

**Roundtable: Agency for the Cooperation
of Energy Regulators (ACER)
with the delegation of the European Federation
of Energy Law Associations (EFELA)
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**Toward a New European Independent Regulatory
Agency?
(Regulation (EU) 2019/942)**

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Outline

- Why an Independent EU Regulatory Agency?
- The ECJ case law and the Treaty of Lisbon
- The Clean Energy for All Package
- Conclusive Remarks

Representative Bodies and Independent Regulators

The third energy packet imposes on Member States the obligation to ensure the independence of each national regulatory authority (NRA) both from any market interest and from the political power (art. 35 of Directive 2009/72/EC and art. 39 Directive 2009/73/EC)

Why?

Reasons of this choice

Uniformity of regulation across the EU

- If NRAs were dependent on national political bodies (and therefore required to follow the guidelines set by them) it would be impossible to guarantee the necessary uniformity in the implementation of Union law

Separation between political choices and technical regulation

- No doubt that fundamental choices regarding energy policy must be reserved to representative bodies
- However, the advantages deriving from the separation between politics and technical regulation are undoubted, in terms of greater stability and technical adequacy of market discipline, entrusted to bodies with specific technical competence in the sector and removed from the influence of changing political majorities

Why a EU Independent Energy Regulatory Agency?

Uniformity of regulation across the EU

- No need of a EU Independent Regulatory Agency to achieve this goal

Advantages deriving from separation between political choices and technical regulation

- A EU Independent Regulatory Agency may help to achieve these advantages

Does the EU legal framework allow the institution of a EU Independent Regulatory Agency?

Meroni and Romano Case Law

Meroni (cases 9/56 and 10/56, 1958): prohibition to the delegation of discretionary powers by EU institutions in order to safeguard the institutional balance

Romano (Case 98/80, 1981): additional non-delegation criterion: the Council can not delegate the power to adopt acts having the force of law because: (i) under the Treaties, agencies are not listed among the authors of legally binding decisions and (ii) no judicial review of agency decisions is foreseen by the Treaties

Treaty of Lisbon

Articles. 263, 265, 267 and 277 TFEU expressly attribute to the ECJ jurisdiction over the acts adopted by the "organs or bodies of the Union»

The provision of a judicial control on the acts of the agencies intended to produce legal effects vis-à-vis third parties presupposes, logically, the possibility of conferring powers on them

The New Delegation Doctrine: the Short Selling Ruling

The case concerned the Regulation providing the European Securities and Market Authority ('ESMA') with far-reaching intervention powers to regulate short selling on the financial markets

ECJ (case C-270/12, 2014): the EU legislature may, in areas requiring specific technical and professional expertise, confer discretionary implementing powers upon a Union agency if these powers are:

- precisely delineated by the empowering act and circumscribed by “criteria and conditions” which restrict the delegated agency’s discretion;
- amenable to judicial review.

Possibility to set up a EU Independent Regulatory Agency for Energy

It may be inferred from the ECJ most recent case law that:

- a transfer of regulatory powers to an Independent Authority would be permitted, provided that the delegating institution subjects the exercise of such powers to defined “criteria and conditions”;
- under such conditions, a EU Regulatory Authority for Energy may be set up

The Clean Energy for All Package

The Clean Energy for All Package contains a regulation outlining a stronger role for the Agency for the Cooperation of Energy Regulators (ACER)

However, it is not clear whether the The Clean Energy Package can be interpreted as step toward a sharper separation between political decisions and technical regulation in the EU electricity market

The Commission's role in the Energy Governance

The Clean Energy Package strengthens the role of the Commission

In particular, according to Regulation (EU) 2018/1999 on the Governance of Energy Union:

- each Member State shall submit to the Commission its National Energy and Climate Plans and their updates, as well as national long term strategies;
- the Commission shall assess national plans, updates and strategies and issues recommendations to Member States for the accomplishment of the Energy Union Objectives

ACER role (Regulation (EU) 2019/942)

- ACER overall mission (art. 1.2): complement and coordinate the work of national energy regulators at EU level. ACER shall also contribute to the establishment of high-quality common regulatory and supervisory practices.
- Mainly advisory role: non-binding opinions and recommendations to NRAs, transmission system operators, EU institutions
- Binding individual decisions in specific cases and under certain conditions on cross-border infrastructure issues

ACER Independency

- ACER shall act independently, objectively and in the interest of the Union. ACER shall take autonomous decisions, independently of private and corporate interests (art. 1.2)
- The members of the Administrative Board shall undertake to act independently and objectively in the interest of the Union as a whole, and shall neither seek nor follow instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other public or private body (art. 18.7)
- the Board of Regulators shall act independently and shall not seek or follow instructions from any government of a Member State, from the Commission, or from another public or private entity (art. 22.3)
- the Director shall neither seek nor follow any instruction from any government, from the Union institutions, or from any other public or private entity or person (art. 23.1)

Appointment of the Administrative Board and of the Director

Pursuant to **Regulation (EU) 2019/942**, ACER's administrative bodies shall be composed by members appointed by European political institutions

Administrative Board:

- 2 members appointed by the Commission,
- 2 members appointed by the EP,
- 5 members appointed by the Council

Director

- appointed by the Administrative Board following a favourable opinion of the Board of Regulators

Board of Appeal

- Appointed by the Administrative Board, on a proposal from the Commission

Role of Administrative Board and Director

Pursuant to **Regulation (EU) 2019/942**, the Administrative Board and the Director play a fundamental role in ACER

Director with broad managing powers (artt. 23-24), including

- draft opinions, recommendations and decisions, and adopt the same following the favourable opinion of the Board of Regulators ;
- prepare the work of the Administrative Board and implement the decisions of the same

Administrative Board with important tasks (art. 19) including:

- adoption of the programming document submitted by Director
- adoption of the budget submitted by Director
- adoption of organizational rules and decisions

Board of Regulators

Composition: senior representatives of each NRA + one non-voting representative of the Commission

Functioning: two-thirds majority of the members present needed for decision making

Tasks:

- provide the favourable opinion necessary for the adoption by the Director of opinions, recommendations and decisions
- provide the favourable opinion necessary for the appointment of the Director
- Provide guidance to the Director in the execution of his/her tasks

Conclusive Remarks

- ACER continues to be designed essentially as a coordination centre for NRAs and an advisory body, rather than as a genuine Independent Authority with effective regulatory powers
- Board of Regulators to decide with a 2/3 majority
- The Administrative Board and the Director, which play a fundamental role in ACER, are appointed by the EP, the Council and the Commission
- It is doubtful that the Energy Package can be effectively considered as a step towards the creation of an independent European Energy Regulator