



POLICY GUIDELINES

by the Energy Community Secretariat

on the Independence of National Regulatory Authorities

PG 02/2015 / 28 Jan 2015



1. Purpose

The Energy Community *acquis communautaire* establishes national regulatory authorities (hereinafter “NRA(s)”) as independent institutions. In particular the Third Energy Package puts increased emphasis on regulatory independence as main issue for reform.

When assessing the compliance of the Contracting Parties with their obligations in this area of the Energy Community *acquis communautaire*, the Secretariat will follow the present Policy Guidelines. Their publication on the Energy Community website ensures transparency.

The present Policy Guidelines are without prejudice to the interpretation of Energy Community law in accordance with the case law of the Court of Justice of the European Union or guidance given by the Ministerial Council under Article 94 of the Treaty.

2. Policy Guidelines

2.1. Functional and political independence

According to Article 35 (4) lit a Directive 2009/72/EC and Article 39 (4) lit a Directive 2009/73/EC, the NRA must be legally distinct and **functionally independent** from any private or public entity, including the head of state, national, local or regional government, ministries, municipalities and political organizations or structures. This clearly rules out subordination of the NRA to any public institution as well as NRA establishment and / or liquidation by any public entity; establishment and liquidation of the NRA is an exclusive responsibility of the legislator and must therefore solely origin from legislation.

NRA staff and management shall **act independently**. This means that NRA staff and management shall not seek or take direct instructions from any public or private entity (Article 35 (4) lit b Directive 2009/72/EC, Article 39 (4) lit b Directive 2009/73/EC). At the same time this implies the prohibition for anyone to *give* such instructions. An “instruction” would in this context typically mean any action that tries to influence regulatory decision making by using pressure of any kind on NRA’s staff or management.

The NRA must be empowered to **take autonomous decisions**, independently from any political body (Article 35 (5) lit a Directive 2009/72/EC, Article 39 (5) lit a Directive 2009/73/EC). This does not only exclude any *ex ante* interference but also requires that decisions of the NRA are immediately binding and directly applicable without the need for any formal or other approval or consent of another public authority or any other third parties. NRA decisions cannot be subject to review, suspension or veto by the government, a Ministry or a committee (or similar body) related to any of them.

This precludes neither **judicial review** nor parliamentary supervision nor appeal mechanisms before independent bodies (Directive 2009/72/EC recital 34; Directive 2009/73/EC recital 30). On the contrary, Article 37 (16-17) Directive 2009/72/EC and Article 41 (16-17) Directive 2009/73/EC requires “*decisions taken by regulatory authorities [to] be [...] justified to allow for judicial review*” and oblige “*Contracting Parties [to] 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*”. The supervision of regulators by parliaments is admissible, but should be limited to very few formal items, organised in a highly formalised manner, aiming to reduce (party) political or individual influence on the review of the performance of the regulator in carrying out its legally required tasks.

The independence requirements of the Third Package do not in principle limit the government in establishing its **national energy policy** within which the NRA must operate, e.g. concerning security of supply, renewables or energy efficiency targets. This, however, shall not result in interventions in the NRA's autonomy. While, e.g., a general policy commitment towards the support of renewable energy sources would be uncritical, the definition of a specific support level must be seen critical in case setting of support fees is a competence of the NRA.

Autonomous decision making must be also safeguarded in a broader context: the NRA must be guaranteed autonomous development of its **work programme** without a need for approval or consent of public authorities or any other third parties. It also has to be the sole responsibility of the NRA to determine how it operates and is managed, including staffing-related matters.

NRA staff and management – irrespectively of whether holding full-time or part-time positions – shall **not hold any position** or office with an electricity or gas undertaking, hold shares or have any other related interests in an electricity or gas undertaking. Ideally this also entails a certain cool-off phase after termination of management positions at the NRA; a period of two years seems adequate.

NRAs shall exercise their powers **impartially and transparently** (Article 35 (4) Directive 2009/72/EC, Article 39 (4) Directive 2009/73/EC). *Impartiality* requires the NRA to act and take decisions in a neutral way, based on objective criteria and methodologies. *Transparency* at minimum requires the NRA to adopt and publish their rules of procedure including at least the decision making procedures; publish information on their organisation and structure; and consult stakeholders before taking important decisions. In this context Article 37 (16) Directive 2009/72/EC and Article 41 (16) Directive 2009/73/EC requires that “*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.*”

Impartiality must be the guiding principle behind political independence, and should further be promoted through appropriate **sanctions** in case of any form of political influence exerted towards the regulators.

2.2. Financial independence

According to Article 35 (5) lit a Directive 2009/72/EC and Article 39 (5) lit a Directive 2009/73/EC NRAs must have a **separate annual budget** with autonomy in its implementation. This does in principle not exclude that the NRA's budget is part of the state budget to the extent there is a clear separate annual budget line for the NRA. Certainly, a more clear-cut approach would entail funding of the NRA's budget from levies. A solution combining both approaches would include the NRA's budget in the state budget but finance it from levies collected by the NRA based on autonomous calculation of its budgetary needs.

To this extent, **approval of the NRA's annual budget** by the parliament does not necessarily constitute an obstacle, provided this is not influencing the NRA's priorities or otherwise intervening into the powers and duties of the NRA (Directive 2009/72/EC recital 34; Directive 2009/73/EC recital 30). Powers going beyond formal approval and allowing for cutting the proposed NRA budget represent an undue limitation of the NRA's financial independence. In this context also careful reflection of the link between political and financial independence is needed: approval of the NRA budget by a Ministry, the government or a committee (or similar

body) related to any of them does not meet political independence requirements adequately.

In any case the NRA needs to be granted **certainty on its annual financial resources**. Where national legislation requires approval of the NRA budget, such needs to be provided well in advance of the start of the NRA's budgetary year; a minimum lead period of two months seems adequate to allow for the NRA's resource planning. After expiry of a reasonable review period, lack of on-time approval should lead to automatic acceptance of the budget.

Article 35 (5) lit a Directive 2009/72/EC and Article 39 (5) lit a Directive 2009/73/EC requires Contracting Parties to equip the NRA with adequate **human and financial resources** that allow the NRA to carry out its duties and exercise its powers in an efficient and effective manner. In this context, independence also needs to be perceived in terms of NRA **staff appointment**. It needs to be the right of the board to freely decide on staff hiring and dismissal as well as on the number of staff required for performing the regulatory duties. The appointment of board members shall follow a transparent procedure which is best guaranteed via public vacancy announcement and evaluation of applicants by an independent committee of neutral experts. Direct appointment by the Minister in charge, government or head of state without prior involvement of externals is critical in terms of political independence.

NRAs must be able to attract sufficiently qualified staff to execute its responsibilities in a meaningful way. This can only be guaranteed if also **salary levels** are sufficiently attractive. NRA staff salaries should consequently orientate on those of the regulated industry. It derives from the NRAs' independence in using its budget that the Board must be free in deciding on staff salaries. Evidently, the Board members' salaries should not be defined by the Board itself but an independent institution, e.g. the Parliament. Board member salaries should be linked to comparable (independent) public bodies (e.g. central banks or supreme courts) or, in case management salary levels in the regulated business are higher, to those. Board member salaries should be published. Independence of the management is best guaranteed if its salaries are fixed for the period of the management member's term in office. In terms of equality it is recommendable that salaries of all Board members are the same, with the possibility of a higher salary for the chairperson.

2.3. Functional independence

According to Article 35 (5) lit b Directive 2009/72/EC and Article 39 (5) lit b Directive 2009/73/EC the **members of the board** of the NRA or, in the absence of a board, the regulatory authority's top management shall be appointed for a fixed term of five to seven years, renewable once. Board members that have been appointed before the transposition of the Third Package shall be allowed to finish their term to the extent it does not last longer than seven years.

The same legal provisions also require an appropriate **rotation scheme** for the board or the top management. This means that the end date of the term of office of the board members cannot be the same for all members.

Article 35 (5) lit b Directive 2009/72/EC and Article 39 (5) lit b Directive 2009/73/EC limits the reasons for **dismissal** of members of the board or, in the absence of a board, members of the top management to the cases of non-compliance with respect to the independence or impartiality of the NRA or misconduct under national law; the latter should be limited to special cases only, such as fraud or bribery.

Independence of the NRA management is at risk where after the **expiry of a board member's term** this post is for a longer time either not filled or filled by the previous board member without renewal of mandate. The first case negatively tightens the NRA's decision making procedures in relation to voting majority requirements. The (legitimate) interest of Board members for renewal of their expired term, on the other hand, carries the risk of increased exposure to political intervention. This problem is of course less valid the more transparent, neutral and uncoupled the management appointment procedure is. In any case legislation should determine a reasonable limited time period for replacement of expired Board members.

Vienna, 28 January 2015



Janez Kopač
Director