

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 (Text with EEA relevance)

CHAPTER IX

NATIONAL REGULATORY AUTHORITIES

Article 35

Designation and independence of regulatory authorities

- 1 Each Member State shall designate a single national regulatory authority at national level.
- 2 Paragraph 1 of this Article shall be without prejudice to the designation of other regulatory authorities at regional level within Member States, provided that there is one senior representative for representation and contact purposes at Community level within the Board of Regulators of the Agency in accordance with Article 14(1) of Regulation (EC) No 713/2009.
- 3 By way of derogation from paragraph 1 of this Article, a Member State may designate regulatory authorities for small systems on a geographically separate region whose consumption, in 2008, accounted for less than 3 % of the total consumption of the Member State of which it is part. This derogation shall be without prejudice to the appointment of one senior representative for representation and contact purposes at Community level within the Board of Regulators of the Agency in compliance with Article 14(1) of Regulation (EC) No 713/2009.
- 4 Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently. For this purpose, Member State shall ensure that, when carrying out the regulatory tasks conferred upon it by this Directive and related legislation, the regulatory authority:
 - a is legally distinct and functionally independent from any other public or private entity;
 - b ensures that its staff and the persons responsible for its management:
 - (i) act independently from any market interest; and
 - (ii) do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks. This requirement is without prejudice to close cooperation, as appropriate, with other relevant national authorities or to general policy guidelines issued by the government not related to the regulatory powers and duties under Article 37.
- 5 In order to protect the independence of the regulatory authority, Member States shall in particular ensure that:
 - a the regulatory authority can take autonomous decisions, independently from any political body, and has separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties; and
 - b 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.

In regard to point (b) of the first subparagraph, Member States shall ensure an appropriate rotation scheme for the board or the top management. The members of the board or, in the absence of a board, members of the top management may be relieved from office during their term only if they no longer fulfil the conditions set out in this Article or have been guilty of misconduct under national law.

Article 36

General objectives of the regulatory authority

In carrying out the regulatory tasks specified in this Directive, the regulatory authority shall take all reasonable measures in pursuit of the following objectives within the framework of their duties and powers as laid down in Article 37, in close consultation with other relevant national authorities including competition authorities, as appropriate, and without prejudice to their competencies:

- (a) promoting, in close cooperation with the Agency, regulatory authorities of other Member States and the Commission, a competitive, secure and environmentally sustainable internal market in electricity within the Community, and effective market opening for all customers and suppliers in the Community and ensuring appropriate conditions for the effective and reliable operation of electricity networks, taking into account long-term objectives;
- (b) developing competitive and properly functioning regional markets within the Community in view of the achievement of the objectives referred to in point (a);
- (c) eliminating restrictions on trade in electricity between Member States, including developing appropriate cross-border transmission capacities to meet demand and enhancing the integration of national markets which may facilitate electricity flows across the Community;
- (d) helping to achieve, in the most cost-effective way, the development of secure, reliable and efficient non-discriminatory systems that are consumer oriented, and promoting system adequacy and, in line with general energy policy objectives, energy efficiency as well as the integration of large and small-scale production of electricity from renewable energy sources and distributed generation in both transmission and distribution networks;
- (e) facilitating access to the network for new generation capacity, in particular removing barriers that could prevent access for new market entrants and of electricity from renewable energy sources;
- (f) ensuring that system operators and system users are granted appropriate incentives, in both the short and the long term, to increase efficiencies in system performance and foster market integration;
- (g) ensuring that customers benefit through the efficient functioning of their national market, promoting effective competition and helping to ensure consumer protection;
- (h) helping to achieve high standards of universal and public service in electricity supply, contributing to the protection of vulnerable customers and contributing to the compatibility of necessary data exchange processes for customer switching.

Article 37

Duties and powers of the regulatory authority

- 1 The regulatory authority shall have the following duties:
 - a fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies;
 - b ensuring compliance of transmission and distribution system operators and, where relevant, system owners, as well as of any electricity undertakings, with their obligations under this Directive and other relevant Community legislation, including as regards cross-border issues;
 - c cooperating in regard to cross-border issues with the regulatory authority or authorities of the Member States concerned and with the Agency;
 - d complying with, and implementing, any relevant legally binding decisions of the Agency and of the Commission;
 - e reporting annually on its activity and the fulfilment of its duties to the relevant authorities of the Member States, the Agency and the Commission. Such reports shall cover the steps taken and the results obtained as regards each of the tasks listed in this Article;
 - f ensuring that there are no cross-subsidies between transmission, distribution, and supply activities;
 - g monitoring investment plans of the transmission system operators, and providing in its annual report an assessment of the investment plans of the transmission system operators as regards their consistency with the Community-wide network development plan referred to in Article 8(3)(b) of Regulation (EC) No 714/2009; such assessment may include recommendations to amend those investment plans;
 - h monitoring compliance with and reviewing the past performance of network security and reliability rules and setting or approving standards and requirements for quality of service and supply or contributing thereto together with other competent authorities;
 - i monitoring the level of transparency, including of wholesale prices, and ensuring compliance of electricity undertakings with transparency obligations;
 - j monitoring the level and effectiveness of market opening and competition at wholesale and retail levels, including on electricity exchanges, prices for household customers including prepayment systems, switching rates, disconnection rates, charges for and the execution of maintenance services, and complaints by household customers, as well as any distortion or restriction of competition, including providing any relevant information, and bringing any relevant cases to the relevant competition authorities;
 - k monitoring the occurrence of restrictive contractual practices, including exclusivity clauses which may prevent large non-household customers from contracting simultaneously with more than one supplier or restrict their choice to do so, and, where appropriate, informing the national competition authorities of such practices;
 - l respecting contractual freedom with regard to interruptible supply contracts and with regard to long-term contracts provided that they are compatible with Community law and consistent with Community policies;
 - m monitoring the time taken by transmission and distribution system operators to make connections and repairs;
 - n helping to ensure, together with other relevant authorities, that the consumer protection measures, including those set out in Annex I, are effective and enforced;

- o publishing recommendations, at least annually, in relation to compliance of supply prices with Article 3, and providing these to the competition authorities, where appropriate;
- p ensuring access to customer consumption data, the provision, for optional use, of an easily understandable harmonised format at national level for consumption data, and prompt access for all customers to such data under point (h) of Annex I;
- q monitoring the implementation of rules relating to the roles and responsibilities of transmission system operators, distribution system operators, suppliers and customers and other market parties pursuant to Regulation (EC) No 714/2009;
- r monitoring investment in generation capacities in relation to security of supply;
- s monitoring technical cooperation between Community and third-country transmission system operators;
- t monitoring the implementation of safeguards measures as referred to in Article 42; and
- u contributing to the compatibility of data exchange processes for the most important market processes at regional level.

2 Where a Member State has so provided, the monitoring duties set out in paragraph 1 may be carried out by other authorities than the regulatory authority. In such a case, the information resulting from such monitoring shall be made available to the regulatory authority as soon as possible.

While preserving their independence, without prejudice to their own specific competencies and consistent with the principles of better regulation, the regulatory authority shall, as appropriate, consult transmission system operators and, as appropriate, closely cooperate with other relevant national authorities when carrying out the duties set out in paragraph 1.

Any approvals given by a regulatory authority or the Agency under this Directive are without prejudice to any duly justified future use of its powers by the regulatory authority under this Article or to any penalties imposed by other relevant authorities or the Commission.

3 In addition to the duties conferred upon it under paragraph 1 of this Article, when an independent system operator has been designated under Article 13, the regulatory authority shall:

- a monitor the transmission system owner's and the independent system operator's compliance with their obligations under this Article, and issue penalties for non-compliance in accordance with paragraph 4(d);
- b monitor the relations and communications between the independent system operator and the transmission system owner so as to ensure compliance of the independent system operator with its obligations, and in particular approve contracts and act as a dispute settlement authority between the independent system operator and the transmission system owner in respect of any complaint submitted by either party pursuant to paragraph 11;
- c without prejudice to the procedure under Article 13(2)(c), for the first ten-year network development plan, approve the investments planning and the multi-annual network development plan presented annually by the independent system operator;
- d ensure that network access tariffs collected by the independent system operator include remuneration for the network owner or network owners, which provides for adequate remuneration of the network assets and of any new investments made therein, provided they are economically and efficiently incurred;

- e have the powers to carry out inspections, including unannounced inspections, at the premises of transmission system owner and independent system operator; and
- f monitor the use of congestion charges collected by the independent system operator in accordance with Article 16(6) of Regulation (EC) No 714/2009.

4 Member States shall ensure that regulatory authorities are granted the powers enabling them to carry out the duties referred to in paragraphs 1, 3 and 6 in an efficient and expeditious manner. For this purpose, the regulatory authority shall have at least the following powers:

- a to issue binding decisions on electricity undertakings;
- b to carry out investigations into the functioning of the electricity markets, and to decide upon and impose any necessary and proportionate measures to promote effective competition and ensure the proper functioning of the market. Where appropriate, the regulatory authority shall also have the power to cooperate with the national competition authority and the financial market regulators or the Commission in conducting an investigation relating to competition law;
- c to require any information from electricity undertakings relevant for the fulfilment of its tasks, including the justification for any refusal to grant third-party access, and any information on measures necessary to reinforce the network;
- d to impose effective, proportionate and dissuasive penalties on electricity undertakings not complying with their obligations under this Directive or any relevant legally binding decisions of the regulatory authority or of the Agency, or to propose that a competent court impose such penalties. This shall include the power to impose or propose the imposition of penalties of up to 10 % of the annual turnover of the transmission system operator on the transmission system operator or of up to 10 % of the annual turnover of the vertically integrated undertaking on the vertically integrated undertaking, as the case may be, for non-compliance with their respective obligations pursuant to this Directive; and
- e appropriate rights of investigations and relevant powers of instructions for dispute settlement under paragraphs 11 and 12.

5 In addition to the duties and powers conferred on it under paragraphs 1 and 4 of this Article, when a transmission system operator has been designated in accordance with Chapter V, the regulatory authority shall be granted at least the following duties and powers:

- a to issue penalties in accordance with paragraph 4(d) for discriminatory behaviour in favour of the vertically integrated undertaking;
- b to monitor communications between the transmission system operator and the vertically integrated undertaking so as to ensure compliance of the transmission system operator with its obligations;
- c to act as dispute settlement authority between the vertically integrated undertaking and the transmission system operator in respect of any complaint submitted pursuant to paragraph 11;
- d to monitor commercial and financial relations including loans between the vertically integrated undertaking and the transmission system operator;
- e to approve all commercial and financial agreements between the vertically integrated undertaking and the transmission system operator on the condition that they comply with market conditions;
- f to request justification from the vertically integrated undertaking when notified by the compliance officer in accordance with Article 21(4). Such justification shall, in particular, include evidence to the end that no discriminatory behaviour to the advantage of the vertically integrated undertaking has occurred;

- g to carry out inspections, including unannounced ones, on the premises of the vertically integrated undertaking and the transmission system operator; and
- h to assign all or specific tasks of the transmission system operator to an independent system operator appointed in accordance with Article 13 in case of a persistent breach by the transmission system operator of its obligations under this Directive, in particular in case of repeated discriminatory behaviour to the benefit of the vertically integrated undertaking.

6 The regulatory authorities shall be responsible for fixing or approving sufficiently in advance of their entry into force at least the methodologies used to calculate or establish the terms and conditions for:

- a connection and access to national networks, including transmission and distribution tariffs or their methodologies. Those tariffs or methodologies shall allow the necessary investments in the networks to be carried out in a manner allowing those investments to ensure the viability of the networks;
- b the provision of balancing services which shall be performed in the most economic manner possible and provide appropriate incentives for network users to balance their input and off-takes. The balancing services shall be provided in a fair and non-discriminatory manner and be based on objective criteria; and
- c access to cross-border infrastructures, including the procedures for the allocation of capacity and congestion management.

7 The methodologies or the terms and conditions referred to in paragraph 6 shall be published.

8 In fixing or approving the tariffs or methodologies and the balancing services, the regulatory authorities shall ensure that transmission and distribution system operators are granted appropriate incentive, over both the short and long term, to increase efficiencies, foster market integration and security of supply and support the related research activities.

9 The regulatory authorities shall monitor congestion management of national electricity systems including interconnectors, and the implementation of congestion management rules. To that end, transmission system operators or market operators shall submit their congestion management rules, including capacity allocation, to the national regulatory authorities. National regulatory authorities may request amendments to those rules.

10 Regulatory authorities shall have the authority to require transmission and distribution system operators, if necessary, to modify the terms and conditions, including tariffs or methodologies referred to in this Article, to ensure that they are proportionate and applied in a non-discriminatory manner. In the event of delay in the fixing of transmission and distribution tariffs, regulatory authorities shall have the power to fix or approve provisional transmission and distribution tariffs or methodologies and to decide on the appropriate compensatory measures if the final transmission and distribution tariffs or methodologies deviate from those provisional tariffs or methodologies.

11 Any party having a complaint against a transmission or distribution system operator in relation to that operator's obligations under this Directive may refer the complaint to the regulatory authority which, acting as dispute settlement authority, shall issue a decision within a period of two months after receipt of the complaint. That period may be extended by two months where additional information is sought by the regulatory authority. That extended period may be further extended with the agreement of the complainant. The regulatory authority's decision shall have binding effect unless and until overruled on appeal.

12 Any party who is affected and who has a right to complain concerning a decision on methodologies taken pursuant to this Article or, where the regulatory authority has a duty to consult, concerning the proposed tariffs or methodologies, may, at the latest within two months, or a shorter time period as provided by Member States, following publication of the decision or proposal for a decision, submit a complaint for review. Such a complaint shall not have suspensive effect.

13 Member States shall create appropriate and efficient mechanisms for regulation, control and transparency so as to avoid any abuse of a dominant position, in particular to the detriment of consumers, and any predatory behaviour. Those mechanisms shall take account of the provisions of the Treaty, and in particular Article 82 thereof.

14 Member States shall ensure that the appropriate measures are taken, including administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons responsible where confidentiality rules imposed by this Directive have not been respected.

15 Complaints referred to in paragraphs 11 and 12 shall be without prejudice to the exercise of rights of appeal under Community or national law.

16 Decisions taken by regulatory authorities shall be fully reasoned and justified to allow for judicial review. The decisions shall be available to the public while preserving the confidentiality of commercially sensitive information.

17 Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government.

Article 38

Regulatory regime for cross-border issues

1 Regulatory authorities shall closely consult and cooperate with each other, and shall provide each other and the Agency with any information necessary for the fulfilment of their tasks under this Directive. In respect of the information exchanged, the receiving authority shall ensure the same level of confidentiality as that required of the originating authority.

2 Regulatory authorities shall cooperate at least at a regional level to:

- a foster the creation of operational arrangements in order to enable an optimal management of the network, promote joint electricity exchanges and the allocation of cross-border capacity, and to enable an adequate level of interconnection capacity, including through new interconnection, within the region and between regions to allow for development of effective competition and improvement of security of supply, without discriminating between supply undertakings in different Member States;
- b coordinate the development of all network codes for the relevant transmission system operators and other market actors; and
- c coordinate the development of the rules governing the management of congestion.

3 National regulatory authorities shall have the right to enter into cooperative arrangements with each other to foster regulatory cooperation.

4 The actions referred to in paragraph 2 shall be carried out, as appropriate, in close consultation with other relevant national authorities and without prejudice to their specific competencies.

5 The Commission may adopt Guidelines on the extent of the duties of the regulatory authorities to cooperate with each other and with the Agency. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 46(2).

Article 39

Compliances with the Guidelines

1 Any regulatory authority and the Commission may request the opinion of the Agency on the compliance of a decision taken by a regulatory authority with the Guidelines referred to in this Directive or in Regulation (EC) No 714/2009.

2 The Agency shall provide its opinion to the regulatory authority which has requested it or to the Commission, respectively, and to the regulatory authority which has taken the decision in question within three months from the date of receipt of the request.

3 Where the regulatory authority which has taken the decision does not comply with the Agency's opinion within four months from the date of receipt of that opinion, the Agency shall inform the Commission accordingly.

4 Any regulatory authority may inform the Commission where it considers that a decision relevant for cross-border trade taken by another regulatory authority does not comply with the Guidelines referred to in this Directive or in Regulation (EC) No 714/2009 within two months from the date of that decision.

5 Where the Commission, within two months after having been informed by the Agency in accordance with paragraph 3, or by a regulatory authority in accordance with paragraph 4, or on its own initiative, within three months from the date of the decision, finds that the decision of a regulatory authority raises serious doubts as to its compatibility with the Guidelines referred to in this Directive or in Regulation (EC) No 714/2009, the Commission may decide to examine the case further. In such a case, it shall invite the regulatory authority and the parties to the proceedings before the regulatory authority to submit observations.

6 Where the Commission takes a decision to examine the case further, it shall, within four months of the date of such decision, issue a final decision:

- a not to raise objections against the decision of the regulatory authority; or
- b to require the regulatory authority concerned to withdraw its decision on the basis that that the Guidelines have not been complied with.

7 Where the Commission has not taken a decision to examine the case further or a final decision within the time-limits set in paragraphs 5 and 6 respectively, it shall be deemed not to have raised objections to the decision of the regulatory authority.

8 The regulatory authority shall comply with the Commission decision to withdraw their decision within a period of two months and shall inform the Commission accordingly.

9 The Commission may adopt Guidelines setting out the details of the procedure to be followed for the application of this Article. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 46(2).

Article 40

Record keeping

1 Member States shall require supply undertakings to keep at the disposal of the national authorities, including the national regulatory authority, the national competition authorities and the Commission, for the fulfilment of their tasks, for at least five years, the relevant data relating to all transactions in electricity supply contracts and electricity derivatives with wholesale customers and transmission system operators.

2 The data shall include details on the characteristics of the relevant transactions such as duration, delivery and settlement rules, the quantity, the dates and times of execution and the transaction prices and means of identifying the wholesale customer concerned, as well as specified details of all unsettled electricity supply contracts and electricity derivatives.

3 The regulatory authority may decide to make available to market participants elements of that information provided that commercially sensitive information on individual market players or individual transactions is not released. This paragraph shall not apply to information about financial instruments which fall within the scope of Directive 2004/39/EC.

4 To ensure the uniform application of this Article, the Commission may adopt Guidelines which define the methods and arrangements for record keeping as well as the form and content of the data that shall be kept. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 46(2).

5 With respect to transactions in electricity derivatives of supply undertakings with wholesale customers and transmission system operators, this Article shall apply only once the Commission has adopted the Guidelines referred to in paragraph 4.

6 The provisions of this Article shall not create additional obligations towards the authorities referred to in paragraph 1 for entities falling within the scope of Directive 2004/39/EC.

7 In the event that the authorities referred to in paragraph 1 need access to data kept by entities falling within the scope of Directive 2004/39/EC, the authorities responsible under that Directive shall provide them with the required data.