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**Report on the annual accounts of the
European Union
Agency for the Cooperation of Energy
Regulators (ACER)
for the financial year 2019,**

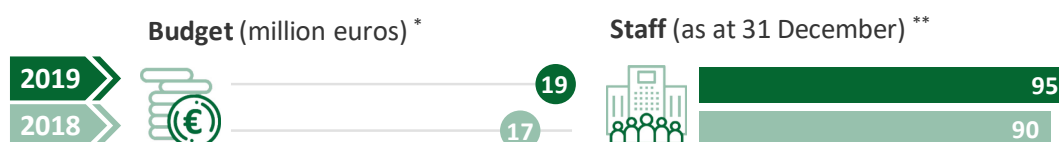
together with the Agency's reply

Introduction

01 The European Union Agency for the Cooperation of Energy Regulators (“the Agency”, or “ACER”), which is located in Ljubljana, was created by Regulation (EC) No 713/2009 of the European Parliament and of the Council¹. The Agency's main task is to assist National Regulatory Authorities in exercising, at Union level, the regulatory tasks that they perform in the Member States and, where necessary, to coordinate their action. Under the REMIT regulation², the Agency was given additional responsibilities, together with national regulatory authorities, regarding the monitoring of the European wholesale energy market.

02 *Graph 1* presents key figures for the Agency³.

Graph 1: Key figures for the Agency



* Budget figures are based on the total payment appropriations available during the financial year.

** “Staff” includes EU officials, EU temporary agents, EU contract staff and seconded national experts, but excludes interim workers and consultants.

Source: Consolidated annual accounts of the European Union for the financial year 2018 and Provisional consolidated annual accounts of the European Union Financial year 2019; Staff figures provided by the Agency.

Information in support of the statement of assurance

03 The audit approach taken by the Court comprises analytical audit procedures, direct testing of transactions and an assessment of key controls of the Agency’s supervisory and control systems. This is supplemented by evidence provided by the

¹ OJ L 211, 14.8.2009, p. 1.

² Regulation No 1227/2011 of the European Parliament and of the Council (OJ L 326, 8.12.2011, p. 1), which assigns an important role to the Agency in supervising trading in wholesale energy markets across Europe.

³ More information on the Agency’s competences and activities is available on its website: www.acer.europa.eu.

work of other auditors and an analysis of information provided by the Agency's management.

The Court's statement of assurance provided to the European Parliament and the Council – Independent auditor's report

Opinion

04 We have audited:

- (a) the accounts of the Agency which comprise the financial statements⁴ and the reports on the implementation of the budget⁵ for the financial year ended 31 December 2019 and
 - (b) the legality and regularity of the transactions underlying those accounts,
- as required by Article 287 of the Treaty on the Functioning of the European Union (TFEU).

Reliability of the accounts

Opinion on the reliability of the accounts

05 In our opinion, the accounts of the Agency for the year ended 31 December 2019 present fairly, in all material respects, the financial position of the Agency at 31 December 2019, the results of its operations, its cash flows, and the changes in net assets for the year then ended, in accordance with its Financial Regulation and with accounting rules adopted by the Commission's accounting officer. These are based on internationally accepted accounting standards for the public sector.

⁴ The financial statements comprise the balance sheet, the statement of financial performance, the cash flow statement, the statement of changes in net assets and a summary of significant accounting policies and other explanatory notes.

⁵ The reports on implementation of the budget comprise the reports which aggregate all budgetary operations and the explanatory notes.

Legality and regularity of the transactions underlying the accounts

Revenue

Opinion on the legality and regularity of revenue underlying the accounts

06 In our opinion, revenue underlying the accounts for the year ended 31 December 2019 is legal and regular in all material respects.

Payments

Basis for a qualified opinion on the legality and regularity of the payments underlying the accounts

07 In 2018, the Agency signed a framework contract in cascade, in two lots, for a maximum amount of 25 million euros and with a maximum duration of 8 years. Lot 1 was for the provision of IT system integration services. Lot 2 was for IT consultancy. We audited two payments under these contracts, with a total value of 160 699 euros. The costs of items audited under specific contract 3 in lot 1, were not in fact covered by the competitive procurement procedure. In other words, they were not covered by the price lists of the bids submitted for the contract. Within the framework contract, the effect of this was particularly evident in lot 1, where payments for items not covered by the competitive procedure amounted to 61,3 % of all payments made under the lot. In such cases, the Agency is required under the Financial Regulation to re-open the competition and conclude a specific contract. In this case, it failed to do so. The specific contracts under lot 1 of the FWC that were concluded so far are therefore irregular. Irregular payments for items not covered by the price lists under lot 1 of the framework contract in 2019 amounted to 975 708 euros.

08 The Agency signed a framework contract for the operation of its data centre through a negotiated procedure, without a contract notice having been published beforehand. No reasonable explanations were given for using a negotiated procedure, and there was no legal requirement to use the specific contractor that was awarded the contract. ACER did not carry out a competitive procurement procedure before signing the direct contract, nor did it carry out any market research. We therefore conclude that the procedure was not in compliance with the Financial Regulation, and was thus irregular. Payments made under this contract in 2019 amounted to 12 430 euros.

09 The total amount paid out irregularly by ACER in 2019 was 988 138 euros. This represents 6,3 % of all payments made by ACER in 2019. These irregular amounts exceed the materiality threshold set for this audit.

Qualified opinion on the legality and regularity of payments underlying the accounts

10 In our opinion, except for the issues explained in the “Basis for a qualified opinion on the legality and regularity of payments” paragraph, payments underlying the accounts for the year ended 31 December 2019 are legal and regular in all material respects.

Basis for opinions

11 We conducted our audit in accordance with the IFAC International Standards on Auditing (ISAs) and Codes of Ethics and the INTOSAI International Standards of Supreme Audit Institutions (ISSAIs). Our responsibilities under those standards are further described in the 'Auditor's responsibilities' section of our report. We are independent, in accordance with the Code of Ethics for Professional Accountants issued by the International Ethics Standards Board for Accountants (IESBA Code) and with the ethical requirements that are relevant to our audit, and we have fulfilled our other ethical responsibilities in accordance with these requirements and the IESBA Code. We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our opinion.

Responsibilities of management and those charged with governance

12 In accordance with Articles 310 to 325 of the TFEU and the Agency's Financial Regulation, management is responsible for preparing and presenting the Agency's accounts on the basis of internationally accepted accounting standards for the public sector, and for the legality and regularity of the transactions underlying them. This includes the design, implementation and maintenance of internal controls relevant to the preparation and presentation of financial statements that are free from material misstatement, whether due to fraud or error. The Agency's management is also responsible for ensuring that the activities, financial transactions and information reflected in the financial statements comply with the official requirements which govern those statements. The Agency's management bears the ultimate responsibility for the legality and regularity of the transactions underlying the Agency's accounts.

13 In preparing the accounts, the Agency's management is responsible for assessing the Agency's ability to continue as a going concern. It must disclose, as applicable, any matters affecting the Agency's status as a going concern, and use the going concern basis of accounting, unless management either intends to liquidate the entity or to cease operations, or has no realistic alternative but to do so.

14 Those charged with governance are responsible for overseeing the Agency's financial reporting process.

The auditor's responsibilities for the audit of the accounts and underlying transactions

15 Our objectives are to obtain reasonable assurance about whether the accounts of the Agency are free from material misstatement and the transactions underlying them are legal and regular, and to provide, on the basis of our audit, the European Parliament and the Council or the other respective discharge authorities with statements of assurance as to the reliability of the Agency's accounts and the legality and regularity of the transactions underlying them. Reasonable assurance is a high level of assurance, but is not a guarantee that an audit will always detect a material misstatement or non-compliance when it exists. These can arise from fraud or error and are considered material if, individually or in the aggregate, they could reasonably be expected to influence the economic decisions of users taken on the basis of these accounts.

16 For revenue, we verify subsidies received from the Commission or cooperating countries and assess the Agency's procedures for collecting fees and other income, if any.

17 For expenditure, we examine payment transactions when expenditure has been incurred, recorded and accepted. This examination covers all categories of payments (including those made for the purchase of assets) other than advances at the point they are made. Advance payments are examined when the recipient of funds provides justification for their proper use and the Agency accepts the justification by clearing the advance payment, whether in the same year or later.

18 In accordance with the ISAs and ISSAIs, we exercise our professional judgement and maintain professional scepticism throughout the audit. We also:

- Identify and assess the risks of material misstatement of the accounts and of material non-compliance of the underlying transactions with the requirements of the legal framework of the European Union, whether due to

fraud or error, design and perform audit procedures responsive to those risks, and obtain audit evidence that is sufficient and appropriate to provide a basis for our opinions. The risk of not detecting a material misstatement or non-compliance resulting from fraud is higher than for one resulting from error, as fraud may involve collusion, forgery, intentional omissions, misrepresentations, or the overriding of internal controls.

- Obtain an understanding of internal controls relevant to the audit in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the internal controls.
- Evaluate the appropriateness of the accounting policies used and the reasonableness of accounting estimates and related disclosures made by management.
- Conclude on the appropriateness of management's use of the going concern basis of accounting and, based on the audit evidence obtained, whether a material uncertainty exists related to events or conditions that may cast significant doubt on the Agency's ability to continue as a going concern. If we conclude that a material uncertainty exists, we are required to draw attention in our auditor's report to the related disclosures in the accounts or, if such disclosures are inadequate, to modify our opinion. Our conclusions are based on the audit evidence obtained up to the date of our auditor's report. However, future events or conditions may cause an entity to cease to continue as a going concern.
- Evaluate the overall presentation, structure and content of the accounts, including the disclosures, and whether the accounts represent the underlying transactions and events in a manner that achieves fair presentation.
- Obtain sufficient appropriate audit evidence regarding the financial information of the Agency to express an opinion on the accounts and transactions underlying them. We are responsible for the direction, supervision and performance of the audit. We remain solely responsible for our audit opinion.
- Considered the audit work of the independent external auditor performed on the Agency's accounts as stipulated in Article 70(6) of the EU Financial Regulation, where applicable.

We communicate with the management regarding, among other matters, the planned scope and timing of the audit and significant audit findings, including any significant deficiencies in internal controls that we identify during our audit. From the matters on which we communicated with the Agency, we determine those matters that were of most significance in the audit of the accounts of the current period and are therefore the key audit matters. We describe these matters in our

auditor's report unless law or regulation precludes public disclosure about the matter or when, in extremely rare circumstances, we determine that a matter should not be communicated in our report because the adverse consequences of doing so would reasonably be expected to outweigh the public interest benefits of such communication.

19 The observations which follow do not call the Court's opinion into question.

Observations on the legality and regularity of transactions

20 We audited recruitment procedures at ACER, and found various weaknesses which affected the candidate evaluation process. In one case, candidates had been assigned a score based on their merits, and this score had been recorded in a table, but a mathematical error had been made in calculating the total number of points assigned to each candidate. Some candidates were not assessed by one of the members of the selection committee, even though they should have been. Also, the Director of the Agency had issued a decision concerning the number of candidates invited to attend interviews and a written test. But this decision was not applied by the selection committee. As a result of these errors, 3 of the 16 candidates should not have been invited to interview, but were invited anyway. A further candidate should have been invited, but was not. Finally, the candidate who was recruited following the procedure did not fulfil the minimum eligibility requirements as set out in the Director's decision. We therefore conclude that the selection procedure was irregular, and that ACER did not comply with the principle of equal treatment and failed to apply effective internal controls. This may expose ACER to high reputational and financial risks, especially if unsuccessful candidates lodge appeals or start legal actions.

Observations on budgetary management

21 ACER signed a framework contract with a temporary-work agency for the use of temporary-agency workers, or interim workers. In 2019, ACER had 20 interim workers in addition to 92 directly employed staff members. Interim workers can be used to perform specific tasks for a temporary period. We found evidence to suggest that the Agency had been using interim workers to make up for shortages in directly employed staff members. All but one of the interim workers working at ACER were performing long-term tasks, such as secretarial work and office management. ACER should rely less on interim workers and should make sure that permanent ongoing tasks are performed by directly employed members of staff.

22 The Agency has had high levels carry-overs for several years; however, there have been slight improvements on the overall rate since 2018. In 2019, carry-overs of committed appropriations were high for two budget titles: Title II (building and associated costs) and Title III (operating expenditure). For Title II, carry-overs were 0,8 million euros or 31 % of the total amount of the Title (0,9 million euros or 35 % in 2018). For Title III, carry-overs were 1,9 million euros or 46 % (1,5 million euros, or 68 % in 2018). The carry-overs are mainly accounted for by IT hardware and consultancy services. They are also partially explained by the nature of the Agency's core activities: these include the maintenance, operation, support and development of the REMIT IT systems, tasks which span several months and can extend beyond the end of the year. However, a significant part (25 %) of Title II carry-overs to 2020 were committed in December 2019; this was only partially justified. This is indicative of a structural issue. To resolve it, the Agency should further improve its budget planning and its implementation cycles.

Observations on internal controls

23 ACER did not comply with internal control principle 12 of its own internal control framework, under which the Agency must record deviations from the rules and procedures in its register of exceptions. In our audit, we identified some deviations from established procedures that should have been recorded (e.g. invitation to an interview of more candidates than the established maximum number in the Director's decision). However, the register of exceptions had not been filled in. This undermines the transparency and the effectiveness of the Agency's internal control systems.

Follow-up of previous years' observations

24 An overview of the action taken in response to the Court's observations from previous years is provided in the **Annex**.

This Report was adopted by Chamber IV, headed by Mr Alex Brenninkmeijer, Member of the Court of Auditors, in Luxembourg on 22 September 2020.

For the Court of Auditors

A handwritten signature in black ink, appearing to read 'k-H se', written in a cursive style.

Klaus-Heiner Lehne

President

Annex - Follow-up of previous years' observations

Year	Court's observations	Action taken to respond to Court's observations (Completed / Ongoing / Outstanding / N/A)
2016	The Agency may consider introducing differentiated budget appropriations to better reflect the multiannual nature of operations.	Ongoing
2017	The Agency's disaster data recovery site is located at the same place as the original data.	Ongoing
2017	The Agency publishes vacancy notices on its own website and on social media, but usually not on the website of the European Personnel Selection Office (EPSO).	Completed
2017	E-procurement: by the end of 2017, the Agency had not yet introduced any of the IT tools developed by the Commission.	Ongoing

The Agency's reply

07. The Agency acknowledges the higher usage of goods/services from 'out of price list' under Lot 1 of this EUR 20m value contract and would like to bring to the attention the fact that the nature of the services under both contracts does not enable an all-inclusive list of services and products. This especially when services such as, system integrator, depend on the technical solution offered by the contractor. The Agency included in the tender specifications the option for out of price list services and products, to be able to cover the full scope required. The out of price list services and products are used to complement the main services, where needed, and to ensure that the full scope can actually be delivered. Before accepting the offers from the supplier, the Agency performed market researches to ensure that the prices of the goods/services offered were aligned to the market and the Agency was not overcharged, even though this research was not formally documented.

The Agency already introduced a formal step in its procurement workflow in order to ensure that whenever it makes use of 'out of price list' the market researches performed for the specific contracts are thoroughly documented in a note to the file.

In order to increase the competition in the forthcoming procurement procedures, the Agency will strive to include more detailed list of services and products in the tender specifications and will limit the use of "out of price list" orders.

08. In July 2013, the Agency concluded a rental contract that included, as a part of the fitting-out, also constructing and equipping a Data Centre. The Agency concluded in 2015 a contract with the same service provider for the regular maintenance of this Data Centre.

Considering these and also taking into account the preference of the landlord to have only one contractor performing electrical and telecommunication works in the building for all its tenants, the Agency contracted the same provider for the regular maintenance of its Data Centre also in 2019.

The Agency did not analyse other possibilities that the market offers in the area of maintenance of the Data Centre.

As a mitigating measure, the Agency is pro-actively looking into the possibility to terminate the current contract and launch a middle value negotiated procurement procedure in the course of 2020.

20. The Agency acknowledges the clerical mistakes, which occurred in the audited procedure. The Agency recorded the non-compliance in its register of procedural incidents, will report it in the Consolidated Annual Activity Report for 2020 and already took measures to prevent such incidents in the future (by reinforcing the HRM team; organising information session on the rules of procedures; revising the current rules and procedures).

The Selection Committee invited more than eight candidates to the written examination and the oral interview mostly due to the low participation rate of invited candidates in past procedures.

Considering that the acceptance rate of job offers varies between 50 and 100% and that the reserve lists are often intended for the recruitment of several candidates and are renewed for several years in a row, it is often more cost efficient to invite more than eight applicants to the interview stage to have a reserve list with high quality candidates that will not be exhausted immediately. The Agency agrees that such decisions should be documented in advance.

21. The Agency has taken full consideration of the requirements stated in the European and Slovenian legislation, related to temporary agency workers (interim workers).

Given the budgetary constraints, the Agency considers that the tasks related to FG II contract staff could be performed by interim staff, as per the nature of profiles set in the Agency's framework contract.

The Agency acknowledged that temporary agency workers should not be assigned if the user undertaking (in this case the Agency) has a permanent need for a specific job position. The Slovenian legal regulations offer no interpretation what is to be considered as "temporary" assignment. The Ministry of Labour and the Labour Inspectorate of Slovenia provided only opinion and certain flexibility in the interpretation of some aspects of the legislation.

As a general approach, at the time of availing itself of temporary agency workers, the Agency always considers the temporary nature of the assignments.

22. The Agency notes that in line with Art.12 (6) of ACER Financial Regulation, carry forward, is a legitimate way to implement the budget and to apply budget principles. The Agency also points out that its level of carry forwards, being 18,15% of the overall 2019 budget, represents the

strong commitment of the Agency to bring down the level of carry forward in comparison to the previous years.

The fact that the Agency's budget has been underfunded during the past years, is negatively affecting its overall planning. To that effect, planned purchases have to be postponed due to the lack of funding and are awaiting savings from other areas of operation. After the last budget review of the year, the Agency managed to bundle in a transfer the necessary funds to cover the needs of additional IT equipment and consultancy that were on hold during the year. Given the short period until year-end, the goods/services ordered could no longer be delivered nor paid in 2019, therefore the related open commitment balances were carried forward into 2020.

23. When a deviation from established processes and procedures takes place without prior authorisation given by the Agency, a procedural incident occurs. In such cases, justifying, analysing and documenting the event and the circumstances triggering it occur ex-post and aims at identifying appropriate measures to be taken in order to avoid similar cases from occurring in the future.

The Agency has registered the procedural incident identified by the Court early in 2020, after all the analysis of facts and remedies have been carried out and shared with the new Director, who took office on 1 January 2020.

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