

CEER State of Play on NRAs' investigatory and sanctioning powers

9 October 2017

*A key element of the **Third Energy Package**¹ is that European energy National Regulatory Authorities (NRAs) are given the necessary powers to carry out their duties. Among these powers listed under Article 37(4) of the Electricity Directive² and Article 41 of the Gas Directive³, investigations may be carried out by energy NRAs and may lead them to impose any necessary and proportionate measures to ensure a proper functioning of the market.*

*In order to assess and summarise the **different national legal backgrounds** and provide an overview on how investigatory and sanctioning powers have been implemented by NRAs across Europe, a questionnaire with a total of 28 questions was developed by CEER (for an overview on CEER see Annex 1).*

21 CEER members** participated in the survey: **Austria, Belgium, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Great Britain, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Poland, Portugal, Slovenia, Spain and Sweden.

Based on the CEER questionnaire results, it can be stated that most of the responding NRAs are given powers to impose effective, proportionate and dissuasive penalties on electricity and gas undertakings that do not comply with their obligations. In doing so, NRAs apply stringent procedures respecting the rights of defence of the undertakings concerned. These investigatory and sanctioning powers of European NRAs may differ and vary according to the respective national legal provisions. In this regard it appears that the national legislations of all participating NRAs provide for **such investigatory and sanctioning regimes**. The scope of regulatory areas for which investigatory and sanctioning powers are applicable includes, in general, breaches of EU as well as national electricity and gas provisions.

When it comes to investigatory and sanctioning powers of NRAs four parts can usually be set forth in the process of imposing a sanction: (1) informal oversight / monitoring; (2) formal investigation; (3) proceeding / prosecution; (4) adjudication of alleged infringements and imposition of sanctions. The CEER questionnaire only focused on stages (2) to (4).

¹ Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC

Directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC

Regulation (EC) No 714/2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003

Regulation (EC) No 715/2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005

Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators

² Directive 2009/72/EC

³ Directive 2009/73/EC

Based on the results of the questionnaire, it appears that **efficient powers have been given to both NRAs and ACER** to ensure the correct enforcement of the 3rd Package. On the one hand, NRAs have been granted with **proper and efficient sanctioning and investigatory powers at national level** to comply with their duties, which is also a guarantee of independence. In this context, NRAs not only enjoy broad powers to conduct such investigations, including via rights of access or through hearings, but there is also a vast array of possible sanctions besides the imposition of fines. Not least through this variety of mechanisms and tools, NRAs have also consolidated achievements in the development of their practices, in particular, in the light of the relevant rulings of the European Court of Justice and the European Convention on Human Rights.

On the other hand, Agency for the Cooperation of Energy Regulators (ACER) has a direct overview of the functioning of the EU energy markets through its monitoring and reporting duties and can act as an intermediary between NRAs and the European institutions, in particular with respect to the Commission, to ensure the proper implementation of EU law objectives. **NRAs' and ACER's powers are therefore complementary** in particular to ensure an efficient implementation of the 3rd Package as well as ACER's own decisions. Investigation and enforcement is a national matter and NRAs have been granted with sufficient competences in this area, which are set out appropriately in the Member States' legislation. Therefore, while ACER is not provided with its own investigatory or sanctioning powers, it can fully rely on NRAs to ensure enforcement of its legally binding decisions as well as the provisions of the 3rd Package. Consequently, cooperation between NRAs and ACER is of paramount importance.

This two-level structure, indeed, guarantees the implementation of the 3rd Package in a coordinated and consistent way while taking into account the specificities of national and regional markets. The balance of power and control between NRAs and ACER is in line with the subsidiarity and proportionality principles. In this perspective, it is important to mention that the legislative proposal of the European Commission on the recast of certain legal acts of the 3rd Package maintains the current principle of distribution of powers between NRAs and ACER. While ACER may be given additional competences as regards regional or pan-European entities or matters, investigations and sanctions, however, remain in the hands of NRAs. Cooperation of NRAs through ACER is also reinforced.

Annex 1: About CEER

CEER is the "Council of European Energy Regulators". CEER was established in 2000 for the cooperation of the independent energy regulators of Europe. It seeks to facilitate the creation of a single, competitive, efficient and sustainable EU internal energy market which works in consumers' interests. CEER is the voice of 36 European national energy regulators at EU and international level. On EU issues, CEER works very closely with and supports the Agency for the Cooperation of Energy Regulators (ACER), an EU Agency formed for the cooperation of energy regulators.

For further information on CEER, please see www.ceer.eu.