Report

Austria

A Tale of Delegation and Power: ACER and the Dichotomy of the Non-Delegation Doctrine and the Creation of a Genuine Internal Market in Electricity

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I. Introduction

On 17 November 2016, the Agency for the Cooperation of Energy Regulators (ACER) adopted its decision, under Regulation 2015/1222 on Capacity Allocation and Congestion Management (CACM Regulation),[1] on the electricity transmission system operators' proposal for the determination of capacity calculation regions (CCR Decision).[2] The CCR Decision is one step on the way to establishing capacity allocation by means of flow-based market coupling as envisaged by the CACM Regulation. It is, at first sight, a highly technical decision based on a highly technical regulation. It is not the type of decision which one would generally expect to make headlines.

Yet, this is precisely what the CCR Decision has been making in the German-speaking world, and in particular in Austria. The reason for the public attention to a seemingly technical decision is contained in Article 5 of Annex I to the CCR Decision, where ACER introduces a bidding zone border between Germany and Austria. This split of the German-Austrian wholesale electricity market, which had formed a single bidding zone since 2001, is expected to lead to a significant increase in wholesale electricity prices in Austria. The Austrian Chamber of Commerce estimates that prices may increase by about 15%;[3] media reports even warn of a price increase of up to 30%.[4] This expected price increase of a commodity which is of central importance to industry and consumers explains the attention which the CCR Decision has received.

The CCR Decision has been appealed to the Board of Regulators.[5] The appeals may give the Board of Regulators the opportunity to clarify a number of legal questions; notably, (i) whether ACER is competent to define bidding zones in the capacity calculation process provided for in Article 15 CACM Regulation, when a separate procedure exists for bidding zone review under Articles 32 to 34 CACM Regulation, (ii) whether the new bidding zone border has been properly defined in order to ensure efficient congestion management and overall market efficiency,[6] and (iii) whether its introduction is in line with the principle of proportionality. All of these issues involve difficult questions of law and fact, which cannot be all addressed here.

The public debate regarding the CCR Decision however serves as a good example of one of the main

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1 Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management, OJ 2015 L 197, 24.

2 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.

3 Wirtschaftskammer Österreich, 'Deutschland will ein Ende der Strompreiszone mit Österreich – höhere Strompreise drohen' (5 September 2016) <https://www.wko.at/Content.Node/branchen/w/Deutschland-will-ein-Ende-der-Strompreiszone-mit-Oesterre.html> accessed 2 February 2017 (in German).

4 Oberösterreichische Nachrichten, 'Bis zu 30 Prozent Preisaufschlag bei Strom befürchtet' (29 September 2016) <http://www.nachrichten.at/nachrichten/wirtschaft/Bis-zu-30-Prozent-Preisaufschlag-auf-Strom-befuerchtet;art15,2359914> accessed 2 February 2017 (in German).

5 See the announcement of appeals published on ACER's website at <http://www.acer.europa.eu/en/the_agency/organisation/board_of_appeal/pages/announcements-of-appeals.aspx> accessed 2 February 2017.

6 Cf CACM Regulation, recital 11.

problems of governance in the regulatory state: the mere fact that a decision is technical does not mean that it is not political. This problem is exacerbated at EU level by the lack of a legal framework for the delegation of powers to agencies, and by the difficulties of establishing the body of law which agencies need to take into account when exercising delegated powers. This report aims to explore some of these issues, by examining the limits to the granting of discretionary powers to agencies like ACER, as well as the extent to which ACER is bound by primary law provisions not explicitly addressed to it, notably the fundamental freedoms and competition law, when exercising its powers. To this end, we first summarise the origins of ACER, its role in regulating the European wholesale market in electricity and congestion management, before proceedings to the analysis of the above questions.

II. ACER: A Brief History

Since the second half of the 20th Century, governments and parliaments have increasingly empowered non-majoritarian institutions to make decisions on public policy. This trend has also influenced supranational governance at EU level. In the EU, the agency model was initially used in 1975, when two agencies, the European Centre for the Development of Vocational Training (Cedefop)[7] and the European Foundation for the Improvement of Living and Working Conditions (EUROFOUND)[8] were established. However, the process, nowadays known as 'agencification', took-up speed in the 1990s and continued to accelerate to currently 34 agencies.[9] Among the reasons invoked for this process is that agencies render the executive on the European level more effective in highly specialised technical areas requiring advanced expertise and continuity, credibility and visibility of public action, thereby enabling the Commission to focus on policy formation.[10]

This trend towards executive decision-making has also extended to utility regulation.[11] In Europe, liberalisation of the 28 national electricity and gas markets alone does not create an integrated European market in energy. As historically separate systems, these liberalised markets were not originally designed to interact. In the dawn of the common market for electricity, the need for coordination was addressed in the European Electricity Regulatory Forum (so-called 'Florence Forum'), which was set up to discuss the creation of true internal electricity markets in Europe and to provide common approaches to issues relevant for cross-border transactions.[12] As part of the second energy package, the Florence Forum was complemented by an independent advisory group on electricity and gas, named 'European Regulator Group for Electricity and Gas' (ERGEG), whose objective was to foster consultation, coordination and cooperation amongst the national regulators as well as the Commission.[13]

However, existing regulators were solely national in character, based on the administrative realms of each Member State, and lacking institutionalised regulatory cooperation and coordination. It was against this backdrop that the Commission identified, in 2007, a regulatory gap as regards cross-border issues and deemed the Florence Forum and ERGEG not apt to tackle the task of bringing along

> the real push towards the development of common standards and approaches that is necessary to make cross-border trade and the development of first regional markets, and ultimately a European energy market a reality.[14]

Assessing several potential options how to tackle this regulatory gap, the Commission observed that this

7 Council Regulation 337/75/EEC of 10 February 1975 establishing a European Centre for Vocational Training [1975] OJ L 39/1.

8 Council Regulation 1365/75/EEC of 10 February 1975 on the creation of a European Foundation for the Improvement of Living and Working Conditions [1975] OJ L 139/1.

9 See for an overview 'Agencies and other EU bodies' (*Europa.eu*, 27 February 2017) <https://europa.eu/european-union/about-eu/agencies_en> accessed 27 February 2017.

10 The Operating Framework for the European Regulatory Agencies, COM(2002)718, final, 2 and 5.

11 Marc Thatcher and Alec Stone Sweet, 'Theory and Practice of Delegation to Non-Majoritarian Institutions' [2002] West European Politics 1.

12 The participants were and still are NRA, Member States, the European Commission, transmission system operators, electricity traders, consumers, network users and power exchanges.

13 Commission Decision of 11 November 2003 on establishing the European Regulators Group for Electricity and Gas, OJ 2003 L 296, recital 5. Cf also Florian Ermacora in Christopher Jones (ed), *EU Energy Law Volume 1: The Internal Energy Market – The Third Liberalisation Package* (3rd edn, Claeys & Casteels 2010), 257.

14 Explanatory Memorandum to the Commission's Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, COM (2007) 530 final, 9-10.

objective required more than the non-binding codes and common approaches through 'gradual convergence' which had been adopted within ERGEG. Real decisions on difficult issues, such as on the harmonisation of grid codes, could be best fulfilled by a separate entity, independent and outside the Commission. This entity was to take the legal form of an agency – ACER – and was to be invested with the competences to make proposals to the Commission regarding acts that involve substantive decisions and take individual decisions which are binding on third parties concerning detailed technical issues.

ACER was established by Regulation 713/2009. The main tasks attributed to ACER under that Regulation involve the issuance of opinions and recommendation to other EU institutions regarding matters of the internal market in electricity.[15] Further areas of ACER's competences can be subdivided in two main categories: (i) tasks regarding transmission system operators including ENTSO-E[16] and (ii) tasks regarding national regulatory authorities (NRAs).[17] Whereas the former mainly concern monitoring tasks and the preparation of network codes, the latter entail, amongst others, genuine decision-making competences of ACER. It is in particular (but not only) in their function as executive decision-makers that agencies face difficult questions as to the limitations of their powers.

III. Agencies Within the Institutional Framework of the Treaties

Despite the impressive number of EU agencies, EU primary law does not lay down any provisions regarding the establishment and the delegation of powers to agencies. Before the entry into force of the Treaty of Lisbon, the existence of agencies as such was *praeter legem*, as the Treaties contained no reference to agencies at all. The Lisbon Treaty indirectly acknowledged their existence, by providing in Article 263 of the Treaty on the Functioning of the EU (TFEU) that acts of agencies are reviewable by the Court of Justice of the EU (CJEU). Other than this recognition of their existence, the Lisbon Treaty however did not bring about any changes. The institutional framework of the EU, as defined in Article 13 of the Treaty on the EU (TEU) and governed by the principle of institutional balance[18], makes no reference to agencies and primary law still does not contain rules for establishing agencies or delegating/conferring powers to such a body.[19] Several attempts made in Intergovernmental Conferences as to set up a sound legal framework with regard to the establishment and empowerment of agencies[20] and the endeavour by the Commission to provide for such framework[21] ended with programmatic promises but did not lead to adoption of legal rules.[22]

1. The Limits to the Delegation of Powers to Agencies

In the absence of Treaty rules regarding the delegation of powers to agencies, the Court of Justice had to fill the gap. In two early cases, the Court laid down strict limits to the delegation of powers to institutions not foreseen in the Treaties. In the *Meroni* judgment of 1958, the Court of Justice decided that the High Authority under the European Coal and Steel Community Treaty had unlawfully delegated power to two funds established under Belgian law, which were put in charge of the operation of the ferrous scrap regime. In doing so, it established a number of

15 art 5 of Regulation 713/2009.

16 art 6 of Regulation 713/2009.

17 art 7 of Regulation 713/2009.

18 Cf Youri Devuyst, 'The European Union's Institutional Balance after the Treaty of Lisbon: "Community Method" and "Democratic Deficit" Reassessed' [2008] 39 Georgetown Jnl Int Law 247.

19 Merijn Chamon, 'The Empowerment of Agencies under the *Meroni* Doctrine and Art 114 TFEU: Comment on *United Kingdom v Parliament and Council (Short-selling)* and the Proposed Single Resolution Mechanism' [2014] 39(3) European Law Review 381.

20 Ellen Vos, 'Agencies and the European Union' in Tom Zwart and Luc Verhey (eds), *Agencies in European and Comparative Perspective* (Intersentia 2003), 128-129.

21 Interinstitutional Agreement on the operating framework for the European regulatory agencies, COM(2005) 59 final. This approach ended in a mere common approach lacking a satisfactory legal framework: Joint Statement of the European Parliament, the Council of the EU and the European Commission on Decentralised Agencies of 19 July 2012 <https://europa.eu/european-union/sites/europaeu/files/docs/body/joint_statement_and_common_approach_2012_en.pdf> accessed 2 February 2017.

22 Eg Roadmap on the follow-up to the Common Approach on EU decentralised agencies <https://europa.eu/european-union/sites/europaeu/files/docs/body/2012-12-18_roadmap_on_the_follow_up_to_the_common_approach_on_eu_decentralised_agencies_en.pdf> accessed 2 February 2017; cf also Report from the Commission – Progress report on the implementation of the Common Approach on EU decentralised agencies, COM(2015) 179 final <http://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-179-EN-F1-1.PDF> accessed 2 February 2017.

criteria for the lawful delegation of powers. Notably, the Court held that the delegating authority could not confer upon another body powers different from those which it held itself under the Treaty.[23] Furthermore, it distinguished between clearly defined executive powers and powers implying a wide margin of discretion, which may permit the execution of actual economic policy. While the former could be delegated, delegation of the latter was not compatible with the Treaty.[24] In the *Romano* judgment of 1981, the Court furthermore held, without referring to *Meroni*, that the Council was precluded from empowering agencies to adopt acts having the force of law.[25] Together, the principles set out in these judgments came to be known as the 'non-delegation' or '*Meroni* doctrine'.

The Court's reasoning, both in *Meroni* and in *Romano*, rested on two central arguments. First, the Court referred in both cases to the institutional balance laid down by the Treaties. Second, it referred to the system of judicial review set up by the Treaties, which at the time did not explicitly provide for judicial review of acts adopted by agencies. In the course of the agencification of EU decision-making starting in the 1990s, the *Meroni* principle however came under significant pressure. In the legal literature,[26] it was mostly regarded as an obstacle to more efficient decision-making by regulatory agencies and as legally outdated, given that the Court had extended the judicial review provided for in the Treaty to agencies in the *Sogelma* case.[27] Moreover, the non-delegation principle appeared to be at odds with the realities of governance in the EU, which had seen the creation of a large number of new agencies in the wake of the liberalisation of formerly nationalised markets. Finally, the Lisbon Treaty, while refraining from adopting a legal framework for the delegation of powers to agencies, recognised their existence by referring to agencies in a number of provisions, most notably by making explicit the judicial review of agency action in Articles 263 and 277 TFEU.

It was against this backdrop that the Court of Justice was asked to re-examine the non-delegation principle in the *ESMA* case. In that case, the United Kingdom challenged the power granted to the European Securities and Markets Authority (ESMA) to prohibit or impose conditions on short-selling, under Article 28 of Regulation (EU) No 236/2012. In its challenge, the United Kingdom relied on three pleas of law, arguing that the delegation of powers to ESMA was incompatible with the *Meroni* judgment, with the *Romano* judgment and with the systematisation of delegating and implementing acts introduced by the Lisbon Treaty in Articles 290 and 291 TFEU. Pursuant to Article 290 TFEU, the legislature may delegate to the Commission the power to adopt non-legislative acts of general application, which supplement or amend certain non-essential elements of a legislative act. Article 291 TFEU covers implementing acts, which generally remain the domain of the Member States; where uniform conditions for implementing legally binding Union acts are needed, those acts shall however confer implementing powers on the Commission, or, in certain specified cases, on the Council. Neither of these provisions makes reference to agencies.

In its judgment, the Court redefined, but did not abandon the *Meroni* principle. It observed that the exercise of the powers in question was circumscribed in a way which limited ESMA's discretion, by requiring ESMA to take account of a significant number of factors, both as regards the conditions for its intervention and as regards the impact of the measure considered. It also noted that the Commission was empowered to adopt delegated acts further specifying these criteria, which the Commission had already done by means of a delegated regulation. Finally, the Court observed that ESMA was required to consult the European Systemic Risk Board, and that the measures imposed by ESMA were temporary in nature. Based on these considerations, the Court concluded that ESMA was not vested with a 'very large measure of discretion' as the United Kingdom had argued; rather, the powers conferred on ESMA were 'precisely delineated and amenable to judicial review'.[28] With regard to *Romano*'s prohibition on empowering agencies to adopt acts having the

23 Case 9/56 *Meroni v High Authority* [1958] ECLI:EU:C:1958:7, 150.

24 ibid 152.

25 Case 98/80 *Romano v Institut national d'assurance maladie-invalidité* [1981] ECLI:EU:C:1981:104, para 20.

26 See eg Paul Craig, *EU Administrative Law* (2nd edn, Oxford University Press 2012), 174; Merijn Chamon, 'EU Agencies between Meroni and Romano or the Devil and the Deep Blue Sea' (2011) 48 CMRL 1055.

27 Case T-411/06 *Sogelma v European Agency for Reconstruction* [2008] ECLI:EU:T:2008:419, para 37.

28 Case C-270/12 *United Kingdom v Parliament and Council (ESMA)* [2014] ECLI:EU:C:2014:18, para 41 et seqq.

force of law, the Court inferred from Articles 263 and 277 TFEU that the institutional framework 'expressly permits Union bodies, offices and agencies to adopt acts of general application', and concluded that no further conditions than those set out in *Meroni* could be inferred from its *Romano* judgment.[29] Regarding the United Kingdom's arguments based on Articles 290 and 291 TFEU, the Court noted that the powers conferred on ESMA did not amount to delegated or implementing acts under those provisions, and hence could not undermine the rules governing the delegation of powers laid down in these provisions.[30]

With respect to the earlier cases, the *ESMA* case hence brought a number of clarifications: it is now clear that the delegation of decision-making power to agencies is not excluded under the Treaty, and that agencies may even be empowered to adopt acts of general application. Moreover, whilst the Court relied explicitly on its prior case law in *Meroni*, its rendition of the content of that judgment in *ESMA* loosened the reins compared to earlier, stricter interpretations.[31] Effectively, the new standard limits the *Meroni* principle to prohibiting the delegation of powers involving the exercise of a large measure of discretion, and requiring a certain technical and professional expertise on the part of the agency.[32]

2. Open Questions

In spite of these clarifications, the *ESMA* judgment leaves open a number of questions regarding the scope of legitimate delegation to agencies under the TFEU. As Chamon notes,[33] the Court of Justice's emphasis that the powers were precisely delineated and amenable to judicial review does not sit easy with the limited judicial review to which agencies are subjected to by the Court. In actions for annulment of decisions of the Community Plant Variety Office[34] and the European Chemicals Agency (ECHA)[35], the Court routinely stresses the wide discretion enjoyed by the agencies, which is subject to limited judicial review by the Union judicature. Moreover, the *ESMA* judgment did not explore the relevance of Articles 290 and 291 TFEU to agency decision-making in any level of detail. Recent case law has fleshed out the distinctions between these provisions to a certain extent. Implementing powers within the meaning of Article 291 TFEU empower the Commission or the Council to provide further detail in relation to the content of a legislative act, in order to ensure its uniform application, but may not supplement or amend the legislative act. By contrast, delegated powers under Article 290 TFEU allow the Commission to adopt non-legislative acts of general application to supplement or amend non-essential elements of the (delegating) legislative act.[36] The exclusive competence of the Commission under Article 290 TFEU thus excludes the conferral of substantial discretionary powers to agencies;[37] however, the Courts have yet to decide whether the delegation of powers to agencies is subject to similar conditions and procedural guarantees as those laid down in Article 291 TFEU.[38] Finally, the Court's explicit acceptance of the delegation of non-legislative, yet still discretionary powers to agencies brings to the fore the difficult distinction between legislative and executive decision-making. As is pointed out in the literature, the divide between primary and secondary norms is by no means easy: there is no simple dichotomy between principle and detail. Moreover, there is no ready equation between detail and the absence of political controversy.[39] The mere fact that a subject matter involves technical considerations does not mean that it does not involve

29 ibid para 65 et seq.

30 ibid para 83 et seq.

31 See eg the five-step test identified by Takis Tridimas, 'Community Agencies, Competition Law, and ECSB Initiatives on Securities Clearing and Settlement' [2009] 28(1) Yearbook of European Law 216, 241.

32 C-270/12 *ESMA* (n 28) para 82.

33 Chamon, 'The Empowerment of Agencies under the *Meroni* Doctrine' (n 19) 380, 395.

34 Case T-187/06 *Schräder v CPVO* [2008] ECLI:EU:T:2008:511, para 59.

35 See, for example, Case T-135/13 *Hitachi Chemical Europe and Others v ECHA* [2015] ECLI:EU:T:2015:253, para 111; Case T-134/13 *Polynt and Others v ECHA* [2015] ECLI:EU:T:2015:254, para 105; Case T-268/10 RENV *Polyelectrolyte Producers Group and Others v ECHA* [2015] ECLI:EU:T:2015:698, para 81; Case T-96/10 *Rütgers Germany and Others v ECHA* [2013] ECLI:EU:T:2013:109, para 134; Case T-95/10 *Cindu Chemicals and Others v ECHA*, ECLI:EU:T:2013:108, para 140; Case T-93/10 *Bilbaína de Alquitranes and Others v ECHA*, ECLI:EU:T:2013:106, para 115.

36 Case C-427/12 *Commission v Parliament and Council*, ECLI:EU:C:2014:170, para 38 et seq; Case C-88/14 *Commission v Parliament and Council* [2015] ECLI:EU:C:2015:499, para 30 et seq; Case T-659/13 *Czech Republic v Commission* [2015] ECLI:EU:T:2015:771, para 48.

37 Wolfgang Weiß, 'Dezentrale Agenturen in der EU-Rechtsetzung' [2016] EuR 631, 654 et seq.

38 ibid 656 et seq.

39 Craig, *EU Administrative Law* (n 26) 110 et seq.

hard choices between competing interests and policy objectives.[40]

3. The CCR Decision

ACER's CCR Decision is an illustration of that last point. The establishment of capacity calculation regions appears to be a technical question of little political import. Neither would one expect the method of capacity allocation, whether by explicit auctions, or by various forms of implicit auctions, to become the subject of political debate. Similarly, the question whether an individual network element is congested would at first sight appear to require technical expertise without involving a significant amount of discretion.

This simple picture however changes when one bears in mind that physical flows between two regions are not necessarily realised at the border between those two countries, but may also flow through other countries. In an interconnected system, flows between countries A and B may thus also affect network elements in country C, through which some of the flows between A and B are realized. In those situations, the question where capacity allocation procedures should be introduced becomes considerably more political, since it involves weighing potential welfare losses in one country (eg in country B, due to the limitation of import capacity from A) against potential welfare gains in another country (eg in country C, which may be able to import cheaper energy after its congestion problem has been resolved). This is even recognized by ACER in the CCR Decision, when it notes that the use of phase-shifting transformers at the Polish-German and Czech-German borders would facilitate exchanges between Germany and Austria, while the introduction of capacity allocation at the German-Austrian border would facilitate electricity exchanges elsewhere in the region.[41] The choice between these two options is no longer merely technical, it is a 'hard choice' involving a balancing of interests which – as the discussions in Austria show – clearly has a political dimension. From a political point of view, the question may be asked whether ACER, whose Board of Regulators is composed of representatives of the NRAs,[42] which in turn are independent of their national governments,[43] has sufficient accountability to be entrusted with such a task. Legally, it translates into the question whether the discretion exercised by ACER is sufficiently circumscribed so as to meet the criteria for lawful delegation set out by the *ESMA* judgment.

IV. Limitations to the Exercise of Delegated Powers

If powers have legitimately been delegated to an agency, primary law nonetheless imposes constraints on the agency's exercise of that power. Whilst the notion that law which occupies a higher rank in the hierarchy of norms also determines the content of new, inferior law is straightforward, this apparent clarity is obscured by the fact that not all superior norms may be intended to determine secondary law-making. This problem is not specific to the EU legal order, but commonly occurs in legal systems. It is due to the fact that law which is passed in constitutional form often also contains provisions which are not constitutional in substance, ie provisions which do not relate to how the State or organisation is governed. In the EU, this is illustrated in particular by the Treaty rules on the fundamental freedoms, which are primarily directed at Member States, and on competition, which are primarily directed at individuals. The question therefore arises whether, and if yes to what extent, these rules also bind the EU institutions, including agencies, in the exercise of their powers.

1. Fundamental Rights, Fundamental Freedoms and Competition Law

The different degree to which different norms of primary law determine the creation of secondary law is evident when comparing the Court of Justice's review of the compliance of secondary law with fundamental rights on the one hand and with the fundamental freedoms on the other hand. The Court has recognized that it must ensure the lawfulness of all

40 Miroslava Scholten and Marloes Van Rijsbergen, 'The ESMA-Short Selling Case: Erecting a New Delegation Doctrine in the EU upon the *Meroni-Romano* Remnants' [2014] 41(4) Legal Issues of Economic Integration 389, 403 et seq.

41 ibid.

42 art 14 of Regulation 713/2009.

43 art 34(4) and (5) of Directive 2009/72/EC.

Union acts in the light of the fundamental rights forming an integral part of the EU legal order.[44] Violations of fundamental rights may thus lead to the annulment not only of individual decisions,[45] but also of acts of general application.[46] Moreover, fundamental rights also affect the division of powers between EU institutions: where measures constitute a serious interference with fundamental rights, they must be adopted by the legislature and cannot be delegated.[47]

Unlike fundamental rights, the fundamental freedoms do not explicitly bind the EU institutions. Their application to the institutions is neither evident, based on their wording, nor can it simply be inferred from the hierarchy of norms: hierarchical arguments only come into play if the competences of two law-making bodies overlap.[48] Where EU institutions have the power to adopt legal acts which may conflict with the fundamental freedoms, an obligation to respect those freedoms may however be inferred from the objectives of Article 26 TFEU, pursuant to which the Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, as well as from the general requirement under the rule of law that legal systems should be clear and free of contradiction.[49] Given the fact that the Union also pursues other objectives, which may conflict with the full realisation of the fundamental freedoms, the fundamental freedoms do not serve as strict limits to the powers of the Union institutions. Thus, whilst the CJEU has held that the fundamental freedoms also apply to measures adopted by the Union institutions,[50] the institutions are granted a broad discretion when deciding on restrictions of those freedoms.[51] The balancing of the fundamental freedoms against other Union objectives entails political, economic and social choices on the part of the Union legislature, which are only amenable to limited judicial review.[52]

Unlike in relation to fundamental rights and fundamental freedoms, the CJEU has not yet examined whether the Union institutions are also subject to the Treaty provisions on competition law. In academic writing, an obligation to respect primary competition law is sometimes inferred from the hierarchy of norms.[53] However, Articles 101 and 102 TFEU are addressed to undertakings, rather than to the Union institutions. Whilst it is true that pursuant to case law, sectoral regulation does not relieve undertakings of their obligation to comply with the Treaty provisions on competition law, as long as it leaves them any scope to do so,[54] it does not follow that the Union institutions would be precluded from enacting legislation which interferes with the competition rules. Moreover, systematic considerations clearly indicate that secondary legislation is not directly subject to Articles 101 and 102: the competition law provisions of the Treaty are enforced by the Commission, which enjoys substantial policy discretion in doing so. If the Commission's enforcement powers were applied vis-à-vis the other institutions, this might interfere with the principle of institutional balance which underlies the attribution of powers in the Treaties.[55]

As pointed out by Tridimas, the fact that the Union institutions are not directly subject to Articles 101 and 102 TFEU does not mean that they are free to undermine competition law.[56] Like the Member States, the Union is subject to the duty of sincere cooperation provided for in Article 4(3) TEU. This duty obliges Member States not to adopt measures which deprive

44 See, for example, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission et al v Kadi* [2013] ECLI:EU:C:2013:518, para 97.

45 CCR Decision, para 56.

46 See, for example, Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland*, ECLI:EU:C:2014:238.

47 Case C-355/10 *Parliament v Council*, ECLI:EU:C:2012:516, para 77; Case C-363/14 *Parliament v Council*, ECLI:EU:C:2015:579, para 53.

48 Herbert Rosenfeldt and Aike Würdemann, 'Schöpfer des Binnenmarktes im Käfig der Verträge – Die grundfreiheitliche Bindung des EU-Gesetzgebers' [2016] EuR 453, 457 et seqq; Martin Nettesheim, 'Normenhierarchien im EU-Recht' [2006] EuR 737, 738.

49 Rosenfeldt and Würdemann (n 48) 458 et seqq.

50 See, for example, Case 15/83 *Denkavit Nederland* [1984] ECLI:EU:C:1984:183, para 15; Case 37/83 *Rewe-Zentral v Landwirtschaftskammer Rheinland* [1984] ECLI:EU:C:1984:89, para 18; Case C-51/14 *Pfeifer & Langen v Bundesanstalt für Landwirtschaft und Ernährung* [2015] ECLI:EU:C:2015:380, para 37.

51 See, for example, Case C-39/90 *Denkavit Futtermittel v Land Baden-Württemberg* [1991] ECLI:EU:C:1991:267, para 26; Case C-51/93 *Meyhui v Schott Zwiesel Glaswerke* [1994] ECLI:EU:C:1994:312, para 20.

52 Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health* [2004] ECLI:EU:C:2004:848, para 52.

53 Florian Schuhmacher and Ana Feiler, 'Gebotszonengrenzen aus energierechtlicher, wettbewerbsrechtlicher und binnenmarktrechtlicher Sicht' [2016] ÖZW 22, 28.

54 Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECLI:EU:C:2010:603, para 80; Robert Klotz and Michael Hofmann, 'Reconfiguration of Electricity Bidding Zones under EU Competition Law' [2015] 3 ENLR 151, 155.

55 Tridimas (n 31) 269.

56 ibid 267 et seqq.

the competition rules of their effectiveness.[57] Given that the Union institutions also are subject to the duty of sincere cooperation, Tridimas concludes that they must also respect the principles of competition for the market and of competition in the market. This obligation however is subject to a degree of discretion commensurate with their public law responsibilities, which likely will be subject to limited judicial review based on the manifest error standard.[58]

The solution proposed by Tridimas is in line with the Court's case law regarding the fundamental freedoms. It suggests that the Union institutions would benefit from a greater margin of discretion than do the Member States. As set out above, the CJEU's case law however limits the delegation of discretionary policy choices of this type to agencies. Even if other objectives pursued by the EU's energy policy may justify an interference with the Treaty's competition rules, the balancing between the various public interests at stake therefore may not be left to ACER, but must be substantially pre-determined by the delegating institution.

2. Application to ACER

In the case of ACER, further support for the contention that it does not have a large margin of discretion to interfere with competition law can also be gleaned from its constituting document and from sectoral regulation. ACER was established by Regulation (EC) 713/2009. Pursuant to recital 18 of that Regulation, '[t]he decisions of the Board of Regulators should [...] comply with Community law concerning energy, such as the internal energy market, the environment and competition'. Furthermore, ACER is granted certain decision-making powers in areas which primarily fall within the competence of the Member States. Notably, ACER may decide on issues relating to the access to and operational security of cross-border infrastructure either upon joint request by the competent national regulatory authorities, or where these authorities failed to reach agreement within a period of six months.[59] The power to adopt Guidelines for situations in which ACER becomes competent to take such decisions however is vested in the Commission.[60] By virtue of its power to adopt Guidelines, which may amend non-essential elements of Regulation (EC) No 713/2009, the Commission is in a position to decide on the degree to which the fundamental freedoms or competition law may be interfered with in favour of other legitimate objectives of EU energy law. This also indicates that the Regulation did not intend to confer substantial discretion on ACER to disregard requirements of EU primary law.

V. Conclusion

ACER's CCR Decision illustrates the uncertainties surrounding the delegation of discretionary powers to agencies under EU law. The Court of Justice's *ESMA* judgment brought the law more in line with the reality of agencification at EU level by relaxing the previously strict requirements for lawful delegation under the *Meroni* doctrine. Following *ESMA*, it is now clear that agencies may be empowered to adopt acts of general application, as long as they do not interfere with the Commission's competence to pass delegated acts pursuant to Article 290 TFEU, and as long as they are not granted a wide measure of discretion. However, the distinction between legislative and executive rule-making remains difficult, as measures which involve technical detail are by no means immune from political controversy. ACER's decision to split the German-Austrian bidding zone, which involved a balancing of interests between welfare gains and losses in several Member States, and received substantial media coverage, serves as a reminder of this fact.

Like the limitations to the delegation of powers, the limitations to the exercise of such powers by agencies are not addressed by the Treaties. Whilst it is evident that agencies are required to respect fundamental rights, the provisions relating to the fundamental freedoms and to competition law are not directly addressed to EU institutions. Indeed, the Union may pursue other policies which sometimes clash with the full realisation of the fundamental freedoms or of the competition rules. These rules can therefore not serve as strict limits to the powers of the Union institutions. Nonetheless, the Court of Justice has

57 See, for example, Case 13/77 *INNO v ATAB* [1977] ECLI:EU:C:1977:185, para 31; Case C-198/01 *CIF v Autorità Garante della Concorrenza e del Mercato* [2003] ECLI:EU:C:2003:430, para 45.

58 Tridimas (n 31) 270 and 274.

59 art 8(1) Regulation (EC) No 713/2009.

60 art 8(4) Regulation (EC) No 713/2009.

long held that fundamental freedoms apply to measures adopted by the institutions, which however have a broad discretion when weighing these freedoms against other legitimate policy objectives. Although the Court has not yet ruled on the application of competition law to action by EU institutions, a similar solution to that adopted in relation to the fundamental freedoms would appear to follow from the Union's duty of sincere cooperation under Article 4(3) TEU. Given that a balancing exercise between the principles of undistorted competition and other policy objectives almost inevitably involves substantial discretion, decisions interfering with the principles of competition law may however not be left to an agency such as ACER, but must be substantially pre-determined by the delegating institution.