
CEER Memo on Principles for regulatory performance assessments

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1 Introduction

Most national energy regulatory authorities (NRAs) in the EU were set up more than ten years ago, and while their tasks have been continually expanded, they have now reached a level of organisational maturity that is often viewed as suitable for performance review. This sentiment has been reflected in a variety of developments and publications, such as the OECD's *Best Practice Principles on the Governance of Regulators*¹ and the organisation's work on *Performance Assessment Framework for Economic Regulators*², CERRE's *Code of Conduct and Best Practices for the setup, operations and procedure of regulatory authorities*³ and a report on *Independence, accountability and perceived quality of regulators* by researchers of the same institution⁴, along with a number of national developments such as the Criteria for good oversight developed in the Netherlands⁵ – to name a few.

The Council of European Energy Regulators (CEER) is an association of 33 European energy regulators.⁶ As an umbrella organisation to institutions that are the subject of performance reviews, CEER seems ideally placed to contribute its own thinking about the principles of regulatory performance assessment as sketched in this paper.

2 Principles

2.1 Performance evaluation must be put in context

Any performance review should be carried out and interpreted as part of the situation in which regulatory activities take place. Though all CEER members work towards achieving

¹ <http://www.oecd.org/gov/regulatory-policy/governance-regulators.htm>

² see <http://www.oecd.org/gov/regulatory-policy/2nd-meeting-of-the-ner.htm>

³ <http://www.cerre.eu/publications/cerre-code-conduct-and-best-practices-setup-operations-and-procedure-regulatory-authori>

⁴ <http://www.cerre.eu/publications/independence-accountability-and-perceived-quality-regulators>

⁵ <http://www.afm.nl/nl/nieuws/2013/apr/criteria-goed-toezicht.aspx>

⁶ CEER has 30 members (NRAs from the 28 EU Member States, plus Iceland and Norway) and 3 observers (the energy regulators from Switzerland, FYROM and Montenegro).

the Internal Energy Market and are united by the principles of the EU's energy legislation, their individual national situations require that each country have individual priorities and work on realising these common views at its own pace. This situation should be the starting point for evaluation. Therefore, any regulatory performance assessment method must allow for sufficient flexibility to fairly represent the national situation, priorities and possibilities.

→ Any regulatory performance assessment should be put against the national background and be adaptable to the national situation.

2.2 Evaluation systems must be made to fit

Even though all regulators work under the European legislative umbrella, their duties and competences vary greatly across countries. This variety is expressed at all levels of regulation: some regulators are responsible for several sectors, others are single-sector regulators; most focus on ex-ante regulation, while others also have powers in the field of ex-post regulation; some have licensing systems, others don't; some countries use feed-in tariffs (in whose design and administration the regulator may or may not be involved), others have different support systems for green electricity; and so on. The entire regulatory system is an expression of the country characteristics and needs. Regulators' possibilities – in terms of powers, budget and staff etc. – vary just as widely.

→ Any regulatory performance assessment should be designed to reflect the duties, competences and powers of the regulator under review.

2.3 Comparability is limited

Both the national context and the powers and duties of the individual regulator need to be taken into account. Therefore, comparing performance between regulators in different countries or different sectors is far from straightforward. For instance, the budgetary figures reported by regulators in their annual reports cannot be interpreted or even compared with one another without considering the duties these regulators are entrusted with, and the extent that these duties take on (e.g. the workforce required to set distribution tariffs greatly depends on the number of distribution system operators and complexity of the system in a country). A performance evaluation exercise aimed at producing a comparison between different countries or sectors can only produce valid results if real comparability is established.

→ **Any comparative regulatory performance assessment should build on an in-depth comparability study between the regulators under review.**

2.4 Market indicators are not performance indicators

Market-oriented indicators (such as switching rates), though they carry important information as to the condition of the market, hold only limited information as to the regulator's performance. Such indicators are influenced by a variety of factors, among which the regulatory framework is one (but not the only one). Therefore, they are not suitable for directly deriving conclusions about a regulator's performance.

→ **Any regulatory performance assessment should make use of market-oriented indicators to fairly depict the situation of the national market, but should not use these as performance indicators.**

2.5 Regulatory performance is about real life

There is a wealth of existing studies and reports that evaluates legal compliance, e.g. the correspondence of national with EU legislation. Though indeed very valuable, this kind of compliance exercise does not provide information as to the real-life situation in a country or market. The legal situation may in many cases be a good starting point, but cannot be the only dimension of performance measurement.

→ **Any regulatory performance assessment should establish a theoretical baseline which consists of real-life (as opposed to de jure) goals.**

2.6 Performance assessment must consider the inside view

As any professional activity, regulation is both highly complex and highly specific to the particular field. It is difficult for outsiders to grasp the full range of thought and conditionality that factors into each regulatory decision. Assessing regulatory performance by purely looking at outside factors and indicators, therefore, falls considerably short of a true reflection of the situation.

→ **Any regulatory performance assessment should be developed in close cooperation with the regulator under review in order to better reflect the reality of the regulatory situation.**

2.7 Performance assessment should consider the outside view

The views of third parties are of great value when assessing the performance of a regulator. To ensure that respondents are not overburdened with information requests, assessors should decide carefully which third party opinion can provide valuable outside views on which aspect of the regulator's work. When interpreting the results of third-party opinions, the relation between the party and the regulator must be borne in mind (e.g. is the third party a part of the regulated industry, a market player, a fellow regulator).

→ **Any involvement of third parties in regulatory performance assessment must be done carefully (to limit the burden on respondents) and bear in mind the relation between the actors.**

2.8 Results must be actionable

A performance evaluation exercise is only valuable if it delivers results that enable the regulator under review to act and improve performance. To this end, an evaluation exercise should look at performance both in terms of achievement of regulatory (substantive) goals and in terms of achievement of institutional (enabling) goals. The former might include dimensions such as security of supply and customer protection; the latter might focus on procedural aspects such as stakeholder involvement and expert staff.

→ **Any regulatory performance assessment should be designed to deliver results that might be turned into concrete actions/recommendations for the NRA under review.**

3 Recommended approach

Regulatory performance assessment can be undertaken in many different ways. To produce results that are valuable and that make the effort of the exercise worthwhile, any regulatory performance assessment should fulfil the above principles.

One possibility to achieve this would be through a system of goals that outline the situation which the regulator should try to achieve. These goals should be drawn from a variety of sources (e.g. legislation, policy, consumer needs etc., complemented by internal goals that enable the regulator as an organisation to work properly) and should fit with the country's priorities.

Once the goals have been established, the current situation can be compared to the desired one. In doing so, the regulators' powers, duties and bearing on the situation should be borne

in mind, along with the current overall national situation as a starting point. If a performance assessment exercise aims to compare different regulators (in different countries or sectors), comparability must be established both at the level of setting the goals and at the level of gauging the regulators' performance against these goals. In any case, the regulator under review should be closely involved in the evaluation process, to provide insight and expert knowledge. When introducing an outside view, respondents should not be overburdened and each respondent's relation with the regulator should be borne in mind when interpreting the results. By identifying any gaps between the current situation and the desired one, the regulator can act on the results, focussing on the areas identified for improvement.

CEER hopes that the above principles, although not exhaustive, contribute to the public debate about regulatory performance assessment and to a thoughtful approach to this complex matter.