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EUROPEAN COMMISSION

Brussels, 22 January 2010

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**

THE REGULATORY AUTHORITIES

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THE REGULATORY AUTHORITIES

1. INTRODUCTION

The new Electricity¹ and Gas Directives² have introduced a new set of rules with regard to the national regulatory authorities (NRAs). Article 35 of the Electricity Directive and Article 39 of the Gas Directive enhance the independence of regulatory authorities. In addition, Articles 36 and 37 of the Electricity Directive and Articles 40 and 41 of the Gas Directive provide for NRAs to be assigned new objectives, duties and powers.

This note provides further information to guide the implementation of measures in the new Electricity and Gas Directives relating to the NRAs. It will outline the increased independence of NRAs as well as the new duties and powers of regulators. It will also touch upon complaints and legal actions against a decision by the regulator and the accountability of the regulator.

The present note sheds light on the Commission's services understanding of how these provisions of the Electricity and Gas Directives are to be interpreted. The note aims to enhance legal certainty but does not create any new legislative rules. In any event, giving binding interpretation of European Union law is ultimately the role of the European Court of Justice. The present note is not legally binding.

2. DESIGNATION AND INDEPENDENCE OF THE REGULATORY AUTHORITY

2.1. Designation of a single regulatory authority

Article 35(1) of the Electricity Directive and Article 39(1) of the Gas Directive stipulate that: *'Each Member State shall designate a single national regulatory authority at national level'*. It is clear that under the new legislation all missions and duties listed in the Electricity and Gas Directives and Regulations³ have to be assigned to a single national regulatory authority.

Whereas the wording of the second Electricity and Gas Directives allowed the designation of several regulatory authorities in one Member State, this is not possible anymore under the

¹ Directive 2009/72/EC of the European Parliament and the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 14.8.2009, p. 55).

² Directive 2009/73/EC of the European Parliament and the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14.8.2009, p. 94).

³ Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (OJ L 211, 14.8.2009, p. 15) ('Electricity Regulation'); Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OJ L 211, 14.8.2009, p. 36) ('Gas Regulation'); Regulation (EC) No 713/2009 of the European Parliament and the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ L 211, 14.8.2009, p. 1) ('the Agency' and 'the ACER Regulation').

new Electricity and Gas Directives. It is therefore no longer possible for a Member State to designate at national level one regulatory authority to deal with one of the regulatory duties listed in the Electricity and Gas Directives (or Regulations), say network tariffs, and a different (regulatory or other) authority to deal with another duty of the regulatory authority. According to the text of the Electricity and Gas Directives, a single national regulatory authority at national level must be entrusted with all the regulatory duties provided for in the Electricity and Gas Directives. This means that the core duties of the NRA can no longer be split between the NRA and the Ministry. However, some monitoring duties can be carried out by another authority (as will be discussed below).

The requirement of having a single national regulatory authority also implies that the same regulatory authority must have the powers to carry-out these duties.

In some Member States, the single national regulatory authority is comprised of several bodies (e.g. board, secretariat or chamber). The new requirement of having a single national regulatory authority does not in principle prevent such a structure. The possibility remains to give certain decision-making powers to one body (e.g. director) and other decision-making powers to another body (e.g. board or chamber). However, such structures all need to be integrally part of the single national regulatory authority entrusted with the duties and powers listed in the Electricity and Gas Directives and Regulations and each of these bodies and structures must meet all the independence requirements of the Electricity and Gas Directives.

Articles 35(2) of the Electricity Directive and 39(2) of the Gas Directive stipulate that: *‘Paragraph 1 ... shall be without prejudice to the designation of other regulatory authorities at regional level within Member States, provided that there is one senior representative for representation and contact purposes at Community level within the Board of Regulators of the Agency in accordance with Article 14(1) of [the ACER Regulation]’*. By regional level should be understood a specific region at infra-national level within a federal Member State or an autonomous region within a Member State. This provision acknowledges the fact that some Member States are federal or decentralised States with several regions.

Articles 35(3) of the Electricity Directive and 39(3) of the Gas Directive provide for a derogation from Articles 35(1) and 39(1) respectively in the case of small systems on a geographically separate region: *‘a Member State may designate regulatory authorities for small systems on a geographically separate region whose consumption, in 2008, accounted for less than 3% of the total consumption of the Member State of which it is part’*. This could be a regulatory authority within the meaning of the Electricity and Gas Directives and to which appropriate powers and competences could be given. Important in this provision is that the small system must be part of a geographically separate region. The fact that a region has little interconnection with the rest of the country is not itself sufficient to qualify for the derogation. In practice, the requirement of having a small system on a geographically separate region is likely to be met only by islands.

2.2. Independence of the national regulatory authority (NRA)

Articles 35(4) of the Electricity Directive and 39(4) of the Gas Directive provide for the following: *‘Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently’*. These Articles refer to *‘regulatory tasks conferred upon it by [these] Directive[s] and related legislation’*. This

phrase is to be understood as the duties and powers under Articles 37 of the Electricity Directive and 41 of the Gas Directive but also as any other duty of the NRA (e.g. for designation and certification of transmission system operators — TSOs — pursuant to Article 10 of the Electricity and Gas Directives and Article 3 of the Electricity and Gas Regulations).

2.2.1. Impartiality

Member States must guarantee that the NRA exercises its powers and carries out its duties impartially.

Impartiality is aimed at guaranteeing that the NRA acts and takes decisions in a neutral way, based on objective criteria and methodologies. In the view of the Commission's services this requirement means that Member States must provide for dissuasive civil, administrative and/or criminal sanctions in case of violations of the provisions on impartiality.

2.2.2. Transparency

The NRA must also carry out its tasks in a transparent manner. In the view of the Commission's services this means first that the NRAs must adopt and publish their rules of procedure. These should include at least procedures for decision making. Compliance with the transparency requirement also means that the NRAs must have clear contact points for all stakeholders and publish information on their own organisation and structure.

A second aspect of transparency, in the view of the Commission's services, is that the NRAs should consult stakeholders before taking important decisions. This should at least include publishing documents ahead of public consultations and organising public hearings. Preferably this would also include the obligation, for the NRA, to 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.

Thirdly, decisions of the NRA must be made available to the public (cf. below point 5 on accountability). This 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.

2.2.3. Independence

Article 35(4) of the Electricity Directive and Article 39(4) of the Gas Directive spell out in more detail the independence requirements that need to be met by the NRA. Whereas subparagraph (a) refers to the independence of the NRA as an organisation, subparagraph (b) refers to the independence of the NRA staff and persons responsible for its management.

Article 35(4)(a) of the Electricity Directive and Article 39(4)(a) of the Gas Directive

Pursuant to Article 35(4)(a) of the Electricity Directive and Article 39(4)(a) of the Gas Directive, '*the regulatory authority is legally distinct and functionally independent from any other public or private entity*' when carrying out the regulatory tasks conferred upon it by the Electricity and Gas Directives.

This requirement goes beyond the requirement of independence laid down in the second Electricity and Gas Directives⁴, which was limited to the electricity and gas industry. Independence in the new legislation concerns not only the electricity and gas industry but also any other public body (including national, local or regional government, municipalities and political organisations or structures) or private body.

Legally distinct means that the NRA must be created as a separate and distinct legal entity from any Ministry or other government body. This provision is closely linked to the requirement that the NRA should be able to take autonomous decisions.

Obviously, the NRA will have to be created in accordance with the constitutional and administrative rules of each Member State insofar as they are consistent with European Union law. Notwithstanding national administrative rules, it is the sole responsibility of the NRA to determine how it operates and is managed, including staffing-related matters. These provisions thus seem to rule out any hierarchical link between the NRA and any other body or institution. Moreover, the NRA can no longer be part of a Ministry. The Commission's services are of the opinion that e.g. 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 Electricity Directive and Article 39(4)(a) of the Gas Directive.

Article 35(4)(b) of the Electricity Directive and Article 39(4)(b) of the Gas Directive

Article 35(4)(b) of the Electricity Directive and Article 39(4)(b) of the Gas Directive stipulate the following:

Member States shall ensure that, when carrying out the regulatory tasks conferred upon it by this Directive and related legislation, the regulatory authority ensures that its staff and the persons responsible for its management:

- (i) act independently from any market interest;*
- (ii) and do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks. This 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 [...].*

These provisions on the independence of the NRA's staff and persons responsible for their management are key requirements because they are aimed at ensuring that regulatory decisions are not affected by political and specific economic interests, thereby creating a stable and predictable investment climate. The aim of the provision is indeed to guarantee that all staff and the persons responsible for the NRA's management (directors, board members, members of the chamber, etc.) act independently from any market interest (covering both the private and the public sectors) and impartially in the exercise of their powers and the fulfilment of their duties. When taking a decision, NRA's staff and management must not be inclined to take account of considerations other than the general interest.

⁴ 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 (OJ L 176, 15.7.2003, p. 37) and 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 (OJ L 176, 15.7.2003, p. 57).

In the view of the Commission's services, Articles 35(4)(b) of the Electricity Directive and 39(4)(b) of the Gas Directive require Member States to develop rules preventing all staff and the persons responsible for their management from pursuing any activity or holding any position or office with an electricity or gas undertaking, and from holding shares or having any other interests in an electricity or gas undertaking. In the view of the Commission's services, this obligation does not, however, prevent the persons concerned from taking part in e.g. pension funds or similar investment schemes that might among other things hold shares in electricity or gas undertakings.

Apart from the establishment of general rules on the independence of NRA's staff and persons responsible for their management it is important that the assessment of compliance with the independence criteria is done on a *case-by-case* basis. For the NRA's staff, it will be up to the NRA's management or board to do so; for the NRA's management or board, it will be up to the competent authorities of the Member State to do so.

The new independence requirement applies to all staff and persons responsible for their management, independently of whether the staff and management hold full-time or part-time positions within the NRA, as the text of the Electricity and Gas Directives itself does not provide for such a distinction. In practice, the requirement of having to be independent from any private or public entity may make it impossible for NRA's staff or management to work part-time for the regulator and part-time in the private or public sector. E.g. an academic could, at first sight, be qualified to act as an independent non-permanent staff or management or board member; however, if the academic also regularly undertakes studies for the energy sector, this could question whether the required independence from any market interest is met.

The new legislation also prohibits the NRA's staff and the persons responsible for its management from seeking or taking direct instructions from any government or other public or private entity. This provision aims to tackle the situation where someone working for the NRA is seeking or taking direct instructions. According to the Commission's services, this provision also implies that it is forbidden for anyone to give such instructions. An instruction in this context is any action calling for compliance and/or trying to improperly influence an NRA decision and thus includes the use of pressure of any kind on NRA's staff or on the persons responsible for its management. In the view of the Commission's services this requires Member States to provide for dissuasive civil, administrative and/or criminal sanctions in case of violation of the provisions on independence as well as for any attempts by public and private entities to give an instruction or to improperly influence an NRA decision.

The Electricity and Gas Directives do not deprive the government of the possibility of establishing and issuing its national energy policy. This means that, depending on the national constitution, it could be the government's competency to determine the policy framework within which the NRA must operate, e.g. concerning security of supply, renewables or energy efficiency targets. However, general energy policy guidelines issued by the government must not encroach on the NRA's independence and autonomy.

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, such as regulatory authorities at regional level or competition authorities. This follows from the text of the Electricity and Gas Directives concerning cooperation at national and supranational level.

First, Article 35(4)(b) of the Electricity Directive and Article 39(4)(b) of the Gas Directive state that the NRA's independence is '*without prejudice to close cooperation, as appropriate, with other relevant national authorities*'. In practice this allows cooperation between the NRA and national competition authorities and, if the case may be, regional regulators. In order to prevent one authority encroaching on the competences of the other authority, Member States should provide for clear arrangements governing cooperation between the different authorities. These arrangements should ideally cover the possibility, as appropriate, to exchange confidential information and provide for the duty to consult the other authority or to ask the other authority for advice.

Second, Article 37(2), second subparagraph of the Electricity Directive and Article 41(2), second subparagraph of the Gas Directive state that '*while preserving their independence, without prejudice to their own specific competencies and consistent with the principles of better regulation, the regulatory authority shall, as appropriate, consult transmission system operators and, as appropriate, closely cooperate with other relevant national authorities when carrying out the duties ...*'

Finally, the Electricity and Gas Directives provide for a duty to collaborate on cross-border issues. Pursuant to Article 38(1) of the Electricity Directive and Article 42(1) of the Gas Directive, NRAs have the duty to closely consult and cooperate with each other and with the Agency, especially on cross-border issues. This provision gives the NRA a broad mandate and clear duty to exchange 'any information necessary for the fulfilment of their tasks'. The text of the Directive gives guidance on the exchange of confidential information in this context: the receiving authority must ensure the same level of confidentiality as that required of the originating authority.

According to Article 38(2) of the Electricity Directive and Article 42(2) of the Gas Directive, NRAs shall at least cooperate at a regional level on a certain number of issues. These actions shall, under Article 38(4) of the Electricity Directive and Article 42(4) of the Gas Directive, be carried out in close consultation with other relevant national authorities and without prejudice to their specific competences. Therefore, the NRA must especially be able to exchange confidential information with other authorities, at both national and European level.

The cross-border issues referred to in Article 38 of the Electricity Directive and Article 42 of the Gas Directive can extend to arrangements not related directly to interconnectors but that may affect the interaction of competitive markets.

One of the general objectives of the NRA is furthermore to promote, in close cooperation with the Agency, regulatory authorities of other Member States and the Commission, a competitive, secure and environmentally sustainable internal market.

Article 35(5) of the Electricity Directive and Article 39(5) of the Gas Directive

Article 35(5) of the Electricity Directive and Article 39(5) of the Gas Directive provide for two specific sets of rules aimed at protecting the independence of the NRA. These sets of rules are not exhaustive and cannot in themselves guarantee compliance with the general principle of independence laid down in paragraph 4. They require Member States to ensure that:

- (a) *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; and*
- (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.*

In regard to point (b) of the first subparagraph, 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.

In the view of the Commission's services these provisions imply the following:

- The NRA must be able to take autonomous decisions, independently from any political, public or private body. This has consequences *ex ante* (before a decision is taken) and *ex post* (after a decision is taken). From an *ex ante* perspective, this requirement excludes any interference from the government or any other public or private entity prior to an NRA decision. It also implies that if the NRA is to draft a work programme for the coming year(s), it should be able to do so autonomously, i.e. without the need for the approval or consent of public authorities or any other third parties. As already indicated, this does not discharge the NRA from complying with the Member State's energy policy insofar as it is in accordance with European Union law.

The *ex post* aspect of the requirement of having an NRA being able to take independent decisions means that the 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. Moreover, the decisions by the NRA cannot be subject to review, suspension or veto by the government or the Ministry. This, of course, precludes neither judicial review nor appeal mechanisms before any other bodies independent of the parties involved and of any government (see below point 5).

- The NRA has separate annual budget allocations. In some Member States, the budget of the regulatory authority is paid directly by the electricity and gas consumers (in which case there is a clear separate annual budget allocation). In other Member States, the budget of the regulatory authority is part of the total State budget. The new legislation continues 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.
- 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.

As stated in recital 34 of the Electricity Directive and recital 30 of the Gas Directive, the approval of the budget of the NRA by the national legislator does not constitute an obstacle to budgetary autonomy. The rules on autonomy in the implementation of the NRA's allocated budget should be complied with in the framework established by national budgetary law and rules. The Commission's services are of the opinion 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. 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 practice, the NRA will probably propose to the legislator a draft budget — based on a work programme or similar document. Nothing in the Electricity and Gas Directives prevents national parliaments from taking a decision on whether the draft budget proposed by the NRA is, in total, commensurate with the duties and powers of the NRA.

In the view of the Commission's services it follows from the respective provisions of the Electricity and Gas Directives that 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.

In accordance with the requirement that the NRA exercises its powers transparently, the NRAs must report on the way they spend their budget. Ideally, this reporting will go hand-in-hand with the reporting duty of the regulators under Article 37(1)(e) of the Electricity Directive and Article 41(1)(e) of the Gas Directive: an NRA must report annually on its activity and the fulfilment of its duties to the relevant authorities of the Member States, the Agency and the Commission.

- The NRA has to have adequate human and financial resources to carry out its duties; as the new European Union rules assign considerably more duties and powers to the NRA, this will affect the human and financial resources to be put at the disposal of the NRA. Given the complexity of (energy) regulation, an NRA must be able to attract sufficiently qualified staff with various backgrounds (lawyers, economists, engineers, etc.).
- The members of the board of the NRA are appointed for a fixed term of five to seven years, renewable once. Appointments will have to be made in accordance with the constitutional and administrative rules of the Member State.

In principle, the maximum total term of members of the board of the NRA is two times seven years. However, Member States can opt against the possibility for renewal, in which case the maximum term of office is seven years.

In principle, those members of the board that have been appointed before the new Electricity and Gas Directives have to be transposed by the Member States finish their term of office provided it does not last longer than seven years. The Commission's services are of the opinion that the maximum term of a regulator appointed under the independence requirements of the second Electricity and Gas

Directives (i.e. before 3 March 2011) is 3 March 2018. Ideally, regulators appointed under the independence requirements of the second Electricity and Gas Directives should be the first ones to participate in the rotation scheme provided for under the new Electricity and Gas Directives. If those regulators meet the new independence requirements, there is nothing that prevents them from being appointed under the new Electricity and Gas Directives.

- An appropriate rotation scheme for the board is to be put in place. This means that the end date of the term of office of the board members cannot be the same for all members. This could be achieved for instance when the term of office of half of the members of the board ends mid-way through the term of office of the remaining board members.
- The members of the board may be removed from office during their term only if they no longer fulfil the conditions set out in the Electricity and Gas Directives as regards their independence or have been guilty of misconduct under national law. Although the Electricity and Gas Directives leave room for rules adopted at national or regional level as far as misconduct is concerned, it has to be stressed that the possibility to remove a member of the board during his or her term will apply in special cases only, such as fraud, bribery and breaches of the independence or impartiality of the NRA. Member States will organise appropriate rights of defence for the persons concerned.

When referring to board members, the Electricity and Gas Directives also use the words ‘persons responsible for its management’ and ‘the regulatory authority top management’ i.e. the persons (typically a limited number of people) who, within the NRA, have the power to take decisions.. Therefore the independence requirements for board members apply to those persons within the NRA having the power to take binding decisions (i.e. probably the members of the board of directors or the members of the management board or, in absence of such a board, the top management).

As stated in recital 34 of the Electricity Directive and recital 30 of the Gas Directive, the independence of the NRA precludes neither judicial review nor parliamentary supervision in accordance with the constitutional laws of the Member States.

It is the view of the Commission’s services that the power of Member States to appoint members of the board of the NRA, the power to approve the budget and any measure of accountability set up by a Member State should not result in any instruction being given concerning the regulatory powers and duties of the NRA.

3. GENERAL OBJECTIVES OF THE REGULATORY AUTHORITY

Articles 36 of the Electricity Directive and 40 of the Gas Directive list the general objectives of the NRA; the NRA must take all reasonable measures in pursuit of these objectives, within the framework of its duties and powers. The specific duties and powers that Member States must grant to the NRA are listed mainly in Articles 37 of the Electricity Directive and 41 of the Gas Directive. These two sets of provisions are complementary: whilst carrying out its duties and exercising its powers, the NRA must follow the general objectives assigned to NRAs.

Articles 36 of the Electricity Directive and 40 of the Gas Directive refer to ‘the regulatory tasks specified in this Directive’. The Commission’s services are of the opinion that the general objectives need to be respected by the NRA, also when carrying out duties provided for in Articles other than Articles 37 of the Electricity Directive and 41 of the Gas Directive or duties laid down in the Electricity, Gas or ACER Regulation.

The list set out in Articles 36 of the Electricity Directive and 40 of the Gas Directive has a clear normative value: in carrying out its regulatory duties and exercising its powers, the NRA has the obligation to take all reasonable measures to implement the list of objectives. The objectives should therefore provide general guidance as regards the performance of the duties and exercise of the powers granted to it. It is important to note that the Electricity and Gas Directives give the NRA a clear European mandate: the NRA must promote a competitive, secure and environmentally sustainable internal market for electricity and gas *in the Community*. This will require thoughtful consideration at national level.

However, Article 36 of the Electricity Directive and Article 40 of the Gas Directive do not as such create general competences for the NRA. For example, point (b) on the development of competitive markets does not entail the competence to apply competition rules, which, as a matter of principle, remain the competence of competition authorities; the reference to energy efficiency in point (d) does not create a general competence as regards the promotion of energy efficiency. The objectives listed in Article 36 of the Electricity Directive and 40 of the Gas Directive can only be pursued by the NRA within the framework of its duties and powers under Articles 37 of the Electricity Directive and 41 of the Gas Directive, and without prejudice to the competences of other authorities.

4. DUTIES AND POWERS OF THE REGULATORY AUTHORITY

4.1. Duties of the regulatory authority

Articles 37 of the Electricity Directive and 41 of the Gas Directive are the key Articles that provide for the duties of the NRA. As explained above, they should be understood in conjunction with the general objectives listed in Articles 36 of the Electricity Directive and 40 of the Gas Directive. Some of the duties are to be fulfilled solely by the NRA (core duty); other duties can be carried out by other authorities (see point 4.1.2 below).

Article 37(1) of the Electricity Directive and Article 41(1) of the Gas Directive lay down the list of duties of the NRA, thereby giving it specific competences. These duties constitute a minimum set of competences and Member States may give the NRA additional powers to those specified. This list of duties is substantially longer than the list of issues for which the NRA was responsible under the second Electricity and Gas Directives.

4.1.1. Core duties

List of duties

The list in Article 37(1) of the Electricity Directive and Article 41(1) of the Gas Directive contains a number of core duties of the NRA. These core duties include:

- duties in relation to tariffs for access to transmission and distribution networks: fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies;
- duties in relation to unbundling: ensuring that there are no cross-subsidies between transmission, distribution, liquefied natural gas, storage, and supply activities;
- duties in relation to the general oversight of energy companies: ensuring compliance of transmission and distribution system operators, system owners (where relevant) and electricity or gas undertakings with their obligations under the Directive and other relevant European Union legislation, including as regards cross-border issues;
- duties in relation to consumer protection: helping to ensure, together with other relevant authorities, that the consumer protection measures, including those set out in Annex I, are effective and enforced; publishing recommendations, at least annually, in relation to compliance of supply prices with Article 3; ensuring access to customer consumption data.

Paragraphs 3 and 5 list specific competences (core duties) of the NRA when, respectively, an independent system operator (ISO) or an independent transmission operator (ITO) has been designated.

It is also important to draw attention to Articles 37(1)(d) of the Electricity Directive and 41(1)(d) of the Gas Directive, pursuant to which the NRA must comply with and implement any relevant legally binding decisions of the Agency and the Commission.

Duties with regard to network tariffs

The NRA's core duty as regards tariffs is stipulated in Article 37(1)(a) of the Electricity Directive and Article 41(1)(a) of the Gas Directive: '*fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies*'. The core task of the NRA relating to the approval of network tariffs is, as in the second Electricity and Gas Directives, further specified in specific provisions, in particular paragraphs 6, 7, 8 and 10.

Under Article 37(6)-(7) of the Electricity Directive and Article 41(6)-(7) of the Gas Directive, the NRA must 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 connection and access to national networks, provision of balancing services and access to cross-border infrastructures.

It follows from the text of the Electricity and Gas Directives that this provision gives the NRA the duty of fixing or approving not only network tariffs or their methodologies, but also methodologies used to calculate or establish the terms and conditions for connection and access to national networks, the provision of balancing services and access to cross-border infrastructures.

Under the second Electricity and Gas Directives, it was possible for the NRA to submit the tariff or the methodology for formal approval to the relevant body of the Member State and for the relevant body to approve or reject the draft NRA decision. This is contrary to the

provisions of the new Electricity and Gas Directives, which unequivocally establish that the NRA must be able to take decisions autonomously and that its decisions are directly binding.

As a result, it is now up to the NRA alone to fix or approve either the network tariff or the network tariff methodology. These new provisions give Member States four options as regards the way tariffs for network access and balancing services are established: the NRA fixes the tariffs, the NRA fixes the methodology, the NRA approves the tariffs or the NRA approves the methodology. Recital 36 of the Electricity Directive and recital 32 of the Gas Directive mention that the NRA will fix or approve the tariff or the methodology on the basis of a proposal by the TSO or distribution system operator(s) or liquefied natural gas (LNG) system operator(s), or on the basis of a proposal agreed between those operator(s) and the users of the network. This means that the NRA also has the power to reject and amend such proposal. If the NRA is given the power over the methodology (fixing or approving), it is up to the TSOs to calculate the tariffs (which have to be in line with the methodology approved by the NRA).

The core duties of the NRA as regards network tariffs do not deprive the Member State of the possibility to issue general policy guidelines which ultimately will have to be translated by the NRA into the tariff structure and methodology. However, these guidelines should not encroach on the NRA's competences or infringe any of the requirements of the Electricity and Gas Directives and Regulations. Although a Member State could e.g. issue a general policy guideline with regard to attracting investments in renewables, the Commission's services would consider a rule setting the profit margin in the cost-plus tariff as a prohibited direct instruction to the NRA.

Article 32(1) of the Electricity and Gas Directives require Member States to ensure that the network tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force and that those tariffs, and the methodologies — where only methodologies are approved — are published prior to their entry into force. It would also make sense for TSOs to have to publish the network tariffs.

The new Electricity and Gas Directives also explicitly stipulate that the NRA has the power to fix or approve provisional transmission and distribution tariffs and methodologies (Article 37(10) of the Electricity Directive and Article 41(10) of the Gas Directive).

Another new provision on the NRA's powers regarding tariffs is set out in Article 37(8) of the Electricity Directive and Article 41(8) of the Gas Directive: *'In fixing or approving the tariffs or methodologies and the balancing services, the regulatory authorities shall ensure that transmission and distribution system operators are granted appropriate incentive, over both the short and long term, to increase efficiencies, foster market integration and security of supply and support the related research activities'*. These provisions need to be read in conjunction with the provisions of the Regulations. E.g. on research activities, Article 8(5) of the Electricity and Gas Regulations provide that the annual work programmes of the European Networks of Transmission System Operators (ENTSOs) must contain inter alia research and development activities and that the ENTSOs must adopt research plans on which the Agency provides an opinion. It is therefore important that the duties of the NRA should be coordinated with the Agency.

Duty to ensure compliance with European Union law

Article 37(1)(b) of the Electricity Directive and Article 41(1)(b) of the Gas Directive state that the NRA has the duty of *‘ensuring compliance of transmission and distribution system operators, and where relevant, system owners, as well as of any electricity and natural gas undertakings, with their obligations under this Directive and other relevant Community legislation, including as regards cross border issues’*.

It follows from this provision that, without prejudice to the rights of the European Commission as guardian of the Treaty on the functioning of the European Union, the NRA is granted a general competence — and the resulting obligation — as regards ensuring general compliance with European Union law. The Commission’s services are of the opinion that Article 37(1)(b) of the Electricity Directive, and Article 41(1)(b) of the Gas Directive, are to be seen as a provision guaranteeing that the NRA has the power to ensure compliance with the entire sector specific regulatory *‘acquis communautaire’* relevant to the energy market, and this vis-à-vis not only the TSOs but any electricity or gas undertaking.

4.1.2. *Monitoring duties*

Article 37(1) of the Electricity Directive and Article 41(1) of the Gas Directive lay down a long list of monitoring duties. These duties broadly relate to monitoring access to networks and infrastructure, monitoring markets and the development of competition, and monitoring consumer protection measures.

However, Article 37(2) of the Electricity Directive and Article 41(2) of the Gas Directive read: *‘Where a Member State has so provided, the monitoring duties set out in paragraph 1 may be carried out by other authorities than the regulatory authority. In such a case, the information resulting from such monitoring shall be made available to the regulatory authority as soon as possible.’*

This paragraph thus allows a Member State to decide that the monitoring duties set out in paragraph 1 are to be carried out by authorities other than the NRA. If a Member State chooses to do so, it must guarantee that the information resulting from this monitoring will, as soon as possible, be made available to the NRA. This provision should apply to all information that has been collected during the monitoring performed by that other body: the text of the Electricity and Gas Directives does not limit the obligation to the report or the result of the monitoring exercise. This implies that also confidential information that was collected as part of the monitoring should be given to the NRA; that not only the results of the monitoring (e.g. monitoring report) but also the underlying data and other information should be given to the NRA. According to the Commission’s services, a Member State has to guarantee that the NRA has specific access to all data resulting from the monitoring exercise.

It has to be stressed that on many subjects there is a close link between the core duties of the NRA and the monitoring duties (which can be executed by another body) listed in Article 37(1) of the Electricity Directive and Article 41(1) of the Gas Directive. This is first of all clear from the wording of the Electricity and Gas Directives: in principle the NRA must be responsible for the different monitoring items, unless a Member State has provided otherwise. But secondly, this is clear from what has to be monitored. It is for example hard to imagine how the NRA will be able to fulfil effectively its core duty to ensure that there are no cross-subsidies (Article 37(1)(f) of the Electricity Directive and Article 41(1)(f) of the Gas Directive) without having access to all data resulting from monitoring wholesale and retail

prices (Article 37(1)(i)-(j) of the Electricity Directive and Article 41(1)(i)-(j) of the Gas Directive).

Finally, it is also important to note that, irrespective of the monitoring duties that can be carried out by a body other than the NRA, the NRA, while performing one of its core duties, has the freedom to engage in monitoring activities. This is first of all the case for those issues for which no specific monitoring activities are listed in paragraph 1. An example here is compliance monitoring: the core duty of the NRA to ensure compliance of electricity and gas undertakings with their obligations under the Electricity and Gas Directives and relevant European Union legislation (pursuant to Article 37(1)(b) of the Electricity Directive and Article 41(1)(b) of the Gas Directive) include the possibility for the NRA to monitor these undertakings' compliance with the relevant legislation. But this is also the case for the monitoring issues listed in paragraph 1. If the monitoring duties have been conferred on another body and if the issues that are monitored are closely linked to the core duties of the NRA, then the latter is by no means bound by the monitoring activities of that other body or limited in performing its own monitoring activities. In any case, it would seem prudent for a Member State, if it chooses to assign (some of) the monitoring duties to an authority other than the NRA, to provide for the possibility of having structural collaboration and data exchange between the NRA and the other authority — although of course such collaboration must not affect the independence of the NRA.

4.2. Powers of the regulatory authority

A new key element of the Electricity and Gas Directives is that the NRA is not only given quite extensive duties but also the necessary powers to be able to carry out its duties. Article 37(4) of the Electricity Directive and Article 41(4) of the Gas Directive provide as follows:

Member States shall ensure that regulatory authorities are granted the powers enabling them to carry out the duties referred to in paragraph 1, 3 and 6 in an efficient and expeditious manner. For this purpose, the regulatory authority shall have at least the following powers:

- (a) to issue binding decisions on [electricity and natural gas] undertakings;*
- (b) to carry out investigations into the functioning of the [electricity and gas] 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 [electricity and natural gas] 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 [electricity and natural gas] undertakings not complying with their obligations under this 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. This shall include the power to impose or propose the imposition of penalties of up to 10% of the annual turnover of the transmission system operator or of up to 10% of the annual turnover of the vertically integrated undertaking on the transmission system operator or on the vertically integrated undertaking, as the case may be, for non-compliance with their respective obligations pursuant to this Directive; and

- (e) appropriate rights of investigations and relevant powers of instructions for dispute settlement under paragraphs 11 and 12.*

The powers listed in paragraph 4 are not exhaustive. Member States must generally grant the NRAs the powers enabling them to carry out their tasks in an efficient and expeditious manner. Under recital 37 of the Electricity Directive and recital 33 of the Gas Directive, the NRA should also be granted the power to contribute to ensuring high standards of universal and public service in compliance with market opening, the protection of vulnerable customers, and the full effectiveness of consumer protection measures.

Subparagraph 4(b) empowers the NRA to carry out investigations into the functioning of the electricity and gas markets. The recitals of the Electricity and Gas Directives clarify that the establishment of virtual power plants or gas release programmes is one of the possible measures that can be used by the NRA to implement this power. A virtual power plant or gas release programme is defined as a release programme whereby an undertaking is obliged either to sell or make available a certain volume of electricity or gas or to grant access to part of its generation capacity to interested suppliers for a certain period of time (recital 37 of the Electricity Directive and recital 33 of the Gas Directive). The Commission's services are of the opinion that the reference to virtual power plants or gas release programmes, in the recitals of the Electricity and Gas Directives, is not exhaustive. Also gas capacity release programmes and storage capacity release programmes could in certain circumstances be considered as necessary and proportionate measures to promote effective competition and ensure the proper functioning of the market.

The NRA's investigations might lead it to impose any necessary and proportionate measures to promote effective competition and ensure the proper functioning of the market. These powers are indeed very important for the NRA in order to be able to fulfil its duties. E.g. the NRA must ensure that TSOs and undertakings comply with their obligations under the Electricity and Gas Directives and other relevant European Union legislation; the tools given to the NRA to verify such compliance are listed in paragraph 4(b). Therefore, it appears that the power to carry out investigations is to be seen as a law enforcement power, with all its correlations, such as carrying out inspections on the premises of the TSOs and electricity and gas undertakings.

Moreover, there seems to be a clear link with the NRA's powers to obtain all necessary information. Under subparagraph (c), the NRA can indeed require any information from electricity and gas undertakings relevant for the fulfilment of its tasks. In some cases, the only way for an NRA to verify whether it has all the information it needs for the fulfilment of its tasks (i.e. to make certain that no information is withheld) is to carry out inspections on the premises of the entities concerned. The Commission's services are of the opinion that the powers that Article 37(4) of the Electricity Directive and Article 41(4) of the Gas Directive

grant to the NRA are very similar to those granted to competition authorities. The possibility of imposing a penalty of up to 10 % of a company's turnover supports this view.

Article 37(4)(c) of the Electricity Directive and Article 41(4)(c) of the Gas Directive also imply that it is up to the NRA alone to judge whether the information it asks from the undertaking is relevant for the fulfilment of its duties and powers. In any case, decisions by the NRA are subject to judicial review or appeal mechanisms before any other bodies independent of the parties involved and of any government (see point 5 below).

The powers of the NRA are formulated in a general manner and are thus not limited to or dependent on any of the unbundling options. The Commission's services are therefore of the opinion that the power to impose any necessary and proportionate measures to promote effective competition and ensure the proper functioning of the market can also include the power to require that a TSO makes certain investments.

Article 37(4)(d) of the Electricity Directive and Article 41(4)(d) of the Gas Directive give the NRA the power to impose effective, proportionate and dissuasive penalties on electricity and gas undertakings. Member States have the choice to assign the power to impose penalties to the regulatory authority or to give the NRA the power to propose to a competent court (and not to any other public or private body) that it impose such penalties. This choice made by the European Union legislator has to do with the constitutional system of some Member States where independent bodies cannot impose sanctions themselves. The text of the Electricity and Gas Directives gives the NRA the power, as the case may be, to: impose a penalty on electricity and gas undertakings; impose on the TSO a penalty of up to 10 % of its annual turnover (in case of ownership unbundling and ISO); and impose a penalty of up to 10 % of annual turnover on the vertically integrated undertaking and/or the ITO.

Since all decisions of the NRA have to be subject to judicial review or appeal mechanisms before any other bodies independent of the parties involved and of any government (see point 5 below), the same holds true for the powers given to the NRA under Article 37(4) of the Electricity Directive and Article 41(4) of the Gas Directive. By the same token, the NRA will have to apply stringent procedures respecting the rights of defence of the companies concerned.

It is also important to draw attention to the relevance of these general enforcement powers of the NRA for ensuring compliance of the network codes that will be adopted pursuant to the Electricity and Gas Regulations. In accordance with Article 37(1)(b) of the Electricity Directive and Article 41(1)(b) of the Gas Directive, the NRA must ensure that TSOs and other undertakings comply with their obligations under the Directive and other relevant European Union legislation, including as regards cross-border issues. Where the codes are adopted through the comitology procedure, they will become part of the *acquis communautaire* and, as a consequence, the NRA will be empowered to engage in investigations and to impose fines in case of violations of the codes.

Also, the Agency has the task of monitoring and analysing the implementation of the network codes and guidelines adopted by the Commission (Article 6(6) of the ACER Regulation). This should in principle allow for consistent application and enforcement of the codes by NRAs in the different Member States. Given the fact that both the Agency and the NRAs have specific duties in this respect, appropriate collaboration between the Agency and the NRAs will be

needed. Moreover, the Agency has no enforcement powers of its own and it will therefore have to refer to the NRAs when it comes to enforcing correct and consistent application of the codes.

5. ACCOUNTABILITY OF THE REGULATORY AUTHORITY — COMPLAINTS AND LEGAL ACTIONS

On several occasions, the new Electricity and Gas Directives expressly touch upon the accountability of the NRA. Firstly, Article 35(4) of the Electricity Directive and Article 39(4) of the Gas Directive require Member States to ensure that the NRA exercises its powers transparently. As already indicated above, this means that the NRA needs to be transparent on the way it takes decisions as well as on the way it spends the budget allocated to it. This includes the need to consult stakeholders (e.g. by organising public hearings) before taking important decisions.

Secondly, the NRA must report *‘annually on its activity and the fulfilment of its duties to the relevant authorities of the Member States, the Agency and the Commission. Such reports shall cover the steps taken and the results obtained as regards each of the tasks listed in this Article’* (Article 37(1)(e) of the Electricity Directive and Article 41(1)(e) of the Gas Directive). Although the wording of the Electricity and Gas Directives does not explicitly require the publication of this report, the Commission’s services are of the opinion that it would be contrary to the requirement of being transparent in the execution of its powers if the report was not published.

A third aspect of the NRA’s accountability is legal accountability, i.e. it must be possible to introduce legal actions against NRA decisions. Already the second Electricity and Gas Directives contained provisions on complaints and legal actions. New elements in the new Electricity and Gas Directives are Article 37(16) and (17) of the Electricity Directive and Article 41(16) and (17) of the Gas Directive.

Under these new provisions, decisions taken by the NRA must be fully reasoned and justified to allow judicial review. It is recommended that all acts by the NRA (including advice, studies etc.) be published (e.g. the result of monitoring activities).

The decisions must be made available to the public while preserving the confidentiality of commercially sensitive information. It is up to the NRA to decide, case by case, what information is commercially sensitive.

The combination, in Article 37(16) of the Electricity Directive and Article 41(16) of the Gas Directive, of having reasoned and justified decisions and of having decisions made public seems to suggest that not only the decision itself but also the reasons for and grounds of the decision need to be made public. This will allow any party affected to assess whether or not there are sufficient reasons to introduce a legal action against an NRA decision.

Article 37(17) of the Electricity Directive and Article 40(17) of the Gas Directive provide as follows: *‘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’*. This means that an appeal or

review procedure before the government or a ministry would not be in line with the provisions of the new Electricity and Gas Directives. This provision should in the view of the Commission's services not only apply to decisions of the NRA when exercising its powers and carrying out its duties, but also e.g. to decisions of the NRA related to the confidentiality of information.

According to the Commission's services, the word 'suitable' implies that for certain types of NRA decisions, Member States should establish specific procedures where the court (or equivalent bodies independent of the parties involved and of any government) will rule at short notice. Similarly, in urgent cases, the court can be given the power to suspend an NRA decision (typically via summary proceedings). However, given the NRA's autonomy in decision making and given the NRA's independence from any public entity, the power to suspend NRA decisions belongs only to courts and judges or appeal mechanisms before any other bodies independent of the parties involved and of any government. Where a government does not agree with an NRA decision, it can make use of these legal actions as well.

Apart from these provisions it is important to recognise the clear link, in the new Electricity and Gas Directives, between increased NRA independence and NRA accountability. Indeed, independence of the NRA precludes neither judicial review nor parliamentary supervision in accordance with the constitutional laws of the Member States (recital 34 of the Electricity Directive and recital 30 of the Gas Directive). Although the Electricity and Gas Directives do not require Member States to organise accountability before national parliaments, the Commission's services are of the opinion that this could be an appropriate means of ensuring increased NRA accountability. Especially when discussing the NRA budget, national parliaments may ask to organise a hearing with the NRA. Similarly, the accountability of the NRA board could be enhanced by organising a parliamentary hearing prior to the appointment of the board members.

The accountability of the NRA can also be enhanced if Member States require the NRA, while submitting its draft budget for approval by the national parliament, to present a draft work programme as well.

While accountability is very important under the new legislative framework, it cannot be used as an excuse to infringe the requirements on independence of the NRA.