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**Council of European  
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**Safeguarding the independence of  
regulators**  
**Insights from Europe's energy regulators on powers,  
resources, independence, accountability and  
transparency**  
**CEER report**

**Ref: C16-RBM-06-03**  
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## INFORMATION PAGE

### Abstract

This document (C16-RBM-06-03) presents a CEER public report on the organisational framework within which Europe's energy regulators operate. It shines a light on NRAs' tasks and powers, resources, independence, and accountability and transparency. In this, it looks both at rules that are imposed on regulators (e.g. by law) and at arrangements and organisational decisions NRAs have taken themselves.

### Target Audience

European Commission, Member States, gas/electricity industry, academics and other interested parties.

### Keywords

National Regulatory Authorities (NRAs)

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## Related Documents

### CEER documents

- Memo on Principles for regulatory performance assessments, CEER, January 2015, Ref. C14-RPAT-06-03, [http://www.ceer.eu/portal/page/portal/EER\\_HOME/EER\\_PUBLICATIONS/CEER\\_PAPERS/Cross-Sectoral/Tab1/C14-RPAT-06-03\\_RPA%20Memo\\_19-Jan-2015.pdf](http://www.ceer.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_PAPERS/Cross-Sectoral/Tab1/C14-RPAT-06-03_RPA%20Memo_19-Jan-2015.pdf)

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## EXECUTIVE SUMMARY

This CEER report presents key findings and recommendations on NRAs tasks, independence and accountability. The report relies on the responses provided by 29 energy National Regulatory Authorities (NRAs) to a CEER survey conducted in the first half of 2016. The recommendations are based on valuable insights from Europe's energy regulators themselves on key issues such as how they are resourced or how independence can be strengthened through legal provisions and voluntary action. The recommendations also draw upon best regulatory practice including recent (public) research.

### Brief summary of findings and recommendations

#### NRA tasks and powers

- The 3<sup>rd</sup> Package provisions concerning NRAs duties and powers are transposed into national legislations in different ways.
- When it comes to issuing binding decisions, of concern is that in five countries, the NRA decision is subject to ministerial approval, can be overturned by the ministry or can otherwise be influenced by it.

CEER recommends:

- All Member States (MSs) should fully implement the 3<sup>rd</sup> Package requirements.
- NRAs should be consistently given the power to issue final and binding decisions that are not subject to outside (ministerial) scrutiny.

#### NRA resource comparisons

- Our data must be interpreted with caution but allows a simple comparison across three core areas of NRAs' work (networks, markets and consumers). It shows that the 12-15 respondents that provided information for the individual aspects, on average, dedicate almost 50% of NRA resources to networks, 29% to markets and 21% to consumer work. On average, 78% of NRAs' resources are dedicated to national work with 22% on international work. For regulators that are competent for both electricity and gas, an average of 62% of resources are devoted to electricity and the remaining 38% to gas.
- NRA resource exercises must be carefully planned and comparability issues be taken into account.

CEER recommends:

- Any party that wishes to undertake an NRA resource exercise should observe the CEER Principles for regulatory performance assessment.

#### Independence

- The independence provisions of the 3<sup>rd</sup> Package are transposed into national legislation in different ways.
- In 5 countries, the NRA can be given instructions on regulatory decisions by the government, by parliament or by a particular ministry.



- All of the respondent NRAs have conflict of interest provisions for heads or board members.
- In 11 countries, government approval of the NRA budget is required or the government caps the budget through the regulatory fee. In a number of countries, there are other restrictions on the NRA's budget through other mechanisms (e.g. ex-post cuts, overall restrictions in law).
- Some NRAs are subject to headcount caps, and the government is heavily involved in NRA staff recruitment and wages in some countries.

CEER recommends:

- The national law should explicitly refer to the NRA's independence from politics and from the industry. The legislator should ensure the absence of conflict in proportionate rules relating to independence of the NRA.
- Some NRAs have drawn up a code of conduct or a staff independence manual; this could be a good practice.
- When the part of the law that refers to the head or fixes the composition of the board of the NRA is changed, the current head/board should still complete their term before the changes come into force.
- The budgetary autonomy of the NRA should be safeguarded at all stages and in all types of processes.
- NRAs should be allowed to use their budget as they see fit. There should be no restrictions on the regulator's staffing policy, as long as it stays within its budget.

### **Accountability and transparency**

- A diversity of accountability tools is observed and NRAs generally use a mix of them.
- Most respondents are subject to ex-post control of their finances (normally by the court of auditors, but sometimes by a ministry), with some NRAs having additional mechanisms to strengthen accountability.
- Similarly, most NRAs have clear consultation procedures in place with a mix of different consultation practices.
- The majority of NRAs systematically publish their decisions.

CEER recommends:

- The ex-post control of an NRA's annual accounts should be performed by an independent auditor. The government should not have a role in this process.
- NRAs should follow a clear consultation policy and this should be made transparent.



## 1 Introduction

### 1.1 Structure of the report

The focus of this CEER report is on energy regulatory powers, resources, accountability and independence with respect to current EU legislation, particularly the 3rd Package. Looking ahead, CEER will in the coming months scrutinise the European Commission's proposed "Clean Energy for All Europeans"<sup>1</sup> legislative package with respect to these issues. This will include the key issue of NRA independence, with a view to ensuring that NRA independence is safeguarded and, where necessary, strengthened.

The requirements for NRAs, or rather the uniformity of these requirements, are the subject of this report's second chapter (following this introductory section). It sets out to provide an overview of how individual duties and powers assigned to regulators by European legislation have been reflected at national level. Of course, these are only one portion of tasks entrusted to NRAs; many regulators receive a range of additional duties under their national legislation, but the chapter serves to establish a degree of comparability among NRAs in terms of their EU-inspired regulatory duties.

On this basis, the third chapter of the report addresses the issue of resources. This is often the subject of debate and simplistic analysis, ignoring a series of comparability issues. The report attempts to develop a short-cut to some degree of comparability.

The fourth chapter shines a light on the legal and practical arrangements around NRA independence – one aspect that has been greatly strengthened in the 3<sup>rd</sup> Package and that in practice is a foundation for regulators to be able to work properly.

This is followed up in the fifth chapter, which looks at accountability and transparency as the two inseparable partners of independence. In this, accountability has a stronger focus on the legal requirements, while transparency refers largely to the degree and way in which regulators decide to make information available.

The last chapter of the report derives recommendations from the results presented throughout the report. These are meant to improve the situation of NRAs in terms of their powers, resources and framework conditions.

### 1.2 Methodology

Information for the report was collected via a questionnaire open for input by NRAs in Q2 2016. In this sense, all information presented in this report relies on the information provided by the questionnaire respondents, and CEER would like to express its gratitude to them for their generous information and insightful comments.

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<sup>1</sup> European Commission proposal "Clean energy for all Europeans" published on 30 November 2016. See: <http://ec.europa.eu/energy/en/news/commission-proposes-new-rules-consumer-centred-clean-energy-transition>





The questions were chosen and worded with reference to a number of existing legal provisions, recommendations and reports, as well as acknowledged best practice in the relevant fields. Overall, 29 NRAs provided information for the report, though response rates varied across the chapters.

Readers should bear in mind that the information collected from across the CEER membership only represents a snapshot and does not provide information on developments of regulators' organisational framework over time. Interpretation of the results achieved should be done carefully.

## 2 NRAs' duties, powers and enforcement possibilities

Under the 3<sup>rd</sup> Package,<sup>2</sup> energy NRAs across Europe<sup>3</sup> have a uniform legal basis for their activities. This EU legislative framework is the foundation for the development of the Internal Energy Market not only where cross-border issues are concerned, but also for establishing harmonised powers and responsibilities for Europe's NRAs. This uniform legal basis enables energy NRAs to develop closer regulatory cooperation, develop best practices and learn from each other to a greater degree than would be possible in the absence of a common legal framework across Europe.

However, considerable leeway remains. The 3<sup>rd</sup> Package assigns some duties expressly to energy NRAs (core duties); for other duties, it leaves an option to have them carried out by other authorities at national level. In addition to this minimum set of tasks, governments/parliaments may give NRAs additional powers and duties. In order to deliver good regulatory outcomes, NRAs must not only be given extensive duties but also need to have the necessary powers to be able to carry them out.

Against this background, CEER collected information from its NRAs on their duties and powers, so as to establish some degree of comparability. Overall, 29 energy NRAs across Europe provided information for this part of the report.

### 2.1 Fixing or approving tariffs and tariff methodologies

Article 37 of the Electricity Directive (and Article 41 of the Gas Directive) specifies NRAs' duties of "fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies". A distinction can be made between NRAs which have the power to fix or approve methodologies used to establish transmission and distribution tariffs, and NRAs which have the power to fix or approve the tariffs themselves.

Figure 1 below shows the number of NRAs that have the power to fix or approve the tariff methodology, while Figure 2 displays the number of energy NRAs that can fix/approve tariffs among the survey respondents. In both cases, mixed models are also possible.

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<sup>2</sup> The 3<sup>rd</sup> Package adopted in 2009 comprises 5 elements of EU energy laws: Electricity Directive (2009/72/EC), Gas Directive (2009/73/EC), ACER Regulation 713/2009, Electricity Regulation 714/2009 and Gas Regulation 715/2009. See [http://www.acer.europa.eu/en/the\\_eu\\_energy\\_market/Legislation/Pages/default.aspx](http://www.acer.europa.eu/en/the_eu_energy_market/Legislation/Pages/default.aspx)

<sup>3</sup> CEER member countries who are not EU Member States have adopted the 3<sup>rd</sup> Package as the legal basis for their national energy regulatory framework, although not necessarily in every detail. In the EEA EFTA States, the 3<sup>rd</sup> Package will apply pending and in accordance with relevant EEA Joint Committee Decision.

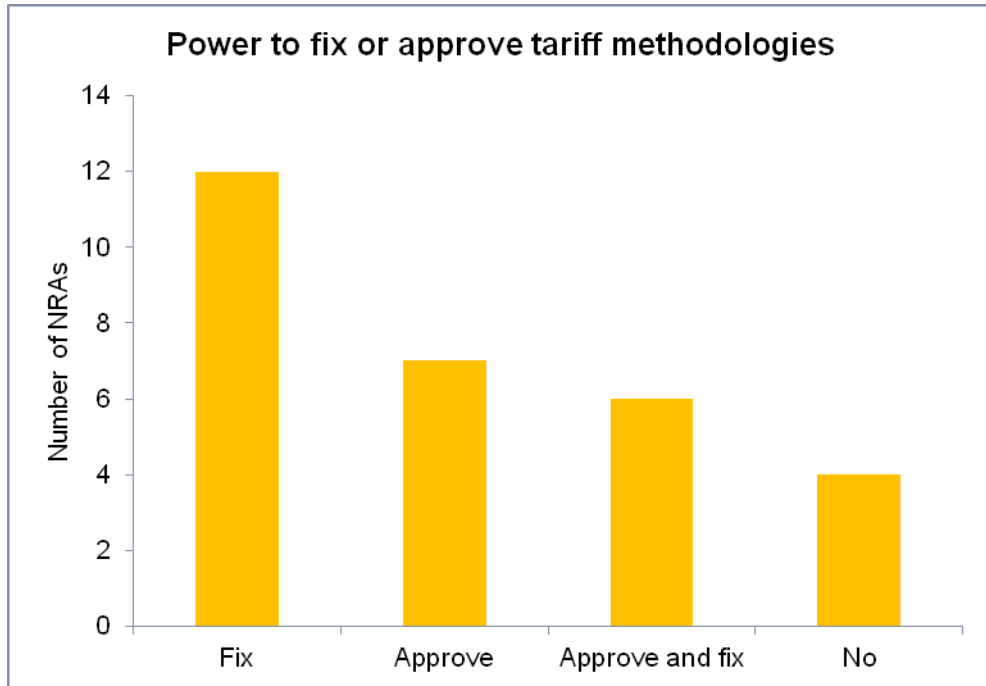


Figure 1: Number of NRAs that have the power to either fix or approve tariff methodologies

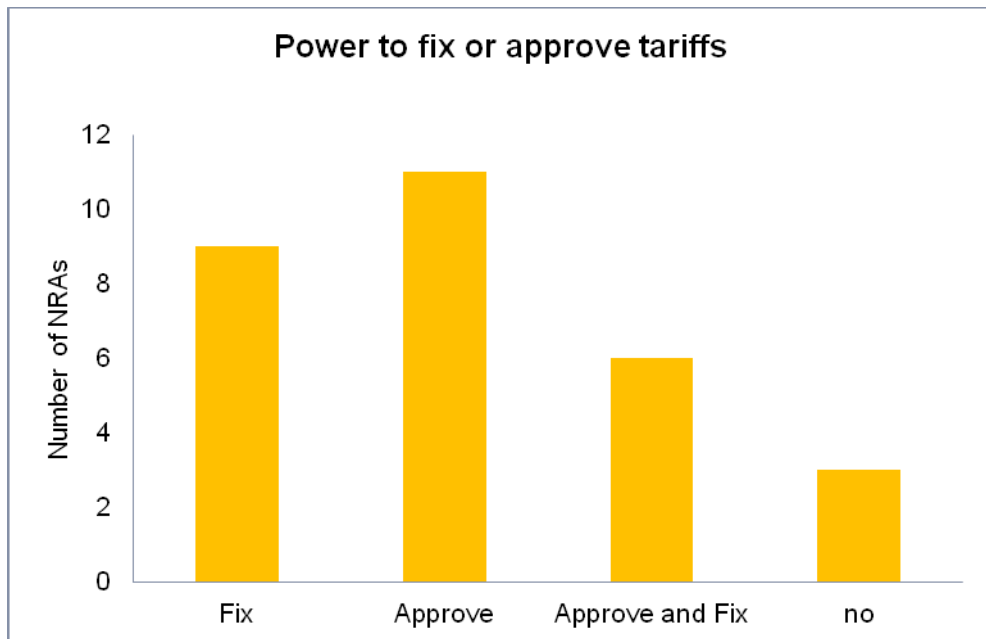


Figure 2: Number of NRAs that have the power to either fix or approve tariffs

When it comes to fixing or approving methodologies for the provision of balancing services, there are only three NRAs whose legislators have not entrusted them with this responsibility. In some cases, this might not even be needed due to the market structure. Details are provided in Figure 3.

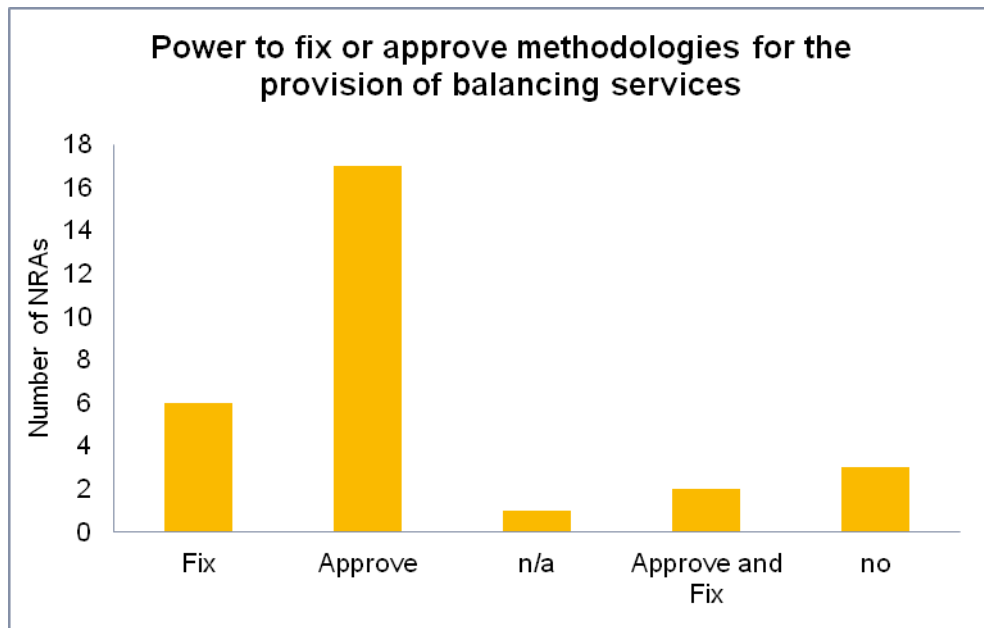


Figure 3: NRA competences in the field of fixing or approving methodologies for the provision of balancing services

Most respondents confirmed that their NRA fixes or approves methodologies for access to cross-border infrastructures. Figure 4 displays the NRAs' competences in this field.

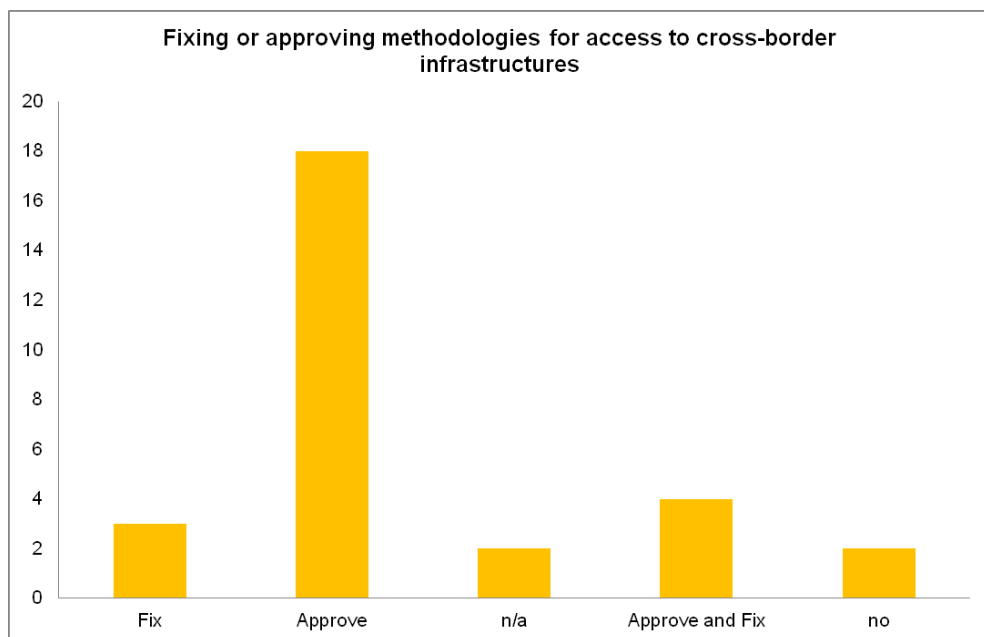


Figure 4: NRA competences in the field of fixing or approving methodologies for access to cross-border infrastructures

All NRAs except one can require transmission system operator (TSO) and distribution system operators (DSOs), if necessary, to modify the terms and conditions including tariffs or methodologies.



## 2.2 Monitoring

All respondent NRAs are empowered to exercise the monitoring powers envisaged by Article 37(1) of the Electricity Directive and Article 41(1) of the Gas Directive and have the power to require all the necessary information from electricity/gas undertakings. In some countries, specific monitoring activities are being carried out also by other competent authorities alongside NRAs. With the exception of two countries, all of the responding NRAs have the power to carry out investigations into the functioning of the electricity/gas markets.

## 2.3 Dispute settlement

Article 37(11) of the Electricity and 41(11) of the Gas Directive foresee that “[a]ny party having a complaint against a transmission[, storage, LNG] or distribution system operator in relation to that operator’s obligations under this Directive may refer the complaint to the regulatory authority which, acting as dispute settlement authority, shall issue a decision [...]”.

Most NRAs (26) indeed act as a dispute settlement authority or arbitration authority with regard to conflicts between market players. About half of the NRAs mentioned that they are also competent to act as an arbitration authority in other types of disputes; most of these deal with consumer disputes.

## 2.4 Rulemaking

Most NRAs (21) confirmed that they have the power to adopt general legal acts such as bylaws, secondary-level legislation, binding orders on technical issues, general regulatory acts or national codes. With regard to the level of involvement in the parliamentary legislative process, the vast majority of NRAs has a role in the process; most of them have an advisory role, but seven also have a right of initiative (see Figure 5).

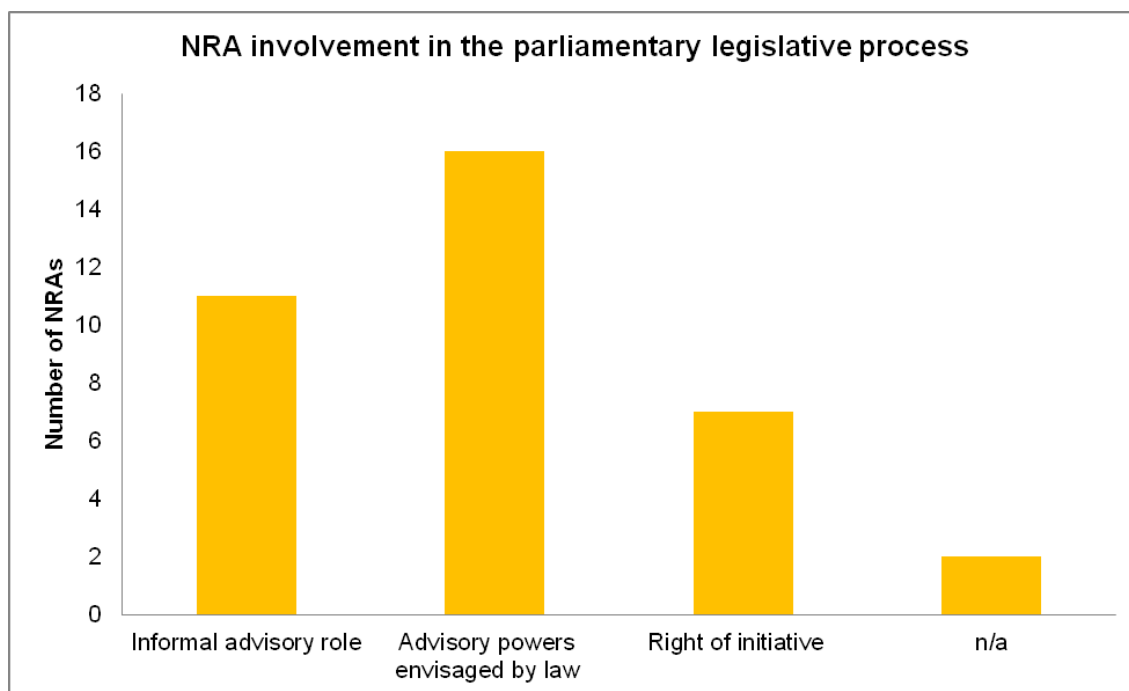


Figure 5: NRA involvement in the parliamentary legislative process

## 2.5 Issuing binding and final decisions

The Electricity and Gas Directives, in Articles 37(4)(a) and 41(4)(a), respectively, clearly state that NRAs must have the power to issue binding decisions to enable them to carry out their duties. This power to issue final and binding decisions which cannot be overruled by any governmental body is also a core element of NRAs' independence (ref. chapter 4.1.3 of this report).

Our survey found that, while the regulatory decisions of all of the participating NRAs are directly enforceable, there are two countries where the final NRA decision can be overruled to a certain extent and in certain cases by an external (governmental) body (besides a judicial review at court).

Most respondents confirmed that in their country, there is no possibility for any ministerial body to influence the adoption or contents of the NRA's decisions. In four countries, however, there is a possibility to give a certain degree of instructions according to the provisions foreseen in the national legislation.

## 2.6 Enforcement

Article 37(4)(d) of the Electricity and Article 41(4)(d) of the Gas Directive require that NRAs must be given the power to impose effective, proportionate and dissuasive penalties, or to propose that a competent court impose such penalties. Of the responding NRAs, 23 are empowered to directly impose such penalties, whereas six NRAs have the power to propose them to a competent court. All NRAs have the power to issue binding decisions to secure compliance with electricity and gas legislation.



Besides, all NRAs can use alternative enforcement actions such as compensations, revocation of licence, temporary prohibition of network access or temporary prohibition of professional activities. Also issuing orders or requests to comply with the statutory situation is quite frequent (depicted as part of the “other measures” column in the figure below). NRAs exercise their enforcement and sanction powers through individual decisions, penal orders and administrative procedures. Some NRAs have an internal body/committee for this.

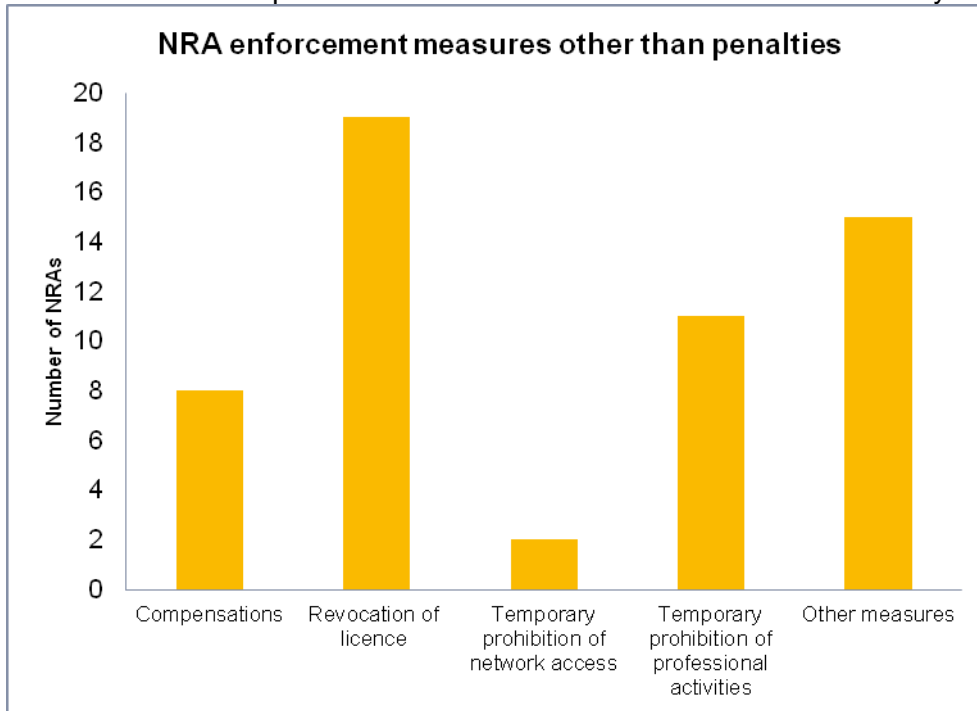


Figure 6 shows the range of enforcement measures at NRAs' disposal.

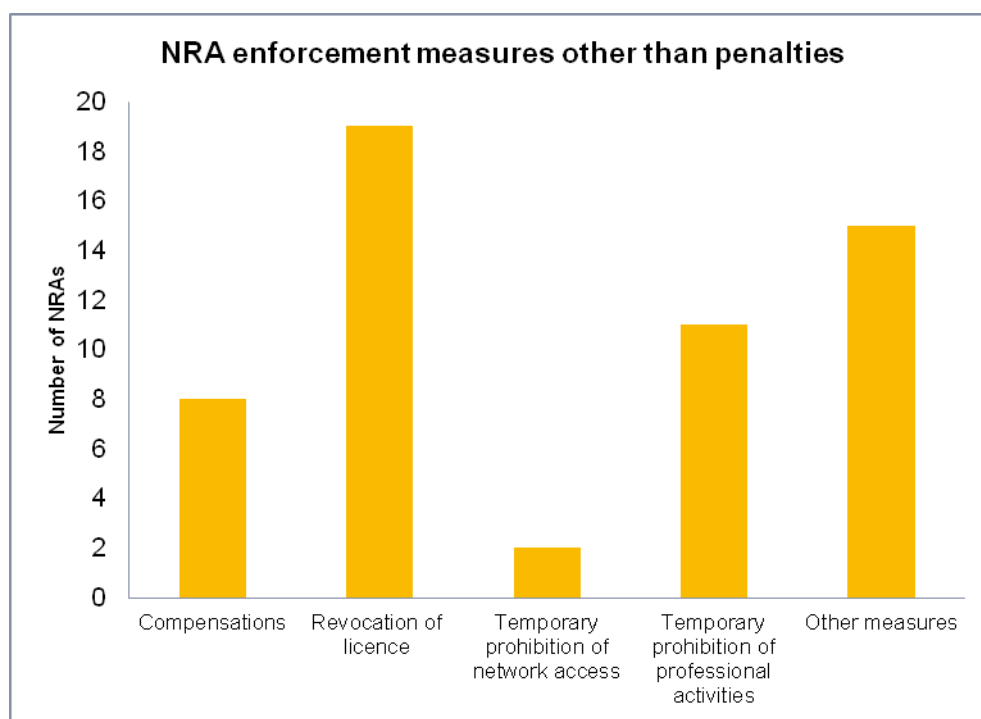


Figure 6: Enforcement actions that NRAs may take, apart from any financial penalties they can impose

## 2.7 Additional tasks and powers

Many NRAs are entrusted with additional tasks and powers by their national legislator, in addition to what is provided for in the 3<sup>rd</sup> Package and under Regulation on Energy Market Integrity and Transparency (REMIT) legislation.<sup>4</sup> The most commonly mentioned additional tasks among respondents were: coordination of permit granting for projects of common interest under the Trans-European energy networks Regulation (TEN-E Regulation); grid planning; organisation, monitoring and control of tendering procedures for new capacity; design and implementation of renewables policy; implementation of energy efficiency policy; security of supply; energy statistics; and consumer protection issues which go beyond the 3<sup>rd</sup> Package requirements.

## 3 NRAs' resources

Whilst chapter 2 provided an overview in terms of NRAs' tasks, this chapter considers NRAs' resources. Time and again, the resources that NRAs have at their disposal or that they request, be it in terms of budget or in terms of staff, are the subject of (public) debate. Often, comparisons are made between NRAs. Such analyses can be over simplistic and fail to consider a number of basic comparability issues such as:

<sup>4</sup> See Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency (REMIT) and the European Commission Implementing Regulation (EU) No 1348/2014 on data reporting implementing Article 8(2) and Article 8(6) of Regulation (EU) No 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency (implementing acts).



- the impossibility to simply compare NRAs with each other because some are single-sector (energy only) NRAs while others are multi-sector NRAs;
- the impossibility to compare simply the “energy part” of NRAs with each other because NRAs’ energy tasks vary widely; these are variations that arise from:
  - the number of tasks (NRAs of some countries are entrusted with carrying out tasks that in other countries do not fall within the scope of action of the energy regulator or are carried out by local or regional regulators; this is touched upon in chapter 2);
  - their level of detail (e.g. depending on how a particular process is designed in each country, also exemplified in chapter 2); and
  - their complexity (a regulatory task might be more or less resource intensive depending on the features and size of a country’s energy market).

Accordingly, CEER’s Principles for regulatory performance assessments<sup>5</sup> recommend that “any comparative regulatory performance assessment should build on an in-depth comparability study between the regulators under review”. This recommendation applies equally to an investigation into the resources NRAs dedicate to their various tasks.

The wording of the questions asked sought to address, at a high level, the comparability considerations mentioned above (see in particular chapter 3.1 below). Importantly, readers should bear in mind that the data provides a snapshot and does not capture the development of NRAs’ resources over time.

### 3.1 Addressing comparability considerations

The relative uniformity found in the responsibilities and powers that NRAs carry out under the 3<sup>rd</sup> Package in chapter 2 (while not for the additional tasks that many carry out under other EU-level or national legislation) is an encouraging starting point to compare NRAs. In line with CEER’s established principle that performance assessment “should be designed to reflect the duties, competences and powers of the regulator under review”, NRAs were asked to provide information about a relatively harmonised set of regulatory tasks, i.e. their network, market and consumer tasks under the 3<sup>rd</sup> Package, the TEN-E Regulation and REMIT (as opposed to the additional tasks many NRAs are entrusted with under national legislation or deriving from other EU-level rules). This set of NRAs’ duties is referred to as “standard tasks” below.

While the approach applied was intended to address the issue of the number of tasks, it does not overcome the issue of the level of detail or complexity (see the second and third sub-points listed above) of comparing the tasks of NRAs. These considerations are also addressed in CEER’s Memo on Principles for regulatory performance assessments,<sup>6</sup> which states that regulatory performance assessment “should be put against the national background and be adaptable to the national situation” and “should be developed in close cooperation with the regulator under review in order to better reflect the reality of the

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<sup>5</sup> CEER Memo on Principles for regulatory performance assessments, C14-RPAT-06-03, 15 January 2015, [http://www.ceer.eu/portal/page/portal/EER\\_HOME/EER\\_PUBLICATIONS/CEER\\_PAPERS/Cross-Sectoral/Tab1/C14-RPAT-06-03\\_RPA%20Memo\\_19-Jan-2015.pdf](http://www.ceer.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_PAPERS/Cross-Sectoral/Tab1/C14-RPAT-06-03_RPA%20Memo_19-Jan-2015.pdf).

<sup>6</sup> CEER Memo on Principles for regulatory performance assessments, C14-RPAT-06-03, 15 January 2015, [http://www.ceer.eu/portal/page/portal/EER\\_HOME/EER\\_PUBLICATIONS/CEER\\_PAPERS/Cross-Sectoral/Tab1/C14-RPAT-06-03\\_RPA%20Memo\\_19-Jan-2015.pdf](http://www.ceer.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_PAPERS/Cross-Sectoral/Tab1/C14-RPAT-06-03_RPA%20Memo_19-Jan-2015.pdf).





regulatory situation". It is clear that such in-depth analysis goes beyond the scope of this paper. Nevertheless, some preliminary results can be drawn despite the varying levels of detail and complexity of NRAs' tasks.

### **3.2 Networks, markets and consumers**

Respondents were asked to indicate how many full-time equivalents (FTEs) of staff they dedicate to the three standard tasks of networks, markets and consumers.

Overall, the data provided by 15 respondents allowed a distinction to be made between the resource intensity of their networks compared to markets compared to consumer tasks in terms of FTEs. The respondent NRAs dedicate, on average, almost half of their resources for standard tasks to their network tasks, while 29% (on average) is for developing and overseeing the markets and the remaining 21% (on average) is for customer information and protection.

### **3.3 Gas versus electricity**

Overall, information provided by 14 NRAs enabled a distinction between the FTEs dedicated to electricity and to gas. Excluding also two countries that have no gas market from the analysis results in an average resource intensity among the remaining countries to 62% electricity and 38% gas.

### **3.4 National versus international activities**

The 3<sup>rd</sup> Package requires NRAs all across the Regulations and Directives to closely cooperate with each other internationally. An OECD (2016) report also points to recent academic research which suggests that regulators' participation in regulatory networks operation across sectors and national borders can enhance the independence of regulators.<sup>7</sup> To capture this aspect, NRAs were asked to estimate how many FTEs they dedicate to national and international work in the three standard tasks. In this, it was not further specified exactly where to draw the line as the two areas are naturally interdependent.

Of the NRAs that provided information, a distinction between FTEs dedicated to their national and international workload can be made for twelve NRAs. On average, these NRAs dedicate 22% of their resources for the standard tasks to international activities, while the remaining 78% are geared towards national work.

The results of this CEER survey differ from those in the (2016) Agency for the Cooperation of Energy Regulators (ACER) resource survey.<sup>8</sup> Given that ACER's survey collected information on resources dedicated to ACER only work, the differences found can be explained by the fact that NRAs also engage in other international work (for example regional

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<sup>7</sup> OECD (2016), *Being an Independent Regulator*, The Governance of NRAs, OECD Publishing, Paris.  
<http://dx.doi.org/10.1787/9789264255401-en>.

<sup>8</sup> ACER Taking stock of the regulators' human resources. Summary of Findings, 2 June 2016,  
[http://www.acer.europa.eu/Official\\_documents/Other%20documents/ACER%20Taking%20stock%20of%20the%20regulators%E2%80%99%20human%20resources%20Summary%20of%20findings.pdf](http://www.acer.europa.eu/Official_documents/Other%20documents/ACER%20Taking%20stock%20of%20the%20regulators%E2%80%99%20human%20resources%20Summary%20of%20findings.pdf).



associations of NRAs such as ARIAE, CEER, MEDREG, ERRA, ICER etc.) or regional cooperation.

### 3.5 Resources for other powers

All of the 15 NRAs that provided information under this heading have tasks in renewable energy and/or energy efficiency beyond their standard tasks in the areas of networks, markets and consumers. The scope of tasks entrusted to NRAs under this heading varies greatly; for instance, several NRAs reported responsibilities in the administration of support schemes, while elsewhere the regulator is also involved in the organisation of tenders for renewable facilities. How resource-intensive this field is differs greatly among NRAs.

## 4 Independence

A regulator's independence is a basic prerequisite not only for proper regulatory work but it provides confidence and trust that regulatory decisions are made with integrity. Confidence in the NRA in turn provides confidence in the market. One of the very reasons why regulators were created in the first place was to ensure that decisions about the energy market would be shielded from commercial and political interests, thereby addressing the conflict of interest that can arise where the government has a stake in energy or network companies. Competitive neutrality is required where government and non-government companies compete under the same regulatory framework. In their daily work, regulators act as referees, balancing competing interests and policy objectives. This requires regulators to be independent both of the industry they regulate and of government.

In addition, with the energy sector accounting for a considerable part of most countries' economies there are very real risks that private and/or public entities may seek to interfere with regulatory decision-making. It is paramount that the NRA's independence be properly protected (e.g. through adequate legal provisions) and safeguarded (e.g. through practical arrangements and a culture of independence within the NRA itself) throughout the life-cycle and work of the NRA.

The abundance of reports and recommendations on regulatory independence speaks to the issue's importance.<sup>9</sup> CEER considers that it is crucial for NRAs to have independence from

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<sup>9</sup> cf. for instance  
OECD (2016), *Being an Independent Regulator*, The Governance of Regulators, OECD Publishing, Paris.  
<http://dx.doi.org/10.1787/9789264255401-en>, or  
ECRB: Independence of National Regulators in the Energy Community – A Critical Review. June 2015,  
[https://www.energy-community.org/portal/page/portal/ENC\\_HOME/DOCS/3754149/18DC1BF11FCE2743E053C92FA8C07751.PDF](https://www.energy-community.org/portal/page/portal/ENC_HOME/DOCS/3754149/18DC1BF11FCE2743E053C92FA8C07751.PDF), or  
ERRA Survey: Independence of the National Regulatory Authorities. June 2015,  
<http://erranet.org/independence/download>, or  
the section on sector regulators in the OECD's Indicators of Product Market Regulation,  
<http://www.oecd.org/eco/reform/indicatorsofproductmarketregulationhomepage.htm>, or  
Energy Community, The National Energy Regulatory Authority of Moldova. Compliance, Governance, Independence and Performance. An Energy Community Secretariat Review. 8 September 2016,  
[https://www.energy-community.org/portal/page/portal/ENC\\_HOME/DOCS/4302393/3BFF875481ED5527E053C92FA8C05594.pdf](https://www.energy-community.org/portal/page/portal/ENC_HOME/DOCS/4302393/3BFF875481ED5527E053C92FA8C05594.pdf),  
or  
Recommendation of the Agency for the Cooperation of Energy Regulators No 01/2016 of 30 May 2016 on ensuring the independence of the Agency for the Cooperation of Energy Regulators and of national regulatory



politics, independence from industry, appropriate board-level arrangements, budgetary autonomy, adequate human resources, and integrity. These issues are the focus of this part of the report, for which 28 energy NRAs provided information.

## 4.1 Safeguarding the independence of the NRA as a whole

The Electricity and Gas Directives, in Articles 35 and 39 respectively, impose on EU Member States the duty to “guarantee the independence of the regulatory authority and [...] ensure that it exercises its power impartially and transparently.” This independence provision is transposed in CEER member countries’ legislations in different forms.

### 4.1.1 The NRA act

The EU Electricity and Gas Directives (Articles 35(4)(b)) of the Electricity Directive and 39(4)(b) of the Gas Directive require Member States to ensure that the regulator “ensures that its staff and the persons responsible for its management: (i) act independently from any market interest; and (ii) do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks. [...]”

Our findings show that the regulator’s independence is explicitly stated in the national law in all respondents’ countries except one. In this, some countries’ legislation keeps quite close to the wording in the Directives, but in other countries the law is not explicit about independence from both political and market interests. Not every national law explains what “independence” means, which leaves considerable leeway for interpretation.

### 4.1.2 Additional safeguards

In addition to the NRA’s founding act or legal basis, many NRAs are subject to national legislation that applies generally, e.g. provisions for all public servants. Such rules usually apply to all NRA staff, while board members of NRAs are sometimes subject to additional explicit conflict of interest rules laid down in the law. Breaches of these legal provisions normally carry criminal or civil law consequences for the offender.

In addition to a dedicated NRA act and provisions in national legislation elsewhere, several NRAs mentioned that they have a dedicated code of conduct or similar document which lays down requirements on independence, conflict of interest and conduct for NRA management and staff. Breaches of such (soft-law) measures normally result in disciplinary consequences (often potentially including dismissal), but there are also cases with punitive provisions for breaches. These are imposed either by the NRA management or by a dedicated body or compliance officer inside the NRA. Combined enforcement by an internal unit or officer and a public body is also possible, depending on which rules were breached or the gravity of the violation.

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authorities,

[http://www.acer.europa.eu/Official\\_documents/Acts\\_of\\_the\\_Agency/Recommendations/ACER%20Recommendation%2001-2016.pdf](http://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Recommendations/ACER%20Recommendation%2001-2016.pdf), or

European Court of Auditors. Improving the security of energy supply by developing the internal energy market: more efforts needed. Special Report. Publications Office of the European Union, 2015.

[http://www.eca.europa.eu/Lists/ECADocuments/SR15\\_16/SR\\_ENERGY\\_SECURITY-EN.pdf](http://www.eca.europa.eu/Lists/ECADocuments/SR15_16/SR_ENERGY_SECURITY-EN.pdf)



### 4.1.3 Political instructions

The 3<sup>rd</sup> Package stipulates that Member States must ensure that “the regulatory authority can take autonomous decisions, independently from any political body [...]” (Article 35(5)(a) Electricity Directive and Article 39(5)(a) Gas Directive).

Even so, political actors (parliament, particular ministries or government at large) in five countries can give instructions on regulatory decisions – either generally applicable decisions or individual ones. For these, the question arises of how this is compatible with the basic independence requirement that they have in their primary law and with the requirement from the 3<sup>rd</sup> Package that NRAs must be given the power to issue binding decisions (ref. also chapter 2.5). This of course requires looking into the detail of the system in place, which varies greatly among these countries.

In countries that cannot receive any instructions or can only be given longer-term goals, there can still be interactions between the regulator and the government in the decision-making process. This could range from the government adopting a decision if the NRA fails to do so or the minister asking the regulator to reconsider certain decisions (while leaving the regulator free to decide).

## 4.2 Ensuring the independence of NRA heads

### 4.2.1 NRA head/board appointment

CEER looked at how the head of an NRA or its board members are appointed, focussing on the last stage in the process. In the vast majority of countries, the appointment process for the head/board of the NRA is subject to rules that are laid down in the law. These might be general rules on the appointment of public officials or rules particularly applicable to the energy regulator. Normally, the head/board appointment by the government (e.g. the line minister) follows a consultation with parliament, usually in the form of a hearing of candidates. Also the qualifications that a head/board member must bring to the position are generally found in the law, though the level of detail given ranges widely.

The OECD (2016) suggests that it is not only or even primarily the appointment process where undue influence comes into play. From their point of view, this happens already at the nomination stage, which is why OECD argues that the nomination of board members by an independent panel can help foster independence.<sup>10</sup>

### 4.2.2 Dismissal of heads/board members and conflict of interest

All respondents stated that there are statutory provisions which clearly outline when a head/board member of the authority can be dismissed. Usually, these are on grounds such as criminal conduct or inability to work for a certain period of time etc.

A number of NRAs reported one or several instances where head/board members of their authorities stepped down from their positions before their terms expired, for various reasons.

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<sup>10</sup> OECD (2016), *Being an Independent Regulator*, The Governance of Regulators, OECD Publishing, Paris.  
<http://dx.doi.org/10.1787/9789264255401-en>.



In two countries, NRAs pointed to cases where terms of office were terminated prematurely because there were changes to the underlying legislation.

Among the different conflict of interest provisions in place, the periods of time at the beginning and end of NRA heads' or board members' tenure often receive attention. Of the 25 NRAs that have provided information on cooling-on and cooling-off periods, 11 have no such rules; 12 respondents have cooling-off rules only; two respondents have both. The cooling-off periods reported by 12 respondents range from one to two years. In one member state, a three-year cooling-off period applies to the NRA's board members.

### 4.3 Securing budget and staff for the NRA

The question of independence in the regulator's budgetary process comes down to a balance between protecting the NRA from undue influence and ensuring that the NRA operates within the rules of proper budgetary behaviour. For this reason, the 3<sup>rd</sup> Package Directives state that Member States must ensure that the NRA "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" (Article 35(5)(a) Electricity Directive and 39(5)(a) Gas Directive). The (2016) ACER recommendation on independence<sup>11</sup> states in more detail that "an executive body (including the government) shall not be allowed, directly or indirectly, to set requirements that could jeopardise the NRA's budgetary autonomy and ability to fulfil its tasks".

Among the respondents to the questionnaire, three confirmed that they have a model entirely in line with the ACER requirement. The majority (14) reported that their budget is issued as a dedicated NRA budget act or as part of the state budget act; this is done by parliament, which is also fully in line with the ACER recommendation, though the question of who proposes the act remains (is this done by the regulator or is it the government, based on the regulator's proposal, that drafts the act and defends it before parliament). Through the application of this process, the budget of NRAs can be (and has been) influenced considerably.

The government might also have an influence on the NRA's budget at other points in the process. There are cases where the NRA's budget is set down in the state budget act each year, but this is within the framework of a longer-term budget forecast (including expenditure caps) that is approved by the council of ministers; or where the budget is adopted by the NRA's own board, but the overall amount is de facto capped by the government's decision on the amount of the regulatory fee. For 11 respondents, governmental approval of the budget is required or the government in fact caps the NRA's budget by setting the regulatory fee.

One step further in the budgetary cycle, 17 NRAs stated that their budget can be reduced ex post. A more detailed look into how such ex-post cutting works would be needed to see whether this is also a point where there could be undue influence.

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<sup>11</sup> Recommendation of the Agency for the Cooperation of Energy Regulators No 01/2016 of 30 May 2016 on ensuring the independence of the Agency for the Cooperation of Energy Regulators and of national regulatory authorities,  
[http://www.acer.europa.eu/Official\\_documents/Acts\\_of\\_the\\_Agency/Recommendations/ACER%20Recommendation%2001-2016.pdf](http://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Recommendations/ACER%20Recommendation%2001-2016.pdf)



Another point for external bodies (government, parliament etc.) to intervene in a regulator's activities is if they can impose restrictions on budget use. Most NRAs (23) reported that this is not possible in their country or only insofar as these bodies are involved in the original budgetary process. However, there are five NRAs whose budget is subject to additional restrictions.

A closer look at potential restrictions to NRAs' staffing numbers shows that some NRAs are subject to general headcount caps that can be imposed across ministries and other public authorities and offices. Where this is the case, the NRA's budget is usually (though not always) part of the state budget or approved as part of the same process and this is how the cap comes into play. There are also cases where headcount caps are imposed by law, and others where the regulator is subject to a government-approved headcount.

In addition to headcount caps that might be imposed, governments are heavily involved in the staff hiring and wage process in three countries. In terms of staff salaries elsewhere, these are most often either freely set by the NRA or in line with the general rules for public servants.

## 5 Accountability and transparency

EU Member States have an obligation to secure and safeguard the independence of regulators (see chapter 4), but this independence must be met by adequate accountability and transparency. Together, they form one of the pillars of good regulatory practice with the aim to increase confidence in the NRA, in the rule of law and general trust in the state.

CEER understands accountability as the preparedness and ability of the regulator to give account and reasons for its conduct on the one hand, and the active publication activities on the other. Regulators as public independent institutions are accountable to national institutions, as well as the undertakings they regulate and the general public.<sup>12</sup> Transparency takes into account the range of stakeholders to be addressed and the communication channel chosen to achieve transparency. Therefore, accountability and transparency encourage higher performance of the NRA when carrying out its missions and duties and also provide for solid ground when assessing regulatory behaviour.

When looking at accountability practices and transparency standards in place, it is important to focus also on the reasons that led to their establishment. First, there are legal obligations stemming from the 3<sup>rd</sup> Package providing that NRAs have to report annually on their activities and the fulfilment of their duties, consult stakeholders, cooperate with other relevant authorities and take decisions that are fully reasoned and justified to allow for judicial review (Article 37 Electricity Directive; Article 41 Gas Directive). Furthermore, NRAs have put in place different accountability and transparency tools and processes that may go even beyond these legal requirements, either to match stricter national requirements or on a voluntary basis. They also support the ACER recommendation,<sup>13</sup> which suggests including in

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<sup>12</sup> OECD (2014), The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264209015-en>.

<sup>13</sup> Recommendation of the Agency for the Cooperation of Energy Regulators No 01/2016 of 30 May 2016 on ensuring the independence of the Agency for the Cooperation of Energy Regulators and of national regulatory authorities,





the legislation “the principle that NRAs are institutionally accountable to their national parliaments – as opposed to their governments” along with “current best practices on consumers and stakeholder consultation”.

This chapter focuses on transparency and accountability mechanisms that are in place across CEER membership. Overall, 28 NRAs provided information for this part of the report.

## **5.1 Annual reporting on the NRA’s activities and duties**

All respondents indicated that they report annually on the fulfilment of their duties as foreseen by the 3<sup>rd</sup> Package and present their national reports at least to one national institution (mostly to parliament), as well as to the European Commission and ACER. Beyond the annual reporting obligation, several NRAs publish specific reports (e.g. on dispute settlement activities, strategic plans/work programmes, independence of network operators, security of supply) and nine can be heard by the national parliament or at least need to reply in writing to its requests.

Accountability tools linked to annual reporting and relations with public institutions are evolving and NRAs are gaining experience with new and versatile tools.

## **5.2 Ex-post control of NRAs’ financial management**

25 of the respondent NRAs are subject to ex-post control of their financial expenditure. In the large majority of cases, it is exclusively the national court of auditors that conducts this audit. Two NRAs are audited by an independent certified auditor, but in other countries, there is some government involvement in the ex-post control.

## **5.3 Preparation of decisions and consultation practices**

There are different consultation practices that support NRA decision making. All except two NRAs consult on their draft decisions. 12 consult systematically on all draft decisions, while 14 consult when appropriate, e.g. when there is a legal obligation or when it is in the interest of good regulatory practice.

Out of 27 respondents, 25 have a clear consultation procedure in place, but this is not always put in writing and it may differ according to the case and/or issue to be consulted upon. Consultation procedures may also be fixed in the law. Only two NRAs do not have such procedures.

A combination approach is very widespread; 27 NRAs use a mix of different consultation tools, mainly written consultations, hearings and workshops. Several NRAs organise also meetings with individual stakeholders. This can take different formats like working groups, specific events, seminars, etc. Some NRAs have regulatory advisory and tariff councils comprising a range of stakeholders from industry, consumers and public administration. Some use social and mass media to raise awareness of stakeholders that a public consultation is ongoing. Two explicitly mentioned other online consultation tools (e.g.

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[http://www.acer.europa.eu/Official\\_documents/Acts\\_of\\_the\\_Agency/Recommendations/ACER%20Recommendation%2001-2016.pdf](http://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Recommendations/ACER%20Recommendation%2001-2016.pdf)



LinkedIn blogs), while two others only publish calls for comments on their websites on a case-by-case basis.

The average timeframe for public consultation is 30 days (one month), but in practice it varies from one day to twelve weeks depending on the urgency of the matter and the expected impact of the measures proposed.

## 5.4 Communication of decisions

The vast majority of NRAs (21) systematically publishes or makes available their decisions. Seven NRAs indicated that they publish when appropriate – e.g. there might be confidentiality reasons or other specific legislative requirements that provide the opposite.

All of the respondents indicated that they provide reasoned and motivated decisions in writing. The reasoning may include impact assessments, evaluation of comments from public consultations and notes from stakeholder workshops or reference to existing court decisions.

## 6 Recommendations

The results of the survey conducted have served to outline the situation of NRAs' organisational situation across CEER membership. In this, we found gaps in a number of instances and good practices in others. From these, we deduce recommendations that could be implemented to improve the NRAs' situation, ultimately enabling them to better exercise the functions entrusted to them. It goes without saying that these should be read as complementing the provisions from the 3<sup>rd</sup> Package.

Regarding the duties and powers conferred to NRAs by the 3<sup>rd</sup> Package the survey found that most regulators' decisions are final and binding, but five cases remain where NRA decisions are subject to ministry approval or can be overturned or otherwise influenced by the ministry. This seems to be in conflict with the requirements from the 3<sup>rd</sup> Package and **should be amended**.

Regarding resources, the practical application of the survey confirmed the 2014 CEER recommendation for **in-depth comparability studies**.<sup>14</sup> An alternative avenue could be a **comparison over time for a single NRA**, which would enable an observation of how its resources and tasks develop. In any case, this must be done **in close cooperation and with insight into the regulator's workings**, as also recommended in CEER's principles for regulatory performance assessment. Ideally, the survey should cover the same sources of information (and respondents) each time for continuity of the data over time.

In terms of independence, the survey has shown that interference with NRAs' decision making is still present in several countries. In a first instance, the **rules laid down in the 3<sup>rd</sup> Package should therefore be put into place and into practice across all countries**.

In some countries, the **national law explicitly refers to independence from both public and private bodies**, and in others it **includes a small definition** (e.g. "refrain from seeking

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<sup>14</sup> CEER Memo on Principles for regulatory performance assessments, C14-RPAT-06-03, 15 January 2015, [http://www.ceer.eu/portal/page/portal/EER\\_HOME/EER\\_PUBLICATIONS/CEER\\_PAPERS/Cross-Sectoral/Tab1/C14-RPAT-06-03\\_RPA%20Memo\\_19-Jan-2015.pdf](http://www.ceer.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_PAPERS/Cross-Sectoral/Tab1/C14-RPAT-06-03_RPA%20Memo_19-Jan-2015.pdf).





or following instructions”). This is a good practice that helps clearly indicate the basis of independence for the regulator’s substantive work.

NRAs and their management and staff are usually subject to a combination of legal provisions to ensure their independence – some from the regulator’s founding legislation, others from general national rules e.g. for public officials. Several NRAs have drawn up an **internal guideline/manual or code of conduct** that either gives an overview of all the applicable rules or even includes additional rules on independence and conflict of interest. This can help avoid the risk of conflict of interests. It can be practical for NRA staff and at the same time can be used to demonstrate towards third parties the solid independence safeguards that are in place.

Countries should **make explicit in the law that the regulator takes its regulatory decisions independently** and no other body, private or public, can interfere with them. This of course does not preclude proper consultation with market players and other competent public authorities nor judicial review. To support this, the relevant NRAs could **point out to their legislators or even the European Commission the contradictions** inherent in the system that could jeopardise their independence.

Looking towards the end of the term of office of NRA heads/board members, when the part of the law that refers to the head or fixes the composition of the board of the NRA is changed, the current head/board **could still complete their term** before the changes come into force. Where this is not possible, at least a **proper justification** should be given.

Regarding NRAs’ budget, there is a need to safeguard NRA’s **budgetary autonomy at all stages and in all types of processes**. For instance, just as it should not be the government that sets the regulator’s annual budget, the executive should not have the possibility to determine the regulatory fee or set a cap on the regulator. Also, where the NRA’s budget is adopted as part of a state budget act or as a dedicated NRA budget act and therefore requires parliamentary approval, it should be the NRA that prepares the respective text and defends it before parliament. Where there are contradictory provisions in the law, the regulator could **point them out to the legislator and/or the European Commission**.

In terms of staff policy, many NRAs are subject to the general provisions that apply across institutions. Through these or other provisions a variety of conditions can be set, such as headcount caps, rules for hiring new staff, salary levels offered etc. In some cases, additional restrictions apply. In reality, NRAs should be able to **use their budget as they see fit**. There should be **no restrictions on the NRA’s staffing policy**, whether they concern hiring, wages or other aspects, as long as the NRA stays within its budget. Of course, the NRA should still be subject to control of proper financial bearing (s. chapter 5).

Where accountability and transparency are concerned, NRA practices often go even beyond the legal requirements and may provide for stricter rules on a voluntary basis. However, the NRA’s consultation policy is **not always published or put into writing** which could be seen as a hurdle to larger participation, but does not necessarily mean that stakeholders are not aware of the procedures and consultation practices.

Financial audits are the common rule, but the **independence of the auditor** does not always seem ensured as in some cases the minister/prime minister has control over the auditing process.



## Annex 1 – List of abbreviations

Term	Definition
ACER	Agency for the Cooperation of Energy Regulators
ARIAE	Asociación iberoamericana de entidades reguladoras de la energía
CEER	Council of European Energy Regulators
DSO	distribution system operator
ERRA	Energy Regulators Regional Association
FTE	full-time equivalent
HR	human resources
ICER	International Confederation of Energy Regulators
MEDREG	Mediterranean Energy Regulators
NRA	national regulatory authority
OECD	Organisation for Economic Co-operation and Development
REMIT	Regulation on Energy Market Integrity and Transparency
TEN-E Regulation	Trans-European energy networks regulation
TSO	transmission system operator



## About CEER

The Council of European Energy Regulators (CEER) is the voice of Europe's national regulators of electricity and gas at EU and international level. CEER's members and observers (from 33 European countries) are the statutory bodies responsible for energy regulation at national level.

One of CEER's key objectives is to facilitate the creation of a single, competitive, efficient and sustainable EU internal energy market that works in the public interest. CEER actively promotes an investment-friendly and harmonised regulatory environment, and consistent application of existing EU legislation. Moreover, CEER champions consumer issues in our belief that a competitive and secure EU single energy market is not a goal in itself, but should deliver benefits for energy consumers.

CEER, based in Brussels, deals with a broad range of energy issues including retail markets and consumers; distribution networks; smart grids; flexibility; sustainability; and international cooperation. European energy regulators are committed to a holistic approach to energy regulation in Europe. Through CEER, NRAs cooperate and develop common position papers, advice and forward-thinking recommendations to improve the electricity and gas markets for the benefit of consumers and businesses.

The work of CEER is structured according to a number of working groups and task forces, composed of staff members of the national energy regulatory authorities, and supported by the CEER Secretariat. This report was prepared by the Regulatory Benchmarking Work Stream of CEER's Implementation, Benchmarking and Monitoring Working Group.

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