

EVALUATING THE FORMAL INDEPENDENCE OF NATIONAL REGULATORY AUTHORITIES IN THE EUROPEAN UNION'S ENERGY SECTOR AND BEYOND

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European Union's energy law stipulates numerous obligations with the intention of achieving a desired level of independence of national regulatory authorities. This article offers an insight into the said obligations as well as into their development and their evaluation. The latter is carried out via two sound benchmarks, i.e. via Gilardi's test and via the new comprehensive independence test. The new test learns from its antecedents, particularly from the methodological point of view. However, it advocates stricter requirements and, consequently, higher independence standards as developed in the most recent regulatory practice and theory. The evaluation of the past and present supranational legal framework in the field of energy reveals a decent progress on the subject of the formal independence of national regulatory authorities but unfortunately also a significant untapped potential which must be considered when drafting the new supranational rules. Moreover, it can be considered when transposing the new Electricity Directive in the national legal system since in the discussed field the directive in question 'merely' aims to achieve a minimal harmonization. And last but not least, lessons learned from the

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discussed case are transferable to other economic sectors, in particular to (other) utilities sectors.

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1. INTRODUCTION

Over the past forty years we have witnessed a dominant paradigm in the field of governance; regulation has emerged as a relatively distinct and ever more important method of governance.¹ Under this paradigm, national regulatory authorities (NRAs) are now among key players due to their (potential)² advantages.³

NRAs significantly affect numerous (economic) sectors and, ultimately, well-being of people.⁴ Due to the role they play, NRAs' design is among regulatory issues that gained a lot of attention. This seems to be true particularly both for NRAs' accountability and their independence.⁵ The latter is perceived to be among the most important preconditions for a good regulation⁶; that is to say, for

¹ Cf. Windholz, E. L., *Governing through Regulation: Public Policy, Regulation and the Law*, Routledge, New York, 2018, pp. 20-28; Talesh, S., *Public Law and Regulatory Theory*, in: Ansell, C.; Torfing, J. (eds.), *Handbook on Theories of Governance*, Edward Elgar Publishing, Cheltenham, 2016, p. 105; Hodge, G., *Revisiting State and Market through Regulatory Governance: Observation of Privatizations, Partnerships, Politics and Performance*, New Zealand Business Law Quarterly, vol. 18, no. 3, 2012, p. 263.

² Namely, a realization of potential advantages depends, *inter alia*, on the institutional design.

³ Cf. Gilardi, F., *Evaluating Independent Regulators*, in: OECD, *Designing independent and accountable regulatory authorities for high quality regulation. Proceedings of an Expert Meeting in London, United Kingdom, 10-11 January 2005*, OECD Publishing, Paris, 2005, pp. 101-125.

⁴ In the European legal theory, a modern state is predominantly perceived to be a service to the people. In this concept, one can recognize a special kind of principal-agent relationship; people (should) play the role of the principal while the peoples' representatives, i.e., elected politicians (and more generally the state in a broad sense, which also includes NRAs), (should) play the role of the agent. Serving the people is the main reason for the existence of modern state which draws its legitimacy from it; Ferčič, A., *Public Services and Related Concepts in the European Union: Understanding the European Union's Legal Framework for Services of General Economic Interest*, Nova Science Publishers, New York, 2020, p. xxxi.

⁵ Cf. González, C. I.; Álvarez, S. G., *Delegation versus Control: A Comparison of Reform Patterns and Diffusion Channels in Latin American Regulatory Agencies*, *Journal of Comparative Policy Analysis: Research and Practice*, vol. 24, no. 4, 2022, pp. 360-384.

⁶ Cf. Eriksen, A., *Political values in independent agencies*, *Regulation & Governance*, vol.

a positive and preferred outcome of the regulatory policy process.

Yet, the degree of NRAs' independence varies between countries, sectors and time periods. While the geographical and sectoral dimensions have been intensively discussed in the theory⁷, the temporal dimension has gained significantly less attention. Even where it has been discussed⁸, the European Union energy sector and related supranational legal framework have not been covered or at least not sufficiently. Since the temporal dimension (combined with the other two dimensions) allows understanding the arc of development and insight into new standards and trends that will guide both, interpreters and legislators, its neglect in the theory is, in my opinion, a serious shortcoming.

15, no. 3, 2021, pp. 794-795; Ottow, A., *Market & Competition Authorities: Good Agency Principles*, Oxford University Press, Oxford, 2015, p. 99, 200; OECD, *OECD Best Practice Principles for Regulatory Policy: The Governance of Regulators*, OECD Publishing, Paris, 2014, pp. 45-88; Geradin, D., *The Development of European Regulatory Agencies: What the EU Should Learn from American Experience*, *Columbia Journal of European Law*, vol. 11, no. 1, 2004, pp. 27-30.

⁷ Cf. Jordana, J.; Fernández-i-Marín, X.; Bianculli, A. C., *Agency proliferation and the globalization of the regulatory state: Introducing a data set on the institutional features of regulatory agencies*, *Regulation & Governance*, vol. 12, no. 4, 2018, pp. 524-540; Koop, C.; Hanretty, C., *Independence, Accountability, and the Quality of Regulatory Decision-Making*, *Comparative Political Studies*, vol. 51, no. 1, 2018, pp. 38-75; Guardiancich, I; Guidi, M., *Formal Independence of Regulatory Agencies and Varieties of Capitalism: A Case of Institutional Complementarity?*, *Regulation & Governance*, vol. 10, no. 3, 2015, pp. 211-229; Maggetti, M., *De facto independence after delegation: A fuzzy-set analysis*, *Regulation & Governance*, vol. 1, no. 4, pp. 271-294; Elgie, R.; McMenamin, I., *Credible Commitment, Political Uncertainty or Policy Complexity? Explaining Variations in the Independence of Non-Majoritarian Institutions in France*, *British Journal of Political Science*, vol. 35, no. 3, 2005, pp. 531-548; Thatcher, M., *Regulation after delegation: independent regulatory agencies in Europe*, *Journal of European Public Policy*, vol. 9, no. 6, 2002, pp. 954-972; Gilardi, F., *Delegation in the Regulatory State: Independent Regulatory Agencies in Western Europe*, Edward Elgar Publishing, Cheltenham, 2008; Gilardi, F., *The Same, But Different: Central Banks, Regulatory Agencies, and the Politics of Delegation to Independent Authorities*, *Comparative European Politics*, vol. 5, no. 3, 2007, pp. 303-327; Gilardi, F., *The Institutional Foundations of Regulatory Capitalism: The Diffusion of Independent Regulatory Agencies in Western Europe*, *The ANNALS of the American Academy of Political and Social Science*, vol. 598, no. 1, 2005, pp. 84-101; Gilardi, F., *op. cit.* (fn. 3), pp. 101-125; Gilardi, F., *The Formal Independence of Regulators: A Comparison of 17 Countries and 7 Sectors*, *Swiss Political Science Review*, vol. 11, no. 4, 2005, pp. 139-167; Gilardi, F., *Policy credibility and delegation to independent regulatory agencies: a comparative empirical analysis*, *Journal of European Public Policy*, vol. 9, no. 6, 2002, pp. 873-893.

⁸ See for example, Coroado, S., *Does formal independence of regulators change? Evidence from Portuguese agencies*, *Governance*, vol. 33, no. 1, 2020, pp. 61-77; Koop, C.; Hanretty, C., *op. cit.* (fn. 7), pp. 38-75.

In this article, the temporal dimension is well included in the discussion on institutional design. For this reason, appropriate benchmarks are applied as well as an appropriate system of observation. As far as the benchmarks are concerned, the article not only applies the familiar Gilardi's test but it even introduces the new test which builds upon antecedents but at the same time surpasses their boundaries since it takes account of contemporary good regulatory practices and theory. Furthermore, as far as the system of observation is concerned, the focus is on the temporal dimension; however, the latter, by its very nature calls into play the remaining two dimensions. In this regard the European Union's internal energy (electricity market) legislative acts as of 1996⁹, 2003¹⁰, 2009¹¹ and 2019¹² have been evaluated under the two instruments mentioned above. There is no need to explain in detail an essential influence of the selected supranational acts on the electricity market legislation of Member States, as well as on those of the candidate countries, in case one simply considers basic features of the European Union and its law, both being *sui generis*, e.g., primacy, direct, indirect and incidental effect, effectiveness etc. In other words, the top-down approach (Europeanisation) is clearly predominant (and this thesis holds from the very beginning of the energy sector liberalization process).¹³ The mere fact that the European Union energy law decisively impacts the energy legislation in approximately thirty countries seems to sufficiently legitimize its choice for the research's purpose. Moreover, the choice made in the context of the sectoral dimension draws its legitimation from the fact that the energy (electricity) sector is among the sectors subject to the liberalization process in which NRAs are traditionally authorized to carry out a major component of regulatory activities. Significantly, electricity plays a vital role in a modern society and its various systems; it is literally a condition *sine qua non* for most other activities supporting business. For illustration, let us think of a doctor providing urgent health care service in the midnight hours

⁹ Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, O. J. L 27 1997, (Directive 96/92/EC).

¹⁰ Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, O. J. L 176 2003, (Directive 2003/54/EC).

¹¹ Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, O. J. L 211 2009, (Directive 2009/72/ES).

¹² Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, O. J. L 158 2019, (Directive (EU) 2019/944 or the new Electricity Directive).

¹³ Cf. Gilardi, F., *The Institutional Foundations*, *op. cit.* (fn. 7), pp. 87, 89-90.

by using a candle to see a patient while all technical devices are out of order due to lack of energy. Or, let us think of digitalization and its dependence on energy. Not surprisingly, both the Juncker's and the von der Leyen's Commissions ranked energy at the top of their priorities. Ultimately, however, ambitious aims as articulated in the European Green Deal, demand effective NRAs which must be, *inter alia*, sufficiently independent.

The formal independence of energy NRAs is the principal theme of this article. The second chapter briefly discusses the NRA's independence as one of the guiding principles for the so-called institutional design (in order to explain the context and topic's relevance, and even more in order to prepare the terrain for the measurement validity as typically required).¹⁴ The third chapter discusses the evaluation tests with an emphasis on the new test. The fourth chapter deals with the evaluation of the NRA's formal independence as required by the selected legislative acts. It also discusses the system of observation, the results of the assessment reached under the evaluation tests, and the untapped potential. Finally, the fifth chapter is designed as a conclusion containing fundamental findings and thesis.

2. NRA'S INDEPENDENCE AS ONE OF THE GUIDING PRINCIPLES FOR THE INSTITUTIONAL DESIGN

NRA's independence is now accepted as one of the guiding principles for their institutional design.¹⁵ The article builds on this thesis.

A specialized legal entity, which in the scope of the executive branch of the state's public authority, but not as a government or ministry, its division or organ, or a body operating under its supervision, relatively independently performs delegated *iure imperii* tasks, even *ex ante* sector regulation, is a relatively old rather than new¹⁶ concept. Yet, independence approaches are still under

¹⁴ By taking into consideration the reference work in the field of measurement validity, the second chapter explains the 'systemized concept' of independence as opposed to the 'background concept'. Moreover, the discussed work is also considered when dealing with the 'indicators' and 'scores for cases'. See more on measurement validity in Adcock, R.; Collier, D., *Measurement Validity: A Shared Standard for Qualitative and Quantitative Research*, *The American Political Science Review*, vol. 95, no. 3, 2001, pp. 529–546.

¹⁵ Cf. Ottow, A., *op. cit.* (fn. 6), pp. 99, 200; Geradin, D., *op. cit.* (fn. 6), pp. 27-30

¹⁶ For illustration, the Interstate Commerce Commission was established in the United States in 1887, to carry out specific public tasks, and in 1889 was excluded from the state administration, thereby enabling it to independently decide on the use of funds, recruitment and internal organizational issues. US legal theory characterizes 1889 as

construction. So, on the one hand, varieties of approaches (even conflicting ones) can be seen, while on the other hand, a closer look reveals a positive arc of development, i.e., a trend of ever higher independence standards. Presently, their compliance with legislative acts and judicial supervision is generally accepted, and the same is true for their financial supervision by the court of auditors or other similar bodies. NRA is, accordingly, not in a position to function in the way that Benjamin Franklin allegedly declared for himself; namely: “I am the lord of myself, accountable to none”. Indeed, their professional supervision free of politicians is not merely allowed but rather welcome. This idea informs us where the real threats to the NRA’s independence come from. The legislation shall provide a lowest level of governmental and ministerial or more general, political interference, both *ex ante* and *ex post*, in the NRA’s regulatory or professional work. For a greater clarity, let it be explicitly pointed out that in light of the type and scope of political interference we can generally differentiate between a traditional holder of public authorization, where governmental or ministerial political interference and supervision are usually expected, and genuine NRA (usually in a form of public agency), where this type of political influence is significantly limited by legislative acts or, even better, it is proscribed in order to ensure the effective independence of a NRA, which is among its essential features. Of course, this independence does not merely relate to the restriction of political influence but also to inappropriate influence coming from other stakeholders aside from politicians, e.g., (energy) companies, trade unions and taxpayers, where principally we have to aim at “zero” as well. This article, however, only stresses the management of political and corporate influences, as they constitute the biggest threat to the NRA’s independent professional work.

Theory differentiates between many types of independent (public) agencies or authorities¹⁷, but considering the article’s content, the focus is on sector regulators that have the most far-reaching powers, including the power to regulate the market behaviour of businesses *ex ante*, which is a very challenging task mainly for two reasons. First, regulators must be careful not to cause regulatory failures when correcting market failures. Second, they must manage extreme interest pressures that are exerted by various influential stakeholders.¹⁸

the beginning of the tradition of independent (regulatory) agencies at the federal level; see Verkuil, P. R., *The Purposes and Limits of Independent Agencies*, Faculty Publications, College of William & Mary Law School, 1988, <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2061&context=facpubs> (10 August 2022).

¹⁷ See for example, Ottow, A., *op. cit.* (fn. 6), pp. 27-30.

¹⁸ Theory cites the “regulatory dilemma” in this regard, which requires the regulator, similar as applies for a tightrope walker, to continuously seek a balance between many

This finding reveals the rationale for endeavouring to ensure a desired level of NRA's independence.¹⁹ The latter is not a stabile situation but rather a labile one. Therefore, a constant and effective effort is needed in order to protect the NRA's independence.

The mere fact that in a given country a sector regulator is established in the form of a (public) agency or similar legal entity, standing alone will not ensure effective regulation.²⁰ Where there is no appropriate legal environment for a NRA, where the NRA is unsuitably organized or designed, or where it is poorly governed and managed, it eventually not only becomes ineffective in carrying out its primary mission but also becomes part of the problem, not the solution; in this case, the NRA's main justification for being established disappears, and with it the legitimacy for its existence and operation. When a NRA ceases to be robust, it loses its ability to withstand pressures by stakeholders, notably corporations, political parties or individual politicians, which would like to exercise their own power to pursue specific private interests, which often are in conflict with those of the general or public interest.

But does the prevention of inappropriate influence exerted by corporations, political parties or individual politicians necessarily constitute a trade-off between the two? I do not think so. I believe, it is possible to achieve both objectives simultaneously, which means that the public measures for ensuring political independence do not necessarily push a NRA into the embrace of companies and other private law corporations, and *vice versa*.²¹

In order to prevent abuse of power and to ensure effective independence of NRA, the theory gradually developed principles, rules and recommendations.²²

opposing concepts, e.g., trust versus distrust, cooperation versus repression, transparency versus confidentiality, and efficiency versus carefulness; see Ottow, A., *op. cit.* (fn. 6), pp. 6-8.

¹⁹ Cf. Cambini, C.; Franzini, D., *Independent regulatory agencies and rules harmonization for the electricity sector and renewables in the Mediterranean region*, Energy Policy, vol. 60, 2013, pp. 179-191.

²⁰ See for example, Çetin, T.; Sobacı, M. Z.; Nargeleçekenler, M., *Independence and accountability of independent regulatory agencies: the case of Turkey*, European Journal of Law and Economics, vol. 41, no. 3, 2016, pp. 601-620.

²¹ This concern, despite not being clearly highlighted, could be recognized in the second energy package, which merely required the assurance of the regulators' independence from energy companies; see Art. 23(1) of Directive 2003/54/EC.

²² Useful theoretical works, in addition to other works cited elsewhere in this article, are e.g. Zhelyazkova, N., *Regulatory Independence in the European Union: A Top-Down View on the Network Industries*, GovReg Working Paper Series, 2016, pp. 1-31; Koske, I.; Naru, F.; Beiter, P.; Wanner, I., *Regulatory Management Practices in OECD Countries*, Economics Department Working Papers No. 1296, 2016, <https://www.oecd-ilibrary.org>.

However, individual theoretical works generally do not cover all relevant regulatory aspects and, importantly for this article, do not discuss the state of play after the new electricity Directive. The latter is at the heart of this article. Moreover, this article considers the relevant documents of certain organizations or professional associations, in particular those specialized for the electricity or energy sector. In particular, selected relevant documents of the OECD²³, ECRB²⁴, ERRA²⁵, CEER²⁶ and ACER²⁷ were analysed in detail, mainly to create the comprehensive test. Moreover, the document prepared by credible external providers for the European Commission should also be noted here.²⁸

An analysis of these documents reveals a lack of a fully homogeneous corpus. Nevertheless, it is possible to identify from them a relatively firm core of good practices and principles, which can be used in the area of the organization, management and governance of a NRA. The identified good practices and

org/docserver/5jm0qwm7825h-en.pdf?expires=1593787958&id=id&acname=guest&checksum=D0478E8A37F8AEBA4C0623C378B5746 (10 August 2022); Bach, T.; Ruffing, E., *Networking for Autonomy? National Agencies in European Networks*, Public Administration, vol. 91, no. 3, 2013, pp. 712-726; Gilardi, F., *The Same, But Different...*, *op. cit.* (fn. 7), pp. 303-327.

²³ OECD, *Creating a Culture of Independence: Practical Guidance Against Undue Influence, The Governance of Regulators*, 2016, <http://www.oecd.org/gov/regulatory-policy/Culture-of-Independence-Eng-web.pdf> (10 August 2022); OECD, *Being an Independent Regulator, The Governance of Regulators*, 2016, <https://dx.doi.org/10.1787/9789264255401-en> (10 August 2022).

²⁴ ECRB, *Independence of National Regulators in the Energy Community – A Critical Review*, 2015, https://www.energy-community.org/portal/page/portal/ENC_HOME/DOCS/3754149/18DC1BF11FCE2743E053C92FA8C07751.PDF (10 August 2022).

²⁵ Szörényi, G. (ed.), *ERRA Survey: Independence of the National Regulatory Authorities*, 2016, https://erranet.org/wp-content/uploads/2016/03/ERRA-Survey-Regulatory-Independence_OPEN_final.pdf (10 August 2022).

²⁶ CEER, *The independence of National Regulatory Authorities*, CEER White Paper series (paper # V) on the European Commission's Clean Energy Proposals, 2017, <https://www.ceer.eu/documents/104400/-/d20f3828-2679-782d-d0d7-81bd4619bfc5> (10 August 2022); CEER, *CEER Report: Safeguarding the independence of regulators, Insights from Europe's energy regulators on powers, resources, independence, accountability and transparency*, 2016, <https://www.ceer.eu/documents/104400/-/ca57c28e-f899-bb14-8e82-919073ff6e68> (10 August 2022).

²⁷ ACER, *Recommendation of the Agency for the Cooperation of Energy Regulators*, 2016, https://acer.europa.eu/Official_documents/Acts_of_the_Agency/Recommendations/ACER%20Recommendation%2001-2016.pdf (10 August 2022).

²⁸ Ypma, P. et al, *Assessing the independence and effectiveness of National Regulatory Authorities in the field of energy: a study carried out for the European Commission by Spark Legal Network*, Trinomics and the University of Groningen, Publications Office of the European Union, Luxembourg, 2019.

principles can in turn be categorized in interrelated (sub-)sets. There are two fundamental sets of good practices and principles dealing with the NRA's independence in the context of corporate and political pressures. Further, the set dealing with political pressures can be further broken down into a subset of good practices and principles relating to the regulator, so to a legal entity as a whole, and into a subset relating the regulator's staff or personnel. This is so because corporate pressures are mainly oriented towards the regulator's personnel while political pressures are often oriented also towards the regulator as a whole (to a legal person). This categorization of good practices and principles is followed in this article. Additionally, as will be explained in Chapter 3, there is a set of three (exclusionary) criteria which can automatically lead to the conclusion that an observed NRA is not sufficiently independent.

Having established that presently the NRA's independence is one of the guiding principles for their institutional design, I shall shift my focus to the ways to ensure their independence.

The first logical step towards ensuring the NRA's independence is through the enactment of a legislative provision clearly stipulating that a given country shall establish a NRA as a distinct legal person (mostly a public agency) which is effectively independent from both, a corporate and political spheres. However, the enactment of a general legislative provision is a necessary but insufficient measure as the past practice reveals it is far from being enough to achieve the desired level of independence. The basic provision shall be concretized and supplemented by numerous specific legislative provisions. This article is focused on the four generations of the European Union's electricity directives; the content of the discussed directives and their evaluation is the very core of this article. The evaluation in question is conducted using the tests described above, while, for practical reasons, the emphasis is on the new comprehensive independence test.

3. THE NEW COMPREHENSIVE INDEPENDENCE TEST FOR THE EVALUATION OF NRA'S INDEPENDENCE: THE METHODOLOGICAL CONSIDERATIONS AND SUBSTANCE

The new comprehensive independence test²⁹ for the evaluation of the NRA's independence is informed by its antecedents which mainly build on eminent Gilardi's test³⁰, which itself draws upon its conceptual idea from even earlier tests.³¹ Therefore, the new comprehensive test also considers the original tests.

²⁹ See Appendix.

³⁰ See his works cited *supra* (fn. 7).

³¹ Cf. Elgie, R., *Democratic accountability and central bank independence: Historical and contem-*

I am well aware of the limits of the formal (*de iure*) independence. One can hardly oppose the thesis that the determinants of the independence are not purely formal; they are not simply to be found in legal statutes, orders and other formal rules.³² Yet, even if the formal and actual (*de facto*) level of independence do not necessarily match each other, since in a regulatory practice the latter can go below or above the level of former³³, I contend the formal rules are a good proxy for the actual independence, particularly in countries which effectively enforce the rule of law.

When designing the evaluation test, the utilization of a certain degree of subjectivity is practically unavoidable. However, it would be narrow-minded to reject *a priori* any such evaluation test and its results; instead, it is better to understand the problem and to apply corrective measures.³⁴ Indeed, there are principally three types of choices involved in the design of the discussed test where at least some degree of personal judgment takes place; i.e., a choice of criteria (variables), a choice of interpretation and a choice of weights.³⁵ The three choices and associated risks are considered and mitigated in this article.

The choice of the test's criteria has been made after a careful consideration of relevant sources; namely, of the legislative acts³⁶, official documents and reports³⁷ as well as theoretical works.³⁸ Although the analysis of the relevant sources demonstrates a lack of fully homogeneous corpus, it is nonetheless possible to identify a relatively firm core of good practices and principles. Well known Gilardi's test and its "versions" come relatively close to the said core; however, the refined evaluation test as discussed in this article in some cases advocates

porary national and European perspectives, *West European Politics*, vol. 21, no. 3, 1998, pp. 53-76; Cukierman, A.; Webb, S. B.; Neyapti, B., *Measuring the Independence of Central Banks and Its Effect on Policy Outcomes*, *World Bank Economic Review*, vol. 6, no. 3, 1992, pp. 353-398; Grilli, V.; Masciandaro, D.; Tabellini, G., *Political and monetary institutions and public financial policies in the industrial countries*, *Economic Policy*, vol. 6, no. 13, 1991, pp. 341-392.

³² Cf. Wooley, J. T., *The Politics of Monetary Policy: A Critical Review*, *Journal of Public Policy*, vol. 14, no. 1, 1994, pp. 57-85.

³³ Cf. Forder, J., *Debate: Some Methodological Issues in the Statutory Characterisation of Central Banks*, *West European Politics*, vol. 24, no. 1, 2001, pp. 202-216.

³⁴ Cf. Mangano, G., *Measuring Central Bank Independence: A Tale of Subjectivity and of Its Consequences*, *Oxford Economic Papers*, vol. 50, no. 3, 1998, pp. 468-492.

³⁵ Cf. Mangano, G., *op. cit.* (fn. 34), pp. 468-492; Ejjfinger, S.; Schaling, E., *Central Bank Independence in Twelve Industrial Countries*, *Banca Nazionale del Lavoro Quarterly Review*, vol. 184, 1993, pp. 49-89.

³⁶ See fn. 9-12.

³⁷ See fn. 23-28.

³⁸ See the list of references.

higher independence standards by considering the latest developments in regulatory practice and theory. Consequently, it contains additional criteria which, however, is not automatically a move forward. Namely, the inclusion of additional irrelevant criteria is clearly detrimental to the test's accuracy since their inclusion has the effect of reducing the weight given to relevant criteria. In an attempt to minimize this pitfall, I included only criteria which are supported by arguments in order to ensure, as much as possible, transparency and objectivity. As a further precaution, I simultaneously apply not only the latest version of Gilardi's test but also the refined test, in order to mirror the state of the art. This way, I have tried to reduce personal (i.e., subjective) judgments and/or preferences to a minimum level. The fact that there are so many relevant sources, which reveal the relatively firm core of the discussed subject, leaves less space for subjectivity and brings less risk as compared with the early attempts to design a set of criteria³⁹, which meant a start from scratch which brought a great portion of subjectivity as already pointed out.⁴⁰

The choice of interpretation seems to be non-problematic since the analysed legislative acts were principally drafted in a clear fashion and mostly there are no difficult interpretative cases. This particularly holds for the new Electricity Directive.⁴¹

The choice of weights to be assigned to the various criteria and the numerical coding of options is more challenging. Before I explain the weights and numerical coding and related mitigation of the subjectivity risk, I briefly describe the test's structure since it suggests reasonable choices which must be made. The test consists of thirty-seven criteria (variables) and one hundred and twenty-four options which puts it among the most comprehensive tests in the field, if not the most comprehensive. The latter itself is a comparative advantage since new trends and standards are included. This is most obvious regarding the evaluation of the independence of NRA from private law corporations.

The test's criteria and related options are allocated in three sets which form a functional unit.

The first set is designed as a kind of filter for the biggest and most troublesome elements. Namely, it contains three clear-cut criteria which shall be perceived as the *peccatum mortale*, which occur if the applicable legislative act

³⁹ See works cited *supra* (fn. 31).

⁴⁰ E.g. Mangano, G., *op. cit.* (fn. 34), pp. 468-492.

⁴¹ There is one interpretative issue; namely, an unclear distinction between members of the board of NRA and its top management as discussed in the fourth chapter but this cannot undermine the earlier statement; namely, that the provisions of the new Electricity Directive are principally clear.

stipulates: (a) NRA is an organizational unit of a government or ministry; (b) a power of a government, ministry or any other public organ, except of a competent court, to modify or abolish the NRA's individual or general legal act; (c) NRA has an obligation to follow instructions, in whatever form, from any public organ or person regarding the regulatory decision-making.

The second set consists of eleven criteria which are related to the independence of NRA and its personnel from private law corporations, particularly those carrying out energy activities. Under scrutiny is any kind of corporative pressure regarding the NRA's decision-making and related legal consequences, conflicts of interest, and contacts as pointed out in the Appendix.

The third set consists of twenty-three criteria related to the independence of NRA and its personnel from the government or ministries and more generally from individual politicians, which are directly or indirectly related to the NRA's legal status, status of its management, measures for prevention of conflict of interest, relations between NRA and public organs, NRA's financing and some other issues as pointed out in Appendix.

After taking into consideration the fatal nature of the first set's criteria, that is to say, by considering that any of them can push the NRA's independence under the critical level and, as a consequence, there is no sense to continue with the analysis, I used a code 'log 0' for each, which means a negative infinity, while the absence of a fatal situation does not lead to a code '1' (there is no benefit for the normal state; its coding with "1" would artificially increase the index while the coding with 'log 1' would also distort the index but in the opposite direction).

The same logic is not applied in the second and third set since none of their criteria is fatal. Only where appropriate, I used just 'yes' and 'no' options which are coded by '0' and '1'. However, in the case of most criteria (C), a simple black and white approach would be clearly inappropriate. Accordingly, numerous logical options are offered to obtain results as precise as possible. In such cases, each option is coded on two decimal places by using a scale from '0' to '1'. To avoid additional subjectivity, the coding is linear, e.g., '0,00; 0,20; 0,40; 0,60; 0,80; and 1,00' (in case there are six options), which is the widely-accepted approach used for a considerable time.⁴² In addition, as to the choice of weights, I decided not to use them in a classical sense, but rather to follow the logic of proportionality. This approach has the advantage of demonstrating and quantifying the differences between the NRA's independence from private law

⁴² Cf. Gilardi, F., *The Same, But Different...*, *op. cit.* (fn. 7); Elgie, R., *op. cit.* (fn. 31); Cukierman, A.; Webb, S. B.; Neyapti, B., *op. cit.* (fn. 31).

corporations and from government (and politicians in general), without the disadvantages of interjecting elements of favorization / discrimination between certain criteria. In other words, it is good to know where the risks come from but I would not dare to say that risks coming from the private sphere are more problematic than those coming from the government, and *vice versa*. More generally, I would not dare to say that certain criteria (variables) are more important than others and exactly how more important since by doing that one necessarily increases the subjectivity of the evaluation test (except in case of *peccata mortalia*). In the final analysis, it is most important to identify situations which, in one way or another, affect the NRA's independence.

The aggregated result, i.e., the NRA's independence index (I) is calculated as follows:⁴³

$$\sum_{i=1}^{33} \frac{C(i)}{33} = \frac{C(1) + \dots + C(33)}{33}$$

The same approach applies calculating both 'partial' NRA's independence indexes; i.e., of that relating to independence from companies or more generally, private law corporations ($I_{(corp)}$) and the government ($I_{(gov)}$). They form the NRA's independence index (I):

$$I = \frac{I_{(corp)} + I_{(gov)}}{2}$$

Finally, in addition to the evaluation of the supranational legislative acts by using the new test, I also used eminent Gilardi's test in order to verify and compare the results. The main differences between the discussed evaluation tests are as follows. The refined test starts with the clear-cut criteria which can automatically stop the evaluation process with the finding that an observed NRA is not (sufficiently) independent. One example is where a regulator is merely an organizational unit of a ministry. An equally problematic situation is where a government or its ministry can abolish or modify the NRA's decisions or even order its decisions, or when a NRA must follow instructions regarding the regulatory decision-making (meaning that it cannot take professional decisions within the valid legal framework). In either of these situations, it is not possible to conclude that the regulator has independence in any real sense of that word, since its core mission is essentially impaired. In such cases, a simple assignment of the code "0"

⁴³ The criteria dealing with *peccata mortalia* are not included in the calculation. Moreover, since the test in one case offers two alternative criteria, only one of them is included in calculation. Consequently, of thirty-seven criteria 'only' thirty-three are included in the calculation.

has too modest impact on the final result. This is true to an even greater extent in the case of an evaluation test with a high number of independence criteria and, accordingly, I chose the code “log 0” which means a negative infinity. The number of independence criteria employed is the next difference between the tests since the new comprehensive independence test contains additional independence criteria as one can easily recognize from a review of the Appendix. As discussed later in the text, some of the additional criteria are presently simply a “must”. Not only does the comprehensive test contain additional criteria dealing with the political pressures, but it also contains several criteria dealing with the corporate pressures which are not included, at least not directly, in Gilardi’s test though they pose an important threat to the NRA’s independence. Another difference is evident in the field of weights; namely, in order to avoid the arbitrariness as much as possible, the comprehensive independence test does not favour any specific criteria over others.

Of importance also is that evaluation tests, in some cases, demand an adjusted application since there are cases where the observed legislative acts do not perfectly fit into the tests’ options. More precisely, in some cases the tests do not offer an option that a certain issue is not regulated. I decided to code all such cases with “0,00” instead of labelling them as “not applicable (N/A)”. Moreover, there are cases where the legislative measures fall into more than one of the test’s options. For example, Art. 57 (5) (d) of the new Electricity Directive stipulates that “the members of the board of the regulatory authority or, in the absence of a board, the regulatory authority’s top management are appointed for a fixed term of five up to seven years, renewable once”, while the evaluation test offers, *inter alia*, the following options: 5 years (0,60), and 6–8 years (0,80). So, I calculated the index of the discussed criteria ($c_{(x)}$) by considering all the relevant options and related values ($t_{(5 \text{ yrs})}$, $t_{(6 \text{ yrs})}$, $t_{(7 \text{ yrs})}$), and the number of those values (N):

$$c(x) = \frac{t(5 \text{ yrs}) + t(6 \text{ yrs}) + t(7 \text{ yrs})}{N} = \frac{0,60 + 0,80 + 0,80}{3} \approx 0,73$$

This way, I believe, the arbitrariness is well-managed, which cannot be said for the ‘alternative’ approach of simply choosing the code ‘0,60’ (5 years) or ‘0,80’ (6 – 8 years) or, slightly better, by calculating the average value of the code ‘0,60’ and ‘0,80’ (which is ‘0,70’). Namely, in the discussed cases each such oversimplification would lead to the different result which is important since, after all, there are numerous cases in which the adjustment is needed. For this reason, I avoided such oversimplification in all cases where the observed legislative acts do not fit perfectly into the one or another evaluation test as used in this article.

4. THE EVALUATION OF THE NRA'S FORMAL INDEPENDENCE AS REQUIRED BY THE SELECTED SUPRANATIONAL LEGISLATIVE ACTS

This chapter is the article's core; it is designed to evaluate the formal independence of NRA, as required by the European Union's directives on common rules for the electricity internal market. For this reason, the directives are analyzed under both the comprehensive independence test and Gilardi's test. This double verification yields at least a triple benefit.

Namely, the article delivers not only the results of an evaluation achieved under the test predominant so far, which in turn enables a simple comparison with previous research works which used the same test but also a comparison of the results of an evaluation conducted with the different independence test. At the same time, it also enables the evaluation with respect to additional criteria (variables) dealing with stricter independence requirements which can be rightly perceived as a "must". This raises considerations relating to the results of the evaluation with and without new criteria. It is relatively safe to assume that we get an artificially higher evaluation result in case of less strict criteria which, however, can be a problem since it can suppress incentives for the improvement of the part of the present (supranational) legislative framework which deals with NRA's independence. As premature or speculative judgments are not welcome in the scientific world, I rather deal with the considerations mentioned above with due respect of the results of evaluation, therefore, the final judgment follows in the last chapter.

4.1. The system of observation

The system of observation, at least the initial one, is comprised of four legislative acts (directives); namely, of the Directive 96/92/EC, the Directive 2003/54/EC, the Directive 2009/72/EC, and of the Directive (EU) 2019/944.⁴⁴

Of course, the most interesting is the Directive (EU) 2019/944, i.e., the new Electricity Directive. It stems from the reasonable premise that NRAs need to be able to make decisions in relation to all relevant regulatory issues if the internal market for electricity is to function properly, and must be fully independent from any other public or private interests (Rec. 80, and Art. 57). This premise can be traced back to the Directive 2009/72/EC, and partly to the

⁴⁴ See fn. 9-12. In this chapter I use the term "the Directive (EU) 2019/944" instead of the term "the new Electricity Directive", which is used in other chapters, in order to avoid misunderstanding when discussing four directives.

Directive 2003/54/EC, while it cannot be found in the Directive 96/92/EC, which did not demand the existence of a NRA; in the context of the construction of the new generating capacity, the Directive 96/92/EC stipulated that Member States shall designate an authority or a public body or a private body independent of electricity generation, transmission and distribution activities to be responsible for the organization, monitoring and control of the tendering procedure (Art. 6(5)), while in the context of the access to the system, it merely stipulated that Member States shall designate a competent authority, which must be independent of the parties, to act as a dispute settlement body (Art. 20(3)). Obviously, none of the two types of national bodies as demanded by the Directive 96/92/EC can be considered as a genuine NRA (which is further confirmed by other directive's provisions) and, consequently, it is impossible to evaluate the independence of a body that does not exist.

In short, the existence of energy NRAs was first demanded in the Directive 2003/54/EC, and after that this obligation was preserved in the Directive 2009/72/EC and Directive (EU) 2019/944.

Yet, the mere existence of a NRA is not a guarantee for effective regulation. Therefore, I used the two tests previously described to evaluate the appropriateness of the discussed directives from the perspective of the NRA's independence as follows directly in the next section.

4.2. The results of evaluation

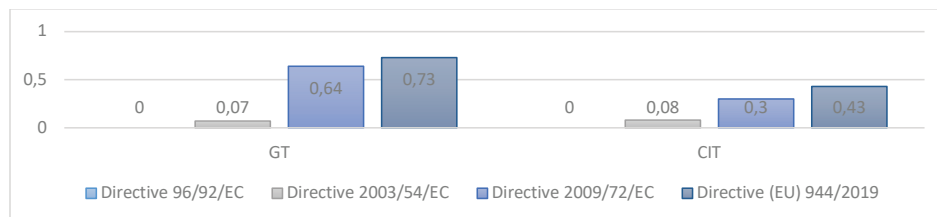
The results of evaluation of the NRA's formal independence as required by the directives, i.e., the Directive 2003/54/EC, the Directive 2009/72/EC and the Directive (EU) 2019/944, conducted pursuant to the comprehensive independence test (CIT) and Gilardi's test (GT)⁴⁵ are presented below. However, in order to avoid misinterpretations, the GT must be considered as only dealing with the formal independence of NRAs from undesired political pressures or executive branch. Therefore, I first depicted the results achieved by full application of the CIT, i.e., by applying the part dealing with corporate pressures and the part dealing with undesired political pressures, and in addition, I offered the results achieved by partial application of the CIT, i.e. by applying only the part of the CIT dealing with undesired political pressures. The results obtained by the latter are better for the comparison with the results achieved by the GT since it more realistically shows a comparison in the field of management of po-

⁴⁵ Since the test uses weights, I decided to include also the results without using weights (which are in brackets).

litical pressures. On the other hand, the comparison of results obtained by the two tests is not possible regarding the management of the corporate pressures since unfortunately the GT does not deal with that. However, in order to assess the development in the field of management of corporate pressures, the results obtained by the CIT's partial application are also discussed.

- Table 1 & Graph 1: the results obtained by the GT and the CIT (a full application of the CIT: management of corporate and political pressures)

	Directive 96/92/EC ⁴⁶	Directive 2003/54/EC ⁴⁷	Directive 2009/72/EC	Directive (EU) 2019/944
GT	N/A: 0,00	0,07 (0,05)	0,64 (0,45)	0,73 (0,65)
CIT	N/A: 0,00	0,08	0,30	0,43



source: the authors's own research

- Table 2 & Graph 2: the results obtained by the GT and the CIT (a partial application of CIT: management of political pressures)

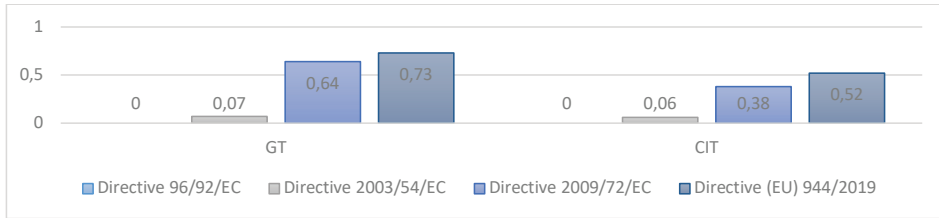
	Directive 96/92/EC ⁴⁸	Directive 2003/54/EC ⁴⁹	Directive 2009/72/EC	Directive (EU) 2019/944
GT	N/A: 0,00	0,07 (0,05)	0,64 (0,45)	0,73 (0,65)
CIT	N/A: 0,00	0,06	0,38	0,52

⁴⁶ As explained in Chapter 4.1., the Directive 96/92/EC does not demand an establishment of a genuine NRA, therefore, the tests are not applicable, yet, I decided to include the directive at this point in order to illustrate the situation in the discussed field in the early stage of the liberalization of energy sector.

⁴⁷ The Directive 2003/54/EC is drafted in a way, which enables alternative scenario regarding the NRA's independence. Namely, the Art. 23(3) clearly enables the *peccatum mortale*. Yet, there is also the alternative and, therefore, I decided to evaluate the Directive 2009/72/EC via the comprehensive test while the result, which is slightly above "0", relates to the alternative which does not lead to the automatic exclusion of the evaluation.

⁴⁸ See fn. 46.

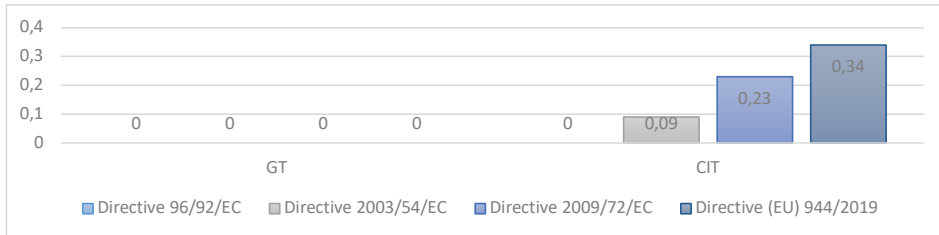
⁴⁹ See fn. 47.



source: the author's own research

- Table 3 and Graph 3: the results obtained by the GT and the CIT (a partial application of the CIT: management of corporate pressures)

	Directive 96/92/EC ⁵⁰	Directive 2003/54/EC ⁵¹	Directive 2009/72/EC	Directive (EU) 2019/944
GT	N/A: 0,00	N/A: 0,00	N/A: 0,00	N/A: 0,00
CIT	N/A: 0,00	0,09	0,23	0,34



source: the authors's own research

Tables 1, 2 and 3, and related Graphs 1, 2 and 3, show that each directive, except the first one, i.e., the Directive 96/92/EC, obviously brought new independence measures or requirements and, accordingly, a correspondingly higher level of the required NRA's formal independence. One can readily discern a constant and relatively steep upward trend both, in the field of management of corporate pressures as well as of political pressures.

Yet, it is obvious that the supranational legislator first took this issue seriously relatively late, in its third energy legislative package (more precisely, in the Directive 2009/72/EC), adopted approximately thirteen years after the liberalization process of the electricity market began. Namely, the Directive 96/92/EC did not even require the establishment of a genuine NRA (which means it is pointless to discuss the independence of a body that does not exist; so, the tests are not applicable and the code "0" in all tables and graphs mirrors this situation), while the Directive 2003/54/EC contained such requirement but,

⁵⁰ See fn. 46.

⁵¹ See fn. 47.

unfortunately, it was nearly devoid of the legislative provisions essentially needed for the NRA's effective independence. Even worse, it explicitly limited the regulatory authority's competences and it stipulated, as an alternative option, the governmental interference in the regulatory authority's professional decisions or work. This means, in case the said option is chosen by Member States, the NRA's formal independence is fundamentally impaired, and thus coded with "0" or more precisely with 'log 0', when using the CIT. However, even in case Member States do not choose the said option, the situation remains suboptimal as becomes clear after the application of both tests which show levels which are slightly above zero (see all tables and graphs).

Moreover, one can also notice that after the initial focus on management of corporate pressures, the last two directives clearly focus on management of political pressures and, as a result, as the CIT reveals, a poor management of corporate pressures decreases the overall level of NRA's formal independence. This conclusion is supported by comparing Tables/Graphs 1 and 2. In the case of the Directive 2009/72/EC, the independence level is decreased from '0,38' to '0,30', while in the case of the Directive (EU) 2019/944 one can see the decrease from '0,52' to '0,43'. In other words, due to the poor legislative management of corporate pressures on the NRA, the overall level of the CIT is lower by approximately twenty percent.

Regarding the required level of the NRA's formal independence, the results show there is still much work to do, what I refer as the significant untapped potential. The untapped potential, which is for practical reasons discussed in the next section, is particularly obvious when looking at the results achieved by application of the CIT which holds for both fields, the management of corporate and political pressures (see all tables and graphs).

This finding, however, brings us to the next issue; namely, to the evaluation of the GT. Plainly, it is not coincidental that the GT played a dominant role so far. However, at least in my opinion, the GT should be upgraded in order to involve higher standards. Namely, it tolerates the so-called *peccata mortalia*, it does not deal with the management of corporate pressures, at least not directly, and it does not include several important independence requirements. Consequently, it yields higher results (final scores) as compared with the new test discussed earlier. I am afraid, however, that this can suppress highly welcome incentives for constant improvements of the existing energy (electricity) legal framework both, in terms of *de lege lata* and *de lege ferenda*. Namely, when evaluating the discussed directives utilizing the GT, the results are pretty decent (this particularly holds for the Directive (EU) 2019/944 with the highest result, i.e., '0,73'). However, the evaluation of the same directive(s) when utilizing

the CIT shows a rather different picture. Namely, as one can deduce from the Table 2 and Graph 2, when observing the Directive 2009/72/EC and the Directive (EU) 2019/944, the results obtained utilizing the CIT are thirty to forty percent lower as compared to the results achieved utilizing the GT which is, I think, simply too much to ignore. In my view, the CIT is more adapted to the present needs in the discussed field, while at the same time it largely predicated upon solid methodological foundations on which the eminent GT is build. This is among the main reasons for a relatively synchronized movement, yet at different levels, of the results obtained utilizing the discussed tests, which is a further argument favouring the CIT.

4.3. The untapped potential

The untapped potential of the new Electricity Directive in the field of NRA's formal independence from private law corporations and government (or more general from the executive branch and politicians) becomes obvious when considering the evaluation results (as presented in the section 4.2.) in combination with the Appendix, which contains the comprehensive independence test.

Without going into each criterion or variable of the discussed test⁵², it is possible already at the general level to identify several directive's shortcomings, as follows.

In the field of management of the corporate pressures, it would be desirable to include detailed rules on conflict of interest; in particular, not only should the NRA's leadership (and their direct relatives) participation in the capital of energy companies and persons related to them be prohibited, but other arrangements which can cause conflicts, e.g., long term contractual relationships, should be as well. Moreover, every NRA's employee who might participate in decision-making and who can be in a position of conflict of interest with private persons involved in administrative procedure should be automatically disqualified from serving. Indeed, although the new Electricity Directive requires conflict of interest provisions, this is not enough. In case of a conflict of interest, the legal act either must be void *ipso iure* or at least present a rebuttable presumption. The same legal consequence shall occur if the NRA's official or employee seeks or takes instructions from corporations or any other private entity when carrying out the regulatory tasks. The new Electricity Directive is also silent about situations involving contacts between NRA's personnel and personnel of the energy companies or their agents. In these situations, the con-

⁵² For this reason, a reader shall consult the Appendix.

ditions for permissible (non-official) contacts, e.g., consultations and meetings, primarily to effectively prevent corporate pressures on the NRA's personnel dealing with the case, should be clearly defined. In this regard, it would also be beneficial to stipulate an obligation in the annual reports to keep records or minutes about every contact, containing all essential pieces of information, including any direct or indirect pressures, and an obligation to reveal the number of such contacts. Moreover, it should be obligatory to report any direct or indirect pressure to a competent body. Another shortcoming of the new Electricity Directive is its absence of any provision prohibiting donations by individuals or legal persons of private law to the NRA. Donations lead to favouritism, plain and simple. Finally, the risks associated with the so-called revolving door are poorly managed. Namely, the provision which demands confidentiality obligations beyond the end of the mandate of the members of the board of the regulatory authority or, in the absence of a board, the end of the mandate of the regulatory authority's top management, is clearly not enough.

In the field of management of political pressures, I strongly recommend a legislative stipulation that the NRA can autonomously decide about its own priorities and strategy. Moreover, NRA shall be in position not only to autonomously decide on its (regulatory) activities within the legislative framework but also on its internal organization, number of personnel, their professional profile, salaries, promotion and employment conditions (which principally means a justified departure from the general legislation on public servants which is often an important obstacle since for NRA and its personnel special rules are needed). Also, the NRA shall be empowered to define its own budget for a period of two or more years or, if the financial plan is conditioned upon the parliament's consent, refusal of the financial plan shall empower the NRA to activate a temporary funding based on the last financial plan to which the parliament gave a consent. Another aspect of budgetary independence, which is missing, is related to proper budgetary supervision or control; namely, the use of a budget by the NRA shall be subject only to the *ex-post* control carried out by the independent court of auditors. The shortcomings identified above are directly related to the NRA as a legal person (a unit). However, several shortcomings are related to the leadership or personnel of the NRA as well. A distinction must be drawn between members of the board of the NRA and its top management. It is not clear what is meant by the said terms since the directive does not define them. However, when considering the entirety of the directive in context, a reasonable conclusion is that these terms shall not be related to one organ of a NRA organized either as a collective organ or (alternatively) as an individual organ. This conclusion can be deduced, *inter alia*, from the provision

requiring the rotation scheme which relates also to top management. In other words, the rotation scheme applies to collective organs. It would be preferable if the NRA has two organs, i.e., one for governance and one for management issues. The directive should stipulate requirements for both organs, not just for one or another. If the NRA is organized according to a two-tier system of governance, which means two organs, i.e., the governance organ (board of NRA or council) and management organ (board of directors) or individual director (which holds sole responsibility for managing NRA's business operations), the regulatory framework indicated in paragraphs (d) through (g) of Article 57(5) is deficient. It unfortunately enables the interpretation that certain requirements are defined just for one organ. Moreover, the directive should stipulate clear rules regarding the power to appoint leadership. Members of the board or council should be appointed by the parliament with a qualified majority and subsequent members of the board or council should be appointed by the board or council, while the executive board or board of directors (or director) should be appointed by the board or council. Detailed rules on conflicts of interest should also be adopted.

Of course, there are more shortcomings (where the coding was less than '1' but more than '0'), but in the preceding text I have elaborated upon only the most obvious ones, while the remaining, less critical shortcomings, can be identified by a combined reading of this section and the Appendix.

5. CONCLUSION

Independence is commonly considered as one of the essential features of the genuine NRA, and as a condition *sine qua non* it belongs among the guiding principles for the institutional design. Indeed, the new Electricity Directive mirrors this premise in its preamble, but unfortunately the preamble has only limited (interpretative) value when compared with the directive's provisions on NRA. Therefore, the article's focus is on the said provisions.

When dealing with the directive's provisions it is wise to take into account two old sayings. "The devil is in the details"; which in our case means that the observed legislative framework must be analyzed in detail, and transposed in the national legal systems. And even more important, "God is in the detail"; whatever one does should be done thoroughly and with due diligence. So, details are important when striving for perfection or at least for the best possible result. In the discussed field this means the desired result can be only achieved if the directive is timely and correctly transposed into the Member States' legal systems, and then duly implemented and consistently enforced.

Yet, this proves to be a challenge when considering the past practice in some Member States. It seems that at least some Member States strive to retain as much control as they can over their NRAs until they are forced to relinquish control by external pressures.⁵³ These Member States are unlikely to take necessary actions in order to go beyond minimum requirements as stipulated by the supranational legislative framework.

Even worse, too many Member States even failed to transpose the minimal requirements, as explicitly stipulated in the old Electricity Directive, into their legal systems.⁵⁴ There is, however, another inconvenient truth, namely, we shall not ignore the differences between Member States in the field of rule of law, its understanding and daily enforcement. The same holds true for both political and business cultures which is reflected in the integrity of individuals and countries' levels of corruption⁵⁵, which is also seen in the energy sector.⁵⁶ Old habits die hard, and it is relatively safe to assume that the factors discussed above can affect the NRA's independence. In short, a disrespect of the rule of law⁵⁷ can not only render the energy legislation related to the NRA ineffective but also weakens the concept of formal independence. Yet, I nevertheless think the latter is a good proxy for a factual independence and, therefore, the formal independence can be perceived as a starting point which must be appropriate in order to achieve the desired final result.

Therefore, the European Union legislator should consider the most problematic cases when drafting the new Electricity Directive. When doing so, howe-

⁵³ Cf. Coroado, S., *op. cit.* (fn. 8), pp. 61-77.

⁵⁴ Cf. Ypma, P. *et al.*, *op. cit.* (fn. 28); Szörényi, G. (ed.), *op. cit.* (fn. 25).

⁵⁵ The Transparency International's Global Corruption Perception Index for 2019 (and for the time period 2012/2019) seems to confirm this thesis. One of the Member States is literally on the top of the list (87 pts out of 100 pts), which means it has the best worldwide result in (anti-)corruption, while the least successful Member State can be found at rank 77 of 183 observed countries (43 pts out of 100 pts, which is 44 pts less than the best ranked peer). Moreover, a comparison of Member States ranked in the first third of the list (i.e., Denmark – the best ranking, Finland, Sweden, Luxembourg, Germany, Austria, and Belgium) and of Member States ranked in the last third (Bulgaria – the worst ranking, Romania, Hungary, Croatia, Greece, Slovakia, and Italy) suggests that, in principle, the political and economic tradition matter and, at least to certain extent, also membership period and geographical position.

⁵⁶ Cf. Grasso, C., *The dark side of power: corruption and bribery within the energy industry*, in: Leal-Arcas, R.; Wouters, J. (eds), *Research Handbook on EU Energy Law and Policy*, Edward Elgar, Cheltenham, 2017, pp. 237-256.

⁵⁷ The rule of law can be compared in half-joking and half-serious manner with computer's operational system. If the latter is not working properly no application will work properly.

ver, it is critically important that it learns from mistakes made in the past. Namely, the new Electricity Directive has taken steps in the right direction since it stipulates new obligations resulting in higher independence standards, yet, there is simply too much untapped potential as revealed by the application of evaluation tests in the fourth chapter (Section 4.3).

The untapped potential of the new Electricity Directive is particularly obvious when looking at the evaluation results achieved by application of the comprehensive independence test whose methodological features and substance are discussed in the third chapter and the Appendix. The new test builds upon its eminent antecedents, yet, it introduces several new evaluation elements. For example, it fatally punishes the so-called *peccata mortalia*. Moreover, in addition to the requirements regarding the management of political pressures, it also includes requirements regarding the management of corporate pressures, along with additional requirements which today are simply a “must”.⁵⁸

As the comprehensive independence test reveals shortcomings of the existing legal framework the test can trigger incentives for improvement at the supranational and national level. After all, the new Electricity Directive “merely” aims to achieve a minimal harmonization. Hence, Member States are free to introduce higher independence standards when they transpose the directive into their legal systems or later when they aim to improve the existing legislation. I truly hope they will decide to do so.

And finally, lessons learned in the discussed case are transferable to other economic sectors, particularly to (other) utilities sectors.

APPENDIX: THE COMPREHENSIVE INDEPENDENCE TEST

Introductory note: the variables or criteria (C) of the comprehensive independence test (CIT) relate to situations and obligations which must be stipulated by a legislative act in order to define limits for the government, ministries and more generally, for the executive branch.

⁵⁸ I am well aware that due to the dynamic nature of the subject under consideration, even the proposed comprehensive independence test will eventually need upgrading or updating, which is actually a good sign.

The comprehensive independence test (CIT)	CIT index
Situations which automatically exclude the formal independence of NRA (‘ <i>peccata mortalia</i> ’)	
§ Is a body carrying out a regulation or regulatory tasks an organizational unit of a government, ministry or entity under their control?	
• yes	log 0
§ Is a government, ministry or entity under their control or any other organ, except a competent court, empowered to abolish NRA’s decision in a particular case?	
• yes	log 0
§ Is NRA obliged to follow instructions, in whatever form, from any organ or person regarding the decision-making in a particular case?	
• yes	log 0
Independence of NRA and its personnel from corporations and other entities of private law	
§ Does a legislative provision stipulate independence of NRA, i.e., of the legal person as a whole, from corporations and any other private entity?	
• yes	1,00
• no	0,00
§ Are members of NRA’s organs and other personnel obliged to act independently from any market interest, and are not allowed to seek or take instructions from corporations or any other private entity when carrying out the regulatory tasks?	
• yes	1,00
• no	0,00
§ If the answer to the previous criterion is ‘yes’, is the act void <i>ipso iure</i> or rebuttable?	
• yes, the act is void <i>ipso iure</i>	1,00
• yes, the act is rebuttable	0,50
• no	0,00
§ Are members of NRA’s organs and their direct relatives excluded from participation in the capital of energy undertakings and persons related to them, and any arrangements or relationships which can cause a conflict of interest?	
• yes	1,00
• yes, except the extension to direct relatives	0,80
• yes, except the extension to conflicting arrangements or relationships	0,60
• yes, except the extension to direct relatives and conflicting arrangements or relationships	0,40
• no, but there is a general prohibition of conflicts of interests	0,20
• no	0,00

§ Is participation in a decision-making process explicitly prohibited to any NRA's official or personnel which can be in conflict of interest regarding the particular case?	
• yes	1,00
• no, but there is a general prohibition of conflicts of interest	0,50
• no	0,00

§ Are donations of individuals or legal persons of private law in favour of NRA prohibited?	
• yes	1,00
• yes, but only above certain threshold	0,50
• no	0,00

§ Are conditions for permissible contacts between NRA's personnel and personnel of the energy companies or their agents, which effectively prevent business pressure on the persons dealing with the case, explicitly stipulated?	
• yes	1,00
• no, but there is an obligation of NRA to define such conditions and to announce them properly	0,50
• no	0,00

§ Is an obligation to keep record or minutes about every contact containing all essential pieces of information, including about (in)direct pressure, and an obligation to reveal the number of such contacts in the annual report, explicitly stipulated?	
• yes	1,00
• yes, except an obligation to reveal the number of contacts in the annual report	0,50
• no	0,00

§ Is an obligation of NRA's personnel to report any direct or indirect pressure to a competent body explicitly stipulated?	
• yes	1,00
• no, such obligation is limited to certain kind of pressures	0,50
• no	0,00

§ Is an obligation of energy companies promptly to deliver all relevant pieces of information and documents as demanded by NRA explicitly stipulated?	
• yes	1,00
• no, such obligation is limited only to certain information and documents	0,50
• no	0,00

§ Are risks associated with the so-called revolving door effectively mitigated?	
• yes	1,00
• no, but nevertheless some of the discussed risks are effectively mitigated	0,50
• no	0,00

Independence of NRA and its personnel from government, ministries and entities under their control and/or political structures

§ Must NRA be established as a legally distinct legal person outside the organizational structure of the government or ministries or entities under their control?

- | | |
|--|------|
| • yes | 1,00 |
| • yes, but government or ministry has certain establisher's rights | 0,50 |
| • no | 0,00 |
-

§ Is there a general legislative provision demanding independence of NRA from government and ministries and entities under their control, so that there are no obligations towards the executive branch?

- | | |
|--|------|
| • yes | 1,00 |
| • yes, except there is an obligation to deliver an annual report | 0,50 |
| • no | 0,00 |
-

§ Is there a legislative provision obligating NRA's members of organs and other personnel to act independently and to refrain from seeking or taking any instruction from a government, ministry, persons of public law or entrusted persons of private law, i.e., persons which are authorized to perform certain public authority functions, when carrying out the regulatory tasks?

- | | |
|-------|------|
| • yes | 1,00 |
| • no | 0,00 |
-

§ Are competences, objectives and tasks of NRA, which enable it to take decisions in relation to all relevant regulatory issues by following the supranational and national legislative acts, explicitly stipulated?

- | | |
|---|------|
| • yes | 1,00 |
| • yes, but with certain exceptions | 0,66 |
| • no, NRA has only few (consultative) competences | 0,33 |
| • no | 0,00 |
-

§ Is there a legislative provision explicitly stipulating that a government, ministry or more generally, executive branch organs shall not decide, approve or otherwise impact any acts of NRA?

- | | |
|------------------------------------|------|
| • yes | 1,00 |
| • yes, but with certain exceptions | 0,50 |
| • no | 0,00 |
-

§ Is NRA empowered autonomously to decide about its own priorities and strategy and, more generally, on its activities within the legislative framework?

- | | |
|---|------|
| • yes | 1,00 |
| • yes, but with certain exceptions where the parliament takes a decision or must give consent | 0,50 |
| • no | 0,00 |
-

§ Is NRA empowered autonomously to decide about the internal organization, number of personnel, their professional profile, salaries, promotion and employment conditions, which can be different from the general legislation on public servants?	
• yes	1,00
• yes, but with certain exceptions where the parliament takes a decision or must give consent	0,50
• no	0,00

§ Does NRA have a separate and sufficiently high budget with own sources as well as human resources as needed for effective regulation?	
• yes	1,00
• no, NRA has own budget but there is no provision on own sources (0,80) or own sources are insufficient for effective regulation, therefore:	
• own financial resources are supplemented by direct transfers from the state's budget and the financial plan prepared by NRA is conditioned upon the parliament's consent	0,80
• NRA is financed exclusively by direct transfers from the state's budget and the financial plan prepared by NRA is conditioned upon the parliament's consent	0,60
• NRA is financed by direct transfers from the state's budget upon decision of the parliament	0,40
• NRA is financed exclusively by transfers made by government or ministry upon their decision	0,20
• no, NRA does not have financial and human resources as needed for effective regulation.	0,00

§ Is NRA empowered to define its own budget for a period of two or more years or, in case the financial plan is conditioned upon the parliament's consent, refusal of the financial plan triggers NRA's right to use a temporary funding based on the last financial plan to which the parliament gave a consent?	
• yes	1,00
• no, the budget is defined for one year	0,66
• no, there is no possibility of temporary funding	0,33
• no, the budget is defined for one year and there is no possibility of temporary funding	0,00

§ Without interference in the decision-making in the field of human resources management (see supra), is NRA empowered to decide about the use of its budget?	
• yes	1,00
• yes, but with certain exceptions	0,50
• no	0,00

§ Is NRA's use of its budget subject only to the ex post control made by the court of auditors?

- | | |
|---|------|
| • yes | 1,00 |
| • no, such control can (also) be done by the parliament | 0,66 |
| • no, such control can (also) be done by entities established and/or controlled by the government or ministry | 0,33 |
| • no, such control can (also) be done by the government or ministry | 0,00 |
-

§ Is NRA organized according to the two-tier system of governance, i.e., a division of competences and powers within the regulatory authority between an organ for strategic decisions and supervision and an organ for operative and managerial decisions, both of them consisting of three or more members?

- | | |
|---|------|
| • yes | 1,00 |
| • no, one of the two organs has less than three members | 0,66 |
| • no, both organs have less than three members | 0,33 |
| • no | 0,00 |
-

§ If NRA is organized according to the two-tier system of governance, are first members of the NRA's governance organ appointed by a parliament with a qualified majority and are its subsequent members appointed by the said governance organ, while the management organ is appointed by the governance organ?

- | | |
|--|------|
| • yes | 1,00 |
| • no, members of the governance organ are appointed by the parliament with a qualified majority | 0,75 |
| • no, members of the governance organ are appointed by the parliament with an ordinary majority | 0,50 |
| • no, both organs are appointed by the parliament | 0,25 |
| • no, both organs are appointed by the government or ministry or by entities under their control | 0,00 |
-

§ If NRA is not organized according to the two-tier system of governance, are first members of the NRA's leadership organ appointed by a parliament with a qualified majority and are its subsequent members appointed by the said NRA's organ?

- | | |
|---|------|
| • yes | 1,00 |
| • no, they are appointed by the parliament with a qualified majority | 0,66 |
| • no, they are appointed by the parliament with an ordinary majority | 0,33 |
| • no, they are appointed by the government or ministry or by entities under their control | 0,00 |
-

§ Is appointment of members of NRA's governance organ and management organ or of NRA's leadership organ only possible among candidates selected via objective, transparent and published criteria (defined by legislative act), in an independent and impartial procedure?	
• yes	1,00
• yes, but there is no provision stipulating that the criteria must be defined by the legislative act	0,66
• no, there is only general obligation to carry out a selection procedure	0,33
• no	0,00

§ Are members of NRA's governance organ and management organ or of NRA's leadership organ appointed for a period of eight to ten years?	
• yes	1,00
• no, they are appointed for a period of six to eight years	0,66
• no, they are appointed for a period of four to six years	0,33
• no, they are appointed for a period of less than four years or more than ten years	0,00

§ Is a re-appointment of members of NRA's governance organ and management organ or of NRA's leadership organ excluded?	
• yes, in combination with their mandate of eight years or more	1,00
• no, in combination with their mandate of four to six years	0,80
• no, in combination with their mandate of six to eight years	0,60
• yes, in combination with their mandate of six to eight years	0,40
• yes, in combination with their mandate of four to six years	0,20
• no, in combination with their mandate of eight years or more	0,00

§ Is a rotation scheme for members of NRA's governance organ and management organ or of NRA's leadership organ mandatory and well defined?	
• yes	1,00
• no	0,00

§ Is a dismissal of members of NRA's governance organ and management organ or of NRA's leadership organ only possible in case conditions for the appointment to the function are no longer fulfilled or due to serious misconduct of national law?	
• yes	1,00
• no	0,00

§ Is a dismissal of members of NRA's governance organ and management organ or of NRA's leadership organ only possible via a court's judgement?

- yes 1,00
 - no, members of NRA's management organ can be dismissed only by NRA's governance organ, while members of NRA's governance organ or members of NRA's leadership organ can be dismissed only by a parliament 0,75
 - no, members of NRA's management organ can be dismissed only by NRA's governance organ, while members of NRA's governance organ or members of NRA's leadership organ can be dismissed by the government or minister or entities under their control 0,50
 - no, any member can be dismissed by the parliament 0,25
 - no, any member can be dismissed by the government or minister or entities under their control 0,00
-

§ Are members of NRA's governance organ and management organ or members of NRA's leadership, and their direct relatives, excluded from holding political functions as well as membership in political parties, and any arrangements or relationships which can cause a conflict of interest (including holding other public functions)?

- yes 1,00
 - no, but there is a general prohibition of conflicts of interests 0,80
 - yes, except the extension to direct relatives 0,60
 - yes, except the extension to conflicting arrangements or relationships 0,40
 - yes, except the extension to direct relatives and conflicting arrangements or relationships 0,20
 - no 0,00
-

§ Is a participation in a decision-making process of any NRA's personnel, which can be in conflict of interest regarding the particular case, explicitly prohibited?

- yes 1,00
 - no, but there is a general prohibition of conflicts of interest 0,50
 - no 0,00
-

§ Is a periodical external evaluation of NRA's independence conducted by the ombudsman or court or by other professional and independent entity explicitly stipulated and mandatory?

- yes 1,00
- no, such evaluation is carried out by the parliament 0,66
- no, such evaluation is carried out by the government or minister 0,33
- no 0,00

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1,00

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Sažetak

Aleš Ferčič*

EVALUACIJA FORMALNE NEOVISNOSTI NACIONALNIH REGULATORNIH TIJELA U ENERGETSKOM SEKTORU EUROPSKE UNIJE I ŠIRE

Regulatorno upravljanje dominantna je paradigma u području upravljanja već desetljećima. U toj paradigmi nacionalna regulatorna tijela sada su među ključnim igračima zbog svojih (potencijalnih) prednosti. Njihova neovisnost prihvaćena je kao jedno od vodećih načela za institucionalni dizajn nacionalnih regulatornih tijela. Sukladno tome, energetska prava Europske unije propisuju brojne obveze s namjerom postizanja željene razine neovisnosti nacionalnih regulatornih tijela. Ovaj članak nudi uvid u navedene obveze kao i u njihov razvoj i vrednovanje. Vrednovanje se provodi pomoću dvaju mjerila, tj. Gilardijevim testom i novim sveobuhvatnim testom neovisnosti koji uči od svojih prethodnika, posebice s metodološkog gledišta. Potonji zagovara strože zahtjeve i, posljedično, više standarde neovisnosti kako su razvijeni u najnovijoj regulatornoj praksi i teoriji. Procjena dosadašnjeg i sadašnjeg nadnacionalnog pravnog okvira u području energetike otkriva pristojan napredak u pitanju formalne neovisnosti nacionalnih regulatornih tijela, ali nažalost i značajan neiskorišten potencijal, koji je u članku eksplicitno obrađen, kako bi se mogao efikasno uzeti u obzir pri izradi novih nadnacionalnih pravila. Štoviše, može se uzeti u obzir prilikom transponiranja nove Direktive o električnoj energiji u nacionalni pravni sustav jer ta Direktiva u razmatranom području "samo" ima cilj postići minimalno usklađivanje (harmonizaciju). I na kraju, ali ne i najmanje važno, lekcije naučene iz razmatranog slučaja mogu se prenijeti i na druge gospodarske sektore, posebice na (ostale) infrastrukturne sektore.

Ključne riječi: nacionalna regulatorna tijela (agencije); dobre regulatorne prakse i principi; formalna neovisnost; nova elektroenergetska Direktiva; sveobuhvatni test neovisnosti

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