

ACER BoR members' nominations

Note from the Director for the attention of the Administrative Board

1. Introduction

There is a lack of clarity in the current legislation as to who has the responsibility for nominating the ACER Board of Regulators (BoR) member (the Government or the National Regulatory Authority (NRA)), ahead of his/her formal appointment by the Administrative Board (AB). There is instead clarity with regard to the nomination of Alternates of the BoR which is specified as the responsibility of NRAs.

Until now the Agency has generally applied an approach according to which a letter from the Government is required for the nomination of a new BoR member. This approach has been recently questioned by CNCM (the new Spanish NRA) and HERA (the Croatian NRA) when proposing their recent nominations of members to the BoR.

This note sets out the legal context of the procedure for nominating ACER BoR members (in the annex) and proposes an approach to address the ambiguity in the 3rd Package.

2. The current approach

When the BoR has been established, the letters regarding the nomination of the BoR members were sent by the Governments, following an invitation letter by the Commission (11 November 2009) which invited each Member State to send the **name, institution and contact details** of the designated members of the BoR as well as one Alternate. The AB subsequently appointed the BoR members and alternates at its first meeting.

Later on, in the case of new nominations, the same approach has been followed: for the appointment of members, a formal letter from the Ministry has been required; for the appointment of alternate, a letter from the NRA itself has been considered as sufficient. These letters were then submitted to the AB for the formal appointment decision.

The approach adopted in the early stages has been questioned by CNMC on the basis (i) that it has been legally established as the National Regulator Authority for Spain under the third package tasks and (ii) of the independence of the NRA and the BoR itself. CNMC therefore considers that the letter for the appointment of the BoR member (Mr Fernando Hernandez) should be submitted by CNMC and not by the Ministry.

3. The way forward

The ambiguities cannot be resolved by the Agency itself (neither its AB nor the BoR). It can only be definitively resolved through an amendment of the Regulation to clearly state the responsibility or, alternatively, through an interpretation of the rules (from the Commission and subject to the European Court). Both options would, however, take a long time. The CNMC nomination (and perhaps others in the future) is pending and needs to be resolved as a matter of urgency. Not least as it would be indeed unfortunate that the formal representation of a NRA at the ACER BoR (with a right to vote) (which is subject to the formal appointment by the AB) is pending until the formal interpretation of the Regulation. This could result in a misrepresentation at the BoR of all 28 NRAs. We need thus to proceed quickly with the formal appointment of the new CNMC BoR member.

Despite the ambiguity in legislation regarding the BoR members' nominations the current situation can be characterised as follows:

- All the National Regulatory Authorities for all countries have now been established according to the third package provisions.
- The MS themselves have already pronounced its National Regulatory Authority according to the third package (in accordance with Articles 35(1) and 39(1) of the Electricity and Gas Directives, see annex).
- BoR members should legally be senior representatives from the National Regularity Authority (which are those established in each country with responsibilities regarding the third package tasks - see annex).
- Despite the ambiguity, the BoR members (according to the Regulation) should act on behalf of their respective national authorities.

Proposed way forward

It is therefore proposed that the Agency addresses this issue in a practical, pragmatic and consistent way for the future, on the following basis:

- The Member State under the legislation is responsible for designating the regulatory body which fulfils the functions of a National Regulatory Authority (see annex). An explicit designation is, therefore, not required where a national legislative act unequivocally indicates the regulatory body which fulfils the function of National Regulatory Authority according to the Third Package.

- The ACER Regulation clearly states that the BoR is composed of senior representatives of the regulatory authority (those established in accordance with Article 35(1) of Directive 2009/72/EC and Article 39(1) of Directive 2009/73/EC). In similar terms, the ACER Regulation provides that only one representative per Member State from the national regulatory authority (which are those mentioned in the previous paragraph –see legal annex) may be admitted to the Board of Regulators.
- In case a Member State has in the past already appointed a senior representative from the National Regulatory Authorities as the BoR member, this should be deemed to be the National Regulatory Authority responsible for representation and contact purposes at Community level within the Board of Regulators.
- A new designation from the Member State is required when there is a change in the institutional structure of the regulatory body established as the National Regulatory Authority, unless a national legislative act unequivocally indicates the regulatory body which fulfils the function of National Regulatory Authority according to the Third Package. This reflects the ACER Regulation which clearly provides that the one senior representative per Member State comes from the national regulatory authority.
- The regulatory body designated by the Member State as the National Regulatory Authority nominates the Member and Alternate of the Board of Regulators and informs accordingly the Agency in order to proceed with the formal appointment by the AB.

This would ensure a pragmatic, consistent approach in resolving this issue imminently pending the CNMC nomination while respecting the principle of subsidiarity.

Annex: Legal Framework

ACER Regulation, Article 14 (1) states:

The Board of Regulators shall comprise: (a) senior representatives of the regulatory authorities, in accordance with Article 35(1) of Directive 2009/72/EC and Article 39(1) of Directive 2009/73/EC, and one alternate per Member State from the current senior staff of those authorities.

Thus, only one representative for each Member State is permitted to the Board of Regulators and he/she must be from the national regulatory authority. **Each national regulatory authority shall be responsible for nominating the alternate from current staff of the national regulatory authority.**

The Administrative Board shall **formally appoint** the members of the Board of Regulators in accordance with Article 14(1).

Article 35(1) of Directive 2009/72/EC (electricity Directive, and 39(1) of the Gas Directive) envisages the following with regard to the designation of the National Regulatory Authorities.

1. Each Member State shall designate a single national regulatory authority at national level.
2. Paragraph 1 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 the ACER Regulation. 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 the ACER Regulation.
3. The BoR RoP (Article 2.2) provide that each NRA is responsible for nominating their member and alternate. This provision mainly served as an indication of the members' understanding on this issue.