

II-5.4: The Agency for the Cooperation of Energy Regulators (ACER) met for the first time on May 4 and 5, 2010

Friday 11 June 2010, by Marie-Anne Frison-Roche, Managing Editor and Director of the RLR

MAIN INFORMATION

On May 4 and 5, 2010, European energy regulators met at Brussels within the framework of the Agency for the Cooperation of Energy Regulators (ACER), which was created by the European Union Regulation of July 13, 2009. This meeting took place in parallel to a new session of the General Assembly of the Council of European Energy Regulators (CEER — a voluntary cooperative association of independent national regulators in Europe's energy sector).

CONTEXT AND SUMMARY

Before the ACER was created, a 2003 decision by the European Commission had implemented the European Regulators Group for Electricity and Gas (ERREG), in order to facilitate communication between member states' various regulatory bodies. This independent consultative body used to assist the Commission on issues relating to energy, and was supposed to facilitate the implementation and smooth operation of a single European energy market.

Despite the ERREG's numerous efforts to implement good practices, public consultations, and to create partnerships with various involved parties, a stronger form of cooperation between Member States became necessary in order to reinforce the internal market for gas and electricity. At stake for the European Union is accelerating the integration of European energy markets.

The EU's third 'Energy Package', made up of two European Directives and three European Regulations, is intended to liberalize EU gas and electricity markets. It was adopted in a plenary session of the European Parliament on April 22, 2009, following its proposition by the European Commission in September 2007. This package entered into law on July 13, 2009, and contained rules intended to further the implementation of a single energy market for the 27 countries of the European Union. The creation of the new Agency was included amongst these rules.

Implemented on July 13, 2009, by European Parliament and Council Regulation n° 713/2009, the ACER was conceived as a European Community-level organization with legal personality intended to facilitate

national regulators' **exercise of their regulatory responsibilities, and to coordinate, or even complement, if necessary, their action on the Community level.** This means that the Agency has been granted important responsibilities.

We will examine hereunder the ACER's composition, financing, and responsibilities:

-As concerns its **composition**, the Agency relies on a complex structure intended to ensure its independence and its representative nature, as it is composed of an Administrative Board, a Board of Regulators, a Director, and an Board of Appeal.

o **The Administrative Board**, in charge of adopting a multi-annual program, establishing staff regulations, a budget and supervising its execution, is made up of nine members and nine alternate members. Members and alternates have four-year terms, except for the first mandate, where half of the members of the Administrative Board will be granted six-year terms, in order to guarantee continual smooth operation of the Agency. The European Parliament and the European Commission each nominate two members and their alternates. The European Council nominates the five other members and their alternates.

o **The Board of Regulators** is in charge of setting goals for the Agency's Director. It is composed of a representative from each member state's national regulatory authority, as well as one non-voting member from the European Commission.

o **The Director** exercises the functions of coordinator and executes the Agency's budget. The Director is nominated by the Administrative Board after approval by the Board of Regulators, for a five-year term.

o **The Board of Appeal** is made up of six members and six alternate members, nominated by the European Commission and confirmed by the Administrative Board. Any person, real or legal, including national regulatory authorities, can appeal a decision taken by the ACER, whether it be: an individual decision on technical questions concerning national regulators; recommendations in terms of exchange of good practices; recommendations on regional energy cooperation programs; opinions published upon request of a national regulatory authority or the European Commission concerning the conformity of a decision taken by a national regulatory authority with EU legislation on harmonizing the common energy market; the modalities and conditions set by the ACER for security and access to cross-border infrastructures; opinions published upon request by the European Commission relating to certification decisions taken by national regulatory authorities.

The Board of Appeal's decisions can themselves be appealed before the European Court of Justice. Because of the breadth of the different types of

decisions that the Board of Appeal is authorized to hand down, one can imagine the great amount of lawsuits that it is susceptible to generate.

This first meeting of European regulators within the framework of the ACER was the opportunity to evoke organizational and procedural questions in relationship to the Agency's daily business. The ACER's decision-makers were appointed: Lord John Mogg, President of the Office of the Gas and Electricity Markets (Ofgem), who was already the President of the CEER and the ERGEG, was named President of the ACER's Board of Regulators. Walter Boltz, President of the Austrian regulator for gas and electricity (E-Control), was named Vice President of the ACER. Their terms are for two-and-one-half years, and can be renewed. Alberto Pototschnig's candidacy was approved by the ACER's Board of Regulators, and was suggested by the Board of Administrators to the post of Managing Director of the ACER on May 6, 2010, but must still be approved by the European Parliament.

As concerns the Agency's **financing**, the ACER enjoys financial resources from multiple sources, principally from subsidies drawn from the European Union's general budget, but also from fees levied by the agency, or voluntary contributions from member states, endowments, gifts, subsidies, etc. The Agency's budget is about 5 million Euros per year.

Finally, the ACER's **missions** are precisely defined in the July 13, 2010 European Regulation that constituted the Agency:

- **Functions concerning cooperation between operators of electricity and gas transmission systems.** The Agency is especially in charge of giving its opinion on the European Network of Transmission System Operators' (ENTSO) planned statutes, list of members, and staff regulations. It supervises the execution of the ENSO's missions and renders a report on this subject to the European Commission.
- The Agency also takes part in the elaboration of network codes for electricity and gas networks, and can hand down individual decisions or general recommendations. These network codes must conform to the ACER's general orientations, published after consulting with the ENTSO and concerned parties. The Agency also plays a role in the factual re-examination of draft network codes that it can recommend the European Commission to adopt. The Agency evaluates modification proposals on these codes submitted to it by the ENTSO, electricity and gas transmission systems operators, transmission system users, and consumers. It can recommend the European Commission adopt these modifications. The Agency can also propose its own amendments after consulting all concerned parties. Transmission systems operators manage their networks according to the codes that have been adopted.
- The Agency supervises and analyzes the implementation of network codes and the implementation of rules adopted by the Commission, and their

impact on the harmonization of applicable rules, in order to facilitate market integration, the absence of discrimination, true competition, and efficient market mechanisms. It communicates its report to the European Commission.

- **Concerning national regulatory authorities:** National regulatory authorities have the obligation to cooperate with the ACER and the European Commission.

- Therefore, the Agency can publish recommendations relating to the minimal technical and functional requirements for being hooked up to the network of production facilities, distribution networks, directly-connected clients' equipment, interconnection circuits, and direct lines. These recommendations must ensure that the technical requirements elaborated by national authorities do not interfere with network interoperability, while remaining objective, non-discriminatory, and compatible with the requirements of European Union legislation.

- The Agency approves commitments made by joint undertakings of vertically integrated transmission system operators; these commitments contain the measures necessary to prevent discriminatory and anticompetitive practices and to reinforce regional cooperation.

- At the European Commission's initiative, the Agency gives its opinion on draft decisions relating to the compatibility of national ten-year network development plans with the non-binding ten-year European Community network development plan. The ACER can demand that a transmission system operator modify its ten-year plan.

- The ACER can submit a consultative opinion to national regulators on decision-making in reply to individual requests for exemptions from general EU principles in managing capacity congestion at new, direct-current interconnections, and exceptionally, at alternating-current interconnections.

- **Concerning cross-border infrastructures:** The ACER has a sort of mediation power between national regulators in case of disagreements.

- Under certain strictly defined conditions, the ACER takes legally-binding decisions, if, and only if, national authorities cannot reach an agreement within six months, or if they decide to bring the affair before the ACER.

- As for direct-current cross-border interconnections that are situated within the borders of multiple countries, the Agency deals with requests for exemptions from general EU competition rules, in order to better take into account cross-border issues and to facilitate the administrative proceedings required for the application. The Agency must be informed of any agreement between national authorities that derogate from general EU legislation.

In 2011, Ljubljana, the capital of Slovenia, will officially welcome the headquarters of the fully operational Agency.

Links with other documents in the same sector

SOURCES AND LINKS

- ▶ European Energy Regulator's News, issue May 2010 <http://www.energy-regulators.eu/por...>
- ▶ Energy regulators' new Agency (ACER) starts work, *European Energy Review*, 5 May 2010. <http://www.europeanenergyreview.eu/...>
- ▶ EU websites introducing the ACER and linking to the législation founding it http://europa.eu/legislation_summar... http://ec.europa.eu/energy/gas_elec...
- ▶ Directive 2009/72/CE of the European Parliament and Council of 13 July 2009, concerning common rules for the internal market of electricity, and abrogating Directive 2003/54/CE <http://www.assemblee-nationale.fr/1...>
- ▶ Regulation (CE) No 714/2009 of the European Parliament and Council of 13 July 2009 on network access conditions for cross-border exchanges and abrogating Regulation (CE) n°1228/2003 <http://eur-lex.europa.eu/LexUriServ...>
- ▶ Regulation (CE) No 715/2009 of the European Parliament and Council of 13 July 2009 concerning access conditions to natural gas transport networks and abrogating Regulation (CE) n° 1775/2005 <http://www.grtgaz.com/fileadmin/use...>
- ▶ Lord John Mogg by EurActiv, "ERGEG : EU regulation at a turning point", Interview, 23 February 2010 <http://www.euractiv.com/en/energy/e...>
- ▶ Agence de coopération de l'énergie: les régulateurs sont peu convaincus, *EurActiv*, 25 January 2010 <http://www.euractiv.com/fr/energie/...>
- ▶ 24 janvier 2008 audition in Brussels of Mr. Philippe de Ladoucette, President of the Commission de Régulation de l'Energie (CRE) by the ITRE Commission of the European Parliament on the thème of the ACER <http://www.bercy.gouv.fr/directions...>

BRIEF COMMENTARY

Our first observation is that there is a paradox in that regulatory systems are normally designed to mirror the sector it regulates: thereby, if the market is global, its institutions have to be, too; whereas, if the market is national, its institutions must remain within its borders. Similarly, regulatory systems are constantly confronted with Politics, in a dose depending on whether the sector is more political or more centered on economics: in the former case, regulation can be detached from the nation-state; in the latter case, regulation must limit itself to the nation-state's borders, because that is the only place where it can rely upon political and democratic legitimacy. However, the energy sector is, by definition, a highly political sector—defining the Political as the power that is legitimate to decide on the future of the social group it represents—and does not technically constitute a global market.

Therefore, energy regulation should remain national. However, the ACER constitutes a sort of

European regulatory authority, even if the vocabulary was carefully chosen in order to avoid the fundamental prohibition of the European Union, which, according to the European Court of Justice's jurisprudence, forbids the EU from establishing organizations that dispossess Member States of their sovereignty, even though the financial sector, which is technically a global market, has not been truly internationally regulated. Why?

This is due to the fact that the ACER's constitution is in and of itself a political decision. Indeed, the ACER is not the reflection of a hypothetical reality in which there is an already unified European energy market, but rather, is the attempt at creating the tools necessary to create such a zone. This is the primary, historical definition of Regulation, as it can be understood from the treaty establishing the European Coal and Steel Community (ECSC).

Indeed, pragmatism is a philosophy that posits that necessity knows no law. Therefore, pragmatism is opposed to other philosophies that posit that action is only legitimated by a conception (for example, sovereignty). Here, we have two perfectly parallel examples: currency and energy, which are both economic and political objects. Therefore, a market is being birthed "using forceps", a market that could not exist simply via free-market forces, in order to politically construct an economic Europe, the European energy market being a simple tool to achieve the Common Market as a whole. In the same current of thought, the creation of a European banking and financial agency is being actively considered, in order to create an EU regulatory framework for the finance sector.

If, however, we adhere to conceptual philosophy, we give primary importance to the political nature of the object at hand: currency is an attribute of sovereignty, so it is obviously a national issue, and not an European issue. This is why we are seeing a resurgence of the issue of sovereign currency in academic literature (Aglietta, Michel, Orléan, André (eds.), *La monnaie souveraine*, Odile Jacob, 1998). Similarly, energy is a political object, which engages the future of the social group. Therefore, it is necessarily national.

But, if we adhere to the other philosophy, usually called pragmatism, we will simply say that we need this object to create a market, and we will give primary importance to the economic dimension of this object, and that in order for ordinary European markets to function, there has to be a European currency and a European energy market. But, the energy market and the currency cannot spontaneously be created, especially because of their residual political nature. Therefore, a very strong political initiative must cause these markets to exist.

Thirdly, we will observe that this European Agency does not cause national regulatory authorities to disappear; on the contrary, it is superimposed upon them and is in charge of coordinating their action and harmonizing their statements of intent. We are not confronted so much with a hierarchical phenomenon—which the previously cited EU principle would be opposed to—but rather a "spiral" mechanism, as we can observe in the field of finance with the Lamfalussy Procedure, or more generally, through the European method of committees. This results in a system whose institutional structure better corresponds to reality—a requirement for regulatory systems, which must mirror what they regulate—but which is achieved at the expense of simplicity, with a great risk of uncertainty and internal complexity, even though legal simplicity and certainty are becoming fundamental norms. However, this is the price to pay for markets' international nature, as long as law remains national, which is justified by their political dimension. Therefore, complexity is legitimate because it is necessary and politically justified (*cf.*, more generally: Audit, Mathias, 'Les autorités de régulation, la confrontation des autorités nationales de régulation à la transnationalité des marchés', in Audit, Mathias; Muir-Watt, Horatia; and Pataut, Etienne (eds.), *Conflicts de lois et régulation économique*, coll. "Droit et Economie" L.G.D.J, 2008, p. 3-15.)

Fourthly, and finally, we will remark that the Agency must give its approval to the Network Code, as elaborated by the transport systems operators. We will observe (in a method that has become habitual in economic law) that codes of good practice, 'soft law', benefit from an increase in normative power from the Agency's *imprimatur*. But, to take the French case as an example, the Commission de Régulation de l'Énergie (CRE — French Commission for the Regulation of Energy) is also in charged of approving such a code every year. This double validation could cause contradictions, and doubtlessly, in a more hierarchical manner, the European agency will see its

views prevail over the national agency's. The constitutive text of the May 4–5, 2010 meeting shows this, because it expounds upon the way that it will exert its power over national authorities—an area the European Regulation of July 13, 2009 remained silent on—using opinions and recommendations, against which it organizes a possibility of appeal, open to national authorities. Of course, this makes the system more complex, and increases its cost: the cost of regulation can become a true political concern, but especially, such a movement participates in the increasingly jurisdictional nature of regulation.