

## ***The independence of National Regulatory Authorities***

CEER White Paper series (paper # V) on the  
European Commission's Clean Energy Proposals

**30 June 2017**

### **1. Introduction**

This Regulatory White Paper provides the views of National Regulatory Authorities (NRAs) in the Council of European Energy Regulators (CEER) with regard to safeguarding the independence of national regulatory authorities in order to benefit energy consumers. The aim is to deepen understanding and assist the EU Institutions in assessing the proposals contained in the “Clean Energy for All Europeans” legislative package of 30 November 2016<sup>1</sup>.

### **2. CEER's Key Recommendations**

The Clean Energy package introduces a range of new or extended functions for energy NRAs. CEER welcomes the trust that the Commission places in energy NRAs and is committed to ensuring that these powers and duties are targeted to deliver benefits to the consumers. In this context, CEER recommends the following 5 areas for legislative improvements. Each area is covered in more detail in later sections:

- ***Safeguard the independence of national regulatory authorities***
  1. National law should provide for the NRA's independence from any other public or private interest. There should be no legal provisions in national law that conflict with each other in terms of NRA independence.
  2. NRAs should consistently be given the power to issue final and binding decisions that are not subject to outside (ministerial) scrutiny or review (except for judicial review). The Clean Energy proposals should prohibit interference with regulatory decisions in order to create clarity and improve the legal basis upon which NRAs act.
- ***Ensure that the term for a NRA Head/Board is respected***
  3. The Clean Energy legislative proposals should provide for continuity of the current term of Board members or heads of NRAs, including in situations where the legal basis for the NRA is revised by the national government. This helps protect the ability of the NRA head/Board to act independently.
- ***Ensure adequate resources for independent regulators***
  4. NRAs must be adequately resourced to carry out the functions assigned to them. The Clean Energy legislative proposals should strengthen the independence of NRAs by clarifying that the NRA's budgetary process and use of budget must be free of undue

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<sup>1</sup> For ease of reading, reference to the Electricity Regulation refers to the re-cast Electricity Regulation (EC) COM/2016/0861final/2 - 2016/0379 (COD), and reference to the Electricity Directive refers to the re-cast Electricity Directive COM/2016/0864 final/2 - 2016/0380 (COD). References to specific Articles in the proposed recast legislation relate to the revised texts (corrigenda) published by the European Commission on 23.02.2017.

influence at all stages. The ex-post review of NRAs' financial accounts must be performed by an independent auditor. The government should have no role in this process. Likewise, new duties assigned to NRAs should be scrutinised as to their actionability and should be assigned adequate additional resources.

- ***Facilitate consultation, accountability and transparency***

5. A clear and transparent NRA consultation policy could supplement NRA transparency and accountability.

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### **3. Safeguard the independence of national regulatory authorities**

Regulatory independence provides greater confidence and trust that regulatory decisions are made with integrity. Regulatory independence is important to ensure that competitive energy markets work in the best long-run interests of consumers. The EU's 3<sup>rd</sup> Package of legislation concerning energy regulators' duties, powers and independence has been transposed into national legislation in Member States in different ways - not always in a way that best safeguards a regulator's ability to fulfil its core functions in an independent manner.

For example, legal provisions in some Member States allow the government a degree of instructions on regulatory work whereas legally the NRA should be fully independent from political interference. CEER's (2016) survey found that in 5 countries the energy NRA can be given instructions on regulatory decisions by the government, by the parliament or by a particular ministry.

This situation can be improved by enhancing role clarity between the stakeholders (including ministries) involved in the regulatory process. To this end, CEER recommends that the Clean Energy proposals provide that the national law should include a small definition of what the NRA's independence from any other public and private interest means. Crucially, NRAs should consistently be given the power to issue final and binding decisions that are not subject to outside (ministerial) scrutiny. CEER recommends that the Clean Energy proposals prohibit interference with regulatory decisions, as such an explicit prohibition would create clarity and improve the legal basis upon which NRAs act. There should be no legal provisions in national law conflicting with each other in terms of NRA independence.

CEER welcomes the new requirements in the Clean Energy package for NRAs to be responsible for "fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs and their methodologies" (instead of "or", Article 59(1)(a) of the proposed recast of the Electricity Directive). CEER also welcomes the clarification that NRAs are in charge of the implementation of Network Codes and Guidelines through national measures (Article 59(1)(d) of the proposed recast of the Electricity Directive). Those changes define regulators' tasks in a better way.

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### **4. Ensure that the term for a NRA Head/Board is respected**

CEER welcomes that the Clean Energy package proposes stricter rules for the appointment and dismissal of boards/heads of NRAs and for their conflict of interest and confidentiality obligations after the end of their term of office as this will also strengthen NRA independence.

However, CEER's (2016) survey found some instances where terms of office were terminated prematurely because there were changes to the underlying legislation. To address this issue, CEER recommends that the Clean Energy legislative proposals provide that when the part of the national law that refers to the NRA Head or that fixes the composition of the NRA's Board is

changed, the current head/Board should still complete their term. This helps protect the ability of the NRA Head/Board to act independently.

## 5. Ensure adequate resources for independent regulators

Regulatory authorities must be adequately resourced to carry out the functions assigned to them. Whilst this principle is already enshrined in the 3<sup>rd</sup> Package, CEER has found that in 11 countries government approval of the NRA's budget is required or the government caps the budget through a regulatory fee. In a number of countries, there are other restrictions on NRA's budget (e.g. ex-post cuts, headcount caps or the government being heavily involved in NRA staff recruitment and wages in some countries).

Against this background, CEER recommends that the budgetary autonomy of the NRA is safeguarded at all stages and in all types of processes, and that NRAs are allowed to use their budget as they see fit (including in their HR policy). There should be no restrictions on a regulator's staffing policy, as long as it stays within its budget. The Clean Energy legislative proposals should strengthen the independence of NRAs by clarifying that the ex-post control of an NRA's financial accounts should be performed by an independent auditor. The government should have no role in this process.

For NRAs to be able to deliver their tasks and duties in the interest of consumers, their resources must match their tasks. New duties (in particular monitoring duties) foreseen for NRAs in the Clean Energy legislative proposals<sup>2</sup> should be scrutinised as to their actionability; if they are justified, they should be accompanied by an adequate level of additional resources.

## 6. Facilitate consultation, accountability and transparency

CEER has found that most NRAs have clear consultation procedures in place, with a mix of different consultation practices, and that the majority of NRAs systematically publish their decisions. Following up on this good practice, CEER recommends that requiring clear and transparent consultation policies could supplement NRA transparency and accountability.

### Annex 1: Relevant ACER/CEER Papers

This White Paper builds on the "[European Energy Regulators' Overview Paper - Initial Reactions to the European Commission's Proposals on Clean Energy](#)", published by CEER and ACER on 23 January 2017. It is part of a series of CEER Regulatory White Papers on key topics related to the Clean Energy package.

European Energy Regulators (ACER-CEER) White Paper #1 <a href="#">Renewables in the Wholesale Market</a> , May 2017
European Energy Regulators (ACER-CEER) White Paper #2 <a href="#">Role of the DSO</a> , May 2017
European Energy Regulators (ACER-CEER) White Paper #3 <a href="#">Facilitating Flexibility</a> , May 2017
European Energy Regulators (ACER-CEER) White Paper #4 <a href="#">Efficient Wholesale Price Formation</a> , May 2017
CEER White Paper (no. I) on <a href="#">Distribution and Transmission Network Tariffs and Incentives</a> , May 2017
CEER White Paper (no. II) on <a href="#">Technology that Benefits Consumers</a> , May 2017

<sup>2</sup> E.g. on dynamic price contracts for consumers in Article 11(3) Electricity Directive or on the availability of comparison websites in Article 59(1)(x) Electricity Directive.

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CEER White Paper (no. III) on <a href="#">Consumer Empowerment</a> , May 2017
CEER White Paper (no. IV) on <a href="#">Efficient System Operation</a> , June 2017
<a href="#">CEER Report on Safeguarding the Independence of Regulators</a> , December 2016
<a href="#">CEER Memo on Principles for regulatory performance assessments</a> , January 2015