#### Guidelines for Trans-European Energy Infrastructure - Electricity and Gas

- consolidated report on progress of projects of common interest (1)
- Opinions on ENTSO-E's and ENTSG's CBA methodologies (1)

#### Electricity TSO Cooperation

- Electricity TSO Cooperation - various opinions (variable 2/3)
- Electricity TSO Cooperation - monitoring report (3)

#### Gas TSO Cooperation

- Gas TSO Cooperation - opinions (variable 1/3)
- Gas TSO Cooperation - monitoring report (3)

#### Tasks to safeguard the security of gas supply

- safeguard of security of gas supply - decisions (1)
- safeguard of security of gas supply - opinions (3)

#### Tasks related to DSOs

- decision for DSO concerning monitoring (1)
- opinion to the EU DSO entity (1)
- support to DSOs in establishing the EU DSO entity (1)

#### Tasks related to Regional Coordination Centres

- decision for the RCCs concerning monitoring (1)
- opinions and recommendations to RCCs (1)
- monitoring cooperation between TSOs and ENTSO-E (1)
- monitoring the performance of RCCs (1)

#### Tasks related to Resource Adequacy

- amending or approving technical parameters for cross border capacities (1)
- methodology for the European resource adequacy assessment (1)
- other methodologies (VoLL, cost of new entry, etc.) (1)
- opinion on calculation of CO<sub>2</sub> emissions limits (1)

#### Tasks related to Risk preparedness

- coordinating national actions related to risk preparedness (1)
- assessing proposal for calculating short-term adequacy (1)
- assessing proposal for identifying electricity crisis scenarios (1)
- monitoring Security of electricity Supply measures (3)



**Tasks which are Subject to Specific Conditions**

- decisions on investment requests (1)
- peer reviews (1)
- opinions requested by NRAs on EU law (1)
- decisions on T&F for interconnectors (1)
- opinions requested by EP, Eco, EC (1)
- opinions and recommendations on ACER's own initiative (2)
- recommendations to assist NRAs and market players (2)

**3.3.2. Wholesale energy market integrity and transparency**

Table 3 presents the number of REMIT market participants, registered report mechanisms<sup>22</sup> (RRMs) and transaction records in 2017-2019. This table shows that the number of registered participants increased by 13% in the considered period, while the number of RRM's increased by 5%. Transactions, in contrast, more than doubled.

Table 3: REMIT market participants and RRM's in 2017-2019<sup>23</sup>

|                     |            | Market participants |        |        |         | Registered reporting mechanisms |        |        |         |
|---------------------|------------|---------------------|--------|--------|---------|---------------------------------|--------|--------|---------|
|                     |            | 2016                | 2017   | 2018   | 2019    | 2016                            | 2017   | 2018   | 2019    |
| Entities            | Registered | 11,873              | 12,895 | 13,971 | 14,655  | 110                             | 117    | 119    | 122     |
|                     | Active     | 8,708               | 8,977  | 9,344  | 9,601   |                                 | 99     | 100    | 115     |
| Transaction records | Median     |                     | 28     | 29     | 29      |                                 | 14,482 | 13,946 | 8,474   |
|                     | Average    | -                   | 62,682 | 94,125 | 126,640 |                                 | 6 M    | 9 M    | 10 M    |
|                     | Top 5      | -                   | 207 M  | 334 M  | 473 M   |                                 | 437 M  | 728 M  | 1,036 M |
|                     | Total      | -                   | 563 M  | 879 M  | 1,216 M |                                 | 563 M  | 879 M  | 1,216 M |
|                     | % Top 5    | -                   | 37%    | 38%    | 39%     |                                 | 77%    | 83%    | 85%     |

Source: ACER (2020) *REMIT quarterly report 2019 Q4*; DG Energy (2020) *Consultation paper on the planned Commission Decision setting the fees due to the Agency for the Cooperation of Energy Regulators*.

ACER indicates that the most resource-intensive activity in market surveillance and conduct is the analysis of data reported by market participants and other parties (such as TSOs). At present, ACER is able to cover only a fraction of the reported REMIT data, as the surveillance tools are not adequately developed. ACER argues it does not dispose of the required resources to develop and enhance the IT system allowing to properly detect potential market manipulation. The lack of adequate personnel to coordinate and track the progress of REMIT cases from NRAs in order to ensure market abuse prohibition provisions are applied by NRAs in a consistent way, has led to a backlog of cases. However, the number of instances of potential market abuse is expected to increase, from 218 on-going cases at the end of 2019 to 280 in 2021. With ACER's recast Regulation, it is required to provide operational

<sup>22</sup> According to the REMIT art. 4: A third party acting on behalf of a market participant. Includes trade reporting systems; an organised market, a trade-matching system or other person professionally arranging transactions; a trade repository registered or recognised under applicable Union legislation on derivative transactions, central counterparties and trade repositories; a competent authority which has received information on derivative transactions, central counterparties and trade repositories.

<sup>23</sup> ACER (2020) *REMIT quarterly report 2019 Q4*. DG Energy (2020) *Consultation paper on the planned Commission Decision setting the fees due to the Agency for the Cooperation of Energy Regulators for collecting, handling, processing and analysing of information reported under Regulation (EU) No 1227/2011 of 25 October 2011 on wholesale energy market integrity and transparency*.



assistance to NRAs' investigations, if they request so. ACER estimates that in 2020 it would require 22 FTEs to support all such NRAs requests<sup>24</sup>.

Up until April 2020, ACER's REMIT activities have led to a number of market abuse decisions imposing sanctions, as shown in Table 4. ACER indicates that support to NRAs regarding market surveillance is highly appreciated by the NRAs.

In November 2019, ACER temporarily suspended the processing of new RRM registration applications, due to the lack of resources required to manage, process, verify and accept the registration documentation and manage the ensuing communication after registration<sup>25</sup>. The draft Programming Document 2021-2023 indicates that a number of REMIT-related tasks were deprioritised (detailed in section 5.2).

Table 4: National REMIT market abuse decisions imposing sanctions

| Year | MS | Fine<br>(thousand €) | Status          |
|------|----|----------------------|-----------------|
| 2020 | UK | 42,500.0             | Final           |
| 2019 | LT | 28.5                 | Appeal possible |
|      | FR | 1,000.0              | Appeal Possible |
|      | HU | 90.0                 | Under appeal    |
|      | HU | 3.0                  | Final           |
|      | UK | 2,393.4              | Final           |
|      | DE | 153.5                | Final           |
| 2018 | DK | 20.4                 | Final           |
|      | ES | 120.0                | Under appeal    |
|      | ES | 80.0                 | Final           |
|      | DK | 147.0                | Final           |
|      | FR | 5,000.0              | Under appeal    |

Source: ACER (2020) *REMIT quarterly report 2020 Q1*.

### Market Integrity and Transparency (REMIT) tasks and (de)prioritisation

Market Integrity and Transparency is the activity with the largest budget share, both in terms of FTEs and financial allocation, mainly due to the costs associated to the operation and enhancement of the IT system. This activity does not include the actual monitoring of the market (which is covered by Market Surveillance and Conduct), but all necessary actions to have the monitoring system operational. The concerned tasks can be grouped in three categories:

- Promotion of the system and coordination activities with stakeholders (MPs and system users, such as NRAs);
- Operating the system (registration of reporting parties, data collection, ensuring data quality);
- Enhancing the system (software update, update of analytical capabilities).

REMIT is one of the activities that has suffered the most from the lack of resources. For 2020, ACER has decided:

- not to request the reporting of a number of transactions, such as intragroup contracts, contracts for balancing services in electricity and natural gas, contracts for the physical delivery

<sup>24</sup> ACER (2019, 2020) *Draft Programming Documents 2020-2022 and 2021-2023*.

<sup>25</sup> ACER (2020) *REMIT quarterly report 2019 Q4*.

of small quantities of electricity and gas. The reporting of these contracts is mandatory upon request from ACER;

- to limit the cooperation with ESMA and other financial market authorities;
- not to follow up new policy and/or legislative developments in the field of EU financial legislation impacting REMIT. Data sharing with national financial market authorities will have to be implemented at national level between NRAs and national financial market authorities.

ACER has also deprioritised<sup>26</sup> the following actions:

- development of new recommendations or proposals;
- review of the REMIT operations and rulebook;
- make non-market sensitive data publicly available;
- registration of new Reporting Mechanisms;
- improvement of the market participant registration;
- collection of EMIR derivatives and emission allowances;
- publication of aggregated REMIT information;
- sample transaction data requests for market participants to verify completeness, accuracy and timeliness of data submission;
- enhancements of the Case-Management-Tool and Notification Platform.

The main risks associated with the cancellation or deprioritisation of these activities are ineffective or inefficient implementation of REMIT and the fact that potential market manipulation is not (timely) identified.

### Tasks (priority level)

- Policy activity to support ACER's REMIT mandate (1)
- Promoting transparency of wholesale energy markets - disclosure of inside information (1)
- Registration and supervision of reporting parties according to Art. 8 of REMIT - supervision of RRM's (1)
- Information management and Data Analytics (1)
- Operation and further enhancements of ARIS - operation (1)
- Ensuring operational reliability and data protection (1)
- Cooperation with NRAs and their coordination (1)
- Facilitation of the stakeholder involvement - material updates consultations (1)
- Cooperation with other stakeholders (2)
- Operation and further enhancements of ARIS - enhancements (2)
- REMIT annual report (2)
- Facilitation of the stakeholder involvement - other consultations (2)
- Promoting transparency of wholesale energy markets - publication of aggregated REMIT data (2)
- Registration and supervision of reporting parties according to Art. 8 of REMIT - registration of new RRM's (2)

### Market Surveillance and Conduct tasks and (de)prioritisation

The aim of this activity is to analyse cases of potential market manipulation and insider trading, on the basis of an agreed market surveillance strategy with NRAs. Since 2018, NRAs have received from ACER

<sup>26</sup> This means they may be carried out only if resources are available.

75 manually assessed triggered alerts per month on average, besides support through REMIT of cases opened by NRAs.

For 2020, ACER plans to work on the further development of a Case Management tool and on the main tool for the automatic screening of REMIT data. This requires surveillance experts with in-depth knowledge on trading in wholesale energy market products, combined with strong data and analysis capacity.

ACER indicates that the increase in the amount of data, and the delay in developing the REMIT IT system (ARIS), are putting further strain on the resources allocated to this activity. This creates a risk of ineffective, uncoordinated or inconsistent implementation of REMIT, as well as risks concerning leakage of sensitive trade data.

#### Tasks (priority level)

- Market surveillance of trading activity in wholesale energy markets (1)
- Cooperation with NRAs on market conduct activities (1)
- Cooperation with other stakeholders (2)
- Development of applied surveillance and conduct business intelligence tools (2)

### 3.3.3. Appeals

Any physical or legal person, including NRAs, can lodge an appeal against an individual decision made by ACER in domains for which it has actual decision-making powers. The decisions of the Board of Appeal may themselves be subject to appeal before the European Court of Justice.

The number of appeals submitted to ACER's Board of Appeals has increased throughout the years, from 2 appeals in 2015 to 8 in the first eight months of 2020. This is illustrated in Figure 8, with all appeals until August 2020 listed in Annex A. The number is increasing despite the consolidation of cases for providing a single decision, and the use of joint appeals by multiple defendants from 2020 on.

TSOs form the majority of the appellants, with 15 out of 25 appeals, followed by NRAs (4 appeals) and market participants (3 appeals). A merchant transmission operator and a gas capacity trading platform form the remaining appellants.

The current and expected increase in the number of appeals requires more resources from both the ACER staff (as the defendant) and the BoA, to handle the appeals as well as to defend the ACER's and BoA's decisions in the European General Court. ACER's Director estimated that the financial implications of the increasing number of appeals could reach up to 500 k€ yearly for ACER and 300-400 k€ for the BoA in the 2020-2023 period<sup>27</sup>.

Besides addressing potentially legitimate concerns from appellants, some appeals have led to the temporary suspension of (parts of) certain ACER decisions, concerning for example network codes. Addressing the appeals requires staff members with specific legal (and technical) expertise from the part of ACER.

The increasing number of appeals seems however not due to a lower quality level of ACER's decisions but rather to economic interests that are at stake, as so far, only two BoA decisions were not favourable to ACER:

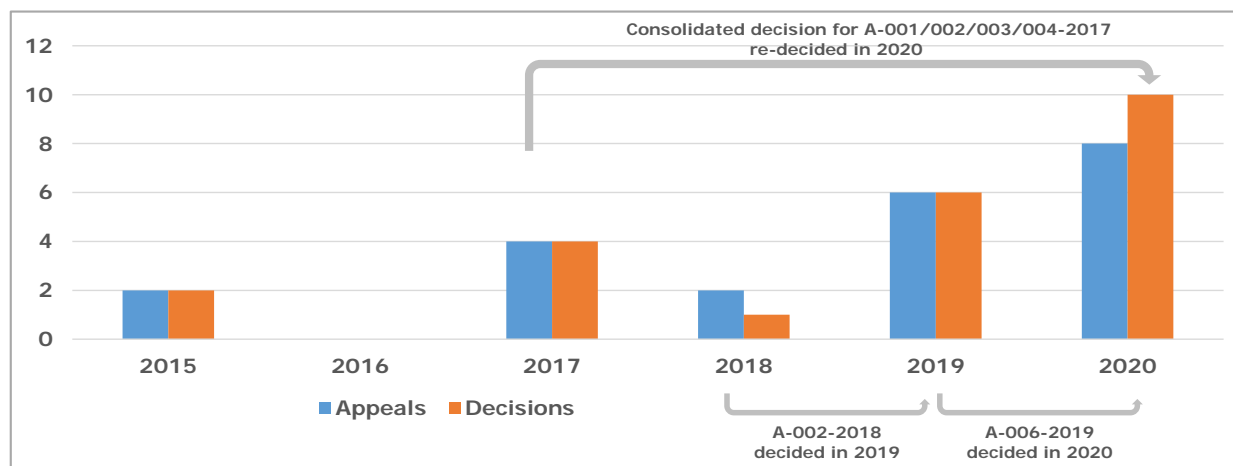
- The BoA has remitted to the Director the Decision No. 06/2016 regarding the determination of electricity bidding zones in case A-001-2017. This consolidated decision for cases A-

<sup>27</sup> ACER Director (2020). Presentation to ITRE's ACER Contact Group. 2<sup>nd</sup> July 2020.

001/002/003/004-2017 on the AT-DE electricity bidding zone border was re-decided in 2020, following a decision of the European Court of Justice in 2019, which reverted the previous BoA dismissal of the appeal<sup>28</sup>;

- The BoA Decision 11/2018 on establishing the capacity booking platform to be used at the “Mallnow” Interconnection Point and “GCP” Virtual Interconnection Point was annulled following the appeal A-002-2018.

Figure 8: Appeals to ACER’s BoA and decisions until August 2020



Source: Own elaboration.

<sup>28</sup> ACER BoA decision on A-001-2017\_R (consolidated).

## 4. PAST AND CURRENT RESOURCE APPROPRIATIONS, AND EFFECTS ON TASK DELIVERY

### KEY FINDINGS

- Since 2013, the yearly EU budget contribution to ACER has increased considerably, from €8.9 million for 2013 to €16.9 million for 2020. Over the same period, the number of permanent staff members increased from 49 to 71.
- Since 2013, ACER has each year been allowed less financial and human resources than requested by its management. The difference between requested and allocated budgets is for ACER considerably higher than for other EU agencies.
- The shortage in human resources has partly been filled with an increased use of temporary staff (“contract agents”).
- Different factors explain the discrepancy between the requested and allocated budgets:
  - Resources’ needs for some tasks assigned to ACER seem having been underestimated during the concerned legislative processes, such as the REMIT regulation;
  - Due to external factors, some tasks are absorbing more resources than initially estimated. For example, the number of REMIT transactions has tripled and ACER is called to arbitrate or decide more frequently than foreseen;
  - Divergences between the interpretation of ACER and the Commission of ACER's legal mandate might also be at the basis of the observed discrepancy.
- CEER and NRAs are aware of ACER's constraints in resources, and argue that these are affecting its ability to properly deliver its mandate and poses risks to the achievement of the objectives of the legislation.

Preliminary findings from the European Court of Auditors suggest that ACER's shortage of resources was affecting the achievement of its objectives and is obliging ACER towards a narrower interpretation of its mandate. The views of most stakeholders contacted for the purpose of the present study align with this finding.

### 4.1. Financing of ACER

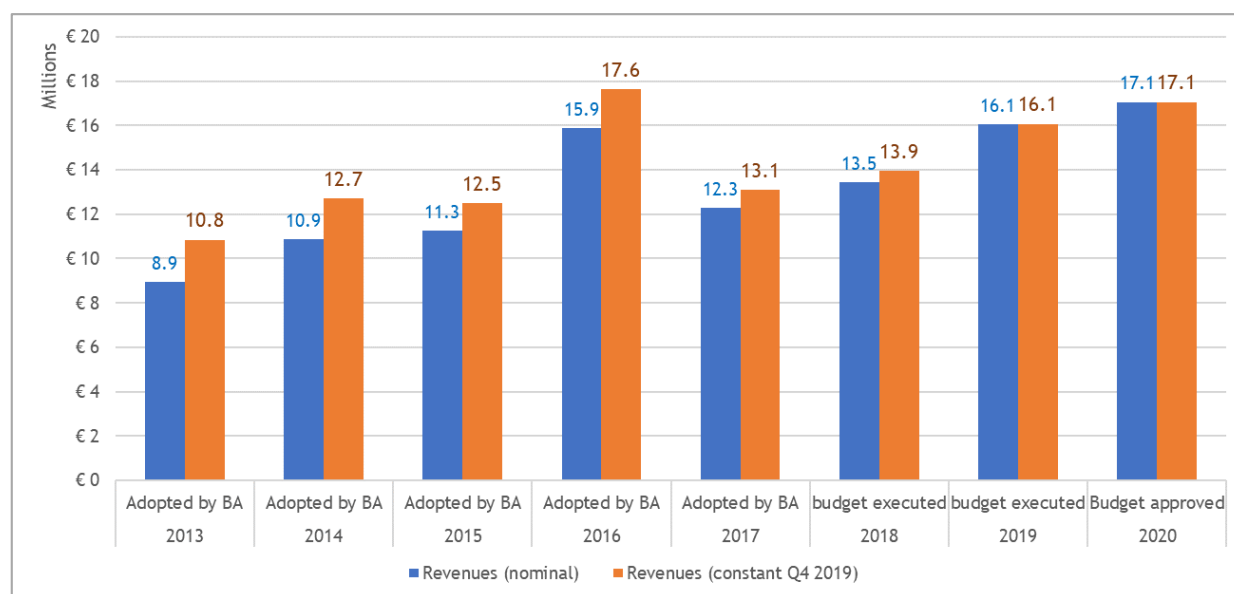
Since its creation, ACER has been funded through an EU contribution from the EU general budget, plus a small EFTA contribution. The latter amounted to 2% of the budget for 2020<sup>29</sup>. As more tasks and responsibilities were gradually assigned to ACER since its creation and due to market developments, ACER required the provision of increased financial and human resources. As shown in Figure 9, the total budget envelope nearly doubled in nominal terms between 2013 and 2020 (from €8.9 million to €16.9 million). In real terms, this represents an increase of almost 60%. The increase in appropriations has been generally steady year-on-year, except for 2016, when ACER was awarded a one-off increase of €4.6 million and 15 FTEs (Figure 9). These additional resources were allowed with the primary aim to support the implementation of REMIT, following the involvement of the European Parliament.

Notwithstanding this substantial budget increase, there was a structural discrepancy between the requested and allocated resources; this may be partly related to the measures included in Communication COM(2013) 519 (Programming of human and financial resources for decentralised agencies 2014-2020), which set a 5% reduction target for all EU agencies during the multi-annual

<sup>29</sup> EFTA countries do not have voting rights in ACER's BoR but provide a small annual contribution to ACER's budget.

financial framework (MFF) 2014-2020 - i.e. every EU agency was obliged to reduce its staff by 5% over five years.

Figure 9: Revenue streams in 2013-2020



Source: EUAN, *EU decentralised Agencies' contribution to the European Parliament's Committee on Budgets hearing with the EUAN*, 23 July 2019; ACER, *Draft Programming Document 2021 – 2023*, January 2020, unpublished.

Next to their allowed revenues, EU agencies have also an allowance concerning the number of permanent staff<sup>30</sup> (also referred to as *establishment plan posts*). From 2013 to 2020, the total allowed number of permanent staff has increased from 47 to 71 (+ 45%), which was expected to allow ACER to cover its new responsibilities assigned during this period. A large increase in staff numbers occurred in 2016, when ACER was allowed to employ 15 additional FTEs, for the majority allocated to REMIT.

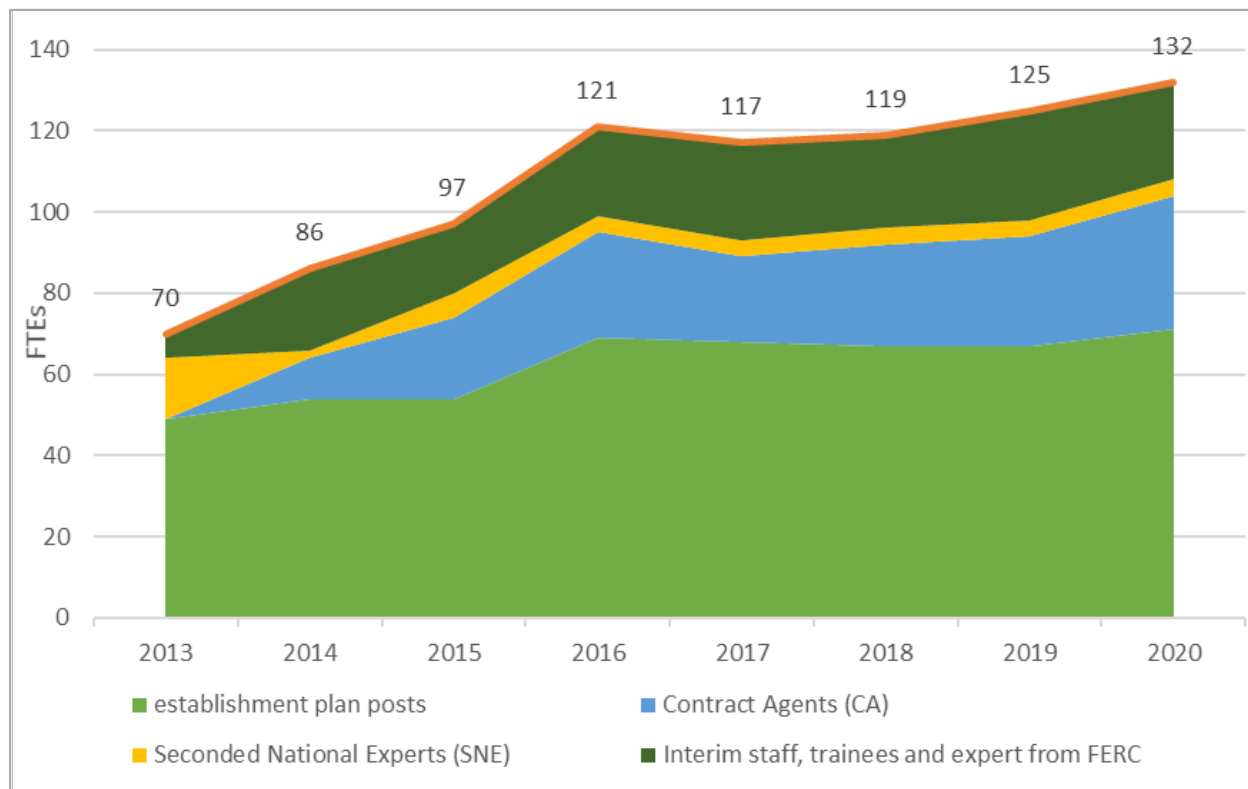
The permanent staff is supplemented by three other staff categories: contract agents, seconded national experts (SNEs) and temporary staff (interim staff, trainees and experts from Federal Energy Regulatory Commission (FERC)<sup>31</sup>. Since 2013, the total number of FTEs employed by ACER has increased from 70 to 132 (+ 89%), with most of this increase being through contract agents. Across the same time period, permanent staff posts increased by 27 units (+ 55%)<sup>32</sup>. The number of SNEs has remained stable at 4 units since 2014. ACER also employs interim staff across different departments to cover support activities, as well as some trainees and seconded experts from FERC.

<sup>30</sup> Permanent staff members are also called temporary agents, as their employment contract foresees an initial fixed term contract, which can be renewed into an indefinite term one once the first term has expired.

<sup>31</sup> The Federal Energy Regulatory Commission is the United States federal agency that regulates the transmission and wholesale of electricity and natural gas.

<sup>32</sup> Note that in the MFF 2014-2019, the EU set a 5% staff reduction target. For ACER, this was roughly equivalent to a reduction of 2.5 FTEs.

Figure 10: Total staff by contract type in 2013-2020



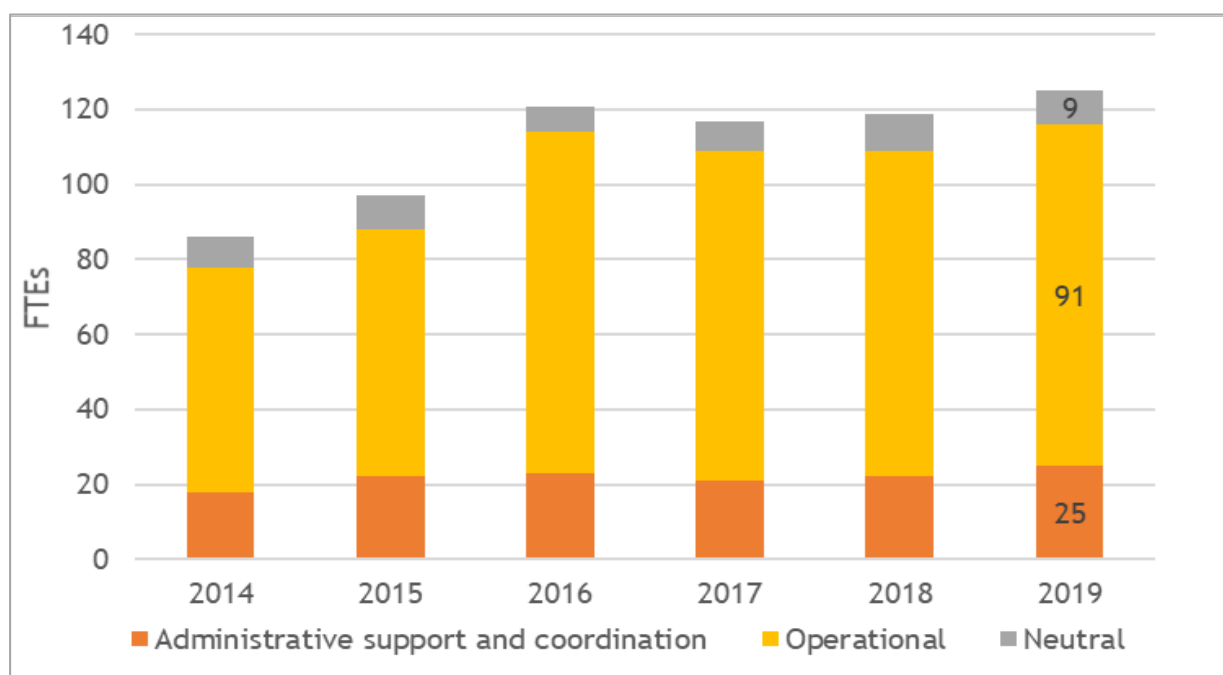
Source: Based on data provided by ACER.

ACER's staff members are classified in 3 categories according to their role:

- **Operational** staff is directly involved in operational activities;
- **Administrative support and coordination** staff is closely (indirectly) involved in the delivery of operational activities;
- **Neutral staff members'** work does not concern operational activities, comprising for example financial management and control (audits).

Over time, ACER's distribution of staff has remained relatively stable, with new staff recruited generally being allocated to operational tasks. As presented in Figure 11, the number of operative staff members (i.e. staff not categorised as support or neutral) increased from 40 units in 2014 to 85 units in 2021, assuming 34 non-operative staff members for 2020 and 2021.

DG ENER would be in favour of an increased share of SNEs, as they can provide relevant expertise to ACER. ACER indicates that, while this option might indeed offer added value, NRAs seem reluctant to pay for staff members that are not available for their national tasks and, given the increasing number of controversial decisions ACER has to take, involving SNEs in its activities could pose a risk to the perceived independency of ACER in these decisions.

Figure 11: Allowed FTEs by type in 2014 - 2019<sup>33</sup>

Source: Based on data provided by ACER.

ACER indicated in 2019 that the numbers, timing and grade of the additional FTEs forecasted to fulfil the new tasks assigned by the Clean Energy Package were insufficient. It noted that the share of Contract Agents (14) compared to Temporary Agents (4) was high to execute such highly complex tasks, and informed the EU institutions of the insufficiency of the foreseen resources<sup>34</sup>.

## 4.2. Budget approval process and differences between requested and approved budgets

ACER's budgetary process includes a number of steps that involve ACER, DG ENER, DG BUDG, the Parliament and the Council. As set in Regulation (EC) No 713/2009 and in article 33 of Regulation (EU) 2019/942<sup>35</sup>, ACER is required to prepare each year a work programme for the following financial year and an associated budget request, which covers both financial and human resources. The budget setting process is the following:

1. ACER's Director draws up a provisional draft estimate covering the operational expenditures required to deliver the work programme for the following financial year. This estimate, based on objectives and expected results, is submitted to the Administrative Board, together with a list of provisional posts.
2. The Administrative Board, on the basis of the estimate prepared by the Director, adopts the draft revenue and expenditure budget for the following financial year. This is subject to observations from the Board of Regulators, which may deliver a reasoned opinion on the draft.

<sup>33</sup> The chart presents the allowed number of human resources. However, the number of resources effectively available is generally slightly below these figures, due to the time required to recruit new staff members.

<sup>34</sup> EU Agencies Network (2019) *EU decentralised Agencies' contribution to the European Parliament's Committee on Budgets hearing with the EUAN*.

<sup>35</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0942&from=EN>.



3. By 31 January of each year, the Administrative Board transmits the budget estimates, including a draft work programme<sup>36</sup>, to the Commission and the Council. This document (called financial statement) forms the basis for negotiations between ACER and DG ENER, and subsequently between DG ENER and DG BUDG.
4. On the basis of the submission, the Commission proposes the amount to be awarded, while the Council, in its role as budgetary authority<sup>37</sup>, adopts the work programme.
5. ACER's budget is then adopted by the Administrative Board and becomes final after the adoption of the general budget of the Union by the European Parliament and Council.

When new tasks are assigned to EU agencies through new legislation, this is accompanied by a legislative financial statement (LFS), compiled by the Commission, which identifies the resources required by an agency to fulfil its new responsibilities. When the Parliament introduces modifications to a legislative proposal, which reduce or expand the scope of tasks to be performed by the agency, the Commission has to review the LFS to account for the changes<sup>38</sup>. This is different from other regulations and directives, where the proponent co-legislator of the change in legislation has to evaluate its financial consequences. The latter procedure has been followed a few times for ACER, for instance when new tasks were assigned to it through the REMIT and TEN-E regulations. Insights received from stakeholders suggest that some LFSs prepared to support new legislative acts (see section 2.2), may have underestimated the resources necessary for ACER to carry out the related new tasks, either because some assumptions used for the estimates were unrealistic or because the LFS was not updated following legislative changes made at the initiative of the Parliament.

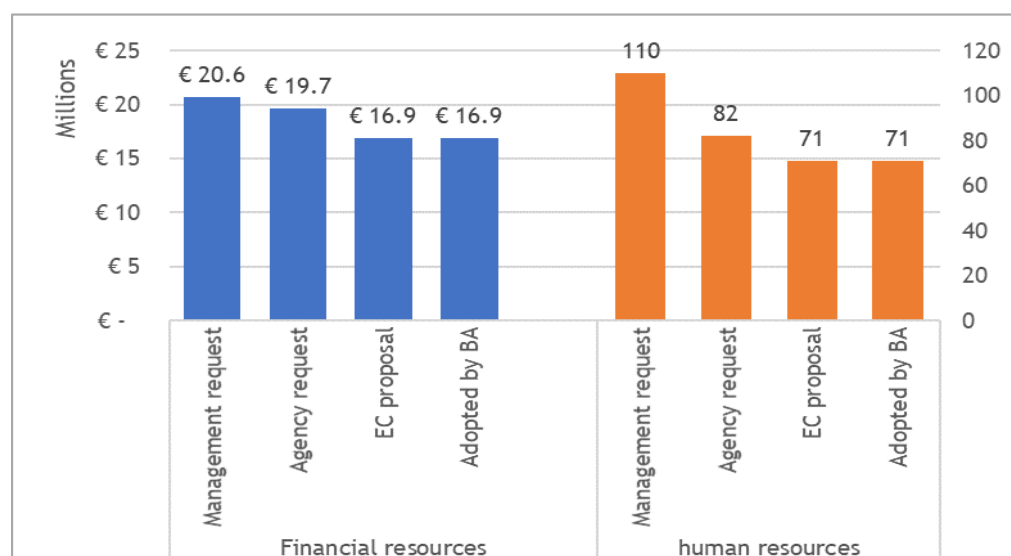
In step 4 of the process, ACER's proposal is scrutinised and assessed by the Commission. Usually, DG ENER first assesses the submission, and involves DG BUDG in the subsequent stages. ACER is given the possibility to further explain and defend its request via hearings. Generally, the Commission's assessment is based on the relevant LFSs and tends to align with the previous year budget. As the Commission does in principle not deviate from the LFS, possible underestimates in LFS have an impact on each new budget approved. However, the Commission also takes into account the work programme and specific tasks planned by ACER. In case of further disagreements, the decision is escalated and negotiated between DG ENER and DG BUDG, and eventually to the Commission. The Parliament and Council (both form together the budgetary authority) have the possibility to influence the outcome of this process, for example if they believe the Commission's proposal does not allow ACER to properly carry out its mandate. This occurred in 2016, when the Parliament and Council agreed to increase both the financial and human resources available to ACER.

Figure 12 shows how the 2020 figures for financial and human resources have changed at the various stages of the process. The final budget allocation to ACER included 39 fewer staff members and €28 million less financial resources than requested by its management. Nevertheless, ACER is able to use contract agents and seconded national experts (from NRAs) to fulfil short-term resources needs not covered by the approved budget. In 2020, ACER relies on 4 seconded national experts and 33 contract agents.

<sup>36</sup> Referred to as establishment plan.

<sup>37</sup> The European Parliament and the Council together form the budgetary authority.

<sup>38</sup> This rule has been introduced starting from 2013.

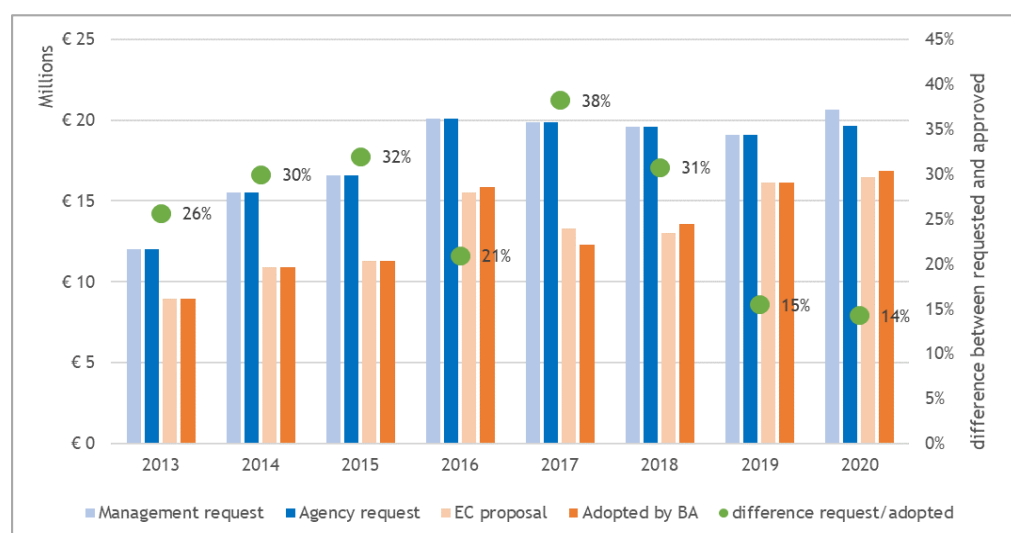
Figure 12: Financial and human resources - adopted versus requested budget for 2020<sup>39</sup>

Source: EUAN, *EU decentralised Agencies' contribution to the European Parliament's Committee on Budgets hearing with the EUAN*, July 2019.

Note: Budgetary authority (BA) is the European Parliament and the Council.

The difference between ACER's requests and its approved allocations has been negative each year since 2013, but has varied substantially. Between 2013 and 2020, ACER has on average been allocated 26% less financial resources and 31% fewer staff than requested by its management. This gap has peaked for financial resources in 2017 (-38%, decreasing to 14% in 2020), and in 2014 and 2015 for human resources (-43%, remaining stable at slightly above 30% since then). In total, during the 8 years analysed, the average annual discrepancy amounted to €4.6 million and 31 FTEs.

Figure 13: Difference between ACER's management request and approved financial resources (2013-2020)

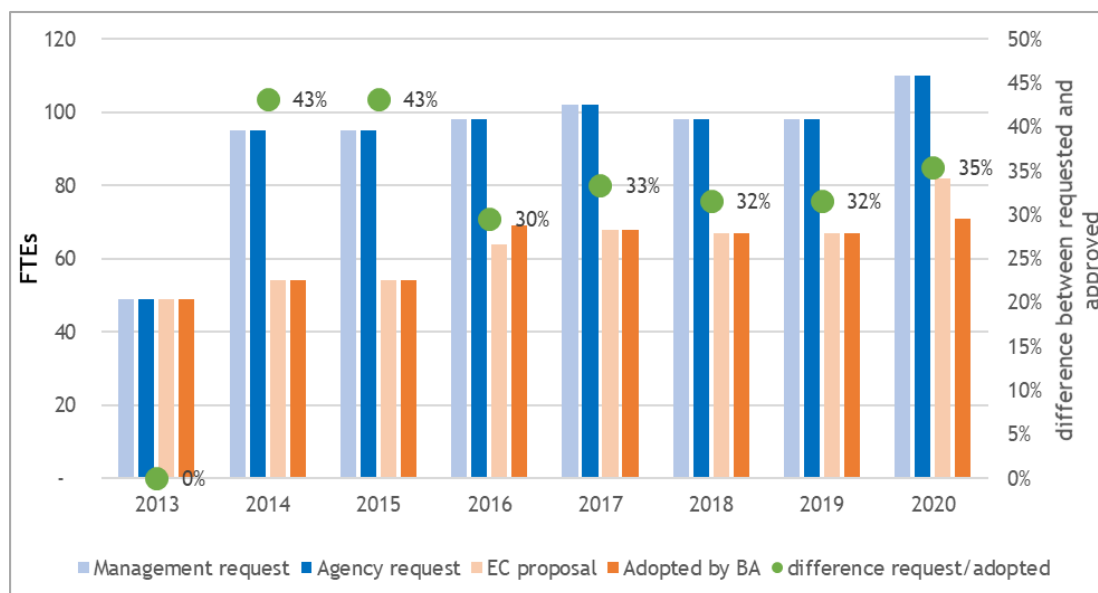


Source: EUAN, *EU decentralised Agencies' contribution to the European Parliament's Committee on Budgets hearing with the EUAN*, July 2019; ACER, *Draft Programming Document 2021 – 2023*, January 2020, unpublished.

Note: The EC proposal is the result of inter-institutional negotiations between DG ENER and DG BUDG.

<sup>39</sup> EUAN, *EU decentralised Agencies' contribution to the European Parliament's Committee on Budgets hearing with the EUAN*, July 2019.

Figure 14: Difference between ACER's management request and approved human resources (2013-2020)

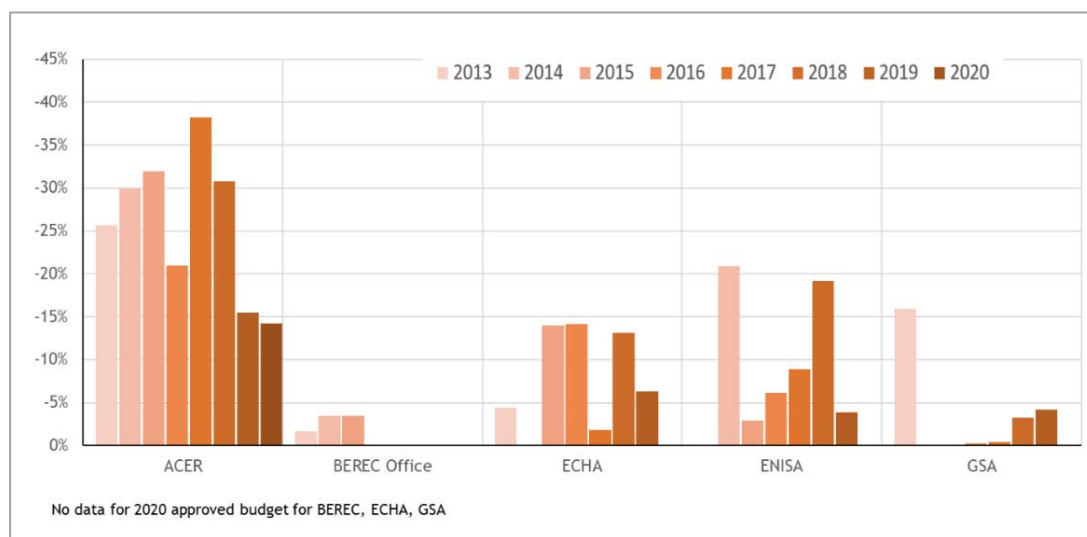


Source: EUAN, *EU decentralised Agencies' contribution to the European Parliament's Committee on Budgets hearing with the EUAN*, July 2019; ACER, *Draft Programming Document 2021 – 2023*, January 2020, unpublished.

#### 4.2.1. Comparison with other EU agencies

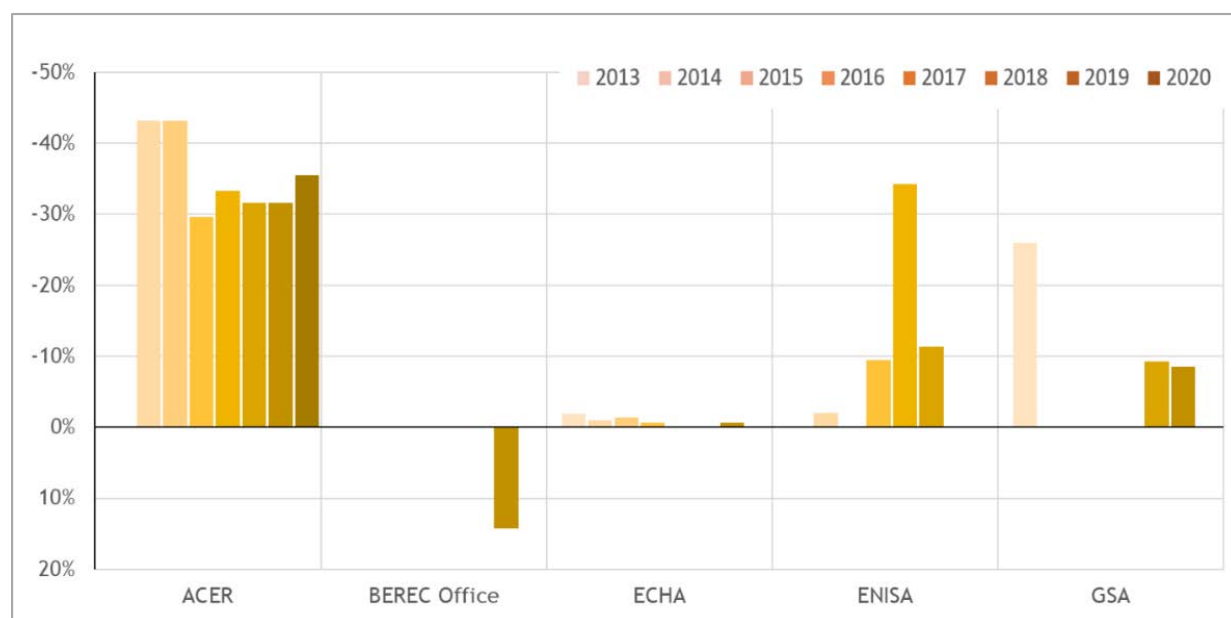
In this section, a comparison is presented between the requested and granted resources for four other agencies overseen by the ITRE Committee. These are the BEREC office (€5.7 million budget and 16 FTEs in 2019); ECHA - European Chemicals Agency (€69.6 million budget and 461 FTEs in 2019); ENISA - the European Union Agency for Cybersecurity (€20.6 million budget and 69 FTEs in 2020); GSA - European GNSS Agency (€32.8 million budget and 139 FTEs in 2020). As shown in Figure 15 and Figure 16, while these four agencies have also been allocated less resources than requested during the last eight years, ACER has been the agency with the largest discrepancy.

Figure 15: Difference between agency's management request and approved financial resources (2013-2020) for agencies overseen by ITRE



Source: EUAN, *EU decentralised Agencies' contribution to the European Parliament's Committee on Budgets hearing with the EUAN*, July 2019.

Figure 16: Difference between agency's management request and approved human resources (2013-2020) for agencies overseen by ITRE



Source: EUAN, *EU decentralised Agencies' contribution to the European Parliament's Committee on Budgets hearing with the EUAN*, July 2019.

#### 4.3. Explaining the structural discrepancy between resources requested by ACER's management and ultimately approved

Based on analysis and feedback received from ACER and other major concerned parties, the structural discrepancy between requested and approved resources can mainly be explained by the following factors:

- **ACER has been established when the overall EU budget was facing strong pressure.** While older agencies may have benefitted from a more generous budget allocation at the moment of their creation, ACER has been created in a time period when the EU had a stringent budget approach (due to the financial crisis of 2009). This may have resulted in an initial resource allocation that did not include any headroom.
- **Resources' needs may have been underestimated in some legislative processes.** Draft directives and regulations, such as those assigning additional responsibilities to ACER, are accompanied by Legislative Financial Statements (LFS), which establish the additional financial and human resources ACER is entitled to deliver these tasks. If, during the legislative process, the draft legislation modifies or adds new tasks, the Commission reviews the LFS and adjusts the resources' estimates. To some extent, the current shortage in resources can be traced to this process, where either the original estimate was not reflecting the effective workload, or the original estimate was not revised when new responsibilities were assigned during the comitology process. This has led to the approval of regulations and/or directives with an underestimated budget impact, in particular for REMIT, where the underestimation of the financial and staff needs was substantial. The EU Court of Auditors observed similar dynamics for most EU agencies, except some of them operating in priority areas<sup>40</sup>. Once a new legal provision is approved by the European Parliament, with associated financial and staff resources estimates, these figures are used as the baseline for each subsequent annual budget approval. Revising

<sup>40</sup> European Court of Auditors (2020). *Future of EU agencies – Potential for more flexibility and cooperation. Preliminary observations.*

these figures is difficult (especially in a context of overall EU budgetary pressure) and requires a clear case shared across all budgetary steps.

- **Underestimated workload related to appeals and recourse decisions.** ACER was initially expected to play a decision-making role in a limited number of cases, especially where NRAs cannot find an agreement. In practice, ACER is called to arbitrate more frequently in issues involving NRAs, (EN)TSOs and other parties, such as for cross-border cost allocation decisions. These interventions, in particular related to the internal electricity market, are requiring a number of resources well above the initial expectations, and often tie up ACER in long-dragged appeals, with the need to also cover associated legal fees.
- **Reduced contribution of seconded national experts (SNEs).** While ACER's decision making role and activities increase, the participation of seconded national experts decreased (from 11 SNEs in 2012 to 4 in 2020), which is partly due to the fact that neutrality in ACER's work gains importance.
- **Interpretation of ACER's mandate.** While the legal provisions that assign new tasks to ACER are generally rather precise, ACER can still exercise some level of discretion in how to implement them. In some cases, ACER's interpretation and implementation may have been more ambitious than the strict legal requirements. While additional efforts and interventions from ACER may have generated added value at the EU level, this more extensive implementation of its role was subject to disagreements between DG ENER and ACER, which have resulted in a number of expenditures not being financed. For example, this was the case with some investments to upgrade REMIT's software and the size of the monitoring team. There are signs that the interpretation of the role of ACER was more consensual during the latest budget discussions with DG ENER.

## 4.4. The impacts of budget restrictions in recent years

### 4.4.1. Staffing levels and operational tasks in 2020

In order to prepare its budget requests, ACER develops each year a programming document with a three-year outlook and a one-year work programme. For 2020, ACER's tasks are grouped in eight activities, six of which are classified as operational and two as support activities. Administrative support (overheads) amounted to 13% of FTEs and 13% of financial resources, a relatively low share<sup>41</sup>.

Table 5 shows that ACER's budget allocation follows a balanced approach in the ratio between FTEs and financial allocations (€129,000 per FTE), while higher financial resources per FTE are dedicated to REMIT and Market Surveillance and Conduct, due to the higher cost of hardware/software employed in these areas. Neutral categories (support) are administrative staff members not allocated to operational activities.

Table 5: Activities, staffing and budget levels for 2020

| Activity 2020 |  | FTE  | Financial resources (million €) | Ratio (million €/FTE) |
|---------------|--|------|---------------------------------|-----------------------|
| Operational   | Market Integrity and Transparency (REMIT)      | 18.5 | 5.24                            | 0.283                 |
| Operational   | Market Surveillance and Conduct                | 13.5 | 1.78                            | 0.133                 |
| Operational   | Electricity and Gas Internal Market Monitoring | 12.4 | 1.60                            | 0.129                 |
| Operational   | Internal Electricity Market                    | 15.8 | 2.04                            | 0.129                 |
| Operational   | Internal Gas Market                            | 8    | 1.03                            | 0.129                 |

<sup>41</sup> A share of support staff is also considered operational and included into budgets for each operational activity.

|             |  |      |       |       |
|-------------|--|------|-------|-------|
| Operational | Infrastructure and Security of Supply              | 15.5 | 2.00  | 0.129 |
| Support     | Administrative support and coordination categories | 17.3 | 2.24  | 0.129 |
| Support     | Neutral categories                                 | 7    | 0.90  | 0.129 |
|             | TOTAL  | 108  | 16.87 | 0.149 |

Source: ACER, *Draft Programming Document 2021 – 2023*, January 2020, unpublished.

Note: FTEs include contract agents and seconded staff.

In the following sections, we explain how ACER prioritises its activities, and we present an overview of activities planned for 2020 for each Operational activity area.

#### 4.4.2. Prioritisation of activities

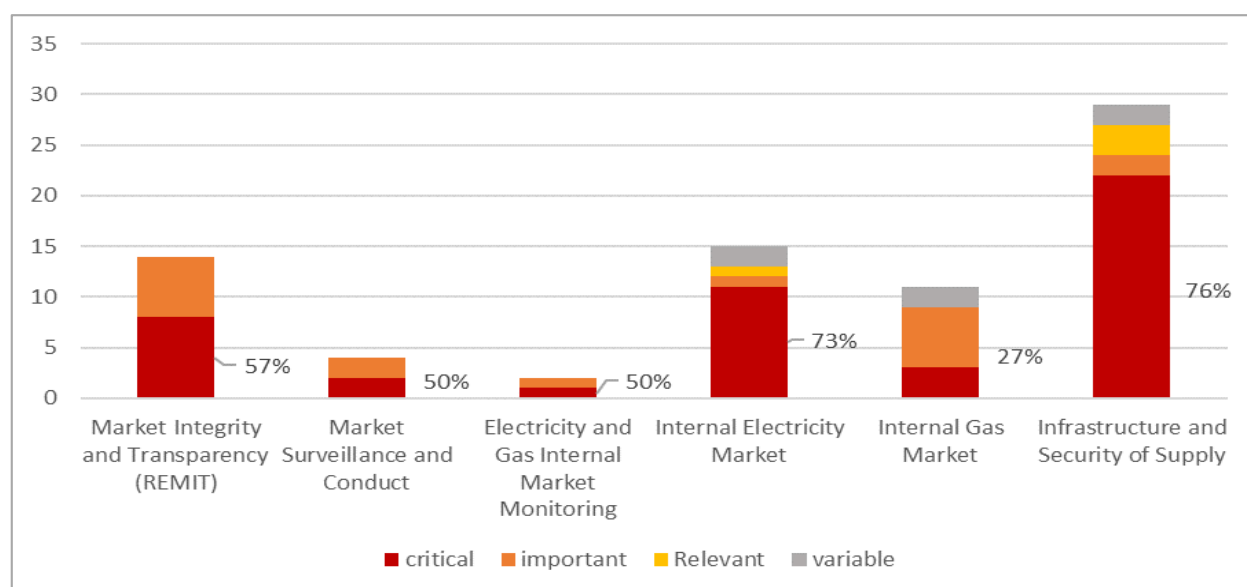
ACER has developed a classification system to prioritise its activities, and to allocate resources accordingly. This allows ACER to focus on those areas and activities which are most critical for delivering the EU objectives and, ultimately, benefits for consumers. The three levels are:

- Priority level 1 - Critical - Activities/tasks that must be fully performed/executed under any circumstance. Failure to do so would seriously undermine the functioning of the Internal Energy Market and the achievement of the EU objectives;
- Priority level 2 - Important - Activities/tasks that could be postponed, reduced in scope or de-scoped with only limited repercussion on the Internal Energy Market;
- Priority level 3 - Relevant - Activities/tasks that ACER could usefully perform, provided adequate resources were made available.

This classification does not explicitly take into consideration whether ACER is legally required to perform these activities, but it reflects ACER's assessment of their importance. As a result, it may be that an activity that is not legally required is assigned a higher priority than another one that ACER is legally required to perform, but which is considered less fundamental in the context of the completion of the Internal Energy Market and/or the implementation of the Energy Union Strategy. The classification system is a tool for ACER to make the best use of the resources at its disposal. In case insufficient resources are assigned to ACER to perform all the activities included in its Work Programme, activities are deprioritised starting from those classified as "relevant" and then, to the extent necessary, those classified as "important", in order to devote sufficient resources to the "critical" activities<sup>42</sup>.

<sup>42</sup> ACER, *Draft Programming Document 2021 – 2023*, January 2020, unpublished.

Figure 17: Number of operational tasks by criticality level



Source: ACER, *Draft Programming Document 2021 – 2023*, January 2020, unpublished.

Note: The percentage is the number of tasks considered critical for each activity.

The prioritisation exercise has led to the following activities having been deprioritised in previous years (negative priorities) because of resources shortages<sup>43</sup>:

- Closure of the REMIT follow-up to new registrations;
- Cooperation with ESMA and national financial market authorities on an ad hoc basis, not allowing for a continuous close cooperation as required;
- Collection of EMIR and MiFIR data regarding derivatives and emission allowances for the monitoring of EU wholesale energy markets and for data sharing with NRAs;
- Establishing data sharing mechanisms with ESMA/national financial regulatory authorities and DG COMP/national competition authorities;
- Closure of the REMIT disaster recovery site during the 2017-2020 period<sup>44</sup>;
- Publication of aggregated REMIT information for transparency reasons;
- Sample transaction data requests for market participants from ARIS in order to verify completeness, accuracy and timeliness of data submission to the Agency;
- Improvement of the market participant registration form: NRA request to facilitate their obligation to register Market Participants<sup>45</sup>;
- The scope of the Market Monitoring Report has been reduced;
- Postponing the publication of implementation monitoring reports for network codes and guidelines.

Further activities related to REMIT and market surveillance have been postponed to after 2020, as ACER did not have the required resources:

- Review of the electronic formats for data collection (XML schemas);

<sup>43</sup> ACER, various documents: *draft Programming Document 2021 – 2023*, *Programming Document 2020 – 2022*, *Programming Document 2019 – 2020*, Annual consolidated reports 2018, 2019.

<sup>44</sup> ACER (2019) *Consolidated Annual Activity Report - Year 2018*; ACER (2020) *Draft Programming Document 2021-2023*.

<sup>45</sup> ACER, *Draft Programming Document 2021 – 2023*, January 2020, unpublished.



- Enabling of sample transaction data requests for market participants from the ARIS in order to verify completeness, accuracy, and timeliness of data submission to ACER to facilitate market participants' compliance with Art. 11(2) of the Implementing Regulation;
- Publication of aggregated REMIT information for transparency reasons according to Art. 12(2) of REMIT, including making available the commercially non-sensitive trade database for scientific purposes;
- Improvements to the market participant registration format pursuant to Art. 9(3) of REMIT and improvements to CEREMP;
- Enhancements to improve existing and develop new alerts to screen REMIT data for the purpose of market surveillance activities;
- Enhancements of ARIS and of the Case Management Tool for the purpose of cooperation with NRAs.

The details on the prioritisation of activities per area and activities which have been deprioritised in 2020 are presented in the following section<sup>46</sup>. For each task, we also report the priority level and a summary of further considerations available in the programming documents.

#### 4.4.3. Stakeholders views

To better understand the impact of the constraints in allocated resources on ACER's mission, stakeholders have been invited to communicate their opinion about the functioning of ACER and their interaction with it. DG ENER and DG BUDG have also contributed to this analysis by providing further information on the budget setting process, and on their evaluation of ACER's budget requests.

CEER/NRAs are fully aware of the resources constraints ACER has been facing, and noticed that the following activity domains have in particular been negatively affected:

- data collection on transactions and orders under REMIT, also due to the fact that ACER's IT system is outdated, sometimes unavailable, and not yet fully functional for some NRAs;
- enhancement of REMIT capabilities, particularly related to data exchanges with NRAs;
- market monitoring, which affects NRAs because they are notified only very late of the results of preliminary analysis;
- market transparency, because of the publication of less detailed and insightful reports. For example, the best practice report on the transmission and distribution tariff methodologies established according to Art. 18.9 of the ACER Regulation was reduced to a "practice report on transmission tariffs methodologies", while also the Market monitoring Reports have been reduced in scope and frequency;
- thoroughness of legal analysis.

NRAs and CEER believe that the boundaries between the responsibilities allocated to ACER and other authorities are sufficiently defined and work well in practice. They also believe ACER is adequately collaborating with stakeholders, and delegating tasks effectively when possible. They are generally very supportive of an increase in ACER's resources, in particular related to REMIT. NRAs recognise ACER is the only institution able to gather the overall data on market activities, and to perform appropriate market surveillance. NRAs also notice that ACER would be more effective if it were able to anticipate problems and market developments, while at present ACER appears to be "catching-up" and not to have resources to act proactively.

In terms of future work and risks, NRAs and CEER:

<sup>46</sup> ACER, *Draft Programming Document 2020 – 2022*, January 2020, unpublished.



- identify similar risks to those ACER presents in its programming documents: under-resourcing creates a risk to the implementation of the IEM: integration and proper functioning of regional and EU markets, harmonising national legislation, improving the integrity and transparency of energy markets in the EU;
- suggest that shortage of resources poses a clear risk to the effectiveness of ACER's work, which in turn means risking reputational damage;
- expect more tasks will be assigned to ACER following the CEP and the upcoming revision of the TEN-E Regulation;
- expect ACER having to deal with more appeals to its decisions in the near future, which may require more resources to be devoted for legal expertise.

Eurelectric states in its recent position paper on the recast ACER Regulation, that *"ACER should be granted the appropriate resources and powers to carry out its tasks effectively"*<sup>47</sup>. In its response to ACER's consultation on the Bridge beyond 2025, Eurogas considers that it is important that *"ACER is equipped with sufficient resources and competences to perform well on its existing tasks"*<sup>48</sup>.

On the other side, ENTSOG states it is not aware of instances of ACER activities being negatively affected by a lack of resources, including concerning ACER's oversight role, and notes that ACER usually delivers on time.

The feedback from the Commission focussed on the budget and programme setting process. The Commission follows a process applied to all agencies and also set in the Regulations establishing ACER (see Section 4.2). Through this process, ACER is able to present its request for additional resources and there are mechanisms to effectively grant additional resources, where deemed appropriate and if the budgetary authorities agree on it. One of the challenges faced by the Commission is to keep the overall budget of all EU agencies under control, as most agencies frequently request increasing resources. Further, any increase in resources awarded in a given year is, in the majority of cases, carried forward to the following years. Anyhow, the Commission is of the opinion that, from 2021 onwards, ACER's budget request and the budget proposal made by the Commission will in principle be more aligned, as ACER will be able to recover a substantial amount of its costs (42%) through fees paid by market participants.

#### 4.4.4. ECA report on EU agencies' performance

The European Court of Auditors is currently undertaking a review on the performance of EU agencies, which includes a survey on stakeholders' perception concerning the effectiveness of the selected agencies<sup>49</sup>. Preliminary findings confirm the insights provided by stakeholders that have been contacted in the context of the present study. ECA found that there is a correlation between the adequacy of resources and the performance of agencies. In the case of ACER, ECA found that:

- stakeholders indicated that ACER's shortage of resources was affecting the achievement of its objectives;
- more than 75% of ACER stakeholders disagreed or strongly disagreed with the statement "The agency has sufficient human resources";
- stakeholders had mixed opinions on whether ACER is fulfilling its mandate and achieving its objectives. They expressed a similar view for other agencies that, like ACER, were found to be constrained by resources;

<sup>47</sup> Eurelectric (2019), *Response to Commission's legislative proposal on ACER Regulation* (<https://www.eurelectric.org/media/2465/acer-regulation-final.pdf>).

<sup>48</sup> Eurogas (2019), *Response to ACER's Public Consultation on the Bridge beyond 2025* (<https://eurogas.org/website/wp-content/uploads/2019/09/Eurogas-Response-to-ACER-Public-Consultation-on-the-Bridge-beyond-2025.pdf>).

<sup>49</sup> European Court of Auditors: *Future of EU agencies – Potential for more flexibility and cooperation*, 2020.

- resource shortages are forcing ACER to deprioritise numerous activities and to state it had insufficient market surveillance staff to properly discharge its mandate. ECA suggested this is leading ACER towards a narrower interpretation of its mandate.

On the basis of the stakeholders' survey, ECA also concluded that ACER should improve its relations with the Commission.

## 5. FUTURE ROLE, RESOURCES AND DELIVERY RISKS OF ACER

### KEY FINDINGS

- ACER strongly contributes to the EU policy objectives and governance goals. Its mandated tasks are likely to further increase in the future, as supported by CEER and NRAs. Significant resources shortages could entail the risks that ACER is unable to properly fulfil its legal obligations and to effectively contribute to the energy policy objectives;
- With the introduction of fees in 2021, ACER expects its total financial and human resources envelope for 2021 would increase by respectively 27% and 10% compared to 2020, while the EU financial contribution would decrease by 12%;
- Revenues from fees will allow to address current structural shortages in executing REMIT-related tasks and increase the value-added of market surveillance and conduct activities. Fees need to be adequately designed to minimise risks of under-recovery of REMIT costs and collection issues, e.g. cashflow risks;
- Even with adequate implementation of fees, risks of punctual resources shortages might still occur. They could lead to ACER performing some tasks sub-optimally, resulting in missed benefits to the EU economy and potentially exposing ACER to legal challenges and reputation damage;

Risks related to inadequate financial and staffing resources can be reduced by Legislative Financial Statements that adequately reflect the impacts of new tasks assigned to ACER, including any changes to draft legislation negotiated by the European Commission, Parliament and Council.

### 5.1. Evaluation of ACER's contribution to reaching the EU policy objectives

ACER plays a central role in implementing the EU Energy Union strategy, and in ensuring that Member States can rely on a robust common energy market in view of efficiently and effectively reaching the EU and national energy and climate objectives and targets.

ACER has (re-)stated in its draft Programming Document 2021-2023 its commitment to supporting the European Green Deal and the Energy Union Strategy. ACER directly contributes to two main dimensions of the Energy Union:

- **Security, solidarity and trust** - diversifying Europe's sources of energy and ensuring security of energy supply through solidarity and cooperation between EU countries;
- **A fully integrated internal energy market** - enabling the free flow of energy across the EU through adequate infrastructure and without technical or regulatory barriers.

ACER also indirectly contributes to the Energy Union dimension of **research, innovation and competitiveness**, as it supports regulatory innovation by promoting the sharing of knowledge among NRAs, and enhances competitiveness, by adhering to principles such as level playing field, transparency and non-discrimination in regulatory processes.

The ACER tasks are separated in four strategic areas, two of which are directly related to the first-mentioned Energy Union dimensions (completion of the energy market, and the European infrastructure and security of energy supply). However, all ACER strategic areas contribute to both dimensions, as integrity and transparency of wholesale energy markets and addressing the regulatory challenges are necessary to guarantee secure, integrated internal energy markets. Moreover,

integrated energy markets, security of energy supply and development of European energy infrastructure are intrinsically linked.

The strategy document (COM/2015/080) aims at building an Energy Union that provides EU consumers - households and businesses - secure, sustainable, competitive and affordable energy. The Regulation on the Governance of the Energy Union and Climate Action (EU)2018/1999 entered into force on 24 December 2018 as part of the Clean energy for all Europeans package. This Regulation sets out how EU countries and the Commission should work together, and how individual countries should cooperate, to achieve the Energy Union's goals<sup>50</sup>.

Table 6 provides a non-exhaustive comparison of the objectives of the Governance Regulation with ACER's six activity areas: Market Integrity and Transparency; Market Surveillance and Conduct; Electricity and Gas Internal Market Monitoring; Internal Electricity Market; Internal Gas Market; Infrastructure and Security of Supply.

There are strong indications that having an EU agency promoting cooperation among energy regulators at EU level is beneficial for the EU as a whole and allows Member States to reach their energy and climate objectives and targets more efficiently, thanks to enhanced cross-border markets integration and competition, knowledge sharing as well as economies of scale resulting from having a single agency performing regulatory and market monitoring actions at EU level. If, for example, each Member State would have to invest in a monitoring system similar to REMIT in order to detect market breaches that involve more than one country, the overall cost would be much higher.

A study published in 2016 by DG BUDG<sup>51</sup> assessed the 'cost of non-agencies', i.e. the overall savings from the existence of EU agencies, and concluded that it is "considerably less costly to carry out the tasks assigned to the agencies at the EU level than by the MS". The research also confirmed that the "added value of the agencies is widely recognised by national authorities, concerned third parties and internationally". Although ACER was not part of the pool of agencies evaluated, it can be assumed that the conclusions are also valid for ACER.

ACER has not been subjected to a full evaluation exercise since 2014, when the Commission found that ACER had adequately focused on its priorities to support the completion of the internal energy market, the development of transmission networks and the implementation of REMIT. A new evaluation should in principle take place this year<sup>52</sup>. In this context, DG ENER has in August 2020 launched a tender for an assessment of the sufficiency of the financial and human resources available to ACER and the cost-effectiveness of their use.

Table 6: How ACER contributes to the EU governance goals

| Goals of the Governance Regulation <sup>53</sup>   | ACER's role in relation to the goal   |
|--|---|
| To implement strategies and measures which ensure that the objectives of the Energy Union are reached.                         | <ul style="list-style-type: none"> <li>ACER does not have a work programme targeted explicitly at energy and/or climate goals. However, network codes to implement national strategies aimed at the decarbonisation of the electricity and gas systems, including policies to ensure security of supply, contribute to this goal. In this way, ACER's work on network codes indirectly supports this goal.</li> </ul> |
| To stimulate cooperation between Member States in order to effectively achieve the objectives and targets of the Energy Union. | <ul style="list-style-type: none"> <li>ACER is the primary EU body in charge of promoting cooperation between NRAs responsible for regulating national energy markets, including through secondments to ACER and work conducted within its Working Groups.</li> </ul>   |

<sup>50</sup> Energy Union, [https://ec.europa.eu/energy/topics/energy-strategy/energy-union\\_en](https://ec.europa.eu/energy/topics/energy-strategy/energy-union_en).

<sup>51</sup> European Parliament, DG for Internal Policies, Policies Department D: Budgetary Affairs (2016), *The Cost of Non-Agencies with Relevance to the Internal Market*.

<sup>52</sup> According to art. 33 (EU) 2019/942, the Commission has to assess, by 5 July 2020, whether the financial and human resources available to ACER allow it to fulfil its objectives.

<sup>53</sup> Energy Union, [https://ec.europa.eu/energy/topics/energy-strategy/energy-union\\_en](https://ec.europa.eu/energy/topics/energy-strategy/energy-union_en).

| Goals of the Governance Regulation <sup>53</sup>  | ACER's role in relation to the goal   |
|---|---|
| To promote long-term certainty and predictability for investors across the EU and foster jobs, growth and social cohesion.                  | <ul style="list-style-type: none"> <li>ACER consistently promotes transparent, non-discriminatory rules for EU energy markets;</li> <li>ACER supports NRAs and EU bodies (EC, EP, etc.) in interpreting and implementing EU energy regulation. This support improves the quality of new rules and reduces the likelihood of appeals by stakeholders;</li> <li>ACER monitors the internal energy market and investigates cases (in cooperation with national authorities) to ensure fair competition.</li> </ul> |
| To reduce administrative burdens, in line with the principle of better regulation.  | <ul style="list-style-type: none"> <li>REMIT and ARIS are an information management system that allows ACER and MSs to exchange market data with the purpose of monitoring the market and pursue any party that breaches market rules.</li> <li>ACER also publishes reports and data analysis for the benefit of all EU stakeholders.</li> </ul>  |
| To ensure consistent reporting by the EU and its Member States under the UN Framework Convention on Climate Change and the Paris agreement. | <ul style="list-style-type: none"> <li>ACER produces each year a number of reports that describe and analyse the internal energy market and its evolution, as well as other periodic reports such as on the monitoring of network codes and best practices on electricity transmission and distribution tariff methodologies.</li> </ul>  |

Source: Own elaboration.

### Potential future ACER tasks

Besides specific tasks regarding e.g. the development of network codes or the planning of energy infrastructure, ACER is since its establishment authorised to provide, on its own initiative, opinions and recommendations to the EU institutions regarding issues related “to the purpose for which it has been established”. In the context of its monitoring of the internal electricity and gas markets, ACER can for instance in the related annual reporting process, submit to the EU institutions opinions on measures to remove identified barriers to the completion of the internal energy markets<sup>54</sup>.

ACER has on several occasions referred to its aim to contribute to the EU energy policy development, which has become a specific strategic area in recent programming documents<sup>55</sup>. In its 2014 evaluation the Commission encourages ACER “to provide input into energy related policy debates at EU and, where appropriate, national level”<sup>56</sup>.

In the 2021-2023 draft Programming Document, addressing long-term regulatory challenges is indicated as one of the strategic areas of ACER. This objective should be achieved through its Market Monitoring Reports, network codes implementation reports as well as specific documents such as gas regulatory recommendations accompanying the Bridge Beyond 2025 paper. Moreover, ACER should contribute with regulatory expertise, when asked, to the development of EU energy and climate policies and the EU green deal, as well as addressing cybersecurity in the energy sector.

Looking forward, a number of tasks could be assigned to ACER in the future, as proposed in the Agency's Bridge Beyond 2025 paper<sup>57</sup>:

- Formalize tracking of Gas Target Model (GTM) key metrics;
- Establish indicators and thresholds in collaboration with NRAs for future dynamic and targeted regulation;
- Act as a recourse decision maker on measures to address market performance issues in the absence of NRAs' agreement;

<sup>54</sup> Regulation (EC) No 713/2009 establishing an Agency for the Cooperation of Energy Regulators.

<sup>55</sup> See for example reference to the electricity and gas target models assessment in ACER (2014) *Work Programme 2014 – Review March 2014*, and the Strategic Area 4: Future Challenges on ACER (2019) *Programming Document 2020 – 2022*.

<sup>56</sup> European Commission (2014). *Evaluation of the activities of the Agency for the Cooperation of Energy Regulators (ACER) under article 34 of Regulation (EC) 713/2009*. C(2014) 242.

<sup>57</sup> ACER and CEER (2019). *The Bridge Beyond 2025 - Conclusions Paper*; ACER Recommendation 02/2019 on the regulatory response to the future challenges emerging from developments in the internal gas market.

- New gas related tasks subsequent to changes in the gas legislation to align it with the electricity legislation in the CEP;
- Approve and eventually request amendments to the ENTSOs' annual work programme and budget;
- Approve energy-sector scenario development and needs' identification at EU level used as a basis for the TYNDPs;
- Oversight of the ENTSOs' planning activities;
- Approve and request amendments to the ENTSOs' TYNDPs, or alternatively prescribe binding guidelines to the TYNDPs' development, checking the TYNDPs against them;
- Prescribe binding guidelines to the CBA methodologies and request amendments where necessary;
- Assess the level playing field between conversion and storage facilities for different energy carriers, and provide recommendations.

However, following the consultation on the Bridge beyond 2025 paper, several EU stakeholders replied that some proposed tasks should not be added to ACER's mandate<sup>58</sup>. For example, gas infrastructure operators do not deem it appropriate that GTM thresholds would be set at the EU level; they also consider that ACER's actual involvement in setting ENTSOs' budgets is sufficient, and that ACER should not be given the authority to approve them. Positions on the future role of ACER in the different domains considered are mixed.

## 5.2. ACER's future budget and staffing

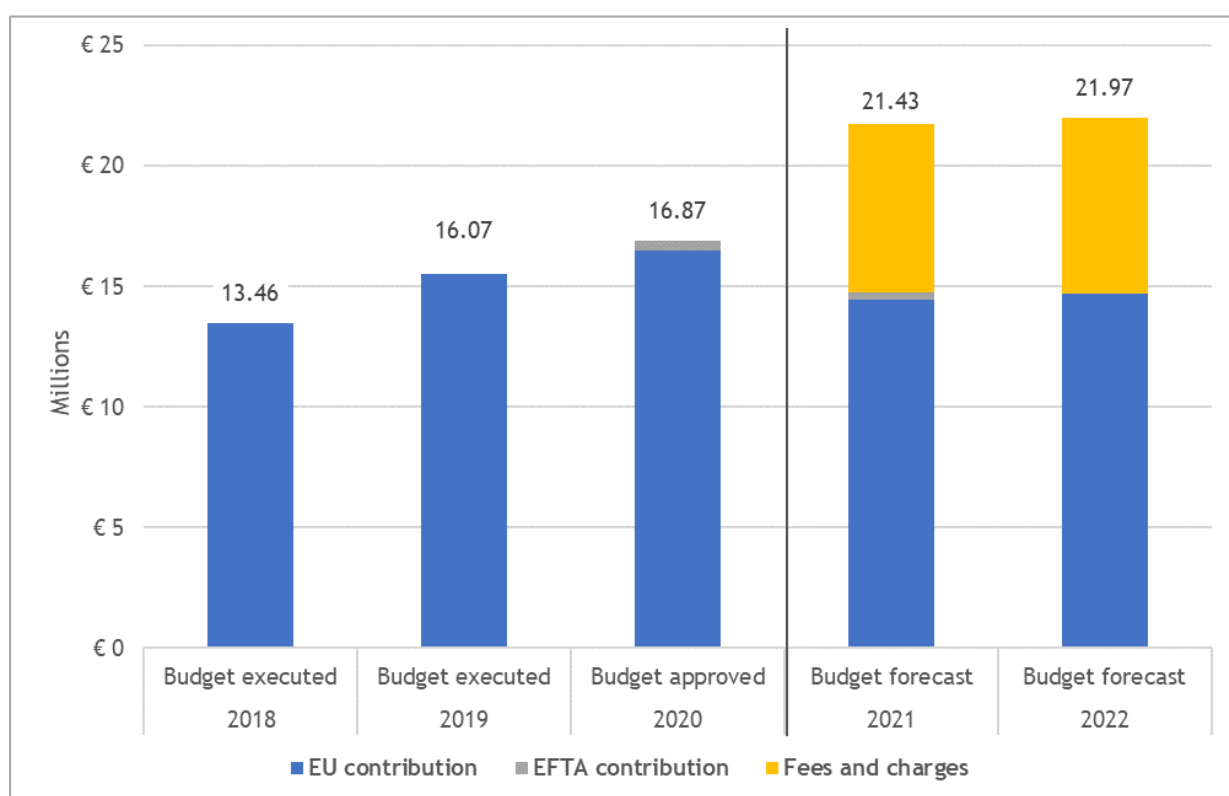
### 5.2.1. Draft budget for 2021-2023

This section presents the expected funding needs for 2021-2023 and analyses how ACER is planning to allocate its resources during this period, based on the *Statement of Estimates of the European Commission for the financial year 2021*, published in June 2020. The following sections analyse the expected revenues from fees for funding REMIT activities, and the risks of under-resourcing to tasks to be fulfilled by ACER.

From 2021 onwards, ACER will implement fees to recover the costs for collecting, handling, processing and analysing the information reported by market participants (MPs), or by entities reporting on behalf of MPs. ACER expects to collect revenues from fees amounting to €7 million in 2021. As a result, its total financial appropriations would increase to €21.4 million in 2021 (+ 27%), assuming that the EU contribution would decrease by €2.0 million (- 12%). The next section (5.2.2) explores the fees in more detail.

<sup>58</sup> ACER (2019) *Public Consultation on The Bridge beyond 2025 – Evaluation Report*; CEER (2019) *Stakeholder Comments on CEER's Public Consultation on Regulatory Challenges for a Sustainable Gas Sector*. Ref C18-RGS-03-03.

Figure 18: Financial resources by source in 2018-2022



Source: ACER, *Draft Programming Document 2021 – 2023*, January 2020, unpublished; European Commission, *Statement of estimates of the European Commission for the financial year 2021*, SEC(2020) 250 - June 2020.

### Planned expenditures and FTEs in 2021-2023

The overall increase in financial resources resulting from the introduction of fees in 2021 will serve to fund specific activities. Table 7 provides a breakdown of ACER's planned expenditures across the three titles (*staff, infrastructure and operating expenditure, and operational expenditure*) and the changes from 2020 to 2021.

The expenditures will increase across the three titles. In particular, the cost of REMIT operations (excluding staff costs) will increase by €1.8 million (+ 65%), which is related to the shift to a fee-based model. This change is expected to significantly alter the expectations of authorities (in particular NRAs) and reporting parties and ACER may have to commit to offer an improved level of services, which will necessitate more performant and highly reliable IT infrastructure. Costs associated with *REMIT* and *Market Surveillance and Conduct* should to a large extent be covered by the fees.

ACER is also expecting a substantial increase in costs associated with contract agents, and in operating expenditures, including costs such as *Information, communication technology and data processing, studies and meeting expenses*. After a relatively high increase of the expenditures in 2021, ACER expects smaller increases in 2022 and 2023, mostly driven by adjustments in staff remuneration.

ACER also expects an important increase in translation costs (from €217,000 in 2020 to €513,600 requested for 2021), as ACER is required to publish opinions in some EU official languages, when a waiver cannot be obtained<sup>59</sup>. Nonetheless, while the increase is significant in relative terms, it represents a limited share of ACER's total budget.

<sup>59</sup> ACER Director (2020). Presentation to ITRE's ACER Contact Group. 2nd July 2020.



Table 7: Expenditures by type in 2019-2023

| Million €   | Executed Budget 2019 | Approved Budget 2020 | Draft Budget 2021 | Envisaged budget 2022 | Envisaged budget 2023 | Change 2020/2021 | Change 2020/2021 (%) |
|---|----------------------|----------------------|-------------------|-----------------------|-----------------------|------------------|----------------------|
| <b>Title 1 - Staff expenditure</b>                        | 9.25                 | 10.71                | 11.94             | 12.33                 | 12.74                 | 1.2              | 12%                  |
| Establishment plan posts salaries & allowances            | 6.60                 | 7.49                 | 8.10              | 8.39                  | 8.68                  | 0.6              | 8%                   |
| External personnel salaries & allowances                  | 1.64                 | 2.12                 | 2.48              | 2.56                  | 2.64                  | 0.4              | 17%                  |
| Other staff expenditure                                   | 1.00                 | 1.11                 | 1.36              | 1.39                  | 1.41                  | 0.3              | 23%                  |
| <b>Title 2 - Infrastructure and operating expenditure</b> | 2.71                 | 2.72                 | 3.87              | 3.87                  | 3.87                  | 1.1              | 42%                  |
| Rental of buildings and associated costs                  | 1.11                 | 1.16                 | 1.29              | 1.29                  | 1.29                  | 0.1              | 12%                  |
| Other   | 1.60                 | 1.57                 | 2.58              | 2.58                  | 2.58                  | 1.0              | 65%                  |
| <b>Title 3 - Operational expenditure</b>                  | 4.11                 | 3.44                 | 5.63              | 5.77                  | 5.91                  | 2.2              | 64%                  |
| REMIT operations  | 3.62                 | 2.80                 | 4.63              | 4.75                  | 4.89                  | 1.8              | 65%                  |
| other   | 0.49                 | 0.64                 | 1.00              | 1.02                  | 1.02                  | 0.4              | 56%                  |
| <b>Total</b>  | <b>16.07</b>         | <b>16.87</b>         | <b>21.43</b>      | <b>21.97</b>          | <b>22.52</b>          | <b>4.6</b>       | <b>27%</b>           |

Source: Analysis based on data from ACER (2019) *Programming Document 2020 – 2022*, ACER (2020) *Draft Programming Document 2021-2023*.

The number of staff would increase by 11 FTEs in 2021, after a similar increase in 2020 (Table 8). ACER expects that 119 FTEs will be sufficient in 2021 and in 2022-2023. The additional human resources would consist of 5 administrators (+ 8%) and 6 contract agents for various operational tasks (+ 18%). As a result, establishment plan posts<sup>60</sup> will in 2021 increase to 76 FTEs, while contract agents will reach 39 units, and seconded national experts will remain at 4.

Table 8: Staff by contract type in 2019-2023

|                                 | Executed Budget 2019 | Budget 2020 | Draft Budget 2021 | Envisaged budget 2022 | Envisaged budget 2023 | Change 2020/2021 |
|---------------------------------|----------------------|-------------|-------------------|-----------------------|-----------------------|------------------|
| Administrators (AD)             | 55                   | 59          | 64                | 64                    | 64                    | 8%               |
| Assistants (AST)                | 12                   | 12          | 12                | 12                    | 12                    | 0%               |
| Assistants/Secretaries (AST/SC) | 12                   | 12          | 12                | 12                    | 12                    | 0%               |
| Establishment plan posts        | 67                   | 71          | 76                | 76                    | 76                    | 7%               |
| Contract Agents (CA)            | 27                   | 33          | 39                | 39                    | 39                    | 18%              |
| Seconded National Experts (SNE) | 4                    | 4           | 4                 | 4                     | 4                     | 0%               |
| <b>Total staff</b>              | <b>97</b>            | <b>108</b>  | <b>119</b>        | <b>119</b>            | <b>119</b>            | <b>10%</b>       |

Source: Analysis based on data from ACER (2019) *Programming Document 2020 – 2022*, ACER (2020) *Draft Programming Document 2021-2023*.

Five fee-financed additional FTEs will be working directly on REMIT. ACER expects 3 of these to be Contract Agents and 2 own staff (i.e. AD establishment plan posts). Nine other additional FTEs, financed via the EU contribution, are expected to work in the market integrity and transparency department (1

<sup>60</sup> Includes temporary agents and temporary agents which have become permanent staff after renewal.



FTE), the gas department (1 FTE), the Director's office (1 FTE) and to undertake operational support tasks (6 FTEs)<sup>61</sup>.

The number of Seconded National Experts is expected to remain stable in 2021-2023. SNEs' salaries are covered by the concerned NRA, but ACER still has to cover allowances as well as travel costs, which are quite substantial<sup>62</sup>. For example, the average annual cost for a permanent staff member working on REMIT is €155,000 and €83,450 for a contract agent, while the average reimbursement costs for SNEs amount to €88,000.

For 2021, ACER has distributed the financial resources not only by title, but also by activity and source (EU contribution or REMIT fees), as presented in Table 9 and illustrated in Figure 19. The differences in FTEs compared to Table 8 are due to the fact that ACER is assigning only ½ FTE for staff to be hired in 2021. As ACER has provided the figures included in Table 9 before the publication of its statement of estimates in June 2020, the mentioned amount of the EU funding slightly differs from the updated estimate. The allocation of the total revenues to the different activities would remain unchanged; only the split between fee-funded and EU-funded resources is expected to change.

REMIT-related activities (1. Market Integrity and Transparency and 2. Market Surveillance and Conduct) make up 44% of the planned budget and 32% of the planned FTEs. Activities 3-6 related to the work of the electricity and gas departments, are planned to use 38% of the budget and 46% of the FTEs in 2021.

Table 9: Financial and human resources for 2021 by activity and source

| Activity   | Financial Resources (thousand €) |                |                 | Human Resources (FTEs) |               |            |
|--|----------------------------------|----------------|-----------------|------------------------|---------------|------------|
|  | Subsidy-financed                 | Fees-financed  | Total FR        | Subsidy-financed       | Fees-financed | Total HR   |
| 1. Market Integrity and Transparency                   | 382.1                            | 6,847.5        | 7,229.6         | 2.5                    | 18            | 20.5       |
| 2. Market Surveillance and Conduct                     | 305.7                            | 1,914.4        | 2,220.1         | 2                      | 14            | 16         |
| 3. Internal Electricity Market                         | 2,598.6                          |                | 2,598.6         | 17                     |               | 17         |
| 4. Internal Gas Market                                 | 1,373.2                          |                | 1,373.2         | 9                      |               | 9          |
| 5. Electricity and Gas Internal Market Monitoring      | 1,915.8                          |                | 1,915.8         | 12.5                   |               | 12.5       |
| 6. Infrastructure and Security of Supply               | 2,244.5                          |                | 2,244.5         | 14.7                   |               | 14.7       |
| 7. Administrative, Support and Coordination categories | 2,720.9                          | 62.1           | 2,783.0         | 17.8                   |               | 17.8       |
| 8. Neutral categories                                  | 1,070.0                          |                | 1,070.0         | 7                      |               | 7          |
| <b>TOTAL</b>   | <b>12,610.8</b>                  | <b>8,824.0</b> | <b>21,434.8</b> | <b>82.5</b>            | <b>32.5</b>   | <b>115</b> |

Source: ACER, *Draft Programming Document 2021 – 2023, January 2020*, unpublished.

Note: The budget estimates published in June 2020 present a different amount of EU-subsidy. While the total allocations to activities would remain unchanged, the split between fee-funded and EU-funded resources will be slightly different.

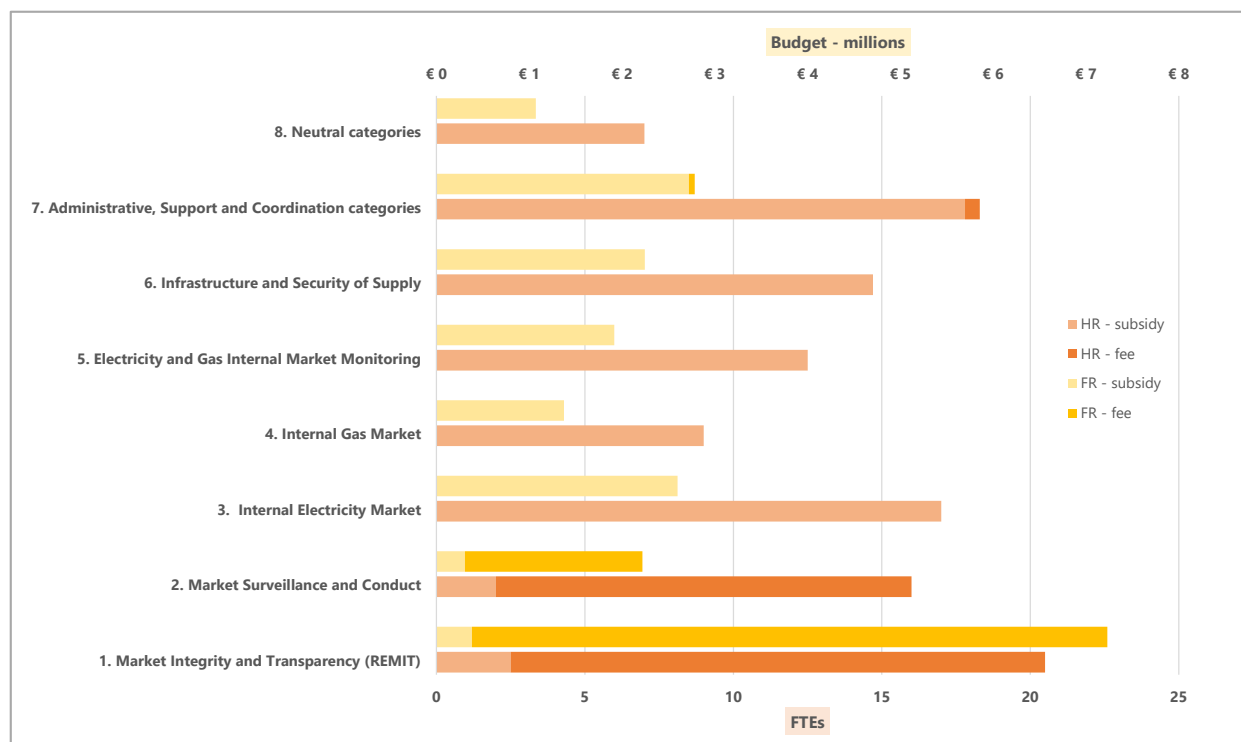
While market integrity and transparency are financial resource-intensive due to the cost of the IT systems, the type of work conducted for market surveillance and conduct (such as case investigation) is more intensive in human resources. Hence, while the financial resources to FTEs ratio for

<sup>61</sup> The latter arises from the conversion of 6 interim posts to statutory staff who will support operational tasks in ACER departments, alleviating the experts in ACER's departments. Currently, 12 interim staff conduct basic secretarial and clerical work, with the operational support work having to be distributed among the departments' experts. Moreover, the legal framework for the use of interim staff is complex and as highlighted by the ECA, there are risks of litigation and reputational damage from the use of interim staff. See ECA (2019). Audit of EU agencies in brief 2019.

<sup>62</sup> Rules for secondments at ACER are defined by the Administrative Board decision AB 02/2011.

activities 2-6 is of around €152,000 per FTE, this ratio reaches €352,000 for activity 1 and €138,000 for activity 2. This represents an increase compared to the ratios for 2020 analysed in Table 9, with the REMIT-related activities presenting both the largest increase (25% in the ratio for 1. Market Integrity and Transparency) and lowest increase (7% for 2. Market Surveillance and Conduct).

Figure 19: Financial and human resources for 2021 by activity and source



Source: ACER, *Draft Programming Document 2021 – 2023, January 2020*, unpublished.

### 5.2.2. Use of fees to finance REMIT activities

For 2021, ACER expects 32.6% of its financial resources to be raised from fees. These resources will serve to finance the REMIT-related activities of Market Integrity and Transparency and Market Surveillance and Conduct as explained above<sup>63</sup>. Table 10 presents the REMIT fee-covered human and financial resources in 2021.

<sup>63</sup> Fees can in principle also be implemented for requesting an exemption decision to new interconnectors and for decisions on TEN-E cross-border cost allocation provided by ACER.

Table 10: REMIT fee-covered expenditures in 2021

| Type of employment contracts   | FTEs in MIT department | FTEs in MSC department | FTEs in Corporate Services* | Total number FTEs | Forecasted expenditures 2021 (€) |
|--|------------------------|------------------------|-----------------------------|-------------------|----------------------------------|
| Establishment plan posts   | 9                      | 11                     |                             | 20                | 3,100,000                        |
| Contract agents  | 8                      | 2                      | 1                           | 11                | 917,950                          |
| Seconded national experts  | 2                      |                        |                             | 2                 | 176,000                          |
| Total staff costs  |                        |                        |                             |                   | 4,193,950                        |
| REMIT IT   |                        |                        |                             |                   |                                  |
| Infrastructure, hardware licenses, deployment, service desk and operations |                        |                        |                             |                   | 1,530,000                        |
| Software maintenance, development, testing and software licenses           |                        |                        |                             |                   | 1,250,000                        |
| Surveillance and BI tools customisation, licenses and consultancy          |                        |                        |                             |                   | 900,000                          |
| Studies, technical writing, coordination, QA and information security      |                        |                        |                             |                   | 800,000                          |
| Business enhancements and development of surveillance and conduct tools    |                        |                        |                             |                   | 150,075                          |
| Total IT   |                        |                        |                             |                   | 4,630,075                        |
| TOTAL FEES AND CHARGES   |                        |                        |                             |                   | 8,824,025                        |

Source: ACER, *Draft Programming Document 2021–2023*, January 2020, unpublished.

\* These staff members will perform tasks such as handling fees.

In the past, ACER has struggled to receive funding for additional staff and financial allocations required to enhance REMIT software and hardware. Initially, ACER estimated the annual funding needs for the operation of the REMIT IT system at between €1.5 and €2.8 million. As the volume of data to be collected is actually more than three times higher than originally envisaged, the cost has raised to €5.2 million in 2020, and will further increase in 2021, given the additional staff, hardware and software necessary to ensure an adequate level of service to properly monitor all transactions and identify and investigate potential cases of market manipulation in cooperation with NRAs. Further, charging fees will require staff dedicated to fee-handling activities. ACER expects that the administrative costs will amount to around €250,000 per year (3 contract agents).

Fee structures and levels should be non-discriminatory and not place an undue financial or administrative burden on market participants or reporting parties acting on their behalf. Based on the current numbers, the fee level would in 2021 amount on average to €600 per registered market party, or €920 per actively reporting market participant.<sup>64</sup> The actual amount will in principle be proportionate to the number of transactions the reporting party has submitted the previous year.

### European Commission Decision establishing REMIT fees

According to Art. 32(2) of the ACER Regulation, the European Commission has the responsibility to set the fees and the way they are to be paid. The Commission must beforehand conduct a public consultation as well as consult ACER's Administrative Board and Board of Regulators. The Commission furthermore 'shall regularly examine the level of those fees on the basis of an evaluation and, if necessary, shall adapt the level of those fees and the way in which they are to be paid'.

<sup>64</sup> In 2020 there are more than 14 700 registered market participants, while in 2019 there were 9 601 actively reporting market participants – see section 3.3.2.

The Commission launched in May 2020 a consultation on its planned Decision on ACER's fees<sup>65</sup>. This draft decision divides the REMIT activities in three categories (information management; market surveillance and conduct; and REMIT fees management), and sets general principles for the REMIT fees:

- Be proportionate to the costs of the relevant services as provided in a cost-effective way;
- Be non-discriminatory; and
- Avoid placing an undue financial or administrative burden on market participants or entities acting on their behalf.

The proposed process for setting the fees for the following years is:

1. ACER's Director estimates the costs associated with REMIT activities;
2. ACER's Administrative Board adopts and submits a provisional draft budget estimate;
3. The EU institutions negotiate and the Council defines ACER's budget, including the share funded through fees, within the process for setting the general budget of the EU;
4. ACER's Administrative Board adopts the approved budget, accounting for eventual adjustments brought in during the EU budgeting process.

The Commission proposes fees to be charged to registered reporting parties (not all market participants are directly registered with ACER). The proposed calculation method for the fees is a mix of a fixed and a variable component reflecting the main REMIT cost drivers, namely the number of registered reporting parties, the number of market participants represented and the number of transactions.

ACER proposed in its 2021-2023 Programming Document a slightly different approach to define the fees<sup>66</sup>:

1. Use as a basis the total authorised REMIT fees defined in the annual budget;
2. Divide this authorised total between all registered reporting parties, proportional to the number of transactions records and/or registered market participants reported by the party in the previous year;
3. Set a minimum fee to be paid by each reporting party.

### Balancing of REMIT fees and expenditures

The REMIT fees will in principle be sufficient to cover the costs of the relevant services, if provided in a cost-effective way. This entails that ACER will not be able to retain any surplus it makes (surpluses will have to be returned to the EU budget), and costs due to inefficient functioning will have to be covered by other means.

Fees will be budgeted using the 'universal budgeting model', where tasks and activities can be co-financed, but fee-revenues cover only the related expenditures, and will not constitute additional net revenues for ACER<sup>67</sup>. Any positive result will have to be repaid to the Commission<sup>68</sup> up to the amount of the contribution received from the general EU budget for the respective year. In case of negative results (annual expenditure on fee-sponsored REMIT activities higher than the amount raised through

<sup>65</sup> DG Energy (2020) *Consultation paper on the planned Commission Decision setting the fees due to the Agency for the Cooperation of Energy Regulators for collecting, handling, processing and analysing of information reported under Regulation (EU) No 1227/2011 of 25 October 2011 on wholesale energy market integrity and transparency*.

<sup>66</sup> ACER (2020) *Draft programming document 2021-2023*.

<sup>67</sup> Based on art. 32 of Regulation (EU) 2019/942 and art. 6(4) of ACER Financial Regulation: Decision 8/2019 of the Administrative Board of the Agency for the Cooperation of Energy Regulators of 21 June 2019 on the Financial Regulation of the Agency for the Cooperation of Energy Regulators.

<sup>68</sup> In accordance with art. 17 of the Agency's Financial Regulation Decision No 8/2019 of the Administrative Board of the Agency for the Cooperation of Energy Regulators of 21 June 2019 on the Financial Regulation of the Agency for the Cooperation of Energy Regulators.

fees), ACER will have to agree with the Commission on how to fill the shortfall. This can be done by a budgetary transfer, or by internally redistributing resources between activities.

Hence, there is a risk that ACER will have to deprioritise resources in case fees are insufficient to cover efficiently-incurred REMIT-related costs and it is not possible to cover the gap through e.g. an additional contribution from the EU. Other risks could incur from the timing for raising the fees (a risk to all EU agencies relying on fees, as detailed in Box 2), or default by registered reporting parties. To address this risk, ACER proposed to invoice fees in January of each year, and to request bank guarantees when the annual fees for a party exceed €50 000.

#### Box 2: Study on the use of fees in EU agencies

Source: European Parliament, DG for Internal Policies, Policies Department D: Budgetary Affairs, *Potential revenue from the extension of charging fees by EU Agencies*, 2018.

### 5.3. Risks of under-resourcing on value-adding activities provided by ACER

Risks arising from under-resourcing of ACER affect its contribution to achieving the objectives of the Energy Union, especially reaching a fully-integrated and properly functioning internal energy market, and promoting energy security, solidarity and trust. The main risks can be grouped as:

A study published by the European Parliament, *Potential revenue from the extension of charging fees by EU Agencies*, contains relevant insights on the implications of ACER raising fees.

The study found that currently around 34% of the EU agencies' revenues comes from fees, with several agencies receiving all or the majority of their revenues in this way. Besides ACER, some other agencies were exploring to become at least partially "self-financed" through industry fees (European Food Safety Authority, European Research Area). Agencies with supervisory, surveillance, regulation and registration activities have more potential to raise fees than those without such activities, but there does not seem to be a systematic approach for implementing fees. So far, fees have been established on a case-by-case basis, which has led to a disparity in the approaches.

The study suggests that implementing fee systems may be positive from an operational perspective, as it may bring EU Agencies closer to the industry/market needs of the economic operators they supervise. Further, the introduction of fees is found to foster timeliness and flexibility, and to generate a reduction in the administrative burden for industry.

However, "there does not appear to be a systematic link between implementing a fee system and an Agency's capacity to execute its mission in full". Furthermore, several partially self-financed Agencies strongly advocate for alternative sources of funding.

Other findings from the study are:

- The mechanisms for implementing fees impact Agencies' budget management at several levels, and require thorough attention in the design and further implementation of fees regulations. Upon the introduction of fees, rules providing for ex-post payment of fees generally raise issues of treasury shortfalls that have to be accurately forecasted.
- Where punctual issues occur in terms of Agencies being able to satisfactorily perform the activities within their mandate, and activities possibly eligible for fee-funding are not yet fee funded, it would be recommendable to explore the opportunity for fee-funding: in general, when fee funding is introduced, its benefits outweigh its shortcomings.

- **Risks of not fulfilling its legal obligations**, for example failure to timely provide an opinion or decision, or failure to perform its market monitoring duties effectively;
- **Risks of performing tasks sub-optimally**, which means ACER would not be performing its role effectively;
- **Risks of legal challenges**, for example related to cybersecurity, data confidentiality, labour disputes, or other similar issues;
- **Risks of reputational damage**, which would reduce its credibility and hamper its ability to carry out its tasks.

In the short-term to 2023, the analysis shows that the main risks are associated with REMIT-related activities. These are detailed in the sub-section below, and may arise along the entire REMIT information workflow, from data collection to automatic and manual monitoring, and case investigation in cooperation with national authorities. Moreover, as these steps are sequential, issues early in the process such as with data collection compromise the ability for ACER and national authorities to investigate and identify potential market abuse cases.

The implementation of the REMIT fees in 2021 poses a specific risk in itself, as the fees will fund the large majority of resources for REMIT-related activities. This risk is related to the lack of experience and tools for the implementation of fees, and to the fee calculation and collection process which should allow to recover the REMIT costs in a timely manner every year.

Next to REMIT, ACER is also exposed to other less critical risks in the short-term, potentially causing delays to the integration of the energy market, and affecting the development of trans-European energy infrastructure and security of energy supply. This risk would arise from delayed implementation and monitoring of network codes, as evidenced by the growing number of appeals on individual ACER decisions and the postponing of implementation monitoring reports of network codes. Adequate resourcing will also be needed to address potential amendments to the network codes raised by stakeholders through the functionality platforms, as the requests (to be handled jointly by ACER and the respective ENTSO) have been increasing. These risks are compounded by the reduced scope of the Market Monitoring Reports, which are deemed to be highly useful according to ACER survey respondents (and which serve also to report on the benefits of the network codes). Also, other periodic activities may be down-scoped in the future, such as the reports establishing best practices in the area of electricity transmission and distribution tariffs methodologies.

These risks impacting energy markets' integration, development of trans-European energy infrastructure and security of energy supply are compounded by the uncertainty on the work load related to certain ACER activities, especially the above-mentioned number of appeals on individual decisions, network code amendments, and BoR decisions on network code implementation. The volume of work related to these tasks has substantially increased in recent years.

Moreover, much of ACER's work is conducted through Working Groups, which depend substantially on the contribution of NRA experts, including as co-convenor. While this involvement of NRAs in the work of the Agency is welcome and fosters collaboration among EU regulators and leverages their expertise, this can compromise the ability of ACER to execute its tasks if NRAs were to cut back on cooperation.

Finally, in the long-term, to address regulatory challenges beyond 2023, new tasks may be assigned to ACER which will require the assignment of adequate financial and human resources. It is important to ensure that legislative financial statements do not underestimate the resources required to implement new mandates, and adequately reflect changes from the Commission's proposals agreed by the co-legislators.

## Box 3: Impact on ACER of the exit of the United Kingdom from the EU

The actual impact of Brexit on ACER will depend on the future relationship between the EU and the UK, which is currently being negotiated.

ACER expects that overall, repercussions on administration and day-to-day regulatory action will be limited. The main impact regards the role of Ofgem in ACER's Board of Regulators and working groups and arrangements concerning the implementation of REMIT. ACER indicates to be preparing scenarios and mitigating measures.

The relationship with the UK will be conditioned by the overall framework for cooperating with regulatory authorities outside of the EU. In this way, the work of ACER will be affected not only by Brexit, but also by the eventual implementation of REMIT in the Energy Community and Norway.

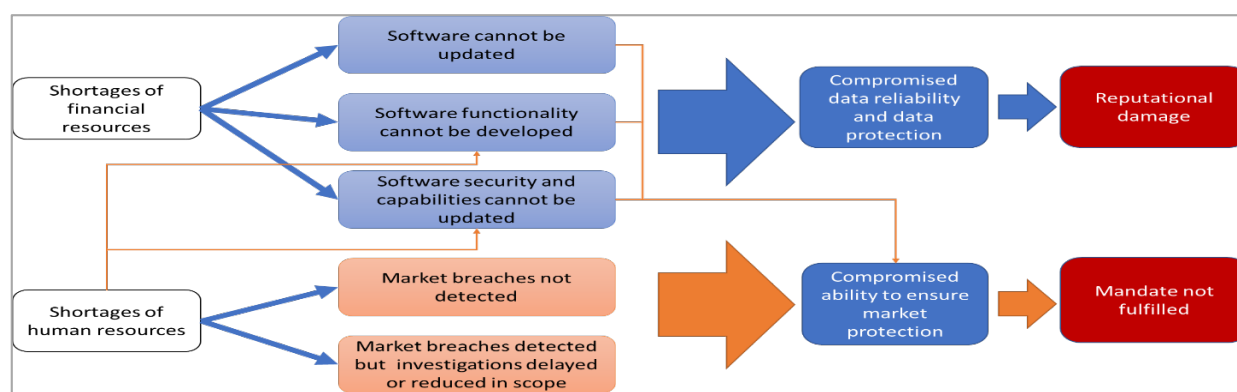
Source: ACER, *Draft Programming Document 2021 – 2023*, January 2020, unpublished.

### Risks for REMIT-related activities

In its draft 2021-2023 programming document, ACER identifies the critical risks it is exposed to, as presented in Annex B. The risks identified concern the lack of resources (human and financial) to properly perform all required REMIT-related activities. If these activities are only partially performed, market surveillance and conduct are compromised, as these activities depend on REMIT data collection and monitoring. ACER could also be exposed to important reputational and legal risks arising from e.g. data breaches or discriminatory treatment of suspicious market activities.

Figure 20 structures the risks identified by ACER related to Market Integrity and Transparency and Market Surveillance and Conduct, mapping how resources shortage generates reputational and implementation risks.

Figure 20: Main risks and consequences of resources shortages for REMIT



Source: Own elaboration based on interviews with ACER officials.

According to ACER, limitations to financial and human resources to carry out REMIT work pose a number of risks:

- Risk of hampering the implementation of a more comprehensive automated screening of REMIT data;
- Risk of existing screening tools being underdeveloped, thus leading to inefficiencies and risks that certain types of market manipulation practises remain undetected;



- Insufficient case experts available to assess identified anomalies resulting from the automatic screening of REMIT data. This will negatively impact the market monitoring of trading activity in wholesale energy markets, with the risk that breaches of REMIT remain undetected or are not treated coherently;
- Insufficient resources to cooperate with NRAs and financial market authorities. The recast ACER regulation assigns to ACER the mandate to provide operational assistance to NRAs, upon their request, regarding REMIT investigations. The concerned resource requirements are at present quite uncertain; a survey of NRAs conducted by ACER indicated that this assistance role could require 20 additional FTEs<sup>69</sup>.

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<sup>69</sup> EU Agencies Network (2019) *EU decentralised Agencies' contribution to the European Parliament's Committee on Budgets hearing with the EUAN*.



## 6. CONCLUSIONS AND RECOMMENDATIONS

**ACER plays a pivotal role in supporting EU energy policy priorities**, in particular by:

- enhancing and ensuring efficient and fair competition on the electricity and gas markets;
- contributing to adequate (cross-border) development and integration of electricity and gas networks, as well as ensuring an efficient use and access to them;
- contributing to security of energy supply.

ACER's initial and main responsibility, as defined in the Third Energy Package legislation published in 2009, focused on fostering cooperation among NRAs in view of facilitating the European Internal Energy Market (IEM) both for electricity and natural gas. Since its creation in 2011, the number and extent of **ACER's responsibilities have substantially increased**, mainly related to:

- REMIT regulation (monitoring system and surveillance functions);
- TEN-E regulation (several responsibilities, such as providing an opinion on draft PCIs' lists and monitoring PCIs' progress);
- security of gas supply regulation;
- implementation of network codes and guidelines; and
- Clean Energy for all Europeans package (various roles, in particular tasks related to the electricity system's adequacy assessment).

It is expected that in the near future additional responsibilities and tasks will be assigned to ACER; the upcoming revision of the TEN-E Regulation and potential changes in the gas legislation might for instance affect its mandate.

ACER's budget has substantially increased, but there has been a **structural gap between the financial and human resources requested by ACER's management and the resources allowed by the budgetary authorities**.

- ACER's financial resources provided by EU allowances have increased from €8.9 million in 2013 to €16.5 million in 2020 (+ 84%) and its permanent staff from 49 to 71 FTEs (+ 45%);
- on average, ACER was assigned 26% less financial resources and 31% fewer staff than requested by its management;
- the gap between requested and allowed resources was higher for ACER than for other EU agencies;
- ACER has supplemented allowed permanent staff with contract agents and interim workforce, which is an adequate solution to fill in short-term gaps but less appropriate for long-term commitments and highly-specialised tasks; and
- the shortage in allowed resources has also partly been compensated by National Experts seconded by NRAs. Their number is however limited; NRAs seem reluctant to propose secondments due to the budget impact, while ACER argues that, given the increasing number of controversial decisions it has to take, having many SNEs would pose a risk to its perceived independency and impartiality.

**Several factors are at the basis of the structural budget shortage:****Recommendations**

- ACER's intention to maintain a share of allowed human and financial resources flexible to address unexpected variations in the workload across its strategic areas is considered an appropriate measure. In this context, ACER could conduct a mapping of its available expertise to optimise the (re)allocation of staff. This could be coupled with a systematic follow-up of the effective resources' use per output.
- NRAs are contributing to ACER's work in a substantial manner, both via participation of their representatives in Working Groups and Task Forces as well as via secondments of national experts. This cooperation is deemed very useful and should be encouraged, as it facilitates the coordination between NRAs and ACER, provides an opportunity for NRA staff to acquire relevant EU level experience, and contributes to a better decision making process that properly considers both EU and national impacts and interests. ACER and CEER/NRAs could establish a planning for involvement of national experts to guarantee the effectiveness and continuity of their contribution and promote the participation of staff from all NRAs. ACER could also explore the feasibility to increase the share of SNEs, by concluding agreements with NRAs that are beneficial to both parties, and by ensuring that sensitive decisions are taken in an impartial way, e.g. by avoiding that SNEs are involved in decisions regarding the Member State they are coming from.

- ACER has been established in 2011, when the overall EU budget was facing strong pressure. This may have limited the headroom the budgetary authorities were able to provide;
- According to the 5% rule imposed in 2013 to EU agencies, ACER had to reduce its staff by 5% (2.5 FTEs) in 2013-2017;
- Resources' needs seem to have been underestimated during some legislative processes that have assigned new responsibilities to ACER;
- The effective workload has increased in recent years, e.g. regarding registration of market participants and transactions (REMIT), and an increasing number of interventions, appeals and recourse decisions;
- Possible divergences in interpretation of specific ACER roles between ACER's management and the European Commission.

**Recommendations**

- To avoid a potential mismatch between ACER's legal missions and its allowed resources, the impact assessments of new or amended legislation on ACER should be based on realistic assumptions and take into account external factors that may affect its workload (e.g. appeals). Moreover, the impact assessments should be adequately updated when draft legislation is amended during the approval process.
- In order to reduce the risks of potential over- or underfunding, the Commission and/or the Parliament could consult with ACER during the legislative process, and invite ACER to provide its views on the estimated impact, that can be used when preparing or adapting the financial statements associated with legislative proposals. Given the range of uncertainty regarding the impact of new legal provisions, the resources' needs could be estimated for several scenarios and assumptions.

**Limitations in the available financial and human resources have led to deprioritising, delaying or cancelling several tasks.** The tasks affected by shortages in resources were related to:

- REMIT data collection and processing, and market surveillance, which raises risks of suboptimal market oversight. Tasks deprioritised or delayed include the cooperation with ESMA, registration of new market participants in the system, implementation of a comprehensive automated screening of REMIT data, case investigation, and requesting the reporting of some categories of transactions;
- the “Clean Energy for All Europeans” package, which raises the risk of delaying the implementation of the internal energy market. Tasks deprioritised include for instance the best practice report on transmission and distribution tariff methodologies; and
- other key tasks, such as reduced scope of market monitoring reports and delays in publishing implementation monitoring reports for network codes and guidelines.

Stakeholders confirmed that the resources shortage is hampering ACER’s ability to deliver on a number of commitments. Lack of adequate resources is creating several risks, such as failure of ACER achieving its objectives by delayed or partial market monitoring and reputational damage.

**ACER’s overall budget request seems reasonable and proportionate to the benefits it generates, and its activities seem to be delivered efficiently.** While it is intrinsically difficult to objectively evaluate the cost-effectiveness of an agency with a unique mandate, ACER’s overall costs are low compared to the potential benefits of enhanced markets and systems integration and compared to the risks of not properly integrated networks and markets due to diverging national rules and approaches. Stakeholders expressed an overall positive view of ACER’s output, and its services increase the effectiveness of NRAs.

ACER’s budget is low compared to the budget of most NRAs. Organising regulatory oversight at EU level is for specific topics (in particular cross-border issues) in principle less costly and more efficient than at national level or via bilateral negotiations between the concerned NRAs.

**ACER’s mandate is clear and complements the role of other institutional actors.** There is no indication that ACER’s mandate would overlap with the role of DG ENER or DG COMP, and similarly there seems no major overlap with NRAs or other EU organisations such as CEER.

**Introducing fees starting from 2021 should enable ACER to better cope with its REMIT and market surveillance functions.**

- Fees will in 2021 allow ACER to increase its available budget by 27% (€4.6 million), while reducing EU appropriations by 12% (€2.0 million) compared to 2020;
- implementation of fees will lead to additional administrative costs (e.g. billing and recovery system) and risks (e.g. unpaid bills, cash-flow-risks, fees not determined at appropriate level); and
- fees will have to be paid by market participants according to the monitoring cost of their market operations for ACER. This system might put ACER under pressure to timely supply the related services and to respect high quality standards.

**Recommendations**

- Taken into account the challenges and risks associated with the implementation of the fee-based delivery model in 2021, it seems appropriate to award ACER resources to the full extent of its request. This allowance can be coupled with a clear commitment regarding its performance in the coming years.

ACER's activity is, to a large extent, driven by external factors ("Tasks initiated by others", such as follow-up of appeals and interventions upon request on cross-border issues). Any cost-reduction target should have a parametrised element that accounts for these tasks which are intrinsically difficult to forecast. Having such an element would allow ACER to be more ambitious in its cost-reduction strategy, without facing the risk of being unable to take up unforeseen critical tasks.

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## ANNEX A - OVERVIEW OF APPEALS TO ACER AND DECISIONS OF THE BOARD OF APPEALS UNTIL AUGUST 2020

| Case       | Consolidated?             | Appeal | Decision | Appellant  |
|------------|---------------------------|--------|----------|--|
| A-001-2015 |                           | 2015   | 2015     | E-Control  |
| A-002-2015 |                           | 2015   | 2015     | APG  |
| A-001-2017 | Consolidated              | 2017   | 2017     | E-Control  |
| A-002-2017 |                           | 2017   | 2017     | VERBUND AG   |
| A-003-2017 |                           | 2017   | 2017     | Austrian Power Grid  |
| A-004-2017 |                           | 2017   | 2017     | VUEN   |
| A-001-2017 | Re-launched, consolidated |        | 2020     | E-Control  |
| A-002-2017 |                           |        | 2020     | VERBUND AG   |
| A-003-2017 |                           |        | 2020     | Austrian Power Grid  |
| A-004-2017 |                           |        | 2020     | VUEN   |
| A-001-2018 |                           | 2018   | 2018     | AQUIND   |
| A-002-2018 |                           | 2018   | 2019     | PRISMA   |
| A-001-2019 | Consolidated              | 2019   | 2019     | Amprion  |
| A-002-2019 |                           | 2019   | 2019     | TransnetBW   |
| A-003-2019 |                           | 2019   | 2019     | BNetzA   |
| A-004-2019 | Consolidated              | 2019   | 2019     | HEA  |
| A-005-2019 |                           | 2019   | 2019     | FGSZ   |
| A-006-2019 |                           | 2019   | 2020     | Gas-System SA  |
| A-001-2020 | Consolidated              | 2020   | 2020     | Austrian Power Grid AG; ČEPS, a.s.; Independent Power Transmission Operator S.A.; Polskie Sieci Elektroenergetyczne; Red Eléctrica de España, S.A.; Réseau de Transport d'Électricité; Affärsverket svenska kraftnät |
| A-004-2020 |                           | 2020   |          | TenneT TSO GmbH and TenneT TSO B.V.  |
| A-002-2020 |                           | 2020   | 2020     | Austrian Power Grid AG; ČEPS, a.s.; Independent Power Transmission Operator S.A.; Polskie Sieci Elektroenergetyczne; Red Eléctrica de España, S.A.; Réseau de Transport d'Électricité; Affärsverket svenska kraftnät |
| A-003-2020 | Consolidated              | 2020   | 2020     | TenneT TSO B.V.  |
| A-006-2020 |                           | 2020   |          | Energie-Nederland  |
| A-005-2020 |                           | 2020   |          | TenneT TSO GmbH and TenneT TSO B.V.  |
| A-007-2020 |                           | 2020   |          | European Network of Transmission System Operators for Electricity (ENTSO-E)  |
| A-008-2020 |                           | 2020   |          | RTE Réseau de Transport d'Électricité  |

## ANNEX B - CRITICAL RISKS IDENTIFIED BY ACER

The **critical risks** identified by ACER in relation to its work programme and associated with resources shortages are all related to REMIT. They specifically concern:

### *REMIT fee collection*

- **For the fee scheme to meet the REMIT resource needs in 2021**, given the need to implement the scheme before then, and the lack of experience with such a scheme.

### *Market integrity and transparency*

- **To REMIT data quality assurance and updating reporting guidance** due to the lack of IT budget and human resources to licence software and upgrade ARIS. As all subsequent REMIT-related activities are dependent on the quality of the data collected, this increases risks in the subsequent activities;
- **To reliability and data protection of the REMIT information system** due to legacy shortages in human resources and budgetary constraints for REMIT IT expenditure, and the change of IT services providers in 2018. The REMIT IT software will be 7 years old in 2021, in a context of increasing number of users and volume of data;
- **To the ability to collect and monitor REMIT data**, due to increasing volume of data which may require additional storage space already in 2021 to avoid any limitations to data collection and monitoring.

### *Market surveillance and conduct*

- **To the adequacy, effectiveness and the efficiency of the market surveillance tool** to trigger alerts for suspicious activity, due to insufficient funding for consultancy experts to develop the tool and to maintain the tool's operational functionality;
- **To (manually) assess priority triggered alerts**, due to increasing number of transactions, which have already required limiting the assessments conducted since 2017, as the received data points increased from 1.5 to 3 million records per day between 2017 and 2019;
- **To leakage of sensitive trade data in the absence of adequate security measures**, if the Case Management Tool created by ACER for cooperating with NRAs is not employed and leads to parallel handling of data;
- **To inconsistent application of market abuse provisions by NRA and failure to notify the relevant authorities**, due to the increase in data collected and in suspicious transaction reports, as the Agency expects the average number of cases per expert will exceed its ability to meaningfully coordinate with NRAs.



This study analyses the role, organisational structure, tasks and financial and human resources of the Agency for the Cooperation of Energy Regulators (ACER). ACER plays an important role in the development, integration and functioning of the electricity and gas systems and markets in the EU, and its responsibilities in these domains have since its establishment in 2011 substantially increased. Although its resources have also significantly grown, ACER is facing a structural budget shortage and had to deprioritise, delay or cancel some tasks in recent years. Collection of fees from 2021 should alleviate these limitations. ACER's request for a higher budget appears reasonable and appropriate given its important contribution to major energy policy priorities, and the fact that its functioning seems efficient and effective.

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