



# **Assessing the independence and effectiveness of National Regulatory Authorities in the field of energy**



**This study was carried out for the European Commission by**  
Spark Legal Network, Trinomics and University of Groningen.



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## TABLE OF CONTENTS

NATIONAL REGULATORY AUTHORITIES .....	9
Executive summary .....	10
1. Introduction .....	22
1.1. Structure of the report.....	22
1.2. Legal context.....	22
1.3. Methodology.....	26
2. Review of the relevant literature and indicators against which independence and effectiveness of NRAs can be measured.....	31
2.1. Literature review.....	31
2.2. Indicators .....	36
3. Description of law and practice impacting on the independence and effectiveness of regulators in the field of energy.....	39
3.1. Introduction .....	39
3.2. Independence of NRAs from political and market actors .....	39
3.2.1. Explicit legal basis for NRA independence .....	39
3.2.2. Availability of enforcement instruments and level of NRA discretion in their use .....	41
3.2.3. Potential legal limitations of NRA independence due to interactions with market interests/government and provision for oversight by national parliaments .....	43
3.2.4. Safeguards to protect the NRA from undue influence from governments or market interests (transparency measures) .....	49
3.2.5. Legal measures providing for Ministerial or Parliamentary involvement in NRA decision-making .....	52
3.2.6. Legal rules concerning nomination, appointment and dismissal of board members.....	54
3.2.7. Conflict of interest provisions concerning board members and key staff .....	59
3.2.8. "De facto aspects" (field research).....	65
3.3. Adequacy of human and financial resources.....	68
3.3.1. Provisions regarding general NRA financing .....	69
3.3.2. Provisions regarding staff recruitment and pay.....	80
3.4. Independence and effectiveness in conducting core tasks.....	88
3.4.1. Setting and approval of tariffs and methodologies .....	88
3.4.2. Consideration of the factors and criteria applicable to the fixing or approval of tariffs or their methodologies .....	92
3.4.3. NRA competence in relation to complaint-handling .....	99
3.4.4. Review of NRA decisions.....	106
4. INDEPENDENCE OF NRAS: LEGAL ANALYSIS .....	109
4.1. Setting the scene: an introduction on independence of supervision and regulation.....	109
4.1.1. Case law .....	109
4.1.2. Adequacy of human and financial resources.....	111
4.1.2.1. Adequate resources are an essential precondition for independence ....	111
4.1.2.2. Knowledge and skills require experienced staff and training.....	112
4.1.2.3. Adequate and stable budgets.....	112
4.1.2.4. Sources of financing .....	113
4.1.2.5. Limitations in the use of the budget.....	113
4.1.2.6. Protection against financial liability is indispensable for independent supervisors.....	114
4.1.2.7. Accountability .....	114

4.1.3.	The Energy Sector .....	114
4.1.3.1.	The Network-bound Electricity and Gas Sector and Independent Regulators.....	116
4.1.3.2.	Core Tasks of Independent National Regulators.....	120
4.2.	Principles on Independent NRAs applied to Selected EU Member States.....	122
4.2.1.	Independence of NRAs from political and market actors .....	122
4.2.1.1.	Explicit legal basis .....	122
4.2.1.2.	A Single National Regulatory Authority.....	124
4.2.1.3.	Potential legal limitations or violations of NRA independence .....	126
4.2.1.4.	Availability of enforcement powers and level of NRA discretion in their use .....	127
4.2.1.5.	Safeguards to protect the NRA from undue influence: transparency measures .....	128
4.2.1.6.	Nomination, appointment and dismissal of board members and key staff.....	129
4.2.2.	Adequacy of Human and Financial Resources .....	132
4.2.2.1.	Human Resources .....	132
4.2.2.2.	Financial Resources .....	135
4.2.3.	Independence and Effectiveness in Conducting Core Tasks .....	139
4.2.3.1.	Setting and approval of tariffs and methodologies .....	139
4.2.3.2.	NRA competence in relation to complaint-handling .....	143
4.2.3.3.	Cross-border and EU cooperation .....	146
5.	Best Practices and recommendations .....	148
5.1.	Key requirements for regulators .....	148
5.2.	Examples of good practices in other sectors and countries.....	150
5.3.	Good practices identified in the Member States examined.....	154
5.3.1.	Independence from political and market actors .....	154
5.3.2.	Adequacy of human and financial resources.....	161
5.3.3.	Effectiveness conducting core tasks .....	165
5.4.	Recommendations .....	166
5.4.1.	Clear determination in legislation of NRA's roles and independence.....	167
5.4.2.	Adequate human and financial resources.....	169
5.4.3.	Recommendations regarding effectiveness in conducting core tasks....	172

## LIST OF TABLES

Table A: Main best practices identified in Member States .....	17
Table 1 : Overview of field research feedback per Member State .....	28
Table 2 : Indicators for the independence and effectiveness of NRAs.....	36
Table 3: Legal rules concerning nomination, appointment and dismissal of board members.....	57
Table 4 : Conflict of interest provisions concerning board members and key staff .....	63
Table 5: Establishment of the budget .....	67
Table 6 : NRA Expenditure for 2010-2018.....	75
Table 7: NRA Staff Numbers (FTE) for 2010-2018.....	83

Table 8: Setting and approval of tariffs and methodologies .....	86
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## **LIST OF FIGURES**

Figure 1 : Key requirements for regulators .....	144
Figure 2 : Independence from political or market actors .....	146
Figure 3 : Independence: Appointment of commissioners .....	147
Figure 4 : Independence: Transparency .....	148
Figure 5 : Human Resources: Remuneration .....	148
Figure 6 : Human Resources: Selection of staff .....	149
Figure 7 : Effectively conducting core tasks: Cooperation .....	149
Figure 8 : The functioning of the Beschlusskammern (as provided by BNetzA) .....	152

## National Regulatory Authorities

<b>Austria</b>	Energie-Control Austria	Regulation of Electricity and Natural Gas Industry
<b>Bulgaria</b>	Комисия за енергийно и водно регулиране	Energy and Water Regulatory Commission
<b>Croatia</b>	Hrvatska Energetska Regulatorna Agencija	Croatian Energy Regulatory Agency
<b>Czech Republic</b>	Energetický regulační úřad	Energy Regulatory Office
<b>France</b>	Commission de Régulation de l'Energie	Regulatory Commission of Energy
<b>Germany</b>	Bundesnetzagentur	Federal Network Agency
<b>Greece</b>	Ρυθμιστική Αρχή Ενέργειας	Regulatory Authority for Energy
<b>Hungary</b>	Magyar Energetikai és Közmű-szabályozási Hivatal	Hungarian Energy Office
<b>Lithuania</b>	Valstybinė kainų ir energetikos kontrolės komisija	National Control Commission for Prices and Energy
<b>Romania</b>	Autoritatea Nationala de Reglementari in domeniul Energiei	Energy Regulatory Authority
<b>Slovakia</b>	Úrad pre reguláciu sieťových odvetví	Regulatory Office for Network Industries
<b>Spain</b>	Comisión Nacional de los Mercados y la Competencia	National Markets and Competition Commission

# Executive summary

## Context

This document constitutes the Final Report of a study which was carried out by a consortium of independent contractors, consisting of Spark Legal Network, the University of Groningen and Trinomics, at the request of the European Commission (hereinafter also referred to as "the Study<sup>1</sup>"). The Study had as objective to analyse potential issues concerning the independence of national regulators.

**The findings, legal analyses, opinions and best practices in the Study represent solely the views of the authors. The Study in particular its legal conclusions, do not reflect the view of the European Commission and are without prejudice to the Commission's legal analysis in EU law enforcement.**

The study was conducted in 2018. It is therefore based on the legislation in force at the time in the Member States covered. The "Clean Energy for All Europeans" Package was still at a proposal stage when the report was drafted. Consequently, it does not necessarily reflect the final adopted text that will be published in the course of 2019.

The general objective of the Study was to assess the *de jure* and *de facto* independence of the national regulatory authorities (hereinafter: NRAs) in the field of energy and their effectiveness in performing key tasks in the following 12 Member States: Austria, Bulgaria, Croatia, Czech Republic, France, Germany, Greece, Hungary, Lithuania, Romania, Slovakia and Spain.

New legislative provisions providing for further harmonisation of the powers and strengthening of the independence of the NRAs were created by Directive 2003/54/EC and Directive 2003/55/EC and were included in the reviewed Directive 2009/72/EC (hereinafter: 2009 Electricity Directive) and Directive 2009/73/EC (hereafter: 2009 Gas Directive), which replaced the 2003 Directives. The 2009 Directives are broader in scope as the NRAs are now also charged with the more general objective of achieving an internal energy market. Specifically, the objectives and tasks of the NRAs are included in Articles 35-40 of the 2009 Electricity Directive and Articles 39-44 of the 2009 Gas Directive. In 2010, the European Commission published an interpretative note on the 2009 Directives, where it clarifies extensively the manner in which it interprets the abovementioned articles.

Further, in its May 2016 Recommendation, ACER recommended the following in order to improve the independence of NRAs:

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<sup>1</sup> Study "Assessing the independence and effectiveness of National Regulatory Authorities (NRAs) in the field of energy" (ENER/B2/2017-362)



- Clear definition in legislation of the respective roles of the Member States and the NRAs;
- Enshrining in law the accountability of NRAs to national parliaments rather than to their governments;
- Clear and explicit rules for nomination, appointment and dismissal of board members and top management;
- Financial independence to be enshrined and adequate resourcing to be ensured; and
- Inclusion of a general legislative provision requiring NRAs to cooperate at Union level within ACER, and that, as a minimum, all NRAs regularly participate in meetings of the Board of Regulators.

Furthermore, as part of the “Clean Energy for All Europeans” Package in November 2016, the Commission launched a Proposal for a Directive of the European Parliament and of the Council on common rules for the internal market in electricity (Recast Internal Electricity Market Directive).

Apart from adding some new tasks, the Recast Internal Electricity Market Directive also aims at diminishing the fragmentation of the regulatory oversight at the European Union level by reinforcing the ACER’s powers. Other notable amendments in the Recast Internal Electricity Market Directive, which are of particular relevance to the present study, include:

- The amendment of the requirement for Member States to ensure NRAs are provided with the duty to fix or approve tariffs *or* their methodologies, so that they will need to have the power to fix or approve tariffs *and* their methodologies;
- The inclusion of a requirement for board members or top management of the NRA to be appointed based on objective, transparent and published criteria, in an independent and impartial procedure, which ensures that candidates have the necessary skills and experience for any relevant position in the NRA, and that parliamentary hearings are held;
- The requirement that conflict of interest provisions are in place and confidentiality obligations extend beyond the mandate of board members/top management; and
- Board members/top management can only be dismissed based on transparent criteria.

Although the Recast Internal Electricity Market Directive is still a proposal and not yet final, it should be noted that the Council of European Energy Regulators (CEER) has already issued a series of white papers presenting the regulators' positions on the “Clean Energy For All Europeans” legislative proposals. In a white paper of 30 June 2017, they highlighted that more ambitious measures are needed to ensure independence of NRAs.

## **Methodology**

The Study focused on three broad issues: the independence of NRAs from political and market actors; the adequacy of human and financial resources; and the independence and effectiveness of the NRA in conducting its core tasks.

The Study involved two broad data collection tasks: the first being focused on desk research; the second on field research. The desk research task involved a review of the available literature on the subject. Furthermore, it involved the identification and description of the legal framework concerning NRA independence in the 12 Member States concerned. The field research built upon this by conducting interviews and surveys in order to gather insights from various stakeholders in relation to level of independence and effectiveness of NRAs in practice. It is important to take into account that the field research is based on a limited sample of interviews and survey responses and as such may not be fully representative. Further, stakeholders expressed their opinion regarding the de facto (or perceived) independence of NRAs and not about the actual legal framework. The findings of the desk and field research were analysed, and a number of best practices were identified. Finally, the study culminated in a number of recommendations for improving the level of independence and effectiveness of NRAs.

### **Independence of NRAs from political and market actors**

The Third Energy Package requires NRAs to be legally and functionally independent from political and market interests. The desk research found that while in all Member States the national law provides explicitly that the NRA should be independent, not all Member States specify that the independence is to be from both political and market interests. Generally, legal frameworks in the Member States provide well for the formal independence of NRAs. However, the field research shows that even when independence is formally arranged for in the required manner, functional independence is still not always self-evident.

In some Member States, the legal framework incorporates some sort of legal limitation to the independence of the NRA. For example, the Study identified a law that retains for the Ministry the right to supervise the legality of general and individual decisions of the NRA. Although the respondents in the field research did not raise any specific concerns about this provision, it may be contended that it is difficult to square such a provision with the idea of the NRA being fully independent. In another Member State, it is noted that the law appears to allocate certain competences to the Ministry which should be allocated to the NRA. In this case, the NRA's ability to carry out those tasks would appear to be restricted. Similarly, there is provision in one Member State for the Ministry to review tariff decisions and request a new deliberation of the NRA, although this has not seemed to have an impact on NRA independence in practice, as despite a recent invocation of this provision by the Ministry, the NRA did not alter its initial decision.

According to Article 37 of the 2009 Electricity Directive and Article 41 of the 2009 Gas Directive, national law must provide NRAs with enforcement powers. It was noted that this requirement was generally satisfactorily implemented in national law, while a variety of enforcement powers exist at national level. In all Member States except two, the NRA is provided with the power to impose sanctions. In one Member State, the power is instead reserved for the competent penal authorities (in line with the requirements of the Directives), while in another the NRA has neither the power to impose or propose sanctions.

The publicity of NRA decisions will enable the parties affected by a decision and the public to be informed about the reasons why a decision was taken and, hence, become aware of the impartiality with which the NRA fulfils its duties and exercises its powers. Similarly, the publicity of NRA rules of procedure and the use of public consultations ensure that the NRA carries out its tasks in a transparent and independent manner. This Study notes that, in each Member State the NRA is required to report annually to the Parliament about the activity and management of the NRA. Furthermore, in all Member States the legal framework provides for obligations to publish certain information, with the type of information that must be published varying among the Member States. In several Member States, the NRA may have some role in the development of transparency measures (e.g. by submitting a statement or position on the legislative draft), while the Study also identified an example where the NRA itself has the competence for introducing the transparency measures.

#### *Appointment and dismissal of board members and top management*

Article 35(5)(b) of the 2009 Electricity Directive and 39(5)(b) of the 2009 Gas Directive provide that the members of the NRA board or its top management shall be appointed for a fixed term of between five and seven years, renewable once.

In all Member States, there are legislative measures concerning the appointment and dismissal of board members or top management. In all Member States examined, the legislation explicitly provides for board members having a term of between five and seven years. The procedures for nomination and appointment laid down in the legal framework vary among the Member States. For example, in some countries the members of the board of the NRA are appointed and dismissed by Parliament, sometimes on a proposal by the Minister, while in others it is done by Government, on a proposal from the Minister. In one Member State, the president and vice-president are selected/nominated by an Advisory Council (made up of upper and lower house parliamentarians) and appointed by the Government. Generally, nomination and appointment are done by the Government/Ministry, the Parliament, or a mixture of the two. Concerns were expressed by some stakeholders concerning the politicised nature of the procedures in some Member States. Notably, stakeholders in certain Member States were even concerned by the politicised nature of parliamentary involvement in the procedure, notwithstanding that this is recommended by literature and is generally less politicised than ministerial or governmental nominations / appointments. It should be noted in this context that the proposal for the Recast

Internal Electricity Market Directive includes specific provisions concerning the appointment of board members and top management, requiring appointment to be based on “objective, transparent and published criteria, in an independent and impartial procedure...and that parliamentary hearings are held.”

Article 35(5)(b) also provides that members of the board or top management should only be dismissed if they are not acting independently of market or political interests or are guilty of misconduct under national law.

In the majority of Member States, it was found that the criteria for dismissal are clear and specific. However, in a few Member States, the criteria may be regarded as vague or ambiguous, with terms such as “serious negligence” or “grave breach or systematic dereliction of official duties” found in the legislation. In one Member State this was regarded as problematic by an NRA representative. In other Member States, meanwhile, dismissal grounds seem to be quite clearly laid out in legislation, and the legislative provisions do not include such broad or open-ended criteria. The proposal for the Recast Internal Electricity Market Directive states that the members of the board or top management can be dismissed only based on transparent criteria which are in place.

#### *Conflict of interest provisions for key staff*

In all the Member States examined, the legislation contains provisions concerning conflicts of interest in respect of board members and / or key staff for the duration of the term of office. The types of provisions vary per Member State. No Member States examined have included pre-employment restrictions, while half the Member States provide some restrictions on post-employment, with the cooling off periods varying. The 2009 Directives are not prescriptive regarding the conflict of interest provisions which should be adopted by the Member States. While limitations regarding post- and pre-employment of board members may be useful in preventing conflicts of interest, regard should be had to the possible impact these may have on the ability of the NRA to attract qualified people to sit on the board. This is essentially a balancing act, and it may be difficult to prescribe a one-size-fits-all solution on the basis of the present study. The proposal for the Recast Internal Electricity Market Directive includes a provision stating that confidentiality obligations must extend beyond the end of the mandate of the board members or top management, but no period is prescribed.

#### **Adequacy of human and financial resources**

Article 35(5)(a) of the 2009 Electricity Directive and Article 39(5)(a) of the 2009 Gas Directive requires NRAs to be provided with adequate human and financial resources to carry out their duties.

Different means of financing NRAs were observed, with three main categories noted: (i) NRAs financed by the State budget; (ii) NRAs financed by market participants via licensing fees etc; and (iii) and combination of (i) and (ii). Some NRAs complained

that the Parliamentary approval of their budget was being used as an opportunity by politicians to exert influence.

Analysing the adequacy of financial and human resources is a difficult task. On the one hand, one can look at the fact that an NRA has used all its resources as evidence that it needs more. On the other hand, it could be argued that it is not uncommon for regulators to have to prioritise certain tasks. In addition, it could be argued that regulators could perform tasks more efficiently. It can also be difficult to draw direct comparisons across Member States due to different factors which may impact upon the needs of the NRA. However, certain trends can be noted, such as the significant decrease in expenditure in a couple of Member States following the economic crises which those Member States experienced.

In certain Member States, headcount caps were noted. In a couple of these, the caps have recently been increased, and the NRA has already hit the new headcount cap, which may be an indicator that these NRAs are overburdened. In some Member States there are no headcount caps, but the Government may have an influence over the procedure or salaries of NRA staff.

In some countries hiring procedures are centralised with little or no involvement of the NRA itself. These hiring procedures can lead to long procedures that put off talented candidates and can also limit the influence of the NRA in selecting its own candidates. The Study regards this as undesirable. To guarantee sufficiently skilled staff it is indispensable that NRAs are involved in designing the job requirements and in the selection of their own staff.

## **Independence and effectiveness in conducting core tasks**

### *Grid tariffs*

When considering the independence of NRAs when setting tariffs and their methodologies, a number of possible restrictions on NRA independence have been noted. Firstly, there is the possibility of the Member State's implementing legislation retaining for the Ministry the powers which should, by virtue of Article 37 of 2009 Electricity Directive, be the preserve of the NRA. This would be a clear example of a situation at national level which is not in line with the requirements of the Third Energy Package. The NRA cannot be regarded as having independence with regard to tariff-setting if the powers are reserved to the Ministry. This situation was noted in one Member State.

A second possibility is where the national legislation does grant the power to set tariffs or their methodologies to the NRA, and no such powers are retained for the Ministry, but the exercise of the power by the NRA is subject to some sort of supervision or intervention by the Ministry. For example, where the NRA is required to have its tariff decision approved by the Ministry, or where the NRA is required to reassess or amend the tariff decision based on feedback received from by the Ministry. Supervision of NRA's tariff decisions by the Ministry is provided for by the law of one Member State,

while in another, the situation appears to be subtler, with the Ministry having the power to ask the NRA to redeliberate. However, in practice, stakeholders did not note any explicit concerns in relation to these provisions in these two Member States.

However, the absence from the legal framework of the possibility of the type of Ministerial encroachment on the powers of the NRA does not necessarily mean that the NRA can independently carry out its task in relation to tariffs. A third possibility is that of legislative interference (whether by primary or secondary legislation) with the NRA's independence and effectiveness. In that regard, it may be the case that, on the one hand, the legislation grants the NRA the exclusive competence in relation to fixing or approval of tariffs or methodologies, but on the other hand, it prescribes such detailed criteria for the calculation of tariffs as to render the NRA's ability to actually decide on tariffs illusory. Such a situation is hardly conducive to effective and independent tariff-setting by the NRA, as its regulatory powers risk being reduced to a rubber stamping of a tariff methodology in essence decided upon by the Legislature. This situation appears to exist in at least one Member State.

On the other end of the spectrum, it may be that legislation concerning the powers and duties of the NRA takes a 'light touch' approach, and merely prescribes very general requirements to which the NRA must have regard when fixing or approving tariffs or methodologies. Such a situation would not seem to unduly fetter the discretion of the NRA, and thus would not be regarded as a threat to its independence or effectiveness in relation to tariff setting. For example, the national framework may repeat or flesh out the provisions of Article 36 or 37(8) of the 2009 Electricity Directive or Article 40 or 41(8) of the 2009 Gas Directive. It should be considered at what point such clarifications or elaborations might move from giving effect to the requirements of the Directives to potentially frustrating them, by limiting the independence and effectiveness of the NRA in carrying out this core task.

It should be noted that Article 59 of the proposal for the Recast Internal Electricity Market Directive would alter the current Article 37(1)(a) of the 2009 Electricity Directive to provide that NRAs must be empowered to fix or approve transmission and distribution tariffs *and* their methodologies, whereas the current text reads "or their methodologies". This would have the effect of clarifying any ambiguities in relation to the role of the NRA, particularly in one Member State where currently the NRA is empowered to fix and approve the methodologies, but the Government is empowered to fix and approve the tariffs<sup>2</sup>.

#### *NRA competence in relation to complaint-handling and review of NRA decisions*

Another core task of NRAs, as provided for by Article 37 of the 2009 Electricity Directive and Article 41 of the 2009 Gas Directive is the handling of complaints.

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<sup>2</sup> This proposal did not find its way into the final text of the recast of the Internal Energy Market Directive

Current law and practice in the Member States examined appear to comply with this provision. Nonetheless certain stakeholders complained in relation to the timeliness of resolving complaints, with certain instances were noted where duration times exceeded the two-month initial limit set by Article 37(11) of the 2009 Electricity Directive and Article 41(11) of the 2009 Gas Directive.

Article 37(17) of the 2009 Electricity Directive and Article 41(17) of the 2009 Gas Directive require Member States to ensure a suitable mechanism for appeal of NRA decisions to an independent body. While most Member States provide for this, the law in two Member States appears to limit an applicant's ability to appeal, as the only option is an appeal to the constitutional court, while the law in another Member State provides for an appeal to the Ministry.

### *Cross-border and EU cooperation*

The 2009 Electricity Directive and the 2009 Gas Directive put more emphasis on EU cooperation than the previous directives. EU cooperation can take many forms and shapes. It can be either some sort of bilateral or multilateral (regional) cross-border cooperation amongst NRAs or cooperation via ACER or CEER. Whereas the first type of cooperation has existed for some time and primarily relates to cross-border trade and the development of interconnectors, cooperation via ACER has started since 2009. All 12 Member States note in relation to cross-border and EU cooperation a general agreement on the need to be involved.

In some Member States stakeholders are in general positive about the (level of) cross-border/EU cooperation of their NRAs, while in others there are mixed opinions, with some stakeholders noting problems regarding interconnectors. Stakeholders and NRA representatives also mentioned that lack of resources and/or language issues play a role in the cooperation with ACER/CEER. It can be noted that some Member States seem to have more problems in allocating resources to staff being involved in activities related to cross-border cooperation. Although this is a national issue, it may lead to an imbalance between Member States which can participate and thus have influence in these bodies and others which have not.

### **Best practices identified and main recommendations of the study**

In addition to a number of best practices identified in the relevant literature, some best practices were identified throughout the Member States. Table A provides an overview of the main best practices identified.

**Table A: Main best practices identified in Member States**

<b>Explicit legal basis for NRA independence</b>	<ul style="list-style-type: none"> <li>- Legislation explicitly stating that the NRA acts with structural and functional autonomy and is fully independent from the Government, from other public authorities and from market actors.</li> </ul>
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	<ul style="list-style-type: none"> <li>- Legislation explicitly requires all board members and employees of the NRA to act independently of all market interests and, in performing their duties, not to seek, nor execute, any instructions of the Government or any other public or private person.</li> <li>- Legislation explicitly states that the organs of the NRA and its Board/staff members are not bound by any instructions from the Government in the exercise of their duties and must act independently of market interests.</li> </ul>
<b>Availability of enforcement instruments and level of NRA discretion in their use</b>	<ul style="list-style-type: none"> <li>- Legislation provides that the NRA can require access to undertakings' accounts (in the framework of the execution of its competences) and its president can start legal proceedings.</li> <li>- Legislation provides that the NRA, acting ex officio or pursuant to a complaint, may issue a reasoned decision adopting appropriate interim measures in keeping with the principle of proportionality to address the situation, before passing a final decision.</li> </ul>
<b>Independence of NRAs in decision making</b>	<ul style="list-style-type: none"> <li>- Existence of separate chambers are responsible for taking decisions on their respective topics and each has its own chair and two vice-chairs, who have the final say.</li> <li>- Compliance measures, and a dedicated compliance officer to ensure they are adhered to.</li> </ul>
<b>Transparency measures</b>	<ul style="list-style-type: none"> <li>- NRA publishes the main documents in English (non-binding courtesy translations).</li> <li>- Legislation requires the NRA to publish minutes of the voting of the Board for decisions on the NRA website.</li> <li>- Legislation requires the NRA to publish NRA's fully reasoned decisions in Government Gazette.</li> <li>- Transparent and detailed public consultations prior to finalising decisions and publishing all relevant information on its website.</li> </ul>
<b>Board and key staff members nomination &amp; appointment procedures</b>	<ul style="list-style-type: none"> <li>- Each board Member appointed by different political actor, to ensure board is not dominated by appointees of one political actor. Ad hoc nomination by Parliament of 3 independent experts (without political</li> </ul>



	<p>mandate) who unanimously select and nominate the board or executive member(s), on the basis of an assessment using objective and transparent criteria, including relevant expertise and experience in the energy domain</p> <p>-</p>
<b>Dismissal of board and key staff members</b>	<ul style="list-style-type: none"> <li>- According to legislation, the president may be dismissed if there is an important reason, by a decision of the government, made at the request of the Ministry, once the Ministry has received the viewpoint of the Advisory Council (which contains members of each house). Important reason is no longer meeting the requirements to perform duties.</li> <li>- Board member can be dismissed if found by the competent disciplinary council to have engaged in actions incompatible with the principles of independence and impartiality which govern the operation of the NRA.</li> <li>- Dismissal grounds are quite clearly formulated in legislation, and the legislative provisions do not include broad or open-ended criteria. For example, a material breach must relate to the requirements or regulations of the office.</li> </ul>
<b>Conflict of interest provisions</b>	<ul style="list-style-type: none"> <li>- Legislation comprises extensive conflict of interest provisions for members of the board, including prohibitions on ties with the energy industry (via stocks, share, material interests).</li> <li>- Code of conduct has been established.</li> </ul>
<b>Adequacy of human resources</b>	<ul style="list-style-type: none"> <li>- No headcount caps for the NRA, and it has a high level of flexibility to determine the salary levels of its staff, subject to certain budgetary constraints.</li> <li>- NRA can adjust the base salary for 20% of its staff which empowers the NRA to pay more competitive wages compared to other public institutions.</li> </ul>
<b>Adequacy of financial resources</b>	<ul style="list-style-type: none"> <li>- NRA budget is financed solely by market participants.</li> <li>- NRA budget is prepared by the Management Board of the NRA and is then approved by the NRA's Supervisory Board chaired by an independent person.</li> </ul>
<b>Setting of grid tariffs</b>	<ul style="list-style-type: none"> <li>- Legislation provides that the NRA defines the conditions and criteria for tariff regulation,</li> </ul>

<b>and/or methodologies</b>	<p>according to regulatory principles and pricing methods defined in a document published by the NRA.</p> <ul style="list-style-type: none"> <li>- Legislation does not set out the criteria in detail, beyond the general need for non-discrimination. Everything else is left to the discretion of the NRA, which sets out the criteria in its published methodology.</li> </ul>
<b>Complaint handling</b>	<ul style="list-style-type: none"> <li>- Separate independent body within the NRA is responsible for settling disputes between operators and users about the access to public electricity and gas networks and their use, and for imposing sanctions or penalties for infringements of the energy law.</li> <li>- NRA must inform the interested party of the measures taken in relation to the complaint in writing, at the latest 30 days from submission.</li> </ul>

Set out below is a summary of the main recommendations of the study:

#### *Independence from political and market actors*

- National legislation should include a clear definition of NRAs' roles, to avoid interdependencies and overlaps with the energy ministry and to ensure NRAs' institutional independence. Lack of clarity on roles and functions can open the door to undue government interventions in NRA's operations.
- Member States should (continue to) correctly implement the Third Energy Package requirements and NRAs should be consistently given the power to issue final and binding decisions that are not subject to ministerial or governmental scrutiny.
- .
- A high level of transparency should be ensured by publishing the outcome of NRA meetings with third parties as well as NRA decisions including their reasoning and justification and by organising open consultation procedures.

#### *Adequate human and financial resources*

- The evaluation of candidates for positions such as board members or top management should be done by an independent panel or external specialised body, on the basis of objective, transparent and published criteria and in an independent and impartial procedure. Such a procedure should also be applied for key NRA staff members who are appointed by the board. Such an independent evaluation should allow for the presentation of a ranked list of suitable candidates, which can be used as a basis for nomination by the board (for key staff members) or by the government and endorsement by the

parliament (for board members). Such a procedure would bring objectivity to the nomination and hence to limit the risk for political dependence.

- Specified term lengths for mandates of NRA heads and board members should apply, with constraints on re-appointment, and limits on dismissal, also in order to avoid premature dismissals for political motivations.
- Applying restrictions on post-employment of staff members prevents the risk of "revolving doors" and conflicts of interest with regulated companies. In order to enable NRAs to attract qualified experts from the energy sector while avoiding conflicts of interest, an adequate cooling off period (e.g. at least 6 months) should apply both for key staff and board members.
- NRAs should not be subject to political interventions in their HR management, such as headcount caps, and the government or ministry should not be involved in NRA staff recruitment and salary-setting.
- NRAs should be allowed to use their budget as they see fit. There should be no restrictions on the regulator's staffing policy, as long as it stays within its budget.
- In order to avoid political influence, NRAs should be empowered to define their own budget, and to ensure their financing via fees included in the grid tariffs. NRA budgets should be separated from the general state budget and be controlled by the NRA itself.
- Moreover, a benchmark at EU level could be organised regularly, for instance every 3 years, to compare and evaluate the individual NRA budgets, taking into account differences in national cost levels (e.g. salaries, rents), the scope of the NRAs' tasks and the complexity of their regulation.

### *Conduct of core tasks*

- NRAs should have the full responsibility for grid tariff setting. Governments should not retain regulatory powers or impose on NRAs methodologies for setting tariffs that could favour certain market participants.
- While it may be useful for legislation concerning tariffs at national level to set out certain key principles to which the NRA should have regard, Member States should avoid overly-prescriptive legislation which can act to fetter the discretion of the NRA to such an extent that its independence and effectiveness in conducting the tasks are compromised.
- There should be effective arrangements in all Member States for interested parties to challenge or appeal NRA's decisions.
- ACER could be empowered to ensure that regional cooperation between NRAs and TSOs promotes effective target delivery;
- The Commission could also consider whether to provide for regulatory oversight on a regional level, for instance through regional groupings of NRAs within, or overseen by, ACER;
- More robust arrangements for overseeing and ensuring independence of NRAs, through a stronger ACER role and/or increased requirements to ensure adequate practical implementation, could be considered.

# **1. Introduction**

## **1.1. Structure of the report**

This Report contains five chapters. This chapter presents the legal context of the study and the methodological approach adopted. Chapter 2 includes a review of the relevant literature, together with a list of indicators which were developed to aid the assessment of the independence and effectiveness of National Regulatory Authorities (hereafter: NRAs). Chapter 3 presents a comparative analysis showing a description of the Study's legal and practical findings concerning the independence of NRAs. Chapter 4 contains a legal analysis of the independence of NRAs based on the findings of the desk and field research. Chapter 5 presents examples of good practices and recommendations based on relevant literature and the findings of the present study.

## **1.2. Legal context**

The liberalisation of the electricity and gas markets in the EU led to the introduction of several new institutions/bodies, including national energy regulators or national regulatory authorities. The establishment of these NRAs is directly linked to the need to regulate energy networks (as natural monopolies) and in particular to ensure non-discriminatory access to the energy networks.

New legislative provisions providing for further harmonisation of the powers and strengthening of the independence of the NRAs were created by Directive 2003/54/EC (hereafter: 2003 Electricity Directive)<sup>3</sup> and Directive 2003/55/EC (hereafter: 2003 Gas Directives)<sup>4</sup> and included in the reviewed Directive 2009/72/EC (hereafter: 2009 Electricity Directive)<sup>5</sup> and Directive 2009/73/EC (hereafter: 2009 Gas Directive)<sup>6</sup>, which replaced the 2003 Directives. The 2009 Directives are broader in scope as the NRAs are now also charged with the more general objective to achieve an internal market. Specifically, the objectives and tasks of the NRAs are included in Articles 35 – 40 of the 2009 Electricity Directive and Articles 39 – 44 of the 2009 Gas Directive. The objectives of the NRAs are listed in Article 36 of the 2009 Electricity Directive and

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<sup>3</sup> Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC.

<sup>4</sup> Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC.

<sup>5</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (Directive 2009/72/EC).

<sup>6</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (Directive 2009/73/EC).

Article 40 of the Gas Directive. The 2009 Directives basically distinguish between three specific objectives: the general objective to establish an internal energy market and the more specific objectives relating to regulated networks (as being natural monopolies) as well as the need to contribute to the protection of vulnerable energy customers.

In May 2016, ACER made a number of recommendations concerning the independence of NRAs, notably:<sup>7</sup>

- Clear definition in legislation of the respective roles of the Member States and the NRAs;
- Enshrining in law the accountability of NRAs to national parliaments rather than to their governments;
- Clear and explicit rules for nomination, appointment and dismissal of board members and top management;
- Financial independence to be enshrined and adequate resourcing to be ensured;
- Inclusion of a general legislative provision requiring NRAs to cooperate at Union level within ACER, and that, as a minimum, all NRAs regularly participate in meetings of the Board of Regulators.

Furthermore, as part of the “Clean Energy For All Europeans” package<sup>8</sup> in November 2016, the Commission launched a Proposal for a Directive of the European Parliament and of the Council on common rules for the internal market in electricity (Recast Internal Electricity Market Directive).<sup>9</sup> Apart from adding some new tasks, the Recast Internal Electricity Market Directive also aims at diminishing the fragmentation of the regulatory oversight at the European Union level by reinforcing the ACER’s powers. Other notable amendments in the Recast Internal Electricity Market Directive, which are of particular relevance to the present study, include:

- The amendment of the requirement for Member States to ensure NRAs are provided with the duty to fix or approve tariffs *or* their methodologies, so that they will need to have the power to fix or approve tariffs *and* their methodologies;<sup>10</sup>
- The inclusion of a requirement for board members or top management of the NRA to be appointed based on objective, transparent and published criteria, in an independent and impartial procedure, which ensures that candidates have

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<sup>7</sup> Recommendation of the Agency for the Cooperation of Energy Regulators No 01/2016 of 30 May 2016.

<sup>8</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank. Clean Energy For All Europeans. Brussels, 30.11.2016 COM(2016) 860 final. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:0860:FIN>

<sup>9</sup> Brussels, 23.2.2017 COM(2016) 864 final/2.

<sup>10</sup> Article 59(1)(a) of Recast Internal Electricity Market Directive; see Proposal for Directive of the European Parliament and of the Council on common rules for the internal market in electricity (recast) COM(2016) 864 final

the necessary skills and experience for any relevant position in the NRA, and that parliamentary hearings are held;<sup>11</sup>

- The requirement that conflict of interest provisions are in place and confidentiality obligations extend beyond the mandate of board members/top management;<sup>12</sup>
- Board members/top management can only be dismissed based on transparent criteria.<sup>13</sup>

The Council of European Energy Regulators (CEER) issued a series of white papers presenting the regulators' positions on the "Clean Energy For All Europeans" legislative proposals. In a white paper of 30 June 2017, they highlighted that more ambitious measures are needed to ensure independence of NRAs.<sup>14</sup>

Independence is an important cornerstone of the functioning and position of NRAs. In the EU legislation on the common market for electricity and gas, the crucial requirement regarding the regulatory design is that the regulators must be independent of commercial interests in the sector. Furthermore, the fact that the state has, at least potentially, economic or political interests particularly with the incumbent companies, suggests that the regulator needs to be independent also from the government.<sup>15</sup> A regulator's independence is not only a basic prerequisite for proper regulatory work but it provides confidence and trust that regulatory decisions are made with integrity. Confidence in the NRA in turn provides confidence in the market. One of the very reasons why regulators were created in the first place was to ensure that decisions about the energy market would be shielded from commercial and political interests, thereby addressing the conflict of interest that can arise where the government has a stake in energy or network companies. Competitive neutrality is required where government and non-government companies compete under the same regulatory framework. In their daily work, regulators act as referees, balancing competing interests and policy objectives. This requires regulators to be independent both of the industry they regulate and of government.<sup>16</sup>

In addition, with the energy sector accounting for a considerable part of most countries' economies there are real risks that private and/or public entities seek to interfere with regulatory decision-making. It is paramount that the NRA's independence be properly protected (e.g. through adequate legal provisions) and safeguarded (e.g. through practical arrangements and a culture of independence

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<sup>11</sup> *Ibidem*, Article 57(5)(c).

<sup>12</sup> *Ibidem*, Article 57(5)(d).

<sup>13</sup> *Ibidem*, Article 57(5)(e).

<sup>14</sup> CEER (2017), *The independence of National Regulatory Authorities*, White Paper series (paper # V) on the European Commission's "Clean Energy For All Europeans" Proposals.

<sup>15</sup> P. Capros (2003), *Independence of energy regulators: new challenges*. Available at: <http://www.rae.gr/old/K2/ER-independence.pdf> (last consulted February 2018).

<sup>16</sup> CEER (2016), *Safeguarding the independence of regulators - Insights from Europe's energy regulators on powers, resources, independence, accountability and transparency*. Available at: <https://www.ceer.eu/documents/104400/-/-/ca57c28e-f899-bb14-8e82-919073ff6e68> (last consulted February 2018).

within the NRA itself) throughout the life-cycle and work of the NRA.<sup>17</sup> Independence of regulators preserves stability and continuity in the setting of rules, avoids political interference in business decisions and regulatory risks, and maintains high standards of expertise and professionalism.<sup>18</sup>

However, independence of NRAs is not only determined by the institutional design but also by other conditions such as sufficient budgets, the ability to attract the right staff, having sufficient expertise etc. Apart from these (formal) conditions, which in theory will enable NRAs to act independently and conduct their tasks effectively, other conditions apply as well. An important pre-condition for acting as an independent regulator is the willingness to act independently. In a leading publication on financial supervision the International Monetary Fund (IMF) stated, in this regard, that a supervisor should not only have the ability to act but also the will to act.<sup>19</sup>

These general notions on sound and independent supervision also apply to energy regulators (NRAs). The position and tasks of NRAs require Member States to designate regulatory authorities, which need to be independent from any public and private interests in the electricity and/or gas sector. This precludes neither judicial review nor parliamentary supervision in accordance with the constitutional laws of the Member States.

Whereas the 2003 Directives did not necessarily require that the NRA be separated from existing government structures, the 2009 Electricity and Gas Directives introduced an important change to this approach. These Directives provided that “[e]ach Member State shall designate a single NRA at national level” and issued specific provisions to ensure the independence of these NRAs.<sup>20</sup> Although the NRA may consist of several bodies like a board and a secretariat, all these bodies need to meet the independence criteria that apply to the NRA as a whole.

The independence criteria provide that the NRA is legally distinct and functionally independent from any other public or private entity.<sup>21</sup> In this regard, the NRA must ensure that its staff and the persons responsible for its management act independently from any market interests and do not seek nor take directions from any government or other public or private entity. Members of the board of the NRA (or in absence of a board, its top management) should be appointed for a fixed period of five

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<sup>17</sup> *Ibidem*.

<sup>18</sup> P. Capros (2003).

<sup>19</sup> IMF (2010), *The making of good supervision. Learning to say “no”*, SPN/10/08.

<sup>20</sup> Art. 35 (1) of Directive 2009/72/EC and art. 39 (1) of Directive 2009/73/EC. Derogations apply in case of regional regulatory authorities (art. 35 (2) of Directive 2009/72/EC and art. 39 (2) of Directive 2009/73/EC) and small and isolated systems (art. 35 (3) of Directive 2009/72/EC and art. 39 (3) of Directive 2009/73/EC).

<sup>21</sup> Art. 35 (4), (5) of Directive 2009/72/EC and art. 39 (4) (5) of Directive 2009/73/EC. See also S. Lavrijssen, A. Ottow, ‘Independent Supervisory Authorities: A Fragile Concept’, *Legal Issues of Economic Integration* 39, No 4 (2012): 419–446, Kluwer Law International BV, The Netherlands.

to seven years (renewable once), and an appropriate rotation scheme of its board or top management should be in place.<sup>22</sup>

The possibility for the NRA to take autonomous decisions, independently from any political body, also entails the need for separate annual budget allocations and the autonomy in the implementation of the allocated budget in order to ensure that the NRA has adequate human and financial resources to carry out its duties. In principle, an approval of the budget of the NRA by the national legislator does not constitute an obstacle to budgetary autonomy as long as provisions relating to the autonomy in the implementation of the allocated budget of the NRA are included and defined by national budgetary law and rules. However, while legislation includes adequate provisions for the independence of NRAs, there are still obstacles and limitations in several Member States. These limitations may be reflected either in the (inadequate or incomplete) transposition of the legislation, or in the development of informal practices, *de jure* or *de facto* political influence in the NRA's decision-making processes or practical arrangements or the NRA's organisational culture itself.

In light of this context, this study aims to assess the independence of the NRAs in 12 selected Member States<sup>23</sup> and their effectiveness in performing key tasks.

**The Member States in question were selected by the European Commission in order to reflect a good balance in terms of geography, date of accession to the EU, size of the country, good/bad practices, and the diversity of obstacles to independence. The selection of a particular Member State does not prejudice in any way of the European Commission's assessment of the independence of the NRA.**

### 1.3. Methodology

This section presents the methodological approach adopted by the Study Team. It involved reviewing the relevant literature and drafting a set of indicators; conducting legal desk research in 12 Member States in order to answer a number of key questions relating to the legal framework at national level; a field research task in order to find out how independence works in practice; and legal analysis and the development of recommendations and best practices.

#### *Literature review and indicators*

The literature review covers the work carried out by organisations such as OECD (Organisation for Economic Co-operation and Development) and the Council of European Energy Regulators (CEER), as well as key literature by legal scholars and EU

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<sup>22</sup> Article 35(5) E-Directive.

<sup>23</sup> Austria, Bulgaria, Croatia, Czech Republic, France, Germany, Greece, Hungary, Lithuania, Romania, Slovakia and Spain.



case law on NRAs/supervision. Based on the literature review, the Study Team developed a number of indicators against which independence and effectiveness of NRAs could be measured. A brief summary of the literature review is presented in Section 2.1.

### *De jure findings*

Relevant information on the applicable legal framework has been collected in the selected 12 Member States, through a team of experienced national legal experts. First of all, the Study Team drafted the research questionnaire. The questionnaire contained thirteen targeted questions designed to identify the rules relevant for and impacting upon the independence of regulators in the Member States. The questionnaires were completed by national legal experts in respect of each Member State. The findings were fed into a comparative analysis. This analysis is a factual narrative, presenting the findings across the 12 Member States per topic in order to allow for easy comparison. The factual narrative is a key component of Chapter 3.

**As the findings of the desk research are based on a set of targeted research questions, which were answered and elaborated upon by legal experts for their respective Member States, a number of issues should therefore be noted. Firstly, the scope of the data collected during the desk research phase is necessarily limited by the nature of the questions asked by the desk research questionnaire. Secondly, as the desk research was carried out in the first half of 2018, it is possible that certain legislative amendments which have been enacted since then have not been captured in respect of certain Member States.**

Further, when reviewing the level of influence to which the NRAs may be subject when conducting their core tasks, the study sought to use the desk research findings to identify impediments to independence and effectiveness which stem from the legal framework itself in each of the Member States examined. By contrast, the field research task sought to identify, based on the perceptions of stakeholders, the extent to which influence may be exerted on the NRAs in practice. When seeking to identify limitations to independence in the legal framework, the point of departure for the research was identifying whether there were explicit provisions in the legal framework which provided for this (for example, a provision subjecting the NRA's decisions to approval by the Minister). Nonetheless, even in the absence of such explicit measures, there are other ways in which the independence and effectiveness of the NRA may be compromised. In relation to tariffs, the study team reviewed the legislation providing the NRAs with powers in relation to tariffs, in order to identify the extent to which provisions are included which are so prescriptive as to limit the discretion of the NRA in exercising its powers to such an extent as to detract from its independence and effectiveness in exercising those powers. The conclusions are presented in a general sense, based on a general review of the level of prescriptiveness of the measures set out in national law. Where detailed provisions, and formulae are present in the legislation, the Study Team has not assessed the actual or potential impact of these provisions, but rather has drawn conclusions from the existence of such provisions (i.e. the fact that the legislation prescribes a formula for the calculation of tariffs could in itself be regarded as a limit to the independence, without analysing the formula itself).



## Field research

The field research brings the *de facto* component into the assessment to complement the desk research, which mostly covers the *de jure* component. The aim was to collect a diverse and representative sample of opinions regarding the independence of NRAs and their effectiveness in performing key tasks. This was done via different methods, including a targeted stakeholder online survey and stakeholder interviews, ensuring that all relevant stakeholders were consulted.

Based on the survey results, the Study Team developed the questionnaires and the topic guides for the stakeholder interviews and topic guides for the NRA interviews. The majority of the interviews were carried by telephone although where possible, the Study Team carried out some of these interviews face-to-face.

**It is important to note that the field research is based on a limited sample of interviews and survey responses (see Table 1) and as such may not be fully representative. Further, stakeholders expressed their opinion regarding the *de facto* (or perceived) independence of NRAs and not about the actual legal framework. Several interviews with stakeholders (e.g. operators active in several Member States) covered more than one country (i.e. providing information for more countries in certain questions).**

The output of this field research is also presented per topic in Chapter 3, allowing the reader to appreciate the interplay between the *de jure* and the *de facto* findings.

**Table 1 : Overview of field research feedback per Member State**

Surveys & interviews	AT	BG	HR	CZ	FR	DE	EL	HU	LT	RO	SK	ES	Total
Stakeholders Survey Results	9	12	4	3	7	18	8	1	4	3	3	9	81
Stakeholders interviews <sup>24</sup>	6	7	3	7	3	7	3	5	2	5	4	2	25
NRA Interviews <sup>25</sup>	1	1	1	1	1	1	1	1	1	1	1	1	12
Total	16	20	8	11	11	26	12	7	7	9	8	12	

*Conclusions, best practices and recommendations*

The Study Team analysed the findings of the desk research and field research (see Chapter 4), and formed conclusions, and developed best practices and recommendations (see Chapter 5).

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<sup>24</sup> Note that several stakeholders provided inputs for more than one Member State, though they did not always provide answers for all questions. Further, 7 out of the 25 stakeholders provided feedback on the interview questions in a written way.

<sup>25</sup> NRA representatives from Greece and Slovakia provided feedback on the interview questions in a written way.

## **2. Review of the relevant literature and indicators against which independence and effectiveness of NRAs can be measured**

This Chapter summarises some of the main points of a number of studies that touch upon the issue of NRAs' independence and effectiveness (sub-section 2.1). This literature review will sketch briefly the state-of-the-art in regulatory independence and effectiveness, allowing the Study Team to develop indicators against which independence and effectiveness of NRAs can be measured (sub-section 2.2).

### **2.1. Literature review**

A review of the relevant literature shows that independent regulators are necessary to preserve stability and continuity in the setting of rules, to avoid political interference in business decisions and regulatory risks, and to maintain high standards of expertise and professionalism.<sup>26</sup> In the EU legislation on the common market for electricity and gas, the crucial requirement regarding the regulatory design is that the regulators must be independent of commercial interests in the sector. Furthermore, the fact that the state has, at least potentially, economic or political interests particularly with the incumbent companies, suggests that the regulator needs to be independent also from the government.<sup>27</sup> A regulator's independence is a basic prerequisite not only for proper regulatory work but it provides confidence and trust that regulatory decisions are made with integrity. Confidence in the NRA in turn provides confidence in the market. One of the very reasons why regulators were created in the first place was to ensure that decisions about the energy market would be shielded from commercial and political interests, thereby addressing the conflict of interest that can arise where the government has a stake in energy or network companies.<sup>28</sup> In addition, with the energy sector accounting for a considerable part of most countries' economies there are very real risks that private and/or public entities may seek to interfere with regulatory decision-making. It is paramount that the NRA's independence be properly protected (e.g. through adequate legal provisions) and safeguarded (e.g. through practical arrangements and a culture of independence within the NRA itself) throughout the life-cycle and work of the NRA. It is crucial for NRAs to have independence from politics, independence from industry, appropriate board-level arrangements, budgetary autonomy, adequate human resources and integrity.<sup>29</sup> The importance of NRAs independence is reflected in the literature, where an abundance of reports and recommendations analyse this issue.

Independent regulatory agencies can be defined as autonomous public bodies empowered to regulate specific aspects of an industry. Within this context, the Court

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<sup>26</sup> P. Capros (2003).

<sup>27</sup> *Ibidem*.

<sup>28</sup> CEER (2016).

<sup>29</sup> *Ibidem*.

of Justice of the European Union (CJEU) stated that independence normally means a status which ensures that the body concerned can act completely freely, without taking any instructions or being put under any pressure.<sup>30</sup> Supervisory authorities must enjoy an independence which allows them to perform their duties free from external influence, direct or indirect, which is liable to have an effect on their decisions.<sup>31</sup> Therefore, independence precludes not only any influence exercised by supervised bodies, but also any directions or other external influence which could call into question the performance of NRAs of their task.<sup>32</sup>

Furthermore, when analysing the independence of NRAs, two dimensions are noted: formal independence (as prescribed in the constitutions of agencies) and de facto independence (as exerted in practice).<sup>33</sup> Nevertheless, formal independence is not always associated with de facto independence and, on the other hand, some regulators can be independent in practice without being independent on paper.<sup>34</sup> Therefore, both dimensions are important and capture different facets of the independence of regulators. In addition to these dimensions, the independence of NRA can be analysed from different perspectives (i.e. independence from political actors and market players, financial independence, etc.).

Regarding the independence of the NRAs, it is considered that Member States should make sure that their NRAs are independent and do not face restrictions to the scope of their role.<sup>35</sup> CEER recommends that national law should explicitly refer to the NRA's independence from politics and from the industry. The legislator should ensure the absence of conflict of interest in proportionate rules relating to independence of the NRA.<sup>36</sup>

The literature also shows that in some instance the lack of clarity on roles and functions can open the door to undue government interventions.<sup>37</sup> OECD considers that some degree of overlapping is inevitable and intrinsic. However, confusion and ensuing deadlocks should be avoided, for example, by identifying in advance possible problematic areas and having regular exchanges on possible solutions between the

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<sup>30</sup> C-518/07 Commission V. Germany (¶¶ 18) Available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=79752&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=360192>

<sup>31</sup> C-614/10 Commission V. Austria (16/10/2012).

<sup>32</sup> C-518/07 Commission V. Germany (9/3/2010).

<sup>33</sup> M. Maggetti (2012), *Regulation in Practice: the de facto independence of regulatory agencies*. Available at: <http://www.zora.uzh.ch/id/eprint/66106/1/Maggetti-2012-1Regulation.pdf> (last consulted March 2018).

<sup>34</sup> F. Gilardi and M. Maggetti (2010), *The independence of regulatory authorities*. Available at : [https://www.fabriziogilardi.org/resources/papers/gilardi\\_maggetti\\_handbook.pdf](https://www.fabriziogilardi.org/resources/papers/gilardi_maggetti_handbook.pdf)

<sup>35</sup> European Court of Auditors (2015), *Improving the security of energy supply by developing the internal energy market: more efforts needed*. Available at: [http://www.eca.europa.eu/Lists/ECADocuments/SR15\\_16/SR\\_ENERGY\\_SECURITY-EN.pdf](http://www.eca.europa.eu/Lists/ECADocuments/SR15_16/SR_ENERGY_SECURITY-EN.pdf) (last consulted February 2018).

<sup>36</sup> CEER (2016).

<sup>37</sup> OECD (2016), *Being an independent regulator – The governance of regulators*. Available at: <http://www.oecd.org/publications/being-an-independent-regulator-9789264255401-en.htm> (last consulted February 2018).

executive and regulator.<sup>38</sup> Grey areas will inevitably remain between the executive and the regulator. OECD suggests, therefore, that the legislative process and parliament can be useful in clarifying these grey areas and resolving possible deadlocks. In this context, the use of public consultations can help regulators obtain and disclose the views of the executive in an open and accountable way. Informal and regular exchange of information could also be an effective way of complementing more formal channels of communication.

Moreover, some governments retained for themselves certain regulatory powers, or have imposed on NRAs methodologies for setting tariffs that could favour certain market participants.<sup>39</sup> To ensure NRAs' institutional independence, ACER recommends that the respective roles of the Member States and the NRAs should be clearly and accurately defined. Furthermore, where EU legislation refers to Member States having functions and responsibilities, it should be clearly stated which of them could be expressly delegated to the NRAs or to another competent body.<sup>40</sup>

In addition, when it comes to issuing binding decisions, in some Member States, NRA's decisions are subject to ministerial approval, can be overturned by the ministry or can otherwise be influenced by it. CEER recommends that NRAs should be consistently given the power to issue final and binding decisions that are not subject to outside (ministerial) scrutiny.<sup>41</sup>

As for the relationship with industry, transparency and consultation can help ensure that decisions build on a wide range of evidence and are perceived as reflecting the needs and the legitimate demands of industry and users.<sup>42</sup>

Adequate resourcing of NRAs is also an issue of fundamental importance to the effectiveness and credibility of the current regulatory model for Energy in Europe. Inadequate resourcing of NRAs puts at risk the independence of NRAs, the effective delivery of the regulatory policies that underpin the Internal Energy Market, and ultimately the benefits of the Internal Energy Market to consumers.<sup>43</sup> However, not all NRAs have resources available to them which are commensurate with the tasks they need to undertake.<sup>44</sup> The European Court of Auditors considers that NRAs should have

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<sup>38</sup> *Ibidem*.

<sup>39</sup> European Court of Auditors (2015).

<sup>40</sup> ACER (2016), *Recommendation 01-2016 on ensuring the independence of ACER and of NRAs (and accompanying publication: Taking stock of the regulators' human resources)*. Available at: [http://www.acer.europa.eu/official\\_documents/other%20documents/acer%20taking%20stock%20of%20the%20regulators%E2%80%99%20human%20resources%20summary%20of%20findings.pdf](http://www.acer.europa.eu/official_documents/other%20documents/acer%20taking%20stock%20of%20the%20regulators%E2%80%99%20human%20resources%20summary%20of%20findings.pdf) (last consulted February 2018).

<sup>41</sup> CEER (2016).

<sup>42</sup> OECD (2016).

<sup>43</sup> ACER (2016).

<sup>44</sup> European Court Auditors (2015).

sufficient resources available for their activities, including allowing them to participate fully in EU-level cooperation activities.<sup>45</sup>

Regarding the budgetary autonomy of NRAs, CEER recommends that it should be safeguarded at all stages and in all types of processes. NRAs should be allowed to use their budget as they see fit without restrictions on the regulator's staffing policy, as long as it stays within its budget.<sup>46</sup> Moreover, the ex-post control of an NRA's annual accounts should be performed by an independent auditor. The government should not have a role in this process.<sup>47</sup> ACER also states that executive bodies shall not be allowed to set requirements that could jeopardise the NRA's budgetary autonomy and ability to fulfil its tasks.<sup>48</sup>

Concerning the budget, generally regulators receive annual rather than multi-annual budget allocations, which can increase the risk of undue influence. In this context, the source of funding- fees, general revenues or a mix of the two – is less important than the way in which funding needs are determined, appropriated and spent. Most regulators' budgets are part of the national budget, which is a guarantee of transparency and accountability of regulators to citizens and can strengthen independence. For regulators funded through fees, an appropriate cost-recovery mechanism is essential to set the "right" fee and avoid a regulator that is under-funded, captured by industry or undermined by the executive (for example in countries with large regulated state-owned enterprises). For regulators funded through general revenues, it can be easier to influence the regulator by reducing the resources at the disposal of the regulator. Annual appropriations can make it easier to influence the regulator than multi-annual appropriations which are less contingent to short-term political/electoral imperatives. Adequate safeguards should be in place so that the budget process does not become a tool to unduly influence the regulator.<sup>49</sup>

Other important factors are the manner in which the staff is nominated and appointed (i.e. by the government's executive branch, by the parliament, by a search committee when it comes to hire a new Chair, etc.) and whether there are restrictions on pre-or post-employment of professional staff. The way in which the regulators attract, retain and motivate staff is ultimately a key determinant of the ability of the regulator to act independently and take decisions that are objective and evidence-based.<sup>50</sup>

Transparency and impartiality on the nomination and the appointment of commissioners, board members and officers in top management position within NRAs is important to safeguard the independence of NRAs. Therefore, it is considered that Member States should be required to establish clear rules and procedures in respect of

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<sup>45</sup> European Court of Auditors (2015).

<sup>46</sup> CEER (2016).

<sup>47</sup> *Ibidem*.

<sup>48</sup> ACER (2016).

<sup>49</sup> OECD (2016).

<sup>50</sup> OECD (2016).



the nomination, appointment and dismissal for those positions.<sup>51</sup> In particular, the nomination process (rather than the appointment) is a crucial juncture where independent panels for selecting nominees can help foster a culture of independence.<sup>52</sup> In relation to the restrictions on pre-or post-employment of professional staff, ACER recommends that for commissioners, board members and officers in top management positions, adequate conflict of interest provisions should be in place, including proportionate employment restrictions during a predefined period following the end of their mandate in the NRA. Also, different provisions could apply to them to reflect their respective roles and responsibilities within the NRA.<sup>53</sup> Nonetheless, these principles are not always followed.<sup>54</sup> Thus, to ensure NRAs' operational independence, it is recommended to have clear rules for nomination, appointment and dismissal of key staff and board members<sup>55</sup> and restrictions on pre-or post-employment of professional staff to avoid the risk of "revolving doors" and conflicts of interest with industry. Lastly, when the part of the law that refers to the head or fixes the composition of the board of the NRA is changed, the current head/board should still complete their term before the changes come into force.<sup>56</sup>

In relation to the effectiveness of NRAs, the literature<sup>57</sup> shows that, in the view of grid companies, regulators in Europe are considered to have effective instruments, such as strong powers to undertake enforcement action, to acquire information and to investigate. Regulators are also positively rated regarding the achievement of policy objectives for the industry. However, grid companies were less positive about reducing the regulatory and administrative burden imposed on their regulated entities. Thus, regulators should put more effort into reducing administrative burden. Nevertheless, regulators need to have an optimal balance between decreasing administrative burden and the power of information acquisition and investigation.<sup>58</sup>

The accountability of the NRAs is another important component. The literature reflects that independence cannot come at the price of accountability. 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.<sup>59</sup> Regulators need to be part of a well-functioning and transparent governance-ecosystem, keeping their fingers on the pulse of the market through interaction with industry and consumers and having effective interactions with

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<sup>51</sup> ACER (2016).

<sup>52</sup> OECD (2016).

<sup>53</sup> ACER (2016).

<sup>54</sup> European Court of Auditors (2015).

<sup>55</sup> ACER (2016).

<sup>56</sup> CEER (2016).

<sup>57</sup> PwC (2014), Online survey among national grid companies. The study focused on 66 grid companies from 18 European countries: Austria, Belgium, Italy, Slovakia, the Czech Republic, Slovenia, Denmark, the Netherlands, Spain, Finland, Norway, Sweden, Germany, Poland, Switzerland, Greece, Portugal and the United Kingdom.

<sup>58</sup> PwC (2014).

<sup>59</sup> ACER (2016).

government institutions.<sup>60</sup> In this context, CEER recommends that NRAs should follow a clear consultation policy and this should be made transparent. Moreover, ACER recommends that legislation should enshrine the accountability of NRAs towards national parliament instead of governments.<sup>61</sup>

Another important safeguard to protect NRAs from undue influence is the transparency level of the NRAs regarding reasoning and justification of decisions, the consultation process and publicity of decisions. ERRA (Energy Regulators Regional Association) recommends that NRAs should prepare, adopt and publish the rules of their various procedures. Moreover, NRAs can provide information on regulatory decisions in the public domain (official website of the authority) and publish their rule-making and tariff-related decisions in the official gazette of the government or in a national newspaper. Transparency also means that the NRAs should have clear contact points for all stakeholders and publish information on their own organisation and structure.<sup>62</sup>

Finally, the literature shows that the Third Energy Package provisions concerning NRAs duties and powers are transposed into national legislations in different ways.<sup>63</sup> Thus, ACER recommends that Member States shall fully transpose and comply with the Third Energy Package, in particular with respect to NRAs' powers, their independence in the fulfilment of their tasks.<sup>64</sup> In this context, ACER considers that the European Commission shall 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.<sup>65</sup>

## 2.2. Indicators

The literature review has allowed the Study Team to develop certain indicators against which independence and effectiveness of NRAs can be measured (see Table 2 below).

The methodology chosen to classify independence and effectiveness of NRAs involved the drafting of a table, where a number of key questions obtained from the literature could be answered. When choosing the questions, it was important to bear in mind that they needed to be answerable on the basis of the desk research and the field research. Nevertheless, due to the nature of the questions, some of them were only applied to the desk research or the field research. For example, the first indicator relates to the "legal framework" in the 12 Member States selected, therefore, the sub-indicators were only applied to the findings of the desk research.

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<sup>60</sup> OECD (2016).

<sup>61</sup> ACER (2016).

<sup>62</sup> ERRA (2015), *Survey: independence of the national regulatory authorities*. Available at: [http://erranet.org/wp-content/uploads/2016/03/ERRA-Survey-Regulatory-Independence\\_OPEN\\_final.pdf](http://erranet.org/wp-content/uploads/2016/03/ERRA-Survey-Regulatory-Independence_OPEN_final.pdf) (last consulted February 2018).

<sup>63</sup> CEER (2016).

<sup>64</sup> ACER (2016).

<sup>65</sup> ACER (2016).

Once the key questions were selected, they were redrafted with the aim of obtaining sub-indicators that represent the conditions to ensure the independence and effectiveness of NRAs. These sub-indicators were grouped into five main categories: 1) Legal framework, 2) NRA independence, 3) Board and staff, 4) Financial resources and 5) Operational issues.

Answering those key sub-indicators in respect of the 12 Member States enabled the Study Team to identify relative levels of independence and effectiveness, based on objective and comparable indicators.

**Table 2 : Indicators for the independence and effectiveness of NRAs**

Indicators	Sub-indicators
<b>Legal framework</b>	Clear definition of NRA's role / competences in national legislation (compliant with EU legislation)
	Legal autonomy of NRA to take binding decisions (no need for ministerial approval nor risk for possible overruling)
	NRA institutionally accountable to parliament only
	Legal right for concerned grid/market operators to challenge/appeal NRA decisions in court
	Legal right for NRA to act as dispute settlement or arbitration authority for conflicts between grid/market operators
	Legal right for NRA to control, inspect and impose sanctions/fines to grid/market operators
Indicators	Sub-indicators
<b>NRA independence</b>	Independence of the NRA from political actors explicitly stated in the legislation and/or internal rules
	Independence of the NRA from market actors explicitly stated in the legislation and/or internal rules
	No (legal) restrictions to the scope of the NRA's role to control, inspect and impose sanctions/fines to grid/market operators
Indicators	Sub-indicators

<b>Board and staff</b>	Objective rules and criteria and adequate procedure for selection and dismissal of key staff and board members
	Adequate staff (quantitatively and qualitatively) to properly carry out core tasks
	Adequate cooling on/off period for staff moving from/to regulated grid/market operators
	No involvement of state in staff recruitment and salary policy and procedures
<b>Indicators</b>	<b>Sub-indicators</b>
<b>Financial resources</b>	Adequate multi-annual budget to carry out core tasks
	Funding independently from state
	Autonomy regarding use of budget
<b>Indicators</b>	<b>Sub-indicators</b>
<b>Operational issues</b>	Procedures to properly consult all concerned stakeholders on draft NRA decisions
	Publication of NRA documents on website in national languages(s) (+ EN as a best practice)
	Transparent grid tariff setting procedure and NRA decisions independently from political actors
	Adequate rules and procedures for complaints handling by NRA
	Adequate participation of the NRA in EU/cross-country cooperation

### 3. Description of law and practice impacting on the independence and effectiveness of regulators in the field of energy

#### 3.1. Introduction

This Chapter contains a comparative analysis showing the description of the law and practice impacting on the independence of NRAs. In order to do so, this section is divided into three sub-sections: sub-section 3.2 analyses the NRA's independence from political and market actors, sub-section 3.3 deals with the adequacy of human and financial resources, and sub-section 3.4 examines the independence and effectiveness of NRAs in conducting their core tasks.

#### 3.2. Independence of NRAs from political and market actors

##### 3.2.1. *Explicit legal basis for NRA independence*

Member States shall ensure that, when carrying out the regulatory tasks conferred upon it by this Directive and related legislation, the regulatory authority:

- (a) is legally distinct and functionally independent from any other public or private entity;
- (b) ensures that its staff and the persons responsible for its management:
  - (i) act independently from any market interest; and
  - (ii) do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks. That requirement is without prejudice to close cooperation, as appropriate, with other relevant national authorities or to general policy guidelines issued by the government not related to the regulatory powers and duties under Article 41 of the Directive 2009/73/EC and Article 37 of the Directive.

*Article 35.4 of **Directive 2009/72/EC** and Article 39.4 of **Directive 2009/73/EC***

This sub-section analyses the legal form of NRAs and whether their independence is explicitly provided for in national laws.

The desk research has shown a diverse framework in relation to the terminology used by Member States to define the legal form that NRAs take. Nevertheless, there are certain communalities across the Member States examined, for example, the majority use the term autonomous, separate or independent when describing the legal form of the NRA.

In relation to NRAs independence, it was found that in all Member States the national law provides explicitly that the NRA should be independent. However, it was also observed that not all Member States specify that the independence is to be from both political and market interests.

In three Member States (Spain, Austria, Lithuania) the law explicitly states that the independence is to be from both political and market interference. In this context, the Spanish legislation states that the NRA acts with structural and functional autonomy and is fully independent of the *Government*, of public authorities and of *market actors*.<sup>66</sup> Likewise, in Lithuania the Law on Energy establishes that the NRA shall adopt independent decisions that shall not be influenced by any state/municipal institution, company, organization or other undertaking.<sup>67</sup> Moreover, there is also an explicit requirement for the independence of a chairperson of the Commission, its members, civil servants and employees of the administration of the Commission which obliges them to act independently of all *market interests* and, in performing their duties, not to seek, nor execute, any instructions of the *Government* or any other public or private person.<sup>68</sup> In Austria the law explicitly states that the organs of the NRA and its members are not bound by any instructions from the *Government* in the exercise of their duties and act independently of *market interests*.<sup>69</sup> It should be noted that in Austria some of the areas of activity are exempt from this provision and the NRA is expected to work upon the lead and instructions from the Minister of Science, Development and Economy. Nonetheless, these areas cover issues outside of and in addition to the regulatory obligations prescribed by EU law for the NRAs.

Furthermore, in four Member States (Czech Republic, Slovakia, France, Romania) the national law uses different wording to describe the independence of the NRAs. Therefore, although the law does not explicitly state that the independence is to be from both political and market interference, it can be assumed from a series of provisions.

There is one Member State (Bulgaria) where the law only explicitly states that the NRA is politically independent of the executive power, without any mention of market interests.<sup>70</sup> In addition, in three Member States (Croatia, Hungary, Germany) the law does not state that the NRA is to be independent from either political and market interference at all. In Germany, the law establishes that the NRA is an independent/separate higher federal authority within the area of competence of the Federal Ministry for Economic Affairs and Energy. Nonetheless, its independence mostly relates to its organisational structure. Moreover, it is worth mentioning that in the case of Germany, there are also regional regulatory authorities and their independence is specified in the regional (Länder) laws.<sup>71</sup> In Croatia and Hungary,

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<sup>66</sup> Article 2.1 of Act 3/2013 and Article 2.1 of RD 657/2013.

<sup>67</sup> Article 8(11)(3) of the Law on Energy.

<sup>68</sup> Article 8(11)(2) of the Law on Energy.

<sup>69</sup> Section 5(2) E-ControlGesetz.

<sup>70</sup> Article 10, Para 3 of the Energy Act.

<sup>71</sup> It should be noted that in DE the tasks of the regulatory authority are exercised by the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railways (Bundesnetzagentur) and regional regulatory authorities (Landesregulierungsbehörde in the regions – Länder). However, as most of the tasks are performed by the Federal Agency, the regional regulatory authorities will not be reviewed in detail and will only be referred to as appropriate.

according to the research conducted, it appears that none of the main legal instruments regulating the status and powers of the NRA mentions that it is to be independent from both political and market interference.

In addition, it was also observed that in some Member States the law refers to the independence from political and market interferences of the NRA and its members (Spain, Lithuania, Slovakia, France), while in other Member States the law only refers to the independence of the NRA's members or bodies (Romania, Austria, Greece), or just to the independence of the NRA itself (Bulgaria, Czech Republic, Croatia, Germany, Hungary).

Lastly, desk research has shown that none of the Member States provide a legal definition of independence. In the majority of the Member States (Bulgaria, Greece, Spain, Croatia, Lithuania, Romania, Slovakia, Austria, Hungary) an interpretation of the term can be made from the provisions regulating the NRA or its staff. Moreover, in the Czech Republic, generally, the independence of the administrative authority (including regulatory authorities) is understood as functional independence. Independence is perceived as the independence of a particular authority in the exercise of its competencies or, where appropriate, in the choice of instruments to achieve (fulfil) those competences. In France, the law provides several definitions which apply to the conditions related to the "independence" of the NRA. For instance, the law defines "conflict of interest" as *"any situation that causes interference between a public interest and public or private interests, which could influence or appear to influence the independent, impartial and objective performance of a duty"*.<sup>72</sup> In Germany, the constitution<sup>73</sup> sheds some light on how the independence/separateness of the NRA should be understood. Nevertheless, neither a definition nor an interpretation of the term is provided.

### *3.2.2. Availability of enforcement instruments and level of NRA discretion in their use*

Member States shall ensure that regulatory authorities are granted the powers enabling them to carry out the duties (...) in an efficient and expeditious manner. For this purpose, the regulatory authority shall have at least the following powers:

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<sup>72</sup> Article 2 of Law No. 2013-907 of 11 October 2013 on the transparency of public life.

<sup>73</sup> Article 87(3) of the German Constitution.

- (a) to issue binding decisions on natural gas/electricity undertakings;
- (b) to carry out investigations into the functioning of the gas/electricity markets, and to decide upon and impose any necessary and proportionate measures to promote effective competition and ensure the proper functioning of the market. Where appropriate, the regulatory authority shall also have the power to cooperate with the national competition authority and the financial market regulators or the Commission in conducting an investigation relating to competition law;
- (c) to require any information from natural gas/electricity undertakings relevant for the fulfilment of its tasks, including the justification for any refusal to grant third-party access, and any information on measures necessary to reinforce the network;
- (d) to impose effective, proportionate and dissuasive penalties on natural gas/electricity undertakings not complying with their obligations under the Directive or any relevant legally binding decisions of the regulatory authority or of the Agency, or to propose to a competent court to impose such penalties (...).
- (e) appropriate rights of investigations and relevant powers of instructions for dispute settlement (...).

*Article 37.4 and 35.5 of **Directive 2009/72/EC**; Article 41.1 and 41.5 of **Directive 2009/73/EC***

This sub-section presents some of the enforcement instruments available to NRAs. It was observed that in all Member States examined, there are enforcement instruments available to the NRA under national law. Specifically, all NRAs have the power to supervise and carry out investigations/inspections. Nevertheless, the scope and rights provided to the NRAs within these instruments vary per Member State.

Moreover, in Spain, the Energy Division of the NRA is the competent body to initiate *ex officio* infringement proceedings falling within its powers in accordance with the Electricity Sector Act and the Hydrocarbon Sector Act.<sup>74</sup> In Croatia, the Act on Regulation of Energy Activities grants the NRA the power to initiate misdemeanour proceedings for failures to comply with obligations set in the Act on Regulation of Energy Activities, or other legally binding decisions of the NRA or ACER.<sup>75</sup> In Lithuania, the NRA has the right to apply to a court for a temporary restriction on the energy undertaking's activities in the wholesale energy market if the market actor concerned has not stopped the violations within the reasonable term.<sup>76</sup> In Austria, the NRA has the power to initiate infringement proceedings at the competent administrative authorities and has the right to appeal against the decisions of those authorities.<sup>77</sup>

While in the majority (10) of Member States the NRA has the power to impose sanctions/penalties, in one Member State (Austria) the NRA does not have this power,

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<sup>74</sup> Article 23.f) of RD 657/2013.

<sup>75</sup> Article 14 (6) of the Act on Regulation of Energy Activities.

<sup>76</sup> Article 36 of the Law on Energy.

<sup>77</sup> Section 25(2) E-ControlGesetz.



but the power to impose sanctions is the preserve of the competent penal authorities. While Austria has taken a different approach to the other Member States examined, the approach is in line with Article 37(4)(d) of the 2009 Electricity Directive, which provides for the possibility of a competent court imposing such penalties. In Croatia, the NRA does not currently have power to impose or propose penalties, but it is understood that Croatia is working on amending the law in order to provide it with this power.

All NRAs across the Member States examined have the right to request information from market participants in general. Nevertheless, the terminology used by national laws when setting these rights, as well as the scope of such rights varies per Member State.<sup>78</sup> In addition, some NRAs have certain powers that could be considered as enforcement instruments. For instance, in France the NRA can demand access to undertakings' accounts (in the framework of the execution of its competences)<sup>79</sup> and its president can start legal proceedings.<sup>80</sup> In Greece, the NRA, acting *ex officio* or pursuant to a complaint, may issue a reasoned decision adopting appropriate interim measures in keeping with the principle of proportionality to address the situation, before passing a final decision.

Finally, it should be noted that in some Member States (e.g. Spain, Croatia, Romania) the legislation provides for general powers/instruments for the NRA itself and more specific powers/instruments depending on the sector, such as the gas sector, the electricity sector and the hydrocarbon sector.

### *3.2.3. Potential legal limitations of NRA independence due to interactions with market interests/government and provision for oversight by national parliaments*

Apart from the national measures transposing the 2009 Electricity Directive and the 2009 Gas Directive, this sub-section analyses any legislative measures that may impact upon the NRAs' or their staff's ability to act independently from market interests, the government, the parliament or any political body. Furthermore, it assesses legal measures which may impact upon the independence of NRAs in setting tariffs or any other legal measure or administrative procedure that may limit the independence of NRAs.

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<sup>78</sup> For instance, in AT the NRA can request information from any relevant person, including persons involved in the transmission of orders or the performance of the acts in question, and their clients, and, if necessary, to summon and interrogate such persons or entities. In EL, the NRA can request information from undertakings engaged in energy-related activities in connection with the performance of their obligations, including justification for any refusal to grant third parties access, and any information relating to measures needed to strengthen the energy transmission or distribution systems. In Croatia, the NRA has the right to request any information from electricity undertakings relevant for the fulfilment of their tasks within the scope of energy activities, including justifications for any refusal to grant access to the grid, and any information on measures necessary to reinforce the grid, etc.

<sup>79</sup> The right to access accounts is defined in Art- L.135-1 of the Energy Code and the procedure for access is defined in Art. L.135-3 to L.135-11 of the Energy Code.

<sup>80</sup> Article L.132-1 and Art. R.132-1, Energy Code.



### *Market interests*

It was observed that none of the Member States have specific legislative measures in place which impact upon either the NRA's or its staff's ability to act independently from market interests.

### *Government*

In most of the Member States, there are no legislative measures which may require either the NRA or its staff to take direct instructions from any government or public/private entity when carrying out regulatory tasks.

Nonetheless, a few potential limitations have been noted which are illustrated below.

In Austria, in certain situations, the NRA should act following the lead or instructions of the Federal Minister of Science, Development and Economy. However, these instances concern topics and issues which have been allocated to the NRA but which are outside the scope of regulatory tasks attributed to NRAs by EU law.<sup>81</sup> This is not prohibited by the Directive. In addition, there is an Advisory Council for Energy which has an advisory role to the E-Control and consists of, *inter alia*, the representatives of the ministries.<sup>82</sup> The competences of the Advisory Council for Energy include providing advice on the granting of subsidies by means of investment grants in accordance with the law<sup>83</sup> and the assessment of regulations issued by the Federal Minister for Economic Affairs, Family and Youth based on E-Control Gesetz, the Federal Electricity Law, the Eco-Electricity Act, the Cogeneration Act and the Federal Gas Law.<sup>84</sup>

In France, the Ministry in charge of energy appoints a Government Commissioner who is attached to the NRA. The Commissioner can request to add items to the agenda of the NRA's meetings which relate to energy policy, the safety and security of public transmission and distribution electricity networks, or to the safety and security of

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<sup>81</sup> As mentioned in the judgment of the National Administrative Court, Ro 2016/04/00137, p.4, [https://www.vwgh.gv.at/medien/mitteilungen/ro\\_2016040013.pdf?61pg7v](https://www.vwgh.gv.at/medien/mitteilungen/ro_2016040013.pdf?61pg7v), last accessed 21/03/2018.

<sup>82</sup> The Advisory Council for Energy includes a chairman, two representatives of the Federal Ministries of Economy, Family and Youth as well as of Agriculture and Forestry, Environment and Water Management; one representative each from the Federal Ministries of Finance and Labor, Social Affairs and Consumer Protection; one representative of each region (Land) and one representative of the Austrian Association of Towns, of the Austrian Association of Municipalities, of the Association of Renewable Energy Austria, of the association "ÖKOBÜRO - Alliance of the Environmental Movement" and of the Federation of Industrialists and one representative from the Austrian Federal Economic Chamber, the Austrian Chamber of Agriculture, the Federal Chamber of Labor and the Austrian Trade Union Confederation.

<sup>83</sup> Eco-Electricity Law and Cogeneration Act.

<sup>84</sup> Section 20(2) E-ControlGesetz.

installations for the transport, distribution or storage of natural gas and LNG installations.<sup>85</sup>

Lastly, in Germany, the rules of procedure of the NRA require the consent of the Federal Ministry for Economic Affairs and Energy in cooperation with the Federal Ministry of Transport and Digital Infrastructure.<sup>86</sup> In addition, the ministries may issue instructions for the NRA. Various legal acts take different approaches to such instructions: According to the Energy Industry Act,<sup>87</sup> only the publication of general instructions is required. At the same time, the NRA may be subject to any case-by-case instructions as well, since the Act constitutes only a duty of publication of the general instruction yet does not restrict the right of the Ministry to issue more specific instructions. At the same time, according to the Telecommunications Act, any instruction received by the NRA from the Ministry for Economic Affairs and Energy and the Ministry of Transport and Digital Infrastructure need to be published in the Official Gazette.<sup>88</sup>

The Federal Network Agency is entitled to bring an action before the Administrative Court against instructions from the Federal Ministry of Transport and Digital Infrastructure within the framework of legal supervision. The Federal Network Agency is eligible for this procedure. The claim must be filed within one month after notification of the instruction to the Federal Network Agency.<sup>89</sup> In practice, however, no such instructions have been issued so far.<sup>90</sup> The obligation to publish instructions can be seen as a safeguard against unjustified instructions.

In Slovakia, a potential limitation of the NRA's independence is linked to the participation of the Ministries of Economy and Environment on certain price proceedings<sup>91</sup> of the NRA.<sup>92</sup> It is clear that the Ministry cannot actually block or veto price proceedings or give instructions to the NRA. Further, its intervention is stated to be for the strict protection of the public interest.

Furthermore, in the majority of Member States, there appears to be no legislative measures that may directly limit the NRA's ability to take autonomous decisions, independently from political bodies. Nevertheless, in some Member States (e.g.

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<sup>85</sup> Article L.133-4 of Energy Code.

<sup>86</sup> Section 3 BEGTPG.

<sup>87</sup> Section 61 Energy Industry Act (Energiewirtschaftsgesetz, EnWG, BGBl. I S. 2549, 07/07/2005).

<sup>88</sup> Section 117 Telecommunications Act.

<sup>89</sup> Section 4(3) Gesetz über die Eisenbahnverkehrsverwaltung des Bundes (Act on Federal Railways Administration), BGBl. I S. 2237, 27/12/1993 with later amendments.

<sup>90</sup> Wissenschaftliche Dienst – Deutscher Bundestag, Academic Service of the German Parliament, Rechtstellung der Bundesnetzagentur – Legal Status of the Federal Network Agency, 2017, p.4.

<sup>91</sup> Article 14, par. 3 of the Regulatory Act.

<sup>92</sup> The abovementioned revision of the Regulatory Act has been backed in the *explanatory documentation of the Ministry of Economy proposing this revision by "the strict protection of the public interest"*.

Croatia, Austria, Germany) there are certain provisions in place that may limit the NRA's autonomy.

In Croatia, the Ministry supervises the legality of the NRA's decisions.<sup>93</sup> The extent of Ministry's supervision has not been specified, but the law restricts the NRA's general powers of administrative supervision - which is granted to the Ministry, central state offices and state administrative organisations - over acts of local or regional offices of state administration.<sup>94</sup> It should be noted that the law lacks clarity with regard to the extent and practical application of the powers granted to the Ministry, because it does not amount to full-scale administrative supervision, nor is the NRA a state body whose work can be controlled by the Ministry in that respect. It is unclear whether the Ministry is authorised to take decisions instead of the NRA, when controlling the legality of its decision.<sup>95</sup> Nonetheless, the study team understands that Croatia is working to amend this provision to bring it into line with the Directives.

In Austria, as mentioned previously, the law provides that in certain instances, the NRA must execute its tasks on instruction from the Ministry of Economy, Family and Youth.<sup>96</sup> However, this requirement does not relate to the execution of the NRA's regulatory tasks falling within the scope of Article 37 of the 2009 Electricity Directive. This is therefore not prohibited by the Directive.

In Germany, in some cases,<sup>97</sup> the NRA is obliged to decide in agreement with the Federal Cartel Office (Bundeskartellamt).<sup>98</sup> Such interaction with the national competition authority is not inconsistent with the 2009 Electricity Directive, Article 36 of which specifically envisages close consultation.

Governmental interaction with NRAs should be limited to general policy guidelines unrelated to the regulatory tasks provided for in Article 37. Most Member States do not provide for governmental interference with the NRAs carrying out the tasks provided for in Article 37 of the Electricity Directive. However, the provision in the Croatian legislation providing for the Ministry to supervise general and individual decisions of the NRA could be problematic.

### *Oversight by National Parliaments*

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<sup>93</sup> Article 36 of the Act on Regulation of Energy Activities.

<sup>94</sup> Article 68 of the Act on the System of State Administration (Zakon o sustavu državne uprave, Official Gazette 150/11, 12/13, 93/16, 104/16).

<sup>95</sup> Article 7 of Act on Regulation of Energy Activities.

<sup>96</sup> Section 18 E-ControlGesetz.

<sup>97</sup> For instances: the questions relating to control measures, as well as the market definition, market analysis, functional separation of companies on to market in order to enhance competition, voluntary separation by a vertically integrated company, establishing procedures and framework conditions for the release of frequency ranges for trading, leasing or cooperative (frequency pooling) purposes in order to allow flexible use of frequencies.

<sup>98</sup> Section 123 Telecommunications Act, Section 58(1) EnWG.

The desk research has shown that none of the Member States have legislative measures in place which may require either the NRA or its staff to take instructions from the Parliament.

In Germany, even though there are no legal provisions requiring the NRA to take instructions from the Parliament, there are certain provisions that may indirectly have the same effect. Specifically, there is an advisory council working within the framework of the NRA which is composed of 16 members of the Bundestag (first chamber of the German Parliament) and 16 members of the Bundesrat (second chamber of the German Parliament).<sup>99</sup> The Advisory Council is entitled *inter alia* to request measures to implement the regulatory objectives;<sup>100</sup> to participate in certain decisions of the Federal Network Agency;<sup>101</sup> to suggest the President and the Deputy Presidents of the NRA.<sup>102</sup> Additionally, an Advisory Council for the Railway Infrastructure is in place, which has similar competences and also consists of the Members of the Bundestag and Bundesrat (nine from each chamber).<sup>103</sup>

Concerning the relationship between the NRA and the Parliament, in all Member States the NRA is required to report annually to the Parliament about the activity and management of the NRA.

Desk research has also shown that in most Member States (Austria, Bulgaria, Germany, Greece, Spain, France, Croatia, Lithuania, Romania, Slovakia) the Parliament is involved in the procedure concerning the appointment/nomination of the NRA's Board or top management (for more information see sub-section 3.2.6).

Furthermore, in some Member States (Czech Republic, Spain, Slovakia, Austria, France) the law requires the members of NRAs to appear before parliamentary hearings in certain situations. For instance, in the Czech Republic, the Chairman of the NRA's Board is obliged to participate in hearings concerning the activity and management report in the Chamber of Deputies of the Parliament of the Czech Republic and of the Senate of the Parliament of the Czech Republic or designated bodies<sup>104</sup>. Moreover, in cases when the Chamber of Deputies of the Parliament of the Czech Republic, the Senate of the Parliament of the Czech Republic, or their authorities, are conducting hearing on a matter falling within the scope of authority of the NRA, such bodies are entitled to request the presence of the Chairman of the NRA's Board at the hearing and to provide the opinion and necessary information or explanations for the case.<sup>105</sup> Likewise, in Spain the President of the NRA must appear,

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<sup>99</sup> Section 5(1) BEGTPG.

<sup>100</sup> Section 120(3) Telecommunication Law.

<sup>101</sup> Section 120 Telecommunication Law in conjunction with Section 61(3)2, 4 Telecommunications Law.

<sup>102</sup> Section 3, 5 BEGTPG.

<sup>103</sup> Section 4 Bundeseisenbahnverkehrsverwaltungsgesetz, <https://www.gesetze-im-internet.de/bevvg/>

<sup>104</sup> Section 17f (1) Energy Act.

<sup>105</sup> Section 17f (2) Energy Act.

at least once a year, before the relevant committee of the Congress to explain the basic outline of the Commission's work, together with its goals and priorities for the future. At the request of the Chamber, one or more Council members may appear alongside the Chairman. These annual appearances shall be based on the annual report and the action plan.<sup>106</sup> Notwithstanding his annual appearances, the President shall appear before the relevant committee of the Lower or Upper Houses of the Spanish Parliament, at their request, on the terms established in their respective Regulations.<sup>107</sup>

In Slovakia, Parliament's committees have the right to invite members of the government, heads of other state administration bodies and the Prosecutor General to their meetings and require explanations, reports and necessary documents from them. In this context, they are obliged to come to the Committee meeting, to submit the required explanations and reports and to submit supporting documents. They may be substituted by the appointed representatives if the committee agrees.<sup>108</sup> In the same way, the competent committees of the Austrian Parliament (in the first and the second chamber) may require a member of the management board of the NRA or the entire management board, to attend a meeting of the parliamentary committee. During such a meeting, the parliamentary committee may ask the management board members about any aspect of the functioning/tasks of the NRA.<sup>109</sup> Finally, in France the NRA's board or staff can also appear during hearings before the parliamentary committees in charge of energy.<sup>110</sup>

Recital 33 of the Electricity Directive clarifies that NRA independence in conducting its regulatory tasks does not preclude parliamentary supervision. Indeed, parliamentary involvement is desirable in the context of appointing board members or top management (which is reflected by the explicit mention of parliamentary hearings for this purpose in Article 57(5)(c) of the proposal for a Recast Internal Electricity Market Directive). The level of parliamentary oversight in the Member States examined seems generally consistent with the goals of transparency and democratic accountability.

### *3.2.4. Safeguards to protect the NRA from undue influence from governments or market interests (transparency measures)*

Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently.

**Article 35.4** of Directive 2009/72/EC; **Article 39.4** of Directive 2009/73/EC

In order to protect the independence of the regulatory authority, Member States shall in particular ensure that:

(a) the regulatory authority can take autonomous decisions, independently from any political body (...)

**Article 35.5(a)** of Directive 2009/72/EC; **Article 39.5(a)** of Directive 2009/73/EC

<sup>106</sup> Article 55, par. 2 of the Act. No. 550/1996 Coll. on the Rules of Procedure of the Parliament.

<sup>109</sup> Section 18 E-ControlGesetz.

<sup>110</sup> Article R.134-6 of Energy Code.

This sub-section considers the safeguards provided by the law to protect NRAs from undue influence from governments and market interests. In addition, it analyses whether the law requires NRAs to be consulted in the progress of designing such safeguards.

The desk research has shown that the law in all Member States provides for safeguards to protect the NRA from undue influence from government or market interests. More specifically, in each Member State the NRA is required to report annually to the Parliament about the activity and management of the NRA.<sup>111</sup> Moreover, in all the Member States examined, the legislation contains conflict of interest provisions in respect of board members for the duration of the term of office.<sup>112</sup>

In addition, in all Member States the law sets the obligation to make certain information public. The type of information that must be published varies per Member State.

In Austria, the regulations of the NRA are to be published in the Official Journal.<sup>113</sup> Furthermore, the decisions taken by the regulatory authority shall be published on the homepage of the NRA, while maintaining the confidentiality of commercially sensitive information.<sup>114</sup>

In Bulgaria, the NRA shall make public on its website the policies pursued and the practice established in the implementation of its acts, as well as the reasoning for any amendment of those acts. In addition, the NRA's Commission publishes on its website the energy companies' proposals for endorsement of prices together with all initial data, the protocols from all public and closed meetings and public discussions, the decisions of the Commission, including the manner in which the members of the Commission have voted and the motives of every member who has voted against, the adopted normative acts, rules, methods and directions. The ordinances and rules adopted by the Commission are promulgated in the "State Gazette".<sup>115</sup>

In the Czech Republic, the NRA is legally obliged to publish: a) the organisational structure of the NRA, b) the final decisions issued in the exercise of supervision in the energy and consumer protection sectors in the electricity and gas business, c) other

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<sup>111</sup> For more information, please see section 3.2.3.

<sup>112</sup> For more information, please see section 3.2.7.

<sup>113</sup> Section 36(3) E-ControlGesetz.

<sup>114</sup> Section 36(4) E-ControlGesetz.

<sup>115</sup> Article 15 of the Energy Act.



final decisions, if they are of significant importance from a legal point of view, and d) the NRA's interpretative advice on the legal provisions in its field of competence, which it takes into account in its decision-making activities.<sup>116</sup>

In Germany, an electronic platform provides the public with up-to-date information regarding the generation of electricity, the load, the quantity of electricity imports and exports, the availability of networks and power generation plants capacity and availability of cross-border interconnections.<sup>117</sup>

In Greece, indicators of transparency are the publication of the NRA's fully reasoned decisions in the Government Gazette<sup>118</sup> and the adoption of internal rules of procedure by Presidential Decree at the recommendation of the NRA.<sup>119</sup>

In Spain, the NRA is obliged to make public all relevant provisions, resolutions, decisions and reports issued, once they have been notified to interested parties, after taking a decision (where appropriate) on the confidential aspects of said resolutions, decisions and reports. In particular, the following shall be publicly released: a) The structure and functions of the Commission and its bodies, including the curriculum vitae of the Council members and management staff; b) A list of the decisions taken at Council meetings; c) The reports on which Council decisions are based; d) The annual report; e) Yearly sectoral economic reports; f) The Commission's action plan for the following year; g) Meetings between Commission members and companies from a given sector; h) The opening of infringement proceedings, etc.<sup>120</sup>

In France, the NRA must publish its decisions in the Official Journal and on the NRA's website. The transparency requirements are further specified under each type of decision to be taken or prepared by the NRA.

In Croatia, the legislation prescribes that the NRA's work is public, and therefore the information related to it must be published in the NRA's website.<sup>121</sup>

In Lithuania, the NRA shall ensure the publicity of the provisions, resolutions, decisions and reports issued in pursuance of the powers conferred upon it by law. The publicity is also ensured by the implementation of the requirement to prepare annual reports on its activities, publish the reports on its website and submit these reports to the President of the Republic, the Parliament and the Government.<sup>122</sup> In addition, the NRA is required to prepare and make public a strategic action plan of its activities.<sup>123</sup>

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<sup>116</sup> Section 17e (1) Energy Act.

<sup>117</sup> Section 111d EnWG.

<sup>118</sup> Article 32 of Law 4001/2011.

<sup>119</sup> Article 45 of Law 4001/2011.

<sup>120</sup> Article 37.1 of Act 3/2013.

<sup>121</sup> Article 38 of HERA's Statute.

<sup>122</sup> Article 8(13) of the Law on Energy.

<sup>123</sup> Article 13 of the Regulations of the Commission.

In Romania, the reports on the functioning of the energy market with regard to its level of transparency, competition, continuity of supply, are published on the NRA's website.

In Slovakia, the NRA shall publish on its website its Regulatory Policy, valid and effective decisions and annual reports.<sup>124</sup> Also, the minutes of voting of the Board (appellate body) shall be published on the NRA's website.<sup>125</sup>

In Hungary, the NRA shall publish on its website: a) its report approved by the National Assembly, b) consolidated decrees by the Authority's President, and c) all the information, the disclosure of which is stipulated by legislation.<sup>126</sup>

It was also observed that in seven of the Member States examined (Bulgaria, Czech Republic, Spain, Greece, Croatia, Hungary, Slovakia) the law provides for some sort of involvement of the NRA in the legislative process and/or in the adoption of Ministerial or other administrative decisions (e.g. by submitting a statement or position on the legislative draft). Thus, in these countries the NRA can be regarded as having a role in the design of the mentioned safeguards. In four Member States, the study did not note provision for such participation on the part of the NRA (Austria, France, Lithuania, Romania). Only in one Member State (Germany) can the NRA introduce transparency measures itself. Specifically, the government has the power to legislate on the transparency measures, but by a statutory order<sup>127</sup> this competence has been transferred to the NRA.

### *3.2.5. Legal measures providing for Ministerial or Parliamentary involvement in NRA decision-making*

This sub-section assesses legal provisions providing for the fulfilment by other institutions of tasks which, under the Third Energy Package, should be fulfilled by the NRA. Moreover, it considers whether the Ministry has the power: 1) to adopt a decision in the event of the NRA failing to do so, 2) to request the NRA to reconsider a decision, or/and 3) to approve or overturn the NRA's decisions.

In most of the Member States examined, there are no legal provisions providing for the fulfilment by other institutions (such as national ministries or parliaments) of tasks which, under the Third Energy Package, should be fulfilled by the NRA. However, a few exceptions have been noted.

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<sup>124</sup> Article 10, let. f) of the Regulatory Act.

<sup>125</sup> Article 6, par. 6 of the Regulatory Act.

<sup>126</sup> Section 3 of the Act XXII of 2013.

<sup>127</sup> Telecommunication Law Statutory Transfer Order, 05.10.2017 BGBl. I S. 3534 (Nr. 67), <https://www.buzer.de/gesetz/12838/index.htm>, last accessed 17/04/2018.).

In Spain, a decree (Royal Decree 903/2017)<sup>128</sup> allocated certain competences, that - on the basis of EU law - should be assigned to the NRA, to the Government. Nevertheless, a new Royal Decree-Law<sup>129</sup> has entered into force on 13 January 2019 with the aim of bringing the competencies of the NRA in line with the requirements of Directives 2009/72/EC and 2009/73/EC. It should be noted that this Royal Decree-Law establishes a transitional regime for the modifications made. In this context, and depending on the functions, the new functions and competences allocated to the NRA will not become effective until 1 January 2020 or until the first regulatory period has ended.<sup>130</sup>

None of the Member States have any legal provisions which provide for the Ministry taking a decision in the event of the NRA failing to do so.

In the majority of Member States, no legal provision exists that envisages the requirement for NRA decisions to receive ministerial approval, or the possibility of NRA decisions being overturned by the Ministry. However, two Member States (Czech Republic, Croatia) are notable in this regard. In the Czech Republic, the law provides that decisions from the NRA are subject to an opinion from the Ministry:

- for the approval of transmission system development plans<sup>131</sup>;
- to comply with an application for a temporary restraint from the third-party access obligation in the case of the construction of a part of the transmission system, the gas storage facility or a substantial increase in the transport or storage capacity of the existing facilities, if the NRA tends to comply with the request, the positive opinion on the security and reliability of gas supplies from the Ministry of Trade and Industry is required.

However, the legislation does not govern any process in which the Ministry could change or cancel the NRA's decision because the NRA is not a subordinate body in relation to the Ministry.

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<sup>128</sup> Royal Decree 903/2017 was derogated by Royal Decree 864/2018. Nevertheless, the relevant provisions regarding the competences of the NRA that were challenged before the Spanish Supreme Court in December 2017 (Art 3.1 (d, m, ñ, q); Art 4.1 (d, i, s, w) remained the same in the Royal Decree 864/2018.

<sup>129</sup> Royal Decree-Law 1/2019, of 11 January, of urgent measures to bring the competencies of the Spanish National Markets and Competition Commission (CNMC) in line with the requirements of EU law in relation to Directives 2009/72/EC and 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and natural gas (Official gazette BOE-A-2019-315). Available at: <https://boe.es/buscar/doc.php?id=BOE-A-2019-315fvf>

<sup>130</sup> Second Transitory Provision of Royal Decree-Law 1/2019.

<sup>131</sup> Since the finalisation of the study the Czech Republic has prepared a draft law to amend these provisions.

In Croatia, the NRA is required to obtain approval from the Ministry before adopting a plan on deregulation of gas prices.<sup>132</sup> However, regulation of gas prices is not a task of the NRA in the Third Energy Package so this should not be viewed as problematic. Further, the Ministry is responsible for controlling the legality of both the general and individual decisions of the NRA. This latter provision is not specified further in the legislative framework.<sup>133</sup>

### *3.2.6. Legal rules concerning nomination, appointment and dismissal of board members*

In order to protect the independence of the regulatory authority, Member States shall in particular ensure that:

(...) (b) the members of the board of the regulatory authority or, in the absence of a board, the regulatory authority's top management are appointed for a fixed term of five up to seven years, renewable once.

(...) Member States shall ensure an appropriate rotation scheme for the board or the top management. The members of the board or, in the absence of a board, members of the top management may be relieved from office during their term only if they no longer fulfil the conditions set out in this Article or have been guilty of misconduct under national law.

**Article 35.5(b)** of Directive 2009/72/EC; **Article 39.5(b)** of Directive 2009/73/EC

This sub-section examines the rules and procedures concerning the nomination and/or selection, appointment and dismissal of board members<sup>134</sup> set down in the law. Moreover, a particular focus is given to 1) the appointment procedures, when a jury or panel is the selection or appointing entity, and 2) the reasons for dismissal of board members.

In all Member States, procedures are in place for appointment and dismissal which are set out in national legislation.

#### *Nomination and / or selection and appointment*

In all Member States there are legislative provisions concerning nomination or selection of board members or top management.<sup>135</sup>

In all Member States examined, the legislation explicitly provides for board members having a term of between five and seven years. In Austria, Bulgaria, Czech Republic,

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<sup>132</sup> Article 54, Gas Market Act.

<sup>133</sup> Article 36 of the Act on Regulation of Energy Activities.

<sup>134</sup> It should be noted that term used to name the "board" tends to vary among the Member States.

<sup>135</sup> While in these Member States, appointment may be preceded by a nomination, the law does not explicitly set out the procedure for such a nomination.

Germany, Greece, Lithuania, Romania, the law provides for a 5-year term. In Spain, France and Slovakia, the term is 6 years, while Croatia and Hungary provide for 7-year terms. In all Member States except Spain and France the term is renewable once. In Spain and France, the 6-year term is not renewable.

The procedure set out in the law for nominating and appointing board members tends to vary among the Member States. For example, in Austria, the members of the NRA's Management Board are appointed by the Ministry of Economy, Family and Youth following a publication of a vacancy notice, while the prospective member's actual contract of service is concluded with the NRA's Supervisory Board, following a hearing before a Parliamentary Committee.

In Bulgaria, the members of the NRA's board are appointed and dismissed by the National Parliament. They are appointed after the conclusion of a public procedure. The proposals for selecting members of the NRA may be made by members of the Parliament and the parliamentary groups.

In the Czech Republic, members of the NRA's Board and its chairperson are appointed and removed by the Government on a proposal from the Minister.

In Germany, the President and Deputy Presidents are appointed by the Federal Government, based on a proposal from the Advisory Council.<sup>136</sup> The Advisory Council needs to request the viewpoint / position of the Advisory Council for Railway Infrastructure. If, despite the request of the Federal Government, the Advisory Council does not present a proposal within a certain timeframe, the right of the Advisory Council to introduce a proposal expires. If the Federal Government does not agree with the proposal of the Advisory Council, the Advisory Council can issue a new one within 4 weeks. Thus, it is the Federal Government which has the ultimate say on the appointment.

In Greece, the Minister must publish a vacancy notice and then wait at least 60 days prior to selecting the members of the board which it submits to the Committee on Institutions and Transparency of the Hellenic Parliament for appointment. The Committee issues an opinion within 30 days. If the opinion is favourable, the chairperson and vice-chairpersons shall be appointed by an act of the Council of Ministers. The other members shall be appointed by a decision of the Minister.

In Spain, members of the Council of the NRA shall be appointed by the Government by Royal Decree, at the proposal of the Ministry, from persons of high standing and recognised professional expertise in the field, provided the person has appeared before the relevant parliamentary committee. The Parliament may veto the appointment within 1 calendar month, but if no veto has been issued within that time, the appointment shall be deemed to be accepted.

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<sup>136</sup> The Advisory Council consists of 16 members of the upper house of parliament and 16 members of the lower house.

In France, the President of the Board of the NRA is appointed directly by the President of the Republic,<sup>137</sup> having first appeared before the Finance Committee of the National Assembly. For the other five members, the appointments are made as follows:

- One member appointed by the president of the National Assembly (lower house of parliament), based on his legal economic and technical competences in the field of personal data protection;
- One member appointed by the president of the Senate (upper house) based on his legal, economic and technical competence in the field of local public energy services;
- One member appointed by Decree, based on his legal, economic and technical competences in the domain of protection of energy consumers and the fight against energy poverty;
- One member appointed by Decree, based on his legal, economic and technical competences in the domain of energy savings policy and renewable energy sources; and
- One member appointed by Decree, on a proposal from the Minister for Overseas (Ministre des Outre-mer) based on his knowledge and experience of non-interconnected areas.

In Croatia, the law sets out that the Government needs to publish the vacancy, and then propose (on the basis of the applications) the president and members of the NRA's Management Board to Parliament for appointment.<sup>138</sup>

In Hungary, the law does not provide for the vacancy to be published. The President of the NRA is appointed by the Prime Minister, with the only requirements being that he satisfies the criteria listed in the Act on Public Servants.<sup>139</sup>

In Lithuania, the Parliament appoints the chairperson and four other members following a recommendation from the President of the Republic. The chairperson selects the vice-chairperson from among the other four.<sup>140</sup>

In Romania, persons meeting the requirements for selection to the Regulatory Committee of the NRA can put themselves forward as candidates, and the three parliamentary committees which exercise control over the NRA make their selection from the list of candidates and submit these names as a common proposal to the

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<sup>137</sup> Article 13 of the Constitution, also Art L.132-2, Energy Code.

<sup>138</sup> Article 23 of the Act on Regulation of Energy Activities.

<sup>139</sup> Articles 6-9 of the Act XXII of 2013.

<sup>140</sup> Article 8(3) of the Law on Energy.

parliament. The parliament then appoints the members during a common meeting of the two chambers.<sup>141</sup>

In Slovakia, the Chairman of the Board is appointed by the Government, and the Vice-Chairmen are appointed by the Government upon proposal of the Chairman.<sup>142</sup> The President appoints 3 members of the Board upon proposal from Parliament, and 3 members on proposal from the Government.<sup>143</sup> It should be noted that a recent revision of the legislation<sup>144</sup> might decrease the independence of the NRA headed by its Chairman. Previously, the Chairman, managing the NRA, had been appointed/recalled by the President on the proposal of the Government. After the revision, the President has been excluded from this procedure and now the whole competence to appoint/recall the Chairman is in the "hands" of the Government. Moreover, there is a lack of rules requiring a transparent selection procedure (in form of public hearing), quality criteria (presented vision) or regular evaluation of the Chairman.

In the Member States examined, no jury or panel is allocated the selection or appointment of board members. Rather, as can be seen from the procedures set out above, there is usually either a parliamentary committee involved in either proposing the candidates to the government for appointment or appointing the members upon a proposal from the government. Where such parliamentary committees are involved, their formation and composition are usually governed by constitutional rules or the rules of parliamentary procedure of the Member State.

### *Dismissal*

In each of the Member States examined, the grounds for dismissal are set out in the legislation. However, in some cases, law includes grounds for dismissal that may be regarded as rather vague. For example, in Bulgaria dismissal may be justified by a "grave breach or systematic dereliction of official duties."<sup>145</sup>

In the Czech Republic, there are some interpretive doubts as to whether the legal regulation of a possible dismissal of members of the NRA's Board is fully in line with the requirements for the functional independence of the regulators. In particular, one of the reasons why a member of the NRA's Board can be dismissed is "a gross or repeated minor breach of the duties of a member of the Board".<sup>146</sup> In practice the

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<sup>141</sup> Article 4(1)-(14)(c), points 1-4 of GEO no. 33/2007, as amended by Law no. 1 of January 3, 2018.

<sup>142</sup> Article 5(1) of the Regulatory Act.

<sup>143</sup> Article 7(3) of the Regulatory Act.

<sup>144</sup> Slovak Parliament adopted, on 13 June 2017, the revision of the Regulatory Act.

<sup>145</sup> Article 12(b) of the Energy Act.

<sup>146</sup> Section 17b (6) Energy Act.

legitimate reason is defined in a very general manner, and the obligations the violation of which are concerned are not stipulated.<sup>147</sup>

In Germany, the president of the NRA may be dismissed if there is an important reason, by a decision of the federal government, made at the request of the Federal Ministry for Economic Affairs and Energy, once the Ministry has received the viewpoint of the Advisory Council of the Federal Network Agency. An important reason exists if the President no longer meets the requirements for the performance of his/her duties, in particular if he/she is found guilty of significant misconduct. Before the dismissal procedure is initiated, the president shall be given the opportunity to comment upon the allegations.<sup>148</sup>

In Greece, a board member is dismissed if he /she is found by the competent disciplinary council to have engaged in actions incompatible with the principles of independence and impartiality which govern the operation of Authority. The Law does not precisely specify that the dismissal results from the infringement of the provisions of solely Law 4001/2011. However, since Law 4001/2011 is the Energy Law of Greece, this should be interpreted in a broader context, so as to include all energy sector specific regulation (including also the Presidential Decree No. 139 on the Regulation on the internal operation and management of the Energy Regulatory Authority).

In Spain, a board member can be removed for a serious breach of duties inherent to their office. However, not only is the term "serious breach" not clarified, but it is also left open for the Government to interpret.<sup>149</sup> A similar situation exists in France.<sup>150</sup>

In Croatia, the ground is a bit clearer, as a serious breach of duty needs to relate to a breach specified in the legislation.<sup>151</sup>

In Lithuania, the grounds are quite clearly set out.<sup>152</sup> For example, a material breach must relate to the requirements or regulations of the office.

In Romania, two seemingly vague or ambiguous grounds are included, due to the use of the terms "serious negligence" and "serious breaches".

**Table 3: Legal rules concerning nomination, appointment and dismissal of board members**

<b>Nomination and / or selection</b>	In all Member States there are legislative provisions concerning nomination or selection of board members. <sup>153</sup>
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<sup>147</sup> Directive 2009/72/EC and 2009/73/EC (procedure 2017/2152).

<sup>148</sup> Section 4 of BEGTPG.

<sup>149</sup> Article 23(1) of Act 2/2013.

<sup>150</sup> Article 6, Law no 2017-55 on IAAs and IPAs.

<sup>151</sup> Article 26 of the Act on Regulation of Energy Activities.

<sup>152</sup> Article 8(5) and 18(6) of the Law on Energy.

<sup>153</sup> While in these Member States, appointment may be preceded by a nomination, the law does not explicitly set out the procedure for such a nomination.



<b>Term</b>	In all Member States examined, the legislation explicitly provides for board members having a term of between five and seven years. In Austria, Bulgaria, Czech Republic, Germany, Greece, Lithuania, Romania, the law provides for a 5-year term. In Spain, France and Slovakia, the term is 6 years, while Croatia and Hungary provide for 7-year terms. In all Member States except Spain and France the term is renewable once. In Spain and France, the 6-year term is not renewable.
<b>Appointment</b>	In the Member States examined, no jury or panel is allocated the selection or appointment of board members. Rather there is usually either a parliamentary committee involved in either proposing the candidates to the government for appointment or appointing the members upon a proposal from the government. Where such parliamentary committees are involved, their formation and composition are usually governed by constitutional rules or the rules of parliamentary procedure of the Member State.
<b>Dismissal</b>	In each of the Member States examined, the grounds for dismissal are set out in the legislation. However, in some cases, law includes grounds for dismissal that may be regarded as rather vague.

### *3.2.7. Conflict of interest provisions concerning board members and key staff*

This sub-section describes the conflict of interest provisions (i.e. rules on pre- or post-employment) set in national legislations and identifies to whom they apply.

In all the Member States examined, the legislation contains provisions concerning conflicts of interest in respect of board members and / or key staff for the duration of the term of office. The types of provisions vary per Member State.

In Austria, the members of the management board, the Regulatory Commission and the Supervisory Board may not for the duration of their office perform any other activity which obstructs its performance of duties or casts doubt on their full independence or jeopardises other essential interests of the function. This applies also to the activities mentioned in the Incompatibility Act.<sup>154</sup> These activities include holding official duties in a senior position in a public company in the area of banking,

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<sup>154</sup> Unvereinbarkeitsgesetz – Incompatibility Act, 1983, BGBl. Nr. 330/1983, available at: [https://www.ris.bka.gv.at/Dokumente/BgblPdf/1983\\_330\\_0/1983\\_330\\_0.pdf](https://www.ris.bka.gv.at/Dokumente/BgblPdf/1983_330_0/1983_330_0.pdf) last accessed 20/03/2018.

commerce, industry or transport, as well as in companies with limited liability or a savings bank. In particular, they may not be members of management or supervisory board of a stock corporation, managing directors or members of the supervisory board of a limited liability company or a savings bank.

In Bulgaria, members of the board of the NRA cannot, during their term of office, occupy another paid office or perform another paid activity unless in the sphere of international projects and programmes related to the activities of the Commission, scientific, teaching or another activity which is regulated under the Copyright and Related Rights Act. They may also not be related parties within the meaning of the Combatting Corruption and Withdrawal of Illegal Acquired Property Act.<sup>155</sup>

In the Czech Republic, members of the NRA board are prohibited from conducting business in energy sectors, participating in the business of a licensee or other person active in the energy sector, being under any such person's authority or otherwise participating in conducting the business of such a person or providing, directly or indirectly, advisory or similar activity to the licensee or other person active in the energy sector. Members of the board shall not hold any other paid function, be in any employment relationship, or engage in any other gainful activity except to manage his / her own property and scientific, pedagogical, literary, journalistic and artistic activities (unless such activity harms the dignity or endangers trust in independence and impartiality of the NRA).<sup>156</sup>

In Germany, the President of the NRA may not exercise any other paid office, business or profession, nor belong to the management of an acquisition-oriented enterprise, be a member of government or parliament. Nor can he give extrajudicial opinions for free. The members of the supervisory board, the board of directors or advisory board of a company active in the acquisition sector requires the consent of the Federal Ministry of Economics and Energy. Upon granting such consent, the Ministry also decides what fee is to be paid to the NRA President. The NRA President must notify the Federal Ministry of Economy and Energy of any gifts / other benefits he or she receives in relation to their role at the NRA. The Federal Ministry of Economy and Energy decides on the use of gifts and the compensation of benefits.<sup>157</sup> In addition, members of the decision-making chambers (main decision-making body of the NRA) may not hold a company in the energy industry. They are also not allowed to be members of the management board or supervisory board of a company in the energy industry or be affiliated to a government or legislative body.

In Greece, pursuant to Article 10 (para. 8) the Board Members of the NRA may not be partner, shareholder, board member, technical or other consultant or employee (with or without pay, on a retainer or with any form of privity) of a company or undertaking

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<sup>155</sup> Article 12(2) and 12(3) of the Energy Act.

<sup>156</sup> Section 17b (6) Energy Act.

<sup>157</sup> Paragraph 4(3) BNetzAG.

whose activities are subject to direct or indirect control and supervision by the NRA during their term of office.<sup>158</sup>

In Spain, the law states that members of the Council (management board) of the NRA shall exercise their functions on an exclusive basis and shall be regarded as senior officials of Central Government. Furthermore, Council members may not individually assume executive or management functions in respect of specific areas of the NRA, responsibility for which lies with the management staff of the Commission. In addition, the President, the Vice-President and the rest of the Council members shall be subject to the rules on the incompatibility of activities established for senior officials of the General State Administration.<sup>159</sup>

In France, legislation provides that members of the NRA Board cannot hold certain public offices, such as mayor or president of the Regional Council etc., with specific rules pertaining to the President of the NRA Board.<sup>160</sup> In addition to public offices, the members of the NRA cannot cumulate their function at the NRA with a leading role in a company, steering committee or member of a company's or professional steering organ if this company or organ has been or is subject to a decision by the NRA or a control enforced by the NRA during the past two years.<sup>161</sup> The Energy Code specifies that the positions of president and board member of the NRA are incompatible with any form of elective mandate at the municipal, departmental, regional or European level, and with the ownership of, directly or indirectly, of interests in an energy undertaking.<sup>162</sup>

In Croatia, members of the Management Board and their family members are not allowed to own or hold shares or stakes in any energy undertaking exceeding 0.5% of the capital stock, or be members of the management board or supervisory board or any other bodies in any energy undertaking, and must not hold any material interest in the area of energy activities or perform any other work in any energy undertaking to which the Act on Regulation of Energy Activities applies, which may lead to the conflict of interest.

A member of the Management Board cannot be an active member of any political party, perform any tasks for any licensed energy undertaking or its branch, or perform any other activity which is likely to lead to the conflict of interest.<sup>163</sup>

A member of the Management Board may not, during his term in office, start any negotiations, or participate in such negotiations, concerning his employment with or advisory services to an energy undertaking licensed to perform a regulated energy

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<sup>158</sup> Article 10(8) of Law 4001/2011.

<sup>159</sup> Article 22.3 of Act 3/2013 and Article 1.2.e) of Act 3/2015 of 30 March, governing the exercise of senior officials of the General State Administration.

<sup>160</sup> Article 10-I, Law no 2017-55 on IAAs and IPAs.

<sup>161</sup> Article 10-III, Law no 2017-55 on IAAs and IPAs.

<sup>162</sup> Article L.132-2 Energy Code.

<sup>163</sup> Article 25 the Act on Regulation of Energy Activities.

activity and/or an activity performed as a public service or any other body controlled, directly or indirectly, by such an energy undertaking. The function of the president of the Management Board as well as that of the member of the Management Board must be performed as the only employment. When it comes to the conflict of interest provisions relating to professional staff members and heads of staff services, the legislation only states that they must not be in a conflict of interest,<sup>164</sup> and that professional staff members may not perform any activity for energy undertakings, which could lead to a conflict of interest.<sup>165</sup>

In Hungary, the President and Vice President<sup>166</sup> of the NRA cannot hold a public office or be a senior official or member of a management body of a business within the scope of the NRA's regulatory activities/competences. In addition, they may not be employed by a business association within the scope of the NRA's regulatory activities/competences. Further, they may not hold direct or indirect ownership shares of companies falling within the scope of the NRA's regulatory activities/competences, etc.

In Lithuania, there are no conflict of interest provisions and/or post-employment restrictions applicable exclusively to key staff or board members. The provisions regarding conflict of interest are applied to all the staff members and board members equally. In this context, NRA employees must avoid situations which can cause conflicts of interest, and shall not participate in the procedure of preparation, consideration or adoption of questions and decisions if such decisions: relate to persons from whom the employee of the Commission receives any benefit; relate to the payment of salaries, allowances, bonuses and other benefits when it might cause public or private conflict of interest; relate to allowances for relatives, cash benefits or their recruitment to the Commission; are taken regarding organizations or companies in which the employee (or his/her relatives) has more than 10 percent of the authorized capital or shares or is related to membership, current duties or other relationships.

Further, an employee may not accept gifts or services if this could lead to conflicts of interest nor accept gifts if they are given as gratitude for the provision of services which are direct functions of the employee.<sup>167</sup>

In Romania, legislation provides that members of the NRA Regulatory Committee (including the president and vice-presidents) shall act independently of any interest of participants in the electricity or natural gas markets, shall not request and shall not accept direct instructions from any public or private entity during the performance of

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<sup>164</sup> Article 28 of the Act on Regulation of Energy Activities.

<sup>165</sup> Article 30 of HERA's Statute.

<sup>166</sup> The management board is composed of a President and a maximum of five Vice-presidents.

<sup>167</sup> Rules for the compliance and control of the public and private interest in the civil service at the Commission (Viešųjų ir privačių interesų derinimo valstybinėje tarnyboje įstatymo nuostatų laikymosi bei kontrolės vykdymo Valstybinėje kainų ir energetikos kontrolės komisijoje tvarkos aprašas, <http://www.regula.lt/Puslapiai/bendra/Veikla/interesu-konfliktu-prevencija.aspx>).

their regulatory duties. In addition, they shall not conduct any gainful activity in the electricity, heat, or natural gas sectors (with the exception of teaching for professional training) shall not own shares or holdings and shall not be a member of management bodies of companies having their object of activity in the electricity, heat, or natural gas sectors or any other fields that fall within the competence of NRA, as provided by the law. This general provision regarding conditions of incompatibility is extended to all personnel, in the provisions referring to the employment and remuneration of NRA staff.<sup>168</sup>

In Slovakia, the Chairman of the Board shall not: become a member of managing, supervisory or controlling bodies in regulated entities; carry out any business in network industries; hold office as deputy of the Slovak Parliament, be a member of the Government, office or membership in a local self-government body; or participate in the share capital of a regulated entity.<sup>169</sup>

The Chairman shall also not have a close person<sup>170</sup> who is an employee of a regulated entity, participates in the share capital of a regulated entity, carries out business in any of the regulated industries in their own name or in the name of another person or through association with other persons or is a member of managing, supervisory or controlling bodies in regulated entities. Similar rules apply for other NRA Board members, but there are no such conflict of interest provisions for the Vice-chairmen<sup>171</sup> or other NRA staff.

#### *Post-employment rules*

In half of the Member States examined, the legislation provides for rules on post-employment (Bulgaria, Greece, Spain, France, Hungary, Lithuania), while in the other half no such restrictions were noted (Austria, Czech Republic, Germany, Croatia, Romania and Slovakia). However, in Croatia, there are rules preventing a member of the management board, during the term of his office, from starting negotiations or participating in negotiations concerning his employment with or concerning any advisory services to an energy undertaking licensed to perform a regulated energy activity and / or an activity performed as a public service or any other body controlled, directly or indirectly, by such an energy undertaking. In the Czech Republic, legal post-employment restrictions were in place but from 2016 these have been removed.

In Bulgaria, high ranked officials (members) of the NRA are not allowed to participate in public procurement procedures announced by the body within which the official worked, for a period of one year following the official's dismissal/removal from office. This restriction also refers to public procurement procedures announced by entities

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<sup>168</sup> Article 4 (13) of GEO no. 33/2007, amended.

<sup>169</sup> Article 5(10)(c) of the Regulatory Act.

<sup>170</sup> Article 116 of Civil Code: A close person shall be defined as a relative in direct line, brother or sister and the spouse; other persons in a family or other relation shall be considered close to each other if a detriment suffered by one of them is reasonably felt as own by the other.

<sup>171</sup> The vice-chairmen are not members of the board.

which are controlled by that body, as well as to legal entities (companies and NGOs) in which the official owns shares, stocks, is a manager, or is a member of a managerial or supervision body.

In Greece, the same conflict of interest provisions which apply during the term of office continue for two years after the expiry of that term.

In Spain, the law also states that for a period of two years following their vacation of office, the President, the Vice-President and Council members may not engage in any private professional activities whatsoever related to regulated sectors and the activities of the NRA. Pursuant to that restriction, the President, the Vice-President and the members of the Commission, upon vacating office due to resignation, expiry of their term of office or permanent incapacity of the exercise of their functions, shall be entitled to receive, as from the month after their vacation of office and for a term equal to that during which they held office, subject to a maximum limit of two years, monthly economic compensation equal to a twelfth of eighty percent of the total remuneration allocated to the office in question in the budget in force during the indicated term.<sup>172</sup>

In France, the NRA's president and board members cannot benefit from any work assignments, consultancy remuneration or share in the capital of any undertaking in the energy sector for three years following the end of their mandate.<sup>173</sup>

In Hungary, the President's or Vice-President may not establish an employment-related relationship with any business entity for a period of one year after the end of his/her term, nor acquire a share in any business entity whose rights or legitimate interest have been affected by a decision of the NRA during a period of three years prior to the termination of their term (this does not include business entities which are majority state-owned).<sup>174</sup>

In Lithuania, employees (including key staff and board members) who have ceased their duties at the NRA, for a period of one year, may not: work as a manager or deputy head of a legal entity if, during the last year at the Commission, his functions were directly related to the supervision or control of the activities of such legal entity; represent persons at the Commission; represent persons at other state or municipal institutions on matters that were attributed to his official functions.

In none of the examined Member States were pre-employment rules or restrictions found in the legislation.

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<sup>172</sup> Article 22(4) of Act 3/2013.

<sup>173</sup> Article L132-2, Energy Code.

<sup>174</sup> Article 11-13 of the Act XXII of 2013.

**Table 4 : Conflict of interest provisions concerning board members and key staff**

<b>Rules on pre-employment</b>	In none of the examined Member States were pre-employment rules or restrictions found in the legislation.
<b>Rules during the term of office</b>	In all the Member States examined, the legislation contains provisions concerning conflicts of interest in respect of board members and / or key staff for the duration of the term of office. The types of provisions vary per Member State.
<b>Rules on post-employment</b>	In half of the Member States examined, the legislation provides for rules on post-employment (Bulgaria, Greece, Spain, France, Hungary, Lithuania), while in the other half no such restrictions were noted (Austria, Czech Republic, Germany, Croatia, Romania and Slovakia).

### 3.2.8. "De facto aspects" (field research)

#### *Independent decision making*

The field research sheds some light on how the legal provisions are applied in practice across the examined 12 Member States. Whereas the legal analysis showed that in all Member States the legal framework explicitly states that the NRA should be independent, the field research leads to a less optimistic outlook. In seven Member States, interviewees or survey respondents<sup>175</sup> were of the opinion that political decision-makers sometimes play an important role in influencing certain NRA decisions, such as on tariffs.<sup>176</sup>

A specific situation was noted in Lithuania where stakeholders were concerned about the relationship between the competition authority and the NRA.

Stakeholders interviewed from Spain indicated that the NRA was not independent from political players as the government was intervening in some of its key competences. According to several interviewees, the improper transposition of the 2009 Directives and the political situation in Spain, played an important role. An example was that the NRA made proposals in relation to tariff decisions but, in practice, they were finally approved by the government (which rarely followed the proposals). However, it should be mentioned that the Spanish legislation has changed since the interviews were

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<sup>175</sup> 20% of 80 survey respondents mentioned that their NRA is to no extent independent from government influence, and 28% mentioned that the NRA is to some extent influenced by the government. On the other hand, 65% of survey respondents mentioned that NRAs acted to a large extent independently from market interests and influence. Further, 53% of survey respondents find their NRA staff and management neutral and competent; while 41% find the Board of Directors of their NRA neutral, competent and not defending specific interests.

<sup>176</sup> See for more specific information on tariff setting, section 3.4.

conducted in Spain. Particularly, a new Royal Decree-Law modifying the functions and competences of the NRA entered into force on 13 January 2019.<sup>177</sup>

In Bulgaria, according to most survey participants<sup>178</sup>, the NRA is not independent from political decision makers, but the representative of the NRA indicated that the regulatory changes in 2016 have improved independence.

Respondents in Hungary<sup>179</sup> note that NRA decisions are not taken fully independently from the government.

Two of the eight Greek survey respondents, as well as two of three general interviewees from Greece mentioned that the NRA (systematically) follows guidelines from the minister; 75% of Greek survey respondents consider the independence from political actors as insufficient<sup>180</sup>.

In the Czech Republic, some of the seven general interviewees (as well as two of the three Czech survey respondents) regard the NRA as fully independent, while some other interviewees have a different view.

In Slovakia, undue political influence was mentioned by several stakeholders.<sup>181</sup>

Additionally, in Croatia overbearing political influence on the functioning of the NRA was reported by two of the three general interviewees and one of the four Croatian survey respondents, in particular concerning politically sensitive topics such as tariff decisions.

In France, Croatia and Greece, undesirable influence on the NRA by market players or discriminatory treatment of specific market players is reported.<sup>182</sup> Perceived influence by market players is reported in France<sup>183</sup>, where state-owned market players are believed to influence decisions made by the NRA. The NRA in Croatia is considered to be independent from market players<sup>184</sup>, but it struggles with the reduction of

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<sup>177</sup> Royal Decree Law 1/2019.

<sup>178</sup> 50% of the 12 Bulgarian survey respondents think that the NRA is to no extent independent from government influence while 45% believe it is independent to a certain extent and only 8% that it is independent to a large extent.

<sup>179</sup> The Hungarian survey respondent (1 out of 1) stated that the NRA is only somewhat independent from government and market influence; while two out of the five general interviewees mentioned government influence towards the NRA.

<sup>180</sup> 25% of the 8 Greek survey respondents mentioned that the NRA is to no extent independent from government influence, while 50% mentioned it independent to a certain extent and only 13% mentioned it was independent to a large extent.

<sup>181</sup> Two out of three survey respondents mentioned the NRA is not independent from government influence, while only one mentioned it was independent to a large extent. One interviewee of the four general interviewees who provided input on Slovakia mentioned undue political influence.

<sup>182</sup> Overall, 63% of the 80 survey respondents believe grid operators have no influence over the NRA while 65% believe (other) market parties have no influence over the NRA.

<sup>183</sup> By one of the three general interviewees providing feedback on France.

<sup>184</sup> With 3 of the 4 Croatian survey respondents mentioning the NRA is to a large extent independent from (other) market parties' influence, though only 1 mentioned the NRA is to a



dominance of the largest player in the electricity market. Moreover, discrimination in favour of state-owned enterprises is reported by two of the three interviewees providing feedback on Greece. Of the Member States where provisions seem to indirectly regulate independence from market actors, only in France did one of the three general interviewees report perceived influence on the NRA by state-owned market players. On the other hand, in the countries where no such provisions are in place, perceived independence from market players was found. In Bulgaria, even though some operators are state-owned, the NRA is not perceived as favouring these players by any of the stakeholders consulted.

In terms of NRA staff receiving instructions from the national government, more than half of survey respondents did not perceive their NRA receiving instructions from the national government. Around a quarter of respondents felt there was such inappropriate influence taking place.

### *Transparency*

It should be noted that, based on stakeholder views, in most Member States the issue of 'transparency' seems to be adequately addressed, except for Lithuania, Greece and to some extent Spain. The latter is confronted with the consequences of merging three different NRAs and possible parallel procedures. Apart from this, it appears from the field research that improvements could be made to the consultation procedure/public participation and the decision-making procedures. In that regard, it is striking that Member States – where the process is considered to be most transparent – are also possibly facing the most disputes / procedures (such as Germany).

Another conclusion from the field research is that, over time, the legal framework in the Member States seems to be developing in the desired direction, giving more safeguards for independence from both political and market actors (this was noted particularly in Bulgaria and Hungary). In Spain, the improper transposition of the Third Energy Package into national legislation was a particular problem. Nonetheless, the Spanish Royal Decree-Law,<sup>185</sup> which entered into force on 13 January 2019, aims to distribute the competencies between the Government and the NRA in line with the 2009 Electricity and Gas Directives.

### *Independence in appointment and dismissal of board members*

With regard to appointment and dismissal of board members, several interviewees and survey respondents<sup>186</sup> reported possible political influence in appointment procedures, in particular when appointments are decided upon by the parliament. Appointment

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large extent independent from grid operators (and the other 3 believe it is only to some extent independent).

<sup>185</sup> Royal Decree-Law 1/2019.

<sup>186</sup> Flawed appointment and dismissal systems were mentioned by survey respondents from Bulgaria, France, Slovakia, Greece, Spain, Romania, Lithuania, and Austria.

and re-election of NRA board members by the parliament in Lithuania was highlighted by one of the four Lithuanian survey respondents as a potential threat to independence from the political players. In Romania, concerns are raised by one of the three Romanian survey respondents regarding the appointment procedure of the president of the NRA, which might lead to political influence by the parliament which appoints the president. In Bulgaria, the selection of commissioners by the parliament, rather than by the government results, according to five of the 12 Bulgarian survey respondents, in nominees being dependent and accountable to a political party and in nominations more often based on political experience than on technical expertise. The tombola system of re-election of commissioners in Bulgaria results, according to one of the 12 survey respondents, in decisions that are not in accordance with the law. Nomination of board members of the NRA in Spain through government and parliament is not necessarily based on their technical expertise. Parliamentary election of board members of the NRA in Croatia is seen as a step forward for the independence from political actors. One of the four Croatian survey respondents is of the opinion that the fact that board members are (re-) elected by the parliament on the nomination by the President of the republic gives rise to a risk of political dependence. The same disagreement can be seen in Hungary where the only survey respondent and two of the five general interviewees providing feedback on Hungary mention government appointments as hindering independence,. In several cases, NRA representatives were less concerned about interference than other stakeholders.

Therefore, in some Member States the appointment procedure that provides a decisive role to parliament is criticised, as detailed above. But other appointment procedures are also criticised. In Hungary, the appointment of the president of the board by the prime minister was mentioned<sup>187</sup> as an obstacle for independence. In France the chairman of the NRA is appointed by the French president, which might lead to some indirect political dependence according to an interviewee<sup>188</sup>. Political parties select board members, who are designated by the minister of energy in Greece; according to two of the three general interviewees providing input on Greece, independence from political actors is an issue there. Stakeholders<sup>189</sup> in Austria mention the appointment of NRA management, which is done by national authorities, as a weak spot.

### 3.3. Adequacy of human and financial resources

In order to protect the independence of the regulatory authority, Member States shall in particular ensure that:

- (a) the regulatory authority (...) has separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties; (...)

**Article 35.5(a)** of Directive 2009/72/EC; **Article 39.5(a)** of Directive 2009/73/EC

<sup>187</sup> One of the three general interviewees which provided input regarding France.

<sup>189</sup> One of the six interviewees who provided information on Austria as well as a one of the nine Austrian survey respondents.

### 3.3.1. Provisions regarding general NRA financing

This sub-section describes how NRAs are financed. With regard to the budget, it assesses whether NRAs have a budget separate from the State or a separate budget line within the State budget, and what the role of the government and the parliament is in the approval of the budget. Moreover, it examines how annual accounts are controlled and approved and which role the government plays within this process.

#### *Establishment of the budget*

In four member states (Czech Republic, Germany, Spain, Slovakia), the NRA is financed solely from the state budget.<sup>190</sup> In all these member states, the NRA has a separate budget line within the state budget. In four Member States, the budget is financed partly by the state and partly by the market participants (Austria, Bulgaria, France, Lithuania). Lastly, in four Member States (Greece, Croatia, Hungary, Romania), the budget is financed solely by the market participants.

**Table 5: Establishment of the budget**

The NRA is financed from the state budget	The NRA is financed by the state and by the market participants	The NRA is financed by market participants
<b>Czech Republic</b> The NRA is funded by the state (and has a separate budget line within the state budget) but indirectly also by the market participants since customers are required to pay an NRA fee. However, the payment of the fee is the revenue of the state budget, not the autonomous income of the NRA. There is no direct proportionality between the amount of the NRA fee payments and the NRA	<b>Austria</b> The NRA is financed partly by the state and partly by the market participants. The Management Board of the NRA prepares a budget and the Supervisory Board approve it. <sup>191</sup> Market participants in specifically defined circumstances may be obliged to contribute to the budget. The total amount of the financing fee is based on the budget approved by the Supervisory Board. <sup>192</sup>	<b>Greece</b> The NRA has the following resources: <sup>193</sup> contributory fees levied on undertakings in the energy sector, <sup>194</sup> subsidies, grants and funding for research programmes and any other revenue from the European Union or international organisations. <sup>195</sup> Furthermore, the NRA may collect subscriptions from persons attending its conferences or similar

<sup>190</sup> Where the NRA is financed both from State resources and from fees paid by market participants, but where those fees are paid to the State and not directly to the NRA, the Study Team regards the NRA as being solely finance from the State budget.

<sup>191</sup> Section 30(1) E-ControlGesetz.

<sup>192</sup> Section 32(2) E-ControlGesetz.

budget.	The NRA may also charge market area administrators for tasks relating to the performance of their tasks relating to the natural gas market.	events. <sup>196</sup> The budget of the NRA is attached to the budget of the Ministry of Environmental Affairs, Energy and Climate Change, being in this way part of the budget of the State.
<b>Germany</b> The budget for the federal NRA is envisaged in the budget law at national level. The budget of the NRA is included there in the section on the Federal Ministry for Economic Affairs and Energy. Bundestag sets the budget in which all federal expenditure must be disclosed.	<b>Bulgaria</b> The NRA is financed by the State as well as receiving revenues <sup>197</sup> from the fees for consideration of applications, issuance of certificates, sale of tender documents, licensing fees, and experts registration fees, and any interest on them; 30% of the fines and pecuniary penalties imposed by the NRA; and donations from persons not subject to licensing and/or controlling under the Energy Act or from persons related to them. <sup>198</sup> The NRA has a separate budget line within the State budget.	<b>Croatia</b> The NRA has its own budget. <sup>199</sup> It is primarily financed through fees for carrying out the regulation of energy activities. The NRA is autonomous in allocating its budget towards fulfilment of its function as the energy regulator. However, the Government decides on the amount of the abovementioned fees, at the proposal of NRA's Management Board, which needs obtain a prior opinion of the Ministry. All aids and grants awarded by the European Union bodies or funds for the improvement of professional and technical performance are entered into NRA's budget.
<b>Spain</b> The NRA has its own assets which shall be independent of the assets of Central Government. <sup>200</sup> Therefore, in addition to the funds allocated each	<b>France</b> The NRA budget is determined by the State, in the annual national budget. All allocations are entered in the general state budget. The	<b>Hungary</b> The NRA is financed by its own revenues (fees, fines, etc.) as it is a central budgetary institution administering a budget chapter. The State

<sup>193</sup> Article 38 of Law 4001/2011.

<sup>194</sup> Especially a one-off fee for processing applications and recommending a decision for licenses or certification to be granted / amended / extended / renewed for the purpose of engaging in various activities and annual fees for pursuing activities in the energy sector as described in the present Law as well as in liquefied fuel sector.

<sup>195</sup> Article 38 of Law 4001/2011 was amended by Law No 4495/2017 on Control and Protection of the Structured Environment and other provisions (Government Gazette Series A, No 167/03.11.2017).

<sup>196</sup> Article 38(5) Law 4001/2011.

<sup>197</sup> Article 27, Para 1, item 1, 2 and 3 of the Energy Act.

<sup>198</sup> There is currently no publicly available information that a donation to the Commission of any sort (in cash or otherwise) has ever taken place.

<sup>199</sup> Article 32 of the Act on Regulation of Energy Activities.

<sup>200</sup> Article 33.1 of Act 3/2013.

<p>year from the State Budget,<sup>201</sup> it also receives income from the assets and rights making up its net worth as well as the proceeds and yields therefrom<sup>202</sup> and any other assets and economic resources allocated to it by law.<sup>203</sup> The annual State budget laws determine what percentage of the sums collected in respect of the fees in the energy sector shall be allocated to the NRA for the exercise of its functions in the energy sector.<sup>204</sup></p>	<p>budgetary resources of the independent administrative authorities are attached to the relevant programmes of the national state budget. Resources from market participants will only be involved when the later pay fees or pay for specific services rendered by the NRA, which will be paid directly to the NRA.</p>	<p>manages and allocates the money. The operation of the NRA is financed with the revenue generated from supervisory and administrative service fees. The rates and collection procedures of these fees are determined by the President of the NRA.<sup>205</sup> The rates of administrative service fees of the NRA and the rules for collection, management, recording and refunding of administrative service fees and other revenues are prescribed in the Regulation of the NRA.<sup>206</sup></p>
<p><b>Slovakia</b></p> <p>The NRA is financed via the State budget. The NRA, similarly to ministries and other special public authorities, has its own section at the State budget.<sup>207</sup> It means that the NRA shall annually propose its own budget which is approved by the Parliament in the form of the Act on State Budget.<sup>208</sup></p>	<p><b>Lithuania</b></p> <p>The NRA is financed from the state budget allocations and its own income, i.e. sums transferred to the Commission by energy undertakings engaged in energy transmission and/or distribution activities.<sup>209</sup> The Commission is considered as a manager of state budget allocations, therefore it has a separate budget line within the State budget.<sup>210</sup></p>	<p><b>Romania</b></p> <p>The NRA is fully financed from own revenues, having decisional, organizational, and functional independence.<sup>211</sup> The NRA's own revenues come from tariffs charged for awarding of licenses, authorizations and certifications, annual contributions levied from regulated economic operators in the electricity, heat and gas sectors, as well as grants awarded by international bodies.<sup>212</sup> The NRA's budget is not part of the</p>

<sup>201</sup> Article 33.2 of Act 3/2013 and Article 43 of RD 657/2013.

<sup>202</sup> Article 33.2 of Act 3/2013 and Article 42 of RD 657/2013.

<sup>203</sup> Article 33.2 of Act 3/2013.

<sup>204</sup> II.4 Annex of Act 3/2013.

<sup>205</sup> Clause (2) Section 21 of Act XXII of 2013.

<sup>206</sup> HEA Regulation 1/2014 (III.4) as amended by HEA Regulation 10/2014 (XI.6.).

<sup>207</sup> Art. 9, par. 1, let. m) of the Act on [523/2004](#) Coll. on Budget Rules of the Public Service – Act on Budget Rules.

<sup>208</sup> Article 6, par. 2 of the Act on Budget Rules.

<sup>209</sup> Article 8(15) and Article 8(16) of the Law on Energy.

<sup>210</sup> Article 4(3) of the Law on the Budget Structure of the Republic of Lithuania (Lietuvos Respublikos biudžeto sandaros įstatymas, <https://www.e-tar.lt/portal/lt/legalAct/TAR.712BBBFA3D41/LdxKFgcrFZ>) (hereinafter – the Law on the Budget Structure).

<sup>211</sup> Art. 1 (1) of GEO no. 33/2007, amended.

<sup>212</sup> Art. 2(2) of GEO no. 33/2007, amended.

		general state budget. It is an independent budget, not included in the Law on the state budget.
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Moreover, in 11 of the Member States (Bulgaria, Czech Republic, Greece, Spain, Croatia, Hungary, Lithuania, Romania, Slovakia, Germany, France) the budget is prepared annually.

In Slovakia however, it is drawn up every year for at least three budget years.<sup>213</sup> The State budget is a medium-term economic instrument and should be approved by the Parliament annually. In this context, the ministry of finance prepares and subsequently the deputies adopt a new budget proposal every year according to actual situation and government's (ruling coalition) priorities. Therefore, the 3-year budget is a medium-term plan but the budget for the upcoming year can vary.

In Austria on the other hand, the budgets are prepared by the management board every two years. It shall contain planned calculations, planned balances, investment and human resources planning for the following two years. The budget needs to be presented to the Supervisory Board by the 31/08 of the year when the budget needs to be established. The Supervisory Board should decide on the budget by 31/10 of that year.<sup>214</sup>

#### *Control and approval of the NRA's annual accounts and the role of the government*

In Austria, the Management Board is obliged to report quarterly to the Supervisory Board regarding compliance with its budget. If budgetary overruns are expected, the chairman of the Supervisory Board needs to be informed immediately.<sup>215</sup> The NRA must prepare the annual financial statements for the past financial year,<sup>216</sup> which must be audited by an auditor or auditing firm.<sup>217</sup> The audited annual financial statements and the cost calculation shall be submitted by the Management Board to the Supervisory Board for approval within five months of the end of the financial year. The Supervisory Board shall make sure the Management Board reports the results of the financial statements and the cost calculation to the Federal Minister of Economy, Family and Youth within six months of the end of the financial year. The Supervisory Board must decide on the discharge of the Management Board of its liability after the end of each financial year.<sup>218</sup> More generally, controlling of the financial management of the NRA is the competence of the Court of Auditors.<sup>219</sup>

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<sup>215</sup> Section 30(3) E-ControlGesetz.

<sup>215</sup> Section 30(3) E-ControlGesetz.

<sup>215</sup> Section 30(3) E-ControlGesetz.

<sup>216</sup> Section 31(2) E-ControlGesetz.

<sup>217</sup> Section 31(3) E-ControlGesetz.

<sup>218</sup> Section 31(5) E-ControlGesetz.

<sup>219</sup> Section 17 E-ControlGesetz.

In Bulgaria, the NRA adopts the financial report of the Commission as submitted by the Chairperson.<sup>220</sup> The financial report is controlled by the Bulgarian National Audit Office whose main function is to control the reliability and accuracy of the financial reports of the budget organizations, the lawful, effective, efficient and economical management of the public funds and activities, as well as to provide to the National Assembly reliable information about this.

In the Czech Republic, the NRA is primarily responsible for the proper management of budget funds in the budget chapter. The state budget funds entrusted to the NRA may also be controlled by the Supreme Audit Office. The Supreme Audit Office is an independent supervisory body whose mission is to control the way of management with the budgetary funds and effective performance of activities financed from the state budget.<sup>221</sup> All approved control findings are published by the President of the Supreme Audit Office in the Journal of the Office and sent to the Chamber of Deputies, the Senate and the Government.<sup>222</sup> The results of the state budget are a part of the state final account.

In Germany, the Bundestag controls the handling of taxpayers' money through the Budget Committee.<sup>223</sup> In particular, the Audit Committee, a subcommittee of the Committee on Budgets, scrutinises the way in which the government executes the budget. The sub-committee works closely with the Federal Audit Office. The Federal Court of Auditors examines the revenue and expenditure after the end of the financial year. It formulates "comments" on the budgetary management of the Federal Government. These remarks constitute important information for the Parliament when it comes to the discharge of the Federal Government.

In Greece, the annual report which the NRA conducts and submits to the Parliament contains a review of the implementation of its budget.<sup>224</sup> The Court of Auditors carries out a corrective audit of the NRA.<sup>225</sup> The financial records, annual accounts and financial statements (audited by two chartered accountants) are published in two daily newspapers with a broad circulation and the Government Gazette and submitted to the Greek Parliament and the Standing Committee on Institutions and Transparency of the Hellenic Parliament.

In Spain, the President of the NRA is responsible for approving outgoings, instructing payments and submitting the accounts of the Commission.<sup>226</sup> In the Commission's expenditure budget, appropriations are restricted and binding at the level of specification established by budget legislation for independent bodies. Variations entailing an overall increase in the initially approved appropriations of up to 3% shall

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<sup>220</sup> Article 21, Para 1, item 32 of the Energy Act.

<sup>221</sup> Act No. 166/1993 Coll. on the Supreme Audit Office.

<sup>222</sup> Section 30 (1) Supreme Audit Office Act.

<sup>223</sup> [https://www.bundestag.de/parlament/aufgaben/haushalt\\_neu/haushalt](https://www.bundestag.de/parlament/aufgaben/haushalt_neu/haushalt)

<sup>224</sup> Article 6(3) of Law 4001/2011.

<sup>225</sup> Para. 4 of Article 6 of Law 4001/2011.

<sup>226</sup> Article 34.3 of Act 3/2013.

be the responsibility of the President of the NRA (provided there is no increase in staff expenditure) and increases of more than 3% shall be the responsibility of the Minister of Finance and Public Authorities (who is responsible for authorising increases in staff expenditure).<sup>227</sup> Internal variations which do not increase the overall budget, shall be approved by the President of the NRA or, if they affect appropriations for staff expenditure, by Minister of Finance and Public Authorities. Variations, once authorised, shall be notified to the Directorate-General of Budgets of the Ministry of Finance and Public Authorities.<sup>228</sup> The financial and economic management of the NRA is subject to supervision by the State Audit Agency,<sup>229</sup> an administrative body linked to the Ministry of Finance which enjoys a legal status of reinforced autonomy vis-à-vis the Government.

In France, during the elaboration of the national budget, the NRA will suggest to the Minister in charge of energy and to the Minister for Finance the amounts which will be necessary for the NRA to ensure its activities and to let the NRA accomplish its missions.<sup>230</sup> It must submit an annual report on its activities and financial capacities to the Government and the Parliament. The annual report includes a multi-annual expenditure-optimisation plan which assesses the projected impact on its staff and on each category of expenditure of the measures for pooling its services with the services of other IAAs or IPAs or with those of a Ministry. The activity report is made public.<sup>231</sup> The NRA's accounts are controlled by the Court of Auditors (*Cour des Comptes*).

In Croatia, the NRA shall submit a report to the Parliament on an annual basis, including inter alia. the budgetary performance of the Agency in the previous year.<sup>232</sup> Moreover, upon request, the Agency shall submit to the Parliament or to the Government, a report on its financial operations also for periods shorter than one year.<sup>233</sup> Once the reports are accepted, the Agency shall publish them in the Agency's bulletin (in Croatian, including an English translation).<sup>234</sup>

In Hungary, as part of auditing the financial management of public finances, the State Audit Office of Hungary shall audit the operation of the chapters within the structure of the central budget, the utilisation of social security funds and separated state funds, as well as the financial management of local governments, minority self-governments and their associations.<sup>235</sup> The government does not play this role in this process.

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<sup>227</sup> Article 43.2 of RD 657/2013.

<sup>228</sup> Article 43.2 of RD 657/2013.

<sup>229</sup> Article 34.5 of Act 3/2013.

<sup>230</sup> Article L. 133-5 Energy Code.

<sup>231</sup> Article 21 Law 2017-55 on IAAs and IPAs.

<sup>232</sup> Article 25(1) Act on the Regulation of Energy Activities.

<sup>233</sup> Article 25(2) Act on Regulation of Energy Activities.

<sup>234</sup> Article 25(3) Act on Regulation of Energy Activities.

<sup>235</sup> Article 61-62 of Act CXCV of 2011 on the State Budget.



In Lithuania, internal variations between the different operational programmes executed by the NRA which do not increase the overall budget, shall be notified to the Ministry of Finance.<sup>236</sup> If the NRA has unused allocations which were dedicated to implement the operational programmes, such allocations shall be transferred back to the state budget by January 10th.<sup>237</sup> The NRA shall prepare a report on its activities for the previous year, publish it on its website and submit to the President of the Republic, the Parliament and the Government within four months of the end of the year. Furthermore, the financial and performance audit of the NRA shall be carried out by the National Audit Office of the Republic of Lithuania.<sup>238</sup> Moreover, the Committee on Economics of the Parliament shall examine the use of the allocations dedicated for implementation of the operational programmes and investment projects implemented by the NRA.<sup>239</sup>

In Romania, the budgetary execution is conducted according to the practices and procedures of internal control and audit.<sup>240</sup> The NRA has an internal audit structure which ensures the internal audit activity, including financial management issues. This internal public audit service also issues annual reports, which are approved by the president and then sent to the Ministry of Finance's unit responsible for harmonization of internal public audit.<sup>241</sup> As such, the annual accounts are controlled and approved by the NRA, based on the internal control and audit procedures and with the supervision of the Ministry of Finance (the Central Unit for Harmonization of Internal Public Audit).

In Slovakia, officially the Government submits its proposal to the Parliament, which adopts the budget of the NRA. Furthermore, an audit (external control) of the management of budgetary resources shall be carried out by the Supreme Audit Office of the Slovak Republic.<sup>242</sup> Moreover, the State administration carries out its own (internal) financial control/audit. The NRA is part of the State administration, so it shall (i) carry out its internal financial control/audit and (ii) accept any government audit conducted by competent authority - the Ministry of Finance, the Office of Government Audit.<sup>243</sup>

#### *Restrictions on the NRA's budget through other mechanisms such as ex-post cuts or overall restrictions set by law*

For the purposes of this section, restrictions are understood as any legal rules or practices which limit the budget of the NRA, such as those which provide for *ex post*

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<sup>236</sup> Article 58 of the Government of the Republic of Lithuania decree "Rules on the Preparation and Enforcement of Budgets of Republic of Lithuania and Municipalities".

<sup>237</sup> Article 32(1) of the Law on Budget Structure.

<sup>238</sup> Article 8(13) of the Law on Energy.

<sup>239</sup> Article 60(8) of the Statute of the Seimas.

<sup>240</sup> Article 2 (4) of GEO no. 33/2007, amended.

<sup>241</sup> Article 2 (8) of GEO no. 33/2007, amended.

<sup>242</sup> Article 60(1) let. a) of the Slovak Constitution (Act No. 460/1992 Coll.).

<sup>243</sup> Or other authorised legal person, within the meaning of the Act No. 357/2015 Coll. on Financial Control and Audit.

reductions of the budget (which could be a threat to independence), or overall restrictions of the budget (which might be a threat to effectiveness).

In most Member States (Bulgaria, Germany, Spain, France, Hungary, Lithuania, Romania, Slovakia) there are no such restrictions on the NRA budget, whether set by ex-post cuts or set by the law. Such restrictions in some form were however observed in four Member States (Austria, Czech Republic, Greece, Croatia).

In Austria, while there are no such restrictions per se, the Supervisory Board needs to grant its consent to investments exceeding EUR 150 000 which were not previously approved by the investment planning yet do not lead to a budget alteration and to all investments that lead to budget alterations.

In the Czech Republic, the NRA is obliged to use the budgetary means as approved. However, the law enables the administrator of the chapters (i.e. also the NRA) to transfer the funds of the state budget within the individual binding indicators stipulated by the Act on the State Budget.

In Greece, if the NRA's financial administration reports a profit at the end of every two years which exceeds the expenditure for the previous financial year, up to 80% of that profit may, by joint decision of the Minister for Finance and the Minister for Environmental Affairs, Energy and Climate Change be appropriated as revenue under the State budget or be used to reduce the contributory fees levied on undertakings in the energy sector by an equal amount across the board, so as to satisfy the criterion of cost-based contributory fees, in which case the method used to allocate this amount to the undertakings liable for it shall be stipulated in the above decision in a transparent, objective, impartial and non-discriminatory manner, with the assent of the NRA.<sup>244</sup>

In Croatia the Management Board of the NRA may not, without approval from the Government, acquire, encumber or dispose of any real estate or other property, or enter into any other legal transaction exceeding one half of NRA's budget.<sup>245</sup>

### **"De facto aspect" (field research)**

The expenditure of the 12 NRAs varies greatly. This, in part, is due to the fact that six of the NRAs (Bulgaria, Germany, Hungary, Lithuania, Slovakia, and Spain) cover more than energy regulation. Bulgaria, Hungary, Lithuania and Slovakia cover water utility regulation (public drinking water and wastewater), alongside energy regulation. BNetzA (Germany), covers electricity and gas, telecommunications, post, and rail regulation. CNMC (Spain), covers competition, energy, telecommunications, audio-visual media, transport, and postal regulation. In table 6, there is a visible distortion in

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<sup>244</sup> Article 38, para.4 Law 4001/2011.

<sup>245</sup> Article 30 of the Act on Regulation of Energy Activities.

the data for Germany's expenditure. This is due to the larger nature and scope of BNetzA's activities and should be kept in mind throughout this section.

**Table 6 : NRA Expenditure for 2010-2018<sup>246</sup>**

Year	AT	BG	HR <sup>247</sup>	CZ	FR <sup>248</sup>	DE	EL	HU	LT	RO	SK	ES
2010	14,26	1,68		4,26	20	156,23			0,87	4,8	2.77	34,7
2011	16,17	1,86		3,83	20	161,14			0,93	3,75	2.40	35,02
2012	20,10	1,86		7,26	20	181,24			1,42	3,98	2.41	35,17
2013	19,55	1,95		7,85	N/A	174,92	5,78	15.9	2,78	11,08	2.71	31,66
2014	20,37	2,12	4,43	8,21	N/A	183,22	6,05	22.4	3,50	13,79	2.94	23,2
2015	21,58	2,05	4,04	8,90	N/A	180,15	4,42	22.7	2,89	13,93	3.26	22,0
2016	22,37	2,57	3,76	10,44	18,5	198,11	4,48	24.9	2,77	14,32	5.04	23,2
2017	20,40	2,82	3,41	10,97	20,9	208,43	4,87	24.2	2,86	16,15	3.57	21,8
2018	20,06	2,97	3,41	11,17		218,54	3,9	24.6	3,05	32,37	4.70	21,8

Source: Data collected from NRA reports and validated by contact person(s) within each NRA.

The field research provided some additional information on the establishment and approval of the budgets compared to the procedures described in the desk research. Many of the NRAs<sup>249</sup> complained about the fact that their final budgets could be decided by government/parliament, even when regulators had the freedom to collect their own revenues. In the case of Bulgaria where much of the NRA budget is allocated by the state, 71% Bulgarian survey respondents mentioned that the approval of the budget has been used as a means to jeopardise its ability to carry out duties and exercise its powers in an efficient and effective manner, while 57% mentioned the NRA sought or received government instructions on its budget spending and that the approval of the budget is used as a means of influencing its priorities. Two other Bulgarian survey respondents also mentioned that the NRA often receives insufficient budget. The NRA representative mentioned that the NRA receives less than requested: e.g. the NRA's licensing and tariff revenues are processed by the finance ministry and half of it is allocated to the NRA. As of the beginning of 2019, this will change as the NRA will be able to keep the full licensing fees/revenues. Three of the twelve Bulgarian

<sup>246</sup> It should be noted that some NRAs cover more than just energy, with some covering water regulation, telecommunications, post, and rail regulation, audiovisual media etc.

<sup>247</sup> Figures not validated by NRA

<sup>248</sup> Figures not validated by NRA

<sup>249</sup> Czech Republic, Greece, Lithuania, and Romania noted that they collect their revenues from the market, yet their final budget is approved by government/parliament. France and Bulgaria received state approved/dependent budgets. Germany and Hungary received parliamentary approval, but did not see this as an issue. Austria has an independent approval of their budget, via a supervisory board, which they noted was a better system than parliamentary approval. Slovakia did not refer to this issue.

survey respondents mentioned that the most recent changes to the Energy Act will allow improved financial independence. The current funding mechanism is perceived as a threat to the independence of the NRA. In the case of Croatia, the NRA representative mentioned that the NRA was forced to refund part of the collected fee to the finance ministry, although the transfer of an excess budget back to the state budget is not provided for by law. Such practice could become a problem if it is abused.

The field research found no additional information on the control and approval of the NRA's annual accounts and the role of government.

However, the field research provided information on the question whether the human and financial resources of NRAs are perceived to be sufficient for NRAs to perform their tasks. 61% of survey respondents believe that their NRA has sufficient financial means to fulfil its tasks while 49% believe that they have adequate staff to appropriately fulfil its tasks. Respondents state that certain NRAs do not have enough budget and staff to adequately perform their core tasks (Romania, Bulgaria, Lithuania, Croatia, Slovakia). At the same time, it is notable that the NRA has already reached the staff limit allowed, which may indicate a need for more resources. In the case of Slovakia, one of the four general interviewees providing feedback on Slovakia highlighted that there have been budgetary issues for the NRA, which led to the regulator not being able to attend certain conferences due to insufficient resources. The Slovakian NRA representative stated in its turn that there were no budgetary issues which would negatively affect its independence or effectiveness but admitted that for certain areas of its core tasks the regulator is effectively seeking additional resources.

Other NRAs seem, based on stakeholder input, to have adequate resources to perform their tasks (France, Spain, Hungary, Austria, Germany, Czech Republic). In the case of France, one out of the three general interviewees states, however, that although the NRA's budget is set on an independent basis, there are constant discussions with parliament and ministry to cut costs while the NRA is arguing to raise its funding. The French NRA representative stated that the independence of the NRA in France is affected negatively due to limited budget, with another general interviewee of the three providing input on France noting, for example, that the NRA requested additional funding for additional missions in relation to solar and wind energy development and production, but it took years to acquire this additional funding. This respondent thought an independent budget would be vital for the NRA's independence and effectiveness and pointed to the way in which the French Telecommunications and Transport Regulators are funded in France. Another general interviewee, however, thought the budget of the French NRA was sized correctly and the right balance was found.

In relation to Germany, it was noted by the NRA representative that the Ministry and Parliament often try to cut the NRA's budget but that they need proper justifications to achieve this. On the other hand, the German NRA can request an increase of the budget based on a highly justified impact assessment that needs to be approved by

the parliament. The ability to attract and retain qualified staff is mentioned as a risk for the independence of the German NRA due to its inability to compete with salaries being paid in the private sector.

Respondents from both Spain and France mention some tension between their core tasks and the available budgets. In the case of France, the French representative noted that the NRA experiences limitations to the number of studies it can launch due to budgetary constraints. The idea that the French NRA is operating at full capacity may be supported by the fact that staff numbers were at 127 when the headcount cap was 127, while they expanded to 149 once the headcount cap increased to that number. An interview was of the opinion that there would be a lack of staff if the actual task of setting and calculating tariffs would be done by the CNMC, as it should be according to the Third Energy Package. An interviewee stated there would not be sufficient staff, in particular for the regulation of network operators.

### *3.3.2. Provisions regarding staff recruitment and pay*

This sub-section assesses any restrictions on how the budget is used by NRAs and any legal provision or informal rule setting headcount caps for staff. In addition, it analyses whether the government is involved in the recruitment of the staff or in the fixing of salaries, or whether the Ministry should approve the establishment/staff plan of the NRA.

#### *Budgetary rules specifically related to staff pay or overall headcount*

In five Member States, while there is no direct restriction on how the budget is used by the NRA, there are nonetheless forms of headcount caps (Bulgaria, Czech Republic, France, Romania, Slovakia). In Greece, there is both a restriction on numbers, and direct involvement in remuneration levels.

In Bulgaria, the 'headcount' is determined by the Commission of the NRA itself in the Rules for the Organisation of the Activities of the NRA which is adopted by the NRA itself and then promulgated in the State Gazette.

In the Czech Republic, the number of staff is regulated by the systematisation approved by the Government.

In France, there is a headcount cap which has been slightly increased in order to cope with the increased number of attributions given to the NRA. In 2016, it was set at 127, and in 2017 at 149.

In Romania, there is a cap on the maximum number of staff positions in the NRA, excluding the members of the Regulatory committee. According to the law, as

modified in January 2018, the maximum number of posts from the NRA is 350<sup>250</sup> (it was increased from 300).

In Slovakia, the current expenditures contain, *inter alia*, a precise amount of money rendered on remuneration of the NRA's staff. Although the Parliament does not determine a precise number of employees of the NRA, it sets a financial cap, which in practice, limits a number of the NRA's employees. Thus, it can be regarded as an indirect headcount cap.

In the rest of the Member States examined (Austria, Germany, Greece, Spain, Hungary, Croatia, Lithuania) there are no such headcount caps. However, in some of these Member States there are rules which may impact upon the hiring of staff by the NRA.

For example, in Austria, the law specifically provides that the 'Management Board has the right to conclude employment contracts with the necessary number of staff.'<sup>251</sup> Therefore, the NRA enjoys a certain flexibility, subject to budgetary constraints.

In Spain, it should be noted that the NRA is bound by a Law on Budgetary Stability and Financial Sustainability although not specifically addressed to the NRA, which requires all public entities to apply preventive and corrective measures aimed at safeguarding the principles enshrined in Article 135 of the Spanish Constitution.<sup>252</sup> Nevertheless, these restrictions only come into play whenever there is a breach (or a serious risk of breach) of the aforementioned constitutional principles (principle of budgetary stability). Thus, although this latter law could result in the reduction of staff numbers, it should be noted that such reduction would only be justified in order to ensure budgetary stability, and it is clear that the context of the law was the overarching need to ensure the stability of public finances.

In Hungary the relevant provisions are contained in Act CXCV of 2011 on the State Budget.<sup>253</sup> These provisions are general rules on how to manage budget revenues and are not specific to the NRA. These rules determine the allowed types and parties of a contract and specify the spending priorities.<sup>254</sup> The number of staff is determined by the NRA itself. The law only specifies that staff expenditure takes precedence over other expenditures.<sup>255</sup> However, other statutory goals should be provided by the NRA. The NRA must meet both conditions at the same time. The NRA's budget must be planned taking these into account. The dismissal of staff is possible only in exceptional and particularly justified cases.

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<sup>250</sup> Article 7 (2) of GEO no. 33/2007, amended.

<sup>251</sup> Section 29(1) E-ControlGesetz.

<sup>252</sup> Organic Act 2/2012 of 27 April

<sup>253</sup> Article 41-16 of Act CXCV of 2011.

<sup>254</sup> Article 41-16 of Act CXCV of 2011.

<sup>255</sup> Article 41-16 of Act CXCV of 2011.

In Lithuania, variations of the NRA's budget in order to increase allocations to staff salaries must be authorised by the Ministry of Finance.<sup>256</sup>

#### *Governmental involvement in fixing salaries*

In seven Member States (Austria, France, Croatia, Hungary, Lithuania, Romania, Slovakia) the government is not involved in fixing the salaries of staff. In five Member States (Bulgaria, Czech Republic, Germany, Greece, Spain), the government may be involved in fixing the salaries of staff. In four of these Member States (Bulgaria, Czech Republic, Germany, Greece), the government is involved in fixing salaries of the employees who are civil service employees. Hence, the salaries are fixed by the government yet apply equally to all civil service employees in the Member States (i.e. not only to NRA staff).

In Bulgaria, the salaries are determined within the limits set out in the Ordinance for the Remunerations of Servants in State Administration adopted by the Council of Ministers as secondary legislation to the Civil Servants Act. However, these limits in salaries are applicable to the entire state administration and there are no specific provisions for the NRA. The concrete amount of the remuneration of a civil servant in the administration of the NRA is determined by the NRA.

In the Czech Republic the number of employees assigned to the NRA (civil servants) is determined by the Government through so-called systemisation.<sup>257</sup> Systemisation provides for each administrative authority (including the NRA), inter alia, the funds available for civil servants.

In Germany, the staff of the NRA are civil servants.

In Greece, remuneration<sup>258</sup> shall be stipulated by a joint decision of the Minister for Finance and the Minister of Environment and Energy.<sup>259</sup> The expenditure for the Secretariat staff remuneration and compensation is charged in its entirety to the NRA's budget. In 2012, according to the Joint Ministerial Decision No 2/17127/0022/28.2.2012 the remuneration of the staff of the NRA was reduced significantly within the context of the measures enacted as a consequence of the adoption of the «Memorandum of Economic and Financial Policies», «Memorandum of Understanding on Specific Economic Policy Conditionality» and «Technical Memorandum of Understanding»<sup>260</sup>. The specific framework adopted via the above

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<sup>256</sup> Article 77 of the Government of the Republic of Lithuania decree "Rules on the Preparation and Enforcement of budgets of Republic of Lithuania and municipalities".

<sup>257</sup> Section 17 Civil Service Act.

<sup>258</sup> Including salaries, bonuses and overtime payment, and all manner of expenditure relating to additional compensation and travel expenses for staff working for the RAE under any employment relationship or retainer, including the five special associates working in the Chairman's Office.

<sup>259</sup> Article 43 4001/2011.

<sup>260</sup> Law No. 3833/2010 on the Protection of the National Economy – Urgent measures to tackle the fiscal crisis» (Government Gazette Series A, No 40/15.3.2010).



Memoranda has opted to curb the government deficit by directly reducing the public sector payroll account since the corresponding expenditure accounts represent the biggest part of the primary budget expenditures. The NRA has brought the case before the Supreme Court asking for the annulment of the Joint Ministerial Decision, though without success for the NRA's personnel.<sup>261</sup>

In Spain the establishment and modification of the remuneration conditions for both management staff and other staff shall require a favourable prior report from the Ministry of Finance and Public Authorities. In addition, the Ministry of Finance and Public Authorities must carry out, at appropriate intervals, special checks on the evolution of staff costs and human resources management costs, in accordance with the criteria established for that purpose.<sup>262</sup>

### *Governmental involvement in staff recruitment*

In two Member States (Greece, Spain) the government can have an influence regarding the staff<sup>263</sup> recruitment of the NRAs.

In Greece, the number of NRA secretariat staff positions may be increased by presidential decree issued at the proposal of the Minister of Environment and Energy, with the assent of the NRA. Positions shall be filled in accordance with the provisions of law,<sup>264</sup> further to a notice issued by the NRA stipulating the formal and material qualifications required in accordance with the provisions of Presidential Decree.<sup>265</sup>

In Spain, the staff who work at the NRA can be civil servants (governed by the rules governing the civil service applicable to all civil servants of Central Government) or employees (governed by the Revised Workers' Statute).<sup>266</sup> Furthermore, the NRA has a list of job positions which must be approved by the Ministry of Finance and Public Authorities. Each year, the President of the NRA shall submit a draft Public Employment Offer to the Ministry of Finance and Public Authorities, through the Ministry of the Economy and Competitiveness. That draft shall take account of the

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Law No. 3845/2010 on the Measures for the implementation of the support mechanism of the Greek economy by the Member States of the Eurozone and the International Monetary Fund Government Gazette Series A, No. 65/6.5.2010).

<sup>261</sup> Supreme Court Decision No 3406/2014.

<sup>262</sup> Article 31.6 of Act 3/2013.

<sup>263</sup> This section refers to the recruitment of the staff of NRAs as opposed to the board members. For information on the nomination/appointment of the board members, please see section 3.6.2.

<sup>264</sup> Law No. 2190/1994 on the Establishment of an Independent Authority to Select Staff and Regulate on Governance Issues (Government Gazette Series A, No. 28/03.03.1994).

<sup>265</sup> Para. 1-2 of article 42 of Law 4001/2011, Presidential Decree No. 50/2001 (Government Gazette Series was later amended by Presidential Decree No.347/2003, Presidential Decree No.44/2005 and Presidential Decree No.116/2006.

<sup>266</sup> Article 31.1 of Act 3/2013.

human resource needs for the work of the National Markets and Competition Commission so that it can properly exercise its functions.<sup>267</sup>

In the remaining Member States the Government is not involved in the staff recruitment.

#### *Brief description of staff recruitment procedures*

In Austria, the conclusion of employment contracts with senior employees, the termination of such employment and the determination of principles for granting bonuses and pension payments to executive staff is subject to approval by the Supervisory Board.<sup>268</sup>

In Bulgaria, the 'headcount' is determined by the Commission of the NRA itself in the Rules for the Organisation of the Activities of the NRA which is adopted by the NRA itself and then promulgated in state gazette.

In the Czech Republic, the number of employees assigned to the NRA (civil servants) is determined by the Government through systemisation.<sup>269</sup> The proposal for systemisation is drawn up by the Ministry of the Interior in agreement with the Ministry of Finance on the basis of proposals from the authorities concerned. Systemisation is approved by the Government for the following calendar year. An employee is recruited by decision of the NRA Board itself. The fulfilment of professional qualifications is verified through a tender procedure before the committee established for this purpose. The interview can be supplemented by a written test.<sup>270</sup> The Committee selects the three most suitable applicants from which the NRA then chooses one applicant with whom a written agreement is concluded.

In Germany, all selection procedures are carried out centrally by the Personnel Unit.

In Greece, the selection procedure for the NRA's staff depends on the position offered. Short term contracts which are subject to private law terms undergo a procedure determined by the NRA which sets the qualifications required and the selection procedure involves an interview. Whereas the recruitment procedure for the opening of a position offering a contract with indefinite duration requires an open procedure of an open public tender held by the Supreme Council for Civil Personnel Selection (ASEP in Greek), the last time such a procedure was held to cover positions for scientific personnel in RAE was in 2009. On the contrary, short term contracts have been offered more regularly since 2014.

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<sup>267</sup> Article 32.2 of RD 657/2013.

<sup>268</sup> Section 15(2)(7) E-ControlGesetz.

<sup>269</sup> Section 17 Civil Service Act.

<sup>270</sup> Section 24 – 28 Civil Service Act.

In Spain, staff who work at the NRA can be civil servants or employees.<sup>271</sup> Civil service staff are governed by the rules on civil service applicable to all civil servants of Central Government, thus, the filling of civil servant posts is carried out in accordance with the procedures applicable to civil servants of Central Government.<sup>272</sup> Non-civil service employees are governed by the Revised Workers' Statute. The recruitment of non-civil service employees is carried out, in accordance with the offer of public employment of Central Government, by public announcement, subject to the principles of equality, merit and ability, as well as the principle of access to public employment for persons with disability.<sup>273</sup> Board members are civil servants. In exceptional cases, these positions may be filled by non-civil service employees under senior management employment contracts, provided that the positions do not entail the exercise of public. Senior management employment contracts shall be subject to specific provisions regulating the Remuneration Regime of Senior Managers and Executives in the Public Business Sector.<sup>274</sup>

In France, the NRA staff is directly appointed by the NRA's president.<sup>275</sup> The recruitment procedure is managed by the NRA itself through the publication of vacancies. Recruited staff have the status of contractual worker for the State (*agent contractuel de l'État*).

In Croatia, the Act on Regulation of Energy Activities states that the NRA is to have professional staff in order to fulfil its professional, administrative and technical tasks and that its staff is to be managed by respective heads of professional services, who are appointed and relieved from their duties by the President of the Management Board, on the basis of a public tender, for a period of four years with the possibility of re-appointment.<sup>276</sup> Conditions to be met by the heads of professional services as well as their rights, obligations, responsibilities and conflict of interest provisions are laid down in the NRA's Statute. The NRA is authorised to adopt its rules on organisation and workplace systematisation, as well as rules on financial remuneration of its staff.<sup>277</sup> Those rules are not publicly available on the NRA's webpage.

In Hungary, the employees are selected by open competition; but the exact terms are determined by the internal rules of the authority, which vary by job positions.

In Lithuania the staff of the NRA can be civil servants or employees. Civil service staff are governed by the rules applicable to all civil servants of the Government. Appointments to civil servant posts are carried out in accordance with the general procedures governing the selection of all civil servants. Employment of non-civil service employees is governed by the Labour Code. Both the civil service staff and

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<sup>271</sup> Article 31.1 of Act 3/2013.

<sup>272</sup> Article 31.2 of Act 3/2013.

<sup>273</sup> Article 31.3 of Act 3/2013.

<sup>274</sup> Article 31.5 of Act 3/2013.

<sup>275</sup> Article R.132-1, Energy Code.

<sup>276</sup> Article 28 of the Act on Regulation of Energy Activities.

<sup>277</sup> Article 31 of the Statute.

non-civil service employees are appointed and dismissed by the chairperson of the NRA.<sup>278</sup>

In Romania, specialised staff needs to hold technical, economic or law degrees, with a minimum 3-years work experience in the electricity, heat and gas sectors or in regulatory activity. The Regulation on the organization and functioning of the NRA mentions that the list of posts, the regulation for organizing and conducting employment based on competitions, employment of staff are all done by order of the president of the NRA.<sup>279</sup> The list of staff / staff plan is approved by order of the NRA's president.

In Slovakia, the NRA, as any other state authority, organizes a selection procedure for any vacant civil service position at first internally and if it is not successful, externally.<sup>280</sup> Selection procedure consists of written and oral parts and is carried out by a selection committee consisting of an uneven number of members. Members of selection committee are appointed by a Secretary General of respective state authority.

### **"De facto aspect" (Field research)**

Similarly to NRA expenditure, the staff numbers of the 12 NRAs vary greatly. As previously noted, six of the NRAs (Bulgaria, Germany, Hungary, Lithuania, Slovakia and Spain) cover more than energy regulation. In table 7, there is a visible distortion in the data for Germany's average staff numbers. This is, in part, due to the larger nature and scope of BNetzA's activities and should be kept in mind throughout this section. As outlined in the previous section some of the regulators (Bulgaria, Czech Republic, Greece, France, Romania, Slovakia) have staff levels capped by government/parliament. Four of these NRAs (Bulgaria, Greece, France, Romania) noted that such a limitation on their staff further limits their effectiveness.

**Table 7: NRA Staff Numbers (FTE) for 2010-2018**

Year	AT	BG	HR <sup>281</sup>	CZ	FR <sup>282</sup>	DE	EL	HU	LT	RO	SK	ES
<b>2010</b>	89,9	128	N/A	107,6	N/A	2500			50	214	95	216
<b>2011</b>	104,2	128	N/A	129,47	134				48	214	104	212
<b>2012</b>	112,7	128	N/A	184,89	130				73	224	88	210

<sup>278</sup> Article 24.8 of the Regulations of the Commission.

<sup>279</sup> Regulation on the organization and functioning of the National Authority for Energy, approved by Order of President of ANRE no. 2/31.01.2018 (Article 1).

<sup>280</sup> Article 40 Act on Civil Service.

<sup>281</sup> Figures not validated by NRA.

<sup>282</sup> Figures not validated by NRA.

<b>2013</b>	114,7	128	N/A	216,48	130	2900	88	197	84	264	98	201
<b>2014</b>	119,7	128	N/A	235,26	130	2900	95	280	93	270	108	176
<b>2015</b>	115,2	165	N/A	234,27	127	2900	88	320	96	273	105	176
<b>2016</b>	126,5	166	N/A	252,78	132,4	3000	88	321	101	273	114	176
<b>2017</b>	122,3	166	N/A	266,92	149	3000	101	321	97	279	117	176
<b>2018</b>	120	166	63	276,57	100+	3000	110	340	100	350	110	185

*Source: Data collected from NRA reports and validated by contact person(s) within each NRA.*

#### *Determination of salaries of NRA staff*

In most countries the salaries of the NRA staff cannot compete with salaries in the private sector. This is considered to be an obstacle or potential obstacle in attracting adequate staff (Bulgaria, Lithuania, Czech Republic, Hungary, Greece, Spain). In Greece, five of the eight Greek survey respondents think that the NRA does not have adequate staff to fulfil its tasks and four do not find the staff and management neutral and competent. It was mentioned that the competence to determine the salaries of the NRA's Board Members and personnel is exercised exclusively by the Ministry. Similarly, it was mentioned that the determination of the number of staff positions and the filling of such positions by recruitment are subject to the approval of the Legislature or Ministry. This was viewed as a threat to the independence and effectiveness of the NRA by the NRA representative; it has led to a dramatic decrease of the NRA's personnel and has had a negative impact on the attraction of high-level professionals, also due to the low remuneration levels. Nevertheless, following the NRA's long-pursued request, the recruitment by the NRA of 79 employees has been jointly approved by three ministers, in order to fill the vacant staff positions as of 2019.

In Bulgaria 67% of the 12 Bulgarian survey respondents think that the number of staff working at the NRA is inadequate to appropriately fulfil its tasks (while the rest think staffing is only somewhat adequate) and respondents<sup>283</sup> have doubts with regard to the neutrality and competence of staff. However, the new Bulgarian Energy Act will provide the NRA with a higher and more flexible budget as a result of which it will be possible to hire new staff.

In the case of Romania, it was noted an attempt to change the law regarding the remuneration level.

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<sup>283</sup> Only 8% thinks that the staff and management of the NRA is neutral and competent; while 50% thinks it is not neutral and competent (and 33% only somewhat neutral and competent).

In the case of Hungary, the NRA representative mentioned that the NRA can adjust the base salary for 20% of staff which empowers the NRA to pay better salaries compared to other public institutions in Hungary.

In the Czech Republic, Croatia and Lithuania respondents mention that the long hiring procedure for new employees also dissuades candidates. In Lithuania, it was noted that from the beginning of 2019, hiring of staff will be centralized within a government body that conducts the selection for all public institutions. This will further limit the NRA's ability to hire its own staff.

In Lithuania the fact that staff can be liable for compensation of damages caused by the decisions they take, makes hiring even more difficult.

In Greece, the selection of the personnel, in particular of technical experts, is performed by another entity without participation of the NRA in the process. This procedure may undermine the NRA's independence.

In the case of France, one of the three general interviewees providing input on France state that staff members are competent, possessing a high level of technical expertise and salaries are noted as being competitive. The NRA's staff is considered to be adequate both quantitatively and qualitatively.

Both of the general interviewees providing input on Spain consider the technical staff to be competent. It was mentioned that senior experts are leaving and the NRA cannot hire new senior experts, only internal public servants, which was not deemed adequate. Nevertheless, they stated that their current staff maintains a high level of technical expertise, as they were hired prior to the merger of the Spanish regulators.

### **3.4. Independence and effectiveness in conducting core tasks**

#### **3.4.1. *Setting and approval of tariffs and methodologies***

The regulatory authority shall have the following duties:

- (a) fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies;(...)

**Article 37.1(a) of Directive 2009/72/EC; Article 41.1(a) of Directive 2009/73/EC**

The regulatory authorities shall be responsible for fixing or approving sufficiently in advance of their entry into force at least the methodologies used to calculate or establish the terms and conditions for:

- (a) connection and access to national networks, including transmission and distribution tariffs or their methodology (and terms, conditions and tariffs for access to LNG facilities). Those tariffs or methodologies shall allow the necessary investments in the networks (and LNG facilities) to be carried out in a manner allowing those investments to ensure the viability of the networks (and LNG facilities);

- (b) the provision of balancing services which shall be performed in the most economic manner possible and provide appropriate incentives for network users to balance their input and off-takes. The balancing services shall be provided in a fair and non-discriminatory manner and be based on objective criteria; and
- (c) access to cross-border infrastructures, including the procedures for the allocation of capacity and congestion management.

**Article 37.6** of Directive 2009/72/EC; **Article 41.6** of Directive 2009/73/EC

Regulatory authorities shall have the authority to require transmission (storage, LNG) and distribution system operators, if necessary, to modify the terms and conditions, including tariffs and methodologies referred to in this Article, to ensure that they are proportionate and applied in a non-discriminatory manner (...). In the event of delay in the fixing of transmission and distribution tariffs, regulatory authorities shall have the power to fix or approve provisional transmission and distribution tariffs or methodologies and to decide on the appropriate compensatory measures if the final tariffs or methodologies deviate from those provisional tariffs or methodologies.

**Article 37.10** of Directive 2009/72/EC; **Article 41.10** of Directive 2009/73/EC

This section begins by outlining the regulatory choices of each of the Member States examined. Then, it sets out in a more detailed fashion the manner in which tariff regulation is provided for in the Member States, including the criteria to be applied, and whether such criteria as specified in legislative provisions or by the NRA itself.

### **Regulatory choices of each Member State**

Member States have four options: 1) the NRA fixes the tariffs, 2) the NRA fixes the methodology, 3) the NRA approves the tariffs or 4) the NRA approves the methodology. NRAs must have at least one of these competences, but it can have more than one or even all of these competences.<sup>284</sup> Table 8 illustrates the legislative choices at Member State level.<sup>285</sup>

**Table 8: Setting and approval of tariffs and methodologies**

NRA has the power to fix tariffs	NRA has the power to approve tariffs
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<sup>284</sup> It should be noted that the proposal for the Recast Internal Electricity Market Directive envisaged this being changed so that the NRA shall have the duty to fix or approve both tariffs and their methodologies. However, this was not approved by the co-legislators in the final text.

<sup>285</sup> It should be noted that the role of the NRAs in relation to tariff-setting is not always expressed in a manner that allows for such a clean categorisation of Member States. For example, the NRA in Bulgaria is noted as having the power to fix tariffs, but there is no legislative distinction between fixing and approving.

<ul style="list-style-type: none"> <li>✓ <b>Austria;</b></li> <li>✓ <b>Bulgaria;</b></li> <li>✓ <b>Czech Republic;</b></li> <li>✓ <b>Croatia;</b><sup>286</sup></li> <li>✓ <b>Hungary;</b></li> <li>✓ <b>Slovakia.</b></li> </ul>	<ul style="list-style-type: none"> <li>✓ <b>Greece;</b></li> <li>✓ <b>Croatia;</b></li> <li>✓ <b>Lithuania;</b></li> <li>✓ <b>Romania.</b></li> </ul>
<b>NRA has the power to fix the tariff methodology</b>	<b>NRA has the power to approve the tariff methodology</b>
<ul style="list-style-type: none"> <li>✓ <b>Greece;</b></li> <li>✓ <b>Spain;</b><sup>287</sup></li> <li>✓ <b>France;</b></li> <li>✓ <b>Croatia;</b></li> <li>✓ <b>Hungary;</b></li> <li>✓ <b>Lithuania;</b><sup>288</sup></li> <li>✓ <b>Romania;</b><sup>289</sup></li> <li>✓ <b>Slovakia.</b></li> </ul>	<ul style="list-style-type: none"> <li>✓ <b>Austria;</b><sup>290</sup></li> <li>✓ <b>Bulgaria;</b><sup>291</sup></li> <li>✓ <b>Germany;</b><sup>292</sup></li> <li>✓ <b>Spain;</b></li> <li>✓ <b>Romania.</b></li> </ul>

In Austria, the NRA has the power to fix tariffs in the gas and electricity sectors.<sup>293</sup> It does not, however, determine the general tariff methodologies as they are established in the legislation. Notwithstanding this, the NRA has a role in approving the more specific methodologies proposed by the TSOs in the gas sector, with the legislation providing that it shall periodically authorise the methods proposed by the TSOs.<sup>294</sup>

In Bulgaria, the legislation provides that transmission and distribution tariffs shall be subject to regulation by the NRA, except in cases where the NRA at its discretion approves a methodology for tariff-setting in relation to the gas sector.<sup>295</sup>

In the Czech Republic, the legislation provides the NRA with the power to set transmission and distribution tariffs.<sup>296</sup> The NRA defines the conditions and criteria for price regulation for a regulatory period of five years.<sup>297</sup>

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<sup>286</sup> Only in certain limited circumstances, where the NRA does not approve the proposed tariff.

<sup>287</sup> As mentioned previously, the Spanish legislation has changed (Royal Decree-Law 1/2019). Nevertheless, the new functions and competences allocated to the NRA will not become effective until 1 January 2020 or until the first regulatory period has ended. Thus, the table presents the legislation applicable before January 2019.

<sup>288</sup> Sets methodology for calculating cap.

<sup>289</sup> In relation to gas.

<sup>290</sup> While a general methodology is prescribed in the legislation, in the case of the gas sector, the NRA approves a more specific methodology proposed by TSOs.

<sup>291</sup> In relation to gas.

<sup>292</sup> While the NRA may, in theory, have the power to fix tariffs, in practice it approves methodologies.

<sup>293</sup> Sections 24 and 70 Federal Gas Law and Sections 48, 49 and 51 Federal Electricity Law.

<sup>294</sup> Section 69(2) Federal Gas Law.

<sup>295</sup> Article 30 of the Energy Act.



In Germany, the NRA sets the caps on the basis of which the tariffs are determined. On the basis of these caps, the network system operators convert into tariffs. The Government has the power to define in an ordinance the situations where the NRA is allowed to fix or approve tariffs.<sup>298</sup> On the basis of this power, the Government delegated the power to set tariffs to the NRA in the Incentive Ordinance, which sets out in detail the manner in which the NRA can set the caps.<sup>299</sup> In practice therefore, the NRA approves the methodology (developed on the basis of legally imposed elements), based on which the tariffs are then determined by the network operators. In Germany it was highlighted that the NRA is not responsible for DSO tariff regulation, but only for setting revenue caps for TSOs and DSOs. They regarded the issue as something the NRA should be responsible for.

In Greece, the law states that the NRA shall rule on the methodology underlying the calculation of tariffs, while having the power to approve the tariffs themselves.<sup>300</sup>

In Spain, the law used to provide that the Ministry had the power to fix and approve tariffs,<sup>301</sup> while the NRA had the power to fix and approve tariff methodologies.<sup>302</sup> However, Spain has revised its legislation, handing over tariff setting to the regulator, with no legal influence over the regulator's tariff decisions.<sup>303</sup>

In France, the legislation provides that methods used to establish tariffs are fixed by the NRA.<sup>304</sup>

In Croatia, the legislation authorises the NRA to fix tariff methodologies.<sup>305</sup>

In Hungary, the law provides that the definition and regulation of tariffs shall be determined by the NRA.<sup>306</sup>

In Lithuania, the legislation gives the NRA the power to fix the tariff methodology and to approve tariffs.<sup>307</sup>

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<sup>296</sup> Section 17 (11) and (12) Energy Act, as implemented in details in Section 48 of implementing legislative act No. 408/2015 Coll. on Rules of Electricity Market.

<sup>297</sup> Section 19a (8) Energy Act.

<sup>298</sup> Section 21a (6)(1), Section 24 Sentence 2 No. 4 EnWG - Energy Industry Law.

<sup>299</sup> Section 32(1) Incentive Ordinance - Verordnung über die Anreizregulierung der Energieversorgungsnetze (Anreizregulierungsverordnung - ARegV), available here [Anreizregulierungsverordnung](#), last accessed 29/06/2018. A Court case concerning the government's interference in the tariff setting of the German regulator is pending (Case C-718/18).

<sup>300</sup> Article 15 of Law 4001/2011.

<sup>301</sup> Article 3.1 d) of RD 903/2017.

<sup>302</sup> Article 7.1 of Act 3/2013.

<sup>303</sup> See Royal Decree-Law 1/2019.

<sup>304</sup> L.341-3 Code de L'Energie.

<sup>305</sup> Article 29(4) and Article 30(1) of the Energy Act.

<sup>306</sup> Article 143(2) of Act LXXXVI of 2007. The most recent decrees are MEKH Regulation 10/2016 (XI. 14.) for electricity and MEKH Regulation of the HEA Nr. 13/2016. (XII. 20.).

<sup>307</sup> Article 8(9)(2) of the Law on Energy; Article 37(1) of the Law on Natural Gas.

In Romania, the legislation provides that tariff methodologies are approved by the NRA, following a consultation procedure.<sup>308</sup> The NRA has the power to approve the tariffs, which are based on the methodologies for tariff-setting.<sup>309</sup>

In Slovakia, the NRA has the power to fix tariffs and their methodologies.<sup>310</sup>

### *3.4.2. Consideration of the factors and criteria applicable to the fixing or approval of tariffs or their methodologies*

Across the Member States examined there are differences in the tariff-setting process and the criteria to be considered. One particular difference is the level of detail in the legislation concerning the tasks which the NRA conducts, with some providing the NRA with a broad discretion, while others setting out detailed criteria. Similarly, a difference can be seen between those Member States where the detail is prescribed in legislation and those where the detail is set out in a decision by the NRA itself. Set out below is a brief description of the situation in each Member State. While this section is descriptive, the implications of these rules for the independence and effectiveness of the NRAs is considered in Section 4.2.3.1.

In Austria, the methodologies for calculating gas and electricity distribution and transmission tariffs are set out in general terms in the legislation.<sup>311</sup> Thus, while the NRA has the power to fix the tariffs, its level of discretion in doing so is somewhat limited by the methodological principles provided in the legislation. For example, in relation to DSOs in the gas sector, the legislation prescribes:

- The determination of costs *must* be based on targets based on the potential savings of the companies, the structural development of the supply task and the market share in the respective network area. The determined costs are to be adjusted both to general targets, which are oriented to productivity developments, and to the network operator-specific inflation rate;<sup>312</sup>
- Financing costs *shall* include the reasonable cost of interest on equity and debt, taking into account capital market conditions and income tax expenses. The financing costs are to be determined by multiplying the appropriate financing cost rate by the interest-bearing capital base. Here, the interest-bearing reserve is considered, taking into account the financing tangent, which is recorded under personnel expenses.<sup>313</sup>
- The quantities underlying the charges *shall* be determined in kWh / h, the arithmetic mean of the maximum hourly output per month determined or

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<sup>308</sup> Law no. 123/2012, art. 76.

<sup>309</sup> Art. 9 (1) of GEO no. 33/2007, amended.

<sup>310</sup> Section 12 of Act 250/2012. In addition, Article 88, par. 6, let. a) and Article 88, par. 2, let. d), f), g) of the Energy Act provide the Ministry with the power to take tariff and non-tariff decisions related to security of supply, obligations of general economic interest and preservation of the integrity of the network.

<sup>311</sup> Sections 48-64 Federal Electricity Act, and Section 69-96 Federal Gas Law

<sup>312</sup> Section 79 of the Federal Gas Law

<sup>313</sup> *Ibidem*, Section 80.

measured in kWh / h, and the number of points of delivery of the last available financial year per network level, based on the delivery and injection quantities.<sup>314</sup>

In Bulgaria, the legislation sets out the prices which shall be regulated by the NRA, which covers, inter alia, transmission and distribution tariffs. The legislation sets out a number of principles, by which the NRA shall be guided, in exercising its regulatory powers in relation to tariffs. These include a set of general principles which apply to the NRA's exercise of its regulatory powers in a general sense,<sup>315</sup> many of which reflect the provisions of Article 36 of 2009 Electricity Directive, but also the following specific principles relating to tariffs:<sup>316</sup>

- They *shall* be non-discriminatory, based on objective criteria and determined in a transparent manner;
- They *shall* cover economically justified operating costs of:
  - o Management, operation and maintenance of energy works;
  - o Maintenance of stand-by and regulating capacities required for reliable supply to customers;
  - o Delivery and maintenance of fuel stocks;
  - o Repairs;
  - o Depreciation;
  - o Storage and processing of spent nuclear fuel and radioactive waste, decommissioning of nuclear facilities, and nuclear safety.
- They *may* include non-recoverable costs related to the transition to a competitive energy market, as well as costs resulting from the fulfilment of public obligations related to the security of supply, including for protection of works, which constitute a critical infrastructure in the energy sector;
- They *must* ensure an economically justified rate of return on capital.
- Etc.

In the Czech Republic, the legislation merely empowers the NRA to set transmission and distribution tariffs. The detail is set out in a document entitled *Principles of Price Regulation*.<sup>317</sup> This document is published by the NRA itself and establishes the principles according to which tariffs will be regulated. The basic legal criterion is the creation of the conditions for a transparent, predictable and long-term stable investment environment in the electricity and gas sectors for the following regulatory period. In the document, the NRA sets out how it will proceed in determining the amount of revenue allowed for individual years, depreciation etc. For a particular year,

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<sup>314</sup> *Ibidem*, Section 81.

<sup>315</sup> Article 23 and 24 of the Energy Act.

<sup>316</sup> It should be noted that these principles refer to all the price regulation activities set out in Article 30.

<sup>317</sup> Prices here refer to tariffs.

<sup>318</sup> <http://www.eru.cz/documents/10540/3550177/Zasady-cenove-regulace-IV-RO-prodlouzene-do-2020.pdf/6788c6c3-4711-4042-b5c1-1985ed59bceb>

the NRA sets the tariffs through a pricing decision (based on the Principles of Price Regulation), which is issued under the Pricing Act<sup>319</sup> and published in the Energy Regulatory Journal.<sup>320</sup>

In Germany, the Government delegated the power to set revenue caps to the NRA via the Incentive Ordinance.<sup>321</sup> The Incentive Ordinance goes beyond merely setting out the principles to which the NRA should have regard in setting the revenue cap but sets out in the Annexes the actual formulae to be applied when making the calculation.<sup>322</sup> Thus, the role of the NRA in setting the revenue caps is limited to the application of a prescribed formula<sup>323</sup>.

In Greece, the legislation states that the NRA sets the methodology in accordance with transparent criteria.<sup>324</sup> The methodology shall be designed to allow the necessary investment in the transmission and distribution system, thereby effectively safeguarding the provision of transmission and distribution services. In addition, the legislation sets out the following criteria:

*For the gas sector, account should be taken of:*

- price stability for the benefit of users;
- reasonable return on the capital used by the natural gas system operator;
- provision of services, including public services, in the most reliable, economic and environmentally-friendly way possible;
- covering the costs to the natural gas system operator of discharging the public service obligations assigned to it;
- strengthening free competition on the natural gas market;
- complying with the principles of transparency, equal treatment and non-discrimination;
- providing short-term and long-term incentives for the profitable operation, consistent planning and development of the infrastructure needed in order to exercise the basic activity and to improve the security of supply and support research activities by operators in connection with their areas of competence;

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<sup>319</sup> Act No. 526/1990 Coll. Price Act

<sup>320</sup> Section 17(9) Energy Act.

<sup>321</sup> The Government's power to do so is provided for by Section 21a(6)(1), Section 24 Sentence 2 No. 4 EnWG – Energy Industry Law. Section 54(2) No.2 EnWG provides that the NRA has the power to either fix or approve tariffs, according to the provision of the Ordinance issued by the Government.

<sup>322</sup> Incentive Ordinance, Annexes 1-4.

<sup>323</sup> See pending ECJ Court case C-718/18.

<sup>324</sup> Article 15 of Law 4001/2011.

- specific characteristics of each market, such as any differences in costs due to the topology of the system;
- providing incentives for charges relating to new consumers;
- carrying out new investments in natural gas systems in order to guarantee safe supply, viability and satisfaction of anticipated future demand.

*For the electricity sector, in addition to a reasonably profit, account should be taken of:*

- the cost of generating or purchasing electricity for the purpose of operating the transmission system or distribution system;
- the cost of wages, salaries and similar costs;
- other operating costs, especially taxes, other fees and duty;
- depreciation of investments;
- the return on invested capital, bearing in mind the business risk and the cost of capital for similar activities;
- the cost of discharging obligations in terms of providing services of general interest;
- the costs of obligations undertaken or operating guarantees provided before the entry into force of the present law;
- quality criteria for the electricity transmission and distribution services provided.

Before the recent revision of its law, the Spanish NRA established, on the basis of transparency, objectivity and non-discrimination, the methodology for calculating the transmission and distribution tariffs, in accordance with the framework set out in Act 3/2013 and its implementing legislation.<sup>325</sup> The methodology for the electricity tariffs was published in a circular,<sup>326</sup> on the basis of which the Ministry fixed the tariffs.<sup>327328</sup> In respect of gas, the NRA has not published a circular, but the Ministry has fixed the

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<sup>325</sup> Article 7.1 a) and 7.1 d) of Act 3/2013.

<sup>326</sup> Circular 3/2014, of 2nd July, of CNMC establishing the methodology for electricity transmission and distribution tariffs), available at: [https://www.cnmc.es/sites/default/files/1185709\\_2.pdf](https://www.cnmc.es/sites/default/files/1185709_2.pdf)

<sup>327</sup> (Order ETU/1282/2017, of December 22, establishing the tolls of access of electricity for the year 2017), available at: <https://www.boe.es/buscar/act.php?id=BOE-A-2017-15521>

<sup>328</sup> As mentioned previously, the Spanish legislation has changes (Royal Decree-Law 1/2919).

tariffs through a Ministerial Order.<sup>329</sup> In December 2017, the Spanish NRA brought an appeal before the Spanish Supreme Court against the Royal Decree 903/2017 which develops the organic basic structure of the Ministry of Energy, Tourism and Digital Agenda. The judgement of the Supreme Court is still pending. Spain has in the meantime revised its legislation, handing over tariff setting to the regulator, with no legal influence over the regulator's tariff decisions.

In France, the legislation specifies that tariffs are to be calculated in a transparent and non-discriminatory manner, in order to cover the costs incurred by the network operators or the costs corresponding to efficient network operation.<sup>330</sup> The methods used to establish the tariffs for use of the public network for the transmission and distribution electricity distribution networks are fixed by the NRA.<sup>331</sup> The legislation provides that the methodology must be based on transparent, non-discriminatory criteria, and include a normal remuneration, which contributes notably to the realisation of the investments necessary for the development of the networks.<sup>332</sup>

The NRA takes into account the general energy policy guidelines issued by the administrative authority.<sup>333</sup> It transmits to the administrative authority for publication in the official journal its reasoned decisions relating to the evolution (in terms of both the level and structure) of tariffs for use of the electricity transmission and distribution network.

In Croatia, Article 29 of the Energy Act grants the NRA the general power to fix tariff methodologies, while Article 30(1) clarifies more specifically that this applies to transmission and distribution tariffs. Article 29 clarifies some criteria to which the NRA should have regard when fixing tariff methodologies.<sup>334</sup> These include the requirements mentioned in the Directive, e.g. of non-discrimination and transparency,<sup>335</sup> the requirement of being based on justified costs, and ensuring an appropriate return on investment. Beyond the criteria set out in Article 29, the NRA appears to have a wide discretion with regard to the fixing of the methodologies, subject to the Minister's power to supervise the legality of general and individual decisions of the NRA.<sup>336</sup>

In Hungary, the legislation grants to the NRA the power to determine the principles and frameworks for tariffs.<sup>337</sup> This is subject to the requirement that they be

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<sup>329</sup> Order ETU / 1283/2017, of December 22, establishing the tolls and fees associated with third party access to gas facilities and the remuneration of regulated activities for the year 2018, available at : <https://www.boe.es/boe/dias/2017/12/27/pdfs/BOE-A-2017-15522.pdf>

<sup>330</sup> L.341-2 Code de l'Energie.

<sup>331</sup> L.341-3 Code de l'Energie.

<sup>332</sup> L341-2 Code de l'Energie.

<sup>333</sup> The Ministry of Environment and Energy.

<sup>334</sup> Article 29 applies to tariff methodologies in a general sense, and does not specifically mention transmission and distribution tariffs.

<sup>335</sup> Article 29(4) Energy Act.

<sup>336</sup> Article 36 of the Act on Regulation of Energy Activities.

<sup>337</sup> Article 143(2) of Act LXXXVI of 2007.

transparent, publicly available, proportionate and non-discriminatory,<sup>338</sup> and that they take into account the principle of the lowest cost, the justified cost of an effective licensing undertaking, including capital costs, is taken into account, but the legislation encourages the licensees concerned to be effective in the short and long term, to continuously improve the quality of their service and to increase security of supply.<sup>339</sup>

In Lithuania, the legislation does not set out the criteria, beyond the need for non-discrimination. Everything else is left to the discretion of the NRA, which sets out the criteria in its published methodology.<sup>340</sup>

In Romania, the legislation sets out detailed principles for the NRA to consider, such as the following for the electricity sector:<sup>341</sup>

- The need for tariffs to be non-discriminatory, based on objective criteria, and determined in a transparent manner;
- The need for tariffs to cover economically justified costs;
- The need to ensure a reasonable rate of return on capital employed;
- The need to contain incentive elements in the short term and long term with regard to increasing energy efficiency, security of supply, market integration and support for research in the field;
- The need for tariffs to reflect justified costs of operators, also considering long-term marginal, avoided costs, incurred as a result of distributed generation and demand-side management measures.

In Slovakia, the NRA itself elaborates the methodologies for electricity and gas tariffs by decree,<sup>342</sup> pursuant to Section 40 of Act No. 250/2012. The decrees set out complex formulas, and define each of the elements thereof, such as the WACC, effectivity factor, RAB etc. However, it is the NRA, not the legislation or the Government which sets them out.

### **"De facto aspect" (field research)**

This sub-section will address the topics of sub-section 3.4.1 and 3.4.2 because the setting and approval of tariffs and methodologies is closely connected to the criteria and procedures for fixing and approving (network) tariffs and methodologies.

The difficulty in providing conclusions regarding the 'de facto aspect' is to a large extent the result of contradictory information from stakeholders, who often use rather general statements without clear examples proving the point made. There were mixed

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<sup>338</sup> *Ibidem*, Article 142(4).

<sup>339</sup> *Ibidem*, Article 142(5).

<sup>340</sup> Methodology of the Electricity Transmission, Distribution and Public Supply Services Price Caps Calculation. (Elektros energijos perdavimo, skirstymo ir visuomeninio tiekimo paslaugų bei visuomeninės kainos viršutinės ribos nustatymo metodika, <https://www.e-tar.lt/portal/lt/legalAct/Oe1684709cc311e48dcd4e4eb2005eaf/ORPJLnCFKx>).

<sup>341</sup> Law no. 123/2012, article 79.

<sup>342</sup> [No. 18/2017 Coll](#) (electricity) and [No. 223/2016 Coll](#) (gas).

opinions regarding the effectiveness of NRAs in tariff setting, with 33 to 38% answering they were very effective, 20 to 32% that they were somewhat effective and 10 to 27% answering they were not effective.<sup>343</sup> One of the five general interviewees providing inputs on Romania argued that the government is influencing tariff setting, but did not give a clear example of how that is done. In the case of Austria, five of the nine Austrian survey respondents mentioned that transparency of grid tariff setting is only somewhat effective and one mentioned not effective, but they did not clearly indicate what is perceived to be wrong and what needs to be improved (it should be noted that another respondent regarded the level of transparency as being good).

In the case of Croatia, one stakeholder (out of the 8 which provided answers for this country) referred to the 'high political relevance of tariff decisions' being an obstacle for the independence of the NRA, but without further explanation. It is hence unclear whether it refers to grid tariffs or regulated prices. The latter has more political relevance and societal impact than a grid tariff decision. A similar comment was made by one stakeholder for Bulgaria, where end-user price regulation still exists and affects grid tariff setting.

The contacts with NRAs provided some additional information on the setting and fixing of tariffs and their methodologies. A majority considered themselves to be independent in this field. Others highlighted that they consult adequately with stakeholders, are provided data and documentation by DSOs and TSOs, yet they maintain the power to take the final decision. One stated that their technical guidelines for tariff setting independently from the ministry/market parties were very clear. Their calculation methodologies were created with the assistance of the World Bank.

Three of the regulators stated that although they maintain competences, staff capacity can be an issue. In the case of one of these, they sometimes rely on consultancy services. However, before a recent legislative change, they were restrained in hiring such services. Another NRA further highlighted that they rely on external counsel, due to understaffing.

Two of the regulators (Austria, Czech Republic) highlighted some issues regarding disputes of their tariffs. For Austria, only three parties can lodge a complaint: TSO, Chamber of Commerce and Chamber of Labour. The latter two represent consumer interests. Limiting the number of interested parties to the latter two would have the effect of preventing other interested parties from being involved in the process. In the Czech Republic, for price decisions, there have been discussions in the constitutional court over whether they should be considered administrative acts or legislative

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<sup>343</sup> A range is provided because the question was split in three subquestions, regarding effectiveness at timely setting tariffs, transparency of procedures for grid tariff setting and effectiveness at fixing or approving transmission and distribution grid tariffs or their methodologies.



decisions. If they are the latter, they cannot be challenged in court. Consequently, few companies challenge such decisions.

For the Czech Republic, the issue of tariff decisions was highlighted as an improper transposition of the package.

### 3.4.3. *NRA competence in relation to complaint-handling*

Member States shall ensure that regulatory authorities are granted the powers enabling them to carry out the duties (...) in an efficient and expeditious manner. For this purpose, the regulatory authority shall have at least the following powers:

(e) appropriate rights of investigations and relevant powers of instructions for dispute settlement (...).

**Article 37.4. e)** of Directive 2009/72/EC; **Article 41.4.e)** of Directive 2009/73/EC

Any party having a complaint against a transmission (storage, LNG) or distribution system operator in relation to that operator's obligations under this Directive may refer the complaint to the regulatory authority which, acting as dispute settlement authority, shall issue a decision within a period of two months after receipt of the complaint. That period may be extended by two months where additional information is sought by the regulatory authorities. That extended period may be further extended with the agreement of the complainant. The regulatory authority's decision shall have binding effect unless and until overruled on appeal.

**Article 37.11** of Directive 2009/72/EC; **Article 41.11** of Directive 2009/73/EC

Any party who is affected and who has a right to complain concerning a decision on methodologies taken pursuant to this Article or, where the regulatory authority has a duty to consult, concerning the proposed tariffs or methodologies, may, at the latest within two months, or a shorter time period as provided by Member States, following publication of the decision or proposal for a decision, submit a complaint for review. Such a complaint shall not have suspensive effect.

**Article 37.12** of Directive 2009/72/EC; **Article 41.12** of Directive 2009/73/EC

This sub-section identifies which NRAs have the competence to act as a dispute settlement authority or arbitrator in relation to conflicts between market players. Where this competence has been identified, a brief description of the procedure is provided.

In all Member States examined, the NRA is competent to act as a dispute settlement authority or arbitrator in relation to conflicts between market players. As for the procedure set out for handling formal complaints, it varies per Member State.

In Austria, the law lists the NRA as an alternative dispute resolution body<sup>344</sup> in disputes between companies and consumers within the meaning of the Consumer Protection Act.<sup>345</sup> Furthermore, the Regulatory Commission (one of the three main organs of the NRA) is also the dispute settlement body in certain cases.<sup>346</sup> With regard to the procedure for handling formal complaints, any interested parties, including network users, suppliers, network operators, other electricity and natural gas undertakings or interest groups, may submit complaints to the NRA.<sup>347</sup> The complaints can be in reference to, *inter alia*, disputes between electricity and natural gas providers and market participants, billing of electricity and natural gas supplies, or system usage fees submitted to the NRA.<sup>348</sup> In disputes involving consumers in the sense of the Consumer Protection Act,<sup>349</sup> the Federal Chamber of Labour must be involved.<sup>350</sup> The NRA strives to reach a dispute settlement within six weeks.<sup>351</sup> The NRA must also draft procedural guidelines for the settlement of disputes and publish them on the Internet.<sup>352</sup>

In Bulgaria, the NRA acts as a settlement authority in determined cases listed in the law.<sup>353</sup> Within two months from submission of the complaint, the NRA may facilitate an amicable settlement of the dispute. The NRA's Commission may extend this period by an additional two months if the subject of dispute requires collection of additional data and information. In case of complaints, where no amicable settlement of dispute has been reached or one of the parties refuses such settlement, the NRA adopts a decision on the complaint within two months of receipt thereof. This period may be extended by an additional two months if the subject of the dispute requires collection of additional data and information by the Commission. Following the complainant's consent, the extended period may be extended by an additional two months. In case

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<sup>344</sup> Section 4(1) Alternative Dispute Resolution Act – Alternative-Streitbeilegung-Gesetz (AStG), BGBl. I Nr.105/2015 – Official Journal Nr. 105/2015, available at <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009242>, last accessed 22/03/2018.

<sup>345</sup> Section 1(1) AStG.

<sup>346</sup> Section 132(1) Federal Gas law, 22(1) Federal Electricity Law in conjunction with Section 12 E-ControlGesetz and Section 30(3)(2) Federal Electricity Law, Section 114(3)(2) Federal Gas Law in conjunction with Section 12 E-ControlGesetz.

<sup>347</sup> Section 26(1) E-ControlGesetz.

<sup>348</sup> Section 26(1) E-ControlGesetz.

<sup>349</sup> Consumer Protection Law, Bundesgesetz vom 8 Maerz 1979, mir dem Bestimmungen zum Schutz der Verbraucher getroffen warden (Konsumentenschutzgesetz – KSchG), BGBl. No 140/1979 – Official Journal 140/1979. available at, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002462>, last accessed 22/03/2018.

<sup>350</sup> The Federal Chamber of Labour is the umbrella organisation of the nine Chambers of Labour in the regions (Laender). The Federal Chamber of Labour deals with matters that affect the entire federal territory or regions (Laender). <https://www.arbeiterkammer.at/ueberuns/akundoeqbggeschichte/index.html>, last accessed 22/03/2018.

<sup>351</sup> Section 26(1) E-ControlGesetz.

<sup>352</sup> Section 26(5) E-ControlGesetz.

<sup>353</sup> Article 22, Para 1 and 2 of the Energy Act.

the NRA finds the complaint grounded, it shall give mandatory instructions on the application of the law in its decision.<sup>354</sup>

In the Czech Republic, the NRA is the body responsible for settling disputes between market participants in a legally defined scope.<sup>355</sup> The procedure is governed by the Administrative Code,<sup>356</sup> which regulates the procedures and actions of public bodies in decision-making in the field of public administration. The procedure starts on the date on which the NRA obtains a proposal for settlement of the dispute. The NRA shall notify the initiation of the proceeding to the other party to the dispute and instruct them about their rights and obligations in the proceedings. Both parties are required to propose evidence to support their claims. The NRA may also give further evidence at its sole discretion. By its decision the NRA can accept or reject, fully or partially, the proposal. In the disputed procedure, participants may also conclude a conciliation which is subject to the NRA's approval.

In Germany, the NRA performs the tasks of a central information and national dispute settlement body. As the dispute settlement body, it shall resolve disputes in a quick and binding fashion.<sup>357</sup> The NRA acts as a national dispute settlement body in cases of use of public utility networks,<sup>358</sup> scope of the right of use<sup>359</sup> and revenue from joint use.<sup>360</sup> In relation to the procedure, the decisions are made by the decision-making chambers<sup>361</sup> (which consist of a chairperson and two associate members) by administrative acts.<sup>362</sup> The national dispute settlement body initiates a procedure on request<sup>363</sup> and a decision of the decision-making chamber shall be made within four months upon receiving the request.<sup>364</sup>

In Greece, certain complaints listed in the law<sup>365</sup> may be filed with the NRA by anyone with a legitimate interest. Moreover, the law establishes at the NRA a permanent arbitration tribunal, to which certain disputes may be referred.<sup>366</sup> Complaints are ruled upon within three months. This deadline may be extended if it is necessary to collect information to reach a decision. The deadline may only be further extended with the complainant's consent. As for the arbitration procedure, arbitration shall be conducted before a three-member panel of persons listed in the register of arbitrators and mediators compiled every two years by decision of the chairman of the NRA. This list shall include members of the NRA, members of technical chambers and law societies

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<sup>354</sup> Article 22, Para 3, 4 and 5 of the Energy Act.

<sup>355</sup> Section 17 (7) )(a) – (e) Energy Act.

<sup>356</sup> Act No. 500/2004 Coll. Administrative Code.

<sup>357</sup> Section 77n Telecommunications Act.

<sup>358</sup> Section 77d Telecommunications Act.

<sup>359</sup> Section 77e Telecommunications Act.

<sup>360</sup> Section 77g Telecommunications Act.

<sup>361</sup> Section 77n, 132(2) Telecommunications Act.

<sup>362</sup> *Ibidem*.

<sup>363</sup> Section 134a(1) Telecommunications Act.

<sup>364</sup> Section 77n Telecommunications Act.

<sup>365</sup> Article 34 of Law 4001/2011.

<sup>366</sup> Para. 1-2 of Article 37 of Law 4001/2011.

and professors of any grade of higher education establishments with specialist knowledge in disputes subject to arbitration by the NRA.<sup>367</sup> The arbitration tribunal shall ensure that proceedings up to publication of the award are completed within six months of the institution of arbitration proceedings.<sup>368</sup> The arbitration tribunal may issue a decision asking the NRA to formulate an opinion on matters in connection with its regulatory powers which are critical to resolving the dispute.<sup>369</sup>

In Spain, the NRA enjoys both dispute settlement competences and arbitration competences, the former being broader and more flexible than the latter.<sup>370</sup> On the one hand, in the sectors of electricity and natural gas the NRA shall act as dispute settlement authority concerning conflicts among market players listed in the law.<sup>371</sup> The Energy Division of the NRA is competent to conduct the administrative procedure and to issue proposals of resolution of conflicts,<sup>372</sup> while the Council of the NRA is competent to take resolutions. With regard to the procedure, there are few specific provisions. The law only states, that the decisions taken by the NRA shall be binding for all parties in conflict; and that the NRA shall decide on any complaint in the shortest possible term and, in any case, within three months from receipt of all the relevant information.<sup>373</sup> Sector-based law in the fields of electricity and gas add further sophisticated rules of procedure, but only some scarce and short provisions.<sup>374</sup> On the other hand, the Energy Division of the NRA shall participate in arbitration procedures whenever they relate to the matters foreseen in sector-based law pertaining to electricity<sup>375</sup> and to natural gas.<sup>376</sup> The competence to resolve arbitration procedures is granted to the Council of the NRA.

In France, a separate independent body within the NRA is responsible for settling disputes between operators and users on the access to public electricity and gas networks and their use, and for punishing any infringements of the Energy Code. This body is called "CoRDIS" (*Comité de règlement des différends et des sanctions*) and is composed of 4 members (2 Councillors of State and 2 Councillors at the Cassation Court) appointed for a term of six years, non-renewable.<sup>377</sup> In relation to the procedure, in principle CoRDIS takes a decision within two months. This time can be extended to four months if the committee deems it necessary. At the same time, a request for provisional measures can be made. In case of serious and immediate

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<sup>367</sup> Para 4 of Article 37 of Law 4001/2011.

<sup>368</sup> Para 6 of Article 37 of Law 4001/2011.

<sup>369</sup> Para 7 of Article 37 of Law 4001/2011.

<sup>370</sup> See the Preamble of Act 3/2013.

<sup>371</sup> Article 7 of Act 3/2013, Article 12.1.b of Act 3/2013, Article 12.1.b of Act 3/2013.

<sup>372</sup> Article 23.b of RD 657/2013.

<sup>373</sup> Article 12.2 of Act 3/2013.

<sup>374</sup> For example: on the Electric Sector, the law sets a deadline of 1 month for lodging the application before the CNMC and of 2 months to solve it when it comes to conflicts related to access to transport and distribution networks.<sup>374</sup> In the absence of a complete procedure, the general rules on common administrative procedure contained in Act 30/1992, recently replaced by Act 39/2015, do apply.

<sup>375</sup> Act 24/2013.

<sup>376</sup> Act 34/1998.

<sup>377</sup> Article L.132-2, Energy Code.

threat to the rules governing access to networks, structures, facilities, or their use, CoRDIS may order precautionary measures to ensure continued functioning of the networks as part of a settlement of the dispute.<sup>378</sup>

In Croatia, the legislation authorises the dissatisfied party to file a complaint to the NRA in certain cases.<sup>379</sup> When the complaint is against TSO's and DSO's actions, the NRA must inform the interested party of the measures it has taken in relation to the complaint in writing and without delay, at the latest 30 days from the submission of the complaint. If the interested party is not satisfied with the NRA's measures, it can initiate an administrative dispute.<sup>380</sup> A similar procedure is also envisaged for complaints regarding actions of the electricity market operator, the only difference is that the administrative dispute against the NRA's decision has the status of urgency.<sup>381</sup> Moreover, the final customer can file a complaint to the NRA as regards the procedure for the change of supplier.<sup>382</sup> The NRA's decision is not subject to appeal, but the party can initiate an administrative dispute (with the status of urgency) against the decision. The complaint itself cannot delay the procedure for the change of supplier and the application of the new supply contract. Finally, the legislation also envisages cases of handling formal complaints by market participants, the unsatisfied party can file a complaint to the NRA against the decision of the energy undertaking on the refusal of access to the network of production pipelines, supply points, or its conditions for access. The NRA must reach a decision within 60 days from the filing of the complaint.<sup>383</sup> The NRA's decision is final, but the unsatisfied party can initiate an administrative dispute against it. The administrative dispute is of an urgent nature. It should be noted that the NRA does not currently have power to impose or propose penalties but is working on amending its legislation in this regard.

In Hungary, the NRA has competence to act in relation to complaints submitted against an authorised network operator due to the violation of its obligations set forth in this Act, complaints submitted by users against authorised operators other than authorised network operators, or complaints arising between the vertically integrated electricity company and the transmission system operator that is its member, and between the transmission system manager and the owner of the transmission network.

In Lithuania, the NRA acts as a dispute settlement authority and as a mediator. In particular, it shall perform pre-trial consideration of disputes of energy undertakings which arise from actions or omissions of energy undertakings. In addition, energy undertakings may request the Commission to act as an intermediary in their dispute over their relations in energy sector. As for the procedure, if an energy undertaking

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<sup>378</sup> Article L.134-22, Energy Code.

<sup>379</sup> Article 20 of the Act on Regulation of Energy Activities.

<sup>380</sup> Articles 34 (3) and 43 (3) of the Electricity Market Act.

<sup>381</sup> Article 54 of the Electricity Market Act.

<sup>382</sup> Article 47 of the Electricity Market Act.

<sup>383</sup> Article 81 of Gas Market Act.

considers that another energy undertaking in carrying out its activities has infringed his rights or legitimate interests, it shall apply to the Commission which settles a dispute by the Rules on Out-of-court Dispute Resolution Procedure.<sup>384</sup> The energy undertaking shall provide to the Commission detailed information of the circumstances of the dispute, establish legal requirements and submit the proving documents.<sup>385</sup> The Commission shall give a decision within 90 days of the date on which all the necessary documents have been submitted. For important reasons the time limit shall be extended by 30 days<sup>386</sup>.

In Romania, the NRA is enabled by law to act as a dispute settlement authority in the electricity<sup>387</sup> and gas<sup>388</sup> sector, and as an arbitration authority in the gas sector.<sup>389</sup> The NRA's activity in handling formal complaints by market participants is divided into: 1) the activity to solve pre-contractual disagreements, and 2) the activity to solve complaints against network operators.

In relation to the procedure for solving pre-contractual disagreements in the electricity and high-efficiency cogeneration sector,<sup>390</sup> it consists of two stages: a) resolution at the level of the licence holder responsible for issuing the contract offer and b) resolution at the level of the NRA. The first phase is mandatory, in case of lack of agreement, the licence holder needs to forward to the NRA, within 30 days from the initial request of the applicant, the report of the case with all the documentation and a request for resolution. The procedure to solve the dispute at the NRA starts from registration of the request sent by the license holder and finishes with a final decision of the NRA (which is legally binding and subject to judicial review) and communication to the parties. For mediating pre-contractual disagreements in the gas sector, a similar procedure is in place. With regard to the procedures for *solving complaints by decision of the NRA*, there are two main procedures. First, there is a procedure for *solving the complaints against network operators*.<sup>391</sup> This procedure is legally binding and subject to judicial review. The deadline for resolution by the NRA is 60 days, it may be extended with another 60 days by notification of the plaintiff, and with another 60 days if the plaintiff agrees to this extension. Second, there is a procedure for *solving disputes arising during contract implementation between /among participants in the wholesale and retail electricity and gas markets*.<sup>392</sup> The first step is

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<sup>384</sup> Rules on Out-of-court Dispute Resolution Procedure.

<sup>385</sup> Article 19 and 20 of the Rules on Out-of-court Dispute Resolution Procedure.

<sup>386</sup> Article 58 of the Rules on Out-of-court Dispute Resolution Procedure.

<sup>387</sup> Article 9 (1) points k) and l) and (2) of GEO no. 33/2007, amended.

<sup>388</sup> Article 10 (1) point s) and (5) of GEO no. 33/2007, amended.

<sup>389</sup> Article 10 (1) point s) of GEO no. 33/2007, amended.

<sup>390</sup> ANRE Order no. 35/2013<sup>390</sup> describes the procedures for solving pre-contractual disagreements in the electricity sector and for mediation of pre-contractual disagreements in the gas sector.

<sup>391</sup> ANRE Order no. 150/2015<sup>391</sup> describes the procedure for solving complaints against network operators.

<sup>392</sup> ANRE Order no. 61/2013<sup>392</sup> describes the procedure for solving disputes arising during contract implementation between /among participants in the wholesale and retail electricity and gas markets.

the conciliation procedure which is mandatory. If the parts proceed with the request for the NRA to solve the dispute, the NRA shall solve the dispute in 60 days. The dispute is settled by a Commission. The decision of the Commission is motivated and can be appealed in court (within 30 days from notification to the parties).

In Slovakia, the NRA is competent to handle two types of conflicts between market participants: 1) out of court settlement; and 2) dispute resolution. In relation to the out of court settlement,<sup>393</sup> the final electricity/gas customer (off-taker) may refer to the NRA any dispute with electricity/gas supplier or DSO provided that the matter in dispute has been dealt with in a complaint procedure and off-taker disagrees with the outcome of such procedure or with the way how the complaint was handled. This out of court dispute settlement process shall close upon entering into a written agreement binding on both parties or upon lapse of the period (60/90 days) where no agreement was reached. As for the dispute resolution,<sup>394</sup> the NRA shall resolve the disputes provided that the parties to the dispute did not reach an agreement on resolution, both parties give their consent with such procedure and no more than one year passed from the breach of the party's obligation. The NRA shall decide the dispute within 60/120 days. The appellate body is the court.

### **"De facto aspect" (field research)**

The survey responses regarding complaint handling were somewhat positive. The area in which NRAs are perceived to be the most effective is their transparency for handling complaints (where 39% of respondents find NRAs very effective). The least effective was for the NRAs timely handling of complaints (where only 29% of survey respondents find the NRAs very effective and 24% do not find them effective). Bulgaria and Greece are the NRAs with the largest amount of negative responses regarding the handling of complaints.<sup>395</sup> Austria, Germany, and France were the most positive regarding this question.

Five of the NRAs outlined that they have adequate resources to deal with formal complaints by market participants. For Bulgaria and the Czech Republic, complaints are more often from consumers, but not so much from market participants. The Czech Republic highlighted that market complaints are rare because issues are tackled with TSOs and DSOs during the negotiation procedure of decisions. Germany highlighted that court cases are already factored in to BNetzA's operations, within each ruling

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<sup>393</sup> Article 37 of the Regulatory Act.

<sup>394</sup> Article 38 of the Regulatory Act.

<sup>395</sup> Bulgaria: 50% of the 12 Bulgarian survey respondents think the NRA is not effective regarding transparency of the procedures for handling complaints; 50% think the NRA does not effectively reach adequate outcomes for complaints; 42% think the NRA is not effective at handling complaints from market participants and 75% think the NRA is not effective at timely handling complaints. Greece: 38% of the 8 Bulgarian survey respondents think the NRA is not effective regarding transparency of the procedures for handling complaints; 38% think the NRA does not effectively reach adequate outcomes for complaints; 38% think the NRA is not effective at handling complaints from market participants and 50% think the NRA is not effective at timely handling complaints.

chamber. Therefore, they are often well prepared and effective when decisions are taken to court. For France, they only have issues when they are required to deal with “mass complaints”, such as dealing with the reimbursement of presumed undue taxes (CSPE). However, in such situations there is usually a solution found in cooperation with the Ministry.

Others (Greece, Spain, Croatia) stated that they have more difficulties when dealing with complaints. Croatia, stated that it is a heavy burden on their resources, however they manage to respond within a decent time. In Greece, they struggle with both the complaints from market participants and consumers. For the latter, their response time exceeds the period of two months as provided in the Third Energy Package. They noted that additional staff would help RAE completing the handling of such complaints within the allotted response time. Spain outlined that the NRA prioritises complaints as efficiently as possible, yet there is still a lack resources. Their response time for conflicts with market participants is often six months, when by law it should only be three. Sanctioning was in practice done within the legal response time of 15 months. They noted that this could improve with increased resources.

#### *3.4.4. Review of NRA decisions*

Decisions taken by regulatory authorities shall be fully reasoned and justified to allow for judicial review. The decisions shall be available to the public while preserving the confidentiality of commercially sensitive information.

**Article 37.16** of Directive 2009/72/EC; **Article 41.16** of Directive 2009/73/EC

Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government.

**Article 37.17** of Directive 2009/72/EC; **Article 41.17** of Directive 2009/73/EC

This sub-section analyses the appeal procedure in place against NRAs decisions. Moreover, it assesses whether ministries play any role in the procedure.

In all Member States examined except for the Czech Republic, Croatia and Hungary, decisions of the NRA can be appealed to a body independent from the parties involved and independent from the Government. In practice, this means an appeal to a court. In none of the Member States (apart from Croatia) was it noted that the Ministry plays a role in the review procedure. In Croatia, the legislation provides that the Ministry has the power to supervise the legality of general and individual decisions of



the NRA.<sup>396</sup> The Study Team understands that Croatia and the Czech Republic are working towards amending its law to introduce a proper appeal procedure which ensures regulatory independence.

In the Czech Republic, there appears to be no provision for review of the NRA's decisions by a body independent of the parties involved. The law seems to provide for review by the NRA's Appeals Board, thus effectively involving the NRA deciding on an appeal against its own decision. Further, regulated entities seem to have no recourse in relation to NRA decisions regarding prices and conditions, since according to the Price Act, the decision of the NRA to set prices is regarded as a normative rule rather than a decision.<sup>397</sup> This is a very restrictive situation, meaning the only option is a review before the Constitutional Court. Similarly, in Hungary, where the tariff decisions of the NRA take the form of a regulation, such regulation appears to be only subject to review by the Constitutional Court, which limits the scope for challenge.<sup>398</sup>

In some Member States, there is a provision for an appeal to the NRA in first instance, with a further appeal to a judicial body. Thus, in Spain, the decisions of any body of the NRA aside from those of the President and the Council may be appealed up the hierarchy,<sup>399</sup> while decisions of the President and the Council can be appealed to the judicial review courts.<sup>400</sup> In Romania, the law provides for a pre-judicial procedure at the NRA, prior to going to court. In Slovakia, the initial appellate body is the Board of the NRA, unless the decision imposes a fine (in which case the appellate body is the Chairman of the NRA) or in the case of a decision on disputes (appellate body is the court). However, where a party claims that his rights or legitimate interests have been infringed by a decision of the NRA, it has recourse to a judicial body.

### **"De facto aspect" (field research)**

The Field Research focused on the situation in the Czech Republic and Hungary in particular as these are Member States in which there appears to be no provision for review by an independent body. The only possibility to appeal a tariff decision of the NRA is before the Constitutional court as the decision is considered a legal act.

68 % of 79 survey respondents think that NRAs are to a large extent highly transparent (while preserving commercially sensitive information) in their publication of decisions. On the whole, the NRAs were perceived as making immediately binding and directly applicable decisions independently from government (75% of survey respondents). Nevertheless, there seemed to be some concerns over the possibility for

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<sup>396</sup> Article 36 of the Act on Regulation of Energy Activities.

<sup>397</sup> Act No. 526/1990 Coll. Price Act.

<sup>398</sup> The Commission has referred Hungary to the Court of Justice in relation to, *inter alia*, the scope for challenging the NRA's tariff decisions. [http://europa.eu/rapid/press-release\\_IP-18-4487\\_en.htm](http://europa.eu/rapid/press-release_IP-18-4487_en.htm)

<sup>399</sup> Article 36.1 of Act 3/2013.

<sup>400</sup> Article 36.1 of Act 3/2013.

operators (TSOs, DSOs, and other market parties) to appeal NRA decisions (48% of survey respondents show concerned in this regard).

## 4. Independence of NRAs: Legal Analysis

### 4.1. Setting the scene: an introduction on independence of supervision and regulation

This chapter aims at presenting a legal analysis of the independence and effectiveness of NRAs in the energy sector. This analysis is based on the information in Chapter 3, the relevant EU legal framework and case law, the Interpretative Note of the Commission, relevant research and publications on independence and other (academic) literature. Below we will first present the relevant case law. Thereafter we will consider in more detail the key issues relating to independent energy regulators. We will then apply these issues to the main categories of our research: (i) Independence of NRAs from political and market actors, (ii) Independence in relation to finances and human resources, and (iii) independence and effectiveness in conducting core tasks of the NRAs.

#### 4.1.1. Case law

It is important, when analysing the independence of NRAs, to bear in mind some key jurisprudential interpretations of the concept of independence. Set out below is a brief description of a number of cases where the Court of Justice of the European Union (CJEU) has attempted to delineate the scope of regulatory independence.

The ruling of the CJEU in *Commission v Germany* concerning the independence of the supervisory authorities in the field of data protection in the German Länder is an important milestone in the interpretation of Member States' responsibility regarding independence of regulatory bodies.<sup>401</sup> The ruling addresses the interpretation of the term 'complete independence' mentioned in the Data Protection Directive.<sup>402</sup> The CJEU ruled that this term should be interpreted in a very broad sense which means that the supervisory authority should be legally fully independent from state administration and that any form of external influence, whether direct or indirect is prohibited. Complete independence can thus be compared with the independence of the judiciary.<sup>403</sup>

The question is whether such far-reaching requirements also apply in other situations, such as in the energy sector. The 2009 Electricity Directive and the 2009 Gas Directive do not seem to be as radical as the Data Protection Directive. While Article 28(1) of the latter obliged Member States to ensure that "authorities shall act with complete

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<sup>401</sup> C-518/07.

<sup>402</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

<sup>403</sup> In *Commission v Austria* (C-614/10), the Court also considered extensively the issue of independence in the context of a data protection authority.

independence in exercising the functions entrusted to them”,<sup>404</sup> 2009 Directives requires Member States to guarantee independence (rather than complete independence) and proceed to set out a number of guiding principles as to what how such independence should be ensured, with Article 35(4)(b)(ii) of 2009 Electricity Directive and Article 39(4)(b)(ii) of 2009 Gas Directive at least envisaging some sort of acceptance to general policy guidelines issued by the government, provided they do not relate to the NRA’s regulatory powers and duties as set out in Article 37 of 2009 Electricity Directive and Article 39 of 2009 Gas Directive. Thus, it would seem that the degree of independence envisaged by the Third Package falls some way short of the complete independence required by the Data Protection Directive. This is perhaps not surprising given the different nature of the two fields of supervision, and many of the concerns present in the energy sector (such as security of supply, infrastructure development, de-carbonisation etc) do not apply in the realm of data protection.

Another important ruling involving regulatory independence is *Commission v. Hungary*.<sup>405</sup> In this case Hungary ended the term of the Data Protection Authority before its formal end and appointed a new Data Protection Authority. According to the court, Member States are free to adopt or amend the institutional model of supervisory authorities, but they must ensure that the independence of the authority is not compromised, so a member of an authority should serve his or her full term.<sup>406</sup> However, in the case of *Autorità per le Garanzie nelle Comunicazioni*<sup>407</sup> concerning the interpretation of independence pursuant to the Framework Directive for electronic communications networks and services,<sup>408</sup> the CJEU held that Parliaments of Member States do have the freedom to issue specific provisions to limit and streamline the budget of a regulatory authority (“may properly be made subject to certain rules of budgetary monitoring by the national parliament, which includes being subject to *ex ante* measures that control public spending”), notwithstanding requirements on impartiality and independence. In paragraph 36 of its judgment, the CJEU noted:

“It is apparent from those provisions that the Framework Directive now imposes the requirement that, in order to guarantee the independence and the impartiality of NRAs, the Member States are to ensure, in essence, that the NRAs, as a whole, are to have adequate financial and human resources to enable them to carry out the tasks assigned to them and, with respect to NRAs responsible for *ex ante* market regulation or for the resolution of disputes between undertakings, that they act independently. However, *there is nothing in those provisions to indicate that compliance with those requirements precludes, as a matter of principle, an NRA being subject to provisions of*

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<sup>404</sup> Directive 95/46/EC has since been repealed and replaced by Regulation 2016/679/EU, which maintains the requirement of “complete independence” and contains no such reference to receipt of general policy guidance from the government.

<sup>405</sup> C-288/12.

<sup>406</sup> In the case at hand, the Data Protection Supervisory (head of the old DPA) had his contract terminated, and a new Supervisor was appointed to lead the new DPA.

<sup>407</sup> C-240/15.

<sup>408</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services

*national law applicable to public finances, and, in particular, to provisions for limiting and streamlining public authority spending, such as those at issue in the main proceedings.” (emphasis added).*

In *Garai & Almendros v Administracion de Estado*,<sup>409</sup> concerning the merger of regulatory bodies, with the consequent dismissal of a board member and president before the expiry of the term of office, the Court came to a similar conclusion as in *Commission v Hungary*. The CJEU held that the Member State’s autonomy over the manner in which the regulator is organised and structured does not justify the dismissal of members before the expiry of their terms of office, in the absence of any rules guaranteeing that such dismissals do not jeopardise the independence and impartiality of members. Thus, the CJEU placed the onus firmly on the Member State to demonstrate that safeguards were in place.

It is notable that the CJEU appears to have taken a more stringent view of Member State’s obligations to ensure independence in relation to dismissal of board members than in the case relating to financing of the regulator, where it appears to leave more latitude to the Member State concerned, in the absence of a specific provision in the Framework Directive preventing Member States from subjecting regulatory authorities to the kind of measures in question.

In *Commission v Belgium*,<sup>410</sup> the CJEU considered the independence of an NRA in the energy sector. The impugned provision provided for the Government laying down certain rules which would impact tariff setting, namely rules concerning the determination of depreciation and profit margin in relation to transmission installations. The Court held that the Belgian rule reduced the scope of the powers granted to NRAs pursuant to the Directive.

#### *4.1.2. Adequacy of human and financial resources*

##### *4.1.2.1. Adequate resources are an essential precondition for independence*

The availability of adequate human and financial resources is, in both literature and international policies, considered to be an important pre-condition for the independence of supervisors.<sup>411</sup> Supervisors should have transparent budgetary processes that do not undermine their operational independence. In the implementation of the budget they should be able to take decisions independently from political, public and private bodies. This means supervisors need to have sufficient resources to identify and prioritise risks, have full autonomy to assign resources to these risks and if necessary to devote sufficient capacity also to enforcement activities. In its evaluation of the quality of financial supervision during the global financial crisis “Good supervision, learning to say no”, the International

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<sup>409</sup> C-424/15.

<sup>410</sup> C-474/08.

<sup>411</sup> Aelen, Margot, *Beginnelsen van goed markttoezicht. Gedefinieerd, verklaard en uitgewerkt voor het toezicht op de financiële markten*, BJU, Den Haag: 2014.

Monetary Fund (IMF) distinguishes between the ability to act and the will to act.<sup>412</sup> Both are essential for good supervision and require that the supervisor has sufficient resources. The ability to act against risks in the supervised sector requires sufficient knowledge of market developments and of supervised entities, adequate resources and necessary legal powers for the supervisor. The ability to act is essential for following through on identified risks and breaches of legislation and this also requires sufficient resources.

#### *4.1.2.2. Knowledge and skills require experienced staff and training*

Supervisors should have adequate resources in terms of knowledge and skills. Especially when supervising highly technical and specialized sectors this requires specialized and well-trained staff. A lack of knowledge or technical skills could jeopardise the quality of supervision and the ability of the supervisory authority to provide sufficient countervailing power towards a highly-skilled regulated sector. This could make the supervisor unduly dependent on the informational resources of market actors and it could hamper an independent judgement of the (adequacy of the) information provided. In general, the skills and technical knowledge should be commensurate with the risk profile and the importance of supervised entities. This also means that salaries should allow supervisory authorities to attract and retain qualified staff. The IMF underlines that rigorous hiring processes as well as scope to offer competitive remuneration packages are required, to attract and retain expert supervisory staff. According to the IMF some of the more successful supervisory agencies during the crisis tended to have a blend of long-term supervisory staff and experienced industry professionals, recruited in mid- or late-career.<sup>413</sup> As some tasks may be highly specialized it is considered essential that the budget should also enable supervisory authorities to commission external experts with the necessary professional skills and independence. Budgets should also be sufficient to provide for regular training of staff and should be sufficient to equip staff with the tools needed to supervise the industry and participate in domestic and international meetings of significant relevance.<sup>414</sup>

#### *4.1.2.3. Adequate and stable budgets*

To achieve the appropriate level of operational independence supervisors should be granted sufficient resources and be able to use them autonomously.<sup>415</sup> However the autonomy of budget does not imply supervisors will be provided resources to address *all* identified risks in a certain sector. Prioritising risks in the regulated sector is inevitable and therefore supervisors should always balance the available resources and

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<sup>412</sup> <https://www.imf.org/en/Publications/IMF-Staff-Position-Notes/Issues/2016/12/31/The-Making-of-Good-Supervision-Learning-to-Say-No-23799>, p. 16.

<sup>413</sup> <https://www.imf.org/en/Publications/IMF-Staff-Position-Notes/Issues/2016/12/31/The-Making-of-Good-Supervision-Learning-to-Say-No-23799>, p. 17.

<sup>414</sup> Basel Core principles on effective banking supervision. <https://www.bis.org/publ/bcbs230.pdf>

<sup>415</sup> Masciandaro, Quintyn en Taylor

the risks in the supervised sector.<sup>416</sup> Considering the need for prioritisation, it may not always be easy to assess the adequacy of the budget provided. Supervisors could feel the budget is insufficient to perform their tasks whereas the supervised industry experiences a high level of administrative burden. To make a more objective assessment of the adequacy of the budget a benchmark between countries with regulated sectors of a similar size could be conducted.<sup>417</sup> It's also important that resource allocation is stable over the years. Supervisors need to have sufficient funds and stable funding sources to be able to carry out their mandates, as much in good times (when supervisors can be at their most effective) as in bad. The IMF warns that especially in a period of economic upswing, supervision can be considered as a burden to the industry resulting in budget cuts or attenuating (legal) requirements for the supervised sector.<sup>418</sup>

#### 4.1.2.4. Sources of financing

In general, three different ways of financing supervisory authorities can be distinguished: 1) the budget is financed by the state entirely; 2) the budget is financed by the private sector (for example through fees); or 3) a combination of both. None of the approaches is necessarily incompatible with the desired level of independence of the supervisory authority. Financing by the state could make a supervisor more vulnerable for undue political influence or austerity measures whereas financing by the private sector could have the disadvantage of undue influence by the supervised sector. However, in all situations the risks of undue influence can be mitigated by the existence of a transparent process of budget allocation that provides for a major role of the supervisor itself in preparing the budgetary proposal. In some countries the budget of supervisors consists partly of the income out of penalties/fines. This may give an incentive to make decisions on enforcement activities dependent on budgetary requirements and or monetary targets and may therefore cause an undesired influence on the operational independence of supervisors. The same goes for targets on the amounts of fines to be imposed by the supervisory authorities that have been assigned to supervisory authorities in some countries. These kinds of targets could influence the independent enforcement policy of the supervisory authority and could therefore also be considered as a possible threat to the operational independence of supervisors.<sup>419</sup>

#### 4.1.2.5. Limitations in the use of the budget

In some countries, supervisors are not entirely free to spend the allocated budget as they see fit. These limitations could, for example, consist of headcount caps limiting

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<sup>416</sup> M.K. Sparrow [PM].

<sup>417</sup> IMF, Kingdom of the Netherlands: Publication of Financial Sector Assessment Program Documentation: Detailed Assessment of Observance on Basel Core Principles for Effective Banking Supervision, 25 July 2011.

<sup>418</sup> <https://www.imf.org/en/Publications/IMF-Staff-Position-Notes/Issues/2016/12/31/The-Making-of-Good-Supervision-Learning-to-Say-No-23799>.

<sup>419</sup> M. Aelen (2014) [PM].

the amount of the budget that can be used for hiring staff or of restrictions in the use of the budget for specific investments. These kinds of limitations in the use of the budget could hinder the allocation of sufficient resources to certain risks or priorities of the supervisors and may therefore interfere with the operational independence of the supervisory authority.

#### 4.1.2.6. Protection against financial liability is indispensable for independent supervisors

It is important that supervisory decisions can be made without the fear for financial liability of the supervisory authority or individual staff members. Financial or legal liability for supervisory decisions could influence the independent decision-making of supervisors.<sup>420</sup> A certain level of legal protection for decisions taken in good faith by the supervisory authority and its staff is therefore often considered an important precondition for independence. In the finance sector, the core principles on effective banking supervision of the Basel Committee state amongst other things that laws should provide protection to the supervisor and its staff against lawsuits for actions taken and/or omissions made while discharging their duties in good faith. This should provide for the supervisor and its staff to be adequately protected against the costs of defending their actions and/or omissions made while discharging their duties in good faith.<sup>421</sup> This legal protection could for instance be provided by legally restricting the liability of supervisors or by providing a certain level of indemnity by the national government.

#### 4.1.2.7. Accountability

Where there is a high level of independence, it is commonly acknowledged that the supervisor should also be (publicly) accountable for the discharge of its duties and the use of its resources. This includes also transparency of financial reporting and the fact that the supervisory authority is subject to external approval by an independent audit office, an independent supervisory board/commission or another body.

### *4.1.3. The Energy Sector*

The energy sector is a clear example of a sector where the issue of independent supervisory and regulatory bodies has proven to be of the utmost relevance. While the discussion in 4.1.1 concerns the general development of independence in the context of regulation and supervision, set out below is a brief discussion of the development of NRAs and the requirements for independence in the context of the energy sector in the EU.

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<sup>420</sup> Core principles for banking supervision. <https://www.bis.org/publ/bcbs230.pdf>. The Core Principles for Effective Banking Supervision (Core Principles) are used by countries as a benchmark for assessing the quality of their supervisory systems and are also used by the International Monetary Fund (IMF) and the World Bank to assess the effectiveness of countries' banking supervisory systems and practices.

<sup>421</sup> <https://www.bis.org/publ/bcbs230.pdf>





#### 4.1.3.1. The Network-bound Electricity and Gas Sector and Independent Regulators

##### *Establishing NRAs*

The need to establish an NRA is closely related to the liberalisation of the energy market. The Single European Act of 1986 and the working document 'Towards an Internal Energy Market' of 1988<sup>422</sup> provided that the energy sector was to be included in the internal market concept and the need to develop specific secondary EU legislation to achieve this goal. The first Electricity and Gas Directives (96/92/EC and 98/30/EC) stipulated in Article 22 that "Member States shall create appropriate and efficient mechanisms for regulation, control and transparency so as to avoid any abuse of a dominant position, in particular to the detriment of consumers, and any predatory behaviour. These mechanisms shall take account of the provisions of the Treaty, and in particular Article 86 thereof." The phrasing of the article indicates that it would be sufficient that member States would have a competition authority in place and does not specifically require Member State to establish a dedicated regulatory authority.

Such explicit provision was included in 2003 Electricity Directive and 2003 Gas Directive replacing the earlier directives. Both directives provide that 'Member States shall designate one or more competent bodies with the function of regulatory authorities' (Article 23 2003 Electricity Directive and Article 25 2003 Gas Directive). The establishment of such regulatory authorities is directly connected to the requirement that Member States introduce a regime of regulated access, i.e. a system of third party access to the transmission and distribution systems based on published tariffs [...] applied objectively and without discrimination between system users. Member States shall ensure that these tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force [...].<sup>423</sup> The need for such regulatory authorities had already been illustrated by those Member States which had opted for a regime of regulated third party access prior to the 2003 Directives (e.g. the UK and Norway). The 2009 Directives go one step further by requiring that 'each Member State shall designate a single national regulatory authority at national level' (Article 35 of 2009 Electricity Directive and Article 39 of 2009 Gas Directive). This means that by contrast to the 2003 Directives that enabled Member States to opt for a situation where several regulatory authorities could play a role in regulating (parts of) the energy sector, pursuant to the 2009 Directives Member States need to appoint one single national regulatory authority.<sup>424</sup> It follows from this provision that the core duties of the NRA can no longer be split between the NRA and the Ministry and that

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<sup>422</sup> COM (88) 238.

<sup>423</sup> Article 20 of 2003 Electricity Directive and Article 18 of 2003 Gas Directive.

<sup>424</sup> Only at the regional level other regulatory authorities can be in place (article 35 para 2 E-Directive and Article 39 para 2 of 2003 Gas Directive).

this single national NRA should thus also have the powers to carry out these duties (see further below).<sup>425</sup>

Be that as it may, it is still up to the Member States to decide which regulatory authorities should be integrated in this single body. Should a competition authority or a consumer protection agency be merged into the NRA in order to meet the requirement of establishing a single NRA? It seems that Member States have interpreted this issue in different ways. Whereas most Member States have decided to maintain a separate competition authority, consumer protection agency and energy regulatory authority, some Member States have decided to integrate the energy regulator and other authorities like the competition authority and/or the consumer protection agency into one single regulatory authority (e.g. The Netherlands). However, when Member States have opted to maintain a separate competition authority or consumer protection agency, it needs to be considered how this corresponds to the requirement of the 2009 Electricity and Gas Directive (see further below), which provide that staff or management of the NRA cannot seek or take direct instructions from any government or public or private entity when carrying out the regulatory tasks. Instructions from other regulatory authorities, for instance the competition authority seem therefore undesirable. However, the Directives also clearly state that the provisions on independence do not deprive the NRA of the possibility (and duty) to consult and cooperate with other relevant (national and European) authorities (Article 35 (4)(b) of 2009 Electricity Directive and Article 39 (4) (b) of 2009 Gas Directive).

### *Independence of NRAs*

Since the introduction of NRAs in the 2003 Directives, over time a more explicit and stringent approach towards independent regulatory authorities has been developed. The 2003 Directives only provided for the independence from the market as Article 23(1) Electricity Directive and Article 25 Gas Directive require that: “[t]hese authorities shall be wholly independent of the interests of the electricity industry.” The directives therefore focused on independence from market players. The 2009 Directives extended the independence to independence from governments. It appears from recital 33 to the Electricity Directive that “[...] experience shows that the effectiveness of regulation is frequently hampered through a lack of independence of regulators from government, and insufficient powers and discretion. For that reason [...] the European Council invited the Commission to develop legislative proposals providing for further harmonisation of the powers and strengthening of the independence of national energy regulators. [...]” According to recital 34 “Energy regulators need to be able to take decisions in relation to all relevant regulatory issues if the internal market in electricity is to function properly, and to be fully independent

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<sup>425</sup> Interpretative note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas, p.4.

from any other public or private interests.” Pursuant to recital 33 “It should be possible for those national regulatory authorities to cover both the electricity and the gas sectors.’ Consequently, both Article 35(4) of the 2009 Electricity Directive and Article 39(4) of the 2009 Gas Directive require that the regulatory authority is: “(a) is legally distinct and functionally independent from any other public or private entity; (b) ensures that its staff and the persons responsible for its management: ...(ii) *do not seek or take direct instructions from any government of other public or private entity when carrying out its regulatory tasks* [...]”. Any other public body includes according to the Interpretative Note, national, local or regional governments, municipalities and political organizations or structures.<sup>426</sup> Moreover, the provision in Article 35(4)(a) of the 2009 Electricity Directive and Article 39(4)(a) of the 2009 Gas Directive, that “...the regulatory authority... is legally distinct and functionally independent from any other public or private entity” means according to the Interpretative Note that the NRA should be created as a separate and distinct legal entity from any Ministry or other government body. The NRA cannot be part of a Ministry. Sharing personnel and sharing offices between the NRA and any other (public or private) body is in principle not in line with Article 35 (4)(a) of the 2009 Electricity Directive and Article 39 (4) (a) of the 2009 Gas Directive.<sup>427</sup> Furthermore, Article 35(5)(a) of the 2009 Electricity Directive and Article 39(5)(a) of the 2009 Gas Directive provide that ‘the regulatory authority can take autonomous decisions, independently from any political body, and has separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties.’

Thus, we see a much broader concept of independence, arranging for independence from both governments as well as from market parties. From the cited provisions and the recitals it also follows that the directives ask that Member States provide for an explicit legal basis for NRA independence. This legal basis should include an arrangement for independence from both government and market parties, giving the regulatory authority the power to take autonomous decisions. The Directives clearly mention these duties and powers to issue binding decisions and impose effective, proportionate and dissuasive penalties (Article 37 (4 and 5) of the 2009 Electricity Directive and 41 (4 and 5) of the 2009 Gas Directive). Of course, these powers come with discretion, but at the same time cannot be used arbitrarily (see further below).

#### *Independence with regard to budget and human resources*

As pointed out above, the independence of NRAs is not only guaranteed by including specific provisions stating that the regulatory authorities should be independent from political and market parties and that any decision-making by the NRA should be independent from any political body, it also requires independence with regard to the appointment of board members, budget allocation and human and financial resources.

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<sup>426</sup> Interpretative Note on Directive 2009/72/EC concerning common rules for the internal market in electricity and directive 2009/73/EC concerning common rules for the internal market in natural gas, 2010.

<sup>427</sup> Interpretative Note 2010 p. 6.

According to both directives (Article 35 (5a) of the 2009 Electricity Directive and 39 (5a) of the 2009 Gas Directive) the yearly allocation of budgets, autonomy in implementing the budget and adequate human and financial resources should be ensured. The 2009 Directives continue to allow the regulatory authority's budget to be part of the State budget; however, there is now a clear need for separate annual budget allocations for the NRA. On the allocation of the budget, the Interpretative Note states that the approval of the budget of the NRA by the national legislator does not constitute an obstacle to budgetary autonomy.<sup>428</sup> Nothing in the Directives prevents national parliaments from taking a decision on whether the draft budget proposed by the NRA is, as a whole, appropriate compared to the duties and powers of the NRA.<sup>429</sup> On the other hand, according to the same document: "the approval of the budget cannot in any way be used as a means of influencing the NRA's priorities or to jeopardise its ability to carry out its duties and exercise its powers in an efficient and effective manner". The Interpretative Note mentions that the role of the national legislator, i.e. national parliament, in approving the NRA's budget is to grant a global financial allocation to the NRA, which should enable the NRA to carry out its duties and exercise its powers in an efficient and effective manner. Assessment criteria could be found by looking at budgets of other regulators and the budget of NRAs in other Member States.

The NRA has autonomy in the implementation of the allocated budget. This means that the NRA, and only the NRA, can decide on how the allocated budget is spent. It may neither seek nor receive any instruction on its budget spending.

In order to guarantee that the board and staff of the NRAs can act independently, the Directives prescribe that the members of the board of the regulatory authority or, in the absence of a board, the regulatory authority's top management should be appointed for a fixed term of five up to seven years, renewable once (Article 35 (5b) of the 2009 Electricity Directive and 30 (5b) of the 2009 Gas Directive). An adequate rotation scheme should be put in place; the end date of the term of office of the board members cannot be the same for all members.<sup>430</sup> Members of the board may be removed from office, if they no longer fulfil the conditions set out in the Directives. The possibility to remove a board member applies only in special cases, such as fraud, bribery and breaches of the independence or impartiality of the NRA.

### *Transparency*

Accountability and transparency are the other side of the coin of independence and a balance is required between the two.<sup>431</sup> "Comprehensive accountability and transparency measures actively support good behaviour and performance by the regulator, as they allow the regulator's performance to be assessed by the legislator

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<sup>428</sup> See also recitals 34 of the 2009 Electricity Directive and 30 of the 2009 Gas Directive.

<sup>429</sup> Interpretative Note, 2010, p. 10.

<sup>430</sup> Interpretative Note, 2010, p. 11.

<sup>431</sup> ERGA Report on the independence of NRAs(2015), p. 37.

or another institution.”<sup>432</sup> It appears from the Interpretative Notes that the Commission identifies three elements regarding transparency. NRAs:

- Must adopt and publish their rules of procedure (at least for decision making) and provide for clear contact points for all stakeholders and publish information on their own organization and structure;
- Should consult stakeholders before taking important decisions, e.g. publish documents ahead of public consultations and organize public hearings, and preferably, publish a document after public consultation giving an overview of the comments received, of those that were taken into account and the reasons why other comments were not taken into account;
- Must make decisions available to the public in order to explain the reasons why a decision was taken.<sup>433</sup>

Public consultations are considered to be an important instrument to create transparency but the type and level of consultation can differ per Member State as well as the type of decisions they may involve (sometimes only decisions regarding tariffs and sometimes broader in scope).<sup>434</sup> It has also been noted that transparency also requires stakeholders to have access to the relevant documents, i.e. depending on the Member State involved that the language should be accessible (available in English).<sup>435</sup>

To ensure transparency and by this promote independence, the Directives on a yearly basis ask for a report... “on its activity and the fulfilment of its duties to the relevant authorities of the Member States, the Agency and the Commission (Article 37 (1e) of the 2009 Electricity Directive and 41 (1e) of the 2009 Gas Directive). Although the Directives do not explicitly require these reports to be published, it will certainly enhance transparency and accountability if these annual reports are published.<sup>436</sup> In order to increase transparency, also decisions made by NRAs should be published by regulators on their websites or by delivering an annual report.<sup>437</sup>

#### 4.1.3.2. Core Tasks of Independent National Regulators

Since the introduction of NRAs in the 2003 Electricity and Gas Directives, their tasks have gradually increased. This increase mainly relates to the monitoring obligations. Under the 2003 Directives, the NRA was responsible for ensuring non-discrimination, effective competition and the efficient functioning of the market and was therefore charged with monitoring, inter alia, congestion management, effective unbundling and

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<sup>432</sup> OECD, *The Governance of Regulators OECD Best Principles for Regulatory Policy*, 2014, p. 81.

<sup>433</sup> Interpretative Note, p. 5.

<sup>434</sup> ERRA survey (2015), p. 48.

<sup>435</sup> ERRA survey (2015), p. 47.

<sup>436</sup> Interpretative Note, p. 19.

<sup>437</sup> INDIREG, Final Report, p. 364 and ERRA survey (2015), p. 47.

the level of transparency and competition. As part of the latter the NRAs had to provide every two years a report on market dominance, predatory and anti-competitive behaviour. The latter element created an overlap with tasks of the competition authority. As a result of the 2009 Directives, the number of monitoring tasks has increased considerably and now, inter alia, also includes the monitoring of investment plans of the TSOs, of network security and reliability rules, the effectiveness of market opening, investment in generation etc. The increase of these tasks may have a direct impact on the size of the NRAs staff and involvement of staff members.

Apart from these monitoring tasks, the primary task and one of the main reasons for establishing NRAs in the 2003 Directives (the introduction of a regime of regulated third party access) is still the need for setting/approving tariffs or their methodologies in a non-discriminatory and transparent way. 2003 Electricity Directive and 2003 Gas Directive provided that all Member States apply a regime of regulated third party access to the transmission and distribution system based on published tariffs and applied objectively and without discrimination between system users. These tariffs or at least the methodologies used to calculate or establish the terms and conditions, were required to be fixed or approved by a regulatory authority. Member States were also entitled to provide that the regulatory authorities shall submit, for formal decision, to the relevant body in the Member State the tariffs or at least the methodologies. The relevant body was required, in such a case, to have the power to either approve or reject a draft decision submitted by the regulatory authority. The 2009 Directives amended this approach as it introduced stricter tariff setting rules. Member States are now required to ensure that the NRA has to fix or approve, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies (Art. 37(1)(a) and the latter have to be published (art 37(7)). A similar provision is found in the 2009 Gas Directive and here it also applies to other parts of the system like LNG and storage facilities. Under the current regime, the NRAs need to act more independently as they are no longer entitled to submit tariffs or their underlying methodologies to a governmental body for a formal decision.

Another core task applying to the NRAs which was introduced by the 2003 Directives is the requirement in Article 25 para 5 Electricity Directive and Article 41(5) Gas Directive) that NRAs act as a dispute settlement authority and handle complaints against TSOs and DSOs. Such a decision by the NRA has a binding effect unless and until overruled on appeal. A similar provision is included in the 2009 Directives (Article 37(11) Electricity Directive and Article 41(11) Gas Directive). However, the NRA is specifically charged with the task to handle complaints between TSOs and vertically integrated undertakings (Article 37(5)(c) Electricity Directive and Article 41(5)(c) Gas Directive).

In addition, the 2009 Directives put more emphasis on the role of the NRAs in cross-border activities and require them to be more actively involved in cross/border developments. This relates not only to the rules and management of interconnectors but also to the involvement of NRAs to develop regional cooperation and to cooperate

with ACER.<sup>438</sup> ACER was established in 2011 as a result of the adoption of the Third Energy Package. Its prime aim is to complete the EU internal electricity and gas market by improving the regulatory framework at EU level. It has a wide range of tasks relating to the improvement of cross-border trade, cross-border networks and regional cooperation.

## **4.2. Principles on Independent NRAs applied to Selected EU Member States**

In this sub-section we will discuss in more detail how the above principles have been applied in the 12 Member States analysed in this study. As such, we assess the legal and practical situation in these countries against the relevant EU legal framework, any guidance issued by the Commission, relevant studies and publications in the field as well as other pertinent (legal) literature.

### *4.2.1. Independence of NRAs from political and market actors*

#### *4.2.1.1. Explicit legal basis*

The NRA should, pursuant to the 2009 Directives, be legally distinct and functionally independent from any other public or private entity. From this it follows that the NRA should have an explicit legal basis.

The principle that the NRA should be independent from political and market players has been *explicitly* arranged for in the legislation of three Member States (Spain, Austria and Lithuania). That, in itself, does not guarantee factual independence. In Spain, for example, members of the NRA's Council, including its President, are selected on the basis of a proposal of the Minister of Economy and are appointed by Royal Decree endorsed by the Government. Candidates must be presented to a committee of the Parliament, which has a veto right on their appointment. The fact that the board of directors is nominated by political parties and the appointment of the heads of regulatory commissions are also vulnerable to political influence, could be a threat to independence of the NRA. At the same time, independence from market players does not seem to be a problem in Spain. Nor does independence from market players seem to be a *de facto* problem in Lithuania. In Austria the field research delivered no indications of a disturbance of independence from either political or market actors.

In four other Member States certain legal provisions only point *indirectly* in the direction of independence from interference by political and market actors (Czech Republic, Slovakia, France, Romania). Here the national laws use different wordings to describe the independence of the NRA. In France, several stakeholders have concerns regarding the independence of the top management of the regulator from political and

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<sup>438</sup> 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.



market influence In Romania, one interviewee noted that the regulator was potentially inclined to favour the state-owned gas TSO and that there were also indications that the publicly owned shipper/supplier of gas would be favoured over its privately-owned competitor. However, another stakeholder proposed that entering the Romanian market is no longer an issue and that the NRA is rather independent from market actors. In Slovakia, several stakeholders mention examples of undue political interference. Also, respondents stated that the regulator seemed to favour or discriminate against specific market operators.

In Bulgaria, the law only explicitly states that the NRA should be independent from the executive power, but it doesn't mention independence from market interests. However, in practice the latter does not seem to create an issue as no problems with independence from market actors were reported. By contrast the research shows that several stakeholders pointed out problems with regard to the need for independence from political influence.

In three Member States, the law does not state that the NRA should be independent from either political and market interference (Croatia, Hungary, Germany). However, in Germany, stakeholders confirm that the NRA functions independently from both government and market players. In Croatia respondents report some critical issues in relation to the NRA's independence from political influence. Independence from market players was not reported as an issue in Croatia. Additionally, in Hungary a lack of independence from political influence seems to be a problem in the eyes of the stakeholders consulted. In this regard, the interviewees also raised some doubt with regard to the NRA's independence from market players.

The wording "legally distinct" means that the NRA must be created as a separate legal entity distinct from any Ministry or other public body.<sup>439</sup> This implies that the NRA should be able to take autonomous decisions and thus not be instructed by government. In the majority of Member States, there are no legal provisions which require ministerial approval for certain NRA decisions nor is the possibility arranged for that the Ministry can overturn an NRA decision. There are two exceptions. First, in the Czech Republic the law provides that the exercise of two powers of the NRA are subject to a binding opinion from the Ministry. However, these powers concerned do not fall within the scope of Article 37 of 2009 Electricity Directive. Secondly, in Croatia where the NRA is required to get approval from the Ministry before adopting a plan on deregulation of gas (production) prices. In addition, the provision that the NRA should be 'legally distinct' seems to rule out any hierarchical link between the NRA and any other body or institution. Based on this interpretation; the NRA can no longer be part of a Ministry.<sup>440</sup>

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<sup>439</sup> See also ERRA (2015), p. 8.

<sup>440</sup> *Ibidem*.

Functionally independent could, in its turn, refer to the requirement that the NRA is able to operate in an independent way, meaning that it has the means and powers to do so. However, neither the directives nor the Commission Interpretative Note provide for a detailed definition or interpretation of the latter. It is therefore not unexpected that none of the Member States provide an explicit legal definition of 'independence'. A variation of terms is used, such as 'autonomous', 'separate' or 'independent' when describing the legal form of the NRA, which is not in contradiction with the directives.

It is also notable that in the national law the concept of independence is related to various actors. Sometimes the law refers to the NRA and its members (Spain, Lithuania, Slovakia, France), while in other Member States the law mentions the NRA's members or bodies (Romania, Austria, Greece) or just the NRA itself (Bulgaria, Czech Republic, Croatia, Germany, Hungary).

Considering the above, it appears that Member States could enhance their legal provisions by including more detailed criteria to ensure coverage of independence from both political and market players. Additionally, a more detailed legal definition of independence could be provided at national level. The Commission could have a role by including further detailed guidelines to Member States.

However, it should be noted that, as field research pointed out, when independence is formally arranged for in the required manner, functional independence is still not always self-evident. In Member States where the legal framework is not very precise, problems with functional independence were also found. Considering the literature review where we learned that an important reason for the requirement of independence is that it contributes to a level playing field, it is noteworthy that in many Member States where problems with independence from political influence were mentioned by stakeholders, this influence was often reported as being related to the perceived positive discrimination of (former) state-owned market actors. It is clear that political influence leading to (perceived) discriminatory actions by the NRA would undermine this objective.

#### 4.2.1.2. A Single National Regulatory Authority

The Directives clearly state that Member States shall designate a single regulatory authority at national level (Article 35 (1) of 2009 Electricity Directive; Article 39 (1) of 2009 Gas Directive). It may be possible that at regional level other regulatory authorities are put in place, but at the national level, only one NRA is permitted according to the Directives. This requirement provides a clear change from the 2003 Directives.

We note that in all Member States assessed, this provision has been met and one single NRA has been established. In Spain the government decided in 2011 to merge three regulators into one single body. As a result, in 2013 the regulatory agencies

dealing with telecommunications, energy and competition have been merged into one NRA: the National Commission for the Markets and Competition (CNMC), which enjoys full functional independence.<sup>441</sup> Nevertheless, it was perceived by stakeholders that the merger had a detrimental impact on the independence of the energy section of the regulator. This was due to its now reduced role, which limits their influence for example in setting and calculating tariffs.

Whereas in Spain, the CNMC is charged with regulating the energy and telecommunications sectors and also acts as the competition authority, similar developments have taken place in other Member States. In the Netherlands, the Electricity and Gas Authority is part of the merged Competition and Consumer Authority, which also is charged with the supervision of the telecommunications market, the postal market and the market for logistics. Taking into account these developments, it might be appropriate to assess the concept of a single NRA and to examine the extent to which other regulatory authorities or agencies could or should be part of the single NRA.

In Lithuania, the competition and the energy authority are separate organisations, such as in many other Member States. However, there were concerns among stakeholders in Lithuania about the competition authority frustrating the will of the energy NRA. Following recital 37, the question arises whether this situation is compliant: "Energy regulators should also be granted the power to decide, irrespective of the application of competition rules, on appropriate measures ensuring customer benefits through the promotion of effective competition necessary for the proper functioning of the internal market in electricity". Further, Article 39 (4)(b)(ii) of 2009 Gas Directive and Article 35 (4) (b)(ii) of 2009 Electricity Directive, that require that the NRA does ..."not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks". However, Article 37(1)(j) also specifically provides for the NRA bringing relevant cases to the competition authority. The example in Lithuania (replicated in other Member States) shows the potential for friction where two regulatory authorities have overlapping competences. It is an issue which can potentially arise between competition authorities and electronic communications regulators, and also between electronic communications regulators and data protection authorities (concerning certain electronic privacy issues). It is unclear to what extent the merging of the authorities, such as in the Netherlands, could solve this issue. The relationship between regulatory authorities with overlapping areas of interest are often dealt with via informal arrangements or by a memorandum of understanding between the two authorities (the latter being the case between the Irish Data Protection Authority and electronic communications regulator). The consideration of which approach is best is ultimately one that goes beyond the scope of previous study. However, in the case of Lithuania, what is important is the perception of stakeholders. This perception could be altered

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<sup>441</sup> I. del Guayo, 'Energy Law in Spain', in: M.M. Roggenkamp et al., *Energy Law in Europe – National, EU and International Regulation*, OUP, 2017, p. 991.

by the NRA clarifying for stakeholders how its cooperation with the competition authority works in practice.

#### 4.2.1.3. Potential legal limitations or violations of NRA independence

In none of the Member States are there legislative measures explicitly impacting on the NRA's board or its staff's ability to act independently of market interests.<sup>442</sup> Nor, in most of the Member States are there any legislative measures in place requiring the NRA's board, or its staff, to take direct instructions from any government or public/private entity. In none of the Member States can the Parliament give direct instructions to the NRA. In a couple of Member States (Germany, Austria), the law provides for indirect interventions, which seems unproblematic.

In Germany members of the Bundestag and the Bundesrat hold seats in an advisory Council that works within the framework of the NRA, which participates in certain decisions of the NRA and can request measures etc. This Council could by indirect intervention hinder NRA's independence, but in practice it seems not to influence NRA decisions. Also in Germany, rules of procedure of the NRA need the consent of the Federal Ministry for Economic Affairs and Energy in cooperation with the Ministry of Transport and Digital infrastructure. It is questionable whether this constitutes a breach of the provisions concerning independence. Furthermore, in Germany these same Ministries can give instructions that have to be published in the Official Gazette, as is regulated in section 117 of the Telecommunications Act. These instructions may deal with issues like security of supply and could have an indirect impact on the activities of the NRA but are in line with the Directives. In Austria the NRA may receive instructions from the Federal Minister of Science, Development and Economy. But this concerns issues that are outside the range of topics regulated under the Directives. Similar to Germany, an Advisory Council for Energy can give advice to the NRA which is different from giving instructions.

However, in France, Spain and Croatia, there are provisions which could be seen as a potential limitation to the independence of the NRA.

In France, an appointed Government Commissioner has the authority to put issues on the agenda of NRA meetings related to energy policy etc.

In Croatia, the Ministry supervises the legality of the NRA's decisions.<sup>443</sup> While this power lacks clarity regarding its practical application (for example it is unclear whether the Ministry is authorised to take decisions instead of the NRA, when controlling the

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<sup>442</sup> This is without prejudice to the discussion in Section 4.2.3 concerning NRA independence in relation to tariffs, where an appreciation of the nuances of tariff rules is provided, in order to identify possible limitations to independence due to the manner in which the legislative framework is drafted, taking into account, *inter alia*, the role of excessive prescriptiveness in national provisions as a potential limitation to NRA independence in relation to those tasks.

<sup>443</sup> Article 36 of the Act on Regulation of Energy Activities.

legality of its decision), it could potentially be a problematic limitation of the independence of the NRA.

In Spain, certain functions under the competence of the Secretary of State for Energy used to limit the independence of the NRA and could be seen contrary to the tasks an NRA should fulfil under the Third Energy Package. Nevertheless, the new Royal Decree Law<sup>444</sup> aims at bringing the competencies of the NRA in line with the requirements of Directives 2009/72/EC and 2009/73/EC.

To conclude, no provisions were found in legislation that give the government or Parliament the power to give direct instructions to the NRA. In three Member States in particular, provisions were noted which could have adverse impacts on NRA independence. These are discussed in further detail in 4.2.3. In addition,, independence of the NRA can also be influenced by provisions on appointment or dismissal which are discussed in Section 4.2.1.6, as well as provisions concerning human resources and budgets, which are discussed in Section 4.2.2. In addition, independence of NRAs may be compromised by specific rules concerning tariff-setting, particularly if such rules are so prescriptive as to render the NRA's discretion in relation to the exercise of its task illusory. This is discussed in Section 4.2.3.

#### 4.2.1.4. Availability of enforcement powers and level of NRA discretion in their use

As noted above, pursuant to Article 37 (2009 Electricity Directive) and 41 (2009 Gas Directive) Member States shall ensure that NRAs have various enforcement powers. As is the case with enforcement, the powers to monitor (e.g. investment plans, compliance levels, levels of transparency) and to issue binding decisions and impose effective, proportionate and dissuasive penalties come with discretion. It is important to note that, pursuant to the Directives, NRAs may also propose that a competent court imposes such penalties.

In all Member States the NRA has enforcement powers provided by law. The scope and rights provided to the NRAs within these powers vary per Member State. In 10 Member States, the NRA has the power to impose sanctions and penalties. For example, in France the law gives the NRA the power to require access to undertakings' accounts (in the framework of the execution of its competences) and its president can start legal proceedings. In Greece, the law provides that the NRA, acting ex officio or pursuant to a complaint, may issue a reasoned decision adopting appropriate interim measures in keeping with the principle of proportionality to address the situation, before passing a final decision. In Austria this power is reserved to the competent penal authorities (although the NRA has the powers of investigation and monitoring). Additionally, all NRAs have the right to request information from market participants in general. The scope of these rights varies per Member State. In some Member States (Spain, Croatia, Romania) the legislation provides for general powers and instruments

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<sup>444</sup> Royal Decree Law 1/2019.

for the NRA itself and more specific powers and instruments depending on the sector. However, in Croatia, the law does not currently provide the NRA with the power to impose or propose penalties. A clear allocation of competences to NRAs and their empowerment through adequate enforcement instruments is key for an independent and effective functioning of NRAs. In this study, no particular problems have been noted regarding the appropriateness of the enforcement instruments available to NRAs under national laws, beyond the situation in Croatia.

#### *4.2.1.5. Safeguards to protect the NRA from undue influence: transparency measures*

In all Member States examined, the law provides for transparency measures that protect the NRA from undue influence from political authorities or market interests. For example, the publicity of the NRA's decisions will enable the parties affected by a decision and the public to be informed about the reasons why a decision was taken and, hence, become aware of the impartiality with which the NRA fulfils its duties and exercises its powers. Similarly, the publicity of NRAs' rules of procedure and the use of public consultations ensure that the NRA carries out its tasks in a transparent and independent manner.<sup>445</sup>

In each Member State the NRA is required to report annually to the Parliament about the activity and management of the NRA. Furthermore, in all Member States the legal framework provides obligations to publish certain information. The type of information that must be published varies from regulations (Austria), policies and established practices (Bulgaria), organizational structure, final decisions and advices on legal provisions (Czech Republic), up-to-date information on generation of electricity, load, quantity of imports and exports, availability of networks and plants capacity (Germany), decisions and internal rules and procedures (Greece), decisions (France), 'information related to the work of the NRA' (Croatia), provisions, resolutions, decisions and reports (Lithuania), information on the functioning of the energy market, level of transparency, completion, continuity of supply (Romania), policy and decision (Slovakia), annual report and consolidated decrees (Hungary). In Spain a broad enumeration of types of information that need to be published is specified.

With regard to the need to arrange for public consultations, seven Member States (Bulgaria, Czech Republic, Spain, Greece, Croatia, Hungary, Slovakia) have arranged for consultation and/or participation of the NRA in legislative processes and/or in the adoption of other administrative decisions is stipulated in the law. In four Member States (Austria, France, Lithuania, Romania) the legislation does not include such a provision. In Germany the NRA can introduce transparency measures itself.

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<sup>445</sup> Commission Staff Working Paper interpretative note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas. Available at: [https://ec.europa.eu/energy/sites/ener/files/documents/2010\\_01\\_21\\_the\\_regulatory\\_authorities.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/2010_01_21_the_regulatory_authorities.pdf)

Although the general impression is that provisions on transparency and the publication of information have been properly implemented, the situation may be less straightforward in practice. In the case of Austria, there are divergent views among stakeholders with respect to the level of transparency. A respondent from Bulgaria referred to the need for a proper and timely notification of new tariffs. Similarly, in Romania one interviewee noted a transparency issue with regard to license fees not being notified in a timely fashion. In Spain, legislation requires the NRA to publish information about meetings between NRA members and regulated companies on the NRA website. However, this information does not seem to be available (or easily accessible) in the website in practice. One of five Romanian stakeholders and one of three French stakeholders indicate that it is not clear what happens with a complaint and/or whether a complaint has been taken into account. This might be solved by the Member State introducing a requirement or practice of publishing all complaints on the website or in its annual report.

All Member States publish procedures, decisions etc. in their national language, while in several Member States the most relevant information is also made available in English. However, in some countries, English translations of the published announcements and procedures are lagging behind. The non-availability of information in English may be a barrier for new market entrants.

#### 4.2.1.6. *Nomination, appointment and dismissal of board members and key staff*

In accordance with the Directives, members of the board or management shall be appointed for a period of 5 to 7 years, renewable once. The Directives, however, do not provide for any guidance with regard to the procedures and the possibility to involve any political bodies.

In all Member States, a procedure for appointment and dismissal is set out in national legislation. In all Member States, except Spain and France this term is renewable once. In Spain and France the term of 6 years is not renewable. The exact obligation placed on Member States by Article 35(5)(b) of 2009 Electricity Directive and Article 39(5)(b) of 2009 Gas Directive is ambiguous. The provisions specify that the term shall be “renewable once”. This seems to oblige the Member States to include the possibility of a renewal in order to correctly transpose this provision. On the other hand, it could be argued that the provisions of the Directives merely grant the Member States the possibility of renewal or seek to express a limitation to the number of renewals. However, from the point of view of legislative drafting, one would expect the provision to state: “renewable *only* once”. The recitals do not shed any light on this provision which could aid with its interpretation. Without further legislative guidance, the provision should be interpreted in light of the ordinary meaning of the words. Thus, the requirement is that the term should be renewable once, not renewable only once, or renewable up to once. On this basis, the transposition in Spain and France could be said to be inadequate. However, the purpose of the provision is generally accepted as being to limit the number of renewals rather than require at least one renewal. Nor does the ambiguity seem to be problematic in practice. However, in the

interests of good legislative drafting, it would be advisable to include the word “only” in the Recast Internal Electricity Market Directive.

The procedures for nomination and appointment laid down in the legal framework vary among the Member States. In some countries the members of the board of the NRA are appointed and dismissed by Parliament (Romania), sometimes on a proposal by the Minister (Bulgaria, Croatia, Lithuania). In other countries this is done by Government, on a proposal from the Minister (Czech Republic, Hungary). In others, appointment is done by the Ministry (Austria, Slovakia, Germany). In Germany, the President and two Vice-Presidents are selected/nominated by an advisory council (made up of upper and lower house parliamentarians) and appointed by the Federal Government. The elected President appoints the Chair and two Vice-chairs within the different *Beschlusskammern*. Stakeholders perceived the appointment of the Board as a good practice (along with the *Beschlusskammern*), leading to an independent NRA. In other Member States the appointment is a procedure in which (a committee of) Parliament as well as the Council of Ministers play a role (Greece, France, Croatia). In Spain appointment is done by the Government on a proposal of the Ministry, but Parliament can veto the appointment.

An interesting finding from the field research is that stakeholders in several Member States expressed concerns at potential political influence arising from the Parliament’s role in appointing NRA board members. Appointment and re-election of NRA board members by parliament in Lithuania is seen by a surveyed stakeholder as a potential threat to independence from the political players. In Romania, the law prescribes that the applications of candidates who meet the requirements are scrutinised by three parliamentary committees and the appointment of the selected candidate(s) is endorsed by both parliamentary chambers. However, in practice, in 2017, the Parliament initiated an investigation through a special committee to analyse the effectiveness of the NRA instead of organizing a competitive selection procedure, as required by law.

This view was particularly stark in Bulgaria where seven out of thirteen stakeholders held the view that parliamentary involvement was more likely to result in board members who are dependent on and accountability to political parties. It should be noted that two out of thirteen held the opposite view, that parliamentary oversight facilitated independence. Similarly, in Croatia, parliamentary election of board members of the NRA is seen as a step forward for the independence from political actors.<sup>446</sup> This latter view reflects the prevailing view in the literature. In principle, governmental involvement should be seen as more likely to give rise to political dependence than parliamentary involvement.

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<sup>446</sup> One of the eight stakeholders noted that a risk for political dependence rises as a consequence of the fact that Board members are (re-)elected by the parliament on the nomination by the President of the republic. However, the NRA representative seemed to be rather satisfied with the appointment system.



According to two of nine surveyed stakeholders in Spain, nomination of board members of the NRA through government and parliament is not necessarily based on their technical expertise. In Slovakia a recent revision of the legislation might decrease the independence of the NRA as the competence to appoint/recall board members is now a government power, instead of a power of the Chairman. Similarly, in Austria, France, Greece and Hungary, some concerns were noted regarding political independence of appointees.

The procedure of dismissal is set out in the legislation of all Member States. In some countries the criteria for dismissal seem rather vague or ambiguous (Bulgaria, Czech Republic, Romania). The legislation refers to criteria such as "a gross or repeated minor breach of the duties of a member of the Board", "grave breach or systematic dereliction of official duties", or "serious negligence" or "serious breaches", but in practice the interpretation is left to the Government, which can lead to political influence in decisions which affect the functioning of the NRA. This approach can be contrasted with that of Lithuania where dismissal grounds seem to be quite clearly laid out in legislation, and the legislative provisions do not include such broad or open-ended criteria. For example, a material breach must relate to the requirements or regulations of the office. However, in practice, this was only seen as problematic in Romania, where the NRA representative noted it as an issue.

In the Czech Republic there are doubts as to whether the legal regulation of a possible dismissal of members of the NRA's board is fully in line with the requirements for the functional independence of the NRA. Furthermore, one stakeholder in Croatia (out of the 8 which provided answers for this country) noted that the NRA must report to the parliament every year. The parliament can refuse to approve the report (by simple majority) and subsequently dismiss the board. This is regarded by the stakeholder as an inappropriate legislative solution as it provides the possibility to prematurely dismiss board members. Also, the NRA representative noted *"About two years ago the government intended to dismiss and replace the entire board of [the NRA] for failing to implement a number of bylaws."* However, it failed as the government collapsed before this happened.

As a conclusion, it can be regarded as good practice the inclusion of clear grounds for dismissal in the law, while avoiding vague and ambiguous terms that give room for interpretation. An option could also be to have in place a prerequisite of some sort of judicial pronouncement as to whether a breach has taken place (rather than be left to the Government, as it tends to be done).

#### *Conflict of interest provisions concerning board members and key staff*

In all Member States examined the legislation contains provisions for conflict of interest in respect of board members for the duration of their term in office. The type of provisions varies per Member State. In some Member States the provisions consist of requirements formulated very broadly (any activity that could cast doubt on independence (Austria)). In other Member States the provisions are much more

specific, for example any occupation of another paid office or paid activity in Bulgaria, or conducting business in energy sectors etc, in the Czech Republic. Another example can be found in Croatia, where the legislation comprises extensive conflict of interest provisions for members of the board, including prohibitions on having ties with the energy industry (via stocks, share, material interests). This was further confirmed by another stakeholder<sup>447</sup> that referred to the one year cooling-off period for board members and that they are not allowed to have personal or family interests in the energy industry.

Post-employment rules regarding the position of key staff are in place in half of the examined Member States (Bulgaria, Greece, Spain, France, Hungary, Lithuania), while in the other half such restrictions were not found. The content of these restrictions varies. Pre-employment rules were not found.

While the 2009 Directives are not prescriptive regarding the conflict of interest provisions which should be adopted by the Member States, ideally provision should be drafted clearly and not expressed too broadly. While limitations regarding post- and pre-employment of board members may be useful in preventing conflicts of interest, regard should be had to the possible impact these may have on the ability of the NRA to attract qualified people to sit on the board. This is essentially a balancing act, and it may be difficult to prescribe a one-size-fits-all solution on the basis of the present study.

#### *4.2.2. Adequacy of Human and Financial Resources*

Below we analyse the manner in which the requirements regarding human and financial resources have been applied in the Member States covered by the study. We will first present the provisions regulating human resources and then those applicable to financial resources. It is key to assess their adequacy with regard to the independence of the NRAs.

##### *4.2.2.1. Human Resources*

###### *Remuneration of staff and hiring procedures*

It is essential for the NRA's independence that it is able to attract adequate human resources both quantitatively and qualitatively. Skilled staff and sufficient expertise are essential for independent assessments of industry information and the assessment of risks. In most countries the fact that salaries of NRA staff cannot compete with salaries in the private sector is considered to be an obstacle or possible obstacle in attracting adequate staff. This is even the case in some of the countries where expertise of staff is currently considered to be sufficient. A number of respondents points out the fact that most NRA staff is (paid as) a civil servant and considers this as a potential threat for attracting and retaining staff.

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<sup>447</sup> Of the eight stakeholders which provided answers for Croatia.

In some countries hiring procedures are centralized with little or no involvement of the NRA itself. These hiring procedures can either lead to long procedures that put off talented candidates but also limit the influence of the NRA to select its own candidates. It is indispensable that NRAs are properly involved in the definition of the job requirements and the selection of their staff, including setting staff salaries. This is however not always the case in some Member States (Lithuania, Greece) where many of the staff members are recruited via the civil service hiring route, which limits the NRA's input somewhat in the hiring of staff, both in terms of being able to select the right people and in terms of setting the salary. Some good examples in this regard can be found in Austria, France and Hungary. In Austria, according to legislation there are no headcount caps for the NRA. Further, the regulator has a large level of flexibility to determine the salary levels of its staff, though it is subject to certain budgetary constraints. In the field research, respondents noted Austria as having adequate staff, with the regulator being flexible to decide its number of staff and their wage levels. It is interesting to note that Table 7 shows the staffing numbers remaining quite stable in recent years, and actually slightly reducing over the last two years, while Table 6 shows a corresponding reduction in expenditure. In France, national law provides that there is no governmental intervention in fixing of wages for the French NRA. However, there is a headcount cap, but this has been increased in recent years. Furthermore, stakeholders estimate that the staff is competitively remunerated which provides the regulator with competent staff. Nonetheless, the French NRA representative noted that it experiences limitations to the number of studies it can launch due to budgetary constraints. The idea that the French NRA is operating at full capacity may be supported by the fact that staff numbers were at 127 when the headcount cap was 127, while they expanded to 149 once the headcount cap increased to that number. In Hungary the law provides that staff expenditure takes precedence over other expenditures and the NRA can determine its own number of staff. Further, the law prescribed that the government is not involved in fixing the wages of staff. It should however be noted that in practice, it was mentioned by the NRA representative that it can adjust the base salary for 20% of its staff which empowers the NRA to pay more competitive wages compared to other public institutions in Hungary. It was confirmed by the field research that the regulator has full control over the number of staff it hires.

In a majority of Member States examined the fact that salaries of NRA staff cannot compete with salaries in the private sector is considered by stakeholders to be an obstacle or possible obstacle in attracting adequate staff (Bulgaria, Lithuania, Czech Republic, Hungary, Greece). In Greece, the competence to determine the wages of the NRA's Board Members and personnel is exercised exclusively by the Ministry. Similarly, the determination of the number of staff positions and the filling of such positions by recruitment are subject to the approval of the legislator or ministry. This was viewed as a fundamental threat to the independence and effectiveness of the NRA; it has led to a dramatic decrease of the NRA's personnel and has had a negative

impact on the attraction of high-level professionals, also due to the low remuneration levels.<sup>448</sup> Nevertheless, following the NRA's long-pursued request, the recruitment by RAE of 79 employees has been jointly approved by three ministers, in order to fill the vacant staff positions as of 2019.

In some Member States long hiring procedures for new employees may dissuade candidates. In Lithuania from the 1 January 2019 hiring of staff will be centralized within a government body that conducts the selection for all public institutions. This will further limit the NRA's ability to hire its own staff. In addition, the fact that staff can be liable for compensation of damages caused by the decisions they take makes hiring even more difficult. In Greece the selection of personnel, in particular of special scientific personnel, is performed by another entity without participation of the NRA in the process. This procedure may undermine the NRA's independence.

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<sup>448</sup> It should be noted, however, that this reduction took place in the context of the fiscal crisis, in order to try to reduce the public deficit. A similar law was passed in Spain in 2012.

#### 4.2.2.2. *Financial Resources*

##### *Financing and allocation of the budget*

According to the 2009 Directives the NRA should have separate annual budget allocations to protect the independence of the NRA.

Pursuant to both directives (Article 35(5)(a) Electricity Directive and 39(5)(a) Gas Directive) yearly allocation of budgets, autonomy in implementing the budget and adequate human and financial resources should be ensured. On the allocation of the budget, the Interpretative Note states that the approval of the budget of the NRA by the national legislator does not constitute an obstacle to budgetary autonomy.<sup>449</sup> Nothing in the Directives prevents national parliaments from taking a decision on whether the draft budget proposed by the NRA is totally appropriate compared to the duties and powers of the NRA.<sup>450</sup> On the other hand, according to the same document: “the approval of the budget cannot in any way be used as a means of influencing the NRA’s priorities or to jeopardise its ability to carry out its duties and exercise its powers in an efficient and effective manner”. The Interpretative Note mentions that the role of the national parliament in approving the NRA’s budget is to grant a global financial allocation to the NRA, which should enable the NRA to carry out its duties and exercise its powers in an efficient and effective manner. Criteria to assess this could be the budget of similar regulators or bodies (e.g. national banks) and the budget of NRAs in other Member States. In the process of allocating a budget that is adequate for the NRA, it is recommended to involve the NRA in an early stage in preparing the budget, preferably by giving the NRA the responsibility to prepare the budget proposal for parliament. Clearly defined and transparent procedures on the allocation and approval of the budget are important to prevent any undue (political) influence. An independent supervisory board or supervisory council of the NRA could play a role in the approval of the proposed budget to safeguard the board of directors of the NRA from undue political influence.

We have found 3 different ways of financing the NRA:

- (i) Solely from the state budget (separate budget line within the state budget), which was found in 4 Member States (Czech Republic, Germany, Spain, Slovakia).
- (ii) Financed by market participants (e.g. from fees for licensing, registration etc, fixed fees or penalties): 4 Member States (Greece, Croatia, Hungary, Romania).
- (iii) A combination of (i) and (ii): 4 Member States (Austria, Bulgaria, France, Lithuania).

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<sup>449</sup> See also recitals 34 of the 2009 Electricity Directive and 30 of the Gas Directive.

<sup>450</sup> Interpretative Note, 2010, p. 10.

NRA budgets are allocated on a yearly basis in 11 Member States (Bulgaria, Czech Republic, Greece, Spain, France, Croatia, Hungary, Lithuania, Romania, Slovakia, Germany). In Slovakia a three-year budget has to be approved by parliament. Within this budget the annual allocation can vary and is decided upon on a yearly basis.

Providing a multi-annual budget or range within which the budget can vary over the medium term can be considered as a good practice since it provides the NRA with the certainty on the availability of both human (providing there is no headcount cap) and financial resources that is necessary to execute a long-term strategy and multi-annual plan. The German NRA has the possibility of applying for an increase of the budget on the basis of a thorough motivation. This can also be considered as a good practice. In Austria the budget is approved by a supervisory board chaired by an independent chairperson, instead of mandatory approval by e.g. parliament which is the case in several other countries. This can also be considered a good practice since an independent assessment of the required budget can be made by a supervisory board. An alternative could be that the supervisory board advises the government on the required budget.

In the case of Bulgaria where the NRA budget is allocated by the state, respondents in the field research state the NRA often receives less than requested, e.g. the NRA's licensing and tariff revenues are processed by the finance ministry and half of it is allocated to the NRA. As of the beginning of 2019, this will change, and the NRA will be able to keep the full licensing fees/revenues. This present funding issue is perceived as a threat to the independence of the NRA. In the case of Croatia, it was mentioned by stakeholders that the NRA was required by the ministry to refund part of the collected fees to the finance ministry, although the transfer of an excess budget to the state budget is not provided for by law. Such a political intervention could become a problem if it is the case; stakeholders mentioned this as the largest potential threat to the NRA's political independence. In the case of Croatia, it was suggested that part of the funding goes to finance ministry (« the excess budget ») and was then transferred into the state budget. If this is the case, it would be problematic as according to the official procedures this is not supposed to happen.

#### *Sufficient financial resources*

As to the question whether NRAs are considered to have sufficient resources, in five member states NRAs are considered by respondents to have insufficient resources to perform their core tasks, either qualitatively, quantitatively or both (Romania, Bulgaria, Croatia, Slovakia, Lithuania). While caution should be exercised when forming conclusions regarding adequacy of resources based on the figures in Table 6 (as various factors may account for differences of expenditure among Member States), the table does indicate a significant increase in expenditure in 2018. This increase is partly reflected in an increase in staff numbers from 279 to 350 (as can be seen in Table 7), which is likely a result of an increase in the headcount cap from 300 to 350. This may suggest that the concerns regarding adequate budget and staff in Romania are being addressed. On the other hand, the fact that the entire headcount is being

used may be a sign that the NRA has no spare capacity. In the case of Slovakia, one of the market stakeholders highlighted that there have been budgetary issues for the NRA, which led to the regulator not being able to attend certain conferences due to insufficient resources. However, a Slovakian NRA representative states that there were no budgetary issues which would negatively affect its independence or effectiveness but admitted that for certain areas of its core tasks the regulator is effectively seeking additional resources. A relationship between the source of the financing of the NRAs and the perceived lack of human and financial resources cannot be established. Amongst the countries that are perceived to have insufficient resources there are countries that are entirely financed through the state budget (Slovakia), partly by state and by market participants (Lithuania, Bulgaria) and by market participants entirely (Romania, Croatia).

#### *Control and approval of the NRA's annual accounts*

On the subject of the control and approval of the NRA's annual accounts, several practices have been observed. NRAs are either controlled by a supervisory board, parliament or a state audit office that is responsible for controlling the entire state budget. All three possibilities are in line with the requirements of the Directives. It should however be noted that this does not always seem to work effectively in practice. In Romania, national law provides that the NRA annual accounts are controlled and approved by the board, based on the internal control and audit procedures and with the supervision of the Ministry of Finance. This internal public audit service also issues annual reports, which are approved by the president and submitted to the Ministry of Finance. However, the financial statements are not audited by an external auditor, but can be audited by the Court of Auditors. In practice, the NRA has reinstated an internal audit department, which had been dismantled before 2011 but has lost some independence in its budget management as it fears critical comments from the Court of Auditors.

Good practices include NRAs' annual accounts being audited by a competent body and that both the accounts and audit report are published and submitted to the parliament. In Croatia, for example, according to the legislation, the NRA must submit a report on its financial operations to the Parliament/Government and publish it in the NRA's bulletin (in Croatian and in English) after approval. It is however unclear from the field research whether the NRA accounts are audited by an external competent body.

In France the annual report includes a multi-year expenditure and optimisation plan which assesses the projected impact on the NRA staff. Such an assessment could also contribute to the measurement of the societal impact of an NRA which is in literature considered as an important aspect of accountability.<sup>451</sup> Providing an impact

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<sup>451</sup> F. de Vries en M. Aelen, 'Ontwikkelingen in de publieke verantwoording door financiële toezichthouders', *Tijdschrift voor toezicht*, 2016, afl. 1.

assessment or measuring societal impact and reporting on the societal objectives that have been reached, is an important aspect of the accountability of the NRA.

### *Conclusion*

Analysing the adequacy of financial and human resources is a difficult task. On the one hand, one can look at the fact that an NRA has used all its resources as evidence that it needs more. On the other hand, it could be argued that it is not uncommon for regulators to have to prioritise certain tasks. In addition, it could be argued that regulators should perform tasks more efficiently. It is also difficult to draw direct comparisons across Member States based on tables such as Table 6 and Table 7 of this report, due to different factors which may impact upon the needs of the NRA. However, such a table may be useful nonetheless, as it may show interesting trends. For example, there is notable decrease in expenditure in Member States such as Spain and Greece following the economic crises which these Member States experienced. However, while both NRAs saw a significant decline in expenditure, in Spain this was accompanied by a decline in staff numbers, while in Greece there was a slight increase in staff numbers. It is unclear why this is the case. It may be that, due to the fact that the Spanish NRA is merged with other regulators (such as competition and telecommunications), it was easier to make staff reductions without compromising core tasks. It may be down to the fact that certain tasks which the NRA should be performing are being performed by the Ministry. Or perhaps the Greek NRA's ability to maintain staffing levels is partly down to the prevalence of short-term contracts, which have been noted as being increasingly used since 2014. In any event, the Greek NRA will receive a significant increase in staff next year, while the Spanish NRA would need such an increase if it were to take over the tariff tasks currently being executed by the Ministry.

Meanwhile, Tables 6 and 7 might corroborate the view that the Austrian NRA has sufficient financial and human resources. Both tables show a slight decrease in resources, but stakeholders noted the NRA as having adequate resources to carry out its tasks. This may be a sign that the independent approval of the budget by a supervisory board allows to achieve a good balance between adequate resources and value for money.

As with other fields of supervision it is not uncommon that staff of regulatory bodies are civil servants and that salaries lie somewhat below salaries paid in the private sector. However, it is important to make regular assessments of the employment terms and conditions for NRA employees. This is necessary to assess whether the salaries are prohibitive to attracting and retaining the right staff. This can be done by comparing the actual salary to benchmarks that can e.g. consist of a weighted average of both the public and the private sector on both the salary and secondary employee benefits like pension schemes etc. Salaries could also be determined periodically on the basis of these kinds of benchmarks. The use of benchmarks also makes it possible to differentiate between different kinds of staff and to identify in what kind of expertise/which functions there is a gap between the salaries paid



publicly and privately, that could be prohibitive for hiring and retaining specific expertise. NRAs could also benefit from having a Supervisory Board that either is responsible for the establishment of specific staff salaries or has an advisory role towards the ministry or the governmental body in charge of determining the salaries. This could protect the NRA from undue political influence.

In some countries hiring procedures are centralized with little or no involvement of the NRA itself. These hiring procedures can lead to long procedures that put off talented candidates and can also limit the influence of the NRA in selecting its own candidates. The Study Team regards this as undesirable. To guarantee sufficiently skilled staff it is indispensable that NRAs are involved in designing the job requirements and in the selection of their own staff.

#### *4.2.3. Independence and Effectiveness in Conducting Core Tasks*

This section will present an analysis of the way in which the Member States assessed in this report have organised in their legal system the three core tasks identified earlier: tariff regulation, complaint handling, and review of NRA decisions.

##### *4.2.3.1. Setting and approval of tariffs and methodologies*

##### *Analytical framework concerning the independence and effectiveness of NRAs in carrying out their duties in relation to grid tariffs*

When considering the independence of NRAs when setting tariffs and their methodologies, it is important to consider a number of possible restrictions on the NRAs independence. Firstly, there is the possibility of the Member State's implementing legislation retaining for the Ministry the powers which should, by virtue of Article 37 of 2009 Electricity Directive, be the preserve of the NRA. This would be a clear example of a situation at national level which is not in line with the requirements of the Third Package. The NRA cannot be regarded as having independence with regard to tariff-setting if the powers are reserved to the Ministry.

A second possibility might be where the national legislation does grant the power to set tariffs or their methodologies to the NRA, and no such powers are retained for the Ministry, but the exercise of the power by the NRA is subject to some sort of supervision or intervention by the Ministry. For example, where the NRA is required to have its tariff decision approved by the Ministry, or where the NRA is required to reassess or amend the tariff decision based on feedback received from the Ministry. This is a subtler impact on the NRA's independence in tariff-setting than the first example. Here, the NRA is entrusted with the power to fix or approve tariffs or their methodologies in line with Article 37 of 2009 Electricity Directive. However, there is the possibility of some residual influence from the Ministry. Regarding the role of the Ministry, a distinction needs to be drawn between the provision of general policy guidelines, to which the NRA should have regard, and the exercise of influence by the Ministry over actual decisions of the NRA. Should the general policy guidelines published by the Ministry concern the regulatory powers and duties of the NRA set out

in Article 37 of 2009 Electricity Directive, including powers to fix or approve tariffs or their methodologies, this risks impacting on the independence of the NRA.

However, the absence from the legal framework of the possibility of the type of Ministerial encroachment on the powers of the NRA does not necessarily mean that the NRA can independently carry out its task in relation to tariffs. One must also look at possible legislative interference (whether by primary or secondary legislation) with the NRA's independence and effectiveness. In that regard, it may be the case that, on the one hand, the legislation grants the NRA the exclusive competence in relation to fixing or approval of tariffs or methodologies, but on the other hand, it prescribes such detailed criteria for the calculation of tariffs as to render the NRA's ability to actually decide on tariffs illusory. Such a situation is hardly conducive to effective and independent tariff-setting by the NRA, as its regulatory powers risk being reduced to a rubber stamping of a tariff methodology in essence decided upon by the Legislature.

In the case of criteria prescribed by secondary or delegated legislation, the risk to the independence of the NRA is starker, as rather than being passed by parliament, such legislation is passed by the Government, and indeed may be amendable without parliamentary scrutiny. An example of such a provision was scrutinised by the CJEU in *Commission v Belgium*.<sup>452</sup> In that case, the impugned provision provided for the Government laying down special rules for the determination of depreciation rules and rate of return in respect of transmission installations of electricity recognized as being of national or European interest. The provision was defended on the basis that the power to approve tariffs was still reserved to the NRA. However, the defence failed as it was held that the attribution of those powers to the government reduced the scope of powers conferred to the NRA by the Directive, since in the approval of tariffs, the NRA is bound by the special rules on the determination of depreciation and profit margin established by the government.

On the other end of the spectrum, it may be that legislation concerning the powers and duties of the NRA takes a light touch approach, and merely prescribes very general requirements to which the NRA must have regard when fixing or approving tariffs or methodologies. Such a situation would not seem to unduly fetter the discretion of the NRA, and thus would not be regarded as a threat to its independence or effectiveness in relation to tariff setting. An example of this might be legislative provisions which echo recital 36 of 2009 Electricity Directive, which provides:

*"In carrying out those tasks, national regulatory authorities should ensure that transmission and distribution tariffs are non-discriminatory and cost-reflective, and should take account of the long-term, marginal, avoided network costs from distributed generation and demand-side management measures."*

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<sup>452</sup> C-474/08.

In addition, it should be noted that Article 36 of 2009 Electricity Directive requires the NRA, in carrying out its tasks in relation to fixing or approval or tariffs or their methodologies, to take all reasonable measures in pursuit of certain objectives, without prejudice to its competences. Eight objectives are listed. It is possible that Member States, when transposing Article 36, attempt to clarify or elaborate upon certain of these objectives. It should be considered at what point such clarifications or elaborations might move from giving effect to Article 36 and the surrounding provisions of the 2009 Electricity Directive, to potentially frustrating them, by limiting the independence and effectiveness of the NRA in carrying out this core task.

Finally, the flexibility granted to the NRA by the manner in which the legislation is drafted should be taken into account. There is a difference between overly-prescriptive legislation providing that the NRA “shall” take into account certain factors, and legislation clarifying that the NRA “may” take certain factors into account. The latter is less likely to be problematic, particularly if the list of factors is expressed as being non-exhaustive.

#### *Analysis of independence of NRAs in relation to fixing or approving grid tariffs or their methodologies*

Bearing in mind the analytical framework set out above, it is necessary to assess the level of independence and effectiveness of the NRAs concerning their powers relating to grid tariffs.<sup>453</sup>

As mentioned previously, in Spain, certain functions under the competence of the Secretary of State for Energy used to limit the independence of the NRA. Specifically, the Ministry had the powers to fix and approve tariffs, while the NRA had the power to fix and approve the methodologies. However, under the new Royal Decree Law, the NRA has the power to approve the structure, methodology and value of the access tariffs to the electricity and natural gas networks. Furthermore, the NRA has competence for the approval of the methodology and the conditions for access and connection to the electricity and natural gas transmission and distribution networks. Regarding the remuneration for the transmission and distribution of electricity, as well as the transmission, distribution and regasification of natural gas, the NRA also has the power to approve the methodology used; the remunerative parameters; the regulatory asset basis; and the activity's annual remuneration.<sup>454</sup>

France seems to be an example of the second possibility referred to in the above analytical framework. The legislation clearly provides the NRA with the power to fix the tariff methodologies, and it does not retain any of the duties set out in Article 37(1)(a) for the Ministry.

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<sup>453</sup> A description of the powers of the NRAs in relation to tariff-setting, as well as the criteria for fixing or approving tariffs or their methodologies is provided in Section XXX, along with the provenance of these criteria (legislation, NRA decision etc).

<sup>454</sup> Royal Decree Law 1/2019.

The Croatian legislation does not have such a specific provision providing for supervision of tariff decisions by the Ministry. However, it provides for a general power of the Ministry to supervise the legality of general and individual decisions of the NRA. While this legal provision may be problematic, no explicit references to it were made by stakeholders. Nonetheless, one of the stakeholders mentioned that no real tariff calculation was taking place in Croatia due to political pressure to prevent increases, while another noted generally the high political impact on the NRA's activities. It should be noted that Croatia is currently working towards remedying this deficiency in implementation.

In Germany, the legislation specifies that the NRA is to have the power to fix or approve tariffs in accordance with a Government Ordinance. That Ordinance delegates to the NRA the power to set caps for tariffs. Thus, this is a clear example of the NRA being granted the requisite power under national law. Unlike the aforementioned Member States, the Ministry does not retain any powers or supervisory role in relation to tariff-setting. Nonetheless, the Ordinance itself can be regarded as being so prescriptive in relation to the manner in which the caps are to be set as to significantly limit the discretion of the NRA. The provisions in the ordinance go beyond the mere establishment of guiding principles for the NRA to take into account, and even include detailed formulae in the annexes. Limiting the discretion of the NRA to this extent presents a risk to its independence and effectiveness in carrying out its tasks in relation to tariffs. Nonetheless, the energy legislation provides the Government with the power to set detailed criteria in relation to tariffs. In *Commission v Belgium*,<sup>455</sup> the CJEU held:

*"by attributing to an authority other than the regulatory authority the power to define criteria which are decisive for the calculation of tariffs as regards certain electricity transmission installations, contrary to the provisions of Article 23(2)(a) of Directive 2003/54"*<sup>456</sup>

The current legislative framework in Germany can be regarded as analogous, since Section 21a(6) of the *Energiewirtschaftsgesetz* provides the Federal Government with the power to define such criteria. In relation to stakeholder feedback, it is notable that only one third noted that grid tariffs were being set in a timely fashion.

In Austria, the NRA has been provided with the power to fix tariffs, but not the methodologies, which are set out in detail in the legislation. Unlike the situation in Germany, therefore, the details are prescribed in primary legislation rather than delegated legislation passed by the Government or a Ministry. In this sense, the

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<sup>455</sup> C-474/08.

<sup>456</sup> Article 23(2)(a) of Directive 2003/54/EC, which is no longer in force, provided:

The regulatory authorities shall be responsible for fixing or approving, prior to their entry into force, at least the methodologies used to calculate or establish the terms and conditions for:  
(a) connection and access to national networks, including transmission and distribution tariffs. These tariffs, or methodologies, shall allow the necessary investments in the networks to be carried out in a manner allowing these investments to ensure the viability of the networks;

Austrian legislation cannot be said to “attribute” powers in relation to tariff-setting to an authority other than the regulatory authority. Nonetheless, the level of prescriptiveness of the legislation could call into question the level of discretion afforded to the NRA in fixing tariffs. It should be noted that, unlike the Ordinance in Germany, the Austrian legislation does not set out detailed formulae for the calculation of tariffs. This was reflected in feedback received from stakeholders who noted that, while the methodologies are backed by quite a few legislative provisions, they are not set in stone in legislation. Nonetheless, the responses to the survey show that stakeholders generally noted timely tariff-setting, and that the NRA is effective in executing its tariff tasks.

In certain Member States, their legislation provides the NRA with the power to set grid tariffs or methodologies and does not define any details in relation to the criteria. Thus, in the case of the Czech Republic, the legislation merely grants the NRA the power to set tariffs, and the NRA itself publishes a document establishing the conditions and criteria. In the case of Slovakia, the legislation provides the NRA with the power to fix the methodologies, which the NRA elaborates by means of a decree which it is empowered to enact pursuant to the primary legislation. Thus, the legislation in these two Member States can be regarded as providing optimal discretion to the NRAs in the exercise of their powers in relation to tariffs. Lithuania is a similar example, where beyond the explicit reference to the need for non-discrimination, the legislation leaves the rest to the discretion of the NRA.

The legislation in other Member States examined sets out a varying degree of detail in relation to tariffs. For example, some of the details in the Member States’ legislation reflects the content of recital 36 of the Electricity Directive, while some reflects the objectives laid down in Article 36 thereof. These details are largely in the form of guiding principles for the NRA to consider or apply. The principles set out in the Romanian legislation seem to broadly re-state what is already provided for in the Electricity Directive, thus merely transposing into national law the principles which EU law already prescribes for the NRA. For example, it requires electricity transmission and distribution tariffs to reflect justified costs of the TSOs/DSOs, also considering long-term marginal, avoided costs, incurred as a result of distributed generation and demand-side management measures, thus re-stating the principle set out in Recital 36. In Bulgaria, a similar provision is found, requiring the tariffs to reflect economically justified operating costs. However, the Bulgarian legislation goes further, by listing the operating costs which are to be included (e.g. depreciation, repairs etc). However, the only stakeholder comment relating to the possible compromise of independence of the NRA in relation to its tariff-setting powers concerned a possible alignment of the objectives of the NRA and the Government, in relation to keeping tariffs low. While it is difficult to draw conclusions from a single stakeholder comment, if it is the case that tariff-setting is being driven by a political motivation to keep tariffs low rather than by technical considerations, this could present a problem for NRA independence.

#### 4.2.3.2. *NRA competence in relation to complaint-handling*

### *Dispute settlement authorities*

One of the core tasks of the NRAs is to act as a dispute settlement authority. Current practices in the Member States examined appear to comply with this provision. In some Member States the NRA can also act as an arbiter or mediator (Austria, Slovakia, Greece, Spain, Germany).

These dispute settlement authorities should *at least* handle complaints against TSOs and DSOs as well as complaints between TSOs and vertically integrated undertakings. This would entail that the NRA also would be entitled to handle other complaints. This is especially relevant if the national NRA would be charged with more than energy disputes (e.g. competition issues). The research shows that in some Member States NRAs are primarily involved in disputes about access and network tariffs. Of particular interest is the situation in Austria as only three parties can lodge a complaint with regard to disputes regarding the tariff methodology: TSO, Chamber of Commerce and Chamber of Labour. The latter two represent consumer interests. Limiting the number of interested parties to the latter two is restricting other interested parties from being involved in the process. In other Member States (Czech Republic, Bulgaria, France and Croatia) the NRA can handle complaints relating to a wide range of disputes, which can involve all aspects of the energy market (contracts between licensees and customers, system operators and system users, access and connection issues). It means that the NRA can be involved in handling disputes about energy prices and other consumer-related issues. It is interesting to note that sometimes disputes relating to energy prices are subject to a process of mediation (Austria). In Austria it is required to involve the Chamber of Commerce in such disputes. The research also shows that in Bulgaria, for example, most complaints are done by customers and are about prices and lack of service. It is interesting to note that the Bulgarian NRA states that it does not know how to change this. However, in case of the latter category (small/household consumers) it seems a clear result of a lack of competition and use of regulated prices, i.e. consumers cannot or have no incentive to switch supplier.

### *Procedures*

If the NRA acts as a dispute settlement body, the procedures should be known beforehand in order to promote transparency. In case the NRA acts as an arbiter or mediator, some Member States apply an Alternative Dispute Resolution Act (Austria) and sometimes reference is made to specific procedures (Civil Code Procedure in Greece). In case the NRA acts as a dispute settlement authority a range of different procedures may apply. These can vary from general administrative law procedures (Czech Republic, Spain), to specific rules regarding dispute resolution procedures (Lithuania) and sometimes to procedures in accordance with sector regulation such as a gas act (Croatia). In France, the law (confirmed by field research) provides that a separate independent body within the NRA is responsible for settling disputes between operators and users about the access to public electricity and gas networks and their use, and for imposing sanctions or penalties for infringements of the Energy Code. This body, called *Comité de règlement des différends et des sanctions* (CoRDIS), is

composed of 4 members (2 Councillors of State and 2 Councillors at the Cassation Court) appointed for a term of six years, non-renewable. In Germany the national dispute settlement body initiates a procedure on request and a decision of one of the NRA's decision-making chambers shall be taken within four months upon receipt of the request. Furthermore, in practice, court cases are factored into the regulator's operations. When drafting a decision, the responsible chamber holds intensive discussions which adequately prepares them for possible complaints. Depending on the type of dispute, it may be required to involve an additional authority (see Austria where the Chamber of Labour needs to be involved in case of a consumer dispute). In some Member States the NRA cannot be involved before an attempt is made to reach an amical settlement (Bulgaria) or the NRA must address the complaint first before it can initiate an administrative dispute (Czech Republic).

Most Member States provide specific time schedules for handling disputes. These vary from 30 days to 3 months or a general statement that 'provisions should be resolved in a quick and binding fashion'. It appears from the stakeholder perceptions that complaints often are not handled within the given period of time (Germany). This is partly blamed by a lack of staff/resources, e.g. France, Slovakia, Greece (see also sub-section 3.3). In order to provide market parties with sufficient trust in the NRA and their role as a dispute settlement body it seems relevant to have a close look at the procedures (time schedules) involved.

#### *Independent dispute settlement bodies*

If an NRA is involved as dispute settlement body or arbiter/mediator, it would be preferable that such a complaint is handled by an independent body within the NRA. So far this seems only to be the case in France, Austria and Germany but could be introduced in other Member States as well. It appears from the report that some Member States have arranged for a separate body within the NRA to deal with dispute settlement. This is the case in France (CoRDis), Austria (Regulatory Commission) and Germany (Decision-making Chamber). Indeed, generally, it is preferable that a separate (independent) body within the NRA is charged with complaint-handling.

#### *Appeals*

The Directives provide that (i) decisions by the NRA should be fully reasoned and justified to allow for judicial review, and (ii) a party affected by the decision should have a right of appeal to a body independent of the parties involved/any government. This raises an important question of whether an NRA can act as an appellate body in relation to its own decisions. We note that in practice such appeal can be done 'internally' or at another (general) court. It could be argued, however, that the NRA is in such case no longer an independent party and, consequently, the possibility that an NRA would act in appeal procedure would be contrary to Article 37(17) of 2009 Electricity Directive and Article 42(17) of 2009 Gas Directive. We refer in particular to the situation in the Czech Republic, where only an internal appeal procedure is provided for. However, it seems that it is not ruled out that the decision could be

appealed in court. A respondent mentioned the possibility to appeal a tariff decision of the NRA at the Constitutional court as the decision is considered a legal act. Thus, on the one hand, the fact that the party has the right to appeal the decision to the constitutional court could be regarded as satisfying the requirement for a right to appeal to an independent body. However, the right to appeal to the constitutional court is a mere residual right, which exists in the Czech constitutional order, by virtue of the Czech energy legislation not expressly removing the possibility from the party. Generally speaking, decisions of regulatory authorities are subject to appeal to administrative or constitutional courts. It would be difficult to conceive that the intention of the legislature by inserting such a requirement into the 2009 Directives was so limited. In Hungary, decisions of the NRA concerning tariffs (which take the form of regulations passed by the NRA) are only reviewable by the Constitutional Court, which severely limits the scope for challenging them.

Apart from this particular issue, we note a variety of appeal procedures. In France, Ministerial Orders governing tariffs can be appealed directly at the Council of State and appeals against decision (following a complaint) by CoRDis (internal dispute settlement committee) are possible at the Court of Appeal in Paris. A similar approach can be found in Greece ('administrative appeals' at the Athens Administrative Court of appeal and regulatory decisions at the Council of State). The research seems to indicate that appeal is only possible at the administrative court in Austria, Bulgaria and Romania. In Spain there is an 'internal' appeal procedure managed by the NRA in case a decision is taken by member of the NRA and an appeal procedure at a 'contentious-administrative court' in case of a decision by the President of the NRA. In the case of Slovakia, an appeal is possible at the board of the NRA, except of decisions involving fines or dispute settlements. In Lithuania, an appeal is possible at the administrative court in case of an individual (administrative) decision, a decision involving a dispute settlement between energy undertakings or a fine. An appeal is possible at the Civil Court against decisions on disputes between energy companies and consumers. In Germany appeals are only possible at the Civil Court. In Croatia, it should be noted that law provides for a general power of the Ministry to supervise the legality of general and individual decisions of the NRA.

It can be concluded that the Member States assessed (apart from the Czech Republic, Croatia and Hungary) have adequate appeal procedures in place. It is unclear, however, the extent to which independent appellate bodies are equipped to deal with highly technical issues like tariff regulation. Further, in Croatia, it is unclear to what extent the Ministry is supervising the decisions of the NRA, but the legal provision allowing for this appears unsatisfactory.

#### 4.2.3.3. Cross-border and EU cooperation

The 2009 Electricity Directive and Gas Directive put more emphasis on EU cooperation than the previous directives. EU cooperation can take many forms and shapes. It can be either some sort of bilateral or multilateral (regional) cross-border cooperation amongst NRAs or cooperation via ACER or CEER. Whereas the first type of cooperation



has existed for some time and primarily relates to cross-border trade and the development of interconnectors, cooperation via ACER has started since 2009. All 12 Member States note in relation to cross-border and EU cooperation a general agreement on the need to be involved.

Often specific reference is made to the need to develop cross-border connections. Although NRAs certainly play a role in this process, it should be noted that the permitting procedures and pancaking of tariffs rely on other legislative developments. Stakeholders expressed the need for a stronger role of ACER, while NRA representatives were in general not in favour of transferring more powers to ACER via legal instruments.

In some Member States (Czech Republic, Austria, Romania, Croatia, Hungary and Germany) stakeholders are in general positive about the (level of) cross-border/EU cooperation of their NRAs. In other Member States there are split opinions (Bulgaria, France, Lithuania); whereas it was reported that the situation in Slovakia needs to be improved.<sup>457</sup> Stakeholders from several countries specifically mentioned the ongoing development of interconnectors and the need to improve cross-border cooperation. One of the Greek interviewees explicitly referred to the lack of interconnection capacity which leads to problems in the wholesale market. Also in other Member States, stakeholders refer to cross-border problems (Bulgaria, Romania, Hungary, Spain) although these may also be related to the long lead time for developing interconnectors, pancaking of tariffs or cross-border trade. It is likely that ongoing regulatory initiatives (for example the network codes) may help in solving some of these issues.

Stakeholders and NRA representatives also mentioned that lack of resources and/or language issues play a role in the cooperation with ACER/CEER. It can be noted that some Member States (notably South-Eastern Member States) seem to have more problems in allocating resources to staff involved in activities related to cross-border cooperation. Although this is a national issue, it may lead to an imbalance between Member States which can participate and thus have influence in these bodies and others which cannot.

As regards ACER, it seems that most stakeholders see an added value in involving ACER in cross-border issues and consider a higher degree of involvement appropriate. NRAs however fear that a shift of competences might negatively affect their autonomy and role.

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<sup>457</sup> Overall, only 31% of survey respondents find that the NRA has enough staff to actively participate in cooperation with neighbouring NRAs and with ACER; while 29% find they have somewhat enough staff and 21% find they do not have enough staff.

## 5. Best Practices and recommendations

In this Chapter, we first present an overview of key requirements for national regulatory authorities in view of their independent and efficient functioning, based on relevant information in the literature and findings from the present study. We then provide some examples of good practices in other sectors based on OECD input, followed by good practices identified in the *de jure* and *de facto* analyses of the 12 Member States within the scope of this study. Based on the key requirements for independence identified through literature, overall analysis and good practices, we provide recommendations to enhance the independence and effectiveness of NRAs for energy in the EU.

### 5.1. Key requirements for regulators

The next overview of best practices for independent regulators is developed on the basis of a literature review of several relevant sources which are confirmed by findings from our study and are in line with the new provisions included in the Recast Internal Electricity Market Directive. These key requirements are also in line with the selected indicators presented in sub-section 2.2.

**Figure 1 : Key requirements for regulators**

Aspect	Sub-area	Key requirements
<b>Independence from political and market actors</b>	<b>Explicit legal basis</b>	<ul style="list-style-type: none"> <li>• Clear definition in legislation of NRA's roles (competences and objectives) and functioning to ensure NRA's institutional and operational independence<sup>458</sup></li> <li>• Adequate legal provisions and internal rules to avoid undue political influence – clear separation from sponsoring ministry and from energy ministry<sup>459</sup></li> <li>• Adequate legal provisions and internal rules to avoid undue influence of NRA from industry</li> <li>• To ensure NRAs' institutional independence, the respective roles of the Member States and the NRAs should be clearly and accurately defined.</li> </ul>
	<b>Availability of enforcement instruments</b>	NA
	<b>Legal limitations or violations of</b>	<ul style="list-style-type: none"> <li>• NRAs should be consistently given the power to issue final and binding decisions that are</li> </ul>

<sup>458</sup> ACER (2016); S. Berg (1999), Developments in Best-Practice Regulation: Principles, process and performance.

<sup>459</sup> CERRE (2012), *Independence, accountability and perceived quality of regulators*. Available at: <http://www.cerre.eu/publications/independence-accountability-and-perceived-quality-regulators> (last consulted February 2018).

	<b>NRA independence</b>	not subject to external (e.g. ministerial) scrutiny <sup>460</sup>
	<b>Safeguards</b>	<ul style="list-style-type: none"> <li>• Mandatory rigorous transparency rules, including open decision-making procedures based on empirical evidence/research, and publication of decisions and their motivations.<sup>461</sup></li> <li>• NRAs should prepare, adopt and publish their rules of different procedures<sup>462</sup></li> <li>• NRAs should publish information on their own organisation and structure<sup>463</sup></li> <li>• NRAs should follow a clear consultation and transparent policy by providing information to stakeholders on a timely and accessible basis and performing open consultations<sup>464</sup></li> </ul>
	<b>Legal measures for accountability and control</b>	<ul style="list-style-type: none"> <li>• Subjecting the regulator's conduct and efficiency to scrutiny by external auditors and parliamentary control<sup>465</sup></li> <li>• Accountability of NRA towards national parliament rather than to government<sup>466</sup></li> </ul>
	<b>Nomination, appointment and dismissal</b>	<ul style="list-style-type: none"> <li>• Clear and published rules for nomination, appointment and dismissal of key staff and board members<sup>467</sup></li> <li>• Heads and board members of NRAs should be selected in a transparent manner based on objective criteria<sup>468</sup></li> <li>• Specified term lengths for NRA heads and board members with constraints on re-appointment, and limits on dismissal<sup>469</sup></li> <li>• Head and board members of the NRA should have a diverse and complementary set of qualifications and experience for the regulated industry and use this for serving the public interest<sup>470</sup></li> </ul>
	<b>Conflict of interest</b>	<ul style="list-style-type: none"> <li>• Adequate rules to prohibit conflicts of interest by developing code of conduct or staff functioning (independence) manual<sup>471</sup></li> <li>• Clear incompatibility rules for board members concerning positions in regulated companies and in politics<sup>472</sup></li> </ul>
<b>Adequacy of human and</b>	<b>NRA financing</b>	<ul style="list-style-type: none"> <li>• Adequate budget level (in line with NRA tasks)<sup>473</sup></li> </ul>

<sup>460</sup> CEER (2016).

<sup>461</sup> Based on ERRA (2015), S. Berg (1999) and study findings.

<sup>462</sup> ERRA (2015).

<sup>463</sup> ERRA (2015).

<sup>464</sup> CEER (2016).

<sup>465</sup> P. Capros (2003).

<sup>466</sup> ACER (2016).

<sup>467</sup> ACER (2016).

<sup>468</sup> ERGA (2015), European Court of Auditors (2015).

<sup>469</sup> CERRE (2012).

<sup>470</sup> CEER (2016).

<sup>471</sup> CEER (2016).

<sup>472</sup> CERRE (2012).

<b>financial resources</b>		<ul style="list-style-type: none"> <li>• NRAs should have budgetary autonomy, and this should be safeguarded at all stages and in all processes<sup>474</sup></li> <li>• Separated budget line in the general state budget<sup>475</sup></li> <li>• Ex-ante scrutiny of NRA budget by parliament</li> <li>• Ex-post control of annual accounts should be performed by independent auditor who submits report to parliament<sup>476</sup></li> </ul>
	<b>Staff recruitment and pay</b>	<ul style="list-style-type: none"> <li>• Adequate human resources (both qualitatively and quantitatively), in line with NRA tasks, and salary levels that are competitive with those in regulated industry<sup>477</sup></li> <li>• Politicians should set no restrictions on the NRA's staffing policy (e.g. no headcount caps), as long as it stays within its budget<sup>478</sup></li> </ul>
<b>Independence conducting core tasks</b>	<b>Setting and approval of tariffs and methodologies</b>	<ul style="list-style-type: none"> <li>• Absence of legislative measures that may impact upon the independence of NRA in setting tariffs<sup>479</sup></li> </ul>
	<b>Criteria and procedures for fixing/approving tariffs and methodologies</b>	N/A
	<b>Complaint handling</b>	N/A
	<b>Review of NRA decisions</b>	<ul style="list-style-type: none"> <li>• Accountability: clearly defined processes and rationales for decisions<sup>480</sup></li> <li>• Providing effective arrangements for appealing NRA's decisions<sup>481</sup></li> </ul>

## 5.2. Examples of good practices in other sectors and countries

The OECD presented several best practices in its 2014<sup>482</sup> and 2016<sup>483</sup> reports, both assessing good governance practices of regulators. Some relevant examples are briefly introduced here, linking them to the relevant independence and effectiveness aspects assessed in this assignment.

<sup>473</sup> Roundtable on 'Changes in institutional design of competition authorities' (2014).

<sup>474</sup> CEER (2016).

<sup>475</sup> Based on study findings. Note that CERRE 2012 proposed as key requirement: NRA budget should preferably be separated from general state budget and be controlled by NRA board.

<sup>476</sup> Based on CEER (2016) and study findings.

<sup>477</sup> Based on ACER (2016), ERRA (2015) and study findings.

<sup>478</sup> Based on CEER (2016) and study findings.

<sup>479</sup> Based on study findings.

<sup>480</sup> S. Berg, (1999).

<sup>481</sup> OECD (2014).

<sup>482</sup> OECD (2014).

<sup>483</sup> OECD (2016).

**Figure 2 : Independence from political or market actors**

Aspect	Independence from political or market actors
Agency	Authority for Consumers and Markets (ACM)
Sector	Consumers and markets
Country	Netherlands
Best practice	Independent regulator: Clear legislation on independence complemented by internal governance rules
Description	<p>ACM is formally an autonomous administrative authority without legal personality, which operates under the Framework Act for autonomous administrative authorities ("Kaderwet Zelfstandige Bestuursorganen"). According to this Act only the Board of ACM is the autonomous administrative authority. The minister provides staff to the autonomous administrative authority. The Framework Act ensures that the staff that is employed by the Board of ACM is empowered only by the Board. The employed staff is only accountable to the Board. The staff is not allowed to seek instructions from the minister, neither can the minister give instructions to the staff employed by the Board of ACM. Crucial conditions for independent staff are therefore guaranteed by law.</p> <p>Since internal governance also plays an important role, ACM regards independence explicitly as one of its three core values (along with openness and professionalism). These core values form the basis of the ACM's actions. In practice, the independent position of ACM as an organisation means, on the one hand, taking a critical attitude and exercising independent judgments, and, on the other, maintaining open and constructive relationships with ministries, other regulators and stakeholders.</p>
Replication potential	NRAs can include independence as a core value and internalise it in their internal governance and organisation culture, to complement and enhance independence defined in legislation.

**Figure 3 : Independence: Appointment of commissioners**

Aspect	Independence: Appointment of commissioners
Agency	Federal Institute of Telecommunications (IFT)
Sector	Telecommunications
Country	Mexico
Best practice	Selection procedure of board members via Evaluation Committee and appointment by parliament

<b>Description</b>	Applicants for appointment as commissioner of IFT are subject to compliance requirements evaluated by a Committee composed of representatives from the Bank of Mexico, the National Institute for Educational Evaluation and The National Institute of Statistics and Geography. The Evaluation Committee decides by majority vote, and is chaired by the member with highest seniority who has the deciding vote. The Committee issues a public call to fill the vacancy and verifies compliance by applicants with the requirements. Those who satisfy are invited for a knowledge test on the subject, for which the Evaluation Committee considers the opinion of at least two higher education institutions and follow the best practices in the field. For each vacancy, the Evaluation Committee provides a list with three to five candidates with the highest passing scores. The government selects from this list the candidate and proposed it to the Senate for ratification by vote of two thirds of the Senate members present. If the Senate rejects the candidate proposed by the executive, the president has to submit a new proposal.
<b>Replication potential</b>	NRAs could use an independent committee for the selection of commissioners/board members, based on specific requirements and a test.  An ad hoc nomination by Parliament of 3 independent experts (without political mandate) who unanimously select and nominate the board or executive member(s), on the basis of an assessment using objective and transparent criteria, including relevant expertise and experience in the energy domain

**Figure 4 : Independence: Transparency**

<b>Aspect</b>	<b>Independence: Transparency</b>
<b>Agency</b>	Osiptel; and Osinergmin
<b>Sector</b>	Communications; and energy and mines
<b>Country</b>	Peru
<b>Best practice</b>	Transparent treatment of public consultation inputs
<b>Description</b>	Both regulators publish all comments they receive in a document called "Matrix of Comments (Matriz de comentarios)", in which they explain why some comments were accepted and others were dismissed. This matrix is published along with the final resolution. It makes the motivation behind the regulators' decisions more accessible to stakeholders and the public. Subsequently, this encourages the regulator to have more objective motivations (via empirical data).
<b>Replication potential</b>	A standardised matrix-comment system could be implemented by the EU NRAs to ensure that all regulatory decisions are transparently taken.

**Figure 5 : Human Resources: Remuneration**

<b>Aspect</b>	<b>Human Resources: Remuneration</b>
<b>Agency</b>	The Water and Waste Services Regulatory Authority (ERSAR)
<b>Sector</b>	Water and Waste
<b>Country</b>	Portugal
<b>Best practice</b>	Remuneration policy separated from practices for civil services
<b>Description</b>	ERSAR is entitled by law to have for its staff a different remuneration policy from other civil servants. The salary levels are decided by a remuneration Commission comprised of three members, appointed respectively by the Ministry of Finance, the Ministry responsible for the economic sector regulated by ERSAR and by ERSAR. This commission determines the salary levels for NRA staff, based on a benchmark with the concerned industry.
<b>Replication potential</b>	The involvement of a formal remuneration commission would allow EU NRAs to objectively decide upon adequate salary levels for NRA staff. This would also provide an appropriate basis for budget adjustments.

**Figure 6 : Human Resources: Selection of staff**

<b>Aspect</b>	<b>Human Resources: Selection of staff</b>
<b>Agency</b>	Italian public utilities regulators (AEEGGI, AGCOM and ART)
<b>Sector</b>	Public utilities
<b>Country</b>	Italy
<b>Best practice</b>	Use of an independent selection panel for the selection of staff
<b>Description</b>	The recruitment of professional and management staff follows the evaluation and assessment of candidates by an independent selection panel and as result of an open competition. The Board adopts a final decision approving the procedure carried out by the selection panel. The recruitment is ultimately carried out by the Head of human resources.
<b>Replication potential</b>	NRAs can use an independent selection panel for recruitment of staff.

**Figure 7 : Effectively conducting core tasks: Cooperation**

<b>Aspect</b>	<b>Effectively conducting core tasks: Cooperation</b>
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<b>Agency</b>	Federal Institute of Telecommunications (IFT)
<b>Sector</b>	Telecommunications
<b>Country</b>	Mexico
<b>Best practice</b>	Legally defined co-ordination mechanisms
<b>Description</b>	<p>The IFT is legally tasked to coordinate with the federal executive to ensure the effective installation of a shared telecommunication network.</p> <p>The Congress will create an Advisory Council of IFT, which will be responsible to act as an advisory body.</p> <p>The IFT may receive non-binding opinions of:</p> <ul style="list-style-type: none"> <li>– The Ministry of Communications and Transport if granting, revocation and authorisation assignments or changes in the control, ownership or operation of companies related to concessions;</li> <li>– The Ministry of Finance and Public Credit for fixing fees or compensations for the granting of concessions and authorisation of services related to these.</li> </ul>
<b>Replication potential</b>	<p>EU energy NRAs could implement legally defined coordination mechanisms which explicitly empower them to cooperate with other authorities or bodies to pursue the NRA's objectives, at national level (e.g. competition authority) or cross-border (e.g. other NRAs). This could allow NRAs to improve their effectiveness through e.g. information sharing, joint regulation or co-regulation. Such initiatives could also improve coordination and harmonisation of regulation in the EU and could consist of giving a stronger role to ACER. Some additional roles are already being considered (or have been assessed) as part of the revised ACER regulation proposed in November 2016.</p>

### 5.3. Good practices identified in the Member States examined

#### 5.3.1. Independence from political and market actors

##### *Explicit legal basis for NRA independence*

According to the relevant Directives, Member States should not only explicitly provide for NRA independence in national law, but also specify that NRAs should be independent from both political actors and market interests. Further, national legislation can specify that this independence should apply for its board and staff members rather than just for the NRA itself. Finally, a definition of independence could be provided in national legislation. While the latter is currently not done directly in any Member State, an interpretation could be derived from the provisions regulating the NRA in general and/or its staff and board members in particular.



For example, the following countries have a rather explicit legal basis for NRA independence:

- **Spain:** The legislation states that the NRA acts with structural and functional autonomy and is fully independent from the *Government*, from other public authorities and from *market actors*. Notwithstanding these formal legal provisions, stakeholders expressed doubts about the effective independence of the NRA.
- **Lithuania:** The Law on Energy establishes that the NRA shall adopt independent decisions that shall not be influenced by any state/municipal institution, company, organization or other undertaking. There is also an explicit requirement which obliges chairpersons of the NRA, its board members, civil servants and employees of the NRA to act independently of all *market interests* and, in performing their duties, not to seek, nor execute, any instructions of the *Government* or any other public or private person.
- **Austria:** The law states that the organs of the NRA and its Board/staff members are not bound by any instructions from the *Government* in the exercise of their duties and must act independently of *market interests*. E-Control is perceived as a good practice regarding legal transposition, including the definition of the roles of the regulator, and provisions to ensure its independent functioning from market and political actors. Further, this seems to be properly implemented, as stakeholders' perception regarding NRA independence is positive. However, the Austrian Court (Bundesverwaltungsgericht) has recently concluded that one NRA member was not independent; moreover, some lawyers have expressed doubts with regard to the independence of the newly nominated NRA Chairman taken into account his previous responsibilities.

#### *Availability of enforcement instruments and level of NRA discretion in their use*

NRAs should have the legal power to impose sanctions and penalties (notwithstanding that it is perfectly in line with Article 37(4)(d) of the Electricity Directive for this task to be entrusted to a competent court, as is the case for Austria) and to request information from market participants (this is the case for all NRAs reviewed).

Good practices include Member States where NRAs also have a legal basis to use enforcement instruments, as for example in:

- **France:** Pursuant to the law, the NRA can require access to undertakings' accounts (in the framework of the execution of its competences) and its president can start legal proceedings.
- **Greece:** The law provides that the NRA, acting *ex officio* or pursuant to a complaint, may issue a reasoned decision adopting appropriate interim measures

in keeping with the principle of proportionality to address the situation, before passing a final decision.

Good practices also refer to Member States where, in order to better reflect sector-specific issues, the legislation provides for general powers/instruments for the NRA and more specific powers/instruments depending on the sector (namely gas, electricity and hydrocarbons) as done in Spain, Croatia and Romania.

### *Independence of NRAs in decision making*

Several stakeholders perceived a strong intervention of political actors in the selection of NRA board members. This in turn, was viewed as possibly affecting the NRA's independence in its decision making.

Apart from strong legislative safeguards, good practices were identified which include independent decision-making bodies within the NRA and internal rules to avoid undue influence from political and market actors. A few practical examples that were revealed through our field research, are hereafter further explained:

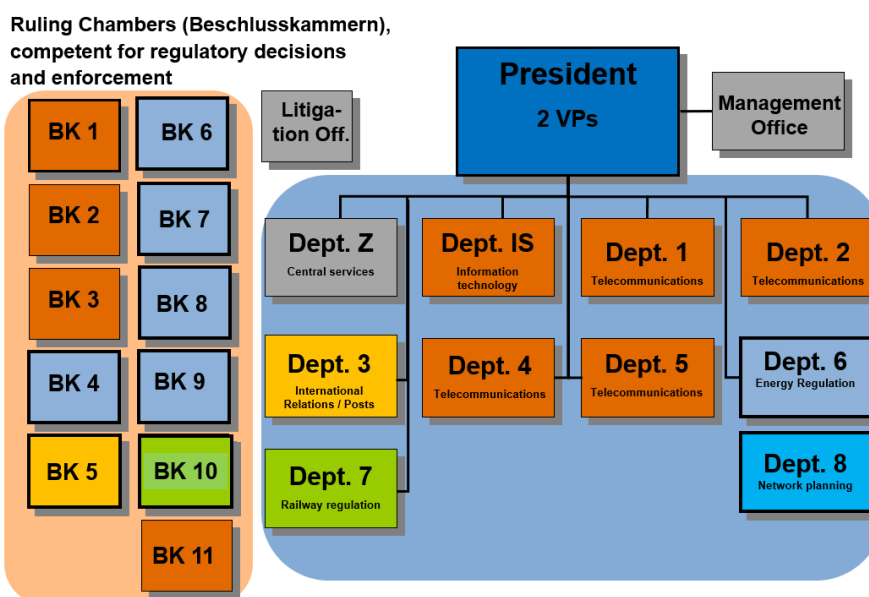
- **Germany:** The federal NRA decisions are taken in so-called "Beschlusskammern" (ruling chambers – see Figure 8). There are 5 chambers for energy (one for fixing costs of capital; two for third party access - one electricity, one gas; and two for tariffs/revenue caps - one electricity, one gas). The chambers are responsible for taking decisions on their respective topics and each has its own chair and two vice-chairs<sup>484</sup>, who have the final say. This system is deemed a good practice as the chambers endorse draft decisions prepared by the staff and present their decisions to the president of BNetzA, who may suggest (but cannot enforce) changes in the decisions made.<sup>485</sup> This provides a high level of independence and limits risks for external influence on the regulator's decisions. Further, stakeholders perceive this as good practice for NRA independence.

### **Figure 8 : The functioning of the Beschlusskammern (as provided by BNetzA)**

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<sup>484</sup> One of the chairs is usually a lawyer and the other two are academically qualified (economist, engineer, etc.).

<sup>485</sup> OECD (2014).



- **Austria:** E-Control's compliance measures were perceived by stakeholders as a good practice for enforcing independence from both political and market players. All staff (including executive directors) have to meet the compliance measures, for criminal law and administrative rules. To ensure that these are followed, the NRA has a dedicated compliance officer. Compliance measures include for instance that any consultation with an external party has to take place in E-Control's premises and at least 2 NRA staff members have to attend. In multi-party issues all relevant stakeholders have to be invited.

### *Safeguards: Transparency measures*

Transparency contributes to ensuring that NRAs are motivated to take independent, effective and fair decisions. NRAs in all examined Member States have the obligation to make certain types of information public. However, which information and how this is published is different depending on the Member State. One of the identified good practices in this regard is that some NRAs do not only publish information about (draft) decisions), but also about contacts/meetings between NRA staff and external parties.

The national law stipulates in some Member States the consultation and/or participation of the NRA in the legislative process and/or in the adoption of Ministerial or other administrative decisions (as done in Bulgaria, Czech Republic, Spain, Greece, Croatia, Hungary, Slovakia), thus giving the NRA a role in the design of transparency measures or, allowing the NRA to introduce transparency measures itself (as is the case in Germany<sup>486</sup>).

<sup>486</sup> The government has the power to legislate on transparency measures, but by a statutory order this competence has been transferred to the federal NRA.

Stakeholders consulted noted that the approach implemented by E-Control (Austria), Ofgem (United Kingdom) and BNetzA (Germany) with regard to publication of relevant information, can in particular be considered as good practices, also taken into account that their public consultations are in general transparent and properly documented and followed by motivated decisions.

Some examples of good transparency measures include:

- **Austria:** While legislation only requires the publication of NRA decisions on its website, the NRA publishes the main Federal and NRA documents in English as well (non-binding courtesy translations)<sup>487</sup>. This allows non-incumbent market participants to be better informed, thus making the market more easily accessible, as found in the field research.
- **Slovakia:** Legislation requires the NRA to publish minutes of the voting of the Board for decisions on the NRA website. All voting outcomes can be found on the Slovakian version of URSO's webpage.<sup>488</sup>
- **Greece:** Legislation requires the NRA to publish NRA's fully reasoned decisions in Government Gazette.<sup>489</sup>
- **Germany:** The field research showed the NRA is having transparent and detailed public consultations prior to finalising decisions and publishing all relevant information on its website.<sup>490</sup>

#### *Board and key staff members nomination & appointment procedures*

Transparency and impartiality on the nomination and appointment of the board and top management members is particularly important to safeguard the independence of NRAs. The Recast Internal Electricity Market Directive prescribes that the appointment of the NRA board members or, in the absence of a board, the NRA top management should be based on objective, transparent and published criteria, in an independent and impartial procedure.

In the Directives it is also outlined that Member states must ensure that the regulator's board/key staff members are appointed for fixed terms, between five and seven years, renewable once. All Member States examined have procedures for board members' appointment set out in national legislation, although not all Member States include the requirement that the term shall be renewable once.

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<sup>487</sup> <https://www.e-control.at/en/recht/bundesrecht>

<sup>488</sup> <http://www.urso.gov.sk/?q=node/534>.

<sup>489</sup> <http://www.et.gr/>

<sup>490</sup> <https://www.bundesnetzagentur.de/DE/Sachgebiete/ElektrizitaetundGas/elektrizitaetundgas-node.html>

A transparent appointment procedure based on objective criteria related to required expertise and relevant experience, is crucial for limiting the risks of board or key staff members not having the necessary background or being subject to political influence. Appointment of board and key staff members based on a selection by an independent body is considered as a best practice by several stakeholders as well as by literature<sup>491</sup>, but none of the Member States under review is currently using such a procedure.

Notwithstanding the weaknesses in the current practices, stakeholders identified the following “good” examples:

- **France:** the appointment system in France as laid down by law is considered by stakeholders as a good practice as it avoids that the board is dominated by members appointed by one minister or political party. In France, each of the six board members is appointed by a different political actor: the President, National Assembly, Senate, three by decree (one of which is proposed by the Minister of Overseas). However, stakeholders perceived political influence in the appointment and dismissal of Board members and identified it as a risk to the NRA’s independence.
- **Germany:** according to the legislation, the President and two Vice-Presidents are selected/nominated by an Advisory Council (made up of upper and lower house parliamentarians), and appointed by the Federal Government. The elected President appoints the Chair and two Vice-chairs within the different *Beschlusskammern*. Stakeholders perceived the appointment of the Board as a good practice (along with the *Beschlusskammern*), leading to an independent NRA.

#### *Dismissal of key staff and board members*

It is specified in the directives that the key staff/board members of the regulator can only be dismissed from their position prior to the end of their term, if they do not fulfil the criteria specified within the Directives, or if they are guilty of misconduct under national law. All Member States examined have procedures for dismissal set out in national legislation. Good practices include that dismissal should not be possible on the basis of political motivations only. Some examples of good practices of national rules are:

- **Germany:** According to legislation, the president may be dismissed if there is an important reason, by a decision of the federal government, made at the request of the Federal Ministry for Economic Affairs and Energy, once the Ministry has received the viewpoint of the Advisory Council of the Federal Network Agency. An important reason exists if the President no longer meets the requirements for

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<sup>491</sup> OECD (2016).

the performance of their duties, in particular if (s)he is found guilty of significant misconduct. Before the dismissal procedure is initiated, the president shall be given the opportunity to comment upon the allegations.

**Greece:** According to legislation, a board member can be dismissed if found by the competent disciplinary council to have engaged in actions incompatible with the principles of independence and impartiality which govern the operation of the NRA.

- **Lithuania:** Dismissal grounds are quite clearly formulated in legislation, and the legislative provisions do not include broad or open-ended criteria. For example, a material breach must relate to the requirements or regulations of the office.

Overall, good practice includes having clear grounds for dismissal set out in regulation (thus avoiding vague and ambiguous terms such as “serious breaches of duties”, “serious negligence” etc.). Further, there could be a prerequisite of some sort of judicial pronouncement as to whether a breach has taken place (rather than being left to the Government, as it tends to be the case).

### *Conflict of interest provisions (including restrictions on pre- or post-employment)*

Independence from market operators is important and can be achieved via adequate conflict of interest provisions, such as preventing financial interests in energy companies and cooling on/off provisions for staff members moving from to regulated energy companies. Furthermore, provisions to inhibit political affiliation of board members can bolster the political independence of the regulator. All examined Member States have legal provisions in place to avoid conflicts of interest for board members; some Member States (Bulgaria, Greece, Spain, France, Hungary, Lithuania) have specific rules on post-employment in their legislation and none of the examined Member States have pre-employment restrictions in the legislation.

Usually, these rules prevent the president and board members from for example: participating in public procurement procedures launched by the NRA, engaging in private professional activities related to regulated sectors and the activities of the NRA, or benefiting from any work assignments, consultancy remuneration or share in the capital of energy undertakings. The time limits for these rules range from one to three years after the end of the term or dismissal.

Good examples of conflict of interest provisions would include clearly formulated requirements. For example, in **Croatia**, the legislation comprises extensive conflict of interest provisions for members of the board, including prohibitions from having ties with the energy industry (via stocks, share, material interests). This was further confirmed by one stakeholder<sup>492</sup> who referred to the one year cooling-off period for board members and that they are not allowed to have personal *or* family interests in the energy industry.

Another example is **Romania**. Legislation includes detailed provisions for conflict of interest of the members of the NRA Regulatory Committee. Further, ANRE has set up a code of conduct as a response to an anti-corruption investigation. This has been a good starting point for a guideline for staff members. However, as many former ANRE staff members now work in the regulated industry, ethical issues might continue to arise in practice.<sup>493</sup>

### *5.3.2. Adequacy of human and financial resources*

#### *Adequacy of staff*

The Directives outline that Member States must ensure that the regulatory authority has adequate human resources to carry out its duties. This is crucial for two reasons. Firstly, an NRA must be able to properly complete its core duties and provide adequate regulation of the energy sector. Secondly, for a regulator to act independently, it should

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<sup>492</sup> Out of the 8 stakeholders providing answers for Croatia.

<sup>493</sup> Eastern Partnership Civil Society Forum (2017), National Energy Regulators: A Comparative Assessment. Romania, Georgia, Ukraine and Moldova.

be able to attract and retain high-level experts, who can act autonomously and are not vulnerable to undue influence from political or market players.

Good practices in this respect include NRAs which can autonomously determine their human resources management, including setting staff salaries at a level which is in line with the levels applied in the regulated energy sector. Some examples:

- **Austria:** According to legislation there are no headcount caps for the NRA. Further, the regulator has a large level of flexibility to determine the salary levels of its staff, though is subject to certain budgetary constraints. The field research clearly denoted Austria as having adequate staff, with the regulator being flexible to decide its number of staff and their wage levels.
- **Hungary:** According to the law, staff expenditure takes precedence over other expenditures and the NRA can determine the number of staff by itself. Further, according to the law, the government is not involved in fixing the wages of staff. In practice, it was mentioned that the NRA can adjust the base salary for 20% of its staff which empowers the NRA to pay more competitive wages compared to other public institutions in Hungary. It was confirmed by the field research that the regulator has full, independent, control over the number of staff they hire.
- **France:** According to the law, there is no governmental intervention in fixing of wages for the French NRA. However, according to the legal assessment, there is a headcount cap. Furthermore, stakeholders estimate that the staff is competitively remunerated which provides the regulator with competent staff.

We notice that in practice the government or ministry is often involved in staff recruitment procedures, which may expose the NRA to political influence. Good practices in this regard include Member States which provide their NRA the legal right to determine its own human resources' needs and to set up specific recruitment procedures based on qualification standards related to the required expertise and experience. Examples of identified good practices include:

- **Austria:** According to the law, the government is not involved in staff recruitment: The NRA management can autonomously hire and conclude employment contracts for staff members. Legally, senior staff employment contracts and conditions are subject to approval by the Supervisory Board.
- **France:** According to the law, the government is not involved in staff recruitment but rather the appointment of NRA staff is endorsed by the NRA's president. Legally, the recruitment procedure for personnel is managed by the NRA itself. Stakeholders highlighted the NRA has no issues in the recruitment procedure and manages to hire highly skilled staff.
- **Croatia:** According to the law, the government is not involved in staff recruitment. The Act on Regulation of Energy Activities explicitly notes that the



regulator should have professional staff for its core tasks, and that such staff should be appointed and relieved of duty by the President of the Management Board. Legally, recruitment is based on a public tender, for a mandate of four years with the possibility of reappointment. The field research further pointed towards the fully independent recruitment of staff. However, it is important to note that it was stated that, on occasion, the government attempts to intervene on this issue, currently to no avail.

- **Romania:** According to the law, the government is not directly involved in staff recruitment and specialised staff is required to meet specific criteria including three years of relevant experience.<sup>494</sup> The Regulation on the organization and functioning of the NRA states that all appointments are based on competitions organised by order of the president of the NRA. Nonetheless, there is a headcount cap.
- **Hungary:** According to the law, the government is not involved in staff recruitment, but rather NRA employees are selected via open competition (with the exact terms determined in the internal rules of the NRA). This was confirmed by the field research where the appointment of the staff was fully (and independently) carried out by the regulator.

#### *Adequacy of financial resources*

Having an independent budget and financing of the NRA and autonomy to use the budget, are regarded as key factors to ensure NRA's effectiveness and independence.

NRAs, according to the relevant Directives, should have separate annual budget allocations and autonomy in the implementation of the allocated budget. NRAs representing good practices in this regard are those which have effectively a separate budget and are financed independently from the state. The determination and approval of the NRA budget by its own organs (e.g. approval by its Supervisory Board in Austria), rather than NRA's budget setting by the government or parliament (which is the case in several other countries) can be considered a good practice. An alternative could be that the NRA Board advises the government or parliament on the required budget, and that the political authorities must duly motivate any adjustment of the budget proposed by the NRA.

Below we highlight some identified good practices in this regard; we note that in most cases, there is nonetheless some kind of political intervention in NRAs' budget setting and financing:

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<sup>494</sup> In the electricity, heat and gas sectors or in regulatory activity.

- **Greece:** According to the law and the field research, the NRA budget is financed solely by market participants. The *de jure* analysis states that the NRA has its own resources from fees approved by the government on proposal of the NRA (e.g. fees due by energy companies for applications, licenses and certifications), other funding<sup>495</sup>, and subscriptions from persons attending its conferences or similar events. Although the budget of the NRA is administratively attached to the budget of the Ministry of Environmental Affairs, Energy and Climate Change, the NRA approves its own budget.
- **Hungary:** According to the law and the field research, the NRA is financed by its own revenues generated from supervisory and administrative service fees and fines<sup>496</sup> (though the State manages and allocates the funds). Legally, the Government submits the budget proposal, which is debated and accepted by the Parliament – the field research indicated that the budget has always been accepted.
- **Austria:** According to the law, the government / parliament does not intervene in approval of the NRA budget. According to the *de jure* analysis, the budget is prepared by the Management Board of the NRA and is then approved by the NRA's Supervisory Board chaired by an independent person. This was confirmed by the field research that further noted that there are no spending reviews of regulator's budget.

Good practices in this respect should also include that NRA budget restrictions through general political measures, such as ex-post cuts or overall restrictions set by law are avoided. Such political interventions have been identified in several Member States (Austria, Czech Republic, Greece, Croatia). The possibility the **German** NRA has to apply for an increase of its budget on the basis of a thorough motivation can also be considered a good practice

Providing a multi-annual budget or range within which the budget can vary over a longer period can be considered as a good practice since it provides the NRA with the certainty on the availability of financial resources that are necessary to execute a long-term strategy and multi-annual plan.

Regarding annual accounts, good practices include that NRA's annual accounts are audited by a competent body and that both the accounts and audit report are published and submitted to the parliament. In **Croatia**, for example, according to the legislation, HERA must submit a report on its financial operations to the Parliament/Government and publish it in the NRA's bulletin (in Croatian and in English) after approval. It is

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<sup>495</sup> Including subsidies, grants and funding for research.

<sup>496</sup> The rates and collection procedures of these fees are determined by the NRA.

however unclear from the field research whether the NRA accounts are audited by an external competent body.

### *5.3.3. Effectiveness conducting core tasks*

#### *Setting of grid tariffs and/or methodologies*

The Directives require that NRAs fix or approve transmission and distribution grid tariffs or their methodologies.

Since in a majority of Member States, the principles or guidelines for tariff setting are determined in a rather detailed way in legislation and/or the government can intervene in the tariff setting process, it is difficult to identify good practices in this domain. Moreover, several of the Member States examined still apply regulated end-user prices; tariff setting can in these Member States hence in general not be considered as a best practice.

In **Bulgaria**, the NRA must in its tariff setting process respect rather detailed principles endorsed in legislation (energy act). In the **Czech Republic**, the legislation provides that the NRA defines the conditions and criteria for tariff regulation<sup>497</sup>, according to regulatory principles and pricing methods defined in a document called the Principle of Price Regulation. Similarly, in **Lithuania**, the legislation does not set out the criteria in detail, beyond the general need for non-discrimination. Everything else is left to the discretion of the NRA, which sets out the criteria in its published methodology. These are examples of the legal framework leaving as wide a degree of discretion as possible to the NRA.

#### *Complaint handling*

NRAs, according to the Directives, should have the competence to act as a dispute settlement authority or arbitrator in relation to conflicts between market players. The current practices in the Member States examined comply with this provision.

Good practices in this regard include France and Germany, where adequate rules and instruments tools are in place to address complaints:

- **France:** According to the law and the field research, a separate independent body within the NRA is responsible for settling disputes between operators and users about the access to public electricity and gas networks and their use, and for imposing sanctions or penalties for infringements of the Energy Code. This body is called "CoRDIS" (*Comité de règlement des différends et des sanctions*) and is composed of 4 members (2 Councillors of State and 2 Councillors at the Cassation Court) appointed for a term of six years, non-renewable.

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<sup>497</sup> Section 19a (9) Energy Act.

- **Germany:** According to the legislation, the national dispute settlement body initiates a procedure on request and a decision of one of the NRA's decision-making chambers shall be made within four months upon receiving the request. Furthermore, in practice, court cases are factored into the regulator's operations. When drafting a decision, the responsible chamber holds intensive discussions which adequately prepares them for possible complaints.

If the NRA acts as a dispute settlement body, the procedures should be known and transparent. In this regard, for some NRAs explicit reference is made to general Administrative Law procedures (Czech Republic, Spain) or specific rules regarding dispute resolution procedures (Lithuania).

Another good practice is the determination of specific time schedules for handling disputes. Most Member States do provide specific time schedules, which vary from 30 days to 3 months, or use a general statement, for instance that 'provisions should be resolved in a quick and binding fashion'. Provisions that provide market parties with certainty and trust in the NRAs and their role as a dispute settlement body, can be considered as good practices. Reasonable time schedules for complaint handling are part of it; some examples as determined in the legislation (which are in line with Article 37(11) of the 2009 Electricity Directive):

- **Hungary:** the NRA must inform the interested party of the measures taken in relation to the complaint in writing, at the latest 30 days from submission.
- **Bulgaria:** the NRA should facilitate an amicable settlement of the dispute within two months from submission of the complaint.
- **France:** In principle CoRDiS makes a decision to resolve disputes within 2 months. This timeframe can be extended to 4 months if deemed necessary.

Finally, transparency with regard to complaints handling is also deemed as a good practice which may lead to improved quality of service. For example, by having a requirement to publish the procedure and also an overview of the complaints on the website and/or in the annual report. The digitalisation process may help to improve the transparency and follow-up. In this regard, the only requirement identified, is in **Austria**, where the NRA must draft and publish online procedural guidelines for the settlement of disputes.

## 5.4. Recommendations

On the basis of our desk and field research, we have not identified the need for major new legal initiatives at EU level (review of existing Directives or new Regulation in view of changed or more detailed legal provisions in EU law regarding independence and effectiveness of NRAs). The existing EU legislation is in general considered as adequate, sufficient and consistent. However, our analysis has shown that the current wording in the Directives (NRAs shall be responsible for "fixing or approving, in accordance with

transparent criteria, transmission or distribution tariffs or their methodologies”) could be clarified i.e that criteria cannot be determined by the government or parliament in such a way that the role and independence of the NRA are jeopardized. Moreover, the NRA should have the final responsibility for both the grid tariffs and their underlying methodology. In order to improve the independence of NRAs, some additional provisions have been included in Article 57 (new) of the Recast Internal Electricity Market Directive, which is currently under discussion in the trialogue concertation.

At the present, national implementation of the current Directives in some EU Member States may not always be fully compliant. Additionally, while EU law may be correctly transposed, it may not be applied (accurately) in practice. Therefore, a stricter screening of national implementation and following up identified inconsistencies or non-compliance with EU law, with formal infringement procedures if necessary, would be appropriate. In addition, detailed guidelines and internal rules of the NRA may be a good way to prevent undue political influence. Further, the adoption by Member States of some of the best practices identified in this report may go some way towards bridging the gap between the current situation in certain Member States and the desired situation.

More specific recommendations are listed in the following sections and have been developed on the basis of the analysis and identified good practices.

#### *5.4.1. Clear determination in legislation of NRA’s roles and independence*

National legislation should include a **clear definition of NRA’s roles**, in particular to avoid interdependencies and overlaps with the energy ministry and to ensure NRA’s institutional independence.<sup>498</sup> The current lack of clarity on roles and functions in some EU Member States, can open the door to undue government interventions in NRA’s operations.<sup>499</sup>

Further, national law should explicitly determine adequate criteria to ensure the NRA’s **independence from politics and from the industry**.<sup>500</sup> In some countries, national law explicitly refers to independence from both public and private bodies, while in others it only includes a small reference (e.g. “refrain from seeking or following instructions”). Clear and extensive rules would be appropriate in the legislation of all Member States.

Member States should correctly implement the Third Package requirements and NRAs should be consistently given the power to issue final and binding decisions that are not subject to ministerial or governmental scrutiny.<sup>501</sup>

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<sup>498</sup> ACER (2016).

<sup>499</sup> OECD (2016).

<sup>500</sup> CEER (2016); CERRE (2012).

<sup>501</sup> CEER (2016).

NRAs should rather be accountable towards national parliaments and not to governments.<sup>502</sup>

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<sup>502</sup> ACER (2016).

#### 5.4.2. Adequate human and financial resources

Several sources, including ACER and stakeholders, mention that NRAs should have adequate human and financial resources (in line with their tasks) to ensure financial and operational independence.<sup>503</sup> Insufficient resources put the regulator's independence at risk<sup>504</sup>, and might also have a negative impact on its effectiveness.

##### *Human resources (HR)*

Most NRAs are at present *de jure* or *de facto* not politically independent in their HR management: the number of their staff members is in some cases politically defined, the NRA cannot always apply its own procedures for hiring personnel, or the NRA cannot apply market-based wages to attract qualified personnel with the required expertise. These rules or restrictions can negatively affect the effectiveness of the NRA and its independence from political or market actors. It would hence be appropriate to enable NRAs to implement the most adequate HR approach and to avoid such political restrictions or interventions in this domain.

Clear rules are necessary for nomination, appointment and dismissal of key staff and board members to ensure NRAs' operational independence.<sup>505</sup> These rules should be enacted in national legislation (including the required qualifications and criteria to avoid conflicts of interest).<sup>506</sup> In the assessed Member States, NRA heads and/or board members are mostly selected and appointed by the government or the parliament, and are therefore often perceived as not being fully independent from political decision makers, in particular if they are candidate for renewal of their mandate. On the basis of literature and findings from the present study, it is recommended that the evaluation of candidates for a mandate of NRA head or board member would be done by an independent panel or external specialised body, on the basis of objective, transparent and published criteria and in an independent and impartial procedure. While the Recast Internal Electricity Market Directive prescribes such a procedure for the board members or top management (in the absence of a board), we consider that such a transparent and external evaluation procedure, based on objective and published criteria, should also be applied for key NRA staff members who are appointed by the board.

Such an independent evaluation should allow for the presentation of a ranked list of suitable candidates, which can be used as a basis for nomination by the board (for key staff members) or by the government and endorsement by the parliament (for board

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<sup>503</sup> The recommendation also mentions that an executive body shall not be allowed to set requirements that could jeopardise the NRA's budgetary autonomy and ability to fulfil its tasks.

<sup>504</sup> ACER (2016).

<sup>505</sup> ACER (2016).

<sup>506</sup> CEER (2016).

members). Such a procedure would bring objectivity to the nomination and hence limit the risk for political dependence. The OECD study (2016) also suggests that, in order to avoid political influence, nomination of board members by an independent panel can help foster independence. NRA heads should be provided with freedom to operate,<sup>507</sup> according to the statutes and guidance provided by the board.

Specified term lengths for mandates of NRA heads and board members should apply, with constraints on re-appointment, and limits on dismissal,<sup>508</sup> also in order to avoid premature dismissals for political motivations. For the same reason, if the legal provisions that refer to the NRA head or that determine the composition of the NRA board are changed, the head/board member in charge should be able to complete his/her term before the changes enter into force.<sup>509</sup>

Applying restrictions on post-employment of staff members prevents the risk of "revolving doors" and conflicts of interest with regulated companies.<sup>510</sup> In order to enable NRAs to attract qualified experts from the energy sector while avoiding conflicts of interest, an adequate cooling off period (e.g. at least 6 months) should apply both for key staff and board members. A short cooling-off period may jeopardise NRAs' independence, while a longer cooling off period may limit interest of highly-qualified candidates from the industry to apply for a mandate (as it narrows post-employment opportunities). At the present, some countries apply rather long cooling off periods. For example, In Italy, there is a four-year cooling off period for the board members of the Telecommunications Regulator (AGCOM)<sup>511</sup>; while in Serbia there is a two-year cooling off period for the chairman, council members and senior staff of the Regulatory authority for Electronic Media to avoid conflicts of interest after the term of office<sup>512</sup> and in Ukraine there is a two-year cooling off period for the Commissioner of the National Energy Regulatory Authority (though there are discussions to limit this to one year).<sup>513</sup> In the audio-visual sector, and ERGA survey showed that the minimum cooling off period for the members of the regulators was six months (United Kingdom) while the longest goes up to three years (Greece, Malta and France).<sup>514</sup>

NRAs should not be subject to political interventions in their HR management, such as headcount caps, and the government or ministry should not be involved in NRA staff

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<sup>507</sup> European Court of Auditors (2015).

<sup>508</sup> CERRE (2012).

<sup>509</sup> CEER (2016).

<sup>510</sup> OECD (2016).

<sup>511</sup> OECD (2013), *Principles for the governance of regulators*. Public consultation draft. 21 June 2013.

<sup>512</sup> Irion, K., Ledger, M., Svensson, S, and N. Rsumovic (2017), *The independence and functioning of the Regulatory Authority for Electronic Media in Serbia : An assessment using the INDIREG methodology*.

<sup>513</sup> Energy Community (2018), *The National Energy Regulatory Authority of Ukraine: Governance and Independence. An Energy Community Secretariat Review*.

<sup>514</sup> ERGA (2015).



recruitment and salary-setting.<sup>515</sup> NRAs should be allowed to use their budget as they see fit. There should be no restrictions on the regulator's staffing policy, as long as it stays within its budget.<sup>516</sup>

Increasing the quality of staff, by hiring additional expertise or retaining existing key staff, can be an appropriate measure.<sup>517</sup>

### *Financial resources*

Most NRAs are vulnerable to *de facto* influence from political authorities as their budget is set or approved by politicians, and their financing is partly or fully provided by the state budget. In order to avoid that such political interventions negatively affect their independence or effectiveness, NRAs should be empowered to define their own budget, and to ensure their financing via fees included in the grid tariffs. NRA budgets should be separated from the general state budget and be controlled by the NRA itself.<sup>518</sup> Having in place a politically determined headcount cap appears not to be in line with the objective of the Directive since it limits the autonomy for the NRA to decide upon the use of its budget, and hence its political independence. Member States could be advised accordingly through EC guidance, for example by adding this recommendation to the Interpretative Note.

An *ex ante* annual control of the NRA's budget by the parliament would be appropriate, while an *ex post* control of the NRA financial accounts should be performed by a competent body (public audit office or independent auditor). The government should not have an active role in this process<sup>519</sup>; the audit report should be submitted to the Parliament.

Moreover, a benchmark at EU level could be organised regularly, for instance every three years, to compare and evaluate the individual NRA budgets, taking into account differences in national cost levels (e.g. salaries, rents), the scope of the NRAs' tasks and the complexity of their regulation. Such an initiative could be taken up either by the Commission, CEER or ACER. Each of these alternatives has different strengths and drawbacks; for example, if the Commission is responsible it can establish a more ambitious benchmark and give it more weight while if CEER is responsible it is more likely to set a less ambitious benchmark but gain consensus across the NRAs. More specifically, with regard to staff salaries, it is suggested to perform regular assessments

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<sup>515</sup> CEER (2016).

<sup>516</sup> CEER (2016).

<sup>517</sup> The future of electricity distribution regulation, Nillesen, P.H.L, 2008, Chapter 3. Available at: [https://pure.uvt.nl/portal/files/1042517/Final\\_Version\\_Thesis.pdf](https://pure.uvt.nl/portal/files/1042517/Final_Version_Thesis.pdf) This chapter was published as an article in The Electricity Journal in 2008, see Nillesen, P.H.L. (2008), A Different Perspective on Energy Network Regulation: An International Survey of Regulation Managers, The Electricity Journal, vol. 21, pp. 79-89.

<sup>518</sup> CERRE (2012).

<sup>519</sup> CEER (2016).

of the terms and conditions for NRA employees, and to assess whether the employment conditions allow to attract and retain the right staff. This could be done by comparing the actual remuneration levels to benchmarks that can consist of weighted averages of both the public and private sector on both the salary and secondary employee benefits like pension schemes. NRAs could also benefit from having a Supervisory Board that is responsible for the establishment of specific staff salaries.

The budgetary autonomy of the NRA should be safeguarded at all stages and in all types of processes. NRAs should be allowed to use their budget as they see fit. There should be no restrictions on the regulator's staffing policy, as long as it stays within its budget.<sup>520</sup>

It is suggested that NRAs have long term supervisory objectives and execute a multi-annual agenda. In order to enable NRAs to adequately invest in e.g. data handling systems and high-level staff, it is recommendable to allocate NRA budgets on a multi-annual basis or to allocate yearly budgets within a multi-annual range.

#### *5.4.3. Recommendations regarding effectiveness in conducting core tasks*

##### *General aspects & transparency*

An important safeguard to protect NRAs from undue influence is by ensuring a high level of transparency by publishing the outcome of NRA meetings with third parties as well as NRA decisions with their reasoning and justification and by organising open consultation procedures. In addition, NRAs should adopt clear rules for their various procedures and publish them. NRAs should adopt and implement a clear and transparent consultation policy.<sup>521</sup> Information on regulatory proposals, decisions and complaints can be published on the official website of the NRA, preferably also accessible in English. Rule-making and tariff-related decisions should preferably also be published in the official gazette of the government/parliament. Transparency also requires that the NRAs have clear contact points for all stakeholders and publish information on their own organisation and structure.<sup>522</sup>

Generally, NRAs also have judicial or quasi-judicial powers such as setting fines and penalties for non-compliance or acting as an arbitrator in disputes among industry participants.<sup>523</sup> These procedures should also be clearly published in order to avoid arbitrary or discriminatory actions; fines and penalties should be proportionate.

##### *Grid tariffs and methodologies*

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<sup>520</sup> CEER (2016).

<sup>521</sup> CEER (2016).

<sup>522</sup> ERRA (2015).

<sup>523</sup> P. Capros (2003).

In several EU Member States NRAs do not have the full responsibility for grid tariff setting, either due to inadequate national legislation (e.g. tariff methodology defined by law), due to improper intervention of the government in this domain or due to the existence of regulated end-user prices, which are in some cases not set by the NRA.

NRAs should have the full responsibility for grid tariff setting. Governments should not retain regulatory powers or impose on NRAs methodologies for setting tariffs that could favour certain market participants.<sup>524</sup>

### *Possibility to challenge NRA decisions*

There should be effective arrangements for interested parties to challenge or appeal NRA decisions.<sup>525</sup> According to our assessment, this is currently not a critical issue, except in the Czech Republic and Hungary, where there does not seem to be provision for a review by an independent body, aside from an ultimate appeal to the constitutional court, and Croatia, where the appeal is currently to the Ministry.

If an NRA is involved as dispute settlement body or arbiter/mediator, it would be preferable that such a complaint is handled by a dedicated staff member within the NRA, who is empowered to act independently of other staff and reports directly to the board.

All Member States assessed have appeal procedures in place. It is unclear, however, to what extent appellate bodies are equipped to deal with highly technical issues like tariff regulation. Where needed, appropriate training of such bodies in order to prepare them to handle and decide on such complicated issues would be advisable.

### *Cooperation and formal relationship between NRA and other regulators (such as competition authorities)*

Despite the exact wording in the 2009 Directives that each Member State should appoint a single NRA, it is less clear what scope this NRA should have. Some Member States have decided to opt for a single NRA supervising several regulated sectors as well as fair competition, others make use of several NRAs (or at least an energy NRA) and a separate competition authority. While the NRA (and its board and key staff) is not permitted to take instructions from any government or public or private entity, it needs of course to cooperate with other regulators, such as competition authorities. This leads to some discrepancies and to the question of the relationship between those authorities. It might be appropriate to further assess this issue, and to evaluate the pros and cons of different organisational models on the basis of current practices across the EU. This analysis could offer useful input that can serve as a basis for elaborating good practices and/or further guidance for Member States. It could consider, inter alia, whether the signing of memoranda of understanding between regulators could be

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<sup>524</sup> European Court of Auditors (2015).

<sup>525</sup> P. Capros (2003).

effective, or the possibility of clarifying for stakeholders the relationship and interaction between regulators, in order to ensure that stakeholders are aware of how decisions relating to overlapping areas of competence are taken.

### *Cross-border and EU cooperation*

A recommendation mentioned in the literature review (see sub-section 2.1) and also suggested by eight stakeholders<sup>526</sup> is to enhance the role of ACER:

1. ACER could be empowered to ensure that regional cooperation between NRAs and TSOs promotes effective target delivery of 2030 climate and energy targets;
2. The Commission could also consider whether to provide for regulatory oversight on a regional level, for instance through regional groupings of NRAs within, or overseen by, ACER;
3. More robust arrangements for overseeing and ensuring independence of NRAs, through a stronger ACER role and/or increased requirements to ensure adequate practical implementation, could be considered;

It might also be appropriate to assure that ACER has the necessary powers to obtain from key institutions in the Member States the information it needs to properly carry out the tasks assigned to it.

Some additional roles/power for ACER are already being considered (or have been assessed) as part of the revised ACER regulation proposed in November 2016.

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<sup>526</sup> However, four of these stakeholders noted that this should be done cautiously, to ensure a balanced institutional framework.



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