



**ADMINISTRATIVE BOARD  
OF THE AGENCY FOR THE COOPERATION OF ENERGY REGULATORS**

**– 43<sup>rd</sup> Meeting –  
– Ordinary Session –**

**Thursday, 12 December 2019, 08:30 – 13:00**

**Trg Republike 3, Ljubljana - Slovenia**

***MINUTES***

## I. LIST OF ATTENDEES

The following Members and Alternates of the Administrative Board were present at the meeting:

Dr Romana JORDAN,	<i>Alternate</i>	Dr Jochen PENKER,	<i>Vice-Chair</i>
Ms Edit HERCZOG,	<i>Member</i>	Mr Diego VAZQUEZ,	<i>Alternate</i>
Prof Uwe LEPRICH,	<i>Alternate</i>	Mr Georgios SHAMMAS,	<i>Alternate</i>
Ms Britta THOMSEN,	<i>Alternate</i>	Mr Florian ERMACORA,	<i>Alternate</i>

Mr Diego VAZQUEZ and Mr Georgios SHAMMAS were granted voting rights pursuant to Decision No 10/2018 of the Administrative Board of 6 September 2018 on the participation of Alternate Members.

Mr Florian ERMACORA submitted proxies of Ms Ditte JUUL JØRGENSEN and Ms Anne MONTAGNON.

Mr Alberto POTOTSCHNIG (*Director ad interim*) and Ms Clara POLETTI (*Chair of the Board of Regulators*) were present at the meeting, acting as observers.

The secretariat was provided by the Agency.

## **II. SUMMARY OF CONCLUSIONS OF THE 43<sup>rd</sup> MEETING OF THE ADMINISTRATIVE BOARD**

At the 43<sup>rd</sup> meeting, the Administrative Board:

- (1) appointed, by unanimity, Mr Christian ZINGLERSEN as Director of the Agency with effect as of 1 January 2020;
- (2) appointed, by unanimity, Dr Jochen PENKER as Chair of the Administrative Board of the European Union Agency for the Cooperation of Energy Regulators with effect as of 21 January 2020;
- (3) appointed, by unanimity, Dr Jurijs SPIRIDONOVŠ as Vice-Chair of the Administrative Board of the European Union Agency for the Cooperation of Energy Regulators with effect as of 21 January 2020;
- (4) adopted, by unanimity, Decision No 21/2019 on the non-application of C(2019) 2548 of 5 April 2019 on the maximum duration for the recourse to non-permanent staff in the Commission services;
- (5) adopted, by unanimity, Decision No 22/2019 on the adoption of the budget and establishment plan of the European Union Agency for the Cooperation of Energy Regulators for the financial year 2020;
- (6) adopted, by unanimity, Decision No 23/2019 on internal rules concerning restrictions of certain rights of data subjects in relation to processing of personal data in the framework of the functioning of the Agency;
- (7) invited the Agency to prepare a draft action plan on the involvement of the Administrative Board in the budgetary cycle and the MFF;
- (8) declared urgency for the adoption of the Programming Document 2020-2022 via written procedure, subject to the absence of amendments needed on the draft submitted for discussion to the Administrative Board.

### III. MINUTES

#### SESSION I

##### SECTION I – OPENING

The 43<sup>rd</sup> meeting of the Administrative Board of the Agency for the Cooperation of Energy Regulators was convened, in ordinary session, on 12 December 2019. The meeting started at 08h30.

Upon invitation of the Chair to the present Members and Alternates of the Administrative Board to declare any actual or potential interest that could be considered prejudicial to their independence with respect to the items on the agenda, no actual or potential interest was declared nor reported.

##### (1) *Approval of the Agenda*

The Agenda of the 43<sup>rd</sup> meeting of the Administrative Board was approved as follows:

Agenda Topics		Accompanying Documents		Rapporteur
<b>Start</b>				<b>08:30</b>
(1)	Approval of the Agenda and Declarations of Interest	Doc. A	<i>for approval</i>	The Chair
(2)	Approval of the minutes of the 42 <sup>nd</sup> meeting of the Administrative Board	Doc. A	<i>for approval</i>	The Chair
<b>Items for reporting</b>				<b>08:45</b>
(3)	Report on Decisions by Delegation and Written Procedure	Doc. A Doc. B	<i>for information</i>	The Chair
(4)	Report on Agency's developments, budget implementation, Audit Results, and the regulatory activity	-	<i>oral update</i>	Director <i>ad interim</i>
(5)	Report on the activities of the Board of Regulators	-	<i>oral update</i>	The Chair of the Board of Regulators
<b>Items for decision</b>				<b>09:45</b>
(6)	Appointment of the Chair of the Administrative Board	-	<i>Oral update</i>	The Secretariat
(7)	Decision on the appointment of the Director of the European Agency for the Cooperation of Energy Regulators	Doc. A	<i>for adoption</i>	The Chair
(8)	Staff Regulations Implementing Rules – Request to opt-out Rules – maximum duration for the recourse to non-permanent staff in the Commission services	Doc. A Doc. B	<i>for adoption</i> <i>for information</i>	Director <i>ad interim</i>
(9)	Decision on the adoption of Budget 2020 and establishment plan	Doc. A	<i>for adoption</i>	The Chair

(10)	Decision on the Restriction of Data Subjects' Rights	Doc. A <i>for adoption</i> Doc. B <i>for information</i>	Director <i>ad interim</i>
<b>Items for discussion</b>			<b>11:30</b>
(11)	Programming Document 2020-2022	Doc. A <i>for information</i>	Director <i>ad interim</i>
(12)	Programming Document 2021-2023	Doc. A <i>for information</i>	Director <i>ad interim</i>
<b>AOB</b>			<b>13:15</b>
(13)	Reminder of dates of AB Meetings for the year 2020	- -	The Chair
(14)	Implementation of the Conflict of Interest Policy for the year 2020	- -	The Chair
<b>Closing</b>			<b>13:00</b>

## (2) *Adoption of the Minutes of 42<sup>nd</sup> Meeting of the Administrative Board*

The Chair went through the conclusions of the 42<sup>nd</sup> meeting of the Administrative Board, confirming the achievement of the outstanding actions with the exception of the submission to the Administrative Board of two reports to be rendered at the next meeting.

The Chair further reported that, by the closing date for comments on the minutes of the 42<sup>nd</sup> meeting, the Agency received minor comments, which were included in the draft for adoption.

**Conclusion:** The Administrative Board adopted, by unanimity, the minutes of the 42<sup>nd</sup> meeting of the Administrative Board.

## **SECTION II - REPORTING**

### (3) *Report on the decisions adopted by written procedure and by delegation*

The Chair reported about the adoption of two decisions after its 42<sup>nd</sup> meeting of the 13 June 2019. In particular, the Chair informed the Administrative Board about the adoption of Decision No 18/2019 and Decision No 19/2019.

On 4 December 2019, it was adopted Decision No 18/2019 on the appointment of one Member Alternate Member of the Board of Regulators of the European Union Agency for the Cooperation of Energy Regulators without voting rights for *Reguleringsmyndigheten for energi* (NVE-RME), the Norwegian energy regulatory authority. She explained that the decision was adopted pursuant to Decision No 5bis/2010 of the Administrative Board of the Agency for the Cooperation of Energy Regulators of 21 September 2010 the Delegation to the Chairman of the powers to appoint new members of the Board of Regulators.

**Conclusion:** The Administrative Board took note of the decisions adopted via delegation since its last meeting.

### (4) *Report on Agency's developments, budget implementation, Audit Results, and the regulatory activity*

#### **4.1 Human Resources**

As regards the Agency's human resources, the Director *ad interim* presented the latest statistics identifying the number of human resources subdivided by contract type and amounting to 125 FTEs, 2 of which in the Brussel's office of the Agency. The Director *ad interim* highlighted that the Agency has completed its Establishment Plan (100% implementation) as all the available positions have been filled. The Director *ad interim* drew the attention of the Administrative Board to the fact that 21.6% of the available resources is covered through traineeship agreements and interim agency workers. Those temporary solutions, for their very nature, can only partially cover the needs of the Agency as they cannot provide the necessary level of expertise to face the structural lack of resources in key positions to fulfil the Agency's mandate at optimal level and therefore deliver the necessary efficiency gains for the Union and its Member States.

The Director *ad interim* further reported on the efforts put in place by the Agency to ensure a timely filling of the contract agents functions assigned to the Agency for the year 2020 with the establishment of reserve lists to be employed once the budgetary procedure will be closed.

The Director *ad interim* provided details on i) the competency framework project launched at the Agency in early 2019; ii) the implementation of SYSPER<sup>1</sup> to be deployed at the Agency in January 2020 after having conducted appropriate training to staff in the course of the year 2019; and iii) on the Inter-agency call for confidential counsellors<sup>2</sup>.

After the completion of the training and the favourable opinion of the clinical psychologist, the Director will be able to appoint the candidates as Confidential Counsellors.

The Director *ad interim* concluded by updating the Administrative Board on the European School in Ljubljana, which was finally accredited in June 2019. The Director *ad interim* highlighted that the European School will be offering a complete primary educational cycle (classes P1 – P5) starting from the school year 2019-2020, where already 25 pupils are enrolled in the English language section and 20 in the Slovene one. The secondary educational cycle (S1 – S7) is instead foreseen to be offered in the school year 2020-2021 to be finally completed for the school year 2023-2024.

#### **4.2 Internal Control Mid-term Assessment, Implementation of the Anti-Fraud Strategy, Implementation of the Action Plan following the Staff Engagement Survey, and the IAS Audit on the HRM, IT and REMIT functions of the Agency**

##### Internal Control Framework Mid-term Assessment

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<sup>1</sup> The information system for the treatment of information for the management of Human Resources of the Commission.

<sup>2</sup> Following the closure of the call, the interviews successfully finalised in November 2019. 11 candidates from 6 Agencies were selected to follow the mandatory 6-day training with the clinical psychologist in 2 groups. The first group will be at ACER in January and February 2020 and second group will be at EASO in March and April 2020.

The Director *ad interim* reported that the Internal Control Framework of the Agency, adopted by the Administrative Board on Decision No 17/2018, is effective and the mid-term assessment of its implementation did not highlight deficiencies besides a minor deficiency in IC Principle No 11 (control over technology). The Director *ad interim* explained that the adoption of a new ICT Strategy has been delayed until the end of the year due to changes in the IT team and new developments at Agency level. The Director *ad interim* reassured the Administrative Board about the effectiveness on the substance of the Internal Control Framework over technology. In particular, the Director *ad interim* stressed that the currently applicable ICT Strategy is implemented in light of the new Internal Control Framework and, therefore, the ICT Steering Committee exercises oversight and provides strategic directions in the ICT domain in light of Internal Control Framework of the Agency.

#### Implementation of Decision No 6/2019 for the Administrative Board on the Anti-Fraud strategy

The Director *ad interim* reported that the area of information security has been subject to the implementation of a series of measures in accordance with the Audit Action Plan. As regards the improvement of the document management system at the Agency, the migration to ARES took place on 2 October 2019. Furthermore, following the adoption of the new Financial Regulation, a Director Decision on engagement and reimbursement of non-remunerated experts was adopted in July alongside the Standard Operating Procedure on the management of non-remunerated experts. The Director *ad interim* therefore provided an overview of the decision explaining the categories of experts invited by the Agency, the management of conflict of interest and the methods for reimbursement. He highlighted that this decision was presented to all staff on 3 September.

The Director *ad interim* concluded by reporting that the Agency adopted Standard Operating Procedures on cooperation with OLAF and follow-up on investigations. He concluded providing an overview of the implementation of the remaining actions by the end of the year 2020.

#### Staff Engagement Survey

The Director *ad interim* recalled that in the year 2018 the Agency undertook a staff engagement survey. The overall participation rate was 76% with an overall satisfaction rate of 57%. The Director *ad interim* reported in detail on the action plan adopted by the management of the Agency to address the results of the Staff engagement survey covering 33 actions in four dimensions (Internal processes, Staff matters, Internal communication and leadership, and External communication). The Director recalled that, as of 4 December 2019, 23 out of the 30 actions were fully implemented, 5 were partially implemented, and for the remaining 5 implementation was on-going. He therefore concluded by reporting in details about the actions implemented and provided additional information on the single actions undertaken. The Director *ad interim* explained that a new staff engagement survey will take place in the course of the first semester of the year 2020.

#### IAS Audit on the HRM, IT Security and REMIT functions of the Agency

The Director *ad interim* reported that the preliminary observations from the audit of ECA on the 2018 accounts highlights that no findings on the legality and regularity of the transactions and on the reliability of the annual accounts were detected. ECA is in the process of reviewing the 2019 accounts and the desk review of the transactions until the end of the year 2019 was scheduled for the first week of February 2020. No visit to ACER premises was required.

As regards the HRM function, the Director *ad interim* stressed that the implementation of the action plan was fully on-track. He reassured the Administrative Board that two “very important” recommendations (on Recruitment and management of CoI and on Appraisal and reclassification exercises) were fully implemented and closed by the IAS. He also recalled that the critical recommendation was also downgraded to “very important”, to reflect the progress made by the Agency in the implementation of the action plan. Furthermore, he stressed that one “important” recommendation (on Planning and Monitoring) was fully implemented and reported to IAS. Finally, the Director *ad interim* further reported that the remaining recommendations (one “very important” recommendation on Guidelines, Document Management, Job Descriptions and Sharing of Information and the other “important” on Setup and management of the HR function and on Planning of resources and monitoring) were to be implemented by the end of the year 2019 and reported to IAS.

As regards the IAS Audit on IT security in ACER and Information Security in the “REMIT” domain (2018), the Director *ad interim* reported that the implementation was fully on-track according to the Action Plan. He highlighted that: i) one “important” recommendation (on the Implementation of the Information Security policy) had been fully implemented and reported to IAS; ii) two “important” recommendations (on IT security governance issues and on Software development and change management) had been partially implemented and reported to IAS; and iii) five remaining “important” recommendations (on ARIS ORACLE database security, on REMIT network infrastructure security, on User accounts management, on Steering the contractor's operational management and on Data encryption) were to be fully implemented by the end of the year 2020, in line with the Action Plan.

The Director *ad interim* finally reported that the IAS Audit on the Implementation of REMIT took place on 4-8 November 2019. To that end a preliminary visit took place on 9-10 September 2019. The Director *ad interim* provided a detailed overview of the scope of the audit identifying the main areas subject to assessment and clarified that the final report was expected to be delivered in March 2020.

#### **4.3 Budget Implementation**

As regards the Budget Implementation for the year 2019, the Director *ad interim* reported that commitments for C1 appropriations reached 97.01% (target 95%) while C1 payments 70.01% (target 75%). As regards the C8 appropriations-carry-over, payments reached 94.18% (target 95%).

As regards the C1 appropriations under Title II and Title III (REMIT), the Director *ad interim* reported that the total appropriations amounted to EUR 3,707,902 with commitments for 97.83% (EUR 3,627,312) and Payments 30.11%. The Director *ad interim* clarified that according to the planning, the commitment appropriations would have reached 99.77% (EUR 3,649,978) by end of September.

The Director *ad interim* reassured the Administrative Board that the planned commitment appropriations was foresaw to reach 100% as the last contract for € 80,589 was meant to be concluded before the end of the year 2019.

#### **4.4 Regulatory activities**

The Director *ad interim* provided an overview on the most recent regulatory tasks to be performed by the Agency in the last semester of the year 2019 and the first semester of the year 2020.

The Director *ad interim* stressed the degree of complexity of the decisions that the Agency is expected to adopt and, most importantly, the impact that the Clean Energy Package will have on the Agency, where all decisions on common terms and conditions or methodologies with a Union-wide scope will fall directly under the competence of the Agency itself.

In particular, the Director *ad interim* highlighted the number of deliverables that the Agency is expected to fulfil within the framework of the implementation of Capacity Allocation and Congestion Management, Forward Capacity Allocation, Electricity System Operation, and Balancing.



The Director *ad interim* reported, once again, that more than twenty decisions will be taken by the Agency in the course of the year 2020. In this regard explained that the amount of decisions to be taken by the Agency in the implementation of network codes should not be considered only in terms of a single occurrence, and therefore be discounted as a negligible task attributed to the Agency. The level of complexity of the issues raised and, therefore, the high potential for appeals, the need for translation in other official languages of the Union, and the possibility for amendments make those decisions constituting a significant burden for the Agency in light of the limited financial and human resources that have been assigned by the Budgetary Authority.

In this regard, and as a way of example, the Director *ad interim* highlighted the Union-wide reports that the Agency has issued in the course of the year 2019 on the analysis on the national tariff consultation documents. Those reports foreseen by Article 27 of the Tariff Network Code, have been issued or were in the process to be issued for each of the Member States. Those reports provide an insight on the status of the implementation of the Network Code with the result that they could reveal contentious issues and therefore have been drafted at times without the necessary degree of cooperation by national authorities, eventually increasing the overall burden for the Agency in performing its mandatory activities. The Director *ad interim* has therefore highlighted the resource intensity of those activities that are instead perceived as on-going and less demanding in terms of resources, as in this case.

In addition, the Director *ad interim* provided insights on the most important decisions adopted by the Agency providing details on the difficulties encountered due to the shortage of human resources that the Agency is constantly facing and the need to maintain its recognised role of qualified actor in the energy sector.

Furthermore, the Director *ad interim* reported that the Agency in addition to its mandatory deliverables is also called to issue other acts upon request of third parties. In this respect, he mentioned the adoption of Recommendation No 1/2019 on the implementation of the minimum margin available for cross-zonal trade, requested by the Electricity Cross-Border Committee.

The Director *ad interim* further reported about the appeals currently pending against the decisions adopted by the Agency, pointing to a multiplication of actions both before the Board of Appeal of the Agency and the Court of Justice.

#### **4.5 International Relations**

The Director *ad interim* reported about the future participation of EEA EFTA NRAs and ESA in the activities of the Agency within the framework of the implementation of the EEA Joint Committee Decision No 93/2017 incorporating the 3<sup>rd</sup> Package legislation in EEA Agreement. The Director *ad interim* explained that the above-mentioned Decision entails the participation of EEA EFTA NRAs and EFTA Surveillance Authority (ESA) in the BoR, without right to vote, and the full participation of EEA EFTA NRAs and ESA in ACER Working Groups and Task Forces. The Director *ad interim* explained further, that, on the basis of the above-mentioned Decision, the preparation of decisions for, and their adoption by, ESA should take place within same time frame as ACER decisions. Finally the Director *ad interim* reported that the Agency was expected to conclude a Memorandum of Understanding or Administrative Arrangements with ESA. The Board of Regulators was also tasked with amending its Rules of Procedure and the Administrative Board would have been called to appoint EEA EFTA NRA BoR members.

#### **4.6 REMIT Implementation**

The Director *ad interim* provided an overview of the key figures of REMIT implementation. In particular, he highlighted that 14,426 Market Participants have been registered in the European Register of Market Participants, the number of approved RRM<sup>3</sup>s reaches 120<sup>3</sup>, and the Agency is currently collecting more than 3 million records of transactions, including orders to trade, on average per day.

The Director *ad interim* further drew the attention of the Administrative Board to the restrictions that the Agency is facing in the implementation of REMIT due to the obsolescence of the IT infrastructure and IT software at its disposal.

As regards the IT infrastructure, the replacement of equipment has started only in Q4/2019 due to the insufficient funding of last year to replace the IT equipment. However, the obsolete IT equipment available at the Agency to support REMIT data collection and storage is meanwhile causing sporadic disruptions to ARIS operations. He highlighted that the KPI of 99% system availability for the first time was missed in Q3/2019.

As regards IT software, the Director *ad interim* warned the Administrative Board about the increasing risks deriving from the aged software currently available at the Agency with the potential for the current situation to worsen if the Budgetary authority is not sufficiently made aware of the financial needs to ensure adequate REMIT IT software development. In particular, he reported also that the Agency has experienced severe issues in August 2019 with several days of downtime for ARIS data collection.

The Director *ad interim* also highlighted once more his concerns about the status of the transition to the new service provider for IT system integration services, where the quality of the services is not at the expected level.

The Director *ad interim* reported about the reprioritisation of the stakeholder activities due to resource limitations. In particular, he highlighted that ACER currently does not provide replies on substance to stakeholder queries on REMIT policy matters for resource reasons. Only generic replies to ACER's Guidance documents are provided. No updates of REMIT Q&As and FAQs on transaction and fundamental data reporting so far in 2019 despite a number of stakeholder questions. He highlighted that the first and only stakeholder roundtable meetings with Associations of Energy Market Participants, Organised Market Places and Inside Information Platforms took place in November 2019. He further explained that no cross border investigatory groups created for the assessment of potential REMIT breaches, despite the increasing number of cross border cases. He also highlighted that ACER is unable to accede to any request for assistance by NRAs on REMIT investigations, pursuant to Article 6(8) of the recast ACER Regulation (NRAs expected to send 600+ requests in the next 2 years). He concluded by warning the Administrative Board about the risks of an increasing dissatisfaction of reporting parties and NRAs with the Agency given the lack of responsiveness.

The Director *ad interim* reported that, in light of the above considerations, on 18 November 2019, ACER announced the suspension of the registration of additional reporting parties as Registered Reporting Mechanisms (RRMs) until further notice. He explained that ACER was forced to suspend the registration of additional reporting parties in order to maintain operational reliability, as required by Article 12(1) of REMIT, in the face of persistent human and financial resource limitations.

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<sup>3</sup> Two previously approved Third party RRM<sup>s</sup> are no longer active.

The Director *ad interim* explained that, in any case, ACER has already registered 120 reporting parties as RRM, which provide ample opportunities for Market Participants to report. There are only 6 Trade Repositories reporting to ESMA in the financial services sector. He explained that the number of RRM is expected to decrease over the next years.

The Director *ad interim* reported about the budget developments for REMIT. The REMIT IT budget request for 2020 was not satisfied, but limited to EUR 2.8m as confirmed in the DG ENER expert review in 2016. The Agency's arguments that a three-fold increase in the number of reported records of transactions to around 3m records per day due to market developments, requires an increasing REMIT IT budget were ignored. The Agency is currently facing a further increase in data collection due to the successful and wave go-live of XBID on 19 November 2019.

The Director *ad interim* explained that the Agency will reconsider its scope of REMIT IT activities in 2020 to ensure at least basic ongoing operations, but would have to postpone the following and thereby increasing the Agency's risks on operational reliability: i) full implementation of recommendations regarding information security, and ii) any new software development/enhancements of ARIS/CMT, iii) very limited capacity to resolve remaining issues with our systems (e.g. performance, architecture, etc.) that require reworking of certain ARIS components (e.g. data sharing solution with NRAs, national financial regulators and DG COMP).

The Director *ad interim* reported further that the Agency had planned software development activities in 2020, also to implement in ARIS the market design changes due to network codes (e.g. 2nd phase of XBID, unit based bidding), but will not be able to implement any such changes. Risk of REMIT data collection and market monitoring becoming meaningless if not up to date with market design changes and market developments.

Finally, the Director *ad interim* explained the number of transactions and orders reported to ACER has significantly increased over the last two years and will continue to increase in the coming years. This in turn will increase the number of alerts triggered when screening for possible instances of market abuse, which require assessment by ACER surveillance experts to decide whether to share them with NRAs for their investigation and enforcement follow-up under REMIT. He concluded by warning the Administrative Board that, given the insufficient resources available to ACER, the backlog in the surveillance and coordination activities will continue to increase, even though ACER will further automate surveillance processes where possible. As a result, possible market abuses run the risk to remain undetected to the detriment of EU energy consumers; and market abuse provisions may be inconsistently applied by NRAs which, in turn, may impact the overall effectiveness of the REMIT framework.

#### **4.7 Budget Constraints and the entry into force of the Clean Energy Package**

In addition to the considerations reported above at point 4.4, the Director *ad interim* expressed concerns for the lack of alignment of the financial statement of the Agency with its extended mandate by the Clean Energy Package. The Director *ad interim* explained that certain newly attributed tasks require expertise going beyond the current framework of the Agency's activities as for instance the issuing of the opinion on technical guidance for the calculation of CO2 emission limits.

He also drew the attention of the Administrative Board that other newly attributed tasks, such as providing operational assistance to NRAs regarding REMIT investigations, upon NRA request, would require the dedication of a significant amount of human resources, currently not available in the Agency's establishment plan. In this regard, the Director *ad interim* highlighted that on the basis of a recent survey of NRAs, 20 additional FTEs would be needed to accomplish this new task. He explained that those resources were not mirrored in the draft Budget 2020.

As reported in detail at the 41<sup>st</sup> meeting of the Administrative Board, the Director *ad interim*, further recalled the additional tasks assigned by the Clean Energy Package. He highlighted the large number of deliverables of complex nature to be concluded within the first six months of its entry into force, and recalled that the Agency has not been provided with the necessary human resources to cover its needs in light of the short time-frame to fulfil its extended legal mandate.

The Director *ad interim* also highlighted that most of the positions related to the Clean Energy Package have been authorised as CAs, rather than TAs, despite the technical complexity of the tasks assigned to the Agency. At the same time, the Director *ad interim* expressed concerns should the possibility for the Agency to raise fees for REMIT be mirrored by a reduction of appropriations deriving from the budget for the Union.

**Conclusion:** (1) The Administrative Board took note of the report and expressed concerns for the lack of sufficient resources to ensure that the Agency meets its mandate.

### **(5) Progress Report from the Board of Regulators**

The BoR Chair reported on the recent activities of the Board of Regulators. The BoR Chair highlighted the wish of the NRAs to cooperate closely with the Agency's staff via the working groups to ensure a timely adoption of the necessary decisions.

The BoR Chair reported that the Rules of Procedure of the Agency are subject to a revision clause and it is working on a timeline to ensure a timely revision.

**Conclusion:** The Administrative Board took note of the report of the BoR Chair and invited the BoR and the Director to involve the Administrative Board at an early stage in all dimensions of the recast Agency's Regulation requiring the adoption of decisions by the Administrative Board itself.

## **SECTION III – ITEMS FOR DECISION**

### **(6) Appointment of the Chair and Vice-Chair of the Administrative Board**

The Secretariat recalled that, on 21 January 2020, the term of office of the Chair and Vice-Chair would have ended. The Administrative Board was, therefore, called to appoint the next Chair and Vice-Chair to ensure business continuity, as the first meeting of Administrative Board in 2020 would have taken place already on 30 January.

By the closing date for nomination, the Secretariat received nominations for Dr Jochen PENKER as Chair and Dr Jurijs SPIRIDONOV as Vice-Chair.

The Secretariat further explained the procedure for the appointment of the Chair and Vice-Chair. However, the Administrative Board decided, by unanimity, not to employ the voting by secret ballot.

Dr Jochen PENKER thanked the Administrative Board and expressed its willingness to stand for the Agency's mission towards the completion of the single energy market to the benefit of all European consumers, as the effective and efficient implementation of EU law will help achieving the Union's climate and energy goals. He maintained that the Agency is built on the principles of inclusiveness, independence, solidarity, integrity and sustainability, and he will work to guarantee their full application when ACER performs its mandate, including its recent additional tasks, as assigned by the Clean Energy Package for all Europeans.

**Conclusion:** The Administrative Board, by unanimity, appointed Dr Jochen PENKER and Dr Jurijs SPIRIDONOV respectively as Chair and Vice-Chair of the Administrative Board.

**(7) Decision on the appointment of the Director of the European Agency for the Cooperation of Energy Regulators**

The Chair recalled that, at its 42<sup>nd</sup> meeting of 26 September 2019, following the favourable opinion of the Board of Regulators in accordance with point (c) of Article 22(5) of the Agency's Regulation, the Administrative Board designated Mr Christian Pilgaard ZINGLERSEN as next Director of the Agency.

On 12 November 2019, Mr ZINGLERSEN made a statement before the ITRE Committee of the European Parliament and answered the questions put by its members. Mr ZINGLERSEN also fulfilled the conditions set in the Staff Regulations to be employed as temporary agent.

The Chair therefore explained that pursuant to Article 23(2) of the Agency's Regulation, the Administrative Board was called to appoint Mr ZINGLERSEN as Director of the Agency with effect as of 1 January 2020.

*Conclusion:*

- (1) The Administrative Board appointed Mr ZINGLERSEN as Director of the Agency with effect as of 1 January 2020;
- (2) the Administrative Board authorised the Chair to put in place the necessary administrative arrangements to ensure the entry into service of Mr ZINGLERSEN.

**(8) Staff Regulations Implementing Rules – Request to opt-out Rules – maximum duration for the recourse to non-permanent staff in the Commission services**

The Director *ad interim* recalled that, on 30 September 2019, the European Commission informed the Agency of the adoption of Commission Decision C(2019) 2548 of 5 April 2019 amending Commission Decision C(2004)1597/6 of 28 April 2004 on the maximum duration for the recourse to non-permanent staff in the Commission services.

He further recalled that, according to Article 110(2) of the Staff Regulations, implementing rules shall apply by analogy to agencies nine months after their entry into force at the Commission.

The Director *ad interim* explained that the European Commission gave its ex ante agreement (Model Decision) regarding the non-application of the aforementioned provision to those Agencies that are based on different staff structure compared to the European Commission.

The Director *ad interim* further explained that the Agency falls in the group of those Agencies with a staff structure not compatible with the European Commission's one. In the Agency the majority of temporary staff other than those referred to in Article 2(a) of the CEOS are those referred to in Article 2(f) of the CEOS and all contract staff are the ones referred to in Article 3(a) of the CEOS.

The Director *ad interim* further explained that, in the Agency, temporary agents referred to in Article 2(a) of the CEOS is exclusively the Director. As regards the majority of temporary staff in the Agency, namely those referred to in Article 2(f) of the CEOS, as well as the unique category of contract staff employed in the Agency, namely those referred to in Article 3(a) of the CEOS, they do not fall under the scope of this Commission Decision. Therefore, this Commission Decision is not adapted to the actual situation of the European Union Agency of the Cooperation of Energy Regulators.

Commission Decision C(2019)2548 did not introduce a modification that could make applicable to the Agency the Decision on the maximum duration for the recourse to non-permanent staff in the Commission services.

The Director *ad interim*, therefore, concluded that it was, therefore, necessary to opt-out from the above mentioned Commission Decision C(2019) 2548 of 5 April 2019.

**Conclusion:** After discussion, the Administrative Board adopted, by unanimity, Decision No 19/2019 on the non-application of C(2019) 2548 of 5 April 2019 on the maximum duration for the recourse to non-permanent staff in the Commission services.

#### **(9) Decision on the adoption of Budget 2020 and establishment plan**

The Director *ad interim* recalled that, on 22 March 2019, the Administrative Board estimated the revenues and expenditures of the Agency for the Cooperation of Energy Regulators for the financial year 2020 in a total of EUR 20 647 663.

The Director *ad interim* explained that, following the approval of the Budget of the Union for the year 2020, the European Union Agency for the Cooperation of Energy Regulators has been assigned with Union contributions for a total of EUR 16 868 810. In particular, it contains the surplus of the Agency from the year 2019 amounting to 192 025 EUR and the EFTA contribution of 2.45% of the EU subsidy amounting to 398 810 EUR.

The Director *ad interim* clarified that, with regard to the establishment plan of the Agency, the number of posts related to temporary agents is fixed in a total of 71 (seventy-one), four more compared to the year 2019. In addition, as regards the expenditures related to other agents, the Union contributions allow a total of 33 (thirty-three) Contract Agents, which is 6 (six) Contract Agents more compared to the number of Contract Agents included in the year 2019 (27 Contract Agents).

The Director *ad interim* clarified that the budget assigned to the Agency in 2020 and the number of authorised posts are significantly lower than what the Administrative Board estimated in March 2019. The Work Programme of the Agency for the year 2020 will therefore undergo adjustments to reflect the resources made actually available to the Agency.

**Conclusion:** After discussion, the Administrative Board adopted, by unanimity, Decision No 20/2019 on the budget and the establishment plan of the Agency for the financial year 2020.

#### **(10) Decision on the Restriction of Data Subjects' Rights**

The Director *ad interim* recalled that Regulation (EU) 2018/1725 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data replaced Regulation (EC) No 45/2001 on the protection of personal data.

He further explained that, according to the newly established data protection Regulation, the Agency shall i) provide transparent information, communication and modalities for the exercise of the rights of the data subject (such as information about the data that have been collected by data subjects directly or via other means, the purpose of the processing of such data, etc.); ii) ensure the right of access to, rectification of; and erasure of such data; iii) ensure the right to restriction of processing; iv) notify the rectification or erasure of personal data or restriction of processing; v) ensure the right of data portability; vi) communicate the personal data breach to the data subject without undue delay; and vii) protect information transmitted to, stored in, related to, processed by and collected from users' terminal equipment.

He continued by reporting that Pursuant to Article 25(1) of Regulation (EU) 2018/1725, the Agency – as all other European institutions, bodies and agencies – shall adopt internal rules restricting the application of the above mentioned rights and obligations. These rules shall be published in the Official Journal of the European Union.

The Director *ad interim* further explained that the Agency has performed an assessment of the necessity and proportionality of the introduction of restrictions. In particular, within the framework of its administrative functioning, the Agency may conduct administrative inquiries, disciplinary proceedings, carry out preliminary activities related to cases of potential irregularities reported to the European Anti-Fraud Office ('OLAF'), process whistleblowing cases, process (formal and informal) procedures of harassment, process internal and external complaints, conduct internal audits, carry out investigations by the Data Protection Officer in line with Article 45(2) of Regulation (EU) 2018/1725, monitor the wholesale energy markets and coordinate national regulatory authorities' activities on potential breaches of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 ('REMIT') and carry out internal information technology (IT) security investigations.

The Director *ad interim* further explained that restrictions, and therefore the introduction of internal rules, should apply to processing operations carried out prior to the opening of the procedures referred to above, during these procedures and during the monitoring of the follow-up to the outcome of these procedures. It should also apply to assistance and cooperation provided by the Agency to national authorities and international organisations outside of its administrative investigations. In cases where these internal rules apply, the Agency has still to give justifications explaining why the restrictions are strictly necessary and proportionate in a democratic society and respect the essence of the fundamental rights and freedoms. Within this framework, the Agency is bound to respect, to the maximum extent possible, the fundamental rights of the data subjects during the above procedures, in particular, those relating to the right of provision of information, access and rectification, right to erasure, restriction of processing, right of communication of a personal data breach to the data subject or confidentiality of communication as enshrined in Regulation (EU) No 2018/1725.

The Director *ad interim* reported that, on 2 October 2019, the European Data Protection Supervisor ('EDPS') has released its opinion on the draft Agency's Decision under Article 41(2) of Regulation (EU) 2018/1725. The Recommendations contained therein have been duly implemented by the Agency in the draft proposed for adoption.

**Conclusion:** After Discussion, the Administrative Board adopted, by majority voting, Decision No 22/2019 on the internal rules concerning restrictions of certain rights of data subjects in relation to processing of personal data in the framework of the functioning of the Agency.

## **SECTION IV – ITEMS FOR DISCUSSION**

### **(11) Programming Document 2020-2022**

The Director *ad interim* explained that, in line with the requirements of the Agency's recast Founding Regulation, the Administrative Board shall adopt the Programming Document (PD), taking into account the opinion of the Commission, after receipt of a favourable opinion from the Board of Regulators, and after the Director has presented it to the European Parliament. The Administrative Board shall submit the PD to the European Parliament, the Council and the Commission by 31 December.

The Director *ad interim* reported that he presented the Draft PD 2020 – 2022 to the ITRE Committee of the European Parliament on 12 November 2019. The Board of Regulators has been called to give its favourable opinion to the document at its meeting on 12 December.

By the date on which the uploading of the documents for the meeting of the Board of Regulators and Administrative Board were due, the Agency had not received the Commission's Opinion. However, the Agency's and the Commission's services have been cooperating to address the Commission's requests.

He concluded by highlighting that, compared to the last version seen by the Board (in January 2019, prior to the draft's submission for the Commission's Opinion), the Agency revised the PD so as to include the tasks allocated to the Agency within the acts of the Clean Energy Package; aligned the tasks and deliverables performed to the resources made available within the adopted 2020 budget; and had taken on board, to the extent possible, the Commission position on the PD 2020 – 2022.

The Director *ad interim* therefore invited the Administrative Board to discuss the Draft PD 2020 - 2022 containing the deliverables/tasks that the Agency is expected to perform in 2020.

- Conclusion:*
- (1) After discussion, the Administrative Board declared urgency for the adoption of the programming document 2020-2022, subject to the absence of amendments needed on the draft submitted for discussion to the Administrative Board;
  - (2) Invited the Agency to prepare a draft action plan on the involvement of the Administrative Board in the budgetary cycle and the MFF.

## **(12) Programming Document 2021-2023**

The Director *ad interim* explained that, In line with the requirements of the Framework Financial Regulation applicable to decentralised agencies, as well as the Agency's Founding Regulation, the Administrative Board must adopt the draft Programming Document (PD) of the Agency after receipt of a favourable opinion of the Board of Regulators, and submit it to the European Parliament Council and to the Commission no later than 31 January.

He continued by recalling that, following the Commission's opinion, due by 1 July 2020, the Board of Regulators will be called to give its favourable opinion to the document and the Administrative Board to adopt it by the end of 2020.

The Director *ad interim* explained that the Agency is currently in the process of preparing its Draft Programming Document 2021 – 2023, including the Work Programme with all the planned operational activities and tasks for 2021. However, the Agency will be headed by a new Director in January 2020, when a number of decisions concerning the Agency's future that are implicit in the PD will have to be taken. As a consequence, the complete draft PD will be submitted to the Board only in January, with the aim of meeting the 31 December deadline. The Director *ad interim* reported that the Agency's services are already in contact with Mr ZINGLERSEN so as to ensure a smoother entry into service.

The detailed Draft PD 2021-2023, containing a breakdown of the requested financial and human resources, and including all the sections and annexes foreseen in the PD template as laid down in the Communication from the Commission on the guidelines for programming document for decentralised agencies, will be submitted for the BoR's favourable opinion and for the AB's adoption in January.

The Administrative Board invited the Agency's services to integrate the draft programming document with a forward on decarbonisation and the Green Deal so as to i) align the Agency's activities with the



agenda of the institutions and ii) highlighting the Agency's contribution to the agenda of the institutions.

*Conclusion:* The Administrative Board took note of the Draft Outline of the PD prepared by the Agency, containing the foreseen deliverables/tasks that the Agency is expected to perform in 2021.

## **SECTION V – ITEMS FOR INFORMATION**

### **(13) Confirmation of dates of AB Meetings for the year 2020**

The Secretariat of the Administrative Board invited Members and Alternates to take note of the dates of the next meetings of the Administrative Board, in ordinary session, as follows: Thursday, 12 December 2019, Thursday, 30 January 2020, Tuesday, 30 June 2020, Thursday, 8 October 2020, and Thursday, 17 December 2020.

### **(14) Implementation of Conflict of Interest Policy – year 2020**

The Secretariat reported that, pursuant to Decision No 02/2015 of the Administrative Board of the Agency for the Cooperation of Energy Regulators of 31 January 2015 laying down a policy for the prevention and management of conflict of interest, Members and Alternates of the Administrative Board are required, by 31 January of each year, to submit their individual Declaration of Interest ('DoI') and Declaration of Commitment ('DoC').

The Secretariat reported that, due to the absence of sufficient financial resources, the online application for the submission of the DoIs and the DoCs has been delayed. In order to simplify the process of submitting and gathering the DoIs and DoCs, the Secretariat has already circulated the relevant documents to be duly filled-in, signed and dated, and returned in original physical format. This year the files are pre-filled. Members and Alternates are invited to review the form and amend or integrate as needed.

## **CLOSING**

In the absence of any other business to be treated, the Chair closed the 43<sup>rd</sup> meeting at 13:00.