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From divergence to convergence: perspectives over European energy governance

PhD in	Legal Studies – International Law and Economics Curriculum
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Abstract

This thesis offers a constitutional perspective over the development of energy governance in the European Union, following the shift from the regulatory network model represented by the European Regulators' Group for Energy and Gas (ERGEG) to the Agency for the Cooperation of Energy Regulators (ACER), with the so-called Third Energy Package. In line with the controversial qualification of ACER as a "network agency" within the complex "agencification" process of the European executive, the present research focuses on the following research question: how is internal energy market governance telling of the evolving regulatory dynamics within the European Union?

According to the aforementioned macro-themes, the thesis is structured as follows. Chapter I will frame the main issues at stake, both theoretically and economically, as it revolves around the following question: how is the European internal energy market regulated, and which is the role played by the Agency for the Cooperation of Energy Regulators in this scenario? In this regard, a few preliminary (potential) clashes between ACER's model and the hybrid notion of "network agency" will be suggested. This issue will be specifically analysed in Chapter II, which will concentrate on the distinguishing features of ACER's practice, with particular regard to the involvement of National Regulators in supranational policy making. ACER's practice will be considered in light of an appropriate legitimisation scheme for power delegation within the EU, pursuant to the *Meroni/Romano* doctrine and the subsequent developments in the 2014 *Shortselling* case.

Finally, Chapter III will frame the distinguishing features of energy governance within the constitutional debate on the agencification of the European executive. In particular, it will be argued that the apparent mismatch between the agencies' relevance in European regulatory practice and the lack of recognition of such phenomenon in European primary law is particularly striking, also in light of the evolution of energy governance in the 2016 Commission's proposal for a "fourth energy package".

Ai miei nonni Bruno, Marcella, Marzina e Nando.

("Ricerchi, ricerchi… ma cosa ricerchi?")

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Table of Contents

Conclusive remarks

List of abbreviations

AB	Administrative Board
ACER	Agency for the Cooperation of Energy Regulators
BEREC	Body of European Regulators for Electronic Communications
BoA	Board of Appeal
BoR	Board of Regulators
CACM	Capacity Allocation and Congestion Management
CEER	Council of European Energy Regulators
DSO(s)	Distribution System Operator(s)
EC	European Commission
ECJ	European Court of Justice
ECT	European Community Treaty
EEC	European Economic Community
EFSA	European Food Safety Authority
ENTSO-E	European networks of transmission system operators for electricity
ENTSO-G	European networks of transmission system operators for gas
EP	European Parliament
ERGEG	European Regulators' Group for Electricity and Gas
ESA(s)	European Supervisory Authority(ies)
ESMA	European Securities Market Authority

EU	European Union
FEP	First Energy Package
FG	Framework Guidelines
GBER	General Block Exemption Regulation
ITC	Inter-Transmission System Operator Compensation
MS(s)	Member State(s)
NC(s)	Network Code(s)
NDP(s)	Network Development Plan(s)
NEMO(s)	Nominated Electricity Market Operator(s)
NRA(s)	National Regulatory Authority(ies)
OJ	Official Journal
PCI(s)	Project(s) of Common Interest
REMIT	Regulation on wholesale Energy Market Integrity and Transparency
RES	Renewable Energy Sources
ROC(s)	Regional Operational Centre(s)
RSCI(s)	Regional Security Cooperation Initiative(s)
SEP	Second Energy Package
SoS	Security of Supply
TEN-E	Trans-European Networks for Energy
TEP	Third Energy Package
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

TPA	Third Party Access
TSO(s)	Transmission System Operator(s)
WP	Winter Package

Introduction

1. Setting the scene

1.1 Context: energy governance and executive fragmentation

The pluralisation of the European executive is a phenomenon of the utmost importance in the evolution of normative and regulatory practice within the European Union (EU). Notwithstanding its composite and inhomogeneous nature, it is paramount to observe its constituent characteristics from a holistic perspective, taking into account both its structural pillars and its progressive evolution.

Indeed, the increasing relevance of agencies and agency-like bodies within the European Union's multilevel governance scenario represents a key tenet of the European Union's shared administration model. Observing the paths and trends qualifying this process from a structural, "constitutional"[1], perspective can result in a relevant exercise when assessing the European Union's status as an autonomous legal order.

In particular, this research will focus on the shift from a supranational network model to the establishment of agency-like bodies, while considering the hybrid forms highlighted by the relevant legal and political scholarship ("network agencies"). The theory of delegated acts will thus constitute the main backdrop to be considered when assessing the legality and constitutional sustainability of the evolving role of European agencies.

In this context, it will be argued that the development of energy law and policy within the EU, starting from the 1990s "First energy package", can embody the mentioned process in an autonomous, telling way. Notably, the patterns observed in the evolution of the normative setting for the energy sector will be analysed through the lenses provided by a comprehensive reading of the fragmentation of the European executive.

[1] PALERMO, *La forma di Stato dell'Unione europea. Per una teoria costituzionale dell'integrazione sovranazionale*, CEDAM, Padua, 2005. On the interlinking relationships between the different souls of this process, see MICKLITZ, *La Constitution économique européenne revisitée. Introduction*, in *Revue internationale de droit économique*, 4/2011, pp. 411 – 417.

More specifically, this thesis will concern the unique balance of powers characterising the shift from network to agency governance in the energy sector, taking into account the practice of the Agency for the Cooperation of Energy Regulators and focusing on the relationship between the Agency and national regulators. Consequently, in light of the peculiarities of energy governance, the divide between convergence and divergence in energy regulation will provide a relevant perspective over the observation of the agency phenomenon throughout the EU.

1.2 Preliminary concepts

The present research aims at framing the evolution of energy governance in the broader context provided by the progressive fragmentation of the European executive through the increasing role of (regulatory) agencies in the European normative setting. In order to develop a consistent analysis, it is paramount to focus on a concise set of preliminary definitions clarifying the approach chosen in the present research. Notably, this thesis acknowledges that the suggested results could have been different if different declinations of divisive subjects (such as the notion of "efficiency") were to be privileged.

As anticipated, the key context to the present research is the proliferation of Eureopean agency-like bodies, determining subsequent waves of "agencification" of European governance in a vast array of sectors, characterised by diverse market harmonisation stages. When referring to the notion of "agencies", primary reference will thus be made to a multifaceted set of delegated (administrative) entities, the *nomen* of which may substantially vary[2]. The common characteristics of European agency-like bodies are instead to be traced back to the following qualifying elements: their establishment through autonomous Regulations spelling out the relevant tasks, their status as autonomous subjects with legal personality and a certain degree of organisational and financial autonomy. The evolutionary process leading to an increasing role of agency-like bodies in the policy making scenario will

[2] For instance, while the energy regulatory agency-like body is indeed qualified as *Agency* for the cooperation of energy regulators, the homologous actors in the financial and food safety sectors are referred to as *Authorities* (respectively, "European Securities and Market Authority" and "European Food Safety Authority"), while the European *Centre* for Disease Prevention and Control is also to be considered a European decentralised "agency". Notably, notwithstanding the different names assigned to these entities, they all pertain to the broader category of agency-like bodies, studied in the present research.

thus be referred to as "agencification". These concepts will be better clarified and contextualised in Chapter III.

The notion of agencification will be juxtaposed to the concept of "transnational network" governance, characterising an alternative (and often antecedent) governance model: as clarified in Chapter I, regulatory networks can be effectively qualified as peculiar environments where NRAs concur to regulate a specific domain, in a (tendentially) voluntary and non-hierarchical manner.

In this sense, a broad notion of governance has been privileged in the present research, so that it would encompass both the model defined in decentralised agencies and the role of regulatory networks. In this context, energy governance would entail defining a cohesive set of rules for the exercise of the Union's (shared) competences, aiming at a "good regulation" of the relevant sector. In particular, in assessing the constitutional sustainability of the relevant governance dynamics, Baldwin's well-known notion of "good regulation" will be taken into account in the present research[3]. It builds upon the concurring permanence of five criteria: fulfilment of the legislative mandate, accountability (both judicial and through democratic institutions), due process (adoption of the relevant acts through a fair, accessible and open procedure), relevant technical expertise, efficiency. As observed in Chapter III, the notion of regulatory efficiency fitting with the present research is that entailing the achievement of the legislative mandate with the minimum possible use of resources.

Within the setup of a constitutionally viable paradigm for the evaluation of good governance and regulation in the energy sector, it will thus be paramount to observe the concrete declinations of the key concept of institutional balance, enshrined in the trilateral relationship between independence, transparency and accountability. While these concepts will be clarified throughout the present research (and mainly in Chapters II and III), it is preliminarily relevant to underline how their interlocking nature plays a crucial role in the identification of the relevant framework of discussion. In particular[4], taking into account a composite notion of institutional supervision including both *ex ante* and *ex post* constituent elements.

[3] See BALDWIN – CAVE – LODGE, *Understanding Regulation*, Oxford University Press, Oxford 2011, pp. 26 – 33.
[4] See BOVENS – CURTIN – HART, *The EU's accountability deficit: reality or myth?*, in BOVENS - CURTIN – HART (eds.), *The real world of EU accountability: what deficit?*, Oxford University Press, Oxford 2010.

2. A constitutional approach to energy regulation

2.1 Research question

In light of the agencification process occurring in the energy sector as a reaction to the persisting need to further market harmonisation, the present research revolves around the following research question: how is internal energy market governance telling of the evolving regulatory dynamics within the European Union?

It is paramount to underline that the research question at stake, which has a key institutional and constitutional relevance in the divide between regulatory convergence and divergence, does not aim at suggesting that the shift from network to agency governance is unique to the energy sector[5]. Rather, the present research will argue that, due to the tangible peculiarities of the agency phenomenon in the energy sector, the Commission's approach to energy regulation can play a role in sketching an evolutionary pattern for European policy making.

In other words, the establishment, practice and potential evolutions of the Agency for the Cooperation of Energy Regulators, ACER (and its governance antecedent, the European Regulators' Group for Electricity and Gas) will be primarily investigated in terms of constitutional sustainability of the delegation model. Notably, the institutional balance characterising the peculiar relationship between the Agency and the coordinated national regulatory authorities (NRAs) will be autonomously considered, in order to assess the viability of the notion of "network agency" in this context.

More specifically, in assessing the constitutional implications of the governance model developed in the energy sector, the present research aims at bridging the gap between the legal and political scholarship on the institutional underpinnings of administrative delegation in the EU. The internal energy market will thus be considered a privileged perspective over the observation of policy making patterns in the European model.

Understandably, the divide between regulatory convergence and divergence plays a crucial role in the definition of the issues at stake, in light of the shared competence principle on

[5] See, *ex multis*, EBERLEIN – GRANDE, *Beyond delegation: transnational regulatory regimes and the EU regulatory state*, in *Journal of European Public Policy*, 12/2005, pp. 89 – 100: establishing regulatory agencies as a way to bridge the regulatory gap defined by transnational networks is a common policy adopted by the Commission in all "sensible sectors".

energy matters enshrined in Article 194 TFEU. Indeed, agencification will be qualified as a progressive embodiment of the principles of subsidiarity and executive federalism, defining the relevant constitutional dynamics in energy governance. Coordination and fragmentation in ACER's practice will thus serve as the key parameters to assess the sustainability of the agency model in the post-Lisbon scenario.

2.2 On methodology

The present research will be preeminently based on the usage of traditional[6] legal methods in the observation and analysis of the substantial issues at stake. Indeed, both the key normative materials and the relevant case law will be consistently interpreted in order to identify the key patterns of convergence and divergence in regulatory practice. A historical, evolutionary approach will also be specifically useful in assessing the shift from network to agency governance in the energy sector, while observing the several steps characterizing energy regulation in the EU.

In this context, evaluating the actual involvement of national regulators in the working mechanisms and regulatory outputs of the Agency will be particularly crucial, in order to assess the conflict between centralisation and fragmentation beyond the scope of a mere observation of the relevant normative and judicial material.

More specifically, a constitutional perspective will be adopted in assessing the practice of the Agency, as emerging from both the establishing Regulation and ACER's internal decisions, minutes and working documents. In other words, the good (market) governance principles building up to the constitutional sustainability of the Agency's practice (independence, accountability, transparency) will be considered the key normative standards to develop a constitutionally oriented interpretation of the relevant documents.

In defining a useful set of criteria to qualify the constitutional status of the Agency's structure and practice, both the legal and the political science scholarship will be used. Notably, a

[6] See ORESTANO, *Introduzione allo studio storico del diritto romano,* Giappichelli, Turin 1963 and CASSESE, *Il sorriso del gatto, ovvero dei metodi nello studio del diritto pubblico* in *Rivista trimestrale di diritto pubblico*, 3/2006, pp. 597-612.

transversal and multidisciplinary approach to administrative delegation in the "post-regulatory State"[7] will be paramount in providing a composite answer to the main issues stemming from the present research.

3. Research plan and structure

In order to address the main research question, introduced in section 2.1, the present thesis will be structured along three main sub-questions. Each question will be tackled in a separate chapter, thus defining a coherent and cohesive framework, in a progressive manner.

In particular, Chapter I will revolve around the following question: how is the European internal energy market regulated, and which is the role played by the Agency for the Cooperation of Energy Regulators in this scenario? Indeed, by framing the main issues at stake both theoretically and economically, this chapter will provide the key context to the analysis to be carried out in chapters II and III. More specifically, after having suggested a first approach to network governance, this chapter will present the main challenges to market harmonisation in the energy sector, and it will focus specifically on the accountability and independence leap from the network model enshrined in the European Regulators' Group for Electricity and Gas (ERGEG) to the establishment of the Agency for the Cooperation of Energy Regulators (ACER). In this regard, Chapter I will suggest a few preliminary (potential) clashes between ACER's model and the hybrid notion of "network agency".

This issue will be specifically analysed in Chapter II, which will concentrate on the following question: which are the distinguishing features of ACER's practice, with particular regard to the involvement of National Regulators in supranational policy making? Notably, it will be argued that, in order to correctly assess the relationship between regulatory convergence and divergence, the actual involvement of national regulators in the Agency's decision-making process has to be taken into account, while considering ACER's practice in light of an appropriate legitimisation scheme for power delegation within the EU. Consequently, Chapter II will first suggest a classification of ACER's tasks according to the varying degree of

[7] SCOTT, *Regulation in the age of governance: the rise of the post-regulatory State*, in LEVI-FAUR – JORDANA (eds.), *The politics of regulation*, Edward Elgar, Cheltenham 2004, pp. 145 – 174.

participation of NRAs to the decision-making process, and then focus on the theory of delegation pursuant to the *Meroni/Romano* doctrine and the subsequent developments in the 2014 *Shortselling* case. Thus, the justiciability of ACER's soft law and the internal governance dynamics of the Agency will be autonomously considered, highlighting the key peculiarities of agency governance within the energy sector.

Finally, Chapter III will frame the distinguishing features of energy governance within the constitutional debate on the agencification of the European executive. In particular, it will deal with the following research question: can European constitutional law provide a viable paradigm for the analysis of the issues at stake, in light of the dynamism of sector regulation? In Chapter III, through a structural analysis of the main conceptual underpinnings of the notion of "agencification" and a composite observation of its relationship with the principles of good (market) governance, it will be argued that the apparent mismatch between the agencies' relevance in European regulatory practice and the lack of recognition of such phenomenon in European primary law is particularly striking. Notably, the need to constitutionalise the agency phenomenon will be clarified, with particular regard to the evolution of energy governance in the 2016 Commission's proposal for a "fourth energy package". In this context, reconciling the key tenets of accountability and independence within the practice of the Agency for the Cooperation of Energy Regulators will prove particularly crucial in shaping a perspective pattern for European (delegated) sector regulation.

Chapter I

Towards network regulation in the energy sector

1. Introductory remarks

This Chapter represents the first pillar of the present research, as it aims at depicting the regulatory framework in place with regard to energy law and policy in the European Union. Indeed, it revolves around the following question: how is the energy market regulated, and which framework is to be considered relevant in order to assess the role and structure of the Agency for the Cooperation of Energy Regulators (ACER)? Providing an answer to this question represents the necessary precondition to the development of the present research, in which both the regulatory practice of ACER (Chapter II) and the constitutional implications of the so-called "agencification" process of European policy making (Chapter III) will be assessed.

Broadly speaking, it is possible to assume that regulatory interventions occur in intricate and many-sided contexts: the main political literature on the issue of networks is well aware of the insidious ground in which this analysis has to take place, where public and private subjects share more and more of their resources and interdependent policy-making goals[1]. In such an environment, there are two distinctive alternative paths the European legislator could have chosen: deregulation through vertical policy making or horizontal coordination through (flexible) networks[2]. The latter approach will be discussed in this research, as it represents one key element of energy regulation in the EU, notwithstanding the paramount role played by European institutions in shaping energy policy goals[3]. Notably, the shortcomings and

[1] See BOGASON – TOONEN, *Introduction: Networks in public administration*, in *Public Administration*, 76(2)/1998, pp. 205 – 227.

[2] See VAN DEN BERGH – CAMESASCA, *European Competition Law and Economics: A comparative perspective*, Sweet & Maxwell, London 2006, p. 403.

[3] One paradigmatic area of the legislative activism of European institutions has undoubtedly been the development of Renewable Energy Sources (RES) policy. Notably, while RES regulation will not be specifically analysed in the present research, as it only focuses on governance and administrative issues, it is worth underlining its key sector regulation character, which has been duly observed in CARNEVALE – CARROZZA – CERRINA FERONI – FERRARI – MORBIDELLI – ORRÙ (eds.), *Verso una politica energetica integrate – le energie rinnovabili nel prisma della comparazione*, Editoriale Scientifica, Naples 2014.

downsides of this model will also be taken into account: shaping multilateral governance through networks could result in an excessively flexible regulatory scheme, which, being far from the traditional vertical model of policy making, lacks relevant accountability procedures[4].

Is a move towards accountability key to the development of network governance in the internal energy market? And, more importantly, is this regulatory asset telling of new constitutional trends within European policy making? The present chapter will provide the necessary background to delve into these issues in Chapters II and III. Accordingly, some theoretical underpinnings to network governance will preliminarily be recalled: section 2 will frame the discussion around ACER (and its institutional antecedent, ERGEG) within the network regulation debate, from a purely theoretical (and introductive) perspective. Section 3 will then focus on the energy market, while providing both an economic and a regulatory insight over current policy choices and challenges to market integration. Finally, section 4 will provide a structured introduction to ACER, highlighting the main problematic issues to be observed in a critical perspective over the following Chapters.

2. Theoretical underpinnings: an introduction

As anticipated, this section aims at providing a theoretical perspective over the observation and analysis of the European Agency for the Cooperation of Energy Regulators (ACER)[5]. In particular, as observed in Chapter III, it will be argued that the development of ACER can be considered part of the so-called "agencification" process of European governance, according to which "network agencies" play a crucial role in supranational regulation. The concept of "regulatory network" will thus be presented, so that the relevance of networks as juridical entities will be used as a prism in order to study the main features of ACER.

As a matter of fact, networks represent a key regulatory tool in European governance; very remarkably, they have been considered "the new paradigm in the architecture of

[4] See BORZEL, *Organizing Babylon – on the different conceptions of policy networks*, in *Public administration*, 76(2)/1998, p. 259.
[5] Part of this section is based upon the research conducted for my Master thesis: *From competition to integration - the dynamics of regulatory practice within the Internal Energy Market: an evolutionary approach to macroeconomic network governance*, Pisa University, 7th July 2014.

complexity"[6]. From a merely socio-political point of view, networks can be defined as a structured connection between stable and non-hierarchical relationships linking separate knots one to the other. The different actors involved are substantially independent, qualifying networks as horizontal structures based on cooperation and resource-sharing towards a common goal[7]. This primitive attempt to determine what networks are (and what they are not) underlines some paramount features of the regulatory model involved, which challenges and ultimately subverts the traditional idea of pyramidal governance.

It is clear that this increasingly autonomous organizational model could be studied adopting different perspectives. This research will focus on the regulatory aspects of the concept of networks: new paradigms of governance can be extrapolated from this sculpt, on both a "natural" and a strictly juridical perspective. In this sense, it is paramount to stress the fact that the energy sector represents an utterly interesting case study, since in this particular field (as it has been developed in the European Union framework) both natural and juridical networks interlink, shaping a truly unique structure. Thus, networks will not be considered as a mere intermediation of conflicting interests: they will be regarded as the participative way in which policy enforcement in the energy sector has been granted through (European) policy making tools[8]. In this process, a vital role is played by the close analysis of the interactions between independent and heterogenic actors[9].

2.1 Applying a relational approach to sovereignty

The profound juridical nature of networks deserves peculiar attention. Indeed, in this context we are not referring primarily to the concept of network as transactional and transnational regulatory model: more importantly, we are to analyse the deep connection existing between networks and the way sovereignty is perceived. The issues and interests at stake are not

[6] KENIS – SCHNEIDER, *Policy networks and policy analysis: scrutinizing a new analytical toolbox*, in MARIN – MAYNTZ (eds.), *Policy network: empirical evidence and theoretical considerations*, Campus ed., Frankfurt 1991, pp. 25 – 59.
[7] BORZEL, *Organizing Babylon – on the different conceptions of policy networks*, in *Public administration*, 76(2)/1998, pp. 253 – 273.
[8] On the juxtaposition of these two perspectives, WILKS, *Understanding competition policy networks in Europe: a political science perspective*, in EHLERMANN – ATANASIU (eds.), *European Competition Law Annual 2002: Constructing The EU Network Of Competition Authorities*, Hart publishing, Oxford 2002, pp. 65 – 79.
[9] See BORZEL, *Organizing Babylon – on the different conceptions of policy networks*, in *Public administration*, 76(2)/1998, p. 259 and BOGASON – TOONEN, *Introduction: Networks in public administration*, in *Public Administration*, 76(2)/1998, pp. 205 – 227.

secondary. The main question, rephrased above, is the following: when do networks stop to be evolutionary normative models based on horizontal multilateral governance, and become uncontrollable and incoherent hydras? In other words, efficiency and efficacy of the network model are to be observed here. Therefore, the juridical emersion of the concept of network will be taken into consideration.

As notoriously stated by Cassese[10], "the legal concept of network refers to an organizational figure composed of public offices and characterised by two main elements: belonging to different entities and collaboration or interdependence". The interaction between these two aspects, as well as the presence of other additional factors, represent the distinctive elements shaping the different networking models known in the administrative experience of the European context. Thus, while reconstructing a possible morphology of networks, the immediate juxtaposition between this model and the traditional national paradigm based on unity and hierarchy within the State becomes evident[11].

First of all, it should not be underestimated that the macro-context of this discourse is the well-known phenomenon of the progressive erosion of national sovereignty, which challenges and ultimately overcomes the traditional idea of national State, evocatively portrayed by the image of the *poleis*[12]. The fundamental characters of such a reality, both on a legal and a socio-economic perspective[13], will be quickly observed in the following paragraph. However, even at such an early stage of the present thesis, it is important to focus on the foundations of this shift from sovereignty to macroeconomic network governance. The causes of such an evolution lie in three main factors: "high openness to the international network of *poleis* (cities); high openness to cultural influences which transcend ideological boundaries; high permeability of territorial boundaries" [14].

[10] CASSESE, *Le reti come figura organizzativa della collaborazione*, in PREDIERI – MORISI (eds.), *L'Europa delle reti*, Giappichelli, Turin 2000, pp. 43-44.
[11] See CASSESE, *La funzione costituzionale dei giudici non statali. Dallo spazio giuridico globale all'ordine giuridico globale*, speech given to the French Court of Cassation, Paris, 11th June 2007, available at https://www.irpa.eu/wp-content/uploads/2011/06/Cassese2.pdf.
[12] See PERULLI, *La città delle reti. Forme di governo nel postfordismo*, Bollati-Boringhieri, Turin 2000, p. 67 ff.
[13] See BARBERA – NEGRI, *Mercati, reti sociali, istituzioni. Una mappa per la sociologia economica*, Il Mulino, Bologna 2008, p. 134.
[14] PERULLI, *La città delle reti. Forme di governo nel postfordismo*, Bollati-Boringhieri, Turin, 2000, p. 74.

In this context, networks become an inevitable "conceptualistic scheme"[15] where a multitude of segments and knots, organised in cells and matrixes, substitute the metaphorical pyramid of the State[16]. Indeed, a network can thoughtfully be visualised as a matrix: this image is particularly suitable to translate the complexity of the challenges of macroeconomic network governance into the language of the contemporary legal reality. Interestingly, networks have been defined as "complex structures aimed at connecting different knots linked one to another by lines and segments characterised by a collaborative and communicative nature" [17]. The social agreement on which the idea of sovereignty is built is therefore subverted by a circular and horizontal circuit, where the interactive[18] nature of governance ends up reconstructing as a comprehensive matrix the complexity of "democratic and pluralistic States" [19].

The idea of matrix emerging from these first thoughts[20] implies some interaction (and integration) between economic, cultural and sociological factors. The unifying role of law in this multifaceted background is paramount, as it leads to a redefinition of the concept of sovereignty in its most horizontal and non-hierarchical nature. At a transnational level no clear vertical organisation can be found linking the different actors and knots of networks[21]. Indeed, it is clear that networking structures stress the importance of ties and bonds as archetypical figures of the equality characterising the different actors, linked one to the other through cooperation, collaboration and communication[22].

This particular aspect is substantial to the point that some scholars have ended up denying the existence of a networking model *per se*: according to this perspective, the concept of "network" is nothing but a "fluid organisation of knots that interact and dialogue with each other"[23]. This thesis, however fascinating, cannot be supported. Indeed, we are to define a theoretical *reduction ad unitatem* of the different juridical declinations of networks, which, far from being a so called "fluid organisation", represent a tangible and challenging governance

[15] See PREDIERI, *Le reti transeuropee nei trattati di Maastricht e di Amsterdam*, in *Il diritto dell'Unione Europea*, 3/1997, p. 287 ff.
[16] See FREDIANI, *La produzione normativa nella sovranità "orizzontale"*, ETS, Florence 2010, p. 105.
[17] *Ibid.*, p. 109.
[18] See PINNA, *La costituzione e la giustizia costituzionale*, Giappichelli, Turin 1999, p. 97 ff.
[19] See FREDIANI, *La produzione normativa nella sovranità "orizzontale"*, ETS, Florence 2010, p. 158.
[20] See PINNA, *La costituzione e la giustizia costituzionale*, Giappichelli, Turin 1999, *passim*.
[21] See LOMI, *Reti organizzative: Teoria, tecnica e applicazioni*, Il Mulino, Bologna 1991, p. 54 ff.
[22] See FERRARESE, *When National Actors Become Transnational: Transjudicial Dialogue between Democracy and Constitutionalism*, in *Global Jurist*, 9/2009.
[23] PINNA, *La costituzione e la giustizia costituzionale*, Giappichelli, Turin 1999, p. 110.

tool[24]. In this sense, reference has to be made to the experiences relating to "coadministration" and "shared administration" within the European regulatory horizon. In particular, we are to deal with a "reticular model which has the effect to create a profound and structured shared entitlement of European and national administration duties, [...] operating in a cohesive way in order to realise joint goals" [25].

Hence, networks are composed of interactive segments and knots based on the cooperation of heterogeneous institutional actors: they are to be closely observed as they represent concrete governance tools in the European panorama, being the result of the crisis of the traditional idea of sovereignty due to both globalisation and regionalism[26]. Therefore, even though networks exist because of the increasing complexity of the relationships between centre and periphery, they do not deny the traditional idea of sovereignty. On the contrary, network governance redefines in a relational and horizontal way the pyramidal structure of the regulatory framework. In other words, networks are organisational figures of cooperation[27], thanks to which the clear-cut distinctions between different administrative levels are substituted by a "complex structure resulting from elements that interact with each other creating a texture made of branches, twigs and knots" [28].

Its dialogic nature implies original decisional flows and regulation schemes, responding to the active interface and exchange between the different actors involved and collaborating to global policy making[29]: the equal cooperation of the knots in the network represents the focal point of a new paradigm, which is (not opposed to, but) coherent with the (physiologic) evolution of the concept of sovereignty.

2.2 Network governance and the EU

The role played by economic supra-structures in the development of regulatory administration is preeminent, as clearly emerging from section 2.1. In fact, in order to properly assess the

[24] For an interesting and concise overview, see AMMANNATI – BILANCIA (eds.), *Governance dell'economia e integrazione europea. Govenance multilivello, regolazione e reti*, vol. II, Giuffré, Milan 2008.
[25] CHITI – FRANCHINI, *L'integrazione amministrativa europea*, il Mulino, Bologna 2003, p. 61 ff.
[26] For the relevant distinction between decentralisation and "non-centralisation", see FREDIANI, *La produzione normativa nella sovranità "orizzontale"*, ETS, Florence 2010, p. 106.
[27] *Ibid.*
[28] CASSESE, *Lo spazio giuridico globale*, Laterza, Roma-Bari 2003, p. 21.
[29] See IELO, *Amministrazioni a rete e reti di amministrazioni: nuovi paradigmi della global governance*, in *Amministrare*, 3/2003, p. 370 ff.

evaluation concerning the development of the relational approach to sovereignty referred to in the previous paragraph, it is of paramount importance to focus on some preliminary observations related to the evolution of the transnational economic context. Thus, in this paragraph we are to valorise the fundamental concept according to which figures that are indicative of the improvement of networks emerge where regulatory issues of transnational importance occur.

In particular, this section is focused on the idea that "networks are symptomatic figures of post-fordism" [30]. In order to consider such a proposition, it is fundamental to observe the historical and economic juxtaposition[31] between the notion of "Fordist State" and the modern idea of State (so-called "post-fordist"). The first concept well-knowingly refers to the extension to the State of the vertical paradigm which is innate to the industrial and productive fordist organisation. Within this general scheme, the binomial combination of State and corporate is strong and powerful, as it involves both social and temporal variables[32]. What is more, it is possible to affirm[33] that within this framework States fully accomplish the three traditional goals and functions characterising national paradigms: the contractual view theorised by Hobbes, Weber's coercion hypothesis and Durkheim's conception of State as identity. As a matter of fact, through the valorisation of the social compromise, fordist States represent the privileged interlocutors of the Keynesian dialogue between interest coalitions and group protagonism, while basing their normative power on the clear space definition provided by territorial boundaries[34].

Coupling networks with post-fordist States means acknowledging a crucial departure from the *status quo* described, with relevant socio-economic, as well as juridical, consequences. Indeed, while in the productive sector multinationals have imposed an a-territorial approach to economic governance, the regulatory framework needs to take into consideration multiple perspectives, including the new social composition of the Western post-industrial context[35].

[30] PERULLI, *La città delle reti. Forme di governo nel postfordismo*, Bollati-Boringhieri, Turin 2000, p. 32.
[31] See FANFANI, *Storia economica*, McGraw Hill, Milan 2010, p. 144.
[32] *Ibid.*
[33] See PERULLI, *La città delle reti. Forme di governo nel postfordismo*, Bollati-Boringhieri, Turin 2000, p. 35.
[34] *Ibid.* For a more recent take on the fluidity of the post-fordist State from a governance perspective, see BOLOGNINI, *Il paradigma smart city e le sue evoluzioni: strumento di governance?*, in FERRARI (ed.), *La prossima città*, Mimesis, Milano 2017, pp. 181 ff.
[35] See VELTZ, *Economia e territori: dal mondiale al locale*, in PERULLI, *Neoregionalismo*, Bollati-Boringhieri, Turin 1998, p. 130 ff.

The vertical and top-down approach, that in fordist societies[36] shifted from firm to State organisation, paved the way to a constructive network thanks to which differentiated actors operate in productive, commercial, cultural, social and ultimately sociological ways. In fact, "the most active flows within networks have a strong inter-sectorial nature; they reflect the existence of networks of production [...] overcoming boundaries and continents" [37].

It would be rather undue to remark the well-known observations concerning the nature and effects of globalisation on socio-economic relationships starting from the second half of the XX century, as these are copiously presented in the most relevant literature on the topic. Instead, we are to underline the close relationship between macro-economic issues and regulatory tools, in this increasingly interconnected network structure at a transnational level, acting as a "great sea crammed with archipelagic States, political entrepreneurs"[38]. In other words, networks shed a new light over the contradictory and dialectic relationship between State form and macroeconomic regulation[39], as they represent a brand new phase in the construction and development of the balance of power in the administrative sector. As a result, networks are primordial spaces of social integration, where both the formation of collective identities and the control role pertaining to the State[40] are developed, through the regulation of structurally supranational phenomena.

At this point of the present discourse, one vital step forward is required: which are the applicability limits of the reticular model to the European multilateral context? It is clear that such a question is more than crucial to the development of this thesis, as it underlines some of the multifaceted facings of the European integration process. Interestingly, the latter has been regarded to as a "process of unification of two or more juridical orders, [...] consequential series of legal acts aimed at the production of an effect: [...] the construction of a single legal order, instead of a plurality of pre-existing orders" as it is "characteristic of this process the fact that, within its development, it modifies the norms concerning the production of legal materials of the integrating orders"[41]. This definition is relevant because the present analysis will specifically focus on the structural function of networks as original policy making and

[36] Mainly United States up until the 1950s, but even Asia and Europe later on.
[37] VELTZ, *Economia e territori: dal mondiale al locale*, in PERULLI, *Neoregionalismo*, Bollati-Boringhieri, Turin 1998, p. 132.
[38] See SAPELLI, *Comunità e mercato*, Rubbettino, Soveria Mannelli 1996, p. 193.
[39] Così, PERULLI, *La città delle reti. Forme di governo nel postfordismo*, Bollati-Boringhieri, Turin 2000, p. 34.
[40] *Ibid.*
[41] ITZCOVICH, *Integrazione giuridica, un'analisi concettuale*, in *Diritto Pubblico*, 3/2005, p. 11.

policy enforcement tools within the European integration framework. Actually, networks play their most relevant role particularly during the modification process referred to above.

As seen before, a network is a "pattern of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the domestic from international sphere" [42]. This structure is undoubtedly coherent with the integration instances of the European Union, while stressing a close cooperation between different levels of administration: it is a spontaneous and highly dynamic model. Indeed, it is essential to underline that reticular forms have been applied in differentiated ways within the European context[43], where a sensible evolution has occurred from "first-generation" to "second-generation" networks. The former concept refers to networks based on "single", uni-personal and highly technically specialised contacts[44], according to the model of the so-called "spontaneous assistance" [45], while "second-generation" networks imply composite and multi-personal reticular structures, developed in vast fields and aimed at progressing new knowledge and competences[46]. The latter type is vital as it allows (and, to some extent, forces and enforces) crucial links between national institutions and branches of national administration bodies (e. g. Regulatory authorities) [47], thus formalising and fixing into procedural schemes the cooperation matrix at the basis of networks, while consenting to its proper and tangible juridical emersion.

Interestingly, however, the result of such a mutation is not the growth of brand new managerial centres producing new binding legal material[48]. Instead, cooperation and exchange circuits and routes are developed, through the valorisation of co-administrative procedures. The characteristics of such a form of collaboration within the Union, which have fruitfully

[42] SLAUGHTER, *A new world order*, Princeton University Press, Princeton 2004, p. 14.
[43] CANEPA, *Reti europee in cammino. Regolazione dell'economia, informazione e tutela dei privati*, Jovene, Naples 2010, p. 5-10.
[44] A few law enforcement European networks can be mentioned as relevant examples, such as the trade and civil law network, the criminal law network.
[45] Art. 13 of Regulation (EC) No 515/97 of 13 March 1997 *on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters* states that: "The competent authorities of each Member State shall, as laid down in Articles 14 and 15, provide assistance to the competent authorities of the other Member States without prior request.".
[46] The *ECCnet*, EURES and SOLVIT networks are well explanatory of this phenomenon.
[47] Cfr. CANEPA, *Reti europee in cammino. Regolazione dell'economia, informazione e tutela dei privati*, Jovene, Naples 2010, p. 8.
[48] *Ibid.*

been synthesised by Cassese[49], will only be quickly reminded here: European Union-related discipline; public interest equally distributed among different subjects with regards to both structure and provenience; agreements between European Commission and national administration concerning the evaluation of the public interests at stake. As already mentioned in numerous occasions, this passage is crucial: it represents the neglect of a top-down approach within the European Union, while embracing instead a new system which is based on horizontal and multi-polar logics.

Given the natural flexibility of network models, as well as the variegated exigencies they respond to, the reticular regulation of transnational economic phenomena within the European context can generate differentiated normative outcomes (while remaining inside the soft law perimeter). In particular, this discourse agrees with those[50] who categorise institutional European networks in three areas: execution and policy enforcement networks (CESR, financial market regulation, European Competition Network); harmonisation networks (communication and energy sectors, on which this thesis is focussed); information networks (justice area, networks linking supreme courts...).

It is evident that this distinction classifies networks according to the scope, goals and purposes of their formation and development. However, just like every artificial classification, this analysis may present some major inconsistencies and shortcomings when applied to a concrete reality as flexible and dynamic as the one concerning networks. What is more, trying to find a stricter and more rigid cataloguing would not only be useless but also damaging, as it would result in losing the *quid pluris* constituted of the peculiarities of each practical example of network in the European framework. Therefore, I have decided not to indulge any further in sterile general considerations and analyse the energy sector as a paramount case study of the overall network experience within the European Union.

3. Setting the scene

After having shortly recalled the theoretical underpinnings to network regulation, this section provides a synthetic overview of the main economic and regulatory elements pertaining to the

[49] See CASSESE, *La signoria comunitaria sul diritto amministrativo*, in CASSESE (ed.), *Lo spazio giuridico globale*, Laterza, Roma-Bari 2003, p. 98.
[50] See CRAIG, *Shared administration and networks: global and EU perspective,* in ANTHONY – AUBY – MORISON – ZWART (eds), *Values in Global Administrative Law, Essays in Honour of Spyridon Flogaitis and Gerard Timsit,* Hart Publishing, Oxford 2011.

internal energy market. As anticipated, indeed, this first chapter of the present research aims at providing a structured framework to the contextual analysis to be developed in Chapters II and III. It is thus paramount to suggest the main axes to be followed when assessing European regulation in the energy sector.

Accordingly, sub-section 3.1 introduces the fundamental infrastructural and economic characteristics of the energy market, in order to suggest, through the observation of market monitoring reports, the current level of integration of the single market. Conversely, sub-section 3.2 presents the main steps taken at legislative and policy making levels to address the integration and interconnection challenges faced by the energy market.

3.1 Market structure and integration: a concise overview

As anticipated, this section will be devoted to depicting a schematic scenario relating to the main economic features of the energy market in the EU. More precisely, this paragraph aims at framing the role of the main actors within this field in a systematic manner, while presenting the key trends shaping the development of the sector, in a necessarily evolutionary perspective. In this context, it is paramount to underline that, in line with the clarifications made in the introductory paragraphs to the present research, this study focuses on the electricity and gas markets, which cover the scope of application of the "general energy market directives"[51], which are similar both in structure, objectives and language.

The basic structure of the internal energy market[52] is closely linked to the physical and economic features of the infrastructure characterising this sector[53]. The primary reference in this context is that pertaining to the three phases of the relevant economic chain: energy

[51] TALUS, *EU Energy Law and Policy: A Critical Account*, Oxford University Press, Oxford 2013, p. 67.

[52] In the present research the terms "internal energy market" and "single energy market" will be used interchangeably. It is worth however mentioning that, following a more internal-market oriented approach, the idea of an "internal market" should in principle represent the expected outcome of the liberalisation process within the single energy market. On this distinction, see European Parliament, DG for Internal Policies, *Competition Policy and an Internal Energy Market*, 2017, p. 20, available at http://www.europarl.europa.eu/RegData/etudes/STUD/2017/607327/IPOL_STU(2017)607327_EN.pdf .

[53] The lexicon used in this section will be considered as overlapping when mentioning the electricity and gas environments. This is not to suggest that no differences exist in terms of physical market structure when reconstructing the two policy areas; rather, it aims at stressing the fact that energy law within the EU (and especially the energy directives) aim at minimising such divergences. The most relevant differences between gas and electricity are located at generation stage, and they have relevant consequences both in the application of exception/derogations (see e. g. Article 17 of Regulation (EC) 714/2009 and Article 36 of Directive 73/2009) and in the answers provided at EU level to tackle the issue of security of supply.

generation, transmission and distribution (which ought to be separated in a liberalised market) and retail. Generators, suppliers and large industrial consumers take part to the wholesale market. Suppliers offer energy to individual consumers on the retail markets[54].

As far as the first stage is concerned, electricity is variously generated (although not storaged[55]) throughout the EU, with physical grids including energy generators which can be very different in terms of capacity, energy sources, modes of operation, ownership regimes[56]. In the case of gas, although storage mimics the generation stage from a policy perspective, as it suggests somewhat similar dynamics in terms of goals and challenges, the first section of the infrastructural grid is mostly characterised by a strong dependence on the location of natural gas resources as well as on the technological development of the actors at stake[57].

Conversely, transmission and distribution imply converging policy challenges in electricity and gas. The key relevance of timing (according to which supply and demand must match at all times due to limited cost-efficient storage techniques), as well as the role played by networks (operated by Transmission System Operators and Distribution System Operators) in a scenario structurally characterised by natural monopolies[58], suggest the emergence of peculiar and autonomous issues to be tackled by the European policy maker. In this context, prices at wholesale level are inextricably connected to retail market dynamics, in an increasingly interconnected market the regulation of which entails both liberalisation concerns and public policy issues, such as the definition of capacity markets[59]. Table 1, below,

[54] In the electricity sector, small energy producers often active in the renewable energy sources environment participate to the retail market by entering directly into the distribution chain, thus bypassing transmission system operators.

[55] On the impossibility to storage electricity as a differentiating factor between electricity and gas regulation, see TALUS, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, Kluwer Law International, Alphen aan den RijIn 2011.

[56] See European Parliament, DG for Internal Policies, *Competition Policy and an Internal Energy Market*, 2017, p. 24, available at http://www.europarl.europa.eu/RegData/etudes/STUD/2017/607327/IPOL_STU(2017)607327_EN.pdf.

[57] The progressive increase in the usage of unconventional, LNG gas surely represents a paradigmatic example in this sense.

[58] For a clear and comprehensive overview of this issue, see BERG – TSCHIRHART, *Natural Monopoly Regulation: Principles and Practice*, Cambridge University Press, Cambridge 1988 and HELM, *Energy policy: security of supply, sustainability and competition*, in *Energy Policy*, 30/2002, pp. 173-184.

[59] The design of capacity markets represents one possible answer to the controversial issue of security of supply, with both regards to the intrinsic intermittency of selected energy sources, and exogenous factors (such as international agreements). As suggested by the 2014 State Aid Guidelines on Energy and Environment (European Commission, *Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020*, O. J. C 200, 28 june 2014, p. 1–55) it is a paradigmatic example of public policy goals intertwining with the necessity to develop undistorted competition. There is a copious amount of literature on the topic. For a comprehensive overview, see BOSCHECK, *State aid, National Energy Policy and*

schematises the infrastructural flow and the governance challenges faced in the electricity and gas networks.

Table 1[60]

Upstream **(Storage)**	Electricity generation Natural gas extraction and rigassification (For gas only)	Potentially competitive
Transmission	High voltage (electricity) High pressure (gas)	Natural Monopoly[61] Network as an essential facility Regulated business (NRAs, Agency for the Cooperation of Energy Regulators)
Distribution	Local networks connecting final customers	
Retail	Billing, Consumer Service	Potentially Competitive

In line with the aforementioned considerations, four main areas are deemed[62] to be symptomatic of the integration stage reached by the internal energy market: gas and electricity

EU Governance, in *Intereconomics – review of European Economic Policy*, 5/2014 and LUCIANI, *Security of supply in natural gas markets: what is it and what it is not*, INDES Working Paper No. 2, 2004, available at https://ceps01.link.be/files/No2%INDES%20.pdf.

[60] It is worth mentioning that this table has to be interpreted according to a top-down logic, consistently with the "one way" nature of the energy network, implying a single direction for the relevant flow. For the economic characteristics of the energy network as a one-way network, see SCARPA - DENOZZA, *Evoluzione possibile della regolazione*, in BRUTI LIBERATI - FORTIS (eds.), *Le imprese multiutility. Aspetti generali e prospettive dei settori a rete*, Mulino, Bologna 2001.

[61] See SCHERER, *Industrial Market Structure and Economic Performance*, Houghton Mifflin, Boston 1980, pp. 100-119.

[62] See Agency for the Cooperation of Energy Regulators (ACER), *Annual Report on the Results of Monitoring the Electricity and Gas Internal Markets in 2016*, October 2017, available at https://acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ACER%20Market%20Monitoring%20Report%202016%20.pdf. The Annual Market Monitoring Reports, prepared by the Agency in cooperation with the Council of European Energy Regulators (CEER), presents the results of the Agency's monitoring of market prices, as well as network access, and it covers the effects of the implementation of the relevant electricity and gas Network Codes. In its latest report, the Agency for the Cooperation of Energy Regulator stresses that "monitoring is still hampered by the difficulty of the Agency to collect the necessary data, hence it

wholesale markets, retail prices, consumer rights and empowerment. More precisely, observing the trends followed by these indicators can suggest the permanence or definition of internal barriers to the development of the single market. Notably, these elements will represent the conceptual background of the policy considerations to be put forward in the following sections. As a matter of fact, in order to assess the efficiency[63] of the regulation in place in the energy sector, it is paramount to clarify what the factual state of the art is in terms of actual market integration.

As far as gas wholesale markets are concerned, substantial divergences linger among Member States: European market integration is hampered by persisting barriers to trade, as well as relevant differences in both market design and functioning at national level. In particular, while the implementation of Network Codes[64] helps levelling the playing field in most hubs, while enhancing liquidity, substantial differences hampering the development of a single gas market remain. In other words, while the overall trend[65] is positive, market design still

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should be given information gathering powers." As suggested in the following chapter of the present research, this is one of the elements assessed in the frame of the Winter Package (*Proposal for a Regulation of the European Parliament and of the Council establishing a European Union Agency for the Cooperation of Energy Regulators (recast)*, COM(2016) 863, 30 novembre 2016, 2016/0378 (COD)). Finally, it is worth noting that the markets covered by ACER's monitoring activity include the EU MSs and the associated markets of Norway and Switzerland. For selected topics, the assessment is extended to the Contracting Parties of the Energy Community Treaty (ECT), aiming at extending the European energy *acquis* beyond the scope of the European internal energy market. The aforementioned countries are: Albania, Bosnia and Herzegovina, Kosovo, Republic of Macedonia, Moldova, Montenegro, Serbia, Ukraine and Georgia.

[63] As anticipated at the outsets of the present research, the notion of efficiency used derives from the social welfare criterion determined for the optimal structure of legal intervention suggested by SHAVELL, *Foundations of Economic Analysis of Law*, Belknap Press, Cambridge 2004, pp. 571 – 591.

[64] Network Codes are soft law instruments that provide harmonized rules for cross-border exchanges of electricity. The sectors in which these can be adopted are listed in Art 8 (6) of the Electricity and Gas Regulations within the Third Energy Package (Regulation (EC) No 714/2009, the "Electricity Regulation", and Regulation (EC) No 715/2009, the "Gas Regulation"), and include: network security and reliability, network connection, third-party access, data exchange and settlement, interoperability, operational procedures in an emergency, capacity-allocation and congestion-management, trading with regard to technical and operational provisions of network access services and system balancing, transparency, balancing, including network-related reserve power, harmonised transmission tariff structures including locational signals and inter-transmission system operator compensation, as well as energy efficiency regarding electricity and gas networks. They are based on Framework Guidelines issued by ACER and, although not *per se* binding, they can be made so through comitology. The legal nature of Network Codes will be observed in Chapter II. For a synthetic and clear overview of the structural differences between Framework Guidelines and Network Codes, see TANASE, *Network Codes & Guidelines. A legal perspective*, July 2018, available at http://fsr.eui.eu/network-codes-versus-guidelines/.

[65] See ACER, *Annual Report on the Results of Monitoring the Electricity and Gas Internal Markets in 2016 - Summary*, October 2017, available at https://acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ACER%20Market%20Monitoring%20Report%202016%20-%20SUMMARY.pdf, p. 3, according to which "The assessment of EU gas markets, performed using the ACER Gas Target Model (AGTM) metrics, reveals an overall gradual improvement in the 2013–2016 period, although further progress towards more liquid and competitive markets is required".

influences the emerging discrepancies, as well as the functioning of gas wholesale markets throughout the EU. It is paramount to stress that a key role must be played by Transmission System Operators (TSOs): Network Codes must be implemented effectively, timely and homogeneously by TSOs throughout Member States, in a transparent[66] and coordinated manner. Cross-border implementation would foster effectiveness and the development of a more integrated market[67].

Table 2, below, summarises the main differences between the different categories of gas hubs in Europe, while specifying the main issues to be tackled in each category, currently hampering the development of a single gas wholesale market.

Table 2[68]

Type of hub	Member States	Defining Characteristic	Key challenges
Established hub	United Kingdom, Netherlands	Broad liquidity with sizeable forwards and price reference indexes.	The remaining barriers hindering the market mainly relate to market functioning. In particular, the divide between cross-border capacity tariffs and hub spreads shall be addressed.

[66] Notably, it is crucial to take into account the role played by ENTSOG, which is the soft law network coordinating European Transmission System Operators in the Gas sector: the ENTSOG Transparency Platform represents a key tool in information access for Gas TSOs, but its efficiency is hampered by structural limits such as the impossibility to track and certify data.

[67] See ACER, *Annual Report on the Results of Monitoring the Electricity and Gas Internal Markets in 2016 - Summary*, October 2017, available at https://acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ACER%20Market%20Monitoring%20Report%202016%20-%20SUMMARY.pdf, p. 4.

[68] This table represents an elaboration of the data included in ACER's *Annual Report on the Results of Monitoring the Electricity and Gas Internal Markets in 2016*. All data has been collected and presented using the ACER Gas Target Model (AGTM). An exposition of the full results and a clarification of the assumptions adopted for the calculation of AGTM can be found at CEER- ACER, *Statistical compendium of AGTM metrics for the year 2016*, October 2017, available at https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/AGTM%20metrics%202016%20-%20statistical%20compendium.pdf . It thus refers to the most recent available data, relating to 2016.

Advanced hub	France, Italy, Belgium, Luxembourg, Germany, Austria, Czech Republic	Higher liquidity but 'spot/prompt' dominated.	Limited liquidity of forward products. Need to better implement the Balancing Network Code.
Emerging hub	Spain, Poland, Denmark, Slovakia	Low but improving liquidity.	High reliance on long-term contracts[69]. Lack of implementation of the Balancing Network Code.
Illiquid hub	Portugal, Ireland, Greece, Croatia, Slovenia, Romania, Bulgaria, Sweden, Finland, Estonia, Latvia, Lithuania, Cyprus	Diverse group: some organised markets in early stage with embryonic liquidity while others lack entry-exit systems.	The barriers hindering market integration depend on market design (rather than market functioning). Therefore, structural reforms are needed, e. g. incentivising the presence of financial traders on hubs to foster forward liquidity. The reliance on long-term contracts and the lack of implementation of the Balancing Network Code fall within this category as well.

After having schematically depicted the key challenges to market integration in the gas wholesale markets, it is relevant to recall a few distinctive issues characterising electricity

[69] According to ACER's Market Monitoring Report, persisting, long term contracts sensibly limit the positive impacts of the Capacity Allocation Mechanism (CAM) and Congestion Management Procedures (CMP) provisions, which enhance integration in more advanced hubs, as they are clearly market-oriented, while providing harmonisation and transparency. See ACER, *Annual Report on the Results of Monitoring the Electricity and Gas Internal Markets in 2016 - Summary*, October 2017, available at https://acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ACER%20Market%20Monitoring%20Report%202016%20-%20SUMMARY.pdf, p. 4.

wholesale markets. Notably, due to the peculiarities of these markets, and the crucial role played by distinctive factors in this setting, an autonomous approach should be taken in order to assess the level of integration reached at European level. In other words, while markets present similar design characteristics throughout the EU, it is key to assess the interconnection of such markets, while taking into account the fundamental role played by timing in this context. More precisely, day-ahead, intraday and balancing timeframes[70] should be assessed separately, in order to consider how cross-border capacity is being allocated among Member States.

Indeed, an efficient use of cross-zonal capacity is symptomatic of an increasingly integrated market[71].

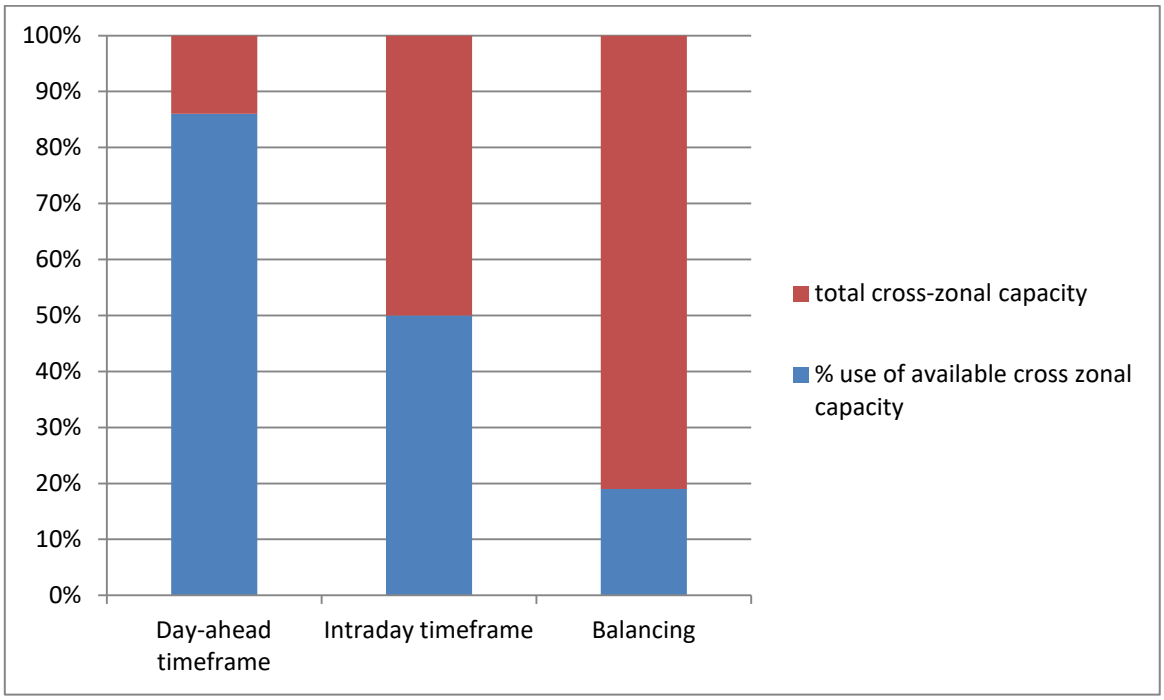
As a matter of fact, while the day-ahead timeframe is characterised by a good level of cross-border capacity usage, a substantial gap still remains across EU borders as far as intraday and balancing timeframes are concerned. Figure 1 summarises the level of efficiency in the use of interconnectors[72], suggesting how interconnection is still to be improved in the EU electricity wholesale market.

[70]The day-ahead market is also known as "spot market", where supply and demand meet determining the electricity price, and it is characterised by bidding closing at 12,00h for deliveries computed for 24 hours ahead. Differently, in the intraday market, participants usually trade one-hour long power contracts: indeed, it is conceived as an intermediate market between the day-ahead one and the real time market, covering operations within the hour. he balancing market is the institutional arrangement that deals with the balancing of electricity demand and supply. For a policy perspective on the relevance of market design and policy making, see VAN DER VEEN – HAKVOORT, *The electricity balancing market: Exploring the design challenge*, in *Utilities Policy*, 43/2016, pp. 186 – 194.

[71] As emerging from the approach taken in the Cross-Border Allocation Regulation, Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management, O.J. L 197, 25.7.2015, pp. 24–72.

[72] Interconnectors allow for cross-border energy trading, as they can be described as physical infrastructures enabling energy flows from previously separated networks.

Figure 1[73]



What is more, the under-usage of interconnection capacity often[74] mirrors the prioritarisation of internal capacity exchanges over cross-border exchanges: on average, only 50% of the capacity which could be made available for trade while preserving national operations is actually computed as "total cross-zonal capacity", making the actual percentage of use even lower than what has been shown in Figure 1.

Action taken by National Regulatory Authorities (NRAs), as well as TSOs, is vital to implement Balancing Network Codes, easing market integration through a more efficient usage of interconnectors throughout the EU. Transparency and data accountability, as well as the lack of homogeneous computing standards among Member States, represent structural challenges to electricity wholesale markets.

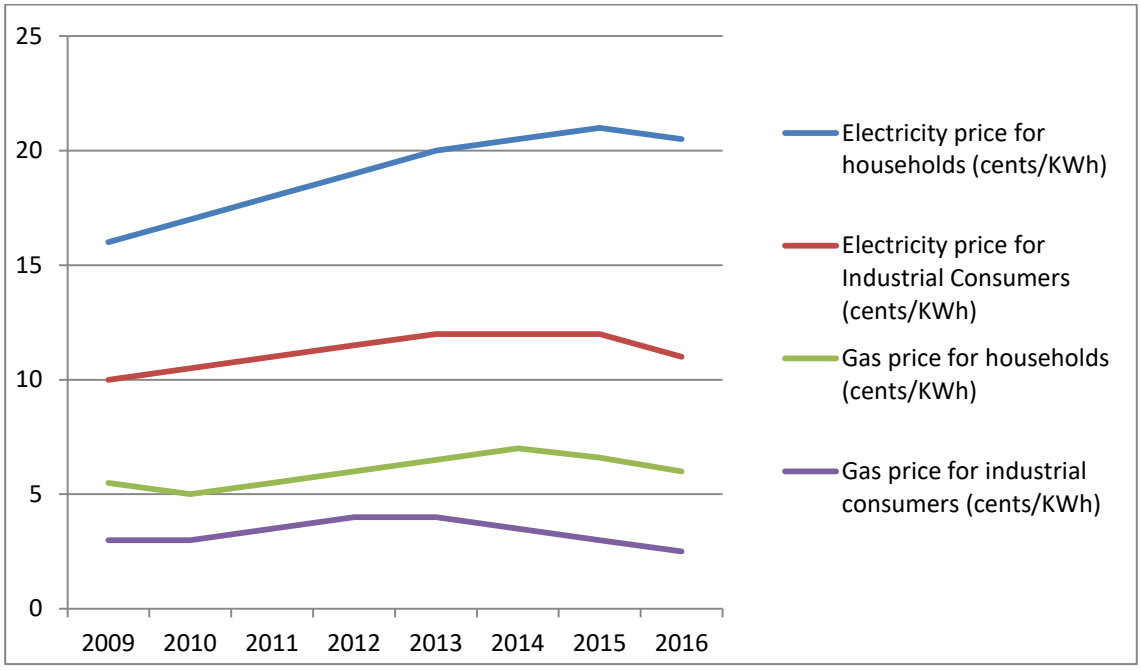
[73] This figure is extrapolated from the data presented in ACER-CEER, *Annual Report on the Results of Monitoring the Electricity and Gas Internal Markets in 2016*, October 2017, available at https://acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ACER%20Market%20Monitoring%20Report%202016%20.pdf. It thus refers to the most recent available data, relating to 2016.

[74] According to ACER-CEER, *Annual Report on the Results of Monitoring the Electricity and Gas Internal Markets in 2016*, October 2017, in 2016 this happened two times out of three.

As anticipated, this synthetic picture of the state of the art of energy market integration in Europe would not be complete without a schematic reference to retail markets and consumer empowerment. These two parameters can be observed together as they are paramount in defining the perception of the electricity and gas markets for European households. Indeed, as underlined in section 3.2, retail prices competition is to be considered the key element to assess when testing the effects of market integration in the European scenario.

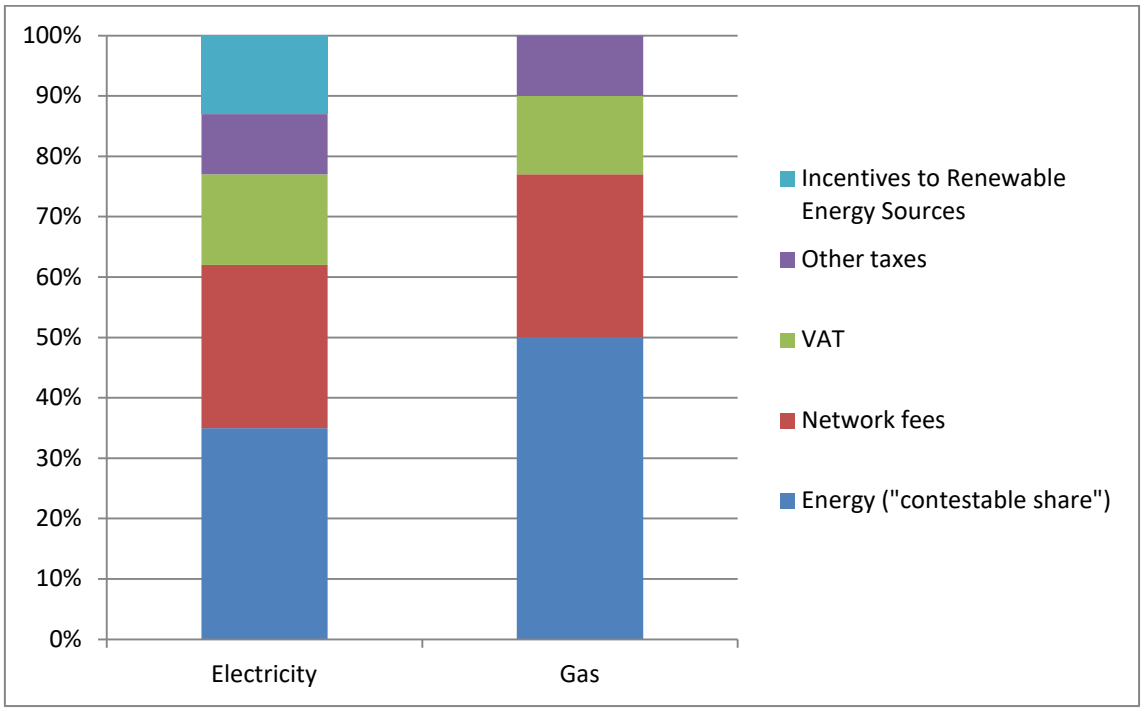
While, as shown in Figure 2, electricity and gas prices have recently (2015) started to decrease for European households and industrial consumers, substantial differences remain among member States, as the price of energy and gas (the so-called "constestable part" of the tariff paid by consumers) represents a small share of the final amount paid, which mainly consists of fees and taxes determined at national level (Figure 3).

Figure 2[75]



[75] The chosen interval is 2009-2016, in order to allow some analysis on the impact of the latest liberalisation package on the retail prices for electricity and gas. The data used in this figure have been elaborated from ACER-CEER, *Annual Report on the Results of Monitoring the Electricity and Gas Internal Markets in 2016*, October 2017, available at https://acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ACER%20Market%20Monitoring%20Report%202016%20.pdf.

Figure 3[76]



Finally, as far as consumer empowerment is considered, it is worth mentioning that a high fragmentation (at national and regional level) of available tools lead to diverging standards of protection among Member States, identifying yet another area of missed market integration. Notably, tangible differences linger among Member States as far as transparency, asymmetric information, and judicial protection are concerned[77].

As schematically presented above, market integration in the energy sector has not been (fully) reached throughout the EU, with regards to both wholesale and retail markets. This section did not aim at suggesting a critical perspective over this issue. Rather, it is meant as part of a structured framework depicted in order to properly contextualise the legal analysis to follow. In particular, section 3.2 aims at briefly depicting the regulatory goals and challenges tackled at EU level, in order to ease the transition towards a single energy market.

[76] The data on this figure exemplifies a possible break-down operation of the main costs covered by households for electricity and gas in 2016. The figure is an elaboration of the data included in ACER-CEER, *Annual Report on the Results of Monitoring the Electricity and Gas Internal Markets in 2016*, October 2017, available at https://acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ACER%20Market%20Monitoring%20Report%202016%20.pdf.
[77] *Ibid.*

3.2 Regulatory insight

As anticipated, several structured steps have been taken at EU level to tackle market integration and development in the energy sector. Indeed, it has already been underlined that the shared nature of the competences in this field, pursuant to Article 194 TFEU[78], defines a controversial set of grey areas characterised by fuzzy boundaries. More precisely, it is possible to suggest that a controversial multilateral relationship exists between National Regulatory Authorities (only partially converging with Member States), the European regulator (not necessarily equal to that of EU institutions) and Transmission System Operators (which may be characterised by a transnational, cross-border nature). A polycentric scenario is thus in place, both allowing for the emergence and the resolution of institutional conflicts. Before delving any further into the macroscopic dynamics of inter-institutional relationships in the energy sector, the present paragraph aims at recalling the milestones leading to the current regulation of this field.

Notwithstanding the tangible interactions of energy law with a vast array of policy areas suggesting differentiated approaches to regulation[79], the main axis around which European

[78] Art. 194 TFEU, introduced by the Lisbon Treaty, states as follows: "1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks. 2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions. Such measures 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, without prejudice to Article 192(2)(c). 3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature". In this context, it is also worth pointing out that art. 170 TFEU, relating to the development of energy infrastructure, points out that: "1. To help achieve the objectives referred to in Articles 26 and 174 and to enable citizens of the Union, economic operators and regional and local communities to derive full benefit from the setting-up of an area without internal frontiers, the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures. 2. Within the framework of a system of open and competitive markets, action by the Union shall aim at promoting the interconnection and interoperability of national networks as well as access to such networks. It shall take account in particular of the need to link island, landlocked and peripheral regions with the central regions of the Union".

[79] Notably, it is possible to suggest (see, *ex multis*, NEWBERY, *The relationship between regulation and competition policy for network industries*, University of Cambridge EPRG Working Papers 0611, 2006) that *ex post*, rather than *ex ante*, policy-making, especially in the field of antitrust and financial regulation (see *ex multis* DIAZ-RAINEY – SIEMS – ASHTON, *The financial regulation of European wholesale energy and environmental markets*, USAEE-IAEE Working Paper, 2011), plays a fundamental role in energy law making. The relationship between antitrust policy-making and *ex ante* energy regulation is particularly controversial, with particular regard to the preeminent enforcement role played by the Commission within the European setting. The

energy policy has revolved has been market integration through competition and, thus, liberalisation. The focus on market competition has represented a major feature of the regulatory mind-set within the European context, as it represents "if not a retreat, at least a redefinition of the role of the State and its tools for action"[80]. In Chapter III, the constitutional underpinnings of this assumption will be challenged.

As suggested in section 3.1 of the present chapter, almost thirty years after the beginning of the liberalisation process, vertical and horizontal integration figures, as well as relevant discrepancies between Member States, still exist. In particular, quasi-oligopolies in the energy markets are still a tangible reality in the European Union, as "the intensity of retail competition remains unsatisfactory in most cases. [...] The push to complete the single EU energy market may be stalling, despite the major improvements introduced since the mid-1990s"[81].

Interestingly, such a hiatus between the objectives pursued by the relevant pieces of legislation and the actual status of the market reflects both the difficulty of generating an appropriate consensus among Member States while approving the relevant directives[82], and the lack of a proper basis for energy policies within the EU Treaties, up to the introduction of art. 194 TFEU with the Lisbon Treaty. As a matter of fact, apart from the European Coal and Steel Community Treaty[83] and the European Atomic Energy Treaty, EU (EC) Treaties did not include any specific reference to energy policy making. Thus, energy was excluded from the *numerus* of competences defined by EU primary law.

The momentum of such an evaluation is evident: the EU could only legislate on energetic markets as long as the regulations concerned covered internal market or competition issues. "The project of the European Union with the liberalisation and the integration of energy markets [was] indeed not only unique in scale, but [...] also unique in the *vertical overlaps of*

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conceptual interlinkages between these differentiated approaches (the momentum of which have been duly noted by TALUS, *EU Energy Law and Policy: A Critical Account*, Oxford University Press, Oxford 2013, Chapter IV) goes beyond the scope of the present research and will thus not be developed any further.

[80] See JAMASB, *Between the State and Market: electricity sector reform in developing countries*, in *Utilities Policy*, 14/2006, pp. 14 – 30.

[81] HANCHER-DE HAUTECLOCQUE, *Manufacturing the EU Energy markets: the current dynamics of regulatory practice*, EUI working paper, RSCAS 2010/10, p. 10.

[82] See HANCHER, *Slow and not so sure: Europe's long march to electricity liberalisation*, in *Electricity Journal*, 10/1997, pp. 92 – 101.

[83] Which has expired on 23rd July 2002.

competences between Member States and the Union level[84], which constrain the process of reform and the legal and regulatory tools available to support it. In retrospect, this long and on-going legislative process has been nothing but a quest to better harmonise twenty-seven separate national market designs and implement stronger *ex ante* regulation, both at the national and the European levels, given the constraints of the European institutional structure for decision-making in energy and the underlying vested interests of Member States."[85]

More specifically, until the 1990s, regulation was substantially based upon sector regulation, the compliance to which was granted by the theory of natural monopolies and exclusive rights[86]. The 1987 Single European Act paved the way for a new systemic vision, implemented initially throughout the 1990s[87] (First Package of directives: 1996 for electricity[88], 1998[89] for gas), that implied defining competition in a Europe-wide energy scheme going beyond regional and national boundaries.

The First Energy Package (FEP), therefore, mainly focused on the definition of common community rules for the classification of a (primitively) competitive retail market, while the Second Energy Package (SEP), realised in 2003[90], was aimed at implementing a harmonised network structure by giving cooperation and integration within the energy sector a more formal status. This multifaceted process culminated in 2009 (and 2010), with the definition of the so called Third Energy Package[91] (TEP). Notably, it is worth recalling the main

[84] *Italics* added.
[85] HANCHER-DE HAUTECLOCQUE, *Manufacturing the EU Energy markets: the current dynamics of regulatory practice*, EUI working paper, RSCAS 2010/10, p. 14. See also CAMERON, *Competition in energy markets: law and regulation in the European Union*, Oxford University Press, Oxford 2007, pp. 95-119.
[86] See HANCHER-DE HAUTECLOCQUE, *Manufacturing the EU Energy markets: the current dynamics of regulatory practice*, EUI working paper, RSCAS 2010/10, p. 2. An interesting analysis of the dynamics suggesting regulatory compliance in the early years of energy sector regulation, as well as the constitutional underpinnings of competence sharing within the EU, is covered in FERRARI, *Energy in the prism of multilevel global governance*, in VILLAR EZCURRA (ed.), *State Aids, Taxation and the Energy Sector*, Thomson Reuters, Toronto 2017, pp. 83 – 95.
[87] Directive 90/377/EC of 29 June 1990 concerning a community procedure to improve the transparency of gas and electricity prices charged to industrial customers, O.J. 17 July 1990, L185/16; Directive 90/547/EC of 29 October 1990 on the transit of electricity through transmission grids, O.J. 13 November 1990, L 313/30.
[88] Directive 96/92/EC of 19 December 1996 concerning common rules for the internal market in electricity, O.J. 30 January 1997, L 27/20.
[89] Directive 98/30/EC of 22 June 1998 concerning common rules for the internal market in natural gas, O.J. 21 July 1998, L 204/1.
[90] Directive 2003/54/EC of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, O.J. 15 July 2003, L 176/37; Directive 2003/55/EC of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, O.J. 15 July 2003, L 176/57.
[91] Directive 2009/72 of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, O.J. 14 August 2009, L 211/55;

substantial provisions of these packages, in order to assess the relationship between sector regulation and the development of a competitive market.

The key obligations[92] enshrined in the regulatory framework mirror the necessity to ensure market liberalisation and non-discrimination (through third party access and unbundling provisions) while safeguarding public policy goals (such as security of supply). This duality is particularly striking in observing the role envisaged for both Member States and TSOs/DSOs.

On the one hand, non-discrimination in the choice of operators from Member States is ensured through both the lack of preferential and exclusive rights for State-owned companies and earlier monopolies, and the definition of specific third party access (TPA) provisions[93] addressed to Member States in order to counterbalance the natural monopoly character of energy networks. Unbundling provisions[94] are also defined in order to address the monopolistic character of transmission, with particular regard to TSOs which are active in other phases of the economic chain (such as distribution or generation): accounting, legal and ownership unbundling provide for competitors' safeguards in this scenario. Moreover, TSOs, rather than Member States, are the addressees of *ad hoc* provisions in the energy packages, as they are given "special responsibility"[95] for managing the system.

On the other hand, a public policy perspective is key in both stating the possibility for Member States to define public service obligations[96], and in introducing a paramount role for Member States and National Regulatory Authorities as gate keepers of the monopolistic setting. Clearly, the governance aspects of the regulatory evolution in the energy sector

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Directive of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, O.J. 14 August 2009, L 211/94; Regulation 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, O.J. 14 August 2009, L 211/1; Regulation 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation 1228/2003, O.J. 14 August 2009, L. 211/15; Regulation 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation 1775/2005, O.J. 14 August 2009, L. 211/36.

[92] For a complete overview of the content of the energy packages from an evolutionary perspective, see VEDDER – RØNNE – ROGGENKAMP – DEL GUAYO, *EU Energy Law*, in ROGGENKAMP - REDGWELL – RØNNE – DEL GUAYO (eds.), *Energy Law in Europe - National, EU and International Regulation*, Oxford University Press, Oxford 2016.

[93] See Article 32 of the Energy and Gas Directives. The parallel numeration of Articles between the two Directives is another symptomatic element of the structural similarities of the two sectors, as far as the liberalisation process is concerned.

[94] See Articles 9, 14, 26 and 31 of the Energy and Gas Directives.

[95] TALUS, *EU Energy Law and Policy: A Critical Account*, Oxford University Press, Oxford 2013, p. 68.

[96] See Articles 3 and ff. of the Electricity and Gas Directives.

represent the core of the present research, and they will be thoroughly observed in the following sections.

4. Network regulation and the energy sector

As in all sensitive sectors, the strategy of the European Commission has been to counter the failure to harmonise and the ensuing regulatory gap through promoting informal harmonization by transnational regulatory networks.[97] The creation of national regulatory authorities in energy was pushed through the three liberalization packages mentioned above, and, by 2005, there was at least one National Regulatory Authority (NRA) in each Member State.[98] The tasks entrusted to them included monitoring rules on interconnection and unbundling, as well as network access; approving terms and conditions (including tariffs) for new producers, and the conditions for connection and access to the network. The Third Energy Package[99] also provided for reinforced cooperation between the transmission system operators, through the creation of European networks of transmission system operators for gas (ENTSOG) and electricity (ENTSOE).

This section[100] aims at framing the critical assessment provided in Chapters II and III, with particular regards to the EU regulatory approach to energy governance. More precisely, the main structural characteristics of the European Regulators' Group for Electricity and Gas (ERGEG) and the Agency for the Cooperation of Energy Regulators (ACER) will be briefly presented. This plain introduction will suggest some of the controversial points to be analysed in the following Chapters, notably as far as the relationship between accountability and independence is concerned. In particular, paragraphs 4.1 and 4.2 (focussing respectively on the structure of ERGEG and ACER) represent an ideal follow up to the theoretical underpinnings introduced in section 2 of the present chapter.

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[97] EBERLEIN - GRANDE, *Beyond delegation: transnational regulatory regimes and the EU regulatory state*, in *Journal of European Public Policy*, 12/2005, pp. 89, 100.

[98] JONES – WEBSTER, *EU Energy Law, The Internal Energy Market*, Claeys & Casteels, Leuven 2010, pp. 111-112.

[99] Third Energy Package – Directive 2009/72/EC (the "Electricity Directive"), Directive 2009/73/EC (the "Gas Directive"), Regulation (EC) No 713/2009 (the "Agency Regulation"), Regulation (EC) No 714/2009 (the "Electricity Regulation") and Regulation (EC) No 715/2009 (the "Gas Regulation") –, REMIT, Regulation (EU) 994/2010 on security of gas supply, Commission Regulation (EU) 838/2010 on the inter-TSO compensation mechanism (the "ITC Regulation") and the so-called TEN-E Regulation (Regulation 437/2013).

[100] Part of this section is based upon the research conducted for my Master thesis: *From competition to integration - the dynamics of regulatory practice within the Internal Energy Market: an evolutionary approach to macroeconomic network governance*, Pisa University, 7th July 2014.

Indeed, while Chapters II and III will focus on a problematic and somewhat dynamic observation of ACER's practice within the constitutionalisation/agencification dilemma, the paragraphs included in this section aim at a more static observation of ERGEG and ACER's structure, to be placed within the schematic "network theory" approach suggested at the beginning of Chapter I. Therefore, as anticipated, the structural elements introduced in this section aim at defining a conceptual background to the evolutionary and critical perspective taken in the following Chapters, assessing the evolution of the "top-down" to "bottom-up" approach to energy governance[101].

4.1 From ERGEG to ACER

Networks are a regulatory instrument structurally used in the development of the internal energy market from the very beginning of the liberalisation process occurred in the mid-1990s. It would go beyond the scope of the present research to deal with the interesting experiences preceding that of ERGEG, which mainly consisted of the European Electricity Regulatory Forum in 1998 and the European Gas Regulatory Forum in 1999. These forums provided the relevant actors involved in the energy sector (National Regulatory Authorities, the European Commission, networking industries) with a(n informal) *sedes* where to discuss the main issues at stake. However, only in 2000 a proper Council of European Energy Regulators (CEER)[102] was created[103], in order to give a more formal status to the matters emerging in the forums, as well as providing the different actors involved with an appropriate framework of discussion.

According to its foundational Memorandum of Understanding (MoU)[104], the objectives pursued by CEER include the promotion of the development of gas and electricity markets;

[101] FERRARI, *Energy in the prism of multilevel global governance*, in VILLAR EZCURRA (ed.), *State Aids, Taxation and the Energy Sector*, Thomson Reuters, Toronto 2017, pp. 83 – 95.
[102] On the structure and nature of this Coucil, see AMMANNATI, *La regolazione cooperativa del mercato interno dell'energia e l'organizzazione comune tra i regolatori europei dell'energia elettrica e del gas*, in AMMANNATI (ed.), *Monopolio e regolazione pro concorrenziale nella disciplina dell'energia*, Giuffrè, Milan 2005; SCUTO, *Governance e mercato unico dell'energia: il network delle autorità nazionali* in BILANCIA-AMMANNATI (eds.), *Governance multilivello, regolazione e reti*, Vol II, Giuffrè, Milan 2008; DI PORTO, *La collaborazione tra autorità di regolazione nella governance dell'energia e delle comunicazioni elettroniche a livello comunitario: spunti da una comparazione*, in BILANCIA-AMMANNATI (eds.), *Governance multilivello, regolazione e reti*, Vol II, Giuffrè, Milan 2008, p. 237 ff.
[103] Anyhow, it is worth noting that CEER did not in fact substitute the previously existing forums. Moreover, it is worth remembering that CEER still plays a relevant role as a support body to ACER, as confirmed by several field interviews conducted with CEER members during the development of the present research.
[104] Originally signed in 2000 by ten National Authorities: Belgium, Finland, Ireland, Italy, Netherlands, Spain, Portugal, Norway, United Kingdom, Sweden.

the cooperation in order to achieve transparency and efficacy in the relevant sectors; the promotion of cooperation and information-sharing between Member States, in order to produce relevant Opinions for the Commission; the study of shared procedures aimed at realising a more efficient and active policy-making. These objectives have proven not to be specific and structured enough; what is more, CEER was not fitted with appropriate dispute resolution mechanisms, which ultimately lead to its incapacity to represent a cohesive voice in its external relations[105].

The aforementioned shortcomings ultimately paved the way for Commission Decision 796/2003[106], establishing ERGEG, the European Regulators' Group for Electricity and Gas. The shift from the voluntary model represented by Forums (and CEER) to the institutionalised (but flexible!) structure of ERGEG is a fundamental evolutionary step in the definition of the regulatory tools within the energy sector. Indeed, "CEER is based on a voluntary agreement among the regulators themselves, while ERGEG was founded by the European Commission in 2003 as its official advisory group on energy issues"[107]. Moreover, the internal Rules of Procedure of ERGEG[108] clearly affirm that "it is necessary to give regulatory cooperation and coordination a more formal status in order to facilitate the completion of the internal energy market".

ERGEG clearly represents a paradigmatic model of macroeconomic network governance. As a matter of fact, it structurally complies with the various requisites mentioned in section 2: flexibility, homogeneity of the main actors involved, horizontal conformation. Nevertheless, one major inconsistency remains: the network is based upon an *ex offcio* Decision from the Commission, and therefore lacks the spontaneity of its formation. In other words, it shares with other administrative networks of independent Authorities within the European Union (specifically, ECN – the European Competition Network) the voluntariness which should[109] be proper of each administrative network.

Structurally, articles 2 and 3 of the Decision play a fundamental role, as they shape both membership and apical figures of the network. In particular, it is clarified that "the Group

[105] See TALUS, *Introduction to EU energy law*, Oxford University Press, Oxford 2016.
[106] Dec. 796/2003, 11th November 2002, O J 296, 14.11.03.
[107] See ERGEG Rules of Procedure, prologue.
[108] *Preamble* n. 5.
[109] See FREDIANI, *La produzione normativa nella sovranità "orizzontale"*, ETS, Florence 2010, p. 105.

shall be composed of the heads of the national regulatory authorities or their representatives. [...] 'national regulatory authority' means a public authority established in a Member State pursuant to Directives 2003/54/EC and 2003/55/EC, according to which Member States shall designate one or more competent bodies with the function of regulatory authorities, to ensure non-discrimination, effective competition and the efficient functioning of the gas and electricity market and in particular to oversee the day-to-day application of the provisions of Directives 2003/54/EC and 2003/55/EC and Regulation (EC) No 1228/2003 in that respect."[110] What is more, "the Commission shall be present at the meetings of the Group and shall designate a high-level representative to participate in all its debates"[111]. Clearly, this last provision introduces an interesting anomaly in terms of network policy making, since it modifies the traditional purely horizontal structure of (harmonisation) macroeconomic governance networks. In this sense, another paradigmatic element of the tight bonds linking ERGEG to the EU Commission is Article 3, paragraph 7, which deals with the annual report to the Commission which is mandatory for the network: "the Group shall submit an annual report of its activities to the Commission. The Commission shall transmit the annual report to the European Parliament and to the Council, where appropriate with comments."

In order to correctly assess the nature and intrinsic scope of ERGEG, its internal organisation should be closely observed. Article 3 of Dec. 796/2003, on this subject, specifies that "the Group shall elect a chairperson from among its Members" and it "may set up expert working groups to study specific subjects, on the basis of a mandate and as it deems appropriate. The Commission may attend all meetings of such expert working groups." [112] Moreover, " The Group shall adopt its Rules of Procedure by consensus or, in the absence of consensus, by a two-thirds majority vote, one vote being expressed per Member State, subject to the approval of the Commission", which "shall provide the secretariat of the Group."[113]

Several important considerations can be drawn from the analysis of these provisions. First of all, with regards to membership, it is clear that three categories of members coexist[114]: a number of effective members (National Regulatory Authorities), a hierarchically superior

[110] Dec. 796/2003, art. 2 para 1-2.
[111] *Ibid.*, para 4.
[112] See Dec. 796/2003, art. 3 para 1-3.
[113] *Ibid.*, para 5-6.
[114] See CANEPA, *Reti europee in cammino*. *Regolazione dell'economia, informazione e tutela dei privati*, Jovene, Naples 2010, p. 58.

member (EU Commission), some observers. As mentioned, the relationships existing between effective members are primarily horizontal, while the EU Commission relates to the other members through a truly vertical paradigm. Additionally, it is worth underlining that the so-called "effective members" are in fact national authorities with a complete and full juridical personality: they are "complete organizational figures"[115] and, therefore, they give their autonomous contribution to the evolution (and success?) of the network.

Obviously, the relationships interlinking the various members of the network are specified in the Rules of Procedure (approved in 2005 pursuant to Article 3 of Dec. 796/2003), according to which votes are weighted in accordance to the degree of membership to the Group. In this respect, particularly relevant are Articles 3[116] (chairperson and Board of Directors), 4[117] (meetings), 5[118] (working procedures) and 6[119] (deliberations).

[115] See IELO, *La nozione comunitaria di autorità indipendente*, in *Amministrare*, 2/2004; MERUSI – PASSARO, *Le autorità indipendenti. Un potere senza partito*, Il Mulino, Bologna 2003, pp. 68 ff.

[116] "The ERGEG Board of Directors shall comprise at least three and no more than six directors (one Chairperson and two or more Vice Chairpersons). The Chairperson is elected pursuant to Articles 6.1 to 6.5.The Chairperson will be elected by the ERGEG for a period of two years, which may be extended for a period of up to one year. In the case of a resignation of the Chairperson during the two year period, a new Chairperson will be appointed under the same terms for a period of up to two years. The Vice-Chairpersons will be elected by the ERGEG, following the same procedure, on the same terms and conditions as for the Chairperson. A Vice Chairperson shall replace the Chairperson at the ERGEG meetings in the case of absence or impediment."

[117] "The ERGEG meeting will be convened in principle at least four times a year and more frequently when appropriate. Any meeting of the ERGEG may be convened by the Chairperson or by the Board of Directors. The ERGEG meeting must be convened by the Board of Directors at the request of at least one fifth of its Members. The meeting should take place within two months of the Commission's receipt of the request, unless exceptional circumstances require otherwise. The Chairperson, or as the case may be the Board of Directors, shall establish an agenda for the meeting. Any proposal from any Members will be added to the agenda. Unless otherwise agreed by the Board, proposed agenda items should be submitted in writing three weeks in advance of the meeting. The proposed agenda of the meeting and all supporting documentation shall be circulated to the Members (and observers) at least two weeks in advance of the meeting. The agenda and a note of the decisions agreed upon at the ERGEG meeting shall be published on the ERGEG web site as soon as is reasonably possible after the meeting."

[118] "The ERGEG shall adopt an annual work programme. The work programme shall be published on the ERGEG web site. The ERGEG may set up working groups chaired by an ERGEG member (or delegated to an expert from an authority that qualifies as a member of the ERGEG) to study specific subjects on the basis of a mandate and as it deems appropriate. The Commission and observers mentioned in Article 2.2 may attend all meetings of such working groups."

[119] "The Members present or represented at the meetings shall use their best efforts in order to reach consensus. In its working and/or deliberation and/or outputs, the ERGEG will respect the national and EU legislation regarding secrecy and confidentiality. Where the Commission informs the ERGEG that the advice requested or the question raised is of a confidential nature, Members as well as observers and any other person shall be under an obligation not to disclose information which has come to their knowledge through the work of the ERGEG or its working groups. The Commission may decide in such cases that only Members may be present at meetings. The ERGEG may also request, where the presence of observers would materially affect its deliberations, that observers are not present for part(s) of the discussion. If consensus is not achieved under Article 6.1, the matter must be put to vote and the reasoned opinion of the ERGEG must be carried by qualified majority pursuant to Article 6.5. Members' votes will be weighted in accordance with the voting principles of the Council of the

This simplified and flexible structure works in perfect coordination with the main goals of the Group, as clearly stated in Article 1, paragraph 2, of the establishing Decision: "the Group, at its own initiative or at the request of the Commission, shall advise and assist the Commission in consolidating the internal energy market, in particular with respect to the preparation of draft implementing measures in the field of electricity and gas, and on any matters related to the internal market for gas and electricity. The Group shall facilitate consultation, coordination and cooperation of national regulatory authorities, contributing to a consistent application, in all Member States, of the provisions set out in Directive 2003/54/EC, Directive 2003/55/EC and Regulation (EC) No 1228/2003, as well as of possible future Community legislation in the field of electricity and gas".

Substantially, the activities of ERGEG can be classified as pertaining to two different typologies: coordination and information sharing activities among members can be defined as a "horizontal competence", while a "vertical competence" can be traced when looking at the relationship between the Group and the European Commission, which can be considered "ancillary". Overall, ERGEG builds common positions among its members, it identifies the best practices available in the different contexts and it points out the areas in which some normative action needs to be taken[120]. Yet, it is worth noting that the Forums established in the '90s and CEER still exist: indeed, they provide a useful basis of network analysis, through a shared platform of discussion with several of the stakeholders involved[121].

From a policy-analysis perspective, the observation of ERGEG is paradigmatic of a new policy-making mind asset, based upon sector harmonisation and aimed at defining a common European macroeconomic regulatory space[122]. The dialogical process between the EU and

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European Union as foreseen in Article 205 (2) EC-Treaty. Members have as many votes as the Member State they represent. Unless the law or these Rules provide for a stricter majority, reasoned opinions are taken by a two thirds majority of the votes. The ERGEG shall identify and report any dissenting opinions of individual Members and communicate that there are .dissenting opinions together with the decision reached, identifying the dissenting member authorities. This shall be achieved by posting the dissenting opinions on the ERGEG website."

[120] See ORTIS, *I nodi della regolazione dei comparti energetici*, in MARIOTTI – TORRANI (eds.), *Energia e comunicazioni. Le autorità indipendenti a 10 anni dalla loro istituzione*, Giuffrè, Milan 2006, p. 112 ff.

[121] In order to facilitate an open dialogical confrontation with the various stakeholders involved in the process, ERGEG conducted a series of formal and informal consultations too. Specific Guidelines have been approved in 2007 in order to properly regulate the relevant procedures (see Guidelines on ERGEG's public consultation practices, ref. E07-EP-16-03, approved on 18th July 2007 and available on ERGEG's official website – www.ergeg.org).

[122] See CANEPA, *Reti europee in cammino. Regolazione dell'economia, informazione e tutela dei privati*, Jovene, Naples 2010, p. 65.

Member States (through NRAs) is active, and the effects and outcomes of such an interaction are utterly important. As a matter of fact, their object and scope is double: first, best practices need to be pointed out and implemented; secondly, consumer protection mechanisms need to be effectively put to practice[123]. Choosing a network structure (like ERGEG) to pursue such a diverse objective is therefore groundbreaking not only because of the joint communication techniques used, but also because of the redefinition of macroeconomic governance tools within the EU space it represents.

The main operative tools used by the network in order to achieve these objectives are working groups[124] and tasks forces; both are based on the horizontal nature of the relationships interlinking the various players involved. Additionally, ERGEG is provided with a peculiarly-designed working tool aimed at defining, since 2006[125], specific regional initiatives in both energy and gas sectors. In particular, regional sector-specific markets[126] have been created, and each of them has a structured sub-network flourishing around a Regional Coordination Committee (RCC), working in close cooperation with ERGEG, the EU Commission, CEER and the relevant Forums, too. The main outputs of these regional initiatives can be summarised as follows: "the amount of information available in the markets which will increase market liquidity and allow more robust competition; fair access to networks and infrastructure, thus increasing trading activities in the regions and between regions; improve compatibility of market rules within regions to facilitate regional market integration"[127]. Clearly, the common objective of all the markets identified is the unification of an extrinsically diverse and fragmented national and sub-national scenario; however, due to the

[123] In line with the major concerns put forward by the EU Commission in its 2008 Green Book on Costumer Protection.
[124] In particular, seven working groups have been established within ERGEG: 1. Customer focus group; 2. Energy community; 3. Energy package; 4. Financial service; 5. Gas; 6. International strategy; 7. Unbundling, reporting and benchmarking task force. Specific reports have to be presented both to ERGEG and to CEER.
[125] Cfr. ERGEG *Conclusions paper, the creation of regional electricity markets*, E05-ERF-03-06a (8th February 2006); ERGEG *Paper, roadmap for a competitive single gas market in Europe, an ERGEG conclusions paper*, E06-GMi-02-03 (28th March 2006).
[126] In the electricity sector, seven markets have been shake: Baltic (Estonia, Latvia, Lithuania), Central-East (Austria, Czech Republic, Germany, Hungary, Poland, Slovakia, Slovenia), Central-South (Italy, Greece, Austria, France, Germany, Slovenia), Central-West (Belgium, France, Germany, Luxembourg, Netherlands), North (Sweden, Denmark, Finland, Germany, Norway, Poland), South-West (France, Portugal, Spain), Franc-UK-Ireland. Clearly, these markets tend to be very interconnected, as shown by the fact that several countries pertain to more than one regional initiative. On the other hand, three markets only have been created in the gas sector: North (Belgium, Denmark, France, Germany, Ireland, Netherlands, Sweden, UK), South West (Portugal, Spain, Southern France), South-East (Austria, Hungary, Italy, Greece, Poland, Czech Republic, Slovakia, Slovenia).
[127] Cfr. ERGEG *Regional initiatives factsheet, progress and prospects*, March 2007 (www.ergeg.org).

peculiarities of each and every context, the modalities according to which the Regional Initiative operates necessarily have to be "customised"[128]. A strict coordination between Regional Initiatives and ERGEG is therefore mandatory, in order to check the appropriate development of the main liberalisation objectives of the network. Fascinatingly, this peculiar relationship between Regional Initiatives and ERGEG can be described as a strive towards a correct balance between autonomy and control, which had emerged already in the European Parliament (EP) while discussing the Third Energy Package[129].

To sum up, it is possible to affirm that ERGEG is a flexible network of regulators where both vertical and horizontal governance tools are combined, thanks to the heterogeneity of its members; the main governance tools include working groups and task forces, even though Regional market Initiatives represent an innovative instrument in order to secure the unification of fragmented national and regional contexts. The main outputs of the network consist of Guide Lines and similar soft law policy tools, which represent both a normative indication for the Commission and NRAs alike and a common ground towards energy legislation harmonisation between Member States and stakeholders, in accordance with Article 4 of Decision 796/2003: "The Group shall consult extensively and at an early stage with market participants, consumers and end-users in an open and transparent manner."

Having briefly depicted the some of the fundamental traits characterising ERGEG, it is now of paramount importance to focus on its evolution from harmonisation network to so-called "network agency"[130], in a pioneering leap towards regulatory convergence. As a matter of fact, notwithstanding ERGEG's efficiency in data gathering and market monitoring[131], its innate shortcomings are evident: the lack of legal bindingness of its outcomes, the impossibility to put to practice a proper enforcement mechanism for its guidelines, as well as the consensus-only rule dominating its decision-making processes. In other words, "this informal approach permitted neither the development of interconnection capacities nor the

[128] CANEPA, *Reti europee in cammino. Regolazione dell'economia, informazione e tutela dei privati*, Jovene, Naples 2010, p. 70. See also MATHIEU, *Regulatory delegation in the European Union – networks, committees and agencies*, Macmillan, Basingstoke 2016, p. 87 ff.
[129] See CANEPA, *La costruzione del mercato europeo dell'energia e il difficile percorso del "terzo pacchetto" legislativo*, in *Amministrare*, 2/2009, pp. 217 – 230.
[130] LAVRIJSSEN – HANCHER, *Networks on track: from European regulatory networks to European regulatory "network agencies"*, in *Legal Issues of Economic Integration*, n. 34(1)/2008, pp. 23 – 55.
[131] See EBERLEIN, *Regulation by cooperation: the "Third Way" in making rules for the internal Energy market*, in CAMERON (ed.), *Legal aspects of EU Energy regulation*, Oxford University Press, Oxford 2005.

coordination of Member State's energy policies"[132]. As a matter of fact, it became clear that neither the loose cooperation model represented by CEER, neither the advisory role of ERGEG managed to bridge the gap between the European policy objectives and the national regulatory competences exercised by NRAs[133]. In order to further enhance market integration, ACER was created within the Third Energy Package.

4.2 ACER's structure and tasks: a first approach

The Agency for the Cooperation of Energy Regulators has been established with Regulation 713/2009[134] (hereinafter "the ACER Regulation"), which represents one of the structural pillars of the Third Energy Package. It has already been pointed out how ACER has been tagged "network agency" by both legal[135] and socio-political[136] scholarship, as "[...] the [pre-]existing networks, such as ERGEG in energy, are incorporated into the [new] agencies as Boards of Regulators which will, together with the Directors and Administrative Boards, cooperate with the Commission and the NRAs to further the completion of the internal market. These agencies are also intended to provide a greater political and legal independence for the members of the networks – the NRAs – from their national governments. In the opinion of the Commission, inadequate political independence at national level indeed hampers an effective and impartial application of European law, and this is one of the reasons why ACER was created as a network agency."[137]

If the presence of a Board of Regulators mirroring the previous network body in place is to be considered the key defining element of "network agencies", as part of the legal scholarship

[132] *Ibid.*
[133] See COLAVECCHIO, *La* governance *del settore energetico*, in CLINI – CARLOTTI, *Diritto Amministrativo*, Maggioli, Rimini 2014, p. 319, and ERMACORA, *The Agency for the Cooperation of Energy Regulators*, in JONES, *EU energy law. The internal energy market. The third liberalisation package*, Claeys and Casteels, Leuven 2010, pp. 257-258.
[134] Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, O. J. L 211, 14 August 2009, pp. 1–14.
[135] See notorious definition in LAVRIJSSEN – HANCHER, *Networks on track: from European regulatory networks to European regulatory "network agencies"*, in *Legal Issues of Economic Integration*, n. 34(1)/2008, pp. 23 – 55, but also, more recently, LEAL-ARCAS – WOUTERS, *Research handbook on EU energy law and policy*, Edward Elgar, Cheltenham 2017, p. 56.
[136] See BROUSSEAU – GLACHANT, *Regulators as reflexive governance platforms*, in *Competition and Regulation in Network Industries*, 12/2011, pp. 194 ff.
[137] HANCHER-DE HAUTECLOCQUE, *Manufacturing the EU Energy markets: the current dynamics of regulatory practice*, EUI working paper, RSCAS 2010/10, p. 3.

seems to suggest[138], then it is possible to include ACER within this broad *genus* of policy-making actors. However, it is worth mentioning that the Agency represents an atypical actor, as it does not follow (in the original ACER Regulation at least) nor the European common template for agencies[139], nor any apparently similar experiences, such as the Body of European Regulators in Electronic Communication (BEREC)[140], also established in 2009. This is due to the coexistence within ACER of both a European and a purely relational soul, making this Agency a distinctive case study of institutional dynamics within the European Union. Accordingly, this paragraph aims at presenting the main features of ACER from a plain legal perspective, observing the most relevant provisions of the ACER Regulation in terms of governance and tasks of the Agency. Chapter II, while focussing on the practical implications of ACER's policy making, as well as the key policy developments following the ACER Regulation, will shed some light on the peculiar duality of the Agency that has just been mentioned.

First, it is paramount to note that the establishing Regulation is clear in defining both a coordination and a technical advisory role for the Agency, assigning it the exercise, at European level, of regulatory tasks in both the electricity and gas markets[141]. In order to do so, ACER has legal personality within both national and European legal systems, and it is

[138] The fundamental reference is, once again, to LAVRIJSSEN – HANCHER, *Networks on track: from European regulatory networks to European regulatory "network agencies"*, in *Legal Issues of Economic Integration*, n. 34(1)/2008, pp. 23 – 55.

[139] See the 2012 Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, available at https://europa.eu/european-union/sites/europaeu/files/docs/body/joint_statement_and_common_approach_2012_en.pdf .

[140] The divergences between BEREC and ACER are apparent, and they are, arguably, closely linked to both intimately political choices (see, for a take on this issue, LEVI-FAUR, *The Governance of Competition: the interplay of technology, economics, and politics in European Union electricity and telecom regimes*, in *Journal of European Public Policy*, 19/1999, pp. 175 – 207) and to the economic characteristics of the networks involved. Notably, the Telecommunication sector is characterised by its "two way network" nature, where the relevant good (data and information) flows in potentially opposite directions. Differently from the "one way" nature of energy networks, in telecoms the economic role played by the network is reflected in differentiated governance needs and tools. It would go beyond the scope of the present research to delve into the structure and tasks of BEREC, which will be used in specific occasions (Chapter II) as a term of comparison for ACER. See BOEGER – CORKIN, *How regulatory networks shaped institutional reform under the EU telecoms framework*, in *Cambridge Yearbook of European Legal Studies*, 14/2012, pp. 49 – 73, and MELODY, *Viewpoint: the closing of the liberalisation era in European telecommunication*, in *Competition and Regulation in Network Industries*, 13/2012, pp. 218 – 235.

[141] ACER Regulation 713/2009, Article 1, paragraph 2: "The purpose of the Agency shall be to assist the regulatory authorities referred to in Article 35 of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and Article 39 of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas, in exercising, at Community level, the regulatory tasks performed in the Member States and, where necessary, to coordinate their action."

represented by its Director[142], which is appointed for a five year term[143] by the Administrative Board, following a "favourable opinion" of the Board of Regulators, from a list of candidates proposed by the Commission[144]. The tasks assigned to the Director, enshrined in Article 17 of the establishing Regulation, have both a preparatory[145] and an administrative[146] or executive role[147], and they shall be exercised "in accordance with the guidance" provided by the Board of Regulators (BoR). The latter, which is one of the four[148] composing bodies of the Agency, mirrors ERGEG in structure and functioning, as it comprises senior representatives of NRAs (as well as one non-voting representative from the Commission), it acts by a two thirds majority, and it has a paramount advisory and propulsive role with regards to both the Director and the Administrative Board[149]. Notably, Chapter II will delve deeply into the relationship between the Director and the Board of Regulators, which is interestingly telling of the internal governance dilemmas faced by ACER. More specifically, it will be argued that the structural and somewhat ontological divide between the European and the relational approach to energy regulation faced by ACER emerges quite strongly in the composite relationship between the Director and the BoR within the Agency.

In this context, a peculiar role is played by the Administrative Board and the Board of Appeal of the Agency, which represent the other pillars of ACER's internal governance. The former is composed of nine members (and nine alternates), appointed by the Commission (2 members), the European Parliament (2 members) and the Council (5 members)[150]: notably, the Administrative Board is entrusted with great competences with regards to appointments (Director, members of the Board of Regulators, members of the Board of Appeal)[151], control

[142] ACER Regulation 713/2009, Article 2: "1. The Agency shall be a Community body with legal personality. 2. In each Member State, the Agency shall enjoy the most extensive legal capacity accorded to legal persons under national law. It shall, in particular, be able to acquire or dispose of movable and immovable property and be a party to legal proceedings. 3. The Agency shall be represented by its Director".
[143] ACER Regulation 713/2009, Article 16, paragraphs 4 and 5, determining the conditions for a three-year extension of the appointment period. Notably, according to Article 16, paragraph 7: "The Director may be removed from office only upon a decision of the Administrative Board, after having obtained a favourable opinion of the Board of Regulators. The Administrative Board shall reach that decision on the basis of a three-quarters majority of its members."
[144] ACER Regulation 713/2009, Article 16, paragraph 2.
[145] ACER Regulation 713/2009, Article 17, paragraphs 2, 6, 7, 8.
[146] ACER Regulation 713/2009, Article 17,
[147] ACER Regulation 713/2009, Article 16, paragraph 1.
[148] ACER Regulation 713/2009, Article 4.
[149] ACER Regulation 713/2009, Articles 14 and 15.
[150] ACER Regulation 713/2009, Article 12.
[151] ACER Regulation 713/2009, Article 13, paragraphs 1, 2, and 3.

over the Agency's compliance with its objectives[152], adoption of ACER's work programme and annual report[153], as well as disciplinary[154] and budgetary[155] competences. It is clear that the Administrative Board represents in a tangible way the close relationship between the European institutions and ACER. Its strong role within the internal governance scenario of ACER hints at the peculiar role played by the Agency as a technical and independent regulator, and the role of the Administrative Board, at least on paper, seems to be at odds with the internal and external independence of ACER, as it is spelled out as a fundamental requirement at the outsets of the Regulation[156]. This dynamic relationship has not been left untouched by the proposed recast of the ACER Regulation within the 2016 Winter Package, in an effort to increase ACER's compatibility with the European 2012 Common Approach. The considerations just mentioned will be organically considered in Chapter II, while Chapter III will deal with the possible answers that constitutional literature can give to the issues of independence and accountability for European agencies.

Finally, some preliminary considerations relating to the Board of Appeal should be put forward. Notwithstanding its necessary constitution within the Agency, the Board of Appeal does not periodically meet[157], as its main task is to deal with the appeals against the decisions adopted pursuant to Articles 7, 8 and 9 of the Regulation, as well as any decision which is of "direct and individual concern" to the applicant (which may be "any natural or legal person")[158]. As a matter of fact, the ACER Regulation provides for *ad hoc* independence

[152] ACER Regulation 713/2009, Article 13, paragraph 4.
[153] ACER Regulation 713/2009, Article 13, paragraphs 5 and 6.
[154] ACER Regulation 713/2009, Article 13, paragraph 9.
[155] ACER Regulation 713/2009, Articles 21, 22, 23, 24.
[156] ACER Regulation 713/2009, Preamble (18): "The Agency should have the necessary powers to perform its regulatory functions in an efficient, transparent, reasoned and, above all, independent manner. The independence of the Agency from electricity and gas producers and transmission and distribution system operators is not only a key principle of good governance but also a fundamental condition to ensure market confidence. Without prejudice to its members' acting on behalf of their respective national authorities, the Board of Regulators should therefore act independently from any market interest, should avoid conflicts of interests and should not seek or follow instructions or accept recommendations from a government of a Member State, from the Commission or another public or private entity. The decisions of the Board of Regulators should, at the same time, comply with Community law concerning energy, such as the internal energy market, the environment and competition. The Board of Regulators should report its opinions, recommendations and decisions to the Community institutions."
[157] ACER Regulation 713/2009, Article 18, paragraph 1. Pursuant to this same provision, "The Board of Appeal shall comprise six members and six alternates selected from among current or former senior staff of the national regulatory authorities, competition authorities or other national or Community institutions with relevant experience in the energy sector. The Board of Appeal shall designate its Chairman. The Board of Appeal shall be convened when necessary".
[158] Article 19 of ACER Regulation deals with the procedure for Appeals. The language used in this provision strictly recalls the post-Lisbon Article 263 TFEU, as it is understandably to be considered an integral part of the fair procedure characterising the adoption and enforcement of ACER's soft law. The relationship between

requirements for the six members of the Board of Appeal and their alternates, who are appointed among NRAs and EU law experts by the Administrative Board following a Commission's proposal[159]. It is not uncommon[160] for European agencies to be equipped with a Board of Appeal structured similarly to ACER's. It will be interesting to observe, however, the role played by administrative appeals in relation to the actions before the European Courts (Article 20). In particular, while it is true that the introduction of a fair procedure[161] including appeals is a key tool in order to counterbalance the potentially problematic scope of delegated powers to ACER, it will be paramount to assess, in Chapter II, how the judicial accountability of ACER's soft law is to be interpreted in practice.

Indeed, pursuant to the 2009 Regulation, the Agency can issue a wide array of acts[162] mostly falling within the broad scope of the notion of soft law[163], including opinions and recommendations addressed to TSOs, NRAs and European institutions (Council, Parliament, Commission). What is more, ACER shall take individual decisions pursuant to Articles 7, 8 and 9 of the establishing Regulation, as well as "submit to the Commission non-binding framework guidelines (framework guidelines) in accordance with Article 6 of Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and Article 6 of Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks"[164]. Moreover, the 2011 Regulation on Wholesale Market Integrity and Transparency (hereinafter: the REMIT

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administrative appeals and actions to be taken before the European Court of Justice is clarified by Article 20: "1. An action may be brought before the Court of First Instance or the Court of Justice, in accordance with Article 230 of the Treaty, contesting a decision taken by the Board of Appeal or, in cases where no right lies before the Board of Appeal, by the Agency. 2. In the event that the Agency fails to take a decision, proceedings for failure to act may be brought before the Court of First Instance or the Court of Justice in accordance with Article 232 of the Treaty. 3. The Agency shall be required to take the necessary measures to comply with the judgment of the Court of First Instance or the Court of Justice."

[159] See ACER Regulation 713/2009, Article 18.

[160] For instance, the Community Plant Variety Office, as well as the European Aviation Safety Agency and the European Chemicals Agency are entrusted with internal administrative procedures in line with ACER's.

[161] See PROSSER, *The Regulatory Enterprise – Government, Regulation, and Legitimacy*, Oxford University Press, Oxford 2010, where national utility regulation is observed, suggesting the key role played by provisions structurally and teleologically close to Article 10 of the ACER Regulation (dealing with Consultations for acts to be approved) and Article 14 (regulation the Board of Directors), as they also fulfil the purpose of introducing internal warranties to the adoption of soft law, through a check-and-balances and external control perspective.

[162] See ACER Regulation 713/2009, Article 4.

[163] See Article 288 TFEU. The scope and content of the arguably vague notion of "soft law" will be dealt with in Chapter II.

[164] ACER Regulation 713/2009, Article 4(1)(e).

Regulation)[165] assigned vast market monitoring and data evaluation competences to ACER, aiming at assessing market abuses and insider trading practices, thus sensibly widening the scope of the Agency's action. Finally, it is worth pointing out that, among other minor interventions by the European legislator[166], several tasks (both advisory and having a monitoring and decisional role) have been entrusted to ACER by Regulation 347/2013[167] (hereinafter: the TEN-E Regulation), establishing the definition of "Projects of common interest" within infrastructural integration policies. Table 3 summarises the main tasks assigned to ACER, according to the relevant legal basis.

In this context, it is paramount to underline how the compatibility of this massive set of competences with the European doctrine of the delegation of powers represents the *vulnus* to be observed when assessing the structural (and constitutional?) role of ACER within European policy making and regulation. As a matter of fact, notwithstanding the fact that ACER's role has exponentially increased, both in weight and in perception among market operators, in the most recent years, it will be argued that even the provisions enshrined in the establishing Regulation might present some inconsistencies with a reasoned interpretation of Article 114 TFEU in line with the *Meroni*/*Romano*/*Short Selling* doctrine.

[165] Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency, O.J. L 326, 8 December 2011, pp. 1–16.
[166] Notably, Regulation (EU) 994/2010 on Security of gas Supply, and Commission Regulation (EU) 838/2010 on the inter-TSO compensation mechanism (the "ITC Regulation").
[167] Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009; OJ L 115, 25 April 2013, p. 39–75.

Table 3[168]

A - Tasks assigned by the Third Package		
Agency's task	**Type of action**	**Legal basis**
Tasks regarding ENTSOs[169]		
1. Provide an opinion to the Commission on draft statutes, list of members and draft rules of procedure of ENTSOs.	Opinion	Article 6(1) Reg 713/2009; Article 5(2) Reg 714/2009, and Article 5(2) Reg 715/2009
2. Monitor the execution of ENTSOs tasks.	Monitoring	Article 6(2) Reg 713/2009; Article 9 Reg 714/2009, and Article 9 Reg 715/2009
3. Provide an opinion to ENTSOs on the draft annual work programme, the draft Community-wide network development plan and other relevant documents (e.g. annual summer and winter supply outlooks).	Opinion	Article 6(3)(b) Reg 713/2009; Article 9(2) Reg 714/2009; Article 9(2) Reg 715/2009

[168] This table is the result of a combined observation of the relevant legislative documents, as well as ACER, *Programming Document 2018 – 2020*, January 2018, available at https://www.acer.europa.eu/en/The_agency/Mission_and_Objectives/Documents/ACER%20Programming%20Document%202018-Revised%20Jan%202018.pdf .

[169] ENTSOs – European Network of Transmission System Operators.

4. Provide, based on matter of facts, a duly reasoned opinion as well as recommendations to ENTSOs, the Commission, the European Parliament and the Council where it considers that the draft annual work programme or the draft Community- wide network development plan do not comply with the objectives or the relevant provisions of the Third Package.	Reasoned opinion Recommendation	Article 6(4) Reg 713/2009; Article 9(2) Reg 714/2009; Article 9(2) Reg 715/2009
5. Monitor the implementation of Community-wide NDPs[170], investigate the reasons for inconsistencies between Community NDPs, and their implementation and make recommendations to TSOs, NRAs or other competent bodies.	Monitoring Recommendation	Article 6(8) Reg 713/2009
6. Provide opinions to NRAs – at NRAs' request - and recommendations to ENTSOs or NRAs to ensure consistency of national 10yr-network development plans with the Community-wide 10yr-network development plans.	Monitoring Opinion Recommendation	Article 8(11) Reg 714/2009; Article 8(11) Reg 715/2009; Article 22(5) Dir 2009/72; Article 22(5) Dir 2009/73

[170] NDPs – Network Development Plans.

7. Provide an opinion to ENTSOs on network codes not relating to areas covered by a request addressed to the ENTSOs by the Commission.	Opinion	Article 6(3)(a) Reg 713/2009; Article 8(2) Reg 714/2009; Article 8(2) Reg 715/2009
8. Participate in the development of network codes relating to areas covered by a request addressed to the ENTSOs by the Commission.	Consultation	Article 6(4) Reg 713/2009; Article 6 Reg 714/2009 Article 6 Reg 715/2009
9. Submit non-binding framework guidelines to the Commission, carry out consultation on draft framework guidelines; if necessary, review the framework guidelines and re-submit them to the Commission.	Drafting Consultation	Article 6(4) Reg 713/2009; Article 6(2) to (4) Reg 714/2009; Article 6 (2) to (4) Reg 715/2009
10. Provide a reasoned opinion to ENTSOs on network codes developed on the basis of framework guidelines.	Reasoned opinion	Article 6(4) Reg 713/2009; Article 6(7) Reg 714/2009; Article 6(7) Reg 715/2009

11. Submit network codes developed by ENTSOs on the basis of framework guidelines to the Commission and recommend that they be adopted.	Recommendation	Article 6(4) Reg 713/2009; Article 6(9) Reg 714/2009; Article 6(9) Reg 715/2009
12. Prepare and submit draft network codes to the Commission, at the request of the Commission and where the ENTSO failed to develop a network code upon a Commission's request.	Drafting Recommendation	Article 6(4) Reg 713/2009; Article 6(10) Reg 714/2009; Article 6(10) Reg 715/2009
13. Propose amendments to network codes.	Reasoned proposal	Article 7(1) and (2) Reg 714/2009; Article 7(1) and (2) Reg
14. Provide duly reasoned opinion to the Commission, where ENTSOs have failed to implement a non–binding network code.	Reasoned opinion	Article 6(5) Reg 713/2009; Article 8(2) Reg 714/2009; Article 8(2) Reg 715/2009
15. Monitor and analyse the implementation of binding network codes and Guidelines, and report to the Commission.	Monitoring Reporting	Article 6(6) Reg 713/2009
16. Monitor progress as regards the implementation of projects to create new interconnector capacity.	Monitoring	Article 6(7) Reg 713/2009

17. Monitor regional cooperation of TSOs; take due account of the outcome when formulating its opinions, recommendations and decisions.	Monitoring	Article 6(9) Reg 713/2009; Article 12 Reg 714/2009 Article 12 Reg 715/2009
Tasks regarding NRAs		
18. Provide a framework for NRAs' cooperation. Promote cooperation between NRAs and TSOs at regional and EU level. Make recommendations on binding rules for cooperation to the Commission.	Cooperation Recommendation	Article 7(3) Reg 713/2009; Article 6(2) Dir 2009/72 Article 7(2) Dir 2009/73
19. Adopt individual decisions on technical issues as provided for in the Third Package.	Decision	Article 7(1) Reg 713/2009
20. Provide recommendations on the harmonisation of technical rules.	Recommendation	Article 5 Dir 2009/72; Article 8 Dir 2009/73
21. Provide recommendations to assist NRAs and market players in sharing good practices.	Recommendation	Article 7(2) Reg 713/2009

22. Provide an opinion on whether an NRA decision complies with Guidelines or other relevant provisions of the Third Package and inform the Commission and the MS concerned where the NRA does not comply with the opinion of the Agency.	Opinion	Article 7((4) and (5) Reg 713/2009; Article 39 Dir 2009/72; Article 43 Dir 2009/73
23. Deliver an opinion when an NRA encounters, in a specific case, difficulties with the application of Guidelines.	Opinion	Article 7(6) Reg 713/2009
24. Provide an opinion on decisions of NRAs on TSO certification. At the request of the Commission, express its views on the certification of third countries TSOs.	Opinion	Article 9(2) Reg 713/2009; Article 3(1) Reg 714/2009; Article 3(1) Reg 715/2009; Article 11(6) Dir 2009/72; Article 11(6) Dir 2009/73
Tasks regarding terms and conditions for access to and operational security of cross- border infrastructure		
25. Decisions on cross-border infrastructure, including exemption decisions for new interconnectors and new gas infrastructures.	Decision	Article 7(7) and Articles 8 and 9 Reg 713/2009; Article 17(5) Reg 714/2009; Article 36 (4) Dir 2009/73

Monitoring and reporting on the electricity and natural gas sectors		
26. Monitor the internal markets in electricity and natural gas.	Monitoring	Article 11(1) Reg 713/2009
27. Produce a public annual report on the results of monitoring and, at the same time, submit an opinion to the European Parliament and to the Commission on the measures that could be taken to remove barriers to the completion of the internal markets in electricity and natural gas.	Publication of monitoring results Opinion	Article 11(2) and (3) Reg 713/2009
Consultations and transparency		
28. Consult with market participants, TSOs, consumers, end-users, competition authorities.	Consultation	Article 10(1) and (3) Reg 713/2009
29. Provide objective, reliable and easily accessible information to the public and interested parties.	Information	Article 10(2) Reg 713/2009
30. Make public agenda, background documents and minutes of meetings of AB, BoR and BoA.	Publication	Article 10(4) Reg 713/2009

Other tasks		
31. Approve compliance programmes of joint undertakings.	Approval	Article 6(4) Dir 2009/72; Article 7(4) Dir 2009/73
32. Respond to consultation on Guidelines.	Opinion	Article 18(3) Reg 714/2009; Article 23(1) Reg 715/2009
33. Provide opinions or recommendations on any of the issues relating to the purpose for which it has been established, upon a request of the European Parliament, the Council or the Commission, or on its own initiative.	Opinion Recommendation	Article 5 Reg 713/2009
34. Provide secretarial services to the Administrative Board.	Support	Article 12(3) Reg 713/2009
35. Provide secretarial services to the Board of Regulators.	Support	Article 14(5) Reg 713/2009

B - Tasks assigned by REMIT		
Agency's task	**Type of action**	**Legal basis**
Monitoring, data collection, and registration		
1. Monitor, in close collaboration with NRAs and other relevant authorities, trading activity in wholesale energy products to detect and prevent trading based on inside information and market manipulation.	Monitoring	Article 7(1) Reg 1227/2011
2. Collect the data for assessing and monitoring wholesale energy markets.	Data collection	Articles 3(4)(b), 4(2), 7(1), 8, 10(3), 16(2) and (3) Reg
3. Establish a European Register of market participants.	Data collection	Article 9(3) Reg 1227/2011
Reporting and recommendations		
4. Report to the Commission on its activities under the Regulation.	Reporting	Article 7(3) Reg 1227/2011
5. Make recommendations to the Commission as regards market rules, standards, and procedures which could improve market integrity and the functioning of the internal market.	Recommendation	Article 7(3) Reg 1227/2011

6. Make recommendations to the Commission as to the records of transactions, including orders to trade, which it considers are necessary to effectively and efficiently monitor wholesale energy markets.	Recommendation	Article 7(3) Reg 1227/2011
Cooperation at Union and national level		
7. Cooperate with NRAs, ESMA[171], national financial market authorities and national competition authorities.	Cooperation	Article 1(3) Reg 1227/2011
8. Ensure that NRAs carry out their tasks under the Regulation in a coordinated and consistent manner.	Coordination	Article 16 Reg 1227/2011
9. Publish non-binding guidance on the application of the definitions set out in Article 2 of the Regulation.	Guidance	Article 16(1) Reg 1227/2011
10. Establish a mechanism to share information on trading activities in wholesale energy products with NRAs, competent financial authorities of the Member States, national competition authorities, ESMA and other relevant authorities.	Guidance Cooperation	Article 10(1) Reg 1227/2011

[171] ESMA – European Securities Market Authority

11. Cooperate with the authorities responsible for overseeing trading in emissions allowances or derivatives relating to emissions allowances and establish mechanisms to share information on records of transactions in such allowances and derivatives.	Cooperation	Article 10(3) Reg 1227/2011
12. Inform ESMA and the competent financial authority, on its own initiative or at NRAs' request, where it suspects that acts are being or have been carried out which constitute market abuse.	Information	Article 16(2) and (3)(b) and (d) Reg 1227/2011
13. Request, on its own initiative or at NRAs' request, one or more national regulatory authorities to supply any information related to a suspected breach of the Regulation.	Information	Article 16(2) and (4)(a) Reg 1227/2011
14. Request, on its own initiative or at NRAs' request, one or more national regulatory authorities to commence an investigation and to take appropriate action where it suspects that there has been a breach of the Regulation.	Guidance	Article 16(2) and (4)(b) Reg 1227/2011

15. Establish and coordinate, on its own initiative or at NRAs' request, an investigatory group where it suspects that there has been a breach of the Regulation and it considers that the possible breach has, or has had, a cross-border impact.	Coordination	Article 16(2) and (4)(c) Reg 1227/2011
International relations		
16. Develop contacts and enter into administrative arrangements with third country authorities in so far as is necessary to achieve the objectives set out in the Regulation, in particular, to promote the harmonisation of the regulatory framework.	Cooperation	Article 19 Reg 1227/2011
Consultations and transparency		
17. Publish the Report to the Commission on its activities under the Regulation.	Publication	Article 7(3) Reg 1227/2011
18. Consult with interested parties before making recommendations to the Commission as to the records of transactions.	Consultation	Article 7(3) Reg 1227/2011
19. Consult with the interested authorities before establishing the mechanisms to share information on trading activity in wholesale energy products with them.	Consultation	Article 10(1) Reg 1227/2011

20. Make all recommendations available to the European Parliament, the Council and the Commission and to the public.	Disclosure	Article 7(3) Reg 1227/2011
21. Make the European register, or extracts thereof, as well as part of the information which it possesses publicly available provided that commercially sensitive information on individual market participants is not disclosed and subject to confidentiality requirements.	Disclosure	Articles 9(3) and 12 (2) Reg 1227/2011
22. Adopt and publish transparent rules on the manner it will disseminate information.	Adoption Publication	Article 12(2) Reg 1227/2011

C - Tasks assigned by the TEN-E Regulation		
Agency's task	**Type of action**	**Legal basis**
Monitoring and recommendation		
1. Monitor the progress achieved in implementing the projects of common interest and make recommendations to facilitate the implementation of projects of common interest.	Monitoring Recommendation	Article 5(3) Reg 347/2013

2. Submit to the Groups a consolidated report for the projects of common interest, evaluating the progress achieved and make, where appropriate, recommendations on how to	Reporting Recommendations	Article 5 (5) Reg 347/2013, Article 6 (8) and (9) Reg 713/2009
3. Provide an opinion to Member States and the Commission on the methodologies submitted by ENTSOs and publish it.	Opinion Publication	Article 11(2) Reg 1347/2013
4. Request of relevant network, load flow and market data and relevant confidentiality agreements.	Request	Article 11(5) Reg 1347/2013
5. Request, on its own initiative or upon a duly reasoned request by NRAs or stakeholders, and after formally consulting the organisations representing all relevant stakeholders and the Commission, of updates and improvements of methodologies; publication of the requests by NRAs or stakeholders and of all relevant non-commercially sensitive documents.	Request, Consultation Publication	Article 11(6) Reg 1347/2013
6. Decision on investments requests, including cross-border cost allocation in case of disagreement among NRAs concerned or on their joint request; consultation of NRAs concerned and of project promoters; publication.	Decision Consultation Publication	Article 12 (6) Reg 1347/2013

7. Notification to the Commission of all cost allocation decisions, together with all the relevant information.	Notification	Article 12 (7) Reg 1347/2013
8. Facilitate the sharing of good practices and make recommendations regarding: (a) the appropriate incentives to be granted to some project of common interest; (b) a common methodology to evaluate the incurred higher risks of investments in electricity and gas infrastructure.	Cooperation Recommendation	Article 13 (5) Reg 1347/2013 and Article 7(2) Reg 713/2009
9. Opinion on the common network operation tools adopted by the ENTSOs.	Opinion	Article 8 (3) Reg 714/2009
10. Ensure exchange of information between Groups.	Information	Annex III (1)
11. Where necessary, check the consistent application of the criteria/cost-benefit analysis methodology and evaluate their cross-border relevance for proposed projects falling under the categories set out in Annex II.1 and 2 of Regulation 1347/2013.	Analysis	Annex III (2)

12. Opinion on the draft regional list of proposed projects falling under the categories set out in Annex II.1 and 2 drawn up by the Groups.	Opinion	Annex III (2) and Article 15(1) Reg 713/2009

5. Provisional conclusions

This Chapter has provided the relevant framework to contextualise the dynamic analysis to be developed in the next Chapters. In particular, it has revolved around the following question: how is the energy market regulated, and which is the role played by the Agency for the Cooperation of Energy Regulators in this scenario? In order to suggest a possible answer to this question, section 2 has introduced a few theoretical underpinnings to network governance (to be fully developed in Chapter III), while section 3 has underlined the main features of the (not yet) integrated energy market, as well as the most relevant regulatory insights pertaining to the sector. Finally, section 4 has shown what the shift from ERGEG to ACER has meant in terms of energy governance, while highlighting some controversial and challenging issues to be further developed in Chapter II.

The most relevant findings can be summarised as follows. First, networks have been classified as paramount regulatory tools in the horizontal and multilevel scenario depicted by supranational governance, especially in the EU. Second, structural challenges remain to market integration in the energy sector. Third, ACER was created in order to foster regulatory convergence in the field and, in this sense, it represents a paramount step towards accountability with regards to ERGEG, while maintaining a flexible structure due to the strong role of NRAs within its internal organisation.

However, the internal governance dynamics involving the Board of Regulators (composed of NRAs according to the archetypical “network agency” scheme) and the Agency’s Director still have to be assessed. Indeed, the dual nature (both European and intergovernmental) of ACER remains a key factor to be investigated. Moreover, independence and accountability of the Agency remain paramount knots to be untangled in order to speculate on ACER’s role

within the general “agencification” process of European policy making. In particular, the issue of institutional balance is crucial, with regards to both ACER’s structure and the vast array of tasks it is entrusted with, in light of the accountability mechanisms introduced by the Lisbon Treaty. These issues will be considered in Chapter II, while Chapter III will provide the necessary constitutional background while opting in favour of an evolutionary perspective accounting for the policy innovations occurred during the last wave of energy policy making (2016 Winter Package).

Chapter II

ACER's regulatory practice and National Regulators

1. Introductory remarks

In line with the structural and institutional context developed in Chapter I, this Chapter argues that it is paramount to consider the Agency's regulatory practice with regards to National Regulatory Authorities in order to assess its (peculiar) constitutional role within European agency governance. More precisely, looking at the way in which independence and accountability of the Agency are moulded from NRAs participation is telling of the nature of ACER within the "network agency" scenario.

Accordingly, this Chapter aims at providing an answer to the following research question: which are the distinguishing features of ACER's practice, with particular regards to the involvement of National Regulators in supranational policy making? Chapter III will then deal with the constitutional implications of the controversial issues hinted at in the present Chapter, with a peculiar focus on the governance innovations introduced by the 2015 Energy Union Communication and the 2016 Winter Package proposals (the so-called "fourth energy package").

Two key critical aspects, to be tackled in order to structurally assess ACER's nature and constitutional sustainability, in terms of both institutional balance and participation, concern the justiciability of the (binding?) soft law the Agency issues, as well as the internal governance mechanisms characterising its practice. As a matter of fact, it may perhaps be considered unnecessary to underline the close relationship linking these two elements (justiciability and internal governance) to the broader issue of accountability, which is

undoubtedly[1] paramount in the constitutional discourse on the agencification of European policy making.

In other words, in order to reflect upon ACER's role within energy regulation in an increasingly dynamic and interconnected setting, it will be paramount to focus on its relationship with Member States (represented in the Board of Regulators of the Agency through their National Regulatory Authorities) and European Institutions (European Commission and European Parliament, but also the European Court of Justice). Notably, these considerations are made increasingly relevant by the structural innovations introduced by the Lisbon Treaty, providing for legal and administrative (political?) accountability for European agencies.

The aforementioned issues will be tackled in the present Chapter following a structured path. Section 2 will provide the relevant framework to ACER's practice in relation to NRAs, proposing a categorisation of the Agency's tasks according to the different degree of participation of National Regulators (thus suggesting a differentiated approach to the implementation of the European principles of subsidiarity and proportionality) and defining the necessary theoretical framework to agencification, the delegation of powers to European agencies. Consequently, Section 3 will delve into the issues of judicial supervision (accountability) and internal governance, with a key focus on the practice of the Agency.

2. Conceptualising ACER: main tasks and the theory of delegation

This section will be devoted to a systematic conceptualisation and analysis of the main peculiarities of the Agency's practice, given the normative and regulatory scenario depicted in the previous pages, providing a necessary framework of discussion on the peculiarities and characteristics on NRAs involvement and the delegation of powers.

[1] Notably, agencification has to be framed within the broader discourse on the applicability of general European administrative law principles to the delegation of powers, among which a key role is to be played by impartiality, independence and accountability. See, *ex multis*, WEATHERHILL (ed.), *Better Regulation*, Hart Publishing, Oxford 2007, p. 20; BALDWIN – CAVE - LODGE, *Understanding regulation*, Oxford University Press, Oxford 2011, pp. 137 – 164; THATCHER, *Delegation to independent regulatory agencies: pressures, functions and contextual mediation*, in *West European Politics* 25/2002, pp. 125 – 147. On the need to reconcile independence and accountability in the delegation of powers scenario, see MAJONE, *Regulatory legitimacy*, in MAJONE (ed.), *Regulating Europe*, Routledge, London 1996, pp. 284 – 301.

In order to focus on the tangible implications of ACER's governance, along the aforementioned critical suggestions, a preliminary attempt at categorising the tasks assigned to the Agency (focussing on the different involvement of the main institutional actors) will be presented (Sub-section 2.1). The composite framework setting the boundaries of delegated legislation in the EU will then be introduced (Sub-section 2.2), in order to provide a clear and structured background to the accountability debate hinted at in Section 3.

2.1 Categorising the tasks assigned to the Agency

According to the general structure included in the Third Energy Package, the tasks assigned to ACER can be easily categorised as schematically pertaining to four traditional categories: advisory tasks, preparatory tasks, monitoring tasks and decision-making tasks. This categorisation, which has been proposed in the previous sections of the present research, is macroscopically relevant when considering the role of ACER as a regulatory actor within energy governance, but it is not particularly telling of the intrinsic nature of the powers assigned to the Agency. In order to understand the main controversial issues pertaining to the judicial and political accountability of ACER it is thus relevant to focus on the main systematic principles governing the Agency's action, consequently suggesting an alternate classification of the tasks assigned to the European regulator.

In other words, it is paramount to investigate ACER's role as a European delegated actor in the development of the internal energy market along three guiding pillars[2]: the implementation of the liberalisation and unbundling provisions included in the Third Energy Package, the development and implementation of network codes, and the qualification and definition of new infrastructures at European level. The legal basis[3] defined for the Agency's

[2] BERNAERTS, *The internal energy market: practical priorities for the Commission*, in GLACHANT – AHNER – DE HAUTELECOCQUE (eds.), *EU energy law – EU energy law and policy, Yearbook 2011*, Claeys & Casteels, Leuven 2011, p. 58 – 60.

[3] Mainly Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, OJ L 211, 14 august 2009, p. 1–14 (hereinafter "ACER regulation"), but also Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency, OJ L 326, 8 December 2011, p. 1–16 (hereinafter "REMIT regulation") and Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009, OJ L 115, 25 April 2013, p. 39–75 (hereinafter "TEN-E Regulation").

existence and operation allows for an interpretation of these tasks which is strictly framed by the guiding principle of subsidiarity and the case-law and normative boundaries[4] set to the delegation of technical decisions. It is thus in this respect that the advisory, preparative, and coordination role of ACER can be characterised by a complementary nature with regards to National Regulators.

What is more, independence, accountability, openness and transparency[5] of the Agency can be considered as key elements towards a full and tangible implementation of the principles of subsidiarity and lawful delegation of powers within the energy governance scenario. Indeed, as anticipated in Chapter I, the ACER Regulation contains a concise set of rules[6] aimed at providing an endogenous answer to the need for the definition of a fair procedure in both the implementation and the justiciability of the acts issued by the Agency.

More specifically, it is known that, pursuant to Article 5, paragraph 3, TEU, "under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level". This language is mirrored in Recital 29 of the ACER Regulation, stating that "since the objectives of this Regulation, namely the participation and cooperation of national regulatory authorities at Community level, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt

[4] The evident reference in this context is that to the *Meroni*, *Romano* and *Short selling* doctrines relating to the interpretation of the delegation of powers to European agencies, which will be specifically dealt with in the following Section.

[5] It has been argued (see CHITI – FRANCHINI, *Le figure organizzative*, in DELLA CANANEA (ed.), *Diritto amministrativo europeo*, Giuffrè, Milan 2013, p. 82) that the legal personnality granted to the Agency by the establishing regulation could be considered *per se* telling of the technical, administrative and operational autonomy of ACER. Consequently, the principles mentioned represent the guiding factors specifying said autonomy of the Agency. The specific provisions determining the independence and accountability of ACER have already been mentioned in Chapter I. Notably, it is worth remembering that Articles 14, paragraph 5, and 16, paragraph 1, relate to the independence of the Director and Board of Regulators, while Articles 15, paragraph 8, 16, paragraph 5, and 23 of ACER Regulation relate to institutional accountability, alongside with Article 20, connected to judicial accountability. Finally, it is perhaps interesting to point out that, pursuant to Articles 11 and 11a of Council Regulation 259/68 of 29 February 1968 (OJ L 56, 4 March 1968, 1 December 1972), the Director and personnel of EU agencies are bound to be independent from national actors, as they have a specific duty to act uniquely in the interest of the Union.

[6] Fall within this category Article 10, pertaining to the definition of the content of the soft law enacted by ACER, as well as Article 30 (access to documents). Articles 14 (internal governance, Boards of Regulators specifically) and 20 (judicial review, to be read in conjunction with Article 263 TFEU) also provide for relevant boundaries to the action of the Agency, in line with the aforementioned guiding principles.

measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives".

The hypothetical[7] overlaps and mismatches[8] of competences between the European and national level shall thus be addressed while observing the tasks assigned to the Agency, suggesting a classification of such powers according to the different involvement of national regulators in issuing the decisions and (binding?) soft law[9], as a key to solving the subsidiarity dilemma[10]. Moreover, qualifying the acts issued by the Agency according to the actors involved helps accounting for the autonomous, bilateral or trilateral role played by the Agency in its paramount coordination role. In particular, it is argued that this element is relevant in addressing the "double nature" of ACER (both European and merely coordinative) hinted at in the final sections of Chapter I.

2.1.1 Unsolicited opinions and recommendations

A first category of (advisory) tasks performed by the Agency covers unsolicited opinions and recommendations. These acts, which are the manifestation of an autonomous power of ACER, represent an unprecedented element in European agency governance, determining a

[7] Judgment of the Court of 31st March 1971, *Commission of the European Communities v Council of the European Communities. - European Agreement on Road Transport*, Case 22-70, EU:C:1971:32. On the consequences of a possible duplication of competences at EU and national level, see ESTELLA, *The EU Principle of Subsidiarity and Its Critique*, Oxford University Press, Oxford 2002, p. 114

[8] See VEIGA DE MACEDO, *The Agency for Cooperation of Energy Regulators: Still Regulation Through Cooperation?*, contribution to *The Centre for Energy, Petroleum and Mineral Law and Policy*, 16th May 2011, p. 9. and THOMPSON, *The European Union's Energy Policy: Two Track Development* in WITZLEB – ARRANZ – WINAND (eds.), *The European Union and Global Engagement: Institutions, Policies and Challenges* Edward Elgar, Cheltenham 2015, p, 178.

[9] The notion of soft law is particularly relevant when considering the energy sector, due to both the diversified declination of subsidiarity in the implementation of energy policies and the European scenario. Indeed (see BROUSSEAU – GLACHANT, *Regulators as reflective governance actors*, in *Competition and Regulation of Network Indusries*, 12/2011, pp. 195 ff.), soft law has helped bridging the regulatory gap between coordination and competition, while playing a crucial role in harmonising different regulatory cultures (BOHNE, *Conflicts between national regulatory cultures and EU energy regulations*, in *Utilities Policy*, 19/2011, pp. 255 – 269). The judicial consequences (see STEFAN, *Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance*, in *Maastricht Journal of European and Comparative law*, 2/2014, pp. 359 – 379) of the vast use of soft law for ACER's practice will be investigated in Section 3.1.

[10] For a similar perspective, see VAONA – POTOTSCHNIG, *Un'Agenzia per la cooperazione fra i regolatori nazionali dell'energia: partecipazione e cooperazione strutturale tra le Autorità nazionali di regolamentazione nell'interesse dell'Unione attraverso un organismo indipendente*, in MERUSI – ANTONIAZZI (eds.), *Vent'anni di regolazione accentrata di servizi pubblici locali*, Giappichelli, Turin 2017, p. 162.

key peculiarity of the energy sector[11]. These acts constitute a substantial bulk of the Agency's action, as they can be addressed to both NRAs and EU institutions, pursuant to Article 5[12] and Article 7[13], of the establishing Regulation. Notably, the mentioned provisions leave a wide margin of appreciation to the Agency, as far as the scope and content of the recommendations are concerned: in principle, ACER's unsolicited opinions and recommendations could cover "any of the issues relating to the purpose for which [the Agency] has been established". As a consequence, they represent an exteriorisation of ACER's European and supranational character: while involving NRAs through the ordinary cooperation of the Board of Regulator, the Agency states the definition of its autonomous will, arguably implementing its own interpretation of energy sector regulation.

2.1.2 Advisory and preparatory soft law not having not having an unsolicited character

With regards to NRAs and TSOs, the establishing Regulation and electricity and gas Directives also include tasks that do not have an unsolicited character: rather, they represent advisory powers to be taken in a predetermined set of legally defined circumstances, either through the necessary procedural steps[14] to be advanced, or following a specific solicitation by a National Regulatory Authority or the Commission[15]. These (binding) recommendations cover a wide range of topics, which are critical to the development of the internal energy market, pursuant to the Third package. In particular, network codes (both in the definition of the relevant priorities and in the compliance with the codes to the Guidelines determined by the Agency) and the relationship between NRAs and TSOs are heavily influenced by ACER's

[11] See ERMACORA, *The agency for the cooperation of energy regulators*, in JONES (ed.), *EU Energy Law. The internal energy market. The third liberalisation package*, Clays & Casteels, Leuven 2010, p. 290.
[12] " The Agency may, upon a request of the European Parliament, the Council or the Commission, or on its own initiative, provide an opinion or a recommendation to the European Parliament, the Council and the Commission on any of the issues relating to the purpose for which it has been established".
[13] "The Agency shall provide a framework within which national regulatory authorities can cooperate. It shall promote cooperation between the national regulatory authorities and between regulatory authorities at regional and Community level, and shall take due account of the outcome of such cooperation when formulating its opinions, recommendations and decisions. Where the Agency considers that binding rules on such cooperation are required, it shall make the appropriate recommendations to the Commission".
[14] Ex. 6(1) Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, OJ L 211, 14 August 2009, p. 15–35, and Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, OJ L 211, 14 August 2009, p. 36–54, or artt. 6(3) and 6(4) ACER Regulation, or 6(7) and 8(2) Regulation 714/2009 and Regulation 715/2009.
[15] Ex. 3(1), par. 2) Regulation 714/2009 and Regulation 715/2009.

opinions. Notably, while the internal governance mechanism[16] for the adoption of these acts is not substantially different from that pertaining to unsolicited opinions and recommendations, it is worth underlining that the participation and role of NRAs and TSOs has a different connotation with regards to this set of advisory and preparatory powers exercised by the Agency. Indeed, the legislative framework aims at establishing ACER as the primary forum of discussion[17] towards an integrated and harmonised energy market, while shaping a bilateral relationship with NRAs and a trilateral relationship with TSOs (as it necessarily involves NRAs as well)[18]. It is thus possible to affirm that a more active involvement of National Regulators is envisaged when adopting these opinions, as a practical implementation of the subsidiarity principle within the traditional scheme defining a "fair procedure"[19] in the adoption of delegated acts. A telling example is the possibility for the Commission or one NRA to ask ACER for an opinion on the conformity of a decision issued by a National Regulator with European sector regulation[20]: in this context, in light of the preparatory nature of the Agency's act[21], NRAs do not act as third parties to the proceedings. Rather, they are involved in the internal decision-making process.

[16] As they both require the assent of the Board of Regulators, as observed in section 2.4 of the present Chapter.

[17] See ACER Recommendation 5/2015, 18 December 2015. On this account, see VAONA – POTOTSCHNIG, *Un'Agenzia per la cooperazione fra i regolatori nazionali dell'energia: partecipazione e cooperazione strutturale tra le Autorità nazionali di regolamentazione nell'interesse dell'Unione attraverso un organismo indipendente*, in MERUSI – ANTONIAZZI (eds.), *Vent'anni di regolazione accentrata di servizi pubblici locali*, Giappichelli, Turin 2017, p. 164.

[18] The advisory and preparatory role of the Agency with regards to TSOs is particularly relevant with regards to network codes. The controversial nature of ACER's soft law relating to Network Codes will be considered in section 2.3, where the legal effects stemming from ACER's Guidance, even in the absence of implemented network codes, will be assessed (Judgment of the Court of First Instance of 27 September 2006, T-59/02, *Archer Daniels Midland Co. v Commission of the European Communities*, EU:T:2006:272). In this context, however, it is worth recalling that while ACER does not have the power to sanction TSOs, pursuant to Article 5 of the establishing Regulation it can adopt the dissuasive policy of reporting to the Commission on any specific misbehaviour. Moreover, with specific regards to network codes, where the trilateral nature of the relationship between ACER, NRAs and TSOs becomes evident, Article 6 Regulation 714/2009 and 715/2009, and Article 6(5) in particular (safeguard clause on cooperation in favour of the Commission) provide for strong incentives to cooperate which impose strict cooperation between the relevant actors. It is however worth noting that in this context the divide between strong cooperation and centralisation becomes blurry.

[19] On the systematic role of introducing and legitimising a fair procedure in order to overcome at the root possible contrast on accountability grounds with the *Meroni* doctrine, see PROSSER, *The Regulatory Enterprise – Government, Regulation, and Legitimacy*, Oxford University Press, Oxford 2010.

[20] Article 7(4) ACER Regulation: "The Agency shall provide an opinion, based on matters of fact, at the request of a regulatory authority or of the Commission, on whether a decision taken by a regulatory authority complies with the Guidelines referred to in Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 or Regulation (EC) No 715/2009 or with other relevant provisions of those Directives or Regulations".

[21] ACER Working document 14 may 2013, POTOTSCHNIG, *The New Regulatory Agency: Priorities and Developments for ACER*, in GLACHANT – AHNER – DE HAUTECLOCQUE (eds.), *EU Energy Law – EU Energy Law & Policy, Yearbook 2011*, Claeys & Casteels, Leuven 2011.

It is worth mentioning, however, that the divide between advisory and preparatory tasks implying a more or less active involvement of NRAs is not directly connected to the subject matter at hand. Rather, it seems to follow a more complex paradigm allowing for differentiated declinations of the subsidiarity principle in the operational tasks connected to the development of the internal energy market. One crucial example of differentiated cooperation between ACER and NRAs is provided by the TEN-E Regulation[22], which deals with the definition and implementation of European Projects of Common Interest (PCIs)[23]. The mechanism set for in the Regulation revolves around the establishment of twelve Regional Groups, the decision-making body of which encompasses the Commission and the relevant Member States[24], having the paramount role of defining a list of proposed PCIs. The Union list shall be adopted by the Commission on the basis of the regional lists, necessarily taking into account, *inter alia*, a reasoned opinion to be issued by ACER. Notably, pursuant to Annex III, Article 2(12), this opinion shall be adopted in accordance with the procedure referred to in Article 15(1) of Regulation 713/2009, prescribing the necessary involvement of the Board of Regulators. Conversely, no form of direct involvement of NRAs is envisaged for any other opinion within the TEN-E Regulation framework. This consideration is particularly poignant with regards to monitoring tasks, as well as the power to issue individual decisions, which will be promptly considered.

2.1.3 Reporting tasks and recommendations pertaining to legislative implementation and market monitoring

Indeed, as anticipated, the legislative framework included in the Third Energy Package and the subsequent legislative interventions[25] provide for the definition of a structured set of monitoring powers for the Agency. Notably, internal market monitoring does not entail a

[22] Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009, OJ L 115, 25 April 2013, p. 39–75 ("TEN-E Regulation").

[23] The criteria for the suitability and adoption of PCIs are enshrined in Article 4 of the TEN-E Regulation, and they include a general evaluation of the overall benefits attached to each specific PCI.

[24] See Article 3(1) TEN-E Regulation: "This Regulation establishes twelve Regional Groups ('Groups') as set out in Annex III.1. The membership of each Group shall be based on each priority corridor and area and their respective geographical coverage as set out in Annex I. Decision-making powers in the Groups shall be restricted to Member States and the Commission, who shall, for those purposes, be referred to as the decision-making body of the Groups".

[25] TEN-E Regulation, REMIT Regulation, but also Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management, OJ L 197, 25 July 2015, p. 24–72 ("CACM Regulation").

uniform involvement of National Regulators (both on an endogenous or on a exogenous level)[26], depending on the topic and legal basis concerned. In this context, a first outcome of a more general market monitoring function, aimed at evaluating the state of the art in terms of market integration, as well as identifying the remaining barriers hindering supranational energy trade and consumer protection, is the adoption of the Annual Market Monitoring Report.

This report may have a propulsive role in terms of policy development for the internal energy market, as it is usually[27] presented to the European Parliament (Itre Commission). It is worth underlining that, pursuant to Article 11, paragraph 3, of Regulation 713/2009, no explicit approval of the Board of Regulators is envisaged with regards to the Report: monitoring is conceived as a strictly technical activity representing an autonomous power of the Agency, and National Regulators are, in principle, excluded from the adoption of the Report. However, a stark testimony to the composite and ever changing nature of the role played by NRAs in the decision-making process is the Agency's consolidated practice[28] requiring the informal consultation of the BoR on the draft version of the report. The Board can, thus, suggest amendments and integrations, also in light of the relevant drafting role played by seconded national experts within the relevant Working Groups, but the Agency is by no means bound to follow the BoR's advice.

Similarly, the monitoring powers relating to the development and implementation of Network Codes[29] by TSOs[30], as well as the monitoring tasks enshrined in the TEN-E Regulation[31], can include reporting activity to European institutions (mainly the Commission), but they substantially cover the adoption of reasoned opinions and recommendations which do not entail a direct involvement of the Board of Regulators. In light of the aforementioned

[26] The distinction between endogenous and exogenous involvement, for the purposes of this research, regards, on the one hand, the involvement of NRAs as structured members of the Board of Regulators, and, on the other, their participation to the adoption process as third parties.
[27] Indeed, no specific provision of the ACER regulation requires its presentation to European institutions. However, the Agency developed such a practice. See VAONA – POTOTSCHNIG, *Un'Agenzia per la cooperazione fra i regolatori nazionali dell'energia: partecipazione e cooperazione strutturale tra le Autorità nazionali di regolamentazione nell'interesse dell'Unione attraverso un organismo indipendente*, in MERUSI – ANTONIAZZI (eds.), *Vent'anni di regolazione accentrata di servizi pubblici locali, Giappichelli*, Turin 2017, p. 168.
[28] *Ibid*.
[29] For a structured overview of the main monitoring powers pertaining to the different stages of
[30] See Article 6, paragraphs 7, 8 and 9 of the ACER Regulation.
[31] See Article 5 TEN-E of the Regulation

consideration, it may be possible to infer that monitoring tasks pertain more to the "European – supranational" character of the Agency, as they include a generally less structured involvement of National Regulators.

Different conclusions shall be drawn, at a first glance, for the REMIT environment, arguably due, at least in part, to the peculiarity of the topic[32] covered by the mentioned Regulation. Indeed, REMIT[33] enshrines a structured set of autonomous monitoring powers, which have been poignantly qualified as tasks aiming at overcoming the paradigm of cooperation, in favour of a structure of interaction[34] on energy trading monitoring between the Agency and NRAs. In particular, ACER coordinates both the investigating and sanctioning activities of NRAs, which are, in turn, the addressees of specific information duties with regards to the alleged violations of the Regulation. The activities carried out by ACER within this framework include the definition of guidelines spelling out the relevant enforcement priorities for NRAs in the case of cross-border infringements, as well as the possibility to request the opening of investigations and enforcement proceedings on specific violations, as well as the establishment and coordination of (binational or regional) investigating groups.

It is worth pointing out, however, that inferring, from the considerations above, an active role for NRAs in the monitoring activities relating to REMIT would be fallacious. As a matter of fact, while it would be difficult to argue against the tangible role played by National Regulators in the REMIT environment, it is crucial to underline that, at the Agency level, no approval of the Board of Regulators is required when dealing with these issues. More specifically[35], the REMIT Regulation only specifies that "the Director of the Agency shall consult the Agency's Board of Regulators on all aspects of implementation of this Regulation

[32] In Chapter I, reference has already been made to the main goals of REMIT. In particular, it is here worth recalling that, according to the preamble (paragraph 2), "The goal of increased integrity and transparency of wholesale energy markets should be to foster open and fair competition in wholesale energy markets for the benefit of final consumers of energy", thus underlining that "close cooperation and coordination between the Agency and national authorities is therefore necessary to ensure proper monitoring and transparency of energy markets". (Paragraph 17). In other words, the crucial role of cooperation in tackling market manipulation and insider trading in wholesale markets may be arguably considered a paramount element shaping supranational governance in this specific sector.

[33] See REMIT Regulation, Articles 10, 13 and 16, where a nuanced set of powers is defined.

[34] See VAONA – POTOTSCHNIG, *Un'Agenzia per la cooperazione fra i regolatori nazionali dell'energia: partecipazione e cooperazione strutturale tra le Autorità nazionali di regolamentazione nell'interesse dell'Unione attraverso un organismo indipendente*, in MERUSI – ANTONIAZZI (eds.), *Vent'anni di regolazione accentrata di servizi pubblici locali*, Giappichelli, Turin 2017, p. 169.

[35] *Ibid*.

and give due consideration to its advice and opinions"[36]. Interestingly, the scope of this general duty of consultation (which is clearly phrased in a mild and vague, if overarching, manner) is not limited to monitoring activities: even the recommendations[37] the Agency can provide to the Commission in order to better develop delegated legislation, as well as the technical standards[38] proposed by ACER aiming at implementing an efficient monitoring for wholesale energy markets, are only subject to the mere consultation of the Board of Regulator[39].

To sum up, it may be possible to affirm that monitoring tasks are conceived, in the main normative framework, as manifestations of an autonomous power of the Agency, involving National Regulators only marginally and mainly as consultative actors. The internal governance implications of this preliminary consideration will be considered in the relevant paragraph of the following section.

2.1.4 Individual decisions

Finally, individual decisions are to be taken into account, as they represent the last *species* of the tasks assigned to the Agency. Preliminarily, it is paramount to underline that individual decisions, which may often be addressed to specific National Regulators, have a peculiar role in the subsidiarity debate, as they represent a tool to overcome, in a specific set of circumstances[40], the impossibility of NRAs to coordinate their action, and the Agency can act autonomously or be delegated by NRAs to solve these disputes. It is worth noting that an active role of National regulators is envisaged in this contest, as both the direct consultation of the NRAs involved and the approval of the BoR are necessary in order to issue and individual decision.

[36] Article 1, paragraph 5, of the REMIT Regulation. The highlight has been added by the author.
[37] See Article 7, paragraph 3, of the REMIT Regulation: "The Agency shall at least on an annual basis submit a report to the Commission on its activities under this Regulation and make this report publicly available. In such reports the Agency shall assess the operation and transparency of different categories of market places and ways of trading and may make recommendations to the Commission as regards market rules, standards, and procedures which could improve market integrity and the functioning of the internal market. It may also evaluate whether any minimum requirements for organised markets could contribute to enhanced market transparency. Reports may be combined with the report referred to in Article 11(2) of Regulation (EC) No 713/2009"
[38] See Commission Implementing Regulation (EU) No 1348/2014 of 17 December 2014 *on data reporting Implementing Article 8(2) and Article 8(6) of Regulation (EU) No 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency*, OJ L 363, 18 December2014, p. 121–142.
[39] Notably, during the activities carried out to develop the present research, no evidence has been found regarding the existence of any (informal) practice implying more than the mere consultation of the Regulators.
[40] See ACER Regulation 713/2009, Article 8(1) and (2), Article 9(1), Regulation 714/2009, Article 17(5) and Regulation 715/2009, Article 36(4).

Conversely, in the TEN-E Regulation, regarding individual decisions on the implementation of PCIs, as well in other more recent legislative interventions[41] dealing with the definition of specific cross-border cost avocation mechanisms, National Regulators are involved only as third parties in the proceedings resulting in the adoption of individual decisions. This results in a variegated involvement of NRAs, characterised by several declinations and variations on the notion of subsidiarity.

2.2 Delegating powers under the *Meroni* doctrine and beyond

From the very outsets of the present research, one crucial element has been made clear: the constitutional sustainability of the agencification process of European policy making heavily relies upon the limits, checks and balances enshrined in the principles shaping the legality of the delegation of powers. As underlined elsewhere[42], the relevant legal basis is represented by Articles 290 and 291 TFEU[43], allowing for the delegation of powers, which (apparently) go beyond the traditional comitology scheme. More specifically, while the choice between implementing and delegated acts still remains problematic in the post-Lisbon scenario[44], the present research will focus on the limits to the delegation of powers to European agencies, which has been judicially set[45], early on in European history, by the well-known *Meroni*

[41] CACM Regulation.
[42] BRADLEY, *Political Problems, Legal Solutions?*, in BERGSTROM - RITLENG (eds.), *Rulemaking by the European Commission: The New System for Delegation of Powers*, Oxford University Press, Oxford 2016, p. 176.
[43] It is worth noting that considering Articles 290 and 291 as the relevant bases for the delegation of powers is not uncontroversial in the legal literature on agencification. Indeed, some recent scholarship, following the steps of the 2014 *Short Selling* case (to be discussed below), hint at the possibility of another basis legitimising the Council to delegate its powers to *ad hoc* agency-like bodies: a combined reading of Articles 114, 263 and 277 TFEU would allow the Council to better implement specific policy making goals on highly technical matters through the delegation of (quasi) legislative powers to EU agencies. See, *inter alia*, CHAMON, *EU Risk regulators and EU procedural law*, in *European Journal of Risk Regulation*, 5/2014, p. 333; ALBERTI, *Delegation of powers to EU Agencies after the Short Selling Ruling*, in *Il Diritto dell'Unione Europea*, 4/2015, p. 471. This point of view, however, is to be considered flawed from the perspective of the authorship, as, in line with the considerations to be laid down below (in the present section), the 2014 *Short Selling* case presents some crucial peculiarities hampering its application to the context at hand. Moreover, it key to point out that the constitutional consistency of the Union would be significantly modified by the introduction of broader discretionary powers for EU agencies.
[44] JACQUE', *The Evolution of the Approach to Executive Rulemaking in the EU*, in BERGSTROM - RITLENG (eds.), *Rulemaking by the European Commission: The New System for Delegation of Powers*, Oxford University Press, Oxford 2016, p. 32.
[45] It is worth underlining that the extent to which the *Meroni* doctrine can be deemed applicable to EU agencies is not straightforward (SCHUTZE – TRIDIMAS (eds.), *Oxford principles of European Law*, Oxford University Press, Oxford 2018, p. 127). As a matter of fact, both the unsettled nature of the notion of "EU agencies"

case[46] of the European Court of Justice. In particular, the validity of the limits set by the *Meroni* doctrine in light of the normative (constitutional?) and judicial evolution of European law will be taken into account.

2.2.1 Delegation of powers: *Meroni* and *Romano*

The 1958 case dealt with the annulment of a decision of the High Authority determining a fee to be paid by the applicant (Meroni & co., Industrie Metallurgiche, S.p.A, Milan) to the imported ferrous scrap equalization fund (*Caisse de péréquation des ferrailles importees*), and the general principles defined by the Court have represented the standards of legality to the delegation of powers in the European context. The main principles governing the delegation of powers under the *Meroni* doctrine can be summarised as follows:

(I) The authority receiving the delegation powers cannot be conferred powers that are different from those which the delegating authority itself received under the Treaty[47];

(II) Delegation should be expressly stated and delegation should be necessary for the performance of the relevant tasks[48];

(III) Any delegation of powers can only relate to clearly defined executive powers, the use of which must be entirely subject to the supervision of the delegating authority[49].

The first crucial element to take into account is thus the paramount role played by preserving the institutional balance, which is, within the *Meroni* framework, "characteristic of the

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(referred to in the Introduction of the present thesis) and the facts and historical context of the case at hand (notably, the delegation occurring in favour of a body established by private law rather than an EU agency) gave rise to a vivid debate in the legal and political scholarship on the applicability of the *Meroni* principles to the delegation of powers to agencies (See MAJONE, *Regulatory legitimacy*, in MAJONE (ed.), *Regulating Europe*, Routledge, London 1996, p. 284 – 301). For the purposes of the present research, however, the *Meroni* doctrine will be considered the starting point of the analysis of the constitutional sustainability of the delegation to EU agencies, and ACER in particular, both because of the subsequent case law confirming the applicability of the 1958 case to European agencies (such as the *Romano* and *Short Selling* cases, to be discussed in the present paragraph) and because the *Meroni* case has been considered the relevant model the governance and tasks of ACER have been shaped around when discussing the Third Energy Package (and against the first proposal from the Commission – see ERMACORA, *The agency for the cooperation of energy regulators*, in JONES (ed.), *EU Energy Law. The internal energy market. The third liberalisation package,* Clays & Casteels, Leuven, 2010, p. 290).

[46] Judgment of the Court of 13 June 1958, case 9 – 56, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, EU:C:1958:7, hereinafter "the *Meroni* case".

[47] *Meroni* case, p. 150.

[48] *Meroni* case, p. 151.

[49] *Meroni* case, p. 152.

institutional structure of the community, and a fundamental guarantee granted by the Treaty in particular to the undertakings and associations of undertakings to which it applies"[50]. It is interesting to note that the notion of institutional balance emerging from the *Meroni* case is an overarching one: it encompasses both the notions of accountability and institutional supervision[51], suggesting the impossibility for delegated agencies to subvert or modify the constitutional structure defined by the Treaties.

In light of the aforementioned considerations, the prescribed unlawfulness of the delegation of discretionary powers to EU agencies is a natural consequence of the poignant necessity to preserve the institutional (and constitutional) balance: "to delegate a discretionary power to bodies other than those which the treaty has established to effect and supervise the exercise of such power each within the limits of its own authority, would render less effective the guarantee resulting from the balance of powers"[52] established by the Treaty, possibly leading to the delegated body issuing "actual economic policy"[53]. Indeed, granting a tangible margin of appreciation to EU agencies, beyond technical issues, would alter the architecture enshrined in the Treaties, notwithstanding the parallel accountability and independence[54] mechanisms defined in the establishing Regulations, defining a shift of responsibility from the delegating to the delegated body.

The lack of discretionary powers to be delegated to EU agencies, as well as the need to define institutional supervision and accountability tools, represent the paramount corollaries of the institutional balance concerns at the core of the *Meroni* criteria. This approach has been developed in the *Romano*[55] judgement, in which the Court underlines the fundamental role to be played by judicial supervision, as well as the prohibition for EU agencies to adopt normative (quasi-legislative) acts. As a matter of fact, *Romano* follows in the steps of *Meroni* by declining the constitutional concerns enshrined in the 1958 case law through the

[50] *Meroni* case, p. 152.
[51] The notion of institutional balance has two corollaries to be taken into account in this sense: the principles of competence and autonomy (Judgment of the Court of 4 October 1991, case C-70/88, *European Parliament v Council of the European Communities*, EU:C:1991:373).
[52] *Meroni* case, p. 154.
[53] *Meroni* case, p. 152.
[54] On the overlaps (and mismatches) of independence and accountability when assessing the compliance of EU agencies with the *Meroni* doctrine, see LAVRIJSSEN – OTTOW, *Independent supervisory authorities: a fragile concept*, in *Legal issues of economic integration*, 39, 2012 p. 419 – 445.
[55] Judgment of the Court (First Chamber) of 14 May 1981, case 98/80, *Giuseppe Romano v Institut national d'assurance maladie-invalidité*, EU:C:1981:104.

specification that delegated bodies cannot issue "acts having the force of law", while stressing the need for judicial control (as opposed to institutional accountability).

As far as the *Meroni/Romano* criteria are concerned, arguably (if not uncontroversially) ACER generally fits within the traditional delegation scheme, also taking into account the considerable role of the *Meroni* doctrine in spelling out the defining characteristics of the Agency in the Third Energy Package drafting process[56]. Indeed, while the first two *Meroni* criteria are certainly met (no powers not pertaining to the delegating authority have been delegated to ACER; the establishment of the Agency can be considered necessary to the implementation of EU energy policy, in light of the "integrative paradigm"[57] of regulation in this sector), both the safeguard of institutional balance (third *Meroni* criterion) and the definition of proper (judicial and political) accountability mechanisms (*Meroni* and *Romano*) represent controversial steps in assessing the compatibility of the ACER Regulation with the relevant case law. The technical and non-discretionary nature of ACER soft law is also doubtable[58], while the accountability mechanisms[59] included in the ACER Regulation are rather limited. More substantially, notwithstanding the introduction of Article 263, paragraph 1, expressly providing for the judicial control of the European Court of Justice over the acts issued by EU agencies, the soft law of ACER largely escapes judicial supervision, thus implying substantial consistency problems with regards to the *Meroni*/*Romano* case law. As

[56] ERMACORA, *The agency for the cooperation of energy regulators*, in JONES, *EU Energy Law. The internal energy market. The third liberalisation package*, Clays & Casteels, Leuven 2010, p. 290.
[57] HANCHER - LAROUCHE, *The Coming of Age of EU Regulation of Network Industries and Services of General Economic Interest*, in CRAIG - DE BÚRCA (eds.), *The Evolution of EU Law*, Oxford University Press, Oxford 2011, p. 768.
[58] With regards to the preparatory documents relating to Network codes, this element becomes even more starkly problematic with the introduction of the Winter Package (see Chapter III).
[59] According to the Regulation, several layers of accountability are defined with regards to ACER, other than judicial accountability (Article 20). Firstly, the Agency is accountable both on budgetary and financial matters (Article 24). The European Ombudsman may also be involved in compliant proceedings in front of the Court of Justice, and it thus plays a supervisory role (Article 30). More importantly, the Regulation spells out a series of reporting obligations, both in terms of independent evaluation and in terms of regulatory reporting activities. Moreover, the Director and the Chairman of the Board of Regulators are periodically heard by the European Parliament (see ACER Communication Strategy, "*Towards an internal energy market for the benefit of all EU consumers 2014-2015*", 3rd November 2014, available at acer.europa.eu). This multifaceted set of mechanisms, however structurally articulated, does not provide a satisfactory answer to the "accountability dilemma" with regards to ACER. Arguably, the mentioned move from ERGEG to ACER has not represented a significant step forward in terms of accountability, as the *ex post* tools enshrined in the Regulation do not provide for an adequate level of protection to the actors involved, and they are not specific enough in nature. More substantially, the pervasive effects of the acts issued by ACER need to be counterbalanced by a structural and systematic review process, rather than merely being included in extensive reports to be presented to Parliament. See STEFAN – PETRI, *Too weak to be controlled: judicial review of ACER soft law*, in *Yearbook of European Law*, 37/2018, pp. 525 – 550.

anticipated, this issue will be specifically addressed in Section 3.1 of the present Chapter, where the conundrum between accountability and binding nature of the acts issued by the Agency will be considered.

2.2.2 A framework for legitimisation: *Short Selling*

The scenario presented up to this point must be completed with reference to the 2014 *Short Selling* case[60], which has addressed the controversial[61] issue of the compatibility of the *Meroni/Romano* case law with the Authorities[62] (namely, the European Securities Markets Authority – ESMA, established with Regulation 1095/2010[63]) introduced in the aftermath of the financial crisis, with particular regards to a specific set of competences enshrined in Regulation 236/2012[64]. This decision represents a constitutional cornerstone in the practice of the delegation of powers, as it deals with the scope of the delegation framework defined by the existing case law, as well as Articles 290 and 291 TFEU, while providing for a cohesive interpretation of Articles 114 (representing the relevant basis for harmonising action on the development of the internal market) and 277 TFEU, in light of the innovations introduced by the Lisbon Treaty[65]. The first part of the conclusions reached by the Court, regarding the interpretation of Articles 290 and 291 in light of an (updated?) interpretation of the *Meroni* and *Romano* judgments are to be considered particularly relevant for the purposes of the present research.

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[60] Judgment of the Court (Grand Chamber), 22 January 2014, case C-270/12, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, EU:C:2014:18. Hereinafter, *Short selling* case.

[61] CHAMON, *EU agencies between* Meroni *and* Romano *or the Devil and the Deep Blue Sea*, in *Common Market Law Review*, 48/2011, p. 1055.

[62] Other than ESMA, the other Authorities established by the 2012 Regulation were the European Banking Authority (EBA) and the European Insurance and Occupation Pensions Authority (EIOPA).

[63] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 *establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC*, OJ L 331, 15 December 2010, pp. 84–119.

[64] Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 *on short selling and certain aspects of credit default swaps*, OJ L 86, 24 March 2012, pp. 1–24.

[65] See VAN CLEYNENBREUGEL, *Meroni circumvented? Article 114 TFEU and EU Regulatory Agencies*, in *Maastricht Journal of European and Comparative Law*, 21(1)/2014, p. 88. In particular, the ESMA judgment in this regard can be considered a step forward in assessing the role of Article 114 as the genuine basis for harmonising actions implementing the internal market, following both the *Tobacco Advertising* case (Judgment of the Court of 5 October 2000, case C-376/98, *Federal Republic of Germany v European Parliament and Council of the European Union*, EU:C:2000:544) and the *Smoke Flavouring* case (Judgment of the Court (Grand Chamber) of 6 December 2005, case C-66/04, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, EU:C:2005:743), which focussed on the key role to be played by comitology.

The case at hand dealt with Article 28 of Regulation 236/2012, entrusting ESMA with a pervasive set of "powers to intervene, and by way of legally binding acts, in Member State financial markets in the event of a 'threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union'"[66]. The action which ESMA was empowered to take under the aforementioned Article included "the imposition on natural and legal persons of notification and disclosure requirements, and a prohibition on the entry into certain transactions or subjecting such transactions to conditions"[67]. The *prima facie* potential contrast, put forward by the UK Government, between the mentioned provision and the *Meroni/Romano* doctrine is apparent: Article 28 of Regulation 236/2012 might entail the delegation of general, binding powers to a delegated Agency without providing for the necessary judicial scrutiny. In other words, the Court had to face the dilemma related to the coherence of a legality scheme focussed on a double standard of safeguard for the institutional balance, both *ex ante* and *ex post*[68].

For the purposes of the present research, it is worth underlining that the Court ruled in favour of the compatibility of the controversial provision with the *Meroni* doctrine, while nuancing its interpretation of the *Romano* criteria and allowing for a broader interpretation of the normative context defined by Articles 290 and 291 TFEU. With regards to the first aspect, the Court analysed the content of the procedural and substantial conditions limiting ESMA's discretion pursuant to its establishing Regulation, as well as the limits imposed by the delegating Authority, finding a full compliance with the *Meroni* doctrine[69], both in terms of institutional balance and margin of appreciation left to the delegated body.

As far as the *Romano* principles were concerned, however, the Court suggested an evolutionary interpretation of the established criteria, in light of Articles 263 and 277 TFEU, reformed by the Lisbon Treaty, by underlining that "the institutional framework established by the FEU Treaty, in particular the first paragraph of Article 263 TFEU and Article 277 TFEU, expressly permits Union bodies, offices and agencies to adopt acts of general

[66] Opinion of Advocate General Jääskinen delivered on 12 September 2013, case C-270/12, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, EU:C:2013:562, p. 1.
[67] *Ibid.*
[68] See ARMSTRONG, *Short-changed on short-selling?* In *Eutopia law*, 22 January 2014, available at https://eutopialaw.com/2014/01/22/short-changed-on-short-selling/#more-2233.
[69] *Short Selling* case, p. 46 – 53.

application"[70]. In this regard, it is paramount to point out that, according to the ECJ, "it cannot be inferred from *Romano* that the delegation of powers to a body such as ESMA is governed by conditions other than those set out in *Meroni*"[71]. The interpretation of the *Romano* criteria is thus nuanced, while putting them in a direct dialogical relationship with what had been decided in *Meroni*: the delegation of powers in *Short Selling* did not have a "quasi-legislative nature", but, rather, it fell within the ambit of the criteria of the *Romano* judgment because "only clearly defined executive powers were delegated"[72].

The more general considerations on the overarching delegation scheme defined in Articles 290 and 291 TFEU also bear constitutional relevance. On the matter, the Court clearly stated that the aforementioned provisions allow for an "open system of delegation", which shall not be *per se* limited to strict delegation to the Commission. In particular, the Court held that, while "the conferral of powers [pursuant to Article 28, and requiring the deployment of specific technical expertise] does not correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU"[73], in order to assess the openness of the delegation scheme and the role of the controversial provision within the broader normative context, the latter should not be considered in isolation. More specifically,

> "that provision must be perceived as forming part of a series of rules designed to endow the competent national authorities and ESMA with powers of intervention to cope with adverse developments which threaten financial stability within the Union and market confidence. To that end, those authorities must be in a position to impose temporary restrictions on the short selling of certain stocks, credit default swaps or other transactions in order to prevent an uncontrolled fall in the price of those instruments. Those bodies have a high degree of professional expertise and work closely together in the pursuit of the objective of financial stability within the Union.
>
> Therefore, Article 28 of Regulation No 236/2012, read in conjunction with the other regulatory instruments adopted in that field identified above, cannot be

[70] *Short Selling* case, p. 65.
[71] *Short Selling* case, p. 66.
[72] ANKERSMIT, *The legal limits to 'agencification' in the EU? Case c-270/12 Uk v Parliament and Council*, in *European Law Blog*, 27 January 2014, available at http://europeanlawblog.eu/2014/01/27/the-legal-limits-to-agencification-in-the-eu-case-c-27012-uk-v-parliament-and-council/.
[73] *Short Selling* case, p. 83.

> regarded as undermining the rules governing the delegation of powers laid down in Articles 290 TFEU and 291 TFEU."[74]

To sum up, while stating the relevance of *Meroni* in the post-Lisbon scenario, *Short selling* might have paved the way for broader delegation of powers to EU-like bodies, in light of the possibility for EU agencies to issue acts having general application (while still not having a quasi-legislative character – pursuant to the updated reading of *Romano* following the introduction of Articles 263(1) and 277 TFEU) and the openness of the delegation clause enshrined in Articles 290 and 291 TFEU.

These considerations are to be considered even more poignant if the broad interpretation of Article 114 TFEU provided by the Court is taken into account. The conditions for the applicability of Article 114, which represents the legal basis for the establishment of regulatory agencies, are well-known: they encompass both the content of the measures (harmonising diverging practices of national players) and the objective of the act (eliminating barriers to trade and developing the internal market). Alongside the possibility for delegated bodies to issue general acts, the Court addresses the issue of individual decisions under EU delegated policy making: "the concept of 'measures for the approximation' of legislation must be interpreted as encompassing the EU legislature's power to lay down measures relating to a specific product or class of products as well as, if necessary, individual measures concerning those products"[75]. The measures enshrined in Article 28, which were aimed at "prevent[ing] the creation of obstacles to the proper functioning of the internal market and the continuing application of divergent measures by Member States"[76] were thus considered lawful within the meaning of Article 114, even as far as individual decisions were concerned. This element is particularly telling from a constitutional perspective, as individual decisions (such as the ones already enshrined in the ACER Regulation) are considered *per se* discretionary in nature[77].

The applicability of the *Short Selling* case law to other EU agencies, and ACER in particular, is highly controversial. On the one hand, it can be considered a step forward towards the

[74] *Short Selling* case, p. 85 and 86.
[75] *Short selling* case, p. 106.
[76] *Short Selling* case, p. 114.
[77] See HOFMANN – MORINI, *Constitutional aspects of the pluralisation of the EU executive through "Agencification"*, in *European Law Review*, 36/2012, p. 442.

normative (or at least judicial) recognition of agencification for those[78] arguing in favour of a more flexible approach to the institutional balance[79] conundrum underlying the *Meroni* doctrine, while on the other hand the implications of *Short selling* on the fragile European constitutional equilibrium could pave the way for an (uncontrolled) delegation of general normative powers (and individual decisions) to European agencies, going beyond the very core notions of European primary law (such as Article 17 TEU)[80], and possibly worsening the democratic deficit of EU policy making[81].

More importantly, the structural aspects of the *Short selling* case should be briefly considered in order to assess its applicability and potential implications for the agencification process. It has been made clear that in *Short Selling* the Court upholds *Meroni*, while providing for a flexible interpretation[82] of the relevant criteria and allowing for the possibility to issue general acts pursuant to Articles 263(1) and 277 TFEU. Moreover, in stating that Article 114 TFEU can be considered a sufficient basis[83] for delegation (including individual – discretionary – decisions) and that Articles 290 and 291 do not represent a closed system of delegation, it has developed a new framework for the potential development of agencification. In other words, *Short Selling* is relevant because it "gives a new framework for delegation of powers to EU agencies, showing that two paradigms of legitimisation for EU agencies co-exist: the

[78] GRILLER – ORATOR, *Everything under control? The way forward for European Agencies in the footsteps of the* Meroni *doctrine*", in *European Law Review,* 35/2010, pp. 3 – 35; LO SCHIAVO, *A judicial re-thinking on the delegation of powers to European agencies under EU law? Comment on case C-270/12, UK v. European Parliament and Council,* in *German law journal,* 16/2015, p. 315.

[79] In particular, it has been convincingly argued that the very notion of "institutional balance" is an evolving one, and a rigid focus on the *Meroni* criteria, prohibiting the delegation of discretionary powers in any circumstance, fails to take into account the increasing complexities of the macroeconomic scenario. See CHITI, *An important part of the EU institutional machinery: features, problems and perspectives of EU agencies*, in *Common Market Law Review*, 46/2009, p. 1395 ff.

[80] See SZEGEDI, *EU-level market surveillance and regulation by EU agencies in light of the reshaped Meroni doctrine – annotation on the judgment of the Court of Justice of the European Union*, in *European network law and regulation quarterly*, 2/2014, p. 303.

[81] CHAMON, *The empowerment of agencies under the Meroni doctrine and Article 114 TFEU: comment on United Kingdom v. European Parliament and Council (Short Selling) and the proposed single resolution mechanism*, in *European Law Review*, 39/2014, pp. 380 – 403.

[82] DE BELLIS, *Procedural Rule-Making of European Supervisory Agencies (ESAs): An Effective Tool for Legitimacy?*, TARN Working Paper 12/2017, p. 12.

[83] It is worth noting that this element follows within the evolutionary path already used by the Court: the delegation of powers to agencies was originally to be inferred from the theory of implied powers (Article 352 TFEU), and only in 2006 (Judgment of the Court (Grand Chamber) of 2 May 2006, C-217/04, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, EU:C:2006:279) was Article 114 first considered the legal basis of choice.

delegation paradigm, based on the long standing *Meroni* doctrine, and an emerging procedural paradigm of legitimisation"[84].

In other words, it is argued in this section that *Short Selling* does not suggest an overcoming of the *Meroni* doctrine. Rather, it defines an additional scheme of legitimisation for EU agencies, which goes beyond the delegation of powers scheme, enshrined in the *Meroni/Romano* paradigm. As previously underlined, the ACER Regulation has been moulded from the defining characteristics of the *Meroni* scheme, and it is thus using these lenses that the following paragraphs will be structured. However, the *Short Selling* developments will duly taken into account when considering the governance implications proposed through the 2015 Energy Union and the 2016 Winter Package (Chapter III).

3. Assessing ACER's practice

In section 2, both a categorisation of the tasks assigned to the Agency according to the different level of involvement of National Regulators in the decision-making process, and a tentative systematisation of the main conceptual limits to the delegation of powers in the EU have been presented. In order to provide a structured answer to the main research question underlying the present Chapter (how is ACER's practice shaped, with regards to National Regulatory Authorities?), it is now of paramount importance to focus on the two key elements suggesting institutional tension within the Agency's framework and its relationship with the post-Lisbon innovations.

Accordingly, section 3.1 will focus on the (limited) justiciability of ACER's soft law, while section 3.2 will provide a closer look at the internal governance dynamics characterising the Agency. Notably, and unsurprisingly in light of the elements introduced in Section 2, the overall picture is a rather controversial and problematic one, from a constitutional perspective.

[84] DE BELLIS, *Procedural Rule-Making of European Supervisory Agencies (ESAs): An Effective Tool for Legitimacy?*, TARN Working Paper 12/2017, p. 13.

3.1 Justiciability of the relevant soft law

The relevance of justiciability in preserving the key institutional balance enshrined in *Meroni*/*Romano* has already been recalled in Section 2.2. Moreover, it is worth underlining that, as anticipated, the *Short Selling* case does not imply[85] a minor role to be played by accountability and judicial supervision in the delegation of powers. Rather, in defining an alternative legitimising scheme for power delegation, in light of Article 263(1) TFEU, the Court's reasoning entails an even more crucial function pertaining to judicial supervision, with particular regard to (relatively) discretionary acts and decisions of EU Agencies.

In the case of ACER, one of the crucial tenets of institutional balance thus revolves around the justiciability of its soft law[86], which, as summarised in Chapter I, represents the key tool used by the Agency to regulate the energy sector and incentivise market interconnection. Notably, soft law is commonly[87] defined as a set of "rules of conduct which have no legally binding force but which nevertheless may have practical effects and legal effects"[88]: such effects have to be autonomously proven for the Court to perform judicial review[89]. In practice, this complex and difficult standard of proof often results in leaving shaky grounds for the justiciability of soft law, notwithstanding the substantial, rather than formalistic, approach (allegedly) chosen by the Court[90].

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[85] See VAN RIJSBERGEN, *On the enforceability of EU Agencies' soft law at the national level: the case of the European Securities and Markets Authorities*, in *Utrecht Law Review*, 10/2014, pp. 116 – 131.

[86] The present section is based on STEFAN – PETRI, *Too weak to be controlled? Justiciability of ACER soft law*, in *Yearbook of European Law*, 37/2018, pp. 525 – 550.

[87] See, *inter alia*, SENDEN, *Soft Law in European Community Law*, Hart Publishing, Oxford 2004, and STEFAN, *Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance*, in *Maastricht Journal of European and Comparative* Law, 21/2014, pp. 359-379.

[88] SNYDER, *The effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, in DAINTITH (ed.), *Implementing EC law in the United Kingdom: Structures for indirect rule*, John Wiley & Sons, Chichester 1995, p. 64.

[89] With particular regards to the soft law issued by the Commission, the recent *Kotnik* case is telling of the uncertain boundaries between binding and not binding effects in soft law (see Judgment of the Court (Grand Chamber) of 19 July 2016, case C-526/14, *Tadej Kotnik and Others v Državni zbor Republike Slovenije*, EU:C:2016:570). In this case, which dealt with State aid in the banking sector as a result of the financial crisis, the Court did not recognise the binding value of guidelines for NRAs, while ascertaining their potential in considering the compliance of NRAs with EU law. On the different approach to justiciability according to the body bringing the case to Court, see STEFAN, *Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance*, in *Maastricht Journal of European and Comparative* Law, 21/2014, pp. 359-379.

[90] See SCOTT, *In legal limbo: post-legislative guidance as a challenge for European administrative law*, in *Common Market Law Review*, 48/2011, p. 320, with particular regards to the well-known *ERTA* case (Judgment of the Court of 31 March 1971, case 22/70, *Commission of the European Communities v Council of the European Communities. European Agreement on Road Transport.*, EU:C:1971:32).

Due to its intrinsic flexibility, soft law has been widely used in the energy sector, both as a regulating and as an interpretative tool[91]. The potential mismatch between flexibility and judicial control is apparent: both the actual and the perceived effects of soft law may indeed be relevant for market players, but, from the justiciability perspective, the lack of legally binding force represents a paramount obstacle to judicial supervision[92].

In particular, the practical effects of soft law are acknowledged by the European Court of Justice, thus engaging in judicial review, only in a limited set of cases[93], which can be substantially summarised as follows, according to three different scenarios[94]:

(i) soft law introduces supplementary obligations not mentioned in hard law provisions[95];

(ii) soft law is issued by an institution as a means of structuring its discretion[96];

(iii) soft law becomes binding on Member States as result of negotiations (possibly coupled with Treaty obligations)[97].

[91] One relevant example is represented by the 2014 State Aid Guidelines on Energy and the Environment (Communication from the Commission, *Guidelines on State aid for environmental protection and energy 2014-2020*, OJ C 200, 28 June 2014, p. 1–55), which represent a paramount soft law instrument issue to provide some guidance on the interpretation and implementation of Article 107(3)(c) TFEU. Established case law of the European Court underlines that the interpretative guidelines issued by the Commission should bind the discretion of the latter (see Judgment of the Court of 15 October 1996, case C – 311/94, *IJssel-Vliet Combinatie BV v Minister van Economische Zaken*, EU:C:1996:383 and Judgment of the Court (Grand Chamber) of 28 June 2005, joined cases C-189 P, 202 P, 205 P, 208 P, 213/02 P, *Dansk Rørindustri A/S, Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH and Others, KE KELIT Kunststoffwerk GmbH, LR af 1998 A/S, Brugg Rohrsysteme GmbH, LR af 1998 (Deutschland) GmbH and ABB Asea Brown Boveri Ltd v Commission of the European Communities*, EU:C:2005:408).

[92] In other words, "for the issue of justiciability, the distinction between soft and hard law remains a valid distinction, while for policy development, implementation and assessment, the boundaries between hard and soft are, indeed, more blurred" (DE LA PORTE – POCHET: *Why and how (still) study the open method of coordination*, in *Journal of European Social policy*, 22/2012, p. 339).

[93] See SCOTT, *In legal limbo: post-legislative guidance as a challenge for European administrative law*, in *Common Market Law Review*, 48/2011, p. 329

[94] See STEFAN – PETRI, *Too weak to be controlled? Justiciability of ACER soft law*, in *Yearbook of European Law*, 37/2018, pp. 525 – 550.

[95] In this case, both the wording and the context of the soft law instrument are to be closely observed. See, e. g., Judgment of the Court of 9 October 1990, case C-366/88, *French Republic v Commission of the European Communities*, EU:C:1990:348, Judgment of the Court of 13 November 1991, case C – 303/90, *French Republic v Commission of the European Communities*, C:1991:424, Judgment of the Court of 16 June 1993, case C – 35/91, *French Republic v Commission of the European Communities*, EU:C:1993:245.

[96] The most apparent example of this scenario is represented by Commission Guidelines, as underlined above. From a theoretical point of view, it has been argued that guidelines limiting the issuing institution's discretion in an interpretative way constitute a form of "post law". See SENDEN - PRECHAL, *Differentiation in and through Community Soft Law*, in DE WITTE – HANF – VOS (eds.), *The Many Faces of Differentiation in EU Law*, Intersentia, Cambidge 2001, pp. 188-189.

In light of these considerations, the present section will focus on the grey areas in which judicial control over ACER's soft law potentially does not easily fit within the proposed framework. Notably, these paragraphs will shed some light on the judicial relevance and interpretation of the (lack of)[98] legal effects of ACER's soft law. The role played by the Agency's Board of Appeal, in this context, is limited, as it performs a quasi-judicial function (ideally preliminary to the judicial review carried out by the ECJ) that does not include the acts that are deprived of legally binding nature.

Generally, ACER's preparatory and advisory role with regards to complex acts aimed at market operators and national regulators can result in soft law having either a typical or an atypical character[99]. For instance, while the unsolicited recommendations and opinions addressed to Member States, European institutions or National Regulatory Authorities fall within the categorisation included in Article 288, paragraph 5, TFEU, the guidelines and the other forms of guidance issued by the Agency, with regard to both Network Codes and the REMIT Regulation, are to be considered outside the scope of such provision.

Both kinds of instruments rise institutional and structural issues that are not dissimilar from the conundrums relating to the soft law issued by other European agencies[100]. The peculiarity of ACER's soft law, thus, relates both to the pervasive role of soft law in energy regulation[101], and to the constitutional implications of accountability (and independence) in this context, in light of the considerations developed in the previous sections.

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[97] In the case of ACER, a good example is the comitology process through which network codes can be made binding by Member States, resulting in the potential justiciability of the framework guidelines they are based on (which shall thus be considered "steering" or "preparatory" acts).

[98] See TURK, *Judicial review in EU law*, Edward Elgar Publishing, Cheltenham 2009, p. 11.

[99] It has been argued that the vast array of different regulatory tools used by European Agencies represents a key characteristic of the so called "disfunctionality" of the regulatory model implied by agencification (see VAUGHAN, *Differentiation and disfunction: an exploration of post-legislative guidance practices in 14 EU Agencies*, in *Cambridge Yearbook of European Legal Studies*, 17/2015, pp. 66 – 91).

[100] See, *ex multis*, CHITI, *European Agencies Rulemaking: Powers, Procedures and Assessment*, in *European Law Journal*, n. 19/2013, pp. 93 – 110, and SIMONCINI, *The erosion of the Meroni Doctrine: The case of the European Aviation Safety Agency*, in *European Public Law*, 21/2015, pp. 309 – 342.

[101] Both the structural and economic peculiarities of the energy sector with regards to other (comparable) sectors (see LEVI FAUR, *The governance of competition: the interplay of technology, economics and politics in European Union electricity and telecom regimes*, in *Journal of Public Policy*, 19/1999, pp. 175 – 207), and the governance peculiarities of the sector (see BROUSSEAU – GLACHANT, *Regulators as reflective governance platforms*, in *Competition and Regulation in Network Industries*, 12/2011, p. 195), as well as the need to recompose the diverging regulatory cultures at national level (see BOHNE, *Conflicts between national regulatory cultures and EU energy regulations*, in *Utilities Policy*, 19/2011, pp. 255 – 269), contribute to the key role played by soft law in the energy sector. More specifically, see STEFAN – PETRI, *Too weak to be controlled? Justiciability of ACER soft law*, in *Yearbook of European Law*, 37/2018, pp. 525 – 550.

3.1.1 Framework Guidelines in the context of Network Codes

The first instrument to be analysed, due both to its pervasive role[102] within energy regulation and to its composite (and controversial) legal nature, is the guidance (*rectius*: the Guidelines) issued by ACER in the context of the elaboration of Network Codes (NCs). Indeed, Framework Guidelines constituting the basis of NCs can be considered a paradigmatic example of the institutional balance dynamics characterising energy regulation[103], while providing an interesting perspective over the evolution of energy governance[104].

Network Codes have already been mentioned on several occasions in the present thesis: it is worth recalling that, substantially, they represent a set of technical rules aimed at regulating cross-border energy exchanges, and they are characterised by a complex (and somewhat hybrid) legal nature. ACER plays a crucial role in the definition of Network Codes, which are the result of a triangular relationship between the Agency, market operators (notably, TSOs as coordinated by ENTSOs) and the European Commission, which may (but not necessarily does) result in the definition of a binding Network Code, through comitology.

More precisely[105], the Agency's intervention first consists in the development of a priority list for the development of NCs, following the solicitation received by the Commission. After the latter has set the relevant priorities, ACER issues specific guidance on the tools and goals to be achieved when implementing NCs: this guidance takes the form of non-binding Framework Guidelines, which result from a structured consultation process of TSOs

[102] Pursuant to Article 8, paragraph 6, of Regulation 714/2009 and Regulation 715/2009, Network Codes can be adopted in a vast array of sectors, and notably "network security and reliability rules including rules for technical transmission reserve capacity for operational network security; network connection rules; third-party access rules; data exchange and settlement rules; interoperability rules; operational procedures in an emergency; capacity-allocation and congestion-management rules; rules for trading related to technical and operational provision of network access services and system balancing; transparency rules; balancing rules including network-related reserve power rules; rules regarding harmonised transmission tariff structures including locational signals and inter-transmission system operator compensation rules; and energy efficiency regarding electricity networks".

[103] With particular regard to electricity NCs, see the recent contribution by LAVRIJSSEN - KOHLBACHER, *EU electricity network codes: good governance in a network of networks*, TILEC Discussion Paper 1/2018.

[104] As a matter of fact, while ACER does not have any specific binding powers with regard to framework guidelines (which thus constitute soft law) according to the *Meroni* framework from which the ACER Regulation has been moulded, the 2016 Winter Package partially subverts this scheme while providing for a stronger (harder?) set of powers for ACER in the context of Network Codes. See VLACHOU, *New governance and regulation in the energy sector: what does the future hold for EU Network Codes?*, in *European Journal of Risk Regulation*, 9/2018, pp. 268 ff. This element will be considered in Chapter III.

[105] See Article 6, Regulation 714/2009 and Regulation 715/2009.

(coordinated by ENTSOs). Notably, a "safeguard clause" is also introduced[106], providing for the Commission's direct intervention in case of inappropriate[107] or lacking Framework Guidelines from ACER. This provision, while introducing a clear incentive towards cooperation between the Agency and market operators, arguably opts in favour of a relatively centralising approach, which can be considered symptomatic of a peculiar institutional balance in this sector. Moreover, the key role played by market operators triggers problematic governance issues with regard to independence, accountability and fairness of the whole process[108].

These controversial elements become apparent if the subsequent steps in the development of Network Codes are taken into account. Code proposals are submitted by ENTSOs to the Agency, which, when assessing the proposed Code's compatibility with the Framework Guidelines and the overarching principles regulating energy policy[109], can suggest amendments and further modifications[110]. It is worth mentioning[111] that, in the event of multiple ENTSO proposals which do not comply with the Framework Guidelines, the Agency has developed an internal practice consisting in formulating a recommendation to the Commission suggesting the relevant amendments[112]. In case of ENTSOs' inactivity, the

[106] See Article 6, paragraph 5, of Regulation 714/2009 and Regulation 715/2009.
[107] The Framework Guidelines are to be deemed consistent with the general development of the internal energy market and the overarching principles governing energy regulation, such as non-discrimination, effective competition, efficient cross-border interconnection and third party acceff.
[108] See LAVRIJSSEN - KOHLBACHER, *EU electricity network codes: good governance in a network of networks*, TILEC Discussion Paper 1/2018.
[109] From a systematic perspective, the appropriateness of ACER's scrutiny over general principles of law could also be contested. See STEFAN – PETRI, *Too weak to be controlled? Justiciability of ACER soft law*, in *Yearbook of European Law*, 37/2018, pp. 525 – 550.
[110] See Article 6, paragraph 6, of Regulation 714/2009 and 715/2009.
[111] See VAONA – POTOTSCHNIG, *Un'Agenzia per la cooperazione fra i regolatori nazionali dell'energia: partecipazione e cooperazione strutturale tra le Autorità nazionali di regolamentazione nell'interesse dell'Unione attraverso un organismo indipendente*, in MERUSI – ANTONIAZZI (eds.), *Vent'anni di regolazione accentrata di servizi pubblici locali*, Giappichelli, Turin 2017, p. 167, footnote 70.
[112] Notably, permeability of the Commission to the Agency's recommendation is questionable. In particular, in a few cases the Commission has engaged in an institutional trilateral dialogue with the Agency and ENTSOs, ending up modifying ACER's proposal, in favour of the ENTSO's suggestion. A paradigmatic example is the Network Code regulating the Gas Capacity Allocation Mechanism, see GROENLEER, *Redundancy in Multilevel Energy Governance: why (and when) regulatory overlap can be valuable*, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2865683. *Contra*, see LAVRIJSSEN – BORDEL, *ACER: demystifying the European energy supervisor from a consumer perspective*, in *Oil, Gas & Energy Law Journal*, 10/2012, p. 12.

Agency can autonomously draft the Codes, and the Commission can eventually intervene, in the event of the Agency's inaction[113].

Finally, the Codes, following the Agency's recommendation addressed to the Commission, can either be adopted through comitology[114] by the latter, or remain deprived of a binding nature. What is more, ENTSOs can autonomously draft NCs which then have to be submitted to ACER for a non-binding opinion.

In light of the complex governance relationships triggered when developing these instruments, Network Codes have effectively been defined as being the regulatory outcome of a "network of networks", where ACER, organising the cooperation among National Regulators as a policy network, cooperates with the TSO network (ENTSO) "in manifold ways in the pre-Comitology phase, whereas ENTSO-E has a dominant role in the development of implementing rules in the post-Comitology phase with the NRAs finally taking the decision as whether to adopt the technical rules developed. The involved bodies and institutions are linked in a regulatory network, the task of which it is to develop ex-ante regulation in the form of network codes. They are formally linked to one another through soft law instruments by which they influence each other's behavior."[115]

The structural consequences of this complex dynamics, with particular regards to the justiciability of Framework Guidelines[116], are evident: while, in the case of binding Network

[113] See Article 6, paragraph 10, Regulation 714/2009 and Regulation 715/2009.

[114] It is paramount to underline that in the present paragraph reference is made to the process of "comitology" as it is the one mentioned in the Third Energy Package. After the Lisbon Treaty, however, Network Codes are adopted as delegated legislation from the Commission. See LAVRIJSSEN - KOHLBACHER, *EU electricity network codes: good governance in a network of networks*, TILEC Discussion Paper 1/2018, p. 14. It would thus be more appropriate to refer to a pre-comitology phase (including discretionary choices) and a post-comitology phase (covering implementing decisions only). See ZINZANI, *Market Integration through 'Network Governance'*, Intersentia, Cambridge 2012, p. 136.

[115] See LAVRIJSSEN - KOHLBACHER, *EU electricity network codes: good governance in a network of networks*, TILEC Discussion Paper 1/2018, p. 17.

[116] As a matter of fact, the justiciability of ACER's Framework Guidelines is autonomously important from both a systematic point of view (compliance with the *Meroni* doctrine) and a practical one, as even in the event of binding and autonomously justiciable (either *ex* Article 263 or *ex* Article 267 TFEU) Network Codes, the negative effects deriving from the implementation of Framework Guidelines may not be erased by the judicial supervision over NCs (see ZINZANI, *Market Integration through 'Network Governance'*, Intersentia, Cambridge 2012, p. 72). In other words (see LAVRIJSSEN - KOHLBACHER, *EU electricity network codes: good governance in a network of networks*, TILEC Discussion Paper 1/2018, p. 64), "it might well be the case that a provision in a network code is successfully challenged for its illegality by the applicant and annulled, however, the frame of the network-like process, set by opinions, recommendations, procedural rules, framework guidelines and draft network codes produced by ENTSO-E and ACER would remain unchanged as the legal

Codes, the Framework Guidelines could arguably[117] be considered "steering instruments"[118], subject to judicial review following the established *Artegodan* case law[119], the justiciability of (non-binding) Framework Guidelines determining "programming legislation"[120] for non-binding Network Codes is much more controversial.

As a matter of fact, it is known that, pursuant to Article 263, paragraph 1, TFEU, the Court of Justice of the European Union shall "review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties." In the absence of specific case-law from the European Court, it is thus crucial to speculate on whether the Framework Guidelines issued by ACER could be deemed to be productive of "legal effects" in the meaning of Article 263. In light of the considerations just developed, determining whether FGs lead to the definition of autonomous legal obligations is particularly crucial in the case of non-binding Network Codes.

Importantly, it has been argued[121] that justiciability on FGs shall be excluded as the fact that no provision determines a direct link (nor any correspondence) between the content of the FGs and the (non-binding) NCs implies that no autonomous legal effects can be considered pertaining to the Framework Guidelines alone. This perspective, discarding any perception of bindingness of FGs for market operators or NRAs, is moulded from the ECJ decision in

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effects of these soft-law instruments cannot entirely be removed without a direct action against the instruments themselves".

[117] And with particular regard to the key role played by FGs in the development of NCs, from a practical perspective. A tangible example is the 2017 Network Code on the tariff for gas (Commission Regulation (EU) 2017/459 of 16 March 2017 *establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013*, OJ L 72, 17 March 2017, pp. 1–28), which was the result of a complex institutional dialogue stemming from the 2014 ACER Guidelines. For a structured analysis of the mentioned case, see STEFAN – PETRI, *Too weak to be controlled? Justiciability of ACER soft law*, in *Yearbook of European Law*, 37/2018, pp. 525 – 550.

[118] According to SENDEN, *Soft Law in European Community Law*, Hart Publishing, Oxford 2004, p. 157, steering instruments are a category of soft law characterised by its relational approach to a piece of legislation, guiding the legislative action by introducing "new rules adopted in the context of such a framework, prior to, simultaneously with or subsequent to legislation".

[119] Judgment of the Court of First Instance (Second Chamber, extended composition) of 26 November 2002, Joined cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00, *Artegodan GmbH and Others v Commission of the European Communities*, EU:T:2002:283. In particular, paragraph 197 famously states that: "Although [an Agency's] opinion does not bind the Commission, it is none the less extremely important so that any unlawfulness of that opinion must be regarded as a breach of essential procedural requirements rendering the Commission's decision unlawful".

[120] See CHALMERS – DAVIES – MONTI, *European Union Law Texts and Materials*, Cambridge University Press, Cambridge 2006, pp. 137 – 138.

[121] LAVRIJSSEN - KOHLBACHER, *EU electricity network codes: good governance in a network of networks*, TILEC Discussion Paper 1/2018, p. 63.

International Business Machines[122], depriving acts having a "purely preparatory nature" of any legal effect. It is worth underlining that this view is rather convincing, as practice shows that, even in the event of binding NCs, the Commission equally takes into account both ACER's FGs and the draft Codes suggested by ENTSOs: it is, in fact, very reasonable to consider FGs, especially in the case of non-binding NCs, mere guidance with little potential for autonomous judicial scrutiny.

An alternative approach could, however, be considered[123]. In the 2015 *Clearing Houses* case[124], the General Court reaffirmed the need to consider a complex set of criteria before dismissing an act as soft law not having any legal effect for the purposes of Article 263. In particular, it provided that:

"In the light of case-law, in order to determine whether an act is capable of having legal effects and, therefore, whether an action for annulment under Article 263 TFEU can be brought against it, it is necessary to examine its wording and context (see, to this effect, judgments of 20 March 1997 in France v Commission, C-57/95, ECR, EU:C:1997:164, paragraph 18, and of 1 December 2005 in Italy v Commission, C-301/03, ECR, EU:C:2005:727, paragraphs 21 to 23), its substance (judgments of 9 October 1990 in France v Commission, C-366/88, ECR, EU:C:1990:348, paragraph 23; of 26 January 2010 in Internationaler Hilfsfonds v Commission, C-362/08 P, ECR, EU:C:2010:40, paragraph 52; and in Athinaïki Techniki v Commission, paragraph 30 above, EU:C:2008:422, paragraph 42; see also, to this effect and by analogy, judgments of 13 November 1991 in France v Commission, C-303/90, ECR, EU:C:1991:424, paragraphs 18 to 24, and of 16 June 1993 in

[122] Judgment of the Court of 11 November 1981, case 60/81, *International Business Machines Corporation v Commission of the European Communities*, EU:C:1981:264. In particular, paragraphs 10 to 12 state that: "In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, it is clear from the case-law that in principle an act is open to review only if it is a measure definitively laying down the position of the Commission or the Council on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision. It would be otherwise only if acts or decisions adopted in the course of the preparatory proceedings not only bore all the legal characteristics referred to above but in addition were themselves the culmination of a special procedure distinct from that intended to permit the Commission or the Council to take a decision on the substance of the case. Furthermore, it must be noted that whilst measures of a purely preparatory character may not themselves be the subject of an application for a declaration that they are void, any legal defects therein may be relied upon in an action directed against the definitive act for which they represent a preparatory step."

[123] STEFAN – PETRI, *Too weak to be controlled? Justiciability of ACER soft law*, in *Yearbook of European Law*, 37/2018, pp. 525 – 550.

[124] Judgment of the General Court (Fourth Chamber), 4 March 2015, case T-496/11, *United Kingdom of Great Britain and Northern Ireland v European Central Bank (ECB)*, EU:T:2015:133, hereinafter, *Clearing Houses* case.

France v Commission, C-325/91, ECR, EU:C:1993:245, paragraphs 20 to 23) and the intention of its author (see, to this effect, judgments in Internationaler Hilfsfonds v Commission, EU:C:2010:40, paragraph 52, and in Athinaïki Techniki v Commission, paragraph 30 above, EU:C:2008:422, paragraph 42)."[125]

Applying the *Clearing Houses* criteria to ACER's Framework Guidelines could entail providing some grounding to justiciability for this instrument. This is particularly true if the approach of the Court, which specifically focuses on the recipient's perspective, is taken into account[126]. Indeed, both the wording and the substance of the Guidelines generally imply a prescriptive nature and a regulatory intention on the part of the authorship, which results on the perception of bindingness on the part of the addressees (market operators and NRAs). More precisely, the wording of the Framework Guidelines, both in electricity and in gas, often[127] implies that compliance with FGs and general EU law objectives is equally mandatory for market operators, arguably both exposing the Agency's intended binding nature in drafting the Guidelines and constraining market operators to abide by the rules set therein.

This (hypothetical) solution, providing for some limited justiciability for Framework Guidelines, could thus solve part of the institutional conundrums characterising Network

[125] *Clearing Houses* case, paragraph 31. Emphasis added.
[126] See TURK, *Liability and accountability for policies annunced to the puclic and for press releases*, in *ECB legal conference 2017 – Shaping a new legal order for Europe: a tale of crises and opportunities*, December 2017, p. 45, available at https://www.ecb.europa.eu/pub/pdf/other/ecblegalconferenceproceedings201712.en.pdf.
[127] The repetitive use of the terms "must" and "shall" ("shall comply...") throughout the Guidelines could be considered telling of this phenomenon. For electricity, a good example could be provided by the 2011 FGs on Electricity System Operation (FG-2011-E-003, 2 december 2011, available at https://acer.europa.eu/en/Electricity/FG_and_network_codes/Electricity%20FG%20%20network%20codes/FG-2011-E-003.pdf), where it is specified that "the network codes will be evaluated by ACER, taking into account the degree of compliance with this Framework Guidelines and the fulfilment of EU law objectives" (see p. 5) and the 2012 FGs on Electricity Balancing (FG-2012-E-009, 18 September 2012, available at https://acer.europa.eu/en/Electricity/FG_and_network_codes/Electricity%20FG%20%20network%20codes/FG-2012-E-009.pdf), where it is stated that the Code "must be in line" with the FGs and "also with the relevant EU legislation" (see p. 5). For gas, see, for instance, the 2013 Framework Guidelines on rules regarding harmonised transmission tariff structures for gas (FG – 2013 – G 01, 29 November 2013, available at https://acer.europa.eu/Official_documents/Acts_of_the_Agency/Framework_Guidelines/Framework%20Guidelines/Framework%20Guidelines%20on%20Harmonised%20Gas%20Transmission%20Tariff%20Structures.pdf): "the Network Code on Tariffs will be evaluated by the Agency. In doing so, the Agency shall consider the degree of alignment with these Framework Guidelines, as well as the fulfilment of the overall objectives of the internal energy market, including maintaining security of supply, supporting the completion and well-functioning of the internal market in gas and cross-border trade, and delivering benefits to consumers, in consistency with the Gas Directive and the Gas Regulation" (p. 6).

Codes, but it leaves open a few structural issues (such as legal standing), and it is just a partial way out of the accountability deadlock.

3.1.2 Opinions and Recommendations

As anticipated in Chapter I and in the present Chapter (section 2), one substantial bulk of ACER's tasks consists of opinions and recommendations, which can be addressed to market operators, national regulators or European institutions. These soft law acts generally pertain to the advisory role of the Agency, and they can have either a solicited or an unsolicited character, depending on their instrumental role. Notably, the legal bases for these opinions is variegated: while the Electricity and Gas Directives provide for a first legitimisation framework, the TEN-E Regulation and other subsequent sector-specific regulations assign the Agency specific advisory powers to be exercised through the adoption of recommendations and opinions.

It is worth underlining that opinions and recommendations are typical acts, as they fall within Article 288, paragraph 5, TFEU: "Recommendations and opinions shall have no binding force." Accordingly, their justiciability is, in principle, excluded from the outsets. Indeed, Article 263, paragraph 1, TFEU, notoriously states that: "The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties."[128]

There is a clear hiatus between the (asserted) lack of justiciability of these instruments and their tangible, practical, effects on energy regulation. Key examples of the mismatch between (the lack of) justiciability and concrete effects of non binding recommendation is provided by "good practices", consisting of ACER's recommendations to NRAs aimed at fostering cooperation (and thus harmonisation[129]) on specific issues (pursuant to both the Electricity

[128] Emphasis added.

[129] The lack of binding character of the instruments addressed to NRAs aiming at harmonising specific sectors has recently been restated by the Court in the well-known *Post Danmark* case (Judgment of the Court (Second Chamber) of 6 October 2015, C-23/14, *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651). In all evidence, the same applies to Commission recommendations (see Judgment of the Court (Grand Chamber) of 20 February 2018, case C-16/16, *Kingdom of Belgium v European Commission*, EU:C:2018:79), notwithstanding Advocate General Bobek's opposite view (see Opinion of Advocate General Bobek, delivered on 12 December 2017, case C-16/16, *Kingdom of Belgium v European Commission*, EU:C:2017:959). It is worth pointing out that

and Gas Directives and the TEN-E Regulation), and the recommendations on the compatibility of the technical rules adopted at Member State level (mainly concerning interoperability, pursuant to Article 5 of the Electricity Directive). The latter, in particular, is an example of a recommendation "giving expression to general principles of law, such as consistency, in the application of the energy legal framework in the EU"[130]. On this issue, it is worth recalling that consistent case law[131] of the European Court excludes the justiciability of soft law on the basis that it generates legal effects because of its implementing nature with regards to general principles of law.

One possible solution with regard to the justiciability of non-binding recommendation lies in the possibility for such recommendations to find their way into binding documents[132], either following the Commission's endorsement[133], or through the adoption of ACER decisions (which are, naturally, undoubtedly reviewable by the ECJ). For instance, ACER issued Decision 1/2014 on the cross-border cost allocation for the Lithuania-Poland interconnection[134], which is a Project of Common Interest within the framework of the TEN-E Regulation, in order to set binding cost allocation mechanisms after NRAs deviated from the previous (not binding) Recommendation[135] on the matter. The criteria set in the latter became thus subject to judicial supervision via (potential) scrutiny over the ACER Decision.

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the main argument against the justiciability of these instruments usually relies upon their lacking capacity to generate obligations for individuals. While this might be true for the soft law instruments addressed to NRAs, it is clearly more debatable in the case of recommendations addressed to market operators, and notably ENTSOs and TSOs. See STEFAN – PETRI, *Too weak to be controlled? Justiciability of ACER soft law*, in *Yearbook of European Law*, 37/2018, pp. 525 – 550.

[130] See STEFAN – PETRI, *Too weak to be controlled? Justiciability of ACER soft law*, in *Yearbook of European Law*, 37/2018, pp. 525 – 550.

[131] Recently, see Judgment of the Court (Second Chamber), 13 December 2012, case C-226/11, *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795.

[132] See STEFAN – PETRI, *Too weak to be controlled? Justiciability of ACER soft law*, in *Yearbook of European Law*, 37/2018, pp. 525 – 550.

[133] See Article 7(3) of the Electricity and Gas Regulations, concerning the possibility to recommend to the Commission the elaboration of binding rules on cooperation among NRAs.

[134] Decision of the Agency for the Cooperation of Energy Regulators no 01/2014 of 11 August 2014 *on the investment request including cross-border cost allocation for the gas interconnection Poland-Lithuania project of common interest no 8.5*, available at https://acer.europa.eu/Official_documents/Acts_of_the_Agency/Individual%20decisions/ACER%20Individual%20Decision%2001-2014%20on%20GIPL.pdf .

[135] Recommendation of The Agency For The Cooperation Of Energy Regulators no 07/2013 of 25 September 2013 *Regarding The Cross-Border Cost Allocation Requests Submitted In The Framework Of The First Union List Of Electricity And Gas Projects Of Common Interest*, available at https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Recommendations/ACER%20Recommendation%2007-2013.pdf .

While providing for a concrete answer to the lack of judicial supervision for ACER recommendations, neither of these solutions (commission endorsement, ACER decision making the recommendation binding) untangle the knot relating to the lack of justiciability for ACER's soft law falling within the scope of Article 288, paragraph 5, TFEU.

3.1.2.1. The E-control case

Autonomous attention shall be paid to the case of ACER opinions on the decisions taken by National Regulators, which, pursuant to Article 7, paragraph 4, of the ACER Regulation, may be issued upon the explicit solicitation of either the Commission or another NRA. These opinions concern the compatibility of the scrutinised national decision with the provisions enshrined in the Third Energy Package or the relevant guidelines potentially issued by the Agency. Their non-binding character is clearly stated, and it can be considered a counterbalancing element with regards to the potential conflict of this provision with the general principle assigning the monopoly of the European Court over the interpretation of EU law. Accordingly, in case the national decision is deemed incompatible with energy regulation (or soft law guidance), ACER cannot impose any sanctions on the NRAs: the content of the Agency's opinion is only to be duly communicated to the Commission and the involved NRA.

However, it is worth noting that the Commission may well start infringement proceedings against the Member State not complying with ACER's opinion[136], thus *de facto* implying legal effects for the soft law instrument itself. Interestingly, and given the non-binding and thus non-justiciable nature of ACER's opinions, the case of national non-compliance and consequent opening of a Commission infringement procedure is the only circumstance under which the opinion might indeed end up being scrutinised by a European judge[137]. No judicial supervision over the Agency's opinion is envisaged with regards to the event of national compliance with the opinion, notwithstanding the potential breach of rights (or creation of obligations) for individuals and market operators, resulting from NRA's compliance.

[136] *Ex* art. 258 TFEU.
[137] See STEFAN – PETRI, *Too weak to be controlled? Justiciability of ACER soft law*, in *Yearbook of European Law*, 37/2018, pp. 525 – 550.

Indeed, similarly to what has been previously observed with regards to opinions and recommendations, the direct correspondence between lack of binding character and lack of justiciability for these opinions triggers some controversial (and unresolved) issues with regards to the protection of rights for market players, and, more generally, accountability and legal consistency[138]. The recent *E-Control* case[139] (which, to the knowledge of the author, represents at present the only case dealing with ACER opinions) provides a clear example of the mismatch between justiciability and legal effects of ACER's opinions on the decisions taken by national regulators, as well as tackling broader issues with regards to the qualification and scrutiny over soft law in the EU.

The case deals with the definition of electricity market bidding zones in Central Europe, which contributes to the determination of wholesale prices and can thus have an impact on a wide range of stakeholders.[140] In particular, ACER's opinion follows the Polish regulator's request to assess the compatibility with energy regulation of the capacity allocation procedure decided by Central European regulators[141] along the Austrian-German border, which had allegedly determined power losses and blackouts for the neighbouring countries (such as Poland). The Agency found, in its opinion, that the Central European NRAs had in fact breached the legislative framework, and recommended the measures to be taken to ensure compliance with the Electricity Regulation[142]. E-Control, the NRA for Austria, challenged the opinion in front of both ACER's Board of Appeal[143] and the European General Court: both

[138] Consistency can be considered a corollary to legal certainty, as part of the general EU law principles. See HERLIN KARNELL – KOSTANDINIDES, *The rise and expressions of consistency in EU law: legal and strategic implications for European integration*, in *Cambridge Yearbook of European Legal Studies*, 15/2013, pp. 139 – 167.

[139] Order of the General Court (Fifth Chamber) of 19 October 2016, case T-671/15, *Energie-Control Austria für die Regulierung der Elektrizitäts- und Erdgaswirtschaft (E-Control) v Agency for the Cooperation of Energy Regulators*, EU:T:2016:626, hereinafter *E-control* order.

[140] STEFAN – PETRI, *Too weak to be controlled? Justiciability of ACER soft law*, in *Yearbook of European Law*, 37/2018, pp. 525 – 550.

[141] Central European regulators are the Austrian NRA, the German NRA and the Luxemburgish NRA, as these three countries traditionally make up one single bidding zone. Recently, the call for splitting the bidding zone has led to ACER's Decision 6/2016 (Decision of the Agency for the Cooperation of Energy Regulators no 06/2016 of 17 November 2016 *on the electricity transmission system operators' proposal for the determination of capacity calculation regions*, available at https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Individual%20decisions/ACER%20Decision%2006-2016%20on%20CCR.pdf), currently challenged by E-control in front of the European Courts (case T-332/17, pending).

[142] STEFAN – PETRI, *Too weak to be controlled? Justiciability of ACER soft law*, in *Yearbook of European Law*, 37/2018, pp. 525 – 550.

[143] Decision of The Board Of Appeal Of The Agency For The Cooperation Of Energy Regulators of 16 December 2015, No A-001-2015, available at

actions were dismissed as inadmissible, as the opinion was deemed to be outside the scope of challengeable acts in light of its non binding nature (*E-control* order). Moreover, the General Court subsequently confirmed the findings of the Board of Appeal in the autonomous proceedings additionally brought against the BoA's inadmissibility decision by E-Control (*E-control* judgment)[144], not finding any error nor breach of the rights of defence in the proceedings in front of the BoA.

This case is thus exemplary in confirming the non justiciability of ACER's opinions, as a direct consequence of their (alleged) non binding nature. Accordingly, it is relevant to take into account the legal and logical steps characterising the conceptual shift between binding nature and justiciability, as well as the criteria used to determine the binding nature of the act. In this context, the reasoning of the Court in the *E-control* order is characterised by two logical steps.

First, the Court acknowledges the final (rather than preparatory) nature of the opinion, while restating the non justiciability of (preparatory) acts not defining specific obligations for NRAs[145]. From a systematic point of view, it is relevant for the general taxonomy of EU soft law that the Court provided, in this order, judicial recognition of "preparatory" or "intermediate" acts[146]. However, in paragraph 64, the Court clearly states that "it is also the case that the fact that the contested opinion contains final legal assessments does not mean that it produces binding legal effects and that it is therefore capable of forming the subject matter of an action under Article 263 TFEU".

Second, the Court then assesses whether the (final) opinion at hand did in fact set out specific obligations for NRAs. Indeed, in E-Control's view "the contested opinion has direct legal

https://www.acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Decisions/238%20A-001-2015%20BoA%20decision%20(non%20confidential%20version)%202112-2112.pdf .

[144] Judgment of the General Court (Seventh Chamber) of 29 June 2017, case T-63/16, *Energie-Control Austria für die Regulierung der Elektrizitäts- und Erdgaswirtschaft (E-Control) v Agency for the Cooperation of Energy Regulators*, EU:T:2017:456, hereinafter *E-control* judgment.

[145] *E-control* order, paragraphs 26-30.

[146] STEFAN – PETRI, *Too weak to be controlled? Justiciability of ACER soft law*, in *Yearbook of European Law*, 37/2018, pp. 525 – 550. See also ELIANTONIO, *Judicial review in an integraged administration: the case of "composite procedures"*, in *Review of European Administrative Law*, 7/2015, pp. 65 – 102.

effects on it in that the opinion includes specific obligations for it and is therefore binding", as it contains a "final legal assessment"[147].

Importantly, in order to consider the binding nature of the opinion, the Court uses the established substantial criteria restated in *Clearing Houses* (context, wording, intentions of the authorship) not to tackle the nature of the content of the opinion, but rather to assess whether the contested opinion is indeed an opinion complying with its legal basis, which is Article 7, paragraph 4, of the ACER Regulation. The syllogism used is the following: the non binding nature of the opinion follows directly from its being an Article 7, paragraph 4, ACER Regulation, opinion (as opposed to Article 7, paragraph 1, binding decisions[148]). Having the opinion being found compliant with its legal basis, its non bindingness and its, consequential, non justiciability are a given. Justiciability and binding nature of the opinion are thus considered "a function of the legal basis of the act"[149].

In the words of the Court, "in the present case, on the one hand, it must be held that, [...] the contested opinion was adopted on the basis of Article 7(4) of Regulation No 713/2009, which, [...] constitutes a legal basis for the adoption of non-binding opinions. It follows from this that ACER was empowered to adopt the contested opinion. On the other hand [...] clearly, [...] the contested opinion did not give ACER any power to impose an obligation or a right in favour of the applicant or another national regulatory authority."[150] What is more, and in contrast with the approach taken in *Clearing Houses*, no analysis concerning the perception of bindingness by the involved NRAs is considered[151].

The relevance of the *E-Control* order in fleshing out the approach of the Court to the (lack of) justiciability for ACER's opinions is crystal-clear.

With regards to the contribution of this case to the wider debate on the development of soft law in the European scenario, one last point shall be put forward. In arguing in favour of the

[147] *E-control* order, paragraph 22.
[148] *E-control* order, paragraph 43 – 44. It is also worth mentioning that the fact that the Court restates the fact that Article 7, paragraph 4, opinions are to be based on "matters of fact" (rather than legal evaluations) could be considered telling of the Court's restraint to consider ACER's opinions as acts capable of determining legal effects for NRA addressees.
[149] STEFAN – PETRI, *Too weak to be controlled? Justiciability of ACER soft law*, in *Yearbook of European Law*, 37/2018, pp. 525 – 550.
[150] *E-control* case, paragraphs 59 – 60.
[151] *E-control* case, paragraphs 81 – 85.

justiciability of ACER's opinion, E-Control suggests its possible structural similarities to Commission Communications and Notices or Frameworks, which, as anticipated in section 3.1, are generally deemed challengeable in front of the European Courts. The Court rejects this argument by stating that, precisely because of the fact that ACER's opinion is a typical soft law instrument (based on Article 7, paragraph 4, of the ACER Regulation and falling within the categorisation of Article 288, paragraph 5, TFEU), "the Court must [...] reject the applicant's argument that the contested opinion is comparable to the Commission communications [...] and which were deemed capable of forming the subject matter of an action under Article 263 TFEU."[152]

In the *E-control* order, the Court thus seems to imply a structural difference between typical (such as opinions and recommendations adopted on the basis of secondary legislation) and atypical soft law instruments (such as Commission Communications), resulting in the possibility of closer judicial scrutiny for the latter[153]. This argument, based on the different qualification of the legal basis the instrument is based on rather than on an actual assessment of its legal effects, is rather formalistic, and, in contrast with the substantial approach usually chosen by the Court, it poses relevant structural and systematic problematic issues, which go beyond the boundaries of energy soft regulation.

3.1.3 Soft law relating to the REMIT Regulation

Finally, some specific remarks concerning the soft law issued by ACER in the context of the REMIT Regulation shall be considered. The main purpose of the REMIT Regulation has already been considered: it deals with market integrity and transparency, and ACER's role in this context is a substantially coordinative one with regards to national regulators, having the Agency to monitor the emergence of (alleged) market manipulative practices and, consequently, ask the NRAs to put in place the appropriate investigations and sanctions as a consequence of the breach of the substantial provisions of the Regulation. In line with the coordinative (rather than active) role of the Agency[154], the lack of participation of NRAs

[152] *E-control* case, paragraph 61.
[153] See STEFAN – PETRI, *Too weak to be controlled? Justiciability of ACER soft law*, in *Yearbook of European Law*, 37/2018, pp. 525 – 550.
[154] See REMIT Regulation, Article 16, paragraph 1: "The Agency shall aim to ensure that national regulatory authorities carry out their tasks under this Regulation in a coordinated and consistent way".

(through the BoR) to the decision-making process regarding REMIT has already been mentioned in Section 2.

As far as specific soft law instruments are concerned, Article 16 of the REMIT regulation shall be recalled: ACER "shall publish non-binding guidance on the application of the definitions set out in Article 2, as appropriate."[155] In all evidence, this guidance can be considered an interpretative soft law instrument covering the scope of the REMIT Regulation, and the Agency, in the "important notice" to the preface of the most recent version of the Guidance[156], underlines that: "the non-binding Guidance on the application of REMIT provided in this document is directed to National Regulatory Authorities (NRAs) to ensure the required coordination and consistency in their monitoring activities under REMIT. It is deliberately drafted in nonlegal terms and made public for transparency purposes only."[157] The potential legal effects stemming from this soft law instrument can thus be considered very limited and, consequently, far from justiciable, notwithstanding the systematic role played by interpretative guidance in the determination of legal certainty and consistency[158].

In this context, one promising parallel could be traced between ACER's interpretative guidance pursuant to Article 16 of the REMIT Regulation, and the interpretative guidelines issued by the European Commission in competition law cases: as anticipated, the Court has found that guidelines limiting the issuing institution's discretion in the application of general principles of EU law could indeed be considered binding upon the issuing institution, in light of the legitimate expectations stemming from their publication[159].

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[155] REMIT Regulation, Article 16, paragraph 1.

[156] Agency for the Cooperation of Energy Regulators, *Guidance on the application of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency*, 4th edition, 17 June 2016, available at https://acer.europa.eu/Official_documents/Other%20documents/4th%20Edition%20ACER%20Guidance%20REMIT.pdf.

[157] *Ibid.*, p. 7. Emphasis added.

[158] Notably, both the concepts of "regulation by information" (SNYDER, *Soft Law and Institutional Practice in the European Community*, in MARTIN (ed.), *The Construction of Europe: Essays in Honour of Emile Noël*, Kluwer Law International, Alphen aan den Rijn 1994, p. 199) and "regulation by publication" (HOFMANN, *Negotiated and non-negotiated administrative rule-making: the example of EC competition policy*, in *Common Market Law Review*, 43/2006, pp. 169 – 170) could be considered when assessing the potentially crucial role played by these soft law tools in clarifying (or determining) the content of legislative documents for individuals, regulators, and market operators. See STEFAN – PETRI, *Too weak to be controlled? Justiciability of ACER soft law*, in *Yearbook of European Law*, 37/2018, pp. 525 – 550.

[159] Judgment of the Court (Grand Chamber) of 28 June 2005, joined cases C-189 P, 202 P, 205 P, 208 P, 213/02 P, *Dansk Rørindustri A/S, Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH and Others, KE KELIT*

Applying this stream of case law to the guidance issued by the Agency would however be misleading: arguably[160], ACER's guidance aims at NRAs coordination, and it does not bind the Agency's discretion, as the REMIT Regulation does not assign ACER any decision-making powers in this sector. Without prejudice to the possible practical implications of ACER's guidance in this context, no legal arguments seem conceivable to allow the Court to perform judicial supervision over this soft law.

3.2 Internal governance

In the previous sections, the normative context of the delegation of powers and the issues to be tackled when dealing with the judicial control to be envisaged for the main soft law issued by ACER have been considered. In line with the composite method characterising the present research, and with the purpose of investigating the regulatory practice of the Agency, it is now paramount to focus on internal governance, and how the relationship between the main bodies within ACER is shaped. In particular, it is argued that observing the interactions between National Regulators and the managing organs of the Agency can be considered particularly telling of the "double nature" of ACER (both European and of mere coordination) variously mentioned in the previous paragraphs.

A first key issue to be put forward is the crucial role played by the hybrid[161] relationship between the Board of Regulators and the Director of the Agency. Indeed, while both bodies are subject to the same independence requirements when operating within the Agency, their nature and goals are profoundly differentiated: while the Director[162] has a duty to act solely in the interest of the Union, the BoR intrinsically puts forward a compromise of differentiated

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Kunststoffwerk GmbH, LR af 1998 A/S, Brugg Rohrsysteme GmbH, LR af 1998 (Deutschland) GmbH and ABB Asea Brown Boveri Ltd v Commission of the European Communities, EU:C:2005:408, paragraph 211.

[160] See STEFAN – PETRI, *Too weak to be controlled? Justiciability of ACER soft law*, in *Yearbook of European Law*, 37/2018, pp. 525 – 550.

[161] TERMINI, *Dall'armonizzazione al mercato unico: ACER – l'agenzia europea per la regolazione dell'energia*, in BILANCIA (ed.), *La regolazione dei mercati di settore tra autorità indipendenti nazionali ed organismi europei*, Giuffrè, Milano 2012 pp. 147 – 148.

[162] Notably, while the Director of ACER has a few peculiar characteristics differentiating it from the (Executive) Directors of other European agencies, it is worth pointing out that the duty to operate solely in the exclusive interest of the Union is to be traced back to the 1968 Staff Regulation (See Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission, OJ L 56, 4 March 1968, p. 1–7).

interests (to be considered in light of the differentiated degree of independence of National regulators within the respective constitutional systems[163]). The Director's independence from the Board of Regulators represents a peculiarity of the energy sector[164], and it becomes apparent in the procedures regarding the appointment[165], removal[166], and assessment[167] of the Director, where a crucial role is played by the Board of Administrators (representing the European institutions) and the Commission itself. Notably, the BoR does retain a role in the mentioned (trilateral) procedures, but substantially in the form of non binding "favourable opinions" to be taken into account[168] by the Board of Administrators. Accordingly, it is possible to affirm that, although several differentiated actors play a role in the key steps of the Director's mandate, ACER's Director does not act as the head of an over-structured Secretariat of national regulators: this role has a clear independent character *vis-à-vis* the

[163] See Preamble 18 of the ACER Regulation 713/2009: "Without prejudice to its members' acting on behalf of their respective national authorities, the Board of Regulators should therefore act independently from any market interest, should avoid conflicts of interests and should not seek or follow instructions or accept recommendations from a government of a Member State, from the Commission or another public or private entity. The decisions of the Board of Regulators should, at the same time, comply with Community law concerning energy, such as the internal energy market, the environment and competition. The Board of Regulators should report its opinions, recommendations and decisions to the Community institutions."

[164] Indeed, Directors are commonly presented as "Executive Directors" in European agencies, and they usually represent a direct representation of the BoR. See, *ex multis*, Articles 51-53 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L 331, 15 December 2010, p. 84–119; Article 83 of Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, OJ L 396, 30 December 2006, p. 1–849.

[165] Pursuant to Article 16, paragraph 2, of the ACER Regulation, "The Director shall be appointed by the Administrative Board following a favourable opinion of the Board of Regulators, on the basis of merit as well as skills and experience relevant to the energy sector, from a list of at least three candidates proposed by the Commission, following a public call for expression of interest. Before appointment, the candidate selected by the Administrative Board may be invited to make a statement before the competent committee of the European Parliament and to answer questions put by its members."

[166] See Article 16, paragraph 7, "The Director may be removed from office only upon a decision of the Administrative Board, after having obtained a favourable opinion of the Board of Regulators. The Administrative Board shall reach that decision on the basis of a three-quarters majority of its members.".

[167] The Director is by no means subject to the evaluation of the BoR when exercising his/her mandate: pursuant to Article 16, paragraphs 3 and 4, of the ACER Regulation, the Director is only assessed by the Commission (directly or through a proposal to the Board of Administrators, which has then to take into account the favourable opinion of the Board of Regulators). See ACER Board of Administrators, Decision 26/2011 of 22 September 2011 (available at www.acer.europa.eu).

[168] The practice of the Agency shows that the role of the Board of Administrators is indeed quite predominant in this context. One telling example is the case of the appointment of the Director: in case more than one candidate, on the list defined by the Commission, obtains the favourable opinion of the Board of Regulators, the Board of Administrators can unilaterally decide on the winning candidate, without asking for a second opinion, nor taking into account which of the candidates obtained the highest number of preferences (see Minutes of the first meeting of ACER's Board of Regulators, 4 May 2010, A10 – BoR – 01 – 02a).

Board of Regulators, as it is conceived as a third figure not representing an unitary expression of the national regulators[169].

The controversial relationship between the Director and the Board of Regulators, which represents the key peculiarity of energy governance, will be schematically observed in the following sub-sections. Preliminarily, however, the constitutional implications of the key role played by European institutions in the several phases characterising the Director's mandate should not be overlooked. As far as independence is concerned, the main provision enshrined in the Regulation states that "without prejudice to the respective roles of the Administrative Board and the Board of Regulators in relation to the tasks of the Director, the Director shall neither seek nor follow any instruction from any government, from the Commission, or from any other public or private entity"[170]. This rather generic formula, which is similarly declined for all of ACER's internal governance bodies, represents the key tool to safeguard the weak institutional balance provided for in the ACER Regulation, which goes beyond the traditional "network agency" scheme while defining a system which is structurally institutionally- (rather than nationally-) driven. In other words, while the move away from the representation of national interests at supranational administrative level arguably represents a step forward in terms of agencification, it may be considered problematic with regards to the tight relationship between Agencies and European institutions (notably, the Commission). This concern will be better clarified in Chapter III, when discussing the trajectory of policy making enshrined in the 2016 Winter Package.

3.2.1 Participation to the decision-making process

When observing the internal governance of ACER, and the relationship between the Director and the Board of Regulators in particular, the most relevant issue to be taken into account is the participation of National Regulators to the decision-making process. Notably, a categorisation of the tasks assigned to the Agency according to the different declinations of the principle of subsidiarity and the differentiated participation of NRAs (through the BoR) to

[169] VAONA – POTOTSCHNIG, *Un'Agenzia per la cooperazione fra i regolatori nazionali dell'energia: partecipazione e cooperazione strutturale tra le Autorità nazionali di regolamentazione nell'interesse dell'Unione attraverso un organismo indipendente*, in MERUSI – ANTONIAZZI (eds.), *Vent'anni di regolazione accentrata di servizi pubblici locali*, Giappichelli, Turin 2017, p. 176.
[170] ACER Regulation, Article 16, paragraph 1.

the adoption of the main soft law instruments has already been attempted in Section 2.1 of the present Chapter. Consequently, this sub-section will focus on the macro-trends shaping the relationship between BoR and Director in the decision-making process, while specifying the rules put in place to incentivise NRAs' participation.

As far as the establishing regulation is concerned, the Board of Regulators takes part to the adoption of recommendations, opinions (both of a solicited and of an unsolicited character) and implementing decisions by expressing a favourable, compulsory and binding opinion on the proposal issued by the Director. More specifically, National Regulators are involved in ACER's (coordination) practice through the binding opinions expressed by the Board of Regulators for the all the tasks enshrined in Article 5 of Regulation 713/2009 ("General Tasks")[171], Article 6 ("Tasks as regards the cooperation of transmission system operators")[172],

[171] Article 5 of ACER Regulation: "The Agency may, upon a request of the European Parliament, the Council or the Commission, or on its own initiative, provide an opinion or a recommendation to the European Parliament, the Council and the Commission on any of the issues relating to the purpose for which it has been established".

[172] Article 6 of ACER Regulation: "1. The Agency shall provide an opinion to the Commission on the draft statutes, list of members and draft rules of procedure of the ENTSO for Electricity in accordance with Article 5(2) of Regulation (EC) No 714/2009 and on those of the ENTSO for Gas in accordance with Article 5(2) of Regulation (EC) No 715/2009. 2. The Agency shall monitor the execution of the tasks of the ENTSO for Electricity in accordance with Article 9 of Regulation (EC) No 714/2009 and of the ENTSO for Gas in accordance with Article 9 of Regulation (EC) No 715/2009. 3. The Agency shall provide an opinion: (a) to the ENTSO for Electricity in accordance with Article 8(2) of Regulation (EC) No 714/2009 and to the ENTSO for Gas in accordance with Article 8(2) of Regulation (EC) No 715/2009 on the network codes; and (b) to the ENTSO for Electricity in accordance with the first subparagraph of Article 9(2) of Regulation (EC) No 714/2009, and to the ENTSO for Gas in accordance with the first subparagraph of Article 9(2) of Regulation (EC) No 715/2009 on the draft annual work programme, the draft Community-wide network development plan and other relevant documents referred to in Article 8(3) of Regulation (EC) No 714/2009 and Article 8(3) of Regulation (EC) No 715/2009, taking into account the objectives of non-discrimination, effective competition and the efficient and secure functioning of the internal markets in electricity and natural gas. 4. The Agency shall, based on matters of fact, provide a duly reasoned opinion as well as recommendations to the ENTSO for Electricity, the ENTSO for Gas, the European Parliament, the Council and the Commission, where it considers that the draft annual work programme or the draft Community-wide network development plan submitted to it in accordance with the second subparagraph of Article 9(2) of Regulation (EC) No 714/2009 and the second subparagraph of Article 9(2) of Regulation (EC) No 715/2009 do not contribute to non-discrimination, effective competition and the efficient functioning of the market or a sufficient level of cross-border interconnection open to third-party access, or do not comply with the relevant provisions of Directive 2009/72/EC and Regulation (EC) No 714/2009 or Directive 2009/73/EC and Regulation (EC) No 715/2009. The Agency shall participate in the development of network codes in accordance with Article 6 of Regulation (EC) No 714/2009 and Article 6 of Regulation (EC) No 715/2009. The Agency shall submit a non-binding framework guideline to the Commission where requested to do so under Article 6(2) of Regulation (EC) No 714/2009 or Article 6(2) of Regulation (EC) No 715/2009. The Agency shall review the non-binding framework guideline and re-submit it to the Commission where requested to do so under Article 6(4) of Regulation (EC) No 714/2009 or Article 6(4) of Regulation (EC) No 715/2009. The Agency shall provide a reasoned opinion to the ENTSO for Electricity or the ENTSO for Gas on the network code in accordance with Article 6(7) of Regulation (EC) No 714/2009 or Article 6(7) of Regulation (EC) No 715/2009. The Agency shall submit the network code to the Commission and may recommend that it be adopted in accordance with Article 6(9) of Regulation (EC) No 714/2009 or Article 6(9) of Regulation (EC) No 715/2009. The Agency shall prepare and submit a draft network code to the Commission where requested to do so under Article 6(10) of Regulation (EC) No 714/2009 or Article 6(10) of Regulation

Article 7 ("Tasks as regards the national regulatory authorities")[173], Article 8 ("Tasks as regards terms and conditions for access to and operational security of cross-border infrastructure")[174] and Article 9 ("Other tasks")[175]. Moreover, as far as amendments are

(EC) No 715/2009. 5. The Agency shall provide a duly reasoned opinion to the Commission, in accordance with Article 9(1) of Regulation (EC) No 714/2009 or Article 9(1) of Regulation (EC) No 715/2009, where the ENTSO for Electricity or the ENTSO for Gas has failed to implement a network code elaborated under Article 8(2) of Regulation (EC) No 714/2009 or Article 8(2) of Regulation (EC) No 715/2009 or a network code which has been established in accordance with Article 6(1) to (10) of those Regulations but which has not been adopted by the Commission under Article 6(11) of those Regulations. 6. The Agency shall monitor and analyse the implementation of the network codes and the Guidelines adopted by the Commission in accordance with Article 6(11) of Regulation (EC) No 714/2009 and in Article 6(11) of Regulation (EC) No 715/2009, and their effect on the harmonisation of applicable rules aimed at facilitating market integration as well as on non-discrimination, effective competition and the efficient functioning of the market, and report to the Commission. 7. The Agency shall monitor progress as regards the implementation of projects to create new interconnector capacity. 8. The Agency shall monitor the implementation of the Community-wide network-development plans. If it identifies inconsistencies between such a plan and its implementation, it shall investigate the reasons for those inconsistencies and make recommendations to the transmission system operators, national regulatory authorities or other competent bodies concerned with a view to implementing the investments in accordance with the Community-wide network-development plans. 9. The Agency shall monitor the regional cooperation of transmission system operators referred to in Article 12 of Regulation (EC) No 714/2009 and Article 12 of Regulation (EC) No 715/2009, and take due account of the outcome of that cooperation when formulating its opinions, recommendations and decisions".

[173] Article 7 of ACER Regulation: "1. The Agency shall adopt individual decisions on technical issues where those decisions are provided for in Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 or Regulation (EC) No 715/2009. 2. The Agency may, in accordance with its work programme or at the request of the Commission, make recommendations to assist regulatory authorities and market players in sharing good practices. 3. The Agency shall provide a framework within which national regulatory authorities can cooperate. It shall promote cooperation between the national regulatory authorities and between regulatory authorities at regional and Community level, and shall take due account of the outcome of such cooperation when formulating its opinions, recommendations and decisions. Where the Agency considers that binding rules on such cooperation are required, it shall make the appropriate recommendations to the Commission. 4. The Agency shall provide an opinion, based on matters of fact, at the request of a regulatory authority or of the Commission, on whether a decision taken by a regulatory authority complies with the Guidelines referred to in Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 or Regulation (EC) No 715/2009 or with other relevant provisions of those Directives or Regulations. 5. Where a national regulatory authority does not comply with the opinion of the Agency as referred to in paragraph 4 within four months from the day of receipt, the Agency shall inform the Commission and the Member State concerned accordingly. 6. When a national regulatory authority encounters, in a specific case, difficulties with the application of Guidelines referred to in Directive 2009/72/EC, Directive 2009/73/EC Regulation (EC) No 714/2009 or Regulation (EC) No 715/2009, it may request the Agency for an opinion. The Agency shall deliver its opinion, after consulting the Commission, within three months of receiving such request. 7. The Agency shall decide on the terms and conditions for access to and operational security of electricity and gas infrastructure connecting or that might connect at least two Member States (cross-border infrastructure), in accordance with Article 8.".

[174] Article 8 of ACER Regulation: "1. For cross-border infrastructure, the Agency shall decide upon those regulatory issues that fall within the competence of national regulatory authorities, which may include the terms and conditions for access and operational security, only: (a) where the competent national regulatory authorities have not been able to reach an agreement within a period of six months from when the case was referred to the last of those regulatory authorities; or (b) upon a joint request from the competent national regulatory authorities. The competent national regulatory authorities may jointly request that the period referred to in point (a) is extended by a period of up to six months. When preparing its decision, the Agency shall consult the national regulatory authorities and the transmission system operators concerned and shall be informed of the proposals and observations of all the transmission system operators concerned. 2. The terms and conditions for access to cross-border infrastructure shall include: (a) a procedure for capacity allocation; (b) a time frame for allocation; (c) shared congestion revenues; and (d) the levying of charges on the users of the infrastructure referred to in

concerned, an established practice[176] of the Agency requires that the BoR's opinion on the proposal submitted by the Director cannot be subject to conditions or specific amendment requests.

Additionally, in Section 2.1 it has already been underlined how the role of the Board of Regulators is even more limited with regards to market monitoring and reporting, as well as the tasks assigned to the Agency by the most recent pieces of legislation. This is undoubtedly true for REMIT[177], where a consultative role is designed for the BoR, but also for the Cross-Border Cost Allocation Regulation[178], where no formal role for the BoR is envisaged.

The constitutional *momentum* of the decision-making dynamics hereby synthesised is apparent: uniquely within the "network agency" template[179], energy governance is not

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Article 17(1)(d) of Regulation (EC) No 714/2009 or Article 36(1)(d) of Directive 2009/73/EC. 3. Where a case has been referred to the Agency under paragraph 1, the Agency: (a)
shall provide its decision within a period of 6 months from the day of referral; and (b) may, if necessary, provide an interim decision to ensure that security of supply or operational security of the infrastructure in question is protected.
4. The Commission may adopt Guidelines on the situations in which the Agency becomes competent to decide upon the terms and conditions for access to and operational security of cross-border infrastructure. Those measures, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 32(2) of this Regulation. 5. Where the regulatory issues referred to in paragraph 1 include exemptions within the meaning of Article 17 of Regulation (EC) No 714/2009 or Article 36 of Directive 2009/73/EC, the deadlines provided for in this Regulation shall not be cumulated with the deadlines provided for in those provisions.

[175] Article 9 of ACER Regulation: "1. The Agency may decide on exemptions, as provided for in Article 17(5) of Regulation (EC) No 714/2009. The Agency may also decide on exemptions as provided for in Article 36(4) of Directive 2009/73/EC where the infrastructure concerned is located in the territory of more than one Member State. 2. The Agency shall provide an opinion, upon request by the Commission in accordance with the second subparagraph of Article 3(1) of Regulation (EC) No 714/2009 or the second subparagraph of Article 3(1) of Regulation (EC) No 715/2009, on decisions of national regulatory authorities on certification. The Agency may, in circumstances clearly defined by the Commission in Guidelines adopted pursuant to Article 18 of Regulation (EC) No 714/2009 or Article 23 of Regulation (EC) No 715/2009 and on issues related to the purpose for which it has been established, be commissioned with additional tasks which do not involve decision-making powers."

[176] VAONA – POTOTSCHNIG, *Un'Agenzia per la cooperazione fra i regolatori nazionali dell'energia: partecipazione e cooperazione strutturale tra le Autorità nazionali di regolamentazione nell'interesse dell'Unione attraverso un organismo indipendente*, in MERUSI – ANTONIAZZI (eds.), *Vent'anni di regolazione accentrata di servizi pubblici locali*, Giappichelli, Turin 2017, p. 178.

[177] REMIT Regulation.

[178] CACM Regulation.

[179] Very importantly, Board of Regulators play a paramount decision-making role within other "network agencies" within the European framework. In line with the notion of Executive Director, representing an administrative figure easing supranational cooperation and dealing with the executive aspects of governance, the Board of Regulators have a propulsive role in determining the content of the soft law and decisions issued by Agencies. This is true, for instance, for BEREC in the telecoms sector (see Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 *establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office,* OJ L 337, 18 december 2009, p. 1–10) and ECHA in the chemicals sector (see Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 *concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation*

Regulators-driven, but rather Director-driven. Indeed, the Director (in light of the role hinted at above) has a propulsive role with regards to the core tasks of the Agency, and the Regulators merely approve or disregard the Director's proposals. This structural element seems to be radically at odds with the fundamental idea of considering ACER the primary forum of discussion for the coordination of NRAs. This strong statement has to be mitigated in relation to the informal interactions characterising the relationship between the Director and the Board of Regulators.

The most relevant element to be taken into account is the paramount role played by Working Groups (WGs) in the drafting and consensus-building process surrounding the Director's propulsive decision-making role. Notably, four WGs have been progressively established[180] by the Director, and they are composed of the Agency's staff, Commission representatives[181] and seconded national experts chosen (and appointed) by NRAs. Their tasks mainly have a preparatory and advisory nature with regards to the technical and propulsive role of the Director, who is responsible for the appointment of the Chairperson of each WG following a non-binding proposal from the BoR[182].

The interactions characterising the functioning mechanisms of WGs revolve thus around the primary objective of promoting institutional cooperation between the Agency and NRAs,

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(EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, OJ L 396, 30 December 2006, p.1). In the case of ESMA (see Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 *establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC* ,OJ L 331, 15 December 2010, p. 84–119), NRAs have an even wider power, as they appoint the Board of Administrators and the Executive Director among the members of the Board of Regulators. See SCHAMMO, *The European Securities and Market Authority: lifting the veil on the allocation of powers*, in *Common Market Law Review*, 46/2011, pp. 1879 – 1914.

[180] In particular, the Electricity Working Group and the Gas Working Group have been established with Director Decision 2011 – 003 on the establishment of working groups of the Agency for the cooperation of Energy Regulators and on the Appointment of the Chairpersons, 1 March 2011; the Monitoring and Procedures Working Group and the Market Integrity and Transparency Working Group have been established with Director Decision 2012 – 05 on the establishment of working groups of the Agency for the cooperation of Energy Regulators and on the Appointment of the Chairpersons, 31 January 2012.

[181] The *ratio* of the participation of Commission representatives to the Working Groups is to be found in the circumstance that a substantial part of the recommendations and opinions issued by ACER are addressed to the Commission, and it is has been argued that it is relevant to informally include the Commission in the decision-making process for "technical coherence" reasons (See VAONA – POTOTSCHNIG, *Un'Agenzia per la cooperazione fra i regolatori nazionali dell'energia: partecipazione e cooperazione strutturale tra le Autorità nazionali di regolamentazione nell'interesse dell'Unione attraverso un organismo indipendente*, in MERUSI – ANTONIAZZI (eds.), *Vent'anni di regolazione accentrata di servizi pubblici locali*, Giappichelli, Turin 2017, p. 181).

[182] Director Decision 2012 – 06 on the Rules of Procedure of the working groups of the Agency for the cooperation of Energy Regulators, 6 February 2012.

while involving NRAs in the drafting process of the relevant proposals to be submitted to the BoR. In other words, WGs have established an informal information transmission chain between seconded national experts and NRAs representatives sitting in the BoR, providing for a *sui generis* participation scheme that goes beyond the formal decision-making process defined in the ACER Regulation.

The paramount role played by WGs in the *lato sensu* decision-making process within the Agency represents a relevant piece of the participation and coordination puzzle of policy making in the energy sector, but the functionalisation of the coordination efforts towards a better implementation of the propulsive role played by the Director may be still considered constitutionally problematic. Indeed, from a structural and systematic point of view, the lack of participation of the designated NRAs representatives sitting in the BoR to the ordinary decision-making process cannot be compensated by the episodic participation of third national experts to the drafting process. Moreover, no mention of Working Groups is made in the ACER Regulation (nor in the subsequent pieces of legislation), leaving it to the discretion of the Director to establish such groups. To sum up, while the practice of WGs does represent a viable tool to concretely achieve technical coherence and information between the Director and NRAs, it cannot be considered an adequate answer to institutional balance concerns.

Finally, as far as the role of the BoR in the decision-making process is concerned, the voting procedures chosen by the Regulators shall be taken into account, as they can be considered telling of the necessity of implementing broader participation among NRAs. The ACER Regulation does not include any specific rules concerning voting and the working mechanisms for the BoR; rather, it implies[183] the necessity to focus on the tension between representativeness and effectiveness towards market harmonisation, while entrusting the Board of Regulators with the adoption and publication of its Rules of procedure, "which shall set out in greater detail the arrangements governing voting, in particular the conditions on the basis of which one member may act on behalf of another and also, where appropriate, the rules governing quorums"[184].

[183] ACER Regulation, Preamble 18.
[184] ACER Regulation, Article 15, paragraph 4.

Pursuant to the BoR's Rules of Procedure[185], each NRA representative (one per Member State) has one vote, the only non-voting members of the Board being the Commission representatives. It is worth underlining that the overarching rule for deliberations is consensus: members should strive to reach consensus in taking decisions[186], and only in case consensus is not achieved, the required qualified majority for each deliberation (on any subject requiring ACER's intervention or opinion, be it binding or no binding) is two thirds of the present members. Notably, "the necessary quorum for a valid BoR decision generally is met if the majority of its Members are present or represented. If the majority of the Members are not present or represented at the first meeting, a second meeting shall be convened, at least 15 days after the first meeting, which may validly deliberate irrespective of the number of members present or represented."[187] Moreover, the Rules of Procedure stress the importance of physical presence[188] to the meetings, being it the Chair's responsibility to assess whether the urgent nature of the matter at hand calls for the use of electronic voting procedures.

The need to increase NRAs participation is thus clear even from the approach underlined in the Rules of Procedure, even in light of the established practice allowing for the participation of the Director to BoR meetings[189].

3.2.2 Guidance to the Director

The other tenet of BoR's involvement in the Agency's policy making, somewhat (at least theoretically) compensating for the limited role of NRAs in the decision-making process, is the key advisory and agenda setting function of the Board of Regulators with regards to the Director. This role is in line with the BoR's approval of the Agency's annual Work Programme, before its formal adoption by the Board of Administrators[190].

[185] The Rules of Procedure of the Board of Regulators of the Agency, A10-BoR-01-03, 4 May 2010, as revised by A12-BoR-20-03, 10 July 2012, As revised by A14-BoR-35-35, 19 February 2014, available at http://www.acer.europa.eu/Official_documents/BoR/Meeting_Docs/A14-BoR-35-05.pdf
[186] BoR's Rules of procedure, Point 6.3.
[187] BoR's Rules of procedure, Point 6.4.
[188] BoR's Rules of procedure, Point 6.6.
[189] See Minutes of BoR meetings for the years 2011 – present, available at acer.europa.eu.
[190] ACER Regulation, Article 15, Paragraph 3: "The Board of Regulators shall, in accordance with Article 13(5) and Article 17(6) and in line with the preliminary draft budget established in accordance with Article 23(1), approve the work programme of the Agency for the coming year and present it by 1 September of each year for adoption by the Administrative Board"

Article 15, paragraph 1, of the ACER Regulation, importantly states that: "The Board of Regulators shall provide opinions to the Director on the opinions, recommendations and decisions referred to in Articles 5, 6, 7, 8 and 9 that are considered for adoption. In addition, the Board of Regulators, within its field of competence, shall provide guidance to the Director in the execution of his tasks." The provision at hand, in assigning National Regulators the function of "providing guidance" to the Director, seems to imply an overarching guiding role for the Board of Regulators, ideally solving the responsibility and participation conundrum underlined in sub-section 3.2.1.

In fact, the broad terminology used, and notably the choice of the term "guidance" instead of the more legally-qualified "guidelines"[191], allowed the Agency to interpret this provision as the legal basis for the creation of a "dialogical space"[192], necessary for the purposes of efficient regulation.

More specifically, the guidance to be expressed by the Board of Regulators has been interpreted as being "merely optional and not-binding in nature"[193], in line with the interpretation suggested for the non-binding "guidance" issued by ACER pursuant to the REMIT Regulation[194]. This interpretation, corroborated by the practice of the Agency, has been developed around the multilayered limits imposed to the content of the guidance.

The first two limits to the content of the guidance concern the Agency's Work Programme and the general framework of EU sector regulation, which shall undoubtedly represent two pillars framing any guidance issued by the Board, due to both systematic[195] and normative[196] reasons. In the Agency's practice, the BoR's guidance is, however, also limited both by the Board of Regulators' competence, as it would be considered *ultra vires* for the BoR to provide guidance on the strictly executive role of the Director, and by the content of the

[191] On the potential bindingness of guidelines, see the leading case T-59/62, Judgment of the Court of First Instance (Third Chamber) of 27 September 2006, *Archer Daniels Midland Co. v Commission of the European Communities*, EU:T:2006:272.
[192] VAONA – POTOTSCHNIG, *Un'Agenzia per la cooperazione fra i regolatori nazionali dell'energia: partecipazione e cooperazione strutturale tra le Autorità nazionali di regolamentazione nell'interesse dell'Unione attraverso un organismo indipendente*, in MERUSI – ANTONIAZZI (eds.), *Vent'anni di regolazione accentrata di servizi pubblici locali*, Giappichelli, Turin 2017, p. 179.
[193] *Ibid.*
[194] See REMIT Regulation, Article 16, paragraph 1.
[195] Providing for some guidance going against the Work Programme approved by the same Board would result in an internal inconsistency to the decision-making process enshrined in Articles 13, paragraph 5, 15, paragraph 3, and 17, paragraph 6, of the ACER Regulation.
[196] See ACER Regulation, Preamble 18.

recommendations, opinions and decisions the Board will have to express its approval upon. In other words, in order to preserve the institutional equilibrium defined with regards to decision making, no detailed guidance on the acts that will represent the outcome of the aforementioned process, the favourable opinion of the BoR on which will be required, can be included within the scope of the guidance pursuant to Article 15, paragraph 1, of the ACER Regulation[197].

Applying the four mentioned limitations has substantially hampered the Board of Regulators from exercising any form of real guidance on the Director: rather than determining an exogenous form of control or priority-setting for the Director, Article 15(1) has only introduced an unenforceable and mild legal basis for informal exchanges between the Director and the BoR.

4. Provisional Conclusions

This Chapter has dealt with the question revolving around ACER's role within the "network governance" paradigm by focussing on its relationship with National Regulators. In particular, it focussed on the following research question: which are the distinguishing features of ACER's practice, with particular regards to the involvement of National Regulators in supranational policy making? In order to assess the Agency's peculiar constitutional role within the agencification process, a tentative categorisation of ACER's main tasks according to the differentiated implementation of the principle of subsidiarity has been primarily put forward. Then, through an evolutionary approach, the theory of delegated powers in the European context has been presented, focussing on the evolution of the *Meroni* and *Romano* doctrine in light of the 2014 *Short selling* case. Finally, the issues of judicial accountability for the Agency's soft law and the internal governance dynamics characterising its decision-making process have been autonomously considered.

[197] VAONA – POTOTSCHNIG, *Un'Agenzia per la cooperazione fra i regolatori nazionali dell'energia: partecipazione e cooperazione strutturale tra le Autorità nazionali di regolamentazione nell'interesse dell'Unione attraverso un organismo indipendente*, in MERUSI – ANTONIAZZI (eds.), *Vent'anni di regolazione accentrata di servizi pubblici locali*, Giappichelli, Turin 2017, p. 180.

The main findings of the present Chapter can be schematically summarised as follows. First, ACER's tasks entail a different degree of participation of NRAs: while opinions and recommendations (having both an unsolicited and a solicited character) generally require for an active involvement of NRAs, market monitoring activities (especially in the context of the REMIT Regulation) are conceived as strictly administrative tasks, where a very limited (or absent) role of NRAs is envisaged. In the case of individual decisions, NRAs can take part to the proceedings as third parties.

Second, as far as the theory of the delegation of powers is concerned, the *Meroni/Romano* criteria represent the model from which the Agency's establishing Regulation has been moulded. While the *Short Selling* case might suggest an alternate framework for the legitimisation of power delegation (with particular regard to the "openness" of the legal basis provided by Articles 290 – 291 TFEU), ACER's practice presents a few critical imbalances with regards to institutional equilibriums and accountability.

Third, the justiciability of ACER's soft law, in light of Article 263(1) TFEU, introduced by the Lisbon Treaty, still remains deeply problematic, thus compromising (one of) the most relevant tenets of the *Meroni* doctrine (which remains valid even following the *Short Selling* stream of case law).

Fourth, as far as internal governance is concerned, the actual involvement of National Regulators in the decision-making process, even on the matters requiring a high degree of participation, is very low, as the Board of Regulators can only express a favourable opinion, voted by two thirds of the present Members, on the proposal made by the Director, who does not represent the interests of the Regulators. The involvement of seconded national experts in the Working Groups preparing the Director's proposal is not a constitutionally valid alternative to the lack of participation of NRAs to the decision-making process of such a "(network) agency", and the "guidance" that the BoR is supposed to give to the Director to compensate for the lack of participation in the decision-making process has been interpreted in ACER's practice in an extremely mild and limited way. This internal governance dynamics represents an *unicum* in European agency governance, as, in the other comparable agency-regulated sectors such as telecoms, the BoR retains all of the propulsive and decision-making power, while the Director has the role of Executive Director, only charged of executive and implementation tasks.

This Chapter has provided for a critical account of the main aspects characterising ACER's role: in light of the aforementioned considerations, it seems fair to argue that the Agency's practice fits uncomfortably with a notion of "network agency" entailing more than the mere presence of a Board of Regulators representing NRAs. Indeed, while NRAs' participation is present in ACER's practice, the supranational (rather than intergovernmental, relational, network-like) nature of the Agency, represented by its Director, seems to prevail in the institutional balance. Thus, it can be argued that the energy field represents an interesting case study to consider the possible evolutions of European policy making, developing the concept of "agencification" beyond the boundaries of "network governance". These elements will be further developed from a constitutional perspective in Chapter III, in light of the (proposed) policy innovations brought about by the 2016 Winter Package.

Chapter III

A constitutional perspective

1. Introductory remarks

Chapter I focussed on the governance of the internal energy market from an evolutionary perspective, underlining the shift from the network model represented by the European Regulators' Group for Energy and Gas (ERGEG) to the establishment of the Agency for the Cooperation of Energy Regulators (ACER). Consequently, Chapter II has highlighted the structural peculiarities characterising ACER's practice. In particular, it has been observed that, both with regard to its structural (internal governance) characteristics and to the justiciability of its soft law, the Agency fits uneasily with a definition of "network agency" implying a strong role of (independent) national regulators in decision-making processes, as well as falling short of substantial institutional balance requisites following the theory of delegation enshrined in the *Meroni* doctrine.

The present chapter aims at contextualising the findings of Chapters I and II within the broader "agencification" process of European governance, in light of the policy developments influencing energy governance and ACER's institutional model. More specifically, this chapter intends to suggest an answer to the following research question: can European constitutional law provide a useful framework for the analysis of the issues at stake, taking into account the dynamic evolution of sector regulation? Indeed, using a constitutional normative standard to study the path towards agencification entails tackling the development of good governance and good regulation in the energy sector, while introducing an overarching legitimisation scheme for delegated regulation within the EU.

In order to address the relevant research question, the structure of this chapter will be bipartite. First (section 2), a European constitutional perspective will be used to suggest a comprehensive reading of the agencification phenomenon. In particular, both the definitory and structural fundaments of the agencification process will be observed, against the backdrop of good governance principles and the 2012 Common Approach defined by the European Commission in order to provide some uniform guidance on the development of the agency

model. Then (section 3), the institutional developments influencing the energy sector will be autonomously recalled, with specific regard to the 2015 Energy Union Communication and the proposed 2016 reform commonly referred to as the "Winter Package".

Notably, it will be suggested that using a constitutional reading of the delegation and agencification phenomenon does provide a relevant framework for discussion when assessing the trends of agency governance in general, and energy regulation in particular. Moreover, it will be argued that the institutional developments proposed for internal energy market governance may exacerbate, rather than solve, the institutional conundrums characterising the complex nature of ACER, which are already made apparent by the lack of explicit and comprehensive recognition of Agencies within European primary law.

2. A European constitutional perspective

After a short introduction to the socio-economic concept of network policy making (Chapter 1, section 2.1), the previous Chapters have considered the Agency for the Cooperation of Energy Regulators in order to assess its role within the broader "network agency" scenario. In particular, it has been argued that, in light of the peculiarities characterising its regulatory practice (highlighted in Chapter II), ACER may be considered a *sui generis* network agency, which may be telling of the trends of the so called "agencification" process of European governance.

This section aims at focussing on the constitutional and regulatory underpinnings of the aforementioned considerations, while taking into account the "agencification" process as a constitutive element of the debate on the different models of regulation (section 2.1). Then (section 2.2), the 2012 Common Approach to European agencies will be observed, in order to assess the Commission's perspective aiming at applying convergence to the diverging scenario of European agencies.

2.1 The "Agencification" process

In Chapter I, policy networks have been defined as horizontal policy-making subjects that can be characterised by a diversified level of hierarchy and voluntary participation[1]. In particular, it has been argued that the flexible and cooperative nature of regulatory networks is to be considered key to the development of harmonisation and market integration in a sector of controversial power delegation from Member States, drawing from the theory of "deliberative supranationalism"[2]. In this context, convergence and homogenisation in regulation are achieved through "professionalization", creating a "shared frame of reference" reinforcing conformity among national regulators[3].

It is paramount to underline that the analysis of the evolution of network governance towards the agency model, though arguably[4] influenced by a strong interaction of distributional conflicts between Member States and diversified degrees of influence from European institutions, has to be interpreted in conjunction with the institutional development of policy making in the EU[5]. In particular, it has convincingly been argued that, from the legal scholarship[6] perspective at least, two driving factors have characterised the pluralisation of

[1] A good example in this sense is represented by the European Competition Network, which can be considered a coordinative subject linking together different peers (National Competition Authorities) that, while maintaining the fluid structure characterising networks, is also characterised by a hierarchical and non-voluntary element, as the Commission plays a peculiar role being the "first among a network of peers". For a structured account on the main literature on this issue, see MAHER – STEFAN, *Competition law in Europe: the challenge of a network constitution*, in OLIVER – PROSSER – RAWLINGS (eds.), *The Regulatory State: constitutional implications*, Oxford University Press, Oxford 2010, ch. 9.

[2] EBERLEIN – GRANDE, *Beyond delegation: transnational regulatory regimes and the EU regulatory State*, in *Journal of European Public Policy*, 12/2005, pp. 89 – 112.

[3] EBERLEIN – KERWER, *New governance in the EU: a theoretical perspective*, in *Journal of Common Market Studies*, 42/2004, p. 162.

[4] See KELEMEN – TARRANT, *The political foundations of the Eurocracy*, in *West European Politics*, 34/2011, pp. 922 – 947. Kelemen's perspective is to be considered part of the so-called "political" school of thought with regards to agencification, as opposed to "institutional" theories, according to which Agencies act as a an institutional way out from the conundrum raising from the need to fulfil market integration (and harmonisation) in spite of of weak regulatory capacity from the European institutions (DEHOUSSE, *Regulation by networks in the European Community*: *the role of European Agencies*, in *Journal of European Public Policy*, 4/1997, pp. 246 – 261). This dichotomy will be briefly considered in Section 2.1.1.

[5] Notably, substantial parallelisms can be drawn from a comparison of EU delegation to agencies and the development of the agency model in the United States, starting from the 1970s. See, *ex multis*, SHAPIRO, *The problems of independent agencies in the United States and the European Union*, in *Journal of European Public Policy*, 4/1997, pp. 276 – 291.

[6] See CHITI, *European Agencies' Rulemaking: powers, procedures and assessment*, in *European Law Journal*, 19/2013, pp. 93-110. In practice, however, it is worth noting that the political science literature has identified a wide variety of inhomogeneous factors shaping the emergence of agency governance in the EU, the majority of which are strictly rooted in the relevant sector regulation involved in the process. See GROENLEER, *The European Commission and Agencies*, in SPENCE – GEOFFREY (eds.), *The European Commission*, Hart Publishing, Oxford 2006, and GROENLEER – TRONDAL, *The phenomenon of European Union Agencies: setting the scene*, in BUSUIOC – GROENLEER (eds.), *The Agency phenomenon in the European Union:*

the EU executive through the establishment of regulatory agencies: first, a (tentative) divide between "technical" and "political" issues (the former pertaining to agencies)[7]; second, the integration (and somewhat formalisation) of diversified network experiences in an inhomogeneous *corpus* of unitary regulatory subjects[8].

Both elements have characterised the emergence of a regulatory agency in the energy sector. Indeed, in the first chapter of the present thesis, an evolutionary approach has been chosen to underline the steps leading from ERGEG to ACER, as a shift from a network model to agency regulation. According to this paradigm, the collegial and open nature of networks can be considered, in the energy sector at least[9], as the structural antecedent to the hierarchical governance model determined by agency regulation.

Emergence, Institutionalisation and Every-day Decision Making, Manchester University Press, Manchester 2012. With particular reference to the determination of "delegation patterns" in a chronological dimensions, three main paths have been identified: coordination (through networks), expertise (through expertise), coordination and expertise (through independent regulatory agencies). For a thorough analysis of this composite perspective, see MATHIEU, *Regulatory delegation in the European Union – networks, committees and agencies*, Macmillan, Basingstoke 2016, pp. 25 – 49.

[7] In particular, the 2002 Commission Communication providing for a first general framework for regulatory agencies (Communication from the Commission – *The operating framework for the European Regulatory Agencies*, 11 December 2002, COM(2002) 718 final), following the 2001 Commission *White Paper on European Governance* (COM (2001) 428, 25 July 2001), considers the establishment of agencies as a key way to "improve[e] the way rules and policy are applied across the Union" (p.1), as "this would make the executive more effective at European level in highly specialised technical areas requiring advanced expertise and continuity, credibility and visibility of public action" (p. 5). As a structural component of the "technical" role of agencies, fact finding and risk assessment usually cover EU agencies' tasks, notwithstanding the practical difficulties in assessing the concrete scope of application of these two different activities (with regards to risk management) as well. This discrepancy is common to the general reasons behind the establishment of agencies in a variety of contexts, including at Member State level (See HOFMANN – TURK (eds.), *EU administrative governance*, Edward Elgar, Cheltenham, 2006).

[8] See HOFMANN – MORINI, *Constitutional aspects of the pluralisation of the EU executive through "agencification*", in *European Law Journal*, 36/2012, pp. 419 – 443.

[9] As a matter of fact, while the shift from (or at least the inglobation of) networks to agencies represents a general trend in the European scenario, determining a privileged perspective over the evolution of European policy-making, it is paramount to underline that this heterogeneous process lead to the creation of a differentiated set of actors which do not fit easily with the category of "agency". Accordingly, while these experiences are still relevant to consider the shift to different governance models in the EU, they might not represent telling examples of the "agencification process". For instance, in the telecommunications sector, the creation of BEREC (which is, indeed, a Body of Regulators and not an Agency), while constituting a stepping stone of regulatory convergence, might not be a relevant shift towards agency governance, due to the political and relational factors characterising its establishment. Indeed, pursuant to its establishing Regulation (Regulation Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 *establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office*, OJ L 337, 18 December 2009, p. 1–10), it is neither an Agency nor an Authority; rather, it is an "Office", characterised by legal personality. See THATCHER, *The creation of European regulatory agencies and its limits: a comparative analysis of European delegation*, in RITTBERGER – WONKA (eds.), *Agency governance in the EU*, Routledge, London 2012, p. 25.

If a broad (and somewhat simplistic) definition of "agencification" is to be taken into account, it could thus be inferred that the regulatory evolution implying a hierarchical and centralising shift from horizontal to vertical governance in European policy making leading to the creation of European agency-like bodies can indeed be classified as "agencification". More specifically, the process of agencification could be considered as a progressive "embodiment of the notion of subsidiarity" in a perspective of "executive federalism"[10], institutionalising regulatory cooperation among NRAs towards the implementation of a truly integrated administration[11].

As anticipated throughout the previous Chapters, it is paramount to underline that agencification implies the set up and institutionalisation of a very diverse array of regulatory subjects, the main shared traits of which mainly (and solely) consisting of their establishment through autonomous Regulations spelling out the relevant tasks, their status as autonomous subjects with legal personality and a certain degree of organisational and financial autonomy[12].

Agencification is thus a tool entailing a diversification (and pluralisation) process of the European executive, "representing the needs of a highly dynamic legal order in which legally separated levels – the EU and the Member States – undertake procedurally well integrated implementation of EU policies"[13]. It follows from the aforementioned considerations that the agencification process, read in conjunction with the evolution of network policy making, is a governance process entailing fragmentation and centralisation at the same time, as it triggers regulatory diversification while providing for a centralised approach to policy-making, with regards to its structural antecedents.

[10] HOFMANN – MORINI, *Constitutional aspects of the pluralisation of the EU executive through "agencification*", in *European Law Journal*, 36/2012, p. 424.
[11] CHITI, *Decentralisaion and integration into the Community administrations: a new perspective on European agencies*, in *European law Journal*, 10/2004, pp. 402 – 438. See also the already mentioned contribution by GRILLER – ORATOR, *Everything under control? The way forward for European Agencies in the footsteps of the* Meroni *doctrine*", in *European Law Review*, 35/2010, pp. 3 – 35.
[12] It is interesting to point out that while the 2002 Commission Communication on the operating framework for the European Regulatory Agencies (mentioned *supra*) acknowledges this lack of homogeneity while underlining the shortcomings of such a diverse regulatory setting, the same premises are substantially restated in the 2012 Common Approach, to be considered in section 2.2 of the present Chapter.
[13] HOFMANN – MORINI, *Constitutional aspects of the pluralisation of the EU executive through "agencification*", in *European Law Journal*, 36/2012, p. 424.

Accordingly, the intimately inhomogeneous nature of European agency-like bodies is symptomatic of the incremental nature of the process of agencification, which is not dissimilar from that characterising other composite legal orders[14].

One unifying element could however be traced back, due to the key role played by subsidiarity in the substantial and procedural diversification of the European Union's executive, to the complex characteristics of the European integration process, according to which the European Union is granted supranational status through "mediated legitimacy"[15]. As a matter of fact, interpreting the bottom-up approach to European integration as the definition of a multilevel constitutional legal order legitimised by subsequent waves of power attributions, from the Member States to the Union, can provide a general framework justifying the progressive delegation of regulatory (and executive) powers to European agencies.

Following this perspective, the agencification process can be considered in its entirety as a global phenomenon defining a long-term trajectory of integration for European policy making, as it entails an advanced degree of (mediated) legitimacy for the European setting, triggering the development of an autonomous European legal order[16] where, through agency delegation, both subsidiarity and executive federalism are achieved.

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[14] See, *ex multis*, the classic contribution to the US debate by STRAUSS, *Formal and functional approaches to separation of powers questions – a foolish inconsistency?*, in *Cornell Law Review*, 72/1987, pp. 488 – 521. In particular, it is possible to argue that in the United States the separation of powers has determined a key use of rule-making delegation, the constitutional legitimisation of which has famously been either substantive (mainly focussing on efficiency and redistribution) or procedural (mainly highlighting the links between transparency, accountability and the determination of fair procedures, SHAPIRO, *Administrative Law Unbounded: Reflections on Government and Governance*, in *Indiana Journal of Global Legal Studies*, 8/2001, p. 369 ff.). For a structured and comprehensive analysis of the possible lessons learnt from the 1970s and 1980s debate in the United States for the European delegation debate, see MAJONE, *Regulatory legitimacy*, in MAJONE (ed.), *Regulating Europe*, Routledge, London 1996, pp. 284 – 301. For the linkages between diversified executives and the need for constitutionalisation in North America, see SHANE – BRUFF – KINKOPF, *Separation of powers law: cases and materials*, Carolina Academic Press, Durham 2018. Moreover, STEWART uses the "transmission belt" model of administration in order to stress the power delegation occurring from citizens to institutions to technical bodies, which are in return bound by a reciprocal, circular, relationship of trust. The author argues that pluralising political processes has determined, in the US at least, a diverse paradigm with regard to the traditional "transmission belt model", allowing for a procedural, autonomous, legitimisation of agency action in light of the emergence of an autonomous "regulatory State". See STEWART, *US Administrative law: A Model for Global Administrative Law?*, in *Law and Contemporary Problems*, 68/2005, pp. 63 – 108.

[15] SIMONCINI, *Paradigms for EU Law and the Limits of Delegation. The Case of EU Agencies*, in *Perspectives on federalism*, 9/2017, p. 66.

[16] In fact, SIMONCINI, in her contribution mentioned *supra*, argues that a combined reading of "mediated legitimacy" theories and the perspective according to which the EU is to be considered an "autonomous legal order" are necessary in order to fully assess the EU integration process. The delegation of executive and

The literature on European agencies is very vast and articulated, covering both the formation and the working mechanisms of these administrative bodies through a legal and socio-political perspective. The research design chosen for the present work will not, however, address these issues. The general considerations that have just been put forward aim at providing a general definitory framework for the contextualisation of ACER within the broader "agencification" process. In particular, interpreting such process in light of the emergence of an autonomous European legal order, to be read as a development of multilevel constitutionalism as a result of "mediated legimisation" of the EU, will shed some light on the constitutional categories to be chosen when assessing European agencies.

Accordingly, the following subsections will briefly address the structural underpinnings determining agencification in the energy sector (beyond the classic principal-agent theory) and the relationship of this regulatory model with the principles of good administration. Finally, the mismatch between the paramount role played by European agencies and their lack of recognition in European primary law will be addressed.

2.1.1 Structural underpinnings

In light of the aforementioned considerations, agencification can be considered a somewhat coherent trend entailing the fragmentation of Europe's regulation, through the establishment, with *ad hoc* Regulations, of autonomous, hierarchical, regulatory bodies. In all evidence, the theoretical hiatus between network and agency governance is nothing but apparent, as, especially with regard to the conceptually blurry notion of "network agency", the two regulatory models appear complementary in defining the current dynamics of regulatory practice in the EU[17]. In this context, the role of Member States is key in designing a

regulatory powers to EU agencies thus represents a paradigmatic case study of the necessity to integrate the two (apparently diverging) perspectives.

[17] In particular, LEVI-FAUR, in his empirical analysis aiming at suggesting the trajectory of European governance in an evolutionary perspective, argues that his study "suggests a trend towards agencification as the major instrument of choice in the EU governance system, and the deliberate institutionalization of dependent networks by the agencies and the Commission. Yet networks are still important for understanding the single European regulatory space, and network relations play an important role in legitimization and co-ordination. The boundaries between networks and agencies are becoming more blurred. [...] The relations between the networks and the agencies are understood as important features of the European governance mix" (LEVI-FAUR, *Regulatory networks and regulatory agencification: towards a Single European Regulatory Space*, in RITTBERGER – WONKA (eds.), *Agency governance in the EU*, Routledge, London 2012, pp. 32 – 52).

governance model in a multilevel constitutional setting, as agencies play a key role in shaping the practical declinations of the founding principle of subsidiarity[18].

Both these elements (the complementary nature of the network and agency models; the role played in the decision-making process by Member States in the regulation of the specific context at hand) have represented two paramount pillars of the interpretation of ACER's role within the broader agencification debate, in the present research.

In order to assess the structural underpinnings of agencification, its thus paramount to consider which tangible elements represent the cornerstones of this process, and which underlying governance trends motivated this shift, along the lines of the divide between "substantial agencification" and mere "agency form"[19]. In all evidence, this issue is crucial in the context of energy regulation, as the fuzzy boundaries of the notion of "network agency" have already been pointed out with specific reference to the Agency for the Cooperation of Energy Regulators[20].

Considering networks as peculiar regulatory environments where NRAs concur to the regulation over a specific domain[21] entails a few structural challenges to the pursuit of "good regulation"[22], to be assessed with regard to the process of agencification. In other words, did

[18] It is worth noting that the impact of national drive over the decision making process has been observed in the political science literature on the matter through an empirical approach, assessing whether, beyond the national participation mechanisms set within agency governance (such as the ones considered in the present research), agencies are in fact a tool of decentralisation or harmonisation of the European executive. For a relatively recent contribution assessing this issue, see EGEBERG – TRONDAL, *EU-level agencies: new executive centre formation or vehicles for national control?* and WONKA – RITTBERGER, *Perspectives on EU governance: an empirical assessment of the political attitudes of EU agency professional*, both in RITTBERGER – WONKA (eds.), *Agency governance in the EU*, Routledge, London 2012, pp. 90 – 132.

[19] THATCHER, *The creation of European regulatory agencies and its limits: a comparative analysis of European delegation*, in RITTBERGER – WONKA (eds.), *Agency governance in the EU*, Routledge, London 2012, p. 28: "it is not clear whether European Regulatory Agencies represent incremental movement towards substantial agencification or whether in fact the EU has adopted the Agency form, but not the reality of Agency governance".

[20] As anticipated, an additional element to be taken into account in this particular sector is the multilayered component of rule-setting bodies, with NRAs and ACER having to conform with a structurally multilevel rule- and standard-setting scenario. On the regulatory implications of this structural issue, see BLACK, *Decentring regulation: the role of regulation and self-regulation in a "post-regulatory world"*, in *Current legal problems*, 2/2001, pp. 103 – 146.

[21] For a structured analysis of a notion of regulatory networks, focussing on the (partial) absence of hierarchy, see Chapter I. On this aspect in particular, in a comparative setting, see THOMPSON, *Between hierarchies and markets: the logics and limits of network forms of organisation*¸ Oxford University Press, Oxford 2003.

[22] On the notion of good regulation as a juxtaposition between the choice of the relevant benchmarks and tangible regulatory action, as anticipated at the very outsets of the present research (see Introduction), see the classic work by BALDWIN – MCCRUDDEN (eds.), *Regulation and public law*, Weidenfeld and Nicolson, London 1987 (chapter III) and FREEDMAN, *Crisis and legitimacy*, Cambridge University Press, 1978, as well

the move towards agency governance determine an increase in the overall quality of regulation, from a structural point of view? In this research, the approach to the definition of "good regulation" has already been considered[23]. It revolves around Baldwin's classic classification of the five concurrent criteria to qualify regulation[24], which build upon Shavell's definition of "optimal regulation"[25]: fulfilment of the legislative mandate, accountability (both judicial and through democratic institutions), due process (adoption of the relevant acts through a fair, accessible and open procedure), relevant technical expertise, efficiency[26]. Notably, these criteria assess the legitimacy the regulator "deserves"[27], and they are thus key to the observation of the agencification process.

In particular, these criteria can be differently shaped, according to the structural characteristics determining the shift from network governance to agency delegation. While the compatibility of said criteria with the agencification process will be considered in Section 2.1.2, it is worth mentioning that, in light of the considerations developed in Chapters I and II, accountability represents the main challenge when assessing the shift from network to agency governance. As far as the structural underpinnings of agencification are concerned, instead, it is paramount to consider the different approaches to network coordination leading to the institutionalisation of European agencies.

The main structural explanations for this process have been traced back, in the political science and legal scholarship, to an autochthonous, paradigmatic, application of the well-

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as the more recent contributions by RADAELLI – DE FRANCESCO, *Regulatory quality in Europe*, Manchester University Press, Manchester 2007, and STERN, *The evaluation of regulatory agencies*, in BALDWIN – CAVE – LODGE, *The Oxford Handbook of Regulation*, Oxford University Press, Oxford 2010. Conversely, Dworkin's work takes the well known stance in favour of good regulation as a function of wealth maximisation (see, *ex multis*, DWORKIN, *Why efficiency?*, in *Hofstra Law Review*, 8/1980, p. 563). For a critical assessment of the circular allocation consequences of the latter approach, see BALDWIN – CAVE – LODGE, *Understanding Regulation*, Oxford University Press, Oxford 2011, pp. 25 – 26.

[23] See Introduction, section 2.

[24] See BALDWIN – CAVE – LODGE, *Understanding Regulation*, Oxford University Press, Oxford 2011, pp. 26 – 33.

[25] See SHAVELL, *Foundations of economic analysis of law*, Belknap Press, Cambridge 2004, pp. 571 – 591.

[26] The notion of efficiency is indeed two-fold, as it can either cover the achievement of the legislative mandate with the minimum possible use of resources, or the realisation of (distrubutively or allocatively) efficient results. The former seems more reasonably applicable to the context of European Union agencification. In particular, the approach suggesting that an efficient regulation entails the achievement of economically efficient goals has been heavily criticised with regards to public agencies, as regulation in this sector has to be "mixed and include irretrievably varied rationales, economic and social". See PROSSER, *Law and the Regulators*, Clarendon Press, Oxford 1997, p. 24.

[27] BALDWIN – CAVE – LODGE, *Understanding Regulation*, Oxford University Press, Oxford 2011, pp. 26 – 32. See also BARKER, *Political legitimacy and the State*, Clarendon Press, Oxford 1990, pp. 20 – 27.

known principal-agent theory[28], while conceiving delegation as one way to enhance "credible commitment"[29] from regulators, which would then act as blame-keeping bodies[30] for sector regluation. As a matter of fact, agencies act as paramount tenets of a so-called "non-majoritarian" institutional model, as they act as "agents" of the political bodies responsible for their institutionalisation (mainly the European Commission and, to a lesser degree, the European Parliament), from which they are organisationally independent while remaining structurally accountable[31].

In this context, the need to enact delegation from the principal to the agent can stem from the need to enhance regulatory cooperation in a sector characterised by a gap between the regulatory capacity and the regulatory needs of the principal. This is the case of ACER, in line with an autonomous interpretation[32] of the "institutionalist" theories to delegation mentioned above.

Clearly, this analysis of the structural underpinnings of the delegation of powers in the context of agencification matches with Majone's perspective over the emergence of the European context as a "mixed polity", based upon the triangular relationship between institutional balance, institutional autonomy and loyal cooperation[33]. It should be clear from the aforementioned considerations that the main controversial issue with regard to the delegation of regulatory powers to European agencies lies mainly within the notion of institutional balance. In this context, Majone stresses the emergence of an autonomous "regulatory (European) State" that, through extensive delegation and consequential diversification, has led to the structural autonomy of the regulatory function with regards to a purely executive one[34].

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[28] For an overview of the main classic studies on the subject, see THATCHER – STONE SWEET, *Theory and practice of delegation to non-majoritarian institutions*, in *West European Politics*, 25/2002 pp. 1-22.
[29] See LEVY, SPILLER *A framework for resolving the regulatory problem*, in LEVY, SPILLER (eds.) *Regulation, institutions and commitment*, Cambridge University Press, Cambridge 1996, pp. 1 – 35.
[30] See, *inter alia*, THATCHER, *Delegation to independent regulatory agencies: pressures, functions and contextual mediation*, in *West European Politics*, 25/2002, pp. 125 – 147.
[31] *Ibid.*
[32] See MATHIEU, *Two agencification paths: EU agencies between coordination and expertise*, contribution to the TARN Young Researchers Master Class on the Agencification of EU Executive Governance, European University Institute, 9th November 2016. In her contribution, the author develops the notion of "functional institutionalism", as a development of the "institutionalist" theories mentioned *supra*.
[33] MAJONE, *Delegation of regulatory poker in a mixed polity*, in *European Law Journal*, 8/2008, pp. 319 – 339.
[34] See also MAJONE, *Regulatory legitimacy*, in MAJONE (ed.), *Regulating Europe*, Routledge, London, 1996, pp. 284 – 301. For a different but converging take see SCOTT, *Regulation in the age of governance: the rise of the post-regulatory State*, Edward Elgar, Cheltenham 2004, pp. 145 – 174.

The tentative "non-majoritarian model of democracy"[35] stemming from the extensive use of delegation in the European agencification context, notwithstanding the limited mechanisms providing a differentiated level of structural institutional balance, is one of the key factors enhancing the need to constitutionalise European agencies, as considered in Section 2.1.3.

2.1.2 Agencification and the principles of good governance

The key factors determining the emergence of the agencification process within European governance have been briefly considered in the previous section. As anticipated, it is now paramount to assess whether the delegation practice within the EU can be reconciled with the main principles of good governance, as it is key to observe the relationship between the compliance with the principles of good governance and the development of a "good" and sustainable regulation for the sectors which are subject to the agencification process.

The main controversial issues, concerning the effectiveness of the *ex ante* and *ex post* controls[36] of the regulatory output, have already been observed: this brief section aims at contextualising the critical considerations mentioned in the previous Chapters within the main structural reflections developed in the constitutional and European administrative law scholarship. More precisely, the key concept of accountability is to be assessed with regard to the principles of good governance, functioning as a relative assessment "normative standard"[37].

Indeed, it should be noted that, in the evolutionary context suggested by the observation of the agencification process, a governance perspective (to be read in conjunction with a "market governance"[38] perspective) is to be considered a "new perspective over old problems"[39]. In this setting, focussing on good governance as a composite *corpus* of rules and norms (and values) providing for converging standards at supranational level entails the necessity to consider the agencification process as part of an evolutionary discourse on the development of

[35] MAJONE, *Regulatory legitimacy*, in MAJONE (ed.), *Regulating Europe*, Routledge, London 1996, p. 298.
[36] See EVERSON, *Agencies: the "dark hour" of the executive?*, in HOFMANN – TURK (eds.), *Legal Challenges in EU administrative Law*, Edward Elgar, Cheltenham 2009, pp. 116 – 135.
[37] LAVRIJSSEN - KOHLBACHER, *EU electricity network codes: good governance in a network of networks*, TILEC Discussion Paper 1/2018, p. 53.
[38] HANCHER – LAROUCHE – LAVRVIJSSEN, *Principles of Good Market Governance*, in *Review of Business and Economic Literature*, 2/2004, pp. 339-374.
[39] MOLLERS, *European governance: meaning and value of a concept*, in *Common Market law review*, 43/2006, p. 313.

(new) policy-making subjects within European market governance. The key role played by accountability, independence and the definition of a fair and transparent procedure in the assessment of the compatibility of agencies' practice with the general framework of EU law has been thoroughly underlined in the previous Chapters[40]. Notably, it is paramount to stress that a divergence between the development of good (market) governance and the actual practice of regulatory subjects could hamper the primary objectives of market integration, other than having a disruptive effect on the constitutional coherence of the sector[41].

The 2001 Commission White Paper on governance[42] is somehow telling of this approach, as it foresees the creation of regulatory agencies as a way to further sector regulation through independent decision-making within the strict framework defined by the establishing Regulations[43]. Moreover, as a condition for the functioning of EU regulatory agencies as a tool to achieve a more consistent implementation of EU law and policy, it is underlined that "agencies must be subject to an effective system of supervision and control"[44].

The White Paper can thus be considered a primitive instrument linking agency practice to good governance, which has to be interpreted as an overarching concept covering the notions of transparency, independence, accountability, proportionality, consistency, predictability, flexibility, clarity of the legal mandate and general respect of the legislative framework[45]. The relationship between the respect of good governance and the achievement of good regulation is evident, as the former can be considered a necessary prerequisite of the latter, in line with the basic definition of "good regulation" used in the present research.

The key role of transparency as a way to ensure market governance throughout the agencification process can be conceived as a corollary to the principles of predictability and legal certainty, as well as the coherence of the legal framework identified[46]. The focus on the

[40] For an overarching discussion of the role played by these principles in shaping administrative practice at national level, see DELLA CANANEA – FRANCHINI, *I principi dell'amministrazione europea*, Giappichelli, Turin 2010.
[41] See HANCHER - LAROUCHE – LAVRVIJSSEN, *Principles of Good Market Governance*, in *Review of Business and Economic Literature*, 2/2004, pp. 350 ff.
[42] European Commission Communication, *European Governance - A White Paper*, 25 July 2001, COM(2001) 428 final (hereinafter: European Commission governance white paper).
[43] European Commission governance white paper, p. 24.
[44] *Ibid.*
[45] HANCHER – LAROUCHE – LAVRVIJSSEN, *Principles of Good Market Governance*, in *Review of Business and Economic Literature*, in *Review of Business and Economic Literature*, 2/2004, p. 342.
[46] The clarity of the legislative mandate (and the respect thereof) is to be considered part of this narrative as the purpose and limits of the establishment of an agency, enshrined in the relevant Regulation, represent key tenets

establishment of open consultations and a participatory procedure to the adoption of market monitoring and implementation acts in agency governance is thus a tenet of this basic concept, ensuring the compliance of agency practice with broader good governance constraints in the form of the establishment of a "fair procedure" in the adoption and publication of acts. The tangible application of the principle of transparency is, in fact, nuanced, in accordance with the institutional subjects involved in the regulatory action, determining a (preliminary) potential frictional element with regards to the consistency of the agencification process[47].

Similarly, the principle of independence, which is structurally[48] two-fold, from both market operators and the political and institutional framework, is to be considered a key (controversial) element with regard to the agencification process. For instance, at the very outsets of the ACER Regulation, its status with regards to the principle of independence is clearly stated, as it is underlined that "an independent central entity offer[s] a number of long-term advantages over other options"[49]. Moreover, "the Agency should have the necessary powers to perform its regulatory functions in an efficient, transparent, reasoned and, above all, independent manner"[50].

In all evidence, three paramount elements concur to the potentially controversial issues arising from a good governance-oriented reading of the agencification process: the substantial independence requisites of Agency bodies (among each other and between them and the

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of the necessity for the Agency to exercise its mandate in a transparent way, which is consistent with the relevant legal framework. The Preambles to the ACER Regulation represent a clear example of this transparency effort from the European legislator, aiming at setting the legislative mandate as a paramount canvas for the exercise of ACER's regulatory prerogatives.

[47] As an example, Article 10 of the 2009 ACER Regulation, while imposing – *"when appropriate*" – a general duty of publication and transparency for the Agency's action "to all interested parties" and the general public, states that "in carrying out its tasks [...] the Agency shall consult extensively and at an early stage with market participants, transmission system operators, consumers, endusers and, where relevant, competition authorities, without prejudice to their respective competence, in an open and transparent manner, *in particular when its tasks concern transmission system operators*." (emphasis added). It is just worth mentioning that a composite interpretation of the notion of transparency, including both the publication (of the regulatory output) and the consultation of the interested parties (relative to the input aiming at defining the content of regulation), is in line with the European Court of Justice's approach to the interpretation of Article 296 TFEU.

[48] This interpretation of the principle of independence is consistent with the reading provided by the legal and political scholarship on the evolution of good governance in a regulatory delegation reading. See, *ex multis*, BUSUOIC, *Accountability, Control and Independence: The Case of European Agencies*, in *European Law Journal*, 15/2009, pp. 599 – 565.

[49] ACER Regulation, Preamble 5.

[50] ACER Regulation, Preamble 18.

European institutions or market players)[51]; the divide between "technical" and "policy" (discretionary)[52] decisions, in line with a constitutionally oriented reading of the delegation of powers, following the *Meroni* doctrine[53]; the complex nature of mixed acts, where market operators play a substantial role in the definition of the regulatory context, beyond the scope of consultations[54].

Notably, as anticipated on several occasions in the present research, the tangible implications of this notion greatly vary according to the structure chosen for the relevant agency (or agency-like) body. The comprehensive formula privileged in the ACER Regulation is that foreseeing that the internal governance bodies "shall act independently and shall not seek or follow instructions from any government of a Member State, from the Commission, or from another public or private entity"[55]. As previously observed, this provision, while enshrining the overarching principle of independence, can be differently nuanced in practice, according to the different interests brought to the regulatory table by the governance bodies of the Agency[56], raising different governance questions.

More importantly, it is paramount to consider the structural relationship linking the substantial independence of the EU agency with regards to the EU institutions, as compared

[51] The problematic nature of this substantial element is apparent in the ACER Regulation, where, as observed in Chapter II, the role of the European institutions (both *per se* and considering their key role within the Board of Administrators) is quite poignant with regard to the Director (thus strongly influencing the decision-making process of the agency). Moreover, the relative independence of the Director with regard to the Board of Regulators is also to be assessed.

[52] The good governance principle of flexibility is to be accounted for in this regard. In particular, it has been observed that in order to achieve a sustainable market governance, "while it is desirable that the legislative framework give the agency clear guidance as to what it is supposed to do, at the same time the agency must not be put in a straightjacket by receiving only well-delineated and limited poker" (HANCHER – LAROUCHE – LAVRVIJSSEN, *Principles of Good Market Governance*, in *Review of Business and Economic Literature*, 2/2004, p. 346). For good governance to be achieved, the independence of the regulator resulting in a clear divide between technical and policy decisions shall be counterbalanced by the provision of flexible and proportionate powers, strictly linked to the basic principles of transparency and clarity of the legal mandate. As observed at a later stage of the present section, the common denominator of this process is to be traced back to the paramount role played by discretion.

[53] See Chapter II, Section 2.2.

[54] An obvious example is represented by the process leading to the adoption of network codes, in the energy sector. In this context, the problematic issue is that the independent role of the agency can be practically weakened by the definition of a regulatory output the content of which has been substantially developed by market operators.

[55] ACER Regulation, Articles 14 and 18. As far as the Director is concerned, Article 16 states that "the Director shall neither seek nor follow any instruction from any government, from the Commission, or from any other public or private entity".

[56] A paradigmatic example is the structural divergence between the Director (who acts in the interest of the Union) and the NRAs sitting within the Board of Regulators, which, in light of the internal governance dynamics observed in Chapter II, represents a telling element of the regulatory dialogue (and peculiarities) taking place within the Agency.

to the independence of NRAs with regard to the relevant Member State governments. Indeed, as it will be observed in Section 3 of the present Chapter, the key role played by European institutions (and especially the Commission) in the appointment of the agencies' managing bodies (also in light of the "Common approach" to be observed in section 2.2) can fit uneasily with the strict independence requirements demanded to national regulators within the Board of Regulators.

Accountability represents the structural (and diachronic) counterpart to transparency (clarity of the legal mandate, flexibility, proportionality, consistency) and independence[57]. Consequently, political and judicial accountability are to be interpreted as structural counterparts to the general accountability aiming at the addresses of the regulatory action, through transparency-enhancing mechanisms. The practical underpinnings of this principle are strongly sector-specific, and the most relevant provisions related to the (limited) accountability mechanisms enshrined in the ACER Regulation have already been observed. Indeed, while the explicit mention of Agency acts in Article 263(1) TFEU potentially represents a step forward as far as (judicial) accountability is concerned, its critical role with regards to soft law and the shortcomings of the political accountability mechanisms for ACER have already been thoroughly recalled.

Rather, from a systemic perspective, it should be observed that, from an institutional design point of view, the most relevant element to be strictly calibrated, in light of the "good governance" perspective assessment suggested in this section, is that of discretion. More specifically, while the circular relationship between accountability and independence, through transparency, is steady and clear, as it represents the foundation of the governance sustainability of the agencification process, a disruptive element is represented by discretion[58], introducing fuzzy boundaries as far as the tenets of flexibility, clarity of the mandate, and, ultimately, accountability are concerned.

In other words, defining and implementing discretion in the diverse delegation of powers scenario determined by agencification entails a global rethinking of the cross-roads between

[57] On the need to reconcile accountability and independence which is embedded in the agencification process, see the paramount contribution by MAJONE, *Regulatory legitimacy*, in MAJONE (ed.), *Regulating Europe*, Routledge, London 1996, pp. 284 – 301.

[58] Discretion in this case is to be interpreted as administrative discretion as framed within the EU law setting. For a comprehensive analysis of this concept, see SIMONCINI, *Administrative Regulation Beyond the Non-Delegation Doctrine. A study on EU agencies*, Hart publishing, Oxford 2018, ch. 3.III.

independence, transparency and accountability. Striking a sustainable balance between these good governance principles represents the main (constitutional) challenge of the agencification process.

2.1.3 The need for constitutionalisation

The mismatch between the structural and tangible relevance of regulatory delegation to EU agencies and the lack of recognition of this phenomenon by European primary law is striking. This contrast is more apparent if, as suggested in this chapter, a constitutional approach is to be used as the paramount normative standard when assessing the legality of delegation, which is considered the product of an autonomous European legal order, beyond the scope of a "mediated legitimacy" reading of European integration[59].

More specifically, it is worth underlining that the fragmentation of the European executive is not only absent in the European "constitutional" apparatus defined by the Lisbon Treaty[60]: it radically clashes with the unitary representation of the executive function within the EU enshrined in the European Treaties[61]. The relevance of the agency phenomenon, in light of its diversity and inhomogeneous nature, raises paramount issues with regard to the constitutional sustainability of the model. In particular, it has convincingly been argued that the lack of recognition of power delegation within the Lisbon Treaty has determined the development of "extra constitutional forms of EU executive, [...] addressing the real life necessities of implementation"[62].

[59] As anticipated, it has been convincingly argued that a constitutional reading of the delegation doctrine in the agencification process is paramount in order to understand the complexity of the phenomenon as part of the evolution of administrative governance throughout the EU (see SIMONCINI, *Paradigms for EU Law and the Limits of Delegation. The Case of EU Agencies*, in *Perspectives on federalism*, 9/2017, p. 61). Indeed, such an interpretation would be compatible with considering European integration as a process through which the emergence of an autonomous legal order has defined a set of common practices to be assessed through good governance standards.

[60] See DE WITTE, *Legal instruments and law-making in the Lisbon Treaty*, in GRILLER – ZILLER (ed.), *The Lisbon Treaty: EU Constitutionalism without a Constitution?*, Springer, Berlin 2008, pp. 79 – 108 and, in the same volume, PONZANO, *"Executive" and "delegated" acts: the situation after Lisbon*, pp. 135 – 141. Both these contributions focus on the provisions on accountability and responsibility enshrined in the Treaties, underlining the limits of the Treaty approach to the definition of procedural accountability and justiciability for delegated acts.

[61] HOFMANN – MORINI, *Constitutional aspects of the pluralisation of the EU executive through "agencification*", in *European Law Journal*, 36/2012, p. 419.

[62] *Ibid.*, p. 439.

The increasing use of delegation[63] and the key relevance of agency regulation in a vast array of sectors[64], where both supranational and shared competences are at stake, lead to a general mainstreaming of agencification[65] as the fundamental path towards executive pluralisation in European governance. As observed, the lack of constitutional recognition of this phenomenon did not entail the complete lack of constitutional limits and parameters, however potentially problematic. Indeed, as underlined in Chapter II, both Articles 290 – 291 TFEU and Article 114 TFEU can be considered, in conjunction with Article 263(1) TFEU, alternative frameworks entailing the constitutional legitimisation of the Agency phenomenon[66], following the *Meroni* and *Shortselling*[67] streams of case law. The overarching principle to be accounted for is clearly the respect and safeguard of institutional balance, enshrined in Article 13(2) TEU, which can be considered a corollary of the principle of legality[68].

[63] See HOFMANN, *Mapping the European Administrative Space*, in *West European Politics*, 31/2008, p. 671, on the subsequent "waves of agencification". Indeed, it has been argued that the extensive use of agency practice is to be considered a distinguishing feature of the European environment (see CURTIN, *Executive Power of the European Union. Law, Practices and the Living Constitution*, Oxford University Press, Oxford 2009.

[64] It has been argued that, at present, it would been impossible for the EU to operate without agencies. See EVERSON – MONDA – VOS, *European Agencies in between Institutions and Member States*, in EVERSON – MONDA – VOS (eds.), *European agencies in between Institutions and Member States*, Wolters Kluwer, Alphen an den Rijn 2014, p. 3.

[65] This phenomenon has been iconically named "agency fever" by EGEBERG-TRONDAL, *Agencification of the European Union administration: Connecting the dots,* TARN working paper no 1/2016, p. 1.

[66] The Lisbon Treaty also introduced a variegated set of additional provisions giving recognition to the Agency phenomenon, by giving constitutional legitimacy to a set of provisions that where already introduced in agency practice through establishing Regulations. In particular, Article 71 TFEU covers internal security, Article 228(1) TFEU relates to the Ombundsman, while Article 287 and Article 257 TFEU cover agency action on audit and fraud. This set of provisions defined the so-called "incomplete constitutionalisation" of European agencies (See EVERSON – VOS, *Unfinished Constitutionalisation: The politicised agency administration and its consequences*, contribution to the TARN Conference on the Agencification of EU Executive Governance, European University Institute, 10th November 2016).

[67] In order to fully frame, from a constitutional perspective, the alternative legitimisation scheme at hand, earlier case law on Article 114 TFEU shall also be considered. Indeed, in the *ENISA* (Judgment of the Court (Grand Chamber) of 2 May 2006, case C-217/04, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, EU:C:2006:279) and *Smoke flavouring* (Judgment of the Court of 6 December 2005, case C-66/04, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, EU:C:2005:743) cases, the Court defined an autonomous scheme for the legitimisation of agencies as "measures" to implement market harmonisation, which is structurally alternative to the delegation scheme enshrined in the *Meroni* doctrine. The expansion of the agency proliferation through market measures, even beyond the scopes of market integration, has been duly studied by the legal scholarship (see DE WITTE, *A Competence to Protect: The Pursuit of Non-Market Aims through Internal Market Legislation*, in SYRPIS (ed.), *The Judiciary, the Legislator and the Internal Market*, Cambridge University Press, Cambridge 2012, pp. 25-46). In this context, as underlined in Chapter II, the 2014 *Shortselling* case does not represent a revision of the *Meroni* doctrine, while determining the definition of an alternative scheme for potential legitimisation.

[68] HOFMANN – MORINI, *Constitutional aspects of the pluralisation of the EU executive through "agencification*", in *European Law Journal*, 36/2012, p. 440.

Solely relying on the Court's interpretation of Articles 290 or Article 114 TFEU for the (implicit) constitutional legitimisation of agency practice has, however, not proven uncontroversial. As a matter of fact, in Section 2.2.2 of the present chapter the potential clashes of agency delegation with the principles of good governance have been recalled. It is indeed within this setting that the agency phenomenon is particularly problematic, as regulatory delegation is stretched between independence and accountability challenges going beyond the mere control of the delegating authority (the Commission?[69]) and more towards a complex institutional balance, including the other European institutions and Member States[70]. The "hybrid nature" of the agency model[71], which has been underlined in the present research with particular regard to the Agency for the Cooperation of Energy Regulators, is paradigmatic of the practical inconsistencies of the current model of constitutional legitimisation of the agencification process within European primary law.

Three aspects are, in particular, currently at stake when determining the necessity for a constitutionalisation of the agency phenomenon: the definition of the relevant legal basis; the extent to which acts can be delegated (does delegation cover discretionary acts?); the nature of the (delegated) administrative act within the general hierarchy of norms[72]. These issues, however interlinking, address separate concerns in the agency scenario and could provide a tangible answer to the good governance dilemmas suggested by agency mushrooming in the EU[73].

While providing a clear legal basis to the establishment and operation of agencies would clarify their constitutional status within the pluralisation[74] of the European executive,

[69] See M. EGEBERG-TRONDAL, *Agencification of the European Union administration: Connecting the dots,* TARN working paper no 1/2016, p. 10.
[70] See, *inter alia*, EVERSON, *Independent Agencies: Hierarchy Beaters?*, in *European law Journal* , 1/1995, pp. 180–204.
[71] For instance, see RIJPMA, *Hybrid Agencification in the Area of Freedom, Security and Justice and its Inherent Tensions: The Case of Frontex*, in BUSUIOC – GROENLEER – TRONDAL (eds.), *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-making*, Manchester University Press, Manchester, 2012 p. 90.
[72] For a structured analysis of this classification, see EVERSON – VOS, *Unfinished Constitutionalisation: The politicised agency administration and its consequences*, contribution to the TARN Conference on the Agencification of EU Executive Governance, European University Institute, 10th November 2016.
[73] See EVERSON – VOS, *European Agencies: what about the institutional balance?*, Maastricht Faculty of Law Working Paper, 4/2014, p. 14.
[74] It has been argued that recognising the legal basis of the agency phenomenon at a constitutional level would entail a shift in the constitutional paradigm from diverse regulatory subjects to diverse regulatory models, emphasising the structural characteristic of legal pluralism. See SCOTT, *Regulatory Governance and the*

determining the limits of delegation[75] and the nature of the resulting act, possibly through the creation of a "European administrative act" [76] following the US model[77], would address the pressing transparency and legal certainty concerns. Therefore, constitutionalisation would does entail a step forward in the legitimisation of the European delegated governance, while addressing this key phenomenon in a systematic and consistent manner.

2.2 The 2012 Common Approach

In Section 2.1, the key structural elements characterising the so-called "agencification" process of EU regulation (and executive governance) have been underlined, through a systematic and constitutional perspective. One fundamental aspect of the pluralisation of the European executive has been traced in the substantive inhomogeneity of the agency phenomenon. More specifically, the diverging characteristics of European agency-like bodies, both with regard to their establishing regulations and their operational mechanisms, have been highlighted as a paramount asset of the process, which, as observed throughout Chapters I and II, covers the implementation of hybrid "networking" models.

Importantly, the inhomogeneity of the qualifying characteristics of European agencies (and agency-like bodies) implies different normative standards in respect of the implementation of good governance, to be conceived as a tool to achieve good regulation. Indeed, the different perimeter of the competences assigned to the internal governance bodies of the decentralised agencies in the relevant decision-making bodies, as well as the composite role played by the European institutions in shaping their regulatory action, can have tangible consequences on the practical development of the key principles of transparency, accountability and independence of the agency.

Challenge of Constitutionalism, in OLIVER, PROSSER, RAWLINGS, *The Regulatory State: Constitutional Implications*, Oxford University Press, Oxford 2010, Ch. 2.

[75] The link between discretion and binding nature of EU delegated acts is of paramount importance in this context. See CHITI, *An important part of the EU's institutional machinery: features, problems and perspectives of European agencies*, in *Common Market Law Review*, 46/2009, pp. 1395 – 1442.

[76] See CURTIN – HOFMANN – MENDES, *Constitutionalising EU Executive Rule-making Procedures: A Research Agenda*, in *European Law Journal*, 1/2013, pp. 1–21.

[77] For a comprehensive review of the structural consequences on justiciability for *ultra vires* and legitimate acts adopted through the unified 1946 US Administrative Procedure Act, see STEWART, *US Administrative law: A Model for Global Administrative Law?*, in *Law and Contemporary Problems*, 68/2005, pp. 63 – 108.

In order to provide a cohesive and coherent framework to the variegated agency scenario, while designing a way forward in terms of agency establishment and implementation, the European Commission, Council and European Parliament adopted a Joint Statement defining a "Common Approach" on decentralised agencies[78]. Notably, the joint statement is the outcome of the institutional dialogue (through the establishment of an inter-institutional working group) stemming from the 2008 Communication adopted by the European Commission on the same matter[79], which dealt with the identification of common development patterns for European agencies. The perspective used in the mentioned soft law instruments in order to frame the controversial issues at hand is quite telling: EU agencies are considered "decentralised" instruments for European (executive) governance.

This element mirrors the overall conception of European agencies as executive branches of European institutions, tasked with the implementation and support of EU decision-making. In this paradigm, the introduction of specific accountability and internal check-and-balance mechanisms is functional to the structural pertinence of these bodies to the European executive. Providing for a general standardisation of the phenomenon can thus be considered a stepping stone in the definition of a governance tool characterised by very strong links with the European institutions.

It is interesting to point out, however, that the joint statement underlines how the Common Approach does not apply to "executive agencies"[80], thus suggesting a reframing of the distinction between regulatory (executive) agencies and purely executive bodies already used in the 2008 Communication[81]. In that context, "regulatory agencies" where named "traditional

[78] Joint Statement of the European Parliament, Council of the EU and the European Commission on decentralised agencies, 19 July 2012, available at https://europa.eu/european-union/sites/europaeu/files/docs/body/joint_statement_and_common_approach_2012_en.pdf (hereinafter, "Common Approach").
[79] Communication from the Commission to the European Parliament and the Council - *European agencies – The way forward*, COM (2008) 135, 13 March 2008 (hereinafter, "2008 Communication").
[80] Common Approach, p. 1.
[81] It is worth mentioning that the distinction between "regulatory" and "executive" agencies, while presented as a clear-cut one, does not seem fully convincing from a systematic perspective, at least lexically speaking. Indeed, the distinction is based upon the different scope of the agency's action, with "regulatory" agencies focussing on the implementation of EU policies and decision-making support, and "executive" agencies dealing with the implementation of specific EU programmes, while both agencies pertain *lato sensu* to the executive function. Rather, it is paramount to concentrate on the distinction between the legal basis: while "regulatory" agencies are profoundly diverse as they are established through different Regulations, "executive" agencies have all been institutionalised by the same legal basis, which is Council Regulation (EC) No 58/2003 of 19 December 2002 *laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes*, OJ L 11, 16 January 2003.

agencies", as they, while still pertaining to the general pluralisation of the European executive, where characterised by autonomous governance, accountability and independence challenges, while being established through differentiated Regulations: the Communication "concentrate[d] on regulatory agencies since this is where there is a need for clarification and a common approach"[82]. Accordingly, the 2012 Common Approach develops this perspective on (regulatory) agencies, the characterising feature of which is thus to be retraced in their independent legal personality, as well as fundamentally decentralised nature, even in terms of (institutional) balance of powers.

The distinguishing element to be highlighted is the functional and substantial link between institutional balance and institutional supervision, emerging from the Common Approach[83]. This interpretation of the legitimacy of the agency action, which is strictly functional to the institutional control over its outputs, is not uncontroversial: while representing a plausible (however partial) interpretation of accountability, it may be considered structurally clashing with the independence of the agency. In other words, the tangible link between institutional supervision and the legitimacy of power delegation implied in the Common Approach fits uneasily with an interpretation of agency governance comprising the usage of a diverse array of discretionary powers.

Moreover, while conceiving agencies as decentralised ramifications of the European executive helps simplifying the "good governance dilemma", it contrasts with the coordinating role of agencies with regard to (independent) national regulatory authorities. The latent conflict between agency supervision and NRA independence is particularly striking in the regulated sectors where agency governance represents a peculiar declination of the subsidiarity principle, in light of the paramount role played by Member States in legislation and regulation, such as energy policy[84]. In all evidence, indeed, the perspective entailing a

[82] 2008 Communication, p. 3.

[83] In this regard, it is interesting to point out that the main approach is to be summarised as follows: agencies "are institutionally legitimised pursuant to the supervision exerted on them by the institutions that set them up" (see MIHAYLOVA, *Governance of EU agencies – the Common Approach and beyond*, contribution to the TARN Conference on the Agencification of EU Executive Governance, European University Institute, 10th November 2016, p. 1).

[84] As anticipated, both structural (competence-based) and contingent (political) reasons lead Member States to be particularly reluctant to assign a paramount role to European governance in the energy sector (See EIKELAND, *The Third Internal Energy Market Package: New Power Relations among Member States, EU Institutions and Non-state Actors?*, in *Journal of Common Market Studies*, 49/2011, pp. 243-263 and JEVNAKER, *Pushing administrative EU integration: the path towards European network codes for electricity*, in *Journal of European Public Policy*, 22/2015, pp. 927 – 947). The peculiarities of this context are thus to be accounted for when

direct relationship between legitimacy and supervision is coherent with a merely "executive" nature of European agencies, while not fully accounting for the diversity of agency-like bodies, often characterised by diverse degrees of "network governance", where the main role of the agency (supposedly) is a (purely) coordinative one, with regard to independent national regulators.

From a more practical perspective, it is worth recalling that the 2012 Common Approach joint statement is structured along five guiding pillars: role and position of agencies in the EU's institutional landscape[85], structure and governance[86], operation[87], programming of activities and resources[88], accountability, controls and transparency with regard to stakeholders[89]. It is paramount to underline that the tentative process of homogenisation of EU agency governance through the Common Approach is, more physiologically than pathologically, potentially inconsistent: the 2012 soft law perspective necessarily suffers from a structurally generic character, due to the paramount integration to be operated through a combined reading of such Common Approach with the various Regulations establishing European agencies[90].

As far as internal governance is concerned, the Common Approach envisages the establishment of a "Management Board" within each agency, necessarily composed by one

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assessing the key role (supposedly) played by NRAs within the Agency for the Cooperation of Energy Regulators.

[85] Common Approach, paragraphs 1 – 9, covering the *ratio* and mechanisms regulating the Agency's establishment and ending, as well as their role within the legal order of the host country.

[86] Common Approach, paragraphs 10 – 22, providing the definition and tasks of the Agency's "management board", "executive board" and "director", as well as envisaging an uniform discipline for (independent) scientific committees and Boards of Appeal.

[87] Common Approach, paragraphs 23 – 26, which include provisions on the discipline to be applied to classified information handled by the Agency, as well as the Agency's institutional role in external communication matters and *vis-à-vis* international relations. Moreover, paragraph 23 covers three envisaged options "in order to deliver the administrative support that agencies need to operate in the most efficient manner": extending the services provided by the Commission; merging smaller agencies; sharing services between agencies.

[88] Common Approach, paragraphs 27 – 45, disciplining the drafting and approval of Work Programmes, the rules applicable to human resources and the budgetary procedures.

[89] Common Approach, paragraphs 46 – 66, which cover reporting, internal and external audit, alert system and evaluation from the European institutions (and notably the Commission), relationship with the stakeholders, prevention of fraud and corruption.

[90] Consequently, a number of potentially controversial provisions of the Common Approach are severely weakened by the intrinsically generic character of the document at hand. For instance, paragraphs 65 and 66, covering transparency and the relationship of agencies with the relevant stakeholders don't help assess the actual role of transparency within the good governance conundrum in this context, since these provisions merely state that "agencies should provide, via their [multilingual] websites, information necessary to ensure transparency, including financial transparency" (Common Approach, paragraph 65), and that the agencies' relationship with stakeholders shall be "coherent with their mandate" (Common Approach, paragraph 66).

representative per Member State and two Commission representatives, to be potentially joined ("where appropriate") by one representative of the European Parliament and a "fairly limited number" of stakeholder representatives[91]. Arguably, in a "network agency" context, this managing board, which has a key role in administrative, operational and budgetary supervision, is to be retraced in the Board of Regulators[92]. Notably, while the Common Approach underlines that Board members shall be chosen due to their "knowledge" of the subject[93], no specific requirement concerning their independence nor role within the general institutional balance is considered[94]. Moreover, regulatory action shall be steered by a smaller "Executive Board", the only necessary condition for the establishment of which is represented by the presence of at least one Commission Member[95].

In addition, it is paramount to point out that the Managing Board and the Commission are conjunctively responsible for the pre-selection and appointment of the Agency's Director[96], who retains his key operational role, while being accountable (mainly through reporting and assessment/evaluation) to the Management Board and the European Commission, Council and Parliament (with specific regard to financial and budgetary matters).

As far as external accountability is concerned, political and (*lato sensu*) institutional balances are the only ones considered in the Common Approach: no focus on judicial accountability is included in the joint statement, as the privileged approach mainly involves the European Parliament and the Council, which are involved on both reporting and budgetary matters, while the Court of Auditors and European Ombundsman, as well as the Internal Audit System (IAS) and the European Anti-Fraud Office (OLAF) retain their constituent competences. Moreover, European institutions can, either jointly or separately, provide opinions on the definition of the agency's operational and regulatory priorities.

[91] Common Approach, paragraph 10, point 1.
[92] Paragraph 13 of the Common Approach, in establishing common voting procedures for Managing Boards which mirror the main voting provisions of establishing Regulations, adds to this consideration.
[93] Common Approach, paragraph 10, point 2.
[94] For instance, and contrary to the main provisions included in establishing Regulations, such as the ACER Regulation, no provisions entail the basic requirement, for the Director and the appointed Commission members, to act "in the sole interest of the Union". In this regard, it is worth mentioning, however, that the "alert/warning system" to be enacted pursuant to paragraph 59 of the Common Approach ensures that any Management Board action going against the interest of the Union (or the general EU law framework) is duly blocked by direct Commission intervention, thus constituting, at least *ex post*, a moderately efficient safeguard clause.
[95] Common Approach, paragraph 10, point 4.
[96] Common Approach, paragraph 14.

In this context, an autonomous role is played by the Commission, which can deliver both administrative support[97] and specific monitoring tasks[98]. The (eventual) budget discharge procedure[99] aiming at defining *ex post* democratic accountability over financially autonomous agencies is symptomatic of the paramount supervision role played by the Commission in a context of policy and governance uncertainty, potentially characterised by a structural mismatch between powers and responsibility[100].

This element is interesting because it can be considered paradigmatic of the contrast between the (institutional) actors responsible for the implementation of European policies and the lack of regulatory oversight over the agencies to which regulation has been delegated, which is particularly apparent in the structural apparatus determined by the 2012 Common Approach. More specifically, the Common Approach fails to delve into the complexities of delegation dynamics by focusing on a (tentatively) homogeneous approach to agency supervision as a way out of the transparency-accountability-independence trilemma.

While the Common Approach has not tangibly influenced – yet – the regulatory practice of the Agency for the Cooperation of Energy Regulators[101], briefly taking into account the main structural underpinnings characterising its main scope and purpose will prove relevant for the observation of the policy (and governance) evolutions of the energy sector, to be discussed in Section 3. More specifically, making ACER closer to the structure emerging from the 2012 Common Approach is one of the (alleged) scopes of the governance reform proposed in late

[97] Administrative support can be delivered from the Commission both during the establishment phase and at a later stage, through the issuing of guidelines, provision of services and model decisions. These activities, however not autonomously telling of the governance setting, represent symptomatic elements to be taken into account when observing the general approach defined in the 2012 joined statement, entailing a close, "mirroring" relationship between the Commission and decentralised (regulatory) executive agencies.

[98] The evaluation step (see Common Approach, paragraphs 60 ff.) is paradigmatic of the key role played by the Commission in ensuring the definition of an "accountability belt" for decentralised agencies. Moreover, specific opinions can be issued by the Commission on the agency's work programme, as well as *ad hoc* monitoring reports to be issued for the benefits of the Council and European Parliament.

[99] Common Approach, paragraphs 56 – 58.

[100] See MIHAYLOVA, *Governance of EU agencies – the Common Approach and beyond*, contribution to the TARN Conference on the Agencification of EU Executive Governance, European University Institute, 10th November 2016, p. 13.: "The Commission is often assigned by the legislators certain responsibilities for the agencies, which are not matched with necessary powers".

[101] Indeed, no mention of ACER is included in the latest Common Approach implementation report, which underlines the substantive need to implement further homogenisation in agency governance throughout the EU, possibly through *ad hoc* modifications of the Regulations establishing decentralised agencies, as well as Staff Regulations and Financial Regulations. See European Commission, Report - *Progress report on the implementation of the Common Approach on EU decentralised agencies*, 24 April 2015, COM(2015) 179 final.

2016, which, as observed in the following Section, could potentially raise a set of (institutional and constitutional) inconsistencies.

3. Policy developments in the energy sector

Section 2 has provided a theoretical overview of the agencification phenomenon. In particular, subsection 2.1 has focussed on a constitutional analysis of this issue, observing the structural underpinnings of the pluralisation of the European executive, their compatibility with good (market) governance principles and, ultimately, suggesting the constitutionalisation of agencies within European primary law. Consequently, sub-section 2.2 has covered an overview of the 2012 Common Approach, which enshrines the Commission's efforts to rationalise and make more homogeneous agency governance throughout the EU.

In this context, it has been highlighted that the perspective chosen for the 2012 Common Approach mirrors a purely executive conception of agency regulation, while determining, in light of the diverging (networking) agency models, possible clashes between the principles of accountability and independence. More precisely, it has been argued that observing the policy developments which currently shape energy governance throughout the EU can provide for a tangible example of the intrinsic contradictions of the agency model, with particular regard to the operational peculiarities of the Agency for the Cooperation of Energy Regulators that have been suggested in Chapter II.

Accordingly, the present section deals with a schematic overview of the policy evolutions occurring in the energy sector, thus suggesting an evolutionary approach to the critique to the current constitutional model and Common Approach qualifying agency governance. Subsection 3.1 will thus focus on the 2015 "Energy Union Communication", while subsection 3.2 will suggest a systematic and constitutionally-oriented reading of the governance innovations introduced by the (proposed) 2016 "Winter Package", which will be paradigmatic in underlining the latent conflict between the 2012 Common Approach and a sustainable and coherent approach to agency delegation.

3.1 The Energy Union Communication

In the present research, the Agency for the Cooperation of Energy Regulators has been used as a paramount case study in the observation of the shift from network governance to agency regulation. In particular, Chapter II has focussed on the practice of the Agency, in order to illustrate its peculiarities: as clarified from the first introductory paragraphs, the regulatory framework chosen for the observation of the agency has been, in the previous chapters, the one defined in the Third Energy Package, which, in all evidence, included the 2009 Regulation establishing ACER.

In this context, a major policy evolution with regard to the mentioned framework has been represented by the 2015 Commission Communication introducing the notion of "Energy Union"[102]. While not comprising autonomous governance provisions substantially modifying the Agency's operational and structural characteristics, the Energy Union Communication is to be individually considered as it sets the stage for a new phase of energy policy.

As a matter of fact, the idea of an autonomous "energy union" strategy, delivered with the aid of the new ambitious targets on energy production and marketability which have been set for 2030 and 2050, determines the evolution of a new paradigm in energy policy, which, as clarified in section 3.2, is characterised by substantial innovations for agency practice. In other words, the 2015 Energy Union Communication has been considered the first, preparatory, document foreshadowing the implementation of a "Fourth energy package"[103].

It is worth recalling that, notwithstanding its innovative nature with regard to its external outreach and long-term objectives, the approach enshrined in the Energy Union Communication, setting the scene for the new Energy Strategy and the 2016 Winter Package, is not unprecedented in European energy policy. Indeed, the 2015 Communication, similarly to the regulatory waves of the Second and Third Energy Packages, builds upon the structural

[102] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank - *A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy*, COM [2015] 080 final. Hereinafter, the "Energy Union Communication".

[103] The possible momentum of the governance evolution enshrined in the regulatory process initiated with the 2015 Energy Union Communication has been recently observed by many legal scholars. See, *ex multis*, DONATI, *La Commissione UE tra politica e regolazione*, in BRUTI LIBERATI – DE FOCATIIS – TRAVI (eds.), *La transizione energetica e il Winter Package. Politiche pubbliche e regolazione dei mercati*, Cedam, Padua 2018, pp. 39 – 57.

shortcomings of market integration and the need to further harmonise internal energy market rules[104], while privileging a sector, energy-centric, approach to law making and regulation.

In practice, the 2015 Communication defines a framework which is structurally coherent with the trilateral relationship interlinking the key energy policy goals within the EU: energy security, energy affordability, energy sustainability. In all evidence, this composite interaction of goals, which may, in practice, even result contradicting, has relevant reflections on technological innovations as well as energy transition policies (notably, low carbon economy goals), in light of the proposed substantial increase in RES energy share. Full integration and harmonisation of the internal energy market becomes thus a key priority, in order to achieve both increased energy security (through cross-border exchanges) and affordable prices, while maintaining an uniform level of consumer protection.

In this context, the idea of a "resilient Energy Union" is that of an "integrated continent-wide energy system where energy flows freely across borders, based on competition and the best possible use of resources, and with effective regulation of energy markets at EU level where necessary"[105]. It is clear that the renewed (political) drive behind the Energy Union Communication is not intrinsically new nor groundbreaking with regard to previous energy policy packages: providing an integrated framework of regulation (where a key role was to be played by ERGEG first, and ACER later) to achieve market harmonisation has been common to every step forward in terms of regulation.

It is however worth stressing that the innovative nature of the Energy Union strategy lies less within its policy aims, background and *raison d'être*, and more in its policy and governance underpinnings, entailing (*inter alia*) a stronger role for the Agency for the Cooperation of

[104] The annual monitoring reports on the implementation of the EU Energy Union suggest that, as anticipated in Chapter I, market integration is still a key challenge within the European Union. See, for the latest take on this issue, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, *Third Report on the State of the Energy Union* {SWD(2017) 384 final} - {SWD(2017) 385 final} - {SWD(2017) 386 final} - {SWD(2017) 387 final} - {SWD(2017) 388 final} - {SWD(2017) 389 final} - {SWD(2017) 390 final} - {SWD(2017) 391 final} - {SWD(2017) 392 final} - {SWD(2017) 393 final} - {SWD(2017) 394 final} - {SWD(2017) 395 final} - {SWD(2017) 396 final} - {SWD(2017) 397 final} - {SWD(2017) 398 final} - {SWD(2017) 399 final} - {SWD(2017) 401 final} - {SWD(2017) 402 final} - {SWD(2017) 404 final} - {SWD(2017) 405 final} - {SWD(2017) 406 final} - {SWD(2017) 407 final} - {SWD(2017) 408 final} - {SWD(2017) 409 final} - {SWD(2017) 411 final} - {SWD(2017) 412 final} - {SWD(2017) 413 final} - {SWD(2017) 414 final}, as well as its annexes, covering both the general roadmap to the implementation of the Energy Union and the Member State focus on national clean energy plans.

[105] Energy Union Communication, preamble.

Energy Regulators. Indeed, the 2015 Communication is not peculiarly telling *per se*, rather as part of a broader package of reforms aiming at defining a new balance between energy efficiency and energy security, while achieving a fully-integrated internal energy market in a context of energy transition. Such elements, with specific regard to governance, will be addressed in the following section.

3.2 The "Winter Package"

In order to provide a cohesive set of tools to achieve "clean energy for all Europeans"[106], the Commission proposed, in November 2016, a set comprising eight legislative measures, at present being scrutinised in the institutional trilogue[107], reforming the internal energy market (notably on electricity) through the so-called "Winter Package". The legislative tools used for this structural reform are, quite tellingly, that of "recasts", aiming at substantially re-writing the content of the Third Energy Packages directives and regulations disciplining the energy market.

In particular, three categories[108] of legislative recasts can be envisaged within the "Clean Energy for all Europeans" package: proposals amending market legislation (aiming at defining a new market design)[109]; new legislative tools focussing on climate change

[106] See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank - *Clean Energy For All Europeans*, COM [2016] 0860 final.

[107] At the moment of writing, four of the proposed legislative tools have been approved: the "Energy Performance in Buildings Directive" (Directive (EU) 2018/844 of the European Parliament and of the Council of 30 May 2018 *amending Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency*, OJ L 156, 19 June 2018, p. 75–91), the "Renewable Energy Directive" (Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 *on the promotion of the use of energy from renewable sources,* OJ L 328, 21 December 2018, p. 82–209), the "Energy Efficiency Directive" (Directive (EU) 2018/2002 of the European Parliament and of the Council of 11 December 2018 *amending Directive 2012/27/EU on energy* efficiency, OJ L 328, 21 December 2018, p. 210–230), the "Energy Union Governance Regulation" (Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 *on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council*, OJ L 328, 21.12.2018, p. 1–77). With regard to other legislative measures covered in the "Winter Package", including the Recast ACER Regulation (to be discussed below), a political agreement has been reached in December 2018, and, following Parliament's adoption on 26th March 2019, Council adoption is scheduled in late May 2019.

[108] See HANCHER – WINTERS, *The EU Winter Package*, Allen & Overy Briefing Paper, February 2017, p. 3.

[109] This category has been also called "Market Design Initiative", as it covers new measures on market liberalisation. It includes the so-called "E-Directive", repealing Directive 2009/72 (Proposal for a Directive of

mitigation (thus highlighting the need to integrate renewable energy sources and low carbon economy within the innovated market design)[110]; new proposals on the overall governance of the Energy Union[111], following the approach suggested in the 2015 Communication. The linkages between these legislative proposals are structural, as they aim at designing a cohesive system where to develop "synergies [...] to ensure policy coherence and reduce administrative impact", as "well-functioning energy markets that ensure secure and sustainable energy supplies at competitive prices are essential for achieving growth and consumer welfare in the European Union", "building on the EU's 2030 climate commitments"[112] confirmed in the International Paris Agreement.

As the legal basis of the proposed legislative tools is clearly to be found in Article 194 TFEU[113], confirming the shared nature of energy-related competences, it is apparent that the European Commission is taking a paramount steering role in defining a cohesive set of policy goals, going beyond the market-oriented approach characterising the pre-Lisbon packages.

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the European Parliament and of the Council *on common rules for the internal market in electricity (recast)*, {SWD(2016) 410} {SWD(2016) 411} {SWD(2016) 412} {SWD(2016) 413}, 23rd February 2017, COM(2016) 864 final/2), a recast of the electricity Regulation repealing Regulation 714/2009 ("E-Regulation" - Proposal for a Regulation of the European Parliament and of the Council *on the internal market for electricity (recast)*, {SWD(2016) 410 final} {SWD(2016) 411 final} {SWD(2016) 412 final} {SWD(2016) 413 final}, 23rd February 2017, COM(2016) 861 final/2) and, more importantly for the purposes of the present research, a recast of Regulation 713/2009 establishing ACER ("recast ACER Regulation", Proposal for a Regulation of the European Parliament and of the Council *establishing a European Union Agency for the Cooperation of Energy Regulators (recast)*, COM/2016/0863 final). These measures are to be implemented at the end of the institutional negotiating phase in 2020. As mentioned *supra*, these proposals have been adopted by the European Parliament on 26th March 2019, following a political agreement reached in December 2018. The Council discussion is scheduled for late May 2019.

[110] This category includes the Renewable Energy Directive, as well as a recast of the Energy Efficiency Directive. As anticipated *supra*, both these Directives have already been approved and entered into force in December 2018.

[111] This category includes two unprecedented instruments in European energy policy: a proposed regulation on risk preparedness (Proposal for a Regulation of the European Parliament and of the Council *on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC*, COM/2016/0862 final - 2016/0377 (COD)), adopted by Parliament on 26th March 2019 and to be discussed by Council in late May 2019, and a Regulation on the Governance of the Energy Union, which, as recalled *supra*, has already entered into force at the moment of writing.

[112] Commission Staff Working Document Impact Assessment *Accompanying the document Proposal for a Directive of the European Parliament and of the Council on common rules for the internal market in electricity (recast) Proposal for a Regulation of the European Parliament and of the Council on the electricity market (recast) Proposal for a Regulation of the European Parliament and of the Council establishing a European Union Agency for the Cooperation of Energy Regulators (recast) Proposal for a Regulation of the European Parliament and of the Council on risk preparedness in the electricity sector*, SWD/2016/0410 final - 2016/0379 (COD).

[113] It has however been argued that, in light of Article 194(2), Member States could retain complete sovereignty over the determination of the relevant energy mix, thus possibly (legitimately) not complying with the RES goals enshrined in the Winter Package. See HANCHER – WINTERS, *The EU Winter Package*, Allen & Overy Briefing Paper, February 2017, p. 5.

The key objectives of the package can thus be summarised[114] as follows: establishing a finally integrated power market throughout the EU, ensuring adequacy and energy security of supply; promoting a structural integration of RES in the energy mix; advancing energy efficiency and technological innovation, through the implementation of a unified governance apparatus.

In all evidence, putting to practice such a diverse array of instruments to reach a cohesive set of goals requires tangible cooperation at institutional level. Moreover, an additional layer of complexity is introduced by the key role played by Member States in a context of fundamentally shared competences, where both subsidiarity and loyal cooperation play a crucial role in defining the constitutional framework of energy policy. Consequently, the Governance Regulation on the Energy Union[115] focuses on the definition of specific monitoring, planning and reporting obligations at the different institutional levels, implying a cohesive and coherent action aiming at integrating market harmonisation with energy efficiency, sustainability and security.

More specifically, the Energy Union is conceived as a unitary subject working in a shared administration setting: administrative efficiency and lack of duplication are key to realising a permanent transmission belt linking the different governance levels, leading to the necessity to build on the previous reporting obligations in order to rationalise the interinstitutional dialogue on a permanent basis[116]. In particular, the Governance Regulation aims at streamlining the existing obligations, as well as implementing new national long-term plans to be consistent with European obligations, called "Integrated National Energy and Climate Plans". Biennial Member States' implementation monitoring reports are also envisaged: Commission's recommendations and specific opinions shall then be part of the annual State

[114] See LOSH – VAN DRIESSCHE, *European Commission presents Energy Winter Package 2016*, Linklaters Briefing Paper, December 2016.

[115] Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 *on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council*, OJ L 328, 21.12.2018, p. 1–77), hereinafter the "Governance Regulation".

[116] Commission Staff working document Impact Assessment *Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the Governance of the Energy Union, amending Directive 94/22/EC, Directive 98/70/EC, Directive 2009/31/EC, Regulation (EC) No 663/2009, Regulation (EC) No 715/2009, Directive 2009/73/EC, Council Directive 2009/119/EC, Directive 2010/31/EU, Directive 2012/27/EU, Directive 2013/30/EU and Council Directive (EU) 2015/652 and repealing Regulation (EU) No 525/2013*, SWD/2016/0395 final - 2016/0375 (COD).

of the Energy Union report, defining a paramount instrument of collective governance[117] (and control).

Although ACER is not mentioned in the Governance Regulation, taking into account the main tenets of the text drafted by the Commission is nonetheless interesting, as this Regulation, which globally reforms current monitoring obligations while streamlining the planning and reporting activities currently scattered throughout European legislation, is quite telling of the general approach privileged by the Commission in the Winter Package[118]. Indeed, the composite set of proposed legislative measures represents a paradigmatic example of the centralised perspective increasingly qualifying European energy policy.

ACER's increased role within the governance scenario, coupled with its strong(er) links to the Commission, emerging from the Agency Regulation recast, is thus not surprising[119]. Its compatibility with the constitutional apparatus discussed in Section 2 is, however, less obvious.

3.2.1 The recast ACER Regulation within the new market design initiative

Focussing[120] on the proposed[121] recast ACER Regulation[122] is paramount in the context of the present research. In particular, it will be argued that the internal governance and competence-

[117] *Ibid.*

[118] Notably, a key role is played within the Regulation by the European Environment Agency (EEA), which "should assist the Commission, as appropriate and in accordance with its annual work programme, with assessment, monitoring and reporting work" (see preamble, para 65, and Article 42 of the Governance Regulation). In all evidence, this element is indeed telling of the multilayered nature of energy governance.

[119] More precisely, the call for more extensive decision-making power and resources for the Agency follows a long institutional path, culminating in the 2015 Parliament Resolution asking the Commission to increase ACER's staff and resources to better implement its monitoring and operational tasks. See European Parliament, *European Parliament resolution of 15 December 2015 on Towards a European Energy Union* (2015/2113(INI)).

[120] Indeed, taking into account the legal and institutional challenges potentially stemming from the other proposed Regulations and Directives would go well beyond the scope of the present research, which aims at contextualising energy governance dynamics between accountability (and thus convergence?) and independence (and thus divergence?).

[121] More specifically, in this paragraph reference will be made to the text adopted by the European Parliament on 26th March 2019 (available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2019-0228+0+DOC+XML+V0//EN&language=EN, last accessed on 15th April 2019), following the Political Agreement reached on 12th December 2018, the Council discussion of which is scheduled for late May 2019. It is thus acknowledged that the long and potentially problematic negotiating *iter* characterising the European ordinary legislative procedure could possibly end up in substantial modifications of the normative text considered in the present paragraph.

[122] Proposal for a Regulation of the European Parliament and of the Council *establishing a European Union Agency for the Cooperation of Energy Regulators (recast)*, COM/2016/0863 final, hereinafter "recast ACER

related innovations introduced with regard to the Agency's practice suggest pressing constitutionality concerns with regard to the paramount good governance principles previously underlined.

The proposed ACER Regulation recast represents a substantial part of the Winter Package's market design initiative (MDI), and its fundamental aim is thus to update ACER's role within the new scenario depicted for the internal energy market. Notably, the Agency, pursuant to the MDI, is potentially vested with stricter and stronger coordination powers with regard to NRAs, while undergoing structural changes aiming at bringing the Agency model closer to the 2012 Common Approach.

Preliminarily, it is worth underlining that the proposed recast mainly intervenes on Articles 7, 9 and 10 of the 2009 Regulation establishing ACER, introducing a key role for the Agency at transmission and wholesale level, while trying to strike a difficult balance between coordination and centralisation[123], especially in those instances involving the risk of regulatory inconsistencies due to a substantial fragmentation of NRA action.

In particular, the MDI builds on the present market model, while prioritising the implementation of Third Energy Package objectives and network codes. Accordingly, it includes provisions on consumer switching and dynamic pricing, covering incentives to demand response and the abolition of price cap regulation. Moreover, it deals with cross-border issues (including in capacity markets and capacity remuneration mechanisms) by disciplining the coordination of resource adequacy assessments, as well as reinforcing transmission system operators' (TSOs) regional cooperation through the introduction of Regional Operational Centres (ROCs) and a European body for distribution system operators (DSO), both to be coordinated by ACER.

As a consequence, ROCs and the EU DSO become the key actors of the (renewed) electricity market integration on cross-border issues, in theoretical and practical opposition to the present model, which focuses on the voluntary cooperation model among TSOs enshrined in Regional

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Regulation" or "ACER Regulation recast". Please note that every Article of the recast ACER Regulation mentioned in the present paragraph mirrors the text and numbering as of April 2019 (see footnote above).

[123] Also taking into account the strong opposition to a centralising approach faced in the public consultation phase, it has been eloquently argued that "the Winter Package foresees a reinforced role for the Agency albeit it shies away from centralising regulatory powers in the hands of ACER", while acknowledging that "stronger regulatory cooperation within ACER is seen as a prerequisite to achieving the EU energy and climate goals". (HANCHER – WINTERS, *The EU Winter Package*, Allen & Overy Briefing Paper, February 2017, p. 9).

Security Coordination Initiatives (RSCIs)[124]. The shift from RSCIs to ROCs is a substantive one with regard to energy governance, as RSCIs do not entail any regulatory oversight from the Agency for the Cooperation of Energy Regulators, while ROCs, providing an answer to "the increased need for more operational coordination"[125], aim at optimising coordinated action approved by both NRAs and ACER, even if the mechanism would not be frictionless, with particular regard to the decision-making mechanisms within each ROC[126].

Pursuant to the recast ACER Regulation, the Agency would play a pivotal role in each one of the regulatory areas characterising the Market Design Initiative, which have just been briefly schematised. In particular, in line with the strong coordination needs already highlighted, ACER would play both a new and unprecedented[127] role in network codes, and a set of new functions with regard to ROCs (as well as the set up of the EU DSO), generation adequacy assessment (including both the issuing of autonomous methodologies and the analysis of Member States' proposals), risk preparedness and the definition of the methodologies and parameters for cross-border participation in capacity mechanisms. Moreover, the recast ACER Regulation envisages the possibility for the Agency to issue unsolicited recommendations (which may in practice differ from opinions) to both market players and national regulators.

Following the Market Design Initiative, in particular, ACER would substantially be given five key areas of improved competences, in comparison with the legislative framework defined by the Third Energy Package and the subsequent energy normative documents observed up until now.

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[124] POTOTSCHNIG, *EU energy law and policy*, presentation at the Annual European Law Conference, The Dickson Poon School of Law, King's College, London, 2nd March 2018.

[125] CORESO (Regional TSO Coordination Initiative for continental Europe), official website, "vision for the future", available at https://www.coreso.eu/mission/vision-towards-the-future/.

[126] In particular, one critical issue has been found in the fact that the internal decision-making process for each ROC would be entirely volatile in nature, as TSOs are not given any guideline concerning the model to be chosen, which is, on a case by case basis, subject to the relevant NRAs' approval. See POTOTSCHNIG, *EU energy law and policy*, presentation at the Annual European Law Conference, The Dickson Poon School of Law, King's College, London, 2nd March 2018.

[127] See VLACHOU, New governance and regulation in the energy sector: what does the future hold for EU Network Codes?, in *European Journal of Risk Regulation*, 9/2018, p. 268 ff. Notably, the stronger role of ACER within the area of network codes (where it would be allowed to have binding powers) has been welcomed by the main European institutions and committees covering an advisory role with regard to the regulation. See, for instance, Opinion of the European Committee of the Regions — *Renewable energy and the internal market in electricity*, OJ C 342 of 12 October 2017, pp. 79—110, paragraphs 24 and 25.

First, ACER would have autonomous competences on "regulatory issues having effects on cross-border trade or cross-border system security [...] where such competences have been conferred on the regulatory authorities"[128] either by EU law or by network codes and guidelines[129]. In particular, a "regional decision- making process"[130] (relating to issues the relevance of which is limited to a given number of NRAs) is introduced by the proposed Regulation: ACER shall issue a decision, following the Director's opinion and subject to the approval of the Board of Regulators, concerning the regional relevance of the matter at hand, eventually entailing the creation of a "regional sub-committee".

Second, ACER's monitoring role[131] would be enhanced with regard to both retail and wholesale markets, in terms of analysis and intervention on emerging barriers to cross-border trade, State aid matters and energy security of supply, being the Agency responsible for an autonomous assessment on the adequacy of the measures put to place by Member States in this sector[132].

Additionally, the mentioned role within global market operators coordination, through regulatory oversight on the newly established ROCs[133], as well as specific supervision (monitoring and implementation) on nominated electricity market operators (NEMOs)[134] and support of the setup of the European DSO coordination body[135], are key tenets of the proposed recast of the ACER Regulation, entailing a close relationship with both TSOs and

[128] Article 6, paragraph 10 of the recast ACER Regulation. More broadly, Article 6 covers the tasks of the Agency, previously pertaining to Article 7 of ACER Regulation 713/2009. Notably, the new competences assigned to ACER are mainly exercised through the adoption of individual decisions addressed to NRAs, which should not *per se* imply relevant justiciability issues, but, in addition to their clear institutional role, they could nonetheless represent a controversial tool when used to enforce horizontal (binding) soft law. The paramount role of soft law in this context is also to be drawn from the "opinions and recommendations" ACER can address to NRAs, TSOs, but also ENTSOs and DSOs, pursuant to Article 2 of the Recast ACER Regulation.
[129] It is merely worth underlining that the structural juxtaposition of the (perceived) bindigness of hard and soft law is intrinsically telling of the controversial nature of the latter, as discussed in Chapter II.
[130] See European Parliament Briefing – *New rules for the Agency for the Cooperation of Energy Regulators (ACER)*, 2nd May 2018, available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599300/EPRS_BRI(2017)599300_EN.pdf.
[131] Both with regard to market monitoring and consumer rights uniform protection.
[132] Recast ACER Regulation, Article 9.
[133] Recast ACER Regulation, Article 7.
[134] Recast ACER Regulation, Article 8.
[135] Provided for in the E-Regulation.

DSOs, as well as a stronger coordination the tangible boundaries of which are still highly unclear[136].

Importantly, ACER's role in relation to energy TSOs (and ENTSO-E in particular) would gain more weight, as the Agency would define the methodologies for a global "European resource adequacy assessment"[137], as well as design the parameters to be applied in cross-border capacity remuneration mechanisms[138]. Moreover, the Agency would play a key role on risk preparedness[139] matters, as well as on the review process of energy market bidding zones[140].

Finally, close attention should be paid to the new tasks assigned to the Agency on the issue of Network Codes[141]. In this context, ACER's powers would become binding, as they would be structurally twofold. First, ENTSO-E would act as merely technical support body, while ACER's proposal would be directly addressed to the Commission (thus bypassing the current trilateral relationship between network code formation, Agency's framework guidelines and institutional endorsement). Second, as far as network codes implementation is concerned, the Agency would directly decide upon the relevant "technical conditions or methodologies", as opposed to the current model, entailing a shared NRA decision.

Arguably, a great proportion of the mentioned tasks has a technical character, and could thus be considered *lato sensu* compliant with the existing delegation scenario, framed by the *Meroni* doctrine. While this consideration is possibly not applicable to another set of new tasks and competences enshrined in the proposed Regulation, such as Network Codes, the practical relevance of which has been duly considered in Chapter II, one additional element shall be taken into account when assessing the constitutional sustainability of the scenario defined by the Winter Package.

[136] POTOTSCHNIG, *EU energy law and policy*, presentation at the Annual European Law Conference, The Dickson Poon School of Law, King's College, London, 2nd March 2018.
[137] Newly introduced by the proposed E-Regulation, and referred to in Recital 5 of the recast ACER Directive, as well as Articles 9 and 15 of the same Regulation.
[138] Recast ACER Regulation, Article 9, paragraph 1, lett. b.
[139] Recast ACER Regulation, Article 9.
[140] Recast ACER Regulation, Article 2, paragraph 1, lett. d.
[141] Recast ACER Regulation, Recitals 16 – 22 and, more specifically Article 5.

Indeed, in an explicit effort[142] to adapt the Agency to the 2012 Common Approach, the proposed Regulation exacerbates[143] the latent conflict between centralisation (towards the Commission) and coordination of independent NRAs already mentioned in Section 2.2, when discussing the practical implications of a concrete declination of the Common Approach. More specifically, Chapter II (organisation of the Agency) and Chapter III (financial provisions) of the recast ACER Regulation include several specific provisions (mainly covering decision-making and appointment mechanisms) defining a converging relationship between ACER (looking less and less like a "network agency") and the 2012 Common Approach.

It is worth mentioning, however, that in the explanatory memorandum to the first draft, the Commission proves to be well aware of the governance (and institutional balance) challenges faced by the European legislator in including specific provisions from the Common Approach in the already fragile equilibrium defined by the ACER Regulation. As a matter of fact, it specifies that it would be "premature" to completely assimilate ACER's internal governance structure to that introduced in the Common Approach[144], as "the main role of ACER is not the execution of delegated regulatory Commission competencies, but the coordination of the regulatory decisions of independent national regulators. [..] The current structure strikes a fine-tuned balance of powers between the different actors, having regard to the special features of the developing internal energy market. Changing the balance at this stage might

[142] See Recast ACER Regulation, Recitals 30 and 31, stating that "In order to ensure that ACER's framework is efficient and coherent with other decentralised agencies, the rules governing ACER should be aligned with the Common Approach agreed between the European Parliament, the Council of the EU and the European Commission on decentralised agencies. However, to the extent necessary, ACER's structure should be adapted to meet the specific needs of energy regulation. In particular, the specific role of the regulatory authorities needs to be taken fully into account and their independence guaranteed." Moreover, "Additional changes to this Regulation may be envisaged in the future in order to bring the Regulation fully in line with the Common Approach. Based on the current needs of energy regulation, deviations from the Common Approach are necessary. The Commission should carry out an evaluation to assess ACER's performance in relation to ACER's objectives, mandate and tasks and, following that evaluation, the Commission should be able to propose amendments to this Regulation."

[143] See BRUTI LIBERATI, *L'Agenzia per la Cooperazione dei Regolatori dell'Energia: braccio operativo della Commissione o Autorità indipendente?*, in BRUTI LIBERATI - DE FOCATIIS – TRAVI (eds.), *La transizione energetica e il Winter Package. Politiche pubbliche e regolazione dei mercati*, Cedam, Padua 2018, pp. 10 – 19.

[144] Notably, it has been observed that "the proposal for a recast of the ACER Regulation stops short of establishing a principle of common EU-level oversight over network. […] This is in line with the subsidiarity principle, as the Commission cannot currently demonstrate that the existing decentralized structure is not fit for purpose" (ROEBEN, *Towards a European Energy Union: European Energy Strategy in International Law*, Cambridge University Press, Cambridge 2018, p. 141).

risk jeopardising the implementation of the policy initiatives in the legislative proposals and thereby would pose obstacles to the further integration of the energy market."[145]

Yet, it shall be highlighted that the lack of complete assimilation of ACER's model to the one included in the Common Approach is conceived as a merely instrumental and temporary one: the Commission clarifies that "even though at this stage, [it] does not find it appropriate to adapt the governance structure of the Agency fully to the Common Approach, it will continue to monitor if the described deviations from the Common Approach are still justified, with the next evaluation scheduled for 2021 which in addition to an assessment of the Agency's objectives, mandate and tasks will have a particular focus on the governance structure of the Agency."[146]

It is thus in this perspective that the key internal governance innovations brought about by the proposed recast ACER Regulation should be considered: while possibly not completely invasive, at the moment, they represent the first steps towards a potential structural mutation of ACER's nature. For instance, while a Management Board such as the one introduced in the Common Approach has not been introduced, the first Commission's draft[147] included a lower threshold for the voting procedures in the Board of Regulators, requiring a simple[148] rather than a two thirds majority, mirroring an increasingly marginalised role of (independent) NRAs within agency governance. What is more, and perhaps more importantly, the independence requisites for the Administrative Board's action had also been reduced in the Commission's proposal: the phrase "without seeking or following any political instructions" had been erased from the necessary rules governing its action[149]. In other words, and with specific regard to the new tasks and competences assigned to the Agency, the original version of the proposed recast Regulation further strengthened the Director's role within the internal

[145] European Commission, *Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council establishing a European Union Agency for the Cooperation of Energy Regulators (recast)*, 30.11.2016 COM(2016) 863 final, p. 22.
[146] *Ibid.*, p. 23.
[147] Proposal for a Regulation of the European Parliament and of the Council *establishing a European Union Agency for the Cooperation of Energy Regulators (recast)*, COM/2016/0863 final - 2016/0378 (COD), recalled at the beginning of this section (hereinafter: "Commission's Proposal (recast ACER Regulation)" or "Commission's draft").
[148] Commission's Proposal (recast ACER Regulation), Article 23, paragraph 1.
[149] Commission's Proposal (recast ACER Regulation), Article 19, paragraph 8.

governance of the Agency[150], while limiting his independence and lowering the BoR threshold within the decision-making process.

It is paramount to underline that several of these concerns seem to have influenced the parliamentary debate following the political agreement on the recast Regulation reached on 12th December 2018. More specifically, the text adopted by Parliament aims at striking a fairer balance between convergence and divergence in this scenario, reinforcing the Board of Regulators through specific internal governance interventions in the dynamic relationship between the BoR and the Director. Recital 36 of the text adopted by Parliament on 26th March 2019 is indeed quite clear in precising that "The Board of Regulators should be able to provide opinions on, and, where appropriate, comments on *and amendments to* the Director's text proposals, which the Director *should take into account*. Where the Director deviates from or rejects the comments and amendments submitted by the Board of Regulators, the Director should *provide a duly justified written reasoning* to facilitate a constructive dialogue."[151] The novelty of this element, which is complemented by a set of provisions aiming at reinforcing the BoR's and Working Groups' role within ACER, while strengthening their independence from market actors, is not only striking in the context of the recast Regulation, but also within the broader agencification debate. Indeed, it represents a tool to tackle the participation deficit of NRAs to the decision-making process within the European regulator. This intent, clearly connected to the "procedural legitimacy" of delegated policy-makers, is quite manifestly presented in Article 14 of the text recently adopted by the European Parliament, which covers "Consultations, transparency and procedural safeguards". Notably, both with regard to individual decisions and insofar as soft law is concerned, the Agency shall "ensure a transparent and reasonable decision-making process guaranteeing fundamental procedural rights"[152], including a fair and open participation of the actors involved.

Should this approach be confirmed by the Council, an apparent tension between the centralised Common Approach suggested by the Commission and the more participative model furthered in the institutional trilogue would add another key element of peculiarity for

[150] This element, which is particularly striking with regard to the key role played by Director's opinion as a tool to steer the practice of the Agency, is peculiarly problematic in light of the close relationship between the Director and the Commission (in light of which nor the composition of the Agency's Board of Administrators, nor the Director's appointment procedures have been modified).
[151] Recast ACER Regulation, recital 36. Italics added.
[152] Recast ACER Regulation, Article 14, paragraph 5.

ACER, as opposed to the other actors of the agencification debate. Such an evolutionary path is to be welcomed as it has been convincingly argued that reducing ACER's peculiarities within the agencification scenario, by bringing it closer to the Common Approach scheme, would change its intimate nature from a horizontal cooperation body to a vertical integration one[153]. Consequently, ACER's stronger links with the European institutions would fit extremely uneasily with its unifying role for national regulatory authorities, which are necessarily complying[154] with key independence requirements from the relevant Member States.

The result is apparently clashing with the need to reconcile accountability and independence in the institutional balance within the agencification process: a stronger Agency, where the Director plays a paramount decision-making role, would determine a further loss of influence for independent NRAs, in an area where subsidiarity and interinstitutional equilibrium are to play a crucial role.

4. Preliminary conclusions

This chapter suggested a constitutional interpretation of the agencification phenomenon within European governance, considering the institutional and regulatory developments involving the energy sector, with particular reference to the Commission's proposed 2016 "Winter Package". In other words, this chapter revolved around the following question: can European constitutional law provide a useful framework for the analysis of the issues at stake, in light of the dynamic evolution of sector regulation?

In particular, Section 2 focussed on the qualifying elements of "agencification", suggesting the pressing need for a comprehensive legitimisation of the agency phenomenon at European primary law level. Moreover, the 2012 Commission Common Approach has been recalled, in order to assess the Commission's perspective over executive decentralisation within the EU.

[153] See BRUTI LIBERATI, *L'Agenzia per la Cooperazione dei Regolatori dell'Energia: braccio operativo della Commissione o Autorità indipendente?*, in BRUTI LIBERATI – DE FOCATIIS – TRAVI (eds.), *La transizione energetica e il Winter Package. Politiche pubbliche e regolazione dei mercati*, Cedam, Padua 2018, pp. 10 – 19. In his contribution, the author further suggests that bringing ACER's model closer to the Common Approach could be used as some sort of legislative argument chosen to cover up a centralising shift in power dynamics for energy regulation.

[154] See DONATI, *La Commissione UE tra politica e regolazione*, in BRUTI LIBERATI – DE FOCATIIS – TRAVI (eds.), *La transizione energetica e il Winter Package. Politiche pubbliche e regolazione dei mercati*, Cedam, Padua 2018, pp. 39 – 57.

Section 3 then provided an overview of the main policy innovations concerning energy governance, highlighting, with specific reference to the proposed recast ACER Regulation, a striking conflict between ACER's (proposed) structure and tasks and its compatibility with good governance principles, according to the progressive rapprochement of the Agency model to the 2012 Common Approach.

In line with the aforementioned considerations, the main issues found in this third chapter can be summarised as follows. First (subsection 2.1.1), agencification has been defined as a progressive path leading to the fragmentation of the European executive power, which represents a symptomatic element of a shared administration scenario, embodying the principle of subsidiarity especially in those areas of regulation, such as energy policy, where the interactions between European institutions and Member States are crucial.

While legitimising frameworks for agency governance can theoretically differ, it has been underlined that assessing agency regulation through the normative standards provided by good (market) governance principles represents a key tool to evaluate its constitutional sustainability (subsection 2.1.2). In this context, the controversial relationship between accountability, independence and transparency represents the core of the institutional balance conundrum.

Therefore, it has been argued (subsection 2.1.3) that the mismatch between the practical relevance of European agency governance and the lack of constitutional recognition of agencies in European primary law is particularly problematic. Three key areas of consitutionalisation have been identified in order to comprehensively frame agencification within European governance: the legal basis of agencification; the theory of delegation; the nature of the administrative acts resulting from delegation.

As a matter of fact, developing a consistent constitutional framework legitimising and regulating the constituent elements of agency governance would imply providing a homogeneous answer to the inhomogeneous nature of the agencification phenomenon. The Commission's 2012 Common Approach (subsection 2.2) aims at tackling this issue, by defining a soft law discipline from which a purely executive notion of decentralised agencies emerges. It has been argued that this element would fit particularly uneasily with the "network" agency model implying the coordination of independent national regulators.

The (constitutional) paradigm briefly proposed has been applied to the recent developments in energy sector regulation, as emerging from the 2015 "Energy Union" Communication (subsection 3.1) and the 2016 Commission's proposal usually referred to as the "Winter Package" (subsection 3.2). In particular, the structural and operational changes envisaged by the proposed recast of the 2009 ACER Regulation have been observed, within the broader electricity market design initiative (subsection 3.2.1). In this context, it has been observed that the proposed power market structure, following the idea of a single, multilevel Energy Union at the cross-roads of energy efficiency, affordability and sustainability, entails both stronger governance links between European institutions and Member States, and a paramount role for ACER.

In particular, while the Agency's institutional position would undoubtedly be strengthened through the attribution of new, more invasive coordination and decision-making powers (such as the case of Network Codes), its constitutional sustainability would undoubtedly be made even more problematic. Indeed, by bringing the Agency's structure and governance closer to the 2012 Commission Common Approach, the already pervasive role of the Director, as well as his strict cooperation with the Commission, would be further enhanced, *vis-à-vis* a weakened Board of Regulators. In other words, assimilating ACER's model to the one sketched in the 2012 Common Approach would unbalance the precarious equilibrium between accountability and independence already characterising agency governance in the energy sector.

Conclusive remarks

1. The peculiarities of (network) agency governance in the energy sector

This research has focussed on the governance setting characterising the energy sector within the European Union, as a peculiar perspective over the evolution of policy making throughout the EU. In other words, it represents an attempt at answering the following research question: how is internal energy market governance telling of the evolving regulatory dynamics within the European Union?

The main issues at stake can importantly be reframed within a composite scenario concerning the divide between divergence and convergence in regulation. More specifically, within a framework of shared competences in energy policy making pursuant to Article 194 TFEU, the progressive centralisation aimed at better harmonising the internal energy market has led to the shift from networking NRA coordination to the increasing (if not frictionless) converging process towards delegated decision making to a (decentralised) regulatory agency.

What is more, the peculiarities of the regulatory model represented by the Agency for the Cooperation of Energy Regulators autonomously involve the (supposed) conflict between convergence and divergence, as ACER's practice entails a tendential fragmentation of the European executive, while implying a structured coordination mechanism for national regulators. The findings presented in Chapters I and II stressed the aforementioned considerations, in assessing ACER's role within the debate on the (somewhat imprecise) notion of "network agency".

Chapter I, in particular, aimed at contextualising, both theoretically and with regard to the relevant market structure, the governance analysis to be carried out throughout the research. The following research question was thus addressed: how is the energy market regulated, and which is the role played by the Agency for the Cooperation of Energy Regulators in this scenario? In this context, regulatory networks have been preliminarily defined as horizontal actors characterised by a differentiated level of voluntary integration and hierarchy between members, which are national regulators and, occasionally, European institutions.

With particular regard to the energy sector, the evolution from the First to the Second and Third energy packages has been observed, and specific attention has been paid to the experience represented by the European Regulators' Group for Electricity and Gas (ERGEG). ERGEG was the regulatory antecedent of the Agency for the Cooperation of Energy Regulators, and its network structure is enshrined in the peer-to-peer relationship characterising membership, as well as the key role played by the networking Board.

In light of the existing challenges to market harmonization, the introduction of ACER as the regulatory successor to ERGEG has thus been considered. More specifically, it was observed that ACER was established through Regulation 713/2009 in order to bridge the existing regulatory gap in the energy sector. In this regard, due to its paramount coordination role and flexible internal governance structure, ACER has been defined a "network agency", according to a broad definition of the "network agency" concept, mainly pertaining to the existence of an internal Board of Regulators representing national regulatory authorities (NRAs).

The tangible implications of the Agency's structure and governance, within the broader regulatory setting just mentioned, have been analysed in Chapter II, which focused on ACER's relationship with national regulatory authorities. Indeed, Chapter II concerned the following research question: which are the distinguishing features of ACER's practice, with particular regard to the involvement of National Regulators in supranational policy making? Through a contextual categorisation of the Agency's main tasks according to the different degree of participation of national regulators, as well as a structured overview of the key internal governance mechanisms characterising ACER's decision-making process, it has been observed how the involvement of NRAs in the Agency's practice is rather limited, when compared to a substantive notion of "network agency". Notably, it has been underlined that there is a structural clash between a purely European nature of the Agency, represented by its Director, and the coordinative character of the NRAs' interests, within the Board of Regulators. This internal governance dynamics is rather peculiar within the European agency governance panorama, which is usually characterised by an Executive Director representing a composition of NRA interests.

Moreover, the role of ACER's practice within the European power delegation scheme has been considered, with particular regard to the evolving, alternate legitimisation frameworks provided by the *Meroni/Romano* doctrine and the *Shortselling* case law. In this context, the

Agency's practice has been found conflicting with the fundamental tenet of institutional balance. The (very) limited justiciability of its soft law is rather telling in this regard: the mismatch between the high practical relevance of ACER's soft law, for instance in the case of the framework guidelines which represent the basis of network codes, and the limited possibility to challenge it in front of the European Courts is another distinguishing feature of the Agency's role.

In light of the elements qualifying energy governance, this research argues that the energy field represents an interesting case study to consider the possible evolutions of European policy making, developing the concept of "agencification" beyond the boundaries of "network governance". Indeed, ACER's practice fits uneasily with a notion of "network agency" entailing more than the mere presence of a Board of Regulators representing NRAs, as the supranational, centralizing and thus converging, nature of the Agency, represented by its Director, seems to prevail in the institutional balance.

2. Lessons learnt from a constitutional perspective

A European constitutional perspective has been privileged in order to provide a structured framework to the considerations pertaining to the peculiarities of energy governance, in an evolutionary perspective. Indeed, Chapter III has revolved around the following question: can European constitutional law provide a viable paradigm for the analysis of the issues at stake, in light of the dynamism of sector regulation?

In particular, the paradigmatic shift entailing the move from the purely networking experience of ERGEG to the agency model represented by ACER has been contextualised within the broader "agencification" process of European executive governance. Analysing agencification using constitutional normative standards is paramount, as this allows to highlight the substantial peculiarities of this governance model, in light of the evolution of European policy making, between regulatory convergence and divergence.

The subsequent waves of agencification have indeed determined the progressive pluralisation of the European executive, characterised by the emergence of a wide range of different agency-like bodies, qualified by diverse structural characteristics and varying degrees of independence from the Commission and other European institutions. The 2012 Common Approach joint statement, while sketching a purely executive idea of decentralised agencies,

does not provide for constitutionally viable solutions in this regard, with particular regard to the post-networking agency model coordinating independent national regulators.

As a matter of fact, assessing the practice of European delegated agency-like bodies according to the standards provided by the implementation of good governance has provided a paramount framework to evaluate the actual embodiment of shared administration within the EU, which is particularly telling of institutional balance dynamics in areas of shared competences (such as energy). Notably, the triangular relationship linking accountability, independence and transparency represents the core of the institutional balance conundrum. The definition of a coherent constitutional framework for agencification would substantially tackle the main inconsistencies of this complex process.

Thus, the present research argues that, in light of the striking mismatch between the utmost relevance of the agencification process and the lack of a comprehensive and consistent recognition of this phenomenon in European primary law, there is a pressing need to constitutionalise regulatory agencies at the European level. In particular, three key areas of constitutinalisation have been suggested: the legal basis of agencification; the theory of delegation; the nature of the administrative acts resulting from delegation.

3. Outreach of the research

In order to address the paramount driver of the present research, which aims at determining to which extent the evolution of energy governance, between convergence and divergence, is telling of a structural trajectory of European policy making, one final issue is to be tackled. In particular, it is paramount to observe how independence and accountability will be reconciled within the governance setting proposed in the 2016 “Winter Package”, aiming at “Clean Energy for All Europeans”.

Indeed, it has been argued that the peculiarities of the energy sector can be observed through a constitutional perspective suggesting the definition of an autonomous European legal order, characterised by a (derived but not mediated) set of normative standards. In order to assess whether the evolution observed in the energy sector plays a role in defining a new paradigm for European policy making, it will be crucial to evaluate how will the Agency’s tasks and governance be shaped in the upcoming “Fourth Energy Package”.

In the present research, applying a constitutional perspective over the innovations enshrined in the proposed recast ACER Regulation has underlined some major inconsistencies regarding the safeguard of independence for an (executive) regulatory agency coordinating (independent) NRAs. In particular, it has been observed that, within the new market design initiative aiming at the definition of a multilevel Energy Union at the cross-roads of energy efficiency, affordability and sustainability, ACER's role would be strengthened, but its constitutional sustainability would be made more problematic with regard to the safeguard of institutional balance.

In this context, after the market-oriented reforms introduced in the 1990s and early 2000s, this reform could entail a move back towards a more centralised, converging, approach to energy regulation. Interestingly, however, the drive would not be represented by Member States, but, rather, by European institutions (and notably the Commission), defining a circular path leading regulation "from State to market and back"[1]: achieving convergence through divergence, with a preeminent, centralising, role of the Commission.

[1] TALUS, *EU Energy Law and Policy: A Critical Account*, Oxford University Press, Oxford, 2013, p. 286.

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