Publishing date: 02/06/2016

Document title: ACER Recommendation 01-2016

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RECOMMENDATION OF THE AGENCY FOR THE COOPERATION OF ENERGY REGULATORS No 01/2016
of 30 May 2016

ON ENSURING THE INDEPENDENCE OF THE AGENCY FOR THE COOPERATION OF ENERGY REGULATORS AND OF NATIONAL REGULATORY AUTHORITIES

THE AGENCY FOR THE COOPERATION OF ENERGY REGULATORS,

HAVING REGARD to Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators\(^1\), and, in particular, Articles 1(2), 4(c), 5 and 17(3) thereof,


HAVING REGARD to the favourable opinion of the Board of Regulators of 26 May 2016, delivered pursuant to Article 15(1) of Regulation (EC) No 713/2009,

WHEREAS:

(a) In accordance with Article 35 of Directive 2009/72/EC and Article 39 of Directive 2009/73/EC, Member States are required to designate National Regulatory Authorities ("NRAs"), to guarantee the independence of those NRAs and to ensure that they exercise their powers impartially and transparently. In particular, Member States must ensure that NRAs can take autonomous decisions, independently of any political body, and have separate annual budget allocations, autonomy in how the budgets are implemented and adequate human and financial resources to carry out their duties.

(b) Article 37 of Directive 2009/72/EC and Article 41 of Directive 2009/73/EC set down the specific duties and powers that NRAs are required to have. Member States shall ensure that NRAs are granted the powers enabling them to carry out those duties.

(c) According to Article 1(2) of Regulation (EC) No 713/2009, the purpose of the Agency for the Cooperation of Energy Regulators (hereafter referred to as the "Agency") is to assist the NRAs in exercising, at European Union level, the regulatory tasks performed in the Member States and, where necessary, to coordinate their action.

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\(^3\) OJ L 211, 14.8.2009, p.94.
(d) The provisions in Directives 2009/72/EC and 2009/73/EC and Regulation (EC) No 713/2009 assign a dual role to NRAs:

i. to carry out regulatory tasks at Member State level, including the implementation of European Union energy legislation. In carrying out such tasks, the NRAs must closely consult and cooperate with each other and with the Agency; and

ii. to participate in the Agency (through the Board of Regulators (“BoR”)) when exercising their functions at Union level. This participation is essential to the Agency carrying out its own functions and helps to safeguard the effective execution of regulatory tasks at European level.

(e) The above Directives also set out a European mandate for the NRAs to promote - in close cooperation with the Agency, the NRAs of the other Member States and the European Commission - a competitive, secure and environmentally sustainable internal market for electricity and for gas within the Union.

(f) It is important that, in exercising their powers and carrying out their duties, NRAs adhere to the principles of better regulation including effective consultation, transparency and accountability.

(g) Under the Third Energy Package⁴, there are important checks and balances applying to both the Agency and NRAs, designed to guarantee their accountability, transparency and independence in undertaking their respective mandates in the public interest. As the regulatory framework of the Internal Energy Market (“IEM”) evolves, it is important that these checks and balances are preserved and, where appropriate, reinforced.

(h) Recital 6 of Regulation (EC) No 713/2009 stipulates the Agency should ensure that regulatory functions performed by NRAs in accordance with Directive 2009/72/EC and Directive 2009/73/EC are properly coordinated and, where necessary, completed at the Union level. To that end, it is necessary to guarantee the independence of the Agency from electricity and gas producers, transmission and distribution system operators, whether public or private, and consumers.

(i) Recital 16 of the Regulation (EC) No 713/2009 specifies that the structure of the Agency should be adapted to meet the specific needs of energy regulation. In particular, the specific role of NRAs needs to be taken fully into account and their independence guaranteed.

(j) Recital 18 of Regulation (EC) No 713/2009 stipulates that the Agency should have the necessary powers to perform its regulatory functions in an efficient, transparent, reasoned and, above all, independent manner. The independence of the Agency is not only a key principle for good governance, but also a fundamental condition to ensure market confidence. Regulation (EC) No 713/2009 contains specific provisions guaranteeing the independence of the Agency’s bodies. In particular:

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a. with regard to the Administrative Board, Article 12(7) requires its members “to act independently and objectively in the public interest, without seeking or following any political instructions”;

b. with regard to the BoR, Article 14(5) specifies that “without prejudice to its members acting on behalf of their respective regulatory authority, the Board of Regulators shall act independently and shall not seek or follow instructions from any government of a Member State, from the Commission, or from another public or private entity”;

c. with regard to the Director, Article 15(1) specifies that “without prejudice to the respective roles of the Administrative Board and the Board of Regulators in relation to the tasks of the Director, the Director shall neither seek nor follow any instruction from any government, from the Commission, or from any other public or private entity”;

d. with regard to the Board of Appeal, Article 18(7) requires its members “to act independently and in the public interest”.

(k) The European Commission’s Communication on the Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy\(^5\) stipulated that full implementation and strict enforcement of existing energy and related legislation is the first priority to establish the Energy Union. The Commission intends to use all available policy instruments in this regard and will insist that Member States fully implement and enforce the Third Energy Package, in particular as regards unbundling and the independence of regulators. The above-mentioned Communication also states that the EU-wide regulation of the single market should be strengthened, through a significant reinforcement of the powers and independence of the Agency to carry out regulatory functions at the European level in order to enable it effectively to oversee the development of the internal energy market and the related market rules as well as to deal with all cross-border issues necessary to create a seamless internal energy market.

(l) The European Commission’s Communication launching the public consultation process on a new energy market design\(^6\) stipulated that, in line with the increased cooperation of System Operators, the powers and independence of the Agency may need to be reinforced so that it is able to carry out regulatory functions at European level, where needed.

(m) The legislative proposals of the European Commission on the new energy market design will, it is understood, address, *inter alia*, governance arrangements at European Union level and, in particular, the future role and powers of the Agency. The Agency provided views on its future role in response to the European Commission’s consultation on the new energy market design\(^7\) and, earlier, in the Conclusion Paper of its “Energy Regulation: the Bridge to 2025” initiative\(^8\). In that Conclusion Paper,

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\(^7\) Joint ACER-CEER response to the European Commission’s Consultation on a new Energy Market Design of 07 October 2015.

\(^8\) ACER Recommendation No 05/2014 of 19 September 2014 on the Regulatory Response to the Future Challenges Emerging from Developments in the Internal Energy Market.
the Agency committed to develop specific mechanisms further to enhance cooperation with and between NRAs.

(n) The current regulatory model for energy in the European Union is based on close complementarity of regulation at national and European level. However, as the IEM becomes more integrated, the future regulatory model will have even more to rely on stronger collaboration between NRAs and the Agency. It is, thus, important that all NRAs participate in the Agency’s BoR and contribute to the work of the Agency according to the established working methods (e.g. Agency’s Working Groups and their substructures). It is, therefore, essential that budget and resource constraints do not inhibit or restrict the involvement of all NRAs in the Agency’s work and the work of the Agency itself. In fact, the effectiveness and credibility of regulatory action at European Union level crucially depend on NRAs having the appropriate independence and resources to cooperate within the Agency and on the Agency itself having adequate resources to perform its functions in an efficient, transparent, reasoned and, above all, independent manner.

(o) Recital 20 of Regulation (EC) No 713/2009 provides that the resources that were then pooled by NRAs for their cooperation at Community level should continue to be available to the Agency. The Agency consulted NRAs to estimate the number of NRAs’ staff involved in Agency-related activities. Results from that exercise\(^9\) show that, overall, NRAs’ contribution to the Agency’s work exceeds 200 Full-Time Equivalent (FTE), but also that the ability to contribute to the work of the Agency varies significantly across NRAs. This is due to the fact that many NRAs are faced with important resource constraints. Where NRAs are constrained in terms of resources their ability to contribute effectively to the work of the Agency is impeded.

(p) In producing the present Recommendation, the Agency reviewed the European Commission’s Interpretative Note\(^10\) and also analysed relevant studies from other organisations, notably relating to independence of regulators. The Special Report No 16/2015 of the European Court of Auditors (ECA), ‘Improving the Security of Energy Supply by Developing the Internal Energy Market: More Efforts Needed’\(^11\), was also considered. That report placed particular emphasis on the NRAs being independent and having sufficient resources to fulfil their duties and to participate fully in the Agency and cooperate at EU level. The report indicates that, although the duties of the NRAs are the same across Member States, the level of resources available to different NRAs varies considerably (the number of staff dealing with energy issues in the eleven NRAs included in the ECA’s analysis ranged from 21 to more than 200) and that not all NRAs have resources available to them which are commensurate with the tasks they need to undertake.

(q) Since its establishment, the Agency has been assigned additional responsibilities – most notably in the areas of wholesale energy market monitoring and of energy

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\(^9\) Taking stock of the regulators’ human resources: Summary of findings.


\(^11\) Special report of Court of Auditors: “Improving the Security of Energy Supply by Developing the Internal Energy Market: more efforts needed” which recommends that: “The Member States should make sure that NRAs are independent and do not face restrictions to the scope of their role. The NRAs should have sufficient resources available for their activities, including allowing them to participate fully in EU-level cooperation activities”.

network development planning, including the process for the selection of projects of common interest – without its resources being adequately reinforced to fulfil such an enlarged mandate.

Article 21 of Regulation (EC) No 713/2009 provides the possibility for the Agency to be financed through fees, which is however limited to specific activities referred to in Article 22. However, at present, fees for the activities referred to in Article 22 of Regulation (EC) No 713/2009 have not been set and the Agency is fully funded from the EU Budget. Partial funding by fees would provide more flexibility for the Agency to mobilise the necessary resources to fulfil its legislative mandate, without burdening the already stretched EU budget. Cost-reflective fees for some more stable resource-intensive activities of the Agency, including some services it provides under Regulation (EU) No 1227/2011¹² such as the registration of Registered Reporting Mechanisms (RRMs), would provide appropriate signals and incentives to promote efficient behaviour by market participants and stakeholders. Other European Union Agencies, including the European Securities and Markets Authority, are already partly financed by fees.

The effectiveness and credibility of regulatory action at European Union level is not, therefore, only crucially dependent on NRAs having the appropriate independence and resources to cooperate within the Agency itself, but also relies on the Agency having adequate resources to perform its functions in an efficient, transparent, reasoned and, above all, independent manner.

IHEREBY RECOMMENDS the following measures in order to reinforce the independence of the Agency and of NRAs. Such measures could be implemented by way of amendments to existing legislation and by updating the European Commission’s Interpretative Note¹³:

1) Adequate resourcing of the Agency to safeguard its independence

The Agency calls on the European Commission and the EU Budgetary Authorities to ensure that it is properly funded and staffed, so as to be able effectively to fulfil its legislative mandate in an independent manner.

Moreover, the Agency recommends that the European Commission set the fees for those activities referred to in Article 22 of Regulation (EC) No 713/2009. However, as the volume of these activities varies significantly from year to year and may be minimal for several years, the Agency would find it difficult to budget the acquisition of long-term resource on the basis of these fees alone.

Therefore, the introduction of cost-reflective fees should also be considered for some more stable resource-intensive activities of the Agency, including some services it provides under Regulation (EU) No 1227/2011. More specifically, the Agency recommends that fees be introduced for the registration of RRMIs.

2) NRAs' legal independence: the full implementation of and compliance with existing legislation must be ensured

The Agency notes that the Third Energy Package contains key requirements that, if fully and effectively implemented and complied with, should secure the independence of NRAs. Member States shall fully transpose and comply with these provisions, in particular with respect to NRAs' powers, their independence in the fulfilment of their tasks. The Agency encourages the European Commission to continue actively to monitor the implementation of the requirements of the Third Energy Package and, where required, to take firm action to ensure compliance with its provisions.

3) NRAs’ institutional independence

The respective roles of Member States and of NRAs must be clearly defined. Therefore, the Agency recommends that:

i. the respective roles of the Member State and of the NRA be clearly and accurately defined;

ii. where EU legislation refers to Member States having functions and responsibilities, it clearly be stated which of them could be expressly delegated to the NRA or to another competent body (for example, responsibility for administering RES support schemes). Any such power of delegation can only be exercised without prejudice to the independence of the NRAs. Similarly, where a NRA is given responsibilities in other sectors, Member States must ensure that the independence of the NRA in respect of its responsibilities related to energy regulation is protected. This should include measures to safeguard the budget allocation for energy regulatory tasks (possibly including the ring fencing of the relevant budget allocation); provisions to ensure that staff carrying out energy regulatory tasks remain independent and that any potential conflicts of interests is avoided. Personnel should only be shared across the different tasks where the same level of independence requirements apply or other robust measures are applied to ensure the independence of staff carrying out energy regulatory tasks.

Moreover, Regulation (EC) No 713/2009 Article 14(1) should be amended to clarify that it is only the respective NRA that has the power to nominate both its member and its alternate to the BoR, for the formal appointment by the Administrative Board.

4) NRAs accountability to national parliaments

The Third Energy Package includes many requirements on the accountability of NRAs, including the requirements that they exercise their powers transparently, report annually on their activities, are legally responsible for their decisions with the possibility for legal actions against them. The Agency recommends that the principle that NRAs are institutionally accountable to their national parliaments – as opposed to their governments – be enshrined in legislation. It is, therefore, recommended that appropriate changes be introduced in Article 35(4) or 35(5) of Directive 2009/72/EC and in Article 39(4) or 39(5) of Directive 2009/73/EC to make this explicit.
In addition, it is recommended that appropriate changes be introduced to Article 37 of Directive 2009/72/EC and Article 41 of Directive 2009/73/EC to reflect in legislation the current best practices of NRAs on consumers and stakeholders consultation.

5) Delegation of monitoring tasks to third parties

Article 37(2) of Directive 2009/72/EC and Article 41(2) of Directive 2009/73/EC enable Member States to provide for monitoring duties of the NRAs to be carried out by authorities other than the NRAs themselves. Where that power is exercised, the information provided from that monitoring shall be made available to the NRA as soon as possible. Recognising the critical nature of the monitoring task, it is of central importance that such data be robust and gathered in an independent way. Therefore, the Agency recommends that:

i. where Member States use the power to require other authorities to carry out the monitoring duties (instead of their NRA), they must ensure that the monitoring is done in such a way as to ensure the same level of independence as would be the case if the monitoring had been carried out by the NRA itself. Such a requirement could be specified through an amendment of Articles 37(2) and 41(2) of the Directives referred to above;

ii. NRAs be able to instruct third parties to carry out the physical collection of data that are necessary for the NRA to fulfil its monitoring duties, but that the NRA remains ultimately responsible for the data and the analysis performed on it. Thus the NRA must ensure that the data that it uses is sufficiently robust and collected in a manner that safeguards its own independence. The European Commission’s Interpretative Note should be updated in this regard.

6) Operational independence: rules for nomination, appointment and dismissal of key figures

Transparency and impartiality in both the nomination and the appointment of commissioners, board members and officers in top management positions within NRAs is important to safeguard the independence of NRAs.

Member States should therefore be required to establish clear rules and procedures in respect of the nomination, appointment and dismissal for those positions. To this end, the provisions of Article 35 of Directive 2009/72/EC and of Article 39 of Directive 2009/73/EC should be amended to include explicit requirements that:

i. appointments are based on objective criteria and are made through an independent, impartial procedure that aim to ensure that:
   a. candidates have the necessary skills and experience for any relevant position in the NRA;
   b. parliamentary hearings are held and transparent criteria for the appointment are published;

ii. individuals that have been found guilty and definitively sentenced for crimes against the public interest under national law should be prohibited from being appointed to any senior position in NRAs;

iii. confidentiality obligations extend beyond the end of the mandate in the NRA;
iv. adequate conflict of interest provisions are in place for commissioners, board members and officers in top management positions, which should include proportionate employment restrictions during a predefined period following the end of their mandate in the NRA. Different provisions could apply to commissioners, board members and officers in top management positions, to reflect their respective roles and responsibilities within the NRA;

v. transparent criteria govern the dismissal of commissioners, board members and officers in top management positions within NRAs before the end of their mandate.

7) NRAs’ financial independence and adequate resourcing

The Agency notes that a number of NRAs suffer severely from limited human and financial resources. This has serious implications for the ability of NRAs to fulfil their tasks independently. Resource constraints also impact heavily on NRAs’ ability to play an active part in the cooperation at EU level that is a necessary part of their powers and duties, and in their ability to contribute to the Agency’s work. Those duties and responsibilities have steadily increased as a result of new legislation (e.g. REMIT) whilst resources and budgets remain static, or in some cases are being reduced. The Agency, therefore, recommends that:

i. Article 35(5) of Directive 2009/72/EC and Article 39(5) of Directive 2009/73/EC be revised to enshrine the following key principles:
   a. the budget of the NRA shall take due account of the tasks assigned to it;
   b. the NRA shall be responsible for proposing its budget;
   c. an executive body (including the Government) shall not be allowed, directly or indirectly, to set requirements that could jeopardise the NRA’s budgetary autonomy and ability to fulfil its tasks;
   d. budgetary autonomy does not preclude parliamentary supervision. As stated in the Third Energy Package, approval of the NRA’s budget by the national legislator (where this complies with the national budgetary law and rules) does not constitute an obstacle to budgetary autonomy. However, any legal provision on the NRA budget to be approved by any other body (including the Government) could jeopardise the NRAs’ budgetary autonomy. Thus, the budget could, where appropriate, be presented by the NRAs directly to the national parliament for the final decision.
   e. NRAs’ annual budget should be safeguarded specifically in respect of the tasks associated with their responsibilities of regulating national markets and their EU obligations in order to ensure that the human and financial resources are adequate to carry out those tasks with autonomy.

ii. the following provisions be clarified by amendments to the Commission’s Interpretative Note:
   a. the responsibility of Member States to ensure that their NRAs have adequate human and financial resources to carry out their duties should explicitly cover the NRAs’ duties actively to participate in EU-level work and in the Agency;
   b. where any NRA has additional roles (for example non-regulatory energy tasks or separate responsibilities in other sectors or markets), the budget in respect of their energy regulatory tasks must be safeguarded (which could include ring
fencing the relevant budget allocation); to ensure that its other roles do not affect its ability independently to fulfil its energy regulatory tasks.

8) NRAs’ duty to cooperate at Community level through the Agency’s Board of Regulators

The future regulatory model will rely still more on stronger collaboration between NRAs and with the Agency and it is, thus, important that all NRAs participate at least in the Agency’s BoR and contribute to the work of the Agency according to the established working methods. Therefore, it is proposed that a general provision is included in legislation requiring NRAs to cooperate at Union level within the Agency and that, as a minimum, all NRAs regularly participate in the meetings of the BoR.

This Recommendation is addressed to the European Parliament, the Council and the European Commission.

Done at Ljubljana on 30 May 2016.

For the Agency:

Alberto Pototschnig
Director
Document title: ACER Recommendation 01-2016
Publishing date: 02/06/2016

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